A FRESH LOOK AT LIMITATIONS: UNPACKING SECTION 36

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ABSTRACT

The wording of the general limitations clause in s 36 of the Constitution of the Republic of South Africa, 1996 differs from that used in its predecessor, the interim Constitution. The Constitutional Court of South Africa has nevertheless continued to apply the limitations jurisprudence developed under the interim Constitution to the 1996 Constitution. While endorsing a two stage approach to rights adjudication the Constitutional Court has, however, failed to state which tasks should be allocated to which stage of the rights adjudication procedure. To avoid requiring courts to engage in a constitutionally unguided narrowing of rights, all balancing and proportionality enquiries should be reserved for the second stage of the process, the limitation stage. Contrary to certain dicta of the Constitutional Court, the limitation stage should not involve an enquiry into the importance of the right which implies the existence of a hierarchy of rights in the Constitution. Nor should the least restrictive means test required by s 36(1)(e) be treated as a threshold enquiry. Although the Constitutional Court has held that every limitation is subject to s 36, it is also not clear from the structure of s 36 that it is capable of applying to all the rights in the Bill of Rights.

I INTRODUCTION

The interim Constitution1 promulgated in 1993 contained a free-standing and general limitations clause for the limitation of rights. This device was extended into the Constitution of the Republic of South Africa, 1996, in

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1 Constitution of the Republic of South Africa, Act 200 of 1993 (interim Constitution). Section 33 of the interim Constitution provided that:

1. The rights entrenched in this Chapter may be limited by law of general application, provided that such limitation—
   (a) shall be permissible only to the extent that it is
      (i) reasonable; and
      (ii) justifiable in an open and democratic society based on freedom and equality; and
   (b) shall not negate the essential content of the right in question, and provided further that any limitation to
Because of the textual similarity between this method of limitation and s 1 of the Canadian Charter, South African limitations jurisprudence has borrowed extensively from Canadian limitations jurisprudence.

The limitations jurisprudence developed in the first Constitutional Court cases under the interim Constitution has continued to influence the post-1996 Constitution limitations landscape despite the textual differences between the two Constitutions. While academic writers have explored the relationship between the limitations clause and those rights that contain their own internal limitations clauses, little attention has

(aa) a right entrenched in section 10, 11, 12, 14 (1), 21, 25 or 30 (1) (d) or (e) or (2);

or

(bb) a right entrenched in section 15, 16, 17, 18, 23 or 24, in so far as such right relates to free and fair political activity, shall, in addition to being reasonable as required in paragraph (a) (i), also be necessary.

2. Save as provided for in subsection (1) or any other provision of this Constitution, no law, whether a rule of the common law, customary law or legislation, shall limit any right entrenched in this Chapter.

3. The entrenchment of the rights in terms of this Chapter shall not be construed as denying the existence of any other rights or freedoms recognised or conferred by common law, customary law or legislation to the extent that they are not inconsistent with this Chapter.

4. This Chapter shall not preclude measures designed to prohibit unfair discrimination by bodies and persons other than those bound in terms of section 7 (1). . .


3 Section 1 of the Canadian Charter states that ‘. . . guarantees set out in [the Charter are] subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.’

4 The primary Canadian case in this regard is R v Oakes (1986) DLR (4th) 200, 227-228. For examples of this borrowing by the South African Constitutional Court see S v Zuma 1995 (2) SA 642 (CC) paras 21-22 and S v Makwanyane 1995 (3) SA 391 (CC) paras 105-107, 110, 134.

5 National Coalition for Gay and Lesbian Equality v Minister of Justice 1999 (1) SA 6 (CC) paras 33-35.

been paid to the jurisprudence of the limitations clause in its own right.\(^7\) Neither has any consistent or coherent limitations clause jurisprudence emerged from the Constitutional Court. Apart from one brief statement in *Prinsloo v Van der Linde*\(^8\) where the Court recognized that different tasks occur at different stages of the two-stage approach to rights interpretation adopted by the Constitutional Court,\(^9\) the Court has not stated what tasks it is allocating to which stage of the two-stage rights interpretation and limitation process.\(^10\) The judgment in *Beinash v Ernst and Young*\(^11\) provides an example of the problem. In that judgment the interpretation of the right is reduced to one paragraph. It is extremely brief and superficial\(^12\) and, in the result, the bulk of the analysis occurs at the limitations stage turning it into a tangle of rights interpretation and rights limitation issues.\(^13\)

This article attempts to expand on the work of Stuart Woolman by exploring s 36 of the 1996 Constitution and offering a particular jurisprudential approach to the application of the limitations clause. It also considers some of the judgments of the Constitutional Court in this regard and highlights some of the difficulties with the Court’s approach to s 36. Part II explores the rights interpretation stage of the two-stage approach to rights adjudication and considers what that stage should and should not involve. Part III analyses s 36 and the various factors listed in s 36(1) as factors to be taken into account when limiting rights. Part IV considers the structure of s 36 and raises the question whether all rights are necessarily capable of limitation by s 36.

### II THE FIRST STAGE OF THE TWO-STAGE APPROACH: RIGHTS INTERPRETATION

(a) What the first stage involves

The decision by the constitutional drafters to employ a free-standing and general limitations clause has had a profound effect on the approach to

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7 The notable exception in this regard is the work of Stuart Woolman who has written extensively on the general limitations clause: see ‘Limitation’ (ibid) as well as in, amongst others, S Woolman ‘Riding the Push Me Pull You: Constructing a Test that Reconciles the Conflicting Interests which Animate the Limitation Clause’ (1994) 10 *SAJHR* 60; S Woolman ‘Coetzee: The Limitations of Justice Such’s Concurrence’ (1996) 12 *SAJHR* 99 and S Woolman ‘Out of Order? Out of Balance? The Limitation Clause of the Final Constitution’ (1997) 13 *SAJHR* 102.
8 *Prinsloo v Van der Linde* 1997 (3) SA 1012 (CC) para 35.
11 1999 (2) SA 91 (CC).
12 Ibid 16.
13 Woolman ‘Limitation’ (note 6 above) 12-24A.
rights adjudication in South African law. The limitations clause lays down prescribed criteria for the limitation of rights in s 36. In the absence of such a clause any limitation of a right would, of necessity, have to occur during the interpretation of the scope of the right. The South African courts have consequently adopted a two-stage approach to rights adjudication. The first stage involves a determination of the scope of the right. If the law of general application which is the subject of the litigation restricts an activity which falls within the protected scope of the right, then a second stage justification analysis is triggered. This stage draws on the factors listed in s 36(1) to determine whether the infringement of the right is justifiable in an open and democratic society based on human dignity, equality and freedom.

The result of such a two-stage approach is that as state interests are accommodated at the second justification stage, courts can afford to interpret rights generously and broadly at the first stage and reserve any qualification of the right for the second stage of the analysis. As Ackermann J indicated in the context of the interim Constitution in Ferreira v Levin:

If a limitation is sought to be made at the first stage of the enquiry, it requires, at best, an uncertain, somewhat subjective and generally constitutionally unguided normative judicial judgment to be made. The temptation to, and danger of, judicial subjectivity is great. This Court would, in my view, be discharging its interpretative function best, most securely and most constitutionally, if, as far as is judiciously possible, it seeks for any limitation of an entrenched right through s 33(1). It may well be that the Constitution itself, either because of the descriptive ambit of one or more of the many other rights entrenched in chap 3, or in some other way, expressly or by clear implication, indicates a limitation of an entrenched right at the first stage of the enquiry. Absent such an indication, the Court would be on safer constitutional ground if it were to find any limitation on the basis of the prescribed criteria in s 33(1). This approach will afford a better guarantee against the Court, however unwittingly, reading its own subjective views into the Constitution.

(b) What the first stage should not involve
With the exception of express or implied limitations of the kind referred to by Ackermann J above, or internal limitations which are not dealt with

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14 Cheadle (note 2 above) 695.
15 See part III below for the text of s 36.
16 See the references in note 9 above.
17 The Constitutional Court has named this stage the ‘threshold stage.’ See Prinsloo (note 8 above) 35.
18 Cheadle (note 2 above) 696-697; Zuma (note 4 above) 414; Makwanyane (note 4 above) paras 100-4.
19 Zuma (note 4 above) paras 14-15; Makwanyane (ibid) para 9; Ferreira (note 9 above) para 52; South African National Defence Union v Minister of Defence 1999 (4) SA 469 (CC) para 28.
20 Zuma (note 9 above) para 21; Ferreira (note 9 above) para 82.
21 Ferreira (note 4 above).
in this article, the first stage of the two-stage approach is, or at least ought to be, an interpretation stage only. It involves a definitional determination of the scope of the right and a delimitation of the boundaries of constitutionally protected activity. At the first stage a court is asking whether certain activities or interests fall within the scope of the right. This process often requires a court to examine the values that underlie the right and the practices that serve those values. There should be no balancing of competing values. As Ackermann J observed in the dictum from Ferreira quoted above, this should be reserved for the second stage of the enquiry.

Sometimes the boundary of the right in question is indicated by the wording of the constitutional text itself either as a matter of definition, or by the incorporation of an internal limitation. In certain instances the boundaries of rights are determined by legislation which the Constitution mandates be enacted to give effect to the right. In every case, however, interpretation, and only interpretation, ought to be involved. No balancing between competing rights or justification or proportionality enquiries should occur at this stage. These forms of enquiry amount to a narrowing of the right concerned through an interpretive process and, as Ackermann J held in Ferreira v Levin, the danger of limiting a right through a first-stage interpretive process is that the analysis is subjective, uncertain and generally constitutionally unguided.

In addition to these interpretive dangers, introducing balancing into...
the interpretation stage of the enquiry gives a litigant two opportunities
to justify the infringement of a right.30 This creates difficulties in the
allocation of the onus in the two-stage approach. It is accepted by our
courts that the applicant bears the onus of proof at the interpretation
stage and that at the second stage the onus shifts to the party seeking to
justify infringing the right.31 There are at least two possible ways of
allocating the onus if one introduces proportionality or balancing into
the first-stage rights interpretation process. The first method is to adopt a
three-step approach to rights adjudication. At the first step the applicant
argues for a broad interpretation of the right and contends that the
activity they seek to protect falls within the ambit of that right. If the
applicant establishes a plausible definition of the right which includes the
activity they seek to have protected, only then will the respondent have to
exclude the applicant’s activity by arguing for a narrower ambit of the
right on the basis of competing rights, values or interests. If the
respondent succeeds the enquiry stops at that stage without any need to
reach s 36. The respondent will have succeeded in limiting a right without
having to engage with s 36 at all. The second possible way of allocating
the onus is to require the applicant to proactively engage with any rights,
interests or values that may have the effect of narrowing the scope of the
right they seek to shelter under. This means the applicant must identify
potentially competing rights, interests and values and present an
argument to the court as to why those rights, interests and values should
not have the effect of narrowing the instant right. Only if they succeed,
will the respondent then have to rely on s 36 to justify infringing the right.
This, in my view, places an unduly high burden on an applicant.32

Another reason to encourage full interpretation of the scope of the
right at the first stage is that, as will be seen in more detail later, s 36(1)
requires courts to take into account the extent to which a limitation limits
the right.33 One cannot define the extent of the limitation unless one
already knows the scope of the right. If balancing is introduced at the
first stage, the scope of the right will never be fully defined. If that is so, it
becomes impossible to perform the limitations analysis properly because

30 Woolman (note 6 above) 12-21.
31 Ferreira (note 9 above) 44; Scagell v Attorney-General Western Cape 1997 (2) SA 368 (CC)
para 9. Onus here does not carry its conventional meaning regarding the onus of proof in civil
or criminal trials. It refers, rather, to a burden to justify a limitation where that becomes an
issue in a s 36 analysis. See Moise v Greater Germiston Transitional Local Council 2001 (4) SA
491 (CC) para 19 and Minister of Home Affairs v National Institute for Crime Prevention and
the Reintegration of Offenders (NICRO) 2005 (3) SA 280 (CC) paras 34-36.
32 Sandra Liebenberg has made a similar argument concerning the fairness of the allocation of
the onus in the context of the justification of the infringement of socio-economic rights:
S Liebenberg  South Africa's Evolving Jurisprudence on Socio-Economic Rights: An Effective
33 Section 36(1)(c) of the Constitution.
the extent of the infringement will never be known and, because the balancing exercise is context specific, it becomes impossible to know whether certain kinds of conduct fall within the protected scope of the right without litigating.

(e) Definitional limitations

It will sometimes be the case that the boundary of a right in the Bill of Rights will affect the scope of another protected right. Gretchen Carpenter has called these kinds of conflicts between rights ‘definitional limitations’. She views the determination of the boundary between the rights as an interpretive task, in other words, a job for the first stage of the two-stage approach. So does Sachs J.

As will be discussed below, space has, however, been created in the limitations clause analysis for taking the interconnectedness or interdependence of rights into account. To debate the boundary between rights at the first stage renders that part of the limitations enquiry nugatory and risks diluting the important task of defining the content of the right as discussed above.

In most instances, conflicts between competing rights are expressed through the intervening medium of some rule of the common law. In order to give proper expression to both rights the common law rule must be tested against the limitations clause. Cameron J dealt with the problem of definitional limitations of competing rights in the context of the two-stage approach and a rule of the common law in Holomisa v Argus Newspapers.

[W]hen two competing rights are both recognised, and both specially protected, but one is shielded by common law rules which bear on the enjoyment and exercise of the other . . . [t]he Court must determine the meaning and content of the right sought to be asserted. It must then assess whether rules, of the common law or otherwise, which protect the one right, curtail or infringe upon the enjoyment of the other. If so, it must determine whether, in the light of the constitutional scheme overall, and the relative place of each competing right in it, that infringement can be justified under the limitation provision. At both stages, there will necessarily be an assessment of competing values.

34 See part III(c)(i) below.
35 Ferreira (note 9 above) 53.
37 Soobramoney v Minister of Health, KwaZulu-Natal 1998 (1) SA 765 (CC) para 54.
38 Iles (note 6 above) 453-454. In Ferreira (note 9 above) para 53, Ackermann J appeared to take the opposite view to Sachs J. Although he does not decide the point, Ackermann J plainly appears to be of the view that definitional limitations are rightly reserved for the limitations stage of rights adjudication. See also Islamic Unity (note 26 above) paras 30-51.
39 Holomisa v Argus Newspapers 1996 (2) SA 588 (W), 606C-608A; Du Plessis v De Klerk 1996 (3) SA 850 (CC) paras 55, 83.
40 Ibid.
41 Ibid. This approach of Cameron J was followed by Van der Westhuizen J in Holomisa v Khumalo 2002 (3) SA 38 (T), 60F-I, 63D-G. See also National Media Ltd v Bogoshi 1998 (4) SA 1196 (SCA) and Van Zyl v Jonathan Ball Publishers (Pty) Ltd 1999 (4) SA 571 (W), 592I-593D.
Cameron J states that an assessment of competing values will necessarily occur at both stages. Although he presumably means at both stages of the two-stage approach to rights adjudication, he reserves his resolution of the tension between freedom of expression and the right to dignity until the justification stage. Any uncertainty about whether competing values are resolved at the first or the second stage is resolved, however, by the judgment of O’Regan J in *Khumalo v Holomisa* where the Constitutional Court held that where rules of the common law unjustifiably infringe rights, the resolution is through s 8 of the Constitution and the development of the common law. Section 8 is clear that where rules of the common law limit rights, those rules must be subjected to the factors in s 36(1) of the Constitution. They therefore properly belong at the second stage of the enquiry. Even in those isolated cases where the rights of litigants conflict without the benefit of an intervening rule of the common law, our courts have resolved the tension by means of the general limitations clause of the constitution.

The first stage of the two-stage approach should therefore be confined to defining the content and boundaries of the right. No restriction or narrowing of the right to accommodate state interests or competing rights should occur at this stage. Once the right has been interpreted and it has been determined that the conduct falls within the scope of protected activity, then only should a court progress to a determination of whether the infringing law is justified or, where rights compete with each other, to the task of developing the common law in terms of s 8 of the Constitution or testing an existing rule of the common law against the criteria of the limitations clause.

III THE SECOND STAGE OF RIGHTS INTERPRETATION — THE SECTION 36(1) FACTORS

After the rights interpretation stage, if it is found that a particular rule infringes the protected scope of a right, a court is required to assess whether the infringement is justifiable. This justification analysis is conducted on the basis of the criteria listed in s 36 of the Constitution. Section 36 states:

(1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including

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42 2002 (5) SA 401 (CC) para 33.
43 For example, see *Director of Public Prosecutions (Western Cape) v Midi Television (Pty) Ltd t/a E TV* 2006 (3) SA 92 (C). But see *South African Broadcasting Corporation Limited v National Director of Public Prosecutions* 2007 (2) BCLR 167 (CC) para 42 where the Constitutional Court did not consider whether a limitations analysis was involved but held that a proportionality enquiry was necessary.
(a) the nature of the right;
(b) the importance and purpose of the limitation;
(c) the nature and extent of the limitation;
(d) the relation between the limitation and its purpose; and
(e) less restrictive means to achieve the purpose.

(2) Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights.

Section 36(1) provides that rights may be limited only ‘in terms of law of general application’. This requirement arises from an important principle of the rule of law, namely that rules should be stated in a clear and accessible manner. Before reaching the s 36(1) factors listed in subsections (a) to (e), it is therefore necessary to define a ‘law of general application’.

(a) ‘Law of general application’

The Constitutional Court has not yet given a general description of a ‘law of general application’ but has confined itself to a piecemeal definition of the term. It is clear from the judgments of the Court that a ‘law of general application’ includes the common law and statutory law, provided that the statute is clear. Employment practices by companies do not qualify as a law of general application and neither does unauthorised conduct by a public official. Mokgoro J, writing alone in a separate concurrence in President of the Republic of South Africa v Hugo, considered the phrase in broad terms and held that to qualify as a law of general application the rule in question should be accessible, precise and generally applicable. On the basis of these criteria she held that a Presidential Act qualified as a law of general application. The majority of the Constitutional Court, including Mokgoro J, in a judgment handed down after Hugo appeared...

44 Dawood v Minister of Home Affairs 2000 (3) SA 936 (CC) para 47.
45 Shabalala v Attorney-General, Transvaal 1996 (1) SA 725 (CC) para 23; Du Plessis (note 39 above) paras 44, 55; S v Thebus 2003 (6) SA 505 (CC) para 65. Kriegler J, in a separate concurrence in Du Plessis (para 136), held that all common law, regardless of its origin, including statutory, regulatory and tribal custom, would qualify as a law of general application.
46 De Reuck v Director of Public Prosecutions, Witwatersrand Local Division 2004 (1) SA 406 (CC) para 57.
47 Hoffmann v South African Airways 2001 (1) SA 1 (CC) para 41.
48 Pretoria City Council v Walker 1998 (2) SA 363 (CC) para 82.
49 President of the Republic of South Africa v Hugo 1997 (4) SA 1 (CC) paras 96-104. The majority expressly refrained from taking a position in this regard (para 30).
50 Ibid.
to accept, however, that an empowering legislative provision was a minimum requirement to qualify as a law of general application.\footnote{August v Electoral Commission 1999 (3) SA 1 (CC) para 23. It is difficult to reconcile the views of Mokgoro J in Hugo (note 49 above) with her concurrence in the majority judgment of Sachs J in August as she expressly acknowledges in Hugo the lack of a legislative basis for the Presidential act concerned in that case and nevertheless finds that it qualifies as a law of general application.}

Once it is found that the rule limiting the right is a law of general application, s 36 requires one to determine whether the limitation is ‘reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom taking into account all relevant factors,’ including those factors listed in s 36(1). This wording suggests that the s 36(1) factors do not constitute a closed list and that other factors may also be taken into account.

(b) The importance of the right — an important factor?

The first factor listed in s 36(1) as a factor to be considered is ‘the nature of the right’. Woolman writes that this factor involves an examination of the nature of the right and the importance of the right in an open and democratic society based on freedom and equality.\footnote{Woolman (note 6 above) 12-48 12-49.} Neither s 36(1) nor s 33 in the interim constitution contain the phrase ‘the nature and importance of the right’.\footnote{Cheadle (note 2 above) 706-707.} Is the ‘nature’ of a right something different to the ‘importance’ of that right and, if so, what is the basis for contending that the ‘importance’ of the right should be considered along with its nature?

The phrase ‘the nature and importance of the right’ appears to have first been introduced by the Constitutional Court in the \textit{Makwanyane} judgment decided under the interim constitution.\footnote{Makwanyane (note 4 above) 104; Cheadle (note 2 above) 706-707.} After \textit{Makwanyane} this phrase was carried over into the Court’s post-1996 limitations jurisprudence,\footnote{Dawood (note 44 above) 40; Christian Education South Africa v Minister of Education 2000 (4) SA 757 (CC) 31; S v Walters 2002 (4) SA 613 (CC) paras 26-27; Thebus (note 45 above) 29; Lawyers for Human Rights v Minister of Home Affairs 2004 (4) SA 125 (CC) para 35.} perhaps on the assumption that the factors in s 36(1) are a re-formulation of the limitations jurisprudence developed by the Constitutional Court in \textit{Makwanyane}.\footnote{Cheadle (note 2 above) 706-707.}

The Court relied for its development of the limitations analysis in \textit{Makwanyane} on Canadian jurisprudence.\footnote{Ibid. Makwanyane (note 4 above) paras 105-107.} Canadian limitations jurisprudence, however, also does not contain a concept of the ‘importance of the right’. Therefore, rather than s 36(1)(a) being a shorthand expression of the ‘nature and importance of the right’ borrowed from \textit{Makwanyane}, it is equally plausible that the drafters looked directly to...
Canadian jurisprudence and deliberately omitted the importance of the right as a result.58

The only explanation offered by the Constitutional Court for including the importance of the right as a factor to be considered alongside the nature of the right is in National Coalition v Minister of Justice.59 This judgment was handed down after Makwanyane, and was delivered in the context of analysing the differences in wording between s 33 of the interim Constitution and s 36 of the final Constitution. Ackermann J, writing for the majority, held that ‘[a]lthough s 36(1) does not expressly mention the importance of the right, this is a factor which of necessity must be taken into account in any proportionality enquiry.’60 In other words, the Court not only considered the importance of the right to be necessary, they were also of the view that it would be necessary in every case and that it would be impossible to conduct a proportionality enquiry without taking it into account.

It is unfortunate that Ackermann J did not explain why he considered the importance of a right to be such an essential element of a proportionality enquiry. Its inclusion implies that some rights are more important than others and that in turn implies that there is therefore a hierarchy of rights in the constitution such that some rights, because of their importance, will be harder to justify infringing than others.61 In the context of the interim Constitution this was perhaps a workable approach. The limitations clause in s 33 of the interim Constitution created thresholds such that some rights were harder to justify infringing than others. Any limitation of a right had to be justified in terms of s 33(a) but, in the case of certain rights enumerated in s 33(b) the limitation, in addition to satisfying the requirements of s 33(a), also had to be necessary. Introducing the additional requirement of necessity created a stricter infringement test for those enumerated rights. Based on the formulation of the interim constitution, the Constitutional Court concluded in Makwanyane that the rights to life and dignity were the most important of all the rights in the bill of rights and the source of all personal rights.62

But the 1996 Constitution has adopted a different formulation to that contained in the interim Constitution. The thresholds created by s 33 in the interim Constitution are gone from s 36. Dignity, equality and

58 Cheadle (note 2 above) 703-709.
59 Note 5 above, 34.
60 Ibid.
61 Currie & De Waal (note 9 above) 178-179 argue that the weight of a right will determine the stringency of the limitations test. Woolman also makes this stringency argument (note 6 above) 12-48 12-50. See also Cheadle (note 2 above) 704.
62 Makwanyane (note 4 above) 144. Kriegler J at para 214 clearly envisages a ranking and hierarchy of rights in the interim Constitution.
freedom are now the foundational values of the Constitution.63 Nothing in the text of the Constitution suggests a ranking of rights such that some rights, because they are more important, will always trump other less important rights in a limitations analysis.64 If there is such a ranking and some rights are more important than others, there is nothing in the constitutional text that gives guidance as to how the rights ought to be ranked and which rights should be regarded as more important.65 Outside of the usage of the phrase ‘the importance of the right’ our courts, including recently the Constitutional Court, have otherwise consistently rejected the imposition of any such hierarchy of rights onto the Constitution.66 While it is true that the justification analysis is premised on the fact that one right will have to yield to another right,67 this does not mean that right A will always be given precedence over right B in a limitations enquiry because right A is more important than right B.68 To perform the justification analysis in such a way would undermine the interconnectedness and interdependence of rights that the Constitutional Court embraces.69 Determining which right should take precedence over another is always a fact-specific enquiry and the outcome of the analysis may vary from case to case. To attempt to categorise some rights as more important than others would be unguided by the constitutional text and, as such, subjective and uncertain.70

63 Section 1 of the Constitution; Khumalo (note 42 above) 26.
64 Cheadle (note 2 above) 703-709.
65 Ibid.
66 See Mthembi-Mahanyele v Mail & Guardian Ltd 2004 (6) SA 329 (SCA) paras 40-42; Prinsloo v RCP Media Ltd t/a Rapport 2003 (4) SA 456 (T), 469E; SABC (note 43 above) paras 47, 49, 55, 91, 125, 128. But see De Reuck v Director of Public Prosecutions, Witwatersrand Local Division 2003 (3) SA 389 (W) para 45 where Epstein AJ held that there was a hierarchy of values to guide the limitations analysis as well as Bogoshi v National Media Ltd 1996 (3) SA 78 (W), 83 where Eloff JP held that a ranking of rights existed based on dicta of the Constitutional Court in Makwanyane.
67 In Ferreira (note 9 above) 53, Ackermann J quoted Isaiah Berlin on this point as follows: ‘... since some values may conflict intrinsically, the very notion that a pattern must in principle be discoverable in which they are all rendered harmonious is founded on a false a priori view of what the world is like. If ... the human condition is such that men cannot always avoid choices ... (this is) for one central reason ... namely, that ends collide; that one cannot have everything ...’.
68 Van Zyl (note 41 above) 591-592.
69 Case v Minister of Safety and Security 1996 (3) SA 617 (CC) para 27; Government of the Republic of South Africa v Grootboom 2001 (1) SA 46 (CC) para 23. The existence of a hierarchy of rights in the Constitution would, however, probably bolster the enforceability of socio-economic rights. The Constitutional Court has repeatedly emphasised that socio-economic rights are crucial for the enjoyment of all other rights in the Bill of Rights (Soobramoney (note 37 above) 8; Grootboom ibid 23; Khosa v Minister of Social Development 2004 (6) SA 505 (CC) paras 40,104 and they would therefore hold a relatively higher ranking than the majority of civil and political rights.
70 Ferreira (note 9 above) 77, 82; Cheadle (note 2 above) 707.
(c) The factors to be taken into account in rights limitation

(1) Section 36(1)(a) — The nature of the right

The nature of the right is a measure of the ability of a right to be limited.71 This is not to be confused with the importance of the right. Although it is considered trite law that no rights are absolute,72 some rights appear by their nature to be incapable of limitation, or at least capable of limitation only in very particular ways.73 Consider, for example, the right not to be subjected to slavery in s 13. Where a court finds that a particular treatment of a person amounts to slavery, the only way in which a court could justifiably permit that treatment to continue is where legislation derogates from the right or the constitution is amended.74 Slavery is control over a person against their will and by definition, therefore cannot be judged reasonable or justifiable in a society based on dignity and equality. Consider also the right to freedom of religion.75 This right has a negative and a positive aspect. The negative aspect provides that the state may not interfere in any person’s practice of their personal religion while the positive aspect of the right provides that each person has a right not to have one religion preferred over another.76 Depending on the facts of a particular case, a litigant may rely on one or other aspect of the right and the importance of the purpose of the limitation will depend, at least in part, on the aspect of the right it limits. This is not the same as saying that one right is more important than another right. Rather, as Cheadle has expressed it, ‘some aspects will be more consonant with the fundamental values than others.’77 In essence, Cheadle contends that a particular right may serve a different mix of

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71 Cheadle (ibid) 708-709.
72 Carpenter (note 36 above) 260.
73 Consider, for example, the right not to be tortured in s 12(1)(d) (see D Davis ‘Freedom and Security of the Person’ in Cheadle et al (eds) (note 2 above) 153, 169), the right not to be subjected to slavery in s 13 (see N Haysom ‘Slavery, Servitude and Forced Labour’ in Cheadle et al (eds) 175, 181-182) and the right guarding children against performing work or services that are inappropriate for their age or that place their well-being, education, physical or mental health or spiritual, moral or social development at risk in s 28(1)(f). E Mureinik ‘A Bridge to Where? Introducing the Interim Bill of Rights’ (1994) 10 SAJHR 31, 35. See also Nyamakazi v President of Bophuthatswana 1994 (1) BCLR 92 (BG), 115; Qozeleni v Minister of Law and Order 1994 (3) SA 625 (E), 640F-G; Phato v Attorney-General, Eastern Cape 1995 (1) SA 799 (E), 108-09; De Reuck (note 46 above) paras 69, 70. The Constitutional Court in Makwanyane (note 4 above) subjected the right to life, arguably the most fundamental right in the Constitution, to a limitations analysis. See also Bernstein v Bester NO 1996 (2) SA 751 (CC) para 67; Dawood (note 44 above) para 37. But see Makwanyane (note 4 above) para 97. However, for a different point of view see Cheadle (note 2 above) 708 who suggests that limitation of such rights comes through a narrow definitional stage rather than through a limitations stage. See also part IV below.
74 Cheadle (note 2 above) 708.
75 Section 15 of the Constitution.
76 Currie & De Waal (note 9 above) 338.
77 Cheadle (note 2 above) 709.
values depending upon the context within which the right is applied. In *Edmonton Journal v Alberta Attorney-General* the Canadian Supreme Court held that:

[A] particular right or freedom may have a different value depending on the context. It may be, for example, that freedom of expression has greater value in a political context than it does in the context of disclosure of the details of a matrimonial dispute. The contextual approach attempts to bring into sharp relief the aspects of any values in competition with it.

Another aspect of the nature of rights is the porosity and permeability of the right. These two words reflect the extent to which a right overlaps with other rights or is dependent upon and interconnected with other rights. Consider, for example, freedom of expression which overlaps the rights to both dignity and privacy. In a defamation case the first stage of rights adjudication would involve a determination of whether or not the defamatory speech falls within the ambit of the freedom of expression right. If it is found that the defamatory speech does fall within the ambit of freedom of expression, it will not be sufficient for a court to permit that speech solely on the grounds that freedom of speech is a constitutionally supported purpose. The speech, though protected, infringes the rights to dignity and perhaps, in certain cases, privacy. This overlapping must be taken into account when assessing the rules of the common law of defamation. Although the Constitutional Court is clearly alive to the interconnectedness and interdependence of rights, there are no judgments of which I am aware in which the Constitutional Court has considered the nature of a right in the way discussed here. The emphasis should not be on the importance of the right, but rather on the importance of the values that a particular right advances in the context in which that right is sought to be applied.

Because of his interpretation of s 36(1)(a) as including an assessment of the importance of the right, Woolman contends that s 36(1)(a) is an enquiry which should properly occur at the first stage of the two-stage approach (namely the interpretation stage) and not as a part of the second limitations stage. Even if Woolman is correct that the ‘nature of the right’ in s 36 implies an assessment of the overall importance of the right in the constitutional scheme, this would still remain an enquiry which correctly belongs at the justification stage of the analysis and not at

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78 Ibid.
80 Cheadle (note 2 above) 708.
81 Cheadle (note 2 above) 703 labels this the ‘permeability’ of the right.
82 Section 16 of the Constitution.
83 Sections 10 and 14 of the Constitution respectively.
84 Woolman (note 6 above) 12-17.
the interpretation stage. At the first stage of the analysis one is enquiring only into the ambit of the right to determine whether conduct falls within the right. While it will be necessary to have regard to the nature of the right in order to determine the ambit of the right, this is a different enquiry to the question that arises at the justification stage. At the justification stage one is asking how important it is to protect against incursions into the right. In other words, one is asking how important it is to protect this right from infringement given its nature. This is not a question that goes to the scope of the right. Once one has determined the scope and decided, for example, that particular speech is protected by the right to freedom of expression, then at the limitations stage a court asks itself whether the right to freedom of expression should be limited by a particular rule of the common law given the interdependence and interconnectedness between dignity, privacy and freedom of expression. This is not an enquiry which should be undertaken at the first stage. Either expression is protected or it is not. How freedom of expression interacts with dignity and privacy should have no bearing on that initial determination.

(ii) Section 36(1)(b) — The importance of the purpose of the limitation

The second factor the constitution enjoins a court to consider is the ‘importance of the purpose of the limitation.’ Van der Westhuizen J interpreted s 36(1)(b) in the following manner in *Magajane v Chairperson, North West Gambling Board*:

The second factor, the importance of the purpose of the limitation, is crucial to the analysis, as it is clear that the Constitution does not regard the limitation of a constitutional right as justified unless there is a substantial state interest requiring the limitation. . . . The court must carefully review the public interest served by the statutory provision and determine the weight that this purpose should carry in the proportionality review.

In other words, the limitation must advance an important state interest. Stated this way, s 36(1)(b) looks like a threshold enquiry: if the purpose of a limitation is not important, the limitation will fail regardless of the outcome of the remainder of the limitations enquiry. When the Constitutional Court considers this factor, however, it typically uses the language of ‘balancing’. Both descriptions are misleading. Section

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85 Woolman himself argues that any balancing exercise between the relative importance of competing values should occur only at the justification stage. Woolman (note 6 above) 12-17 12.24C and 12-48 12-49.
86 2006 (5) SA 250 (CC) para 65.
87 Woolman (note 6 above) 12-48 12-49.
88 *Makwanyane* (note 4 above) 145.
36(1)(a) requires a court to assess the nature of the right in issue. Section 36(1)(b) then asks the court to determine the purpose of the limitation and to reach a view on the importance of the limitation based on the state interest that that limitation advances.\textsuperscript{89} Neither subsection states what ought to be done with these two factors, once assessed. As will be discussed below, s 36(1)(a), 36(1)(b) and s 36(1)(c) form essential elements of factors 36(1)(d) and 36(1)(e) and these two subsections provide the guidance as to how 36(1)(a) through 36(1)(c) ought to be used once assessed. In other words, subsections 1(a) to 1(c) provide the elements that must be used in the limitations analysis. Subsections 1(d) and 1(e) describe the manner in which they should be used.

(iii) \textit{Section 36(1)(c) — The nature and extent of the limitation}

There is not much that needs to be said about the nature and extent of the limitation. It is clear that what is involved here is an assessment of the manner in which the limiting law limits the right and the extent to which the limitation curtails enjoyment of the right. What is perhaps important to note, is that what is of concern in s 36(1)(c) is not the effect of the right on the litigant, but rather the effect of the limitation on the right itself.\textsuperscript{90}

(d) \textit{The mechanics of rights limitation — how to use the limitation factors}

Section 36(1)(d) asks a court to consider the relationship between a limitation and the purpose of the limitation. The importance of the purpose of the limitation does not enter into this subsection. The court is asked merely to consider whether the purpose of the limitation, regardless of its importance, is reasonably related to the means used to achieve that purpose. Our courts have dubbed this the ‘rational connection test’.\textsuperscript{91} If there is no rational connection between the limitation and its purpose then that is the end of the enquiry. The nature of the right involved, the importance of the purpose of the limitation and the extent of the limitation all become irrelevant. Section 36(1)(e) introduces a second limitations test. It asks a court to determine whether the limitation chosen is the least restrictive means of achieving the purpose of the limitation. Here the nature and extent of the limitation and the nature of right are important prior questions that must be answered before one can consider whether there are other ways of achieving the purpose of the limitation.

\textsuperscript{89} \textit{De Lange v Smuts NO} 1998 (3) SA 785 (CC) para 166; \textit{Magajane} (note 86 above) 95; \textit{Chief Lesapo v North West Agricultural Bank} 2000 (1) SA 409 (CC) para 29; \textit{Prince v President, Cape Law Society} 2002 (2) SA 794 (CC) paras 52, 53; \textit{Jaftha v Schoeman} 2005 (2) SA 140 (CC) para 40; \textit{Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd} 2001 (1) SA 545 (CC) para 53.

\textsuperscript{90} \textit{S v Meaker} 1998 (8) BCLR 1038 (W), 1054E-G; \textit{Islamic Unity} (note 26 above) 49.

\textsuperscript{91} See, for example, \textit{Ferreira} (note 9 above) para 126.
while curtailing less of the right. Understanding the purpose of the limitation and the extent to which the limitation infringes the right are self evidently matters which must be understood before one can determine whether some other formulation would achieve the same purpose but infringe the right less. The nature of the right, as explained above, is instrumental in understanding the manner in which the limitation limits the right concerned. Again, however, the importance of the purpose of the limitation does not appear to be a necessary enquiry.

The practical effect of the least restrictive means test is that a court has to engage in a selection between alternative policy choices for achieving a particular purpose. This raises what the Constitutional Court has called 'a fundamental problem of judicial review.'92 Is it proper for courts to substitute their judgment as to what is reasonable and necessary for that of an elected legislature? Even if it were proper, it is doubtful whether the courts are particularly well-equipped for the task. Nevertheless, it is a task the courts are constitutionally mandated to undertake.

Despite the fact that ss 36(1)(d) and 36(1)(e) have different necessary elements (the purpose and nature of the limitation in the case of s 36(1)(d), and the nature of the right as well as the nature and extent of the limitation in the case of s 36(1)(e)), the inclusion of a rational connection test and a least restrictive means test appears to be analytically unnecessary and redundant.93 It is difficult to conceive of an infringement of a right which could be irrational in terms of s 36(1)(d) and yet simultaneously satisfy the least restrictive means test in s 36(1)(e) or vice versa. If a restrictive measure is not tailored as narrowly as possible it will impose a greater cost on the affected person than is necessary.94 The result is that both the least restrictive means test and the rationality test would be satisfied or infringed together.95 If the two tests in 36(1)(d) and 36(1)(e) can be answered using only the nature of the right, and the nature, purpose and extent of the limitation, how is the importance of the purpose of the limitation relevant in the limitations analysis?

Section 36(1)(e) will only raise a counter-majoritarian dilemma of the type the Constitutional Court described in Makwanyane if one reads that subsection as always requiring a court to select the means of achieving the limitation that imposes the smallest restriction on the right. In other words, if one reads s 36(1)(e) not as a threshold enquiry whereby a

92 Makwanyane (note 4 above) para 107.
93 Woolman ‘Push-Me-Pull-You’ (note 7 above) 85; Woolman (note 6 above) 12-63.
94 Woolman (note 6 above) 12-63.
95 See, for example, De Lange (note 89 above) para 99; Prince (note 89 above) para 35 read with paras 46, 47; De Reuck (note 46 above) para 70. In Prinsloo (note 8 above) the Constitutional Court placed the rational connection enquiry at the rights interpretation stage despite its express inclusion in the list of factors in s 36(1), perhaps in an attempt to avoid this redundancy.
limitation will always fail if there is a less restrictive means of achieving its purpose, but simply as a factor to be taken into account when determining whether or not a particular limitation is justified, the court is no longer asked to prefer the less restrictive method over the method chosen by the legislature. All it is required to do is note that a less restrictive method was available. Whether or not the fact that a less restrictive means was available and was not used should disqualify a limitation will then depend upon the importance of the purpose of that limitation, the extent to which it infringes the right and the nature of the right being infringed. In *S v Manamela* the Constitutional Court held that the less restrictive means test should not be used to limit the range of legislative choice in a specific area. If one were always required to pick the least restrictive means one would have no option but to limit the legislature’s choices, namely to those means which are the least restrictive of all possible means. In a minority judgment in *Manamela* O’Regan J and Cameron AJ adopted the approach to the least restrictive means test advocated here, and the majority concurred in the principles enunciated in this portion of their judgment and disagreed only as to the application of the principles. O’Regan J and Cameron AJ held as follows:

It is clear that the question whether there are less restrictive means to achieve the government’s purpose is an important part of the limitation analysis. However, it is as important to realise that this is only one of the considerations relevant to that analysis. It cannot be the only consideration. It will often be possible for a court to conceive of less restrictive means . . . The problem for the Court is to give meaning and effect to the factor of less restrictive means without unduly narrowing the range of policy choices available to the Legislature in a specific area. The Legislature, when it chooses a particular provision, does so not only with regard to the prioritisation of certain social demands and needs and the need to reconcile conflicting interests . . . When a court seeks to attribute weight to the factor of ‘less restrictive means’ it should take care to avoid a result that annihilates the range of choice available to the Legislature. In particular, it should take care not to dictate to the Legislature unless it is satisfied that the mechanism chosen by the Legislature is incompatible with the Constitution.

Furthermore, if one takes this approach it has the result that the rational connection test and the least restrictive means test may well produce different outcomes. In *Manamela* the Court found that the limitation was rationally connected to the purpose and rejected it only on the grounds that it was not the least restrictive means of achieving that purpose. The limitation was found to be overly broad.

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96 2000 (3) SA 1 (CC) para 34.
97 Ibid.
98 Ibid paras 94-95 (footnotes omitted).
99 For a summary of the judgment that reveals this analysis see the headnote in the *South African Law Reports* (note 96 above).
(e) A recommended approach to the application of section 36

It should be clear from what has been said above that despite the language of balancing or proportionality that the Constitutional Court uses when describing the limitations clause analysis, balancing is only one part of the enquiry. Section 36 also contains the threshold enquiry in s 36(1)(d), namely whether the means used to achieve the limitation is rationally connected to the purpose of the limitation. If a limitation is not rationally connected to its purpose, that limitation cannot prevail regardless of its importance or the outcome of any of the other factors in the enquiry. It seems, then, that the best approach to the limitations clause is to begin with an examination of the purpose, the nature and the extent of the limitation. Once these are understood one can proceed to determining whether the limitation, given its nature and purpose, passes the rational connection test. If the limitation fails at this part of the analysis then that is the end of the enquiry. Assuming the limitation passes this threshold test, a court can then proceed to consider the nature of the right and balance this against the importance of the limitation, taking into account the availability of a less restrictive means of achieving the purpose of the limitation.

IV DIFFERENT ROUTES TO LIMITATION

A lack of jurisprudential clarity at the limitations stage can be ill-afforded for rights which already contain their own internal limitations clauses. It is not the intention of this paper to attempt to grapple with the interaction between s 36 and the internal limitations clauses in the socio-economic rights of the Constitution as these have been canvassed extensively elsewhere. This section takes a narrower focus, which is to ask whether every limitation of a right must necessarily proceed through s 36.

Section 36(2) states that laws may limit rights entrenched in the bill of rights in two distinct ways, namely ‘as provided in subsection (1)’ or as provided ‘in any other provision of the Constitution’. By other provisions of the Constitution, s 36(2) is undoubtedly referring to the individualised

101 Cheadle (note 2 above) 703-706.
102 Woolman (note 6 above) 12-50.
103 But see also the judgments of O’Regan J in the New National Party of South Africa v Government of the Republic of South Africa 1999 (3) SA 191 (CC) and Democratic Party v Minister of Home Affairs 1999 (3) SA 254 (CC) and a commentary on them by Woolman (note 6 above) 12-24C note 3.
104 See the references at note 6 above.
limitations clauses within particular rights and freedoms.\textsuperscript{105} But s 36(2) does not limit the sources of limitation to individualized limitations within the Bill of Rights. It specifically says that limitations may be found in ‘any other provision of the Constitution’.\textsuperscript{106} An example of such a limitation would be s 56(a) which gives the National Assembly the power to summon any person before it and to have that person give evidence or produce certain documents.\textsuperscript{107} Section 69(a) confers the same power on the National Council of Provinces.\textsuperscript{108} These powers would, at a minimum, infringe the right to privacy in s 14 of the Bill of Rights\textsuperscript{109} in many circumstances.\textsuperscript{110}

Section 7(3) of the Constitution states that ‘[t]he rights in the Bill of Rights are subject to the limitations contained or referred to in s 36, or elsewhere in the Bill.’ This provision appears to conflict with s 36(2) by seeming to limit the sources of limitation to provisions within the Bill of Rights alone. Such a reading of s 7(3) would mean, however, that the

\textsuperscript{105} Woolman ‘Push-Me-Pull-You’ (note 7 above) 63; Cheadle (note 2 above) 695.

\textsuperscript{106} My emphasis. It is accepted practice in our constitutional jurisprudence for rights to be interpreted in the context of the Constitution as a whole rather than merely within the framework of the Bill of Rights. See, for example, Makwanyane (note 4 above) para 115; S v Mhlungu 1995 (3) SA 867 (CC) para 45; Ferreira (note 9 above) paras 52, 80; De Lange (note 89 above) para 30; National Coalition (note 5 above) para 87; Grootboom (note 69 above) paras 22, 24; First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service 2002 (4) SA 768 (CC) para 49.

\textsuperscript{107} The relevant portion of s 56 of the 1996 Constitution states:

‘The National Assembly or any of its committees may

(a) summon any person to appear before it to give evidence on oath or affirmation, or to produce documents;

(b) require any person or institution to report to it;

(c) compel, in terms of national legislation or the rules and orders, any person or institution to comply with a summons or requirement in terms of paragraph (a) or (b); and

(d) . . .’

\textsuperscript{108} The relevant portion of s 69 of the 1996 Constitution states:

‘The National Council of Provinces or any of its committees may

(a) summon any person to appear before it to give evidence on oath or affirmation, or to produce documents;

(b) require any person or institution to report to it;

(c) compel, in terms of national legislation or the rules and orders, any person or institution to comply with a summons or requirement in terms of paragraph (a) or (b); and

(d) . . .’

\textsuperscript{109} Section 14 of the 1996 Constitution states that:

‘Everyone has the right to privacy, which includes the right not to have

(a) their person or home searched;

(b) their property searched;

(c) their possessions seized; or

(d) the privacy of their communications infringed.’

\textsuperscript{110} See also the recent example of the limitation of the right to freedom of expression by the power of the court to regulate its own process conferred by s 173 of the Constitution in the SABC case (note 43 above) 37. In that case Moseneke J, in a minority judgment, rejected the contention that s 173 can be used to limit freedom of expression (para 91) although he does not appear to exclude other sources of limitation external to the Bill of Rights (see para 92).
right to privacy in s 14 could never be limited by the s 56 and 69 powers simply because those powers lie outside of the Bill of Rights. Such a reading would render those powers ineffective and would hamper the ability of Parliament to perform its constitutionally mandated duties. The solution lies in the wording of subsections (1) and (2) in s 36. The effect of subsection one seems to be that a law may only limit a right if the limitation meets the conditions of subsection one. On the other hand, subsection two appears to permit limitations either in terms of subsection one or in terms of any other limitations provision elsewhere in the Constitution. The most reasonable interpretation of this apparent conflict is that any limitation that arises from a source other than s 36 or as an internal limitation in Chapter 2, must comply in substance with the requirements of s 36(1). This interpretation is consistent with the purpose of an external and general limitations clause, namely that the limitation be capable of being applied generally to any provision that limits a right, and makes sense of the apparent conflict between ss 36(2) and 7(3).111

To return to the example of the powers of the National Assembly and the National Council of Provinces, where these bodies seek to limit rights by exercising their s 56 and 69 powers respectively, they will have to satisfy the requirements of s 36 in limiting those rights. This would require that they exercise their powers for a proper constitutional purpose, that the exercise of that power be reasonable and necessary, and that the exercise of the power does not unduly limit the right. Were this not the case, and limitations arising from sources other than s 36 were not required to comply with the criteria in s 36, there would be no means of challenging an abuse of the s 56 and 69 powers where they were exercised in the absence of a legitimate parliamentary purpose.

But if provisions outside of the Bill of Rights are only permitted to limit rights where they satisfy the requirements of s 36, does that mean that the only method of testing the justifiability of the limitation of a right is through s 36? Consider, for example, s 29(2) of the Constitution which confers on everyone the right to receive education in the official language of their choice where reasonably practicable.112 How would one meaningfully apply s 36 to this section? Any infringement of this right

111 See SABC (ibid) paras 37, 42 where, although not deciding whether a limitation of freedom of expression by s173 implicated a limitations enquiry or not, the Constitutional Court held that at a minimum, a proportionality enquiry was necessary and that in exercising s 173 powers courts must not unjustifiably attenuate rights. See also the minority judgments of Moseneke J at paras 92, 94 and Mokgoro J at para 125.

112 The relevant portions of s 29 state:

'(1) Everyone has the right
(a) to a basic education, including adult basic education; and
(b) to further education, which the state, through reasonable measures, must make progressively available and accessible.
would typically occur on an ad hoc basis and would be justified by circumstances prevailing in a particular area or at a particular time. Section 36 would not apply in such a case as s 36, on its own terms, applies only to laws of general application and not to conduct or to specific applications of the law.\textsuperscript{113}

Similarly, in every case in which the Constitutional Court has considered the right to equality it has, at least nominally, proceeded to a limitations analysis.\textsuperscript{114} However, with the exception of the dissenting judgment of Mokgoro J writing alone in \textit{Hugo},\textsuperscript{115} there is no case in which the limitations clause has ever rescued an infringing law from unconstitutionality. Under both the interim and the 1996 Constitutions, discrimination is presumed to be unfair when it is based on a listed ground.\textsuperscript{116} That presumption is, however, open to rebuttal, and in the only two cases in which discriminatory laws survived an equality challenge it was at this rebuttal stage that the legislation succeeded.\textsuperscript{117} The limitations stage was therefore not reached in those cases. In the

\begin{enumerate}
\item Everyone has the right to receive education in the official language or languages of their choice in public educational institutions where that education is reasonable practicable. In order to ensure the effective access to, and implementation of, this right, the state must consider all reasonable educational alternatives, including single medium institutions, taking into account
\begin{enumerate}
\item equity;
\item practicability; and
\item the need to redress the results of past racially discriminatory laws and practices.
\end{enumerate}
\end{enumerate}

\textsuperscript{113} Cheadle (note 2 above) 702 footnote 21; Kreigler J’s dissenting judgment in \textit{Hugo} (note 49 above) 76 footnote 86; \textit{Walker} (note 48 above) 82; \textit{Hoffmann} (note 47 above) 41. See also \textit{Giddey NO v JC Barnard and Partners 2007 (2) BCLR 125 (CC) 18, 23, 30 where the Court omits any mention of s 36.}

\textsuperscript{114} See, for example, \textit{S v Ntuli 1996 (1) SA 1207 (CC); Brink v Kitchoff NO 1996 (4) SA 197 (CC); Fraser v Children’s Court, Pretoria North 1997 (2) SA 261 (CC); the dissenting judgments of Kriegler J and Mokgoro J in \textit{Hugo} (ibid) (the majority finding that the discrimination is not unfair); the dissenting judgments of O’Regan J and Sachs J in \textit{Harksen v Lane NO 1998 (1) SA 300 (CC) (the majority finding that there is no unfair discrimination); \textit{Larbi-Odam v Member of the Executive Council for Education (North-West Province) 1998 (1) SA 745 (CC); \textit{Walker} (ibid) (the limitations clause was found not to apply); \textit{National Coalition v Home Affairs (note 5 above); \textit{National Coalition v Home Affairs (note 5 above); \textit{Hoffmann} ibid (the limitations clause was found not to apply); \textit{Moseneko v The Master 2001 (2) SA 18 (CC); \textit{Satchwell v President of the Republic of South Africa 2002 (6) SA 1 (CC); the dissenting judgment of Sachs J and O’Regan J in \textit{S v Jordan 2002 (6) SA 642 (CC) (the majority found no infringement of the right to equality); \textit{Du Toit v Minister for Welfare and Population Development 2003 (2) SA 198 (CC); \textit{J v Director General: Department of Home Affairs 2003 (5) SA 621 (CC); \textit{Khosa (note 69 above).}

\textsuperscript{115} Note 49 above. The majority found that there was no unfair discrimination. See the further discussion of Mokgoro J’s judgment below.

\textsuperscript{116} Section 8(2) read with 8(5) of the interim Constitution and ss 9(3) and 9(5) of the 1996 Constitution. But see the dissenting judgment of Sachs J in \textit{Walker} (note 48 above).

\textsuperscript{117} See \textit{Walker} (bid) and the majority judgment in \textit{Hugo} (note 49 above). In two cases the Constitutional Court omitted the rebuttal stage and proceeded directly to limitations, and in both cases the equality challenge succeeded. See \textit{Brink} (note 114 above) and \textit{Satchwell} (note 114 above).
cases where unfairness was not rebutted, the limitations clause either did not apply at all because there was no law of general application,\textsuperscript{118} or where there was such a law it could not save the impugned law from unconstitutionality.\textsuperscript{119} In the cases where discrimination occurred on an unlisted ground and unfairness was established\textsuperscript{120} and the general limitations clause applied,\textsuperscript{121} the limitations clause failed in every case to rescue the offending law from unconstitutionality.\textsuperscript{122}

An examination of fairness forms a part of the equality analysis. If discrimination is on a listed ground, unfairness is presumed but can be rebutted. If discrimination is on an unlisted ground, unfairness must be established. It is hard to conceive of a law that could be unfair and yet simultaneously reasonable, and so it doesn’t appear as if there is much work (if any) left for s 36 to do while fairness forms a part of the equality examination. In \textit{Harksen}\textsuperscript{123} Goldstone J for the majority held that the impact of the discrimination on the complainant would be the determining factor regarding the unfairness of the discrimination.\textsuperscript{124} This is a factor which the Court is expressly enjoined to take account of in section 36.\textsuperscript{125} In \textit{Hugo}\textsuperscript{126} Kriegler J held that section 36 is concerned with justification, possibly notwithstanding unfairness, while section 9 is concerned with fairness.\textsuperscript{127} So, for example, Kriegler J lists public reaction to the release of prisoners as a factor that should properly be considered under s 36 and not under section 9.\textsuperscript{128} Mokgoro J in her dissenting judgment in \textit{Hugo} proceeds to a limitations analysis after finding the discrimination unfair and by implication therefore also supports the view that the reasonableness factors in s 36 are different to the fairness factors in s 9.\textsuperscript{129} But even if one agrees with Kriegler J and

\begin{itemize}
  \item \textit{Walker} (note 48 above). See also the dissenting judgment of Kriegler J in \textit{Hugo} (note 49 above).
  \item \textit{Brink} (note 114 above); \textit{National Coalition} (note 5 above); \textit{National Coalition v Home Affairs} (note 100 above); \textit{Satchwell} (note 114 above); \textit{Mosebeni} (note 114 above); \textit{Du Toit} (note 114 above); \textit{J} (note 114 above). See also the dissenting judgment of O’Regan J and Sachs J in \textit{Jordan} (note 114 above).
  \item Unfairness was not established in \textit{Hugo} (note 49 above); \textit{Prinsloo} (note 8 above); or \textit{Harksen} (note 114 above) (but see the dissenting judgments of O’Regan J and Sachs J in that case).
  \item There was no law of general application in \textit{Hoffmann} (note 47 above).
  \item See \textit{Fraser} (note 114 above); the dissenting judgments of O’Regan J and Sachs J in \textit{Harksen} (note 114 above); \textit{Khosa} (note 69 above).
  \item \textit{Note} 114 above.
  \item Ibid 50.
  \item Section 36(1)(c).
  \item \textit{Note} 49 above.
  \item Ibid 77.
  \item Ibid 78.
  \item Ibid 94-106. In addition there may be a role for the limitations clause in justifying the infringement of equality in cases of sentencing. Here, for a host of reasons, indirect discrimination causes uneducated, poor or unrepresented persons to often receive harsher sentences than those who can afford better legal representation. See, for example, \textit{Makwanyane} (note 4 above) paras 47-53. This unfair discrimination can be justified under the limitations clause as being in the public interest, for without it the sentencing system would collapse.
\end{itemize}
Mokgoro J that a theoretical and conceptual difference exists between the fairness and reasonableness tests, the equality decisions cited above show that in practice the Constitutional Court tends to subsume the general limitations clause reasonableness analysis into the fairness test.\(^{130}\) This is not surprising when one considers that towards the beginning of the Constitutional Court’s equality jurisprudence in \textit{Prinsloo v Van der Linde}\(^{131}\) it had already suggested that the very purpose of the fairness criterion in the equality test was to save courts from having to subject every piece of legislation that differentiated between categories of people to a limitations enquiry.\(^{132}\)

Just as there are difficulties in reconciling s 36 with ss 29 and 9 of the Constitution, it is similarly difficult to conceive of a role for s 36 in the justification of limitations to the right to property in s 25 of the Constitution,\(^{133}\) the occupational freedom right in s 22,\(^{134}\) just administrative action in s 33\(^{135}\) and the socio-economic rights in ss 26 and 27.\(^{136}\) Given these problems it is therefore somewhat surprising to find the Constitutional Court, without more, stating that all rights in the Bill of Rights are limited by the general limitations clause.\(^{137}\) The analysis of the

\(^{130}\) This is borne out by the cases in which an examination of fairness has been omitted entirely, for example, \textit{Brink} (note 114 above) and \textit{Satchwell} (note 114 above), and the cases where a limitations enquiry is omitted, for example, \textit{Khosa/Mehlaule} (note 69 above) 80. But see \textit{Lotus River, Ottery, Grassy Park Residents Association v South Peninsula Municipality 1999 (2) SA 817 (C), 831-833. See also C Albertyn ‘Equality’ in Cheadle et al (eds) (note 2 above) 115-117 who argues that s 36 does have a role to play in the s 9 analysis albeit that a bright line can’t be drawn between the tests to be allocated to each section.

\(^{131}\) Note 8 above.

\(^{132}\) Ibid paras 24-26. The Court held that: ‘If each and every differentiation made in terms of the law amounted to unequal treatment that had to be justified by means of resort to s 33, or else constituted discrimination which had to be shown not to be unfair, the Courts could be called upon to review the justifiability or fairness of just about the whole legislative programme and almost all executive conduct. . . . The Courts would be compelled to review the reasonableness or the fairness of every classification of rights, duties, privileges, immunities, benefits or disadvantages flowing from any law. Accordingly, it is necessary to identify the criteria that separate legitimate differentiation from differentiation that has crossed the border of constitutional impermissibility and is unequal or discriminatory “in the constitutional sense”.’

\(^{133}\) Due to space constraints it is not possible to canvass the relationship between s 36 and the internal limitations in the property clause here. T Roux in ‘Property’ in Cheadle et al (eds) (note 2 above) 429, 437-442 argues that there is no room for s 36 in the construction of the property clause. See also De Waal et al (note 100 above) 426-427. For a contrary view see AJ Van der Walt \textit{The Constitutional Property Clause: a comparative analysis of section 25 of the South African Constitution of 1996} (1997) Chap 3; AJ Van der Walt \textit{Constitutional Property Clauses: a comparative analysis} (1999) 331-2, 357-8. There are judicial decisions subscribing to both views. See, for example, \textit{Janse van Rensburg NO v Minister van Handel en Nywerheid 1999 (2) BCLR 204 (T) and Director of Public Prosecutions: Cape of Good Hope v Bathgate 2000 (2) SA 535 (C).}

\(^{134}\) De Waal et al (note 100 above) 381.

\(^{135}\) Ibid footnote 4.

\(^{136}\) See, for example, the references at note 6 above.

\(^{137}\) \textit{Dawood} (note 44 above) 37; \textit{Case} (note 69 above) 37; \textit{First National Bank} (note 106 above) 110; \textit{SABC} (note 43 above) 91 (Mosemeke J).
limitations clause given above, together with an understanding of the internal limitations clauses in socio-economic rights constitute sufficient evidence that this cannot be the case.

VI Conclusion

In Ferreira v Levin Sachs J urged the Court not to engage in a ‘purely formal or academic’ analysis, nor to engage in ‘ad hoc technism.’\textsuperscript{138} In a certain sense, then, this article is everything Sachs J urged the courts to avoid. It has hopefully demonstrated, however, the very real and practical effects that different approaches to rights adjudication and the limitations enquiry can have on litigants, on our constitutional jurisprudence and ultimately on the outcome of constitutional litigation. To advocate a particular understanding of the limitations enquiry is not of itself necessarily formalistic or academic. The quality of rights adjudication in our country is entirely dependent on the nature of the questions the court asks in adjudicating on rights issues.\textsuperscript{139} Section 36 stipulates the questions that must be asked when limiting a right and, even though the list of factors in s 36 is not exhaustive, one must nevertheless have regard to what the text of s 36 says. As Kentridge AJ famously stated in S v Zuma, ‘the Constitution does not mean whatever we might wish it to mean.’\textsuperscript{140} There are significant differences in wording between the limitations clause in the interim Constitution and s 36. Those differences cannot be ignored. A proper understanding of the role of the limitations clause will enable courts to allocate the correct tasks to the correct stages of rights adjudication and provide for a jurisprudentially sound approach to rights adjudication.

\textsuperscript{138} Note 9 above, 656D.
\textsuperscript{139} Woolman (note 6 above) 12-19.
\textsuperscript{140} Note 4 above 17.