IRR

CIVIL LIBERTY IN SOUTH AFRICA

Freedom Under Law
Three Decades After Apartheid

July 2023

Martin van Staden

Table of Contents

July 2023

Published by the South African Institute of Race Relations

222 Smit Street (Virtual office),
Braamfontein Johannesburg, 2000, South Africa
PO Box 291722, Melville, Johannesburg, 2109, South Africa
Telephone: (011) 482–7221

© South African Institute of Race Relations

Members of the Media are free to reprint or report information, either in whole or in part, contained in this publication on the strict understanding that the South African Institute of Race Relations (IRR) is acknowledged. Otherwise no part of this publication may be reproduced, stored in a retrieval system, or transmitted in any form or by any means, electronical, mechanical, photocopy, recording, or otherwise, without the prior permission of the publisher.

While the IRR makes all reasonable efforts to publish accurate information and bona fide expression of opinion, it does not give any warranties as to the accuracy and completeness of the information provided. The use of such information by any party shall be entirely at such party's own risk and the IRR accepts no liability arising out of such use.

Author: **Martin van Staden LL.M.**

Editors: **Terence Corrigan, John Endres and Marius Roodt**

1. Introduction

The near omnipresence of 'rights talk' has, for many, turned the notion of civil liberty into a banality – a phenomenon that exists at best only in the background with little practical relevance. It is easy to lose sight of the reasons why society has entrenched recognition for fundamental freedom in higher-status laws like the Constitution. When sight of this is lost, freedom is taken for granted, and when this happens it can easily be forfeited when other endeavours, invariably based on appeals to justice, take freedom's place as the central principle of political organisation.[1]

During Apartheid, the freedom recognised and guaranteed by South Africa's mixed Roman-Dutch and English legal heritage was taken for granted, which made it significantly easier for the political class to motivate and adopt the ostensible 'imperative' of segregation and the 'harmonious' separate development of racial groups. It was at the height of Apartheid, in 1958, that the Institute of Race Relations commissioned Edgar Harry Brookes and JB MacAulay to write *Civil Liberty in South Africa*,[2] wherein they explained how much freedom South Africans had lost at the altar of racial separation.[3]

Since Brookes and MacAulay's contribution, and particularly since 1994, South Africa's performance on civil liberty has improved significantly, to the point that the country can comfortably claim to be a member of the so-called 'free world'. This status is hardly etched in stone, however, and South Africa once again risks sacrificing freedom as other ostensible 'imperatives' – such as social engineering towards (unattainable) material equality – come to stand in for civil liberty.

Civil liberty can be lost if not jealously guarded by a vigilant civil society, an independent judiciary and, ideally, a political establishment that values freedom rather than treating it with indifference, suspicion, or contempt.

This contribution presents a brief review of the government's performance on civil liberty since 1994, an analysis of section 36 of the Constitution which is arguably central to the *protection* rather than the *infringement* of constitutional rights, and recommendations on how civil liberty could be better prioritised and protected in the future.

1 As AC Grayling writes:
'Today's leaders have grown up taking those freedoms and rights [fought for during the Second World War] for granted, and are demonstrably not much interested in them any more; they find them an inconvenience because protecting them requires lengthier and costlier measures than they care to sanction. Alas, most of the general population either seem to share that indifference, or are merely ignorant of what is in the process of being lost. The cliché – no less true for being one – has it that we only properly value things when they have gone: perhaps the day will come when both leaders and led wake to the carelessness with which they allowed a precious inheritance to slip from their grasp.'
Grayling AC. *Towards the Light: The story of the struggles for liberty & rights that made the modern West.* (2007). London: Bloomsbury. 5-6.

2 Brookes EH and MacAulay JB. *Civil Liberty in South Africa.* (1958). Cape Town: Oxford University Press.

3 For example, Brookes and MacAulay explain in detail how the National Party government's Suppression of Communism Act (44 of 1950) was framed so widely that it effectively allowed the Governor-General to remove members of Parliament from office simply if he believed they were 'communists' (23-24). Additionally, the Natives (Urban Areas) Act (21 of 1923), which limited the presence of black South Africans in 'white' areas, allowed blacks without passes to justify their bona fide presence in these areas to native commissioners. The snag was that they could be arrested on their way to the native commissioner's office, as this office was located in said 'white' areas for which no pass was obtained (91-92).

2. Freedom under law

2.1 The value of the ordinary individual

Up until relatively recently in the history of human civilisation, the state and its institutional predecessors were not subject to limitations in law.[4] The state was allowed – legally – to ride roughshod over the interests of those who lived within its jurisdiction.[5]

There were other-than-legal consequences when political authorities overplayed their hands as far as powerful or influential social formations were concerned, but this was not a risk when dealing with ordinary people whose political value, or ability to assert their interests, was negligible. The latter could be killed or tortured, their property confiscated, and their interests set aside, for the flimsiest of reasons, if any reason was considered necessary. The state only needed to care about how it treated the 'bigger fish', which is why the 1215 *Magna Carta* was primarily directed at recognising and protecting the interests of the clergy and aristocracy vis-à-vis the monarchy, not those of ordinary people.[6]

This was not uniform across the world. Different societies had different levels of respect for the interests of the individual,[7] but it is fair to say that the interests of the state (understood to include both the self-interest of the political class and the so-called 'public interest') invariably prevailed over the interests of ordinary people.[8]

This began to change in Europe around the time of the Enlightenment. The fundamental worth, agency, and capacity of the ordinary individual became recognised in law. The real 'break with the past', as far as constitutionalism and human freedom was concerned, came in the form of the American and French revolutions in the late eighteenth century, when fundamental legal instruments were adopted that entrenched the rights of the general population.[9]

Civil liberty and the law are therefore inextricably related concepts. Whereas 'liberty' can be defined as the freedom of the individual to do as they please with themselves, their property, and those who voluntarily consent, without infringing on the same right of other individuals, 'civil liberty' can be thought of, according to Brookes and MacAulay, as 'those natural rights essential to the free development of personality, under the guarantee of law'.[10] Liberty as recognised and protected by law, within the context of a political dispensation, therefore amounts to civil liberty.[11]

4 *Princeps legibus solutus est* – the sovereign is not bound by the laws. Consider also, *L'État, c'est moi* – I am the state (apocryphal, attributed to Louis XIV of France); *Quod licet Iovi, non licet bovi* – what is permissible for Jupiter is not permissible for cows; and, 'All animals are equal, but some are more equal than others' – *Animal Farm*.

5 Thomas Hobbes's account of the social contract is an apt description of this state of affairs, where the public authority is constituted by a 'contract' between legal subjects *inter se*, but which authority then 'does not reciprocally have a contract with its subjects'. Instead, 'all law is made by the sovereign which is itself above the law'. Grayling 121.

6 The *Magna Carta* nonetheless became an important milestone in realising civil liberty on a broader basis with the advent of constitutionalism.

7 See for instance Benjamin Constant's examination of individual freedom in the ancient world, wherein Constant identifies only Athens as a potential exception to the rule that, 'All private actions were submitted to a severe surveillance. No importance was given to individual independence, neither in relation to opinions, nor to labour, nor, above all, to religion.' Constant B. 'The liberty of the ancients compared to that of the moderns.' (1819). 309-328. 309-313.

8 Grayling 3.

9 Grayling 260.

10 Brookes and MacAulay 1.

11 It might be said, for instance, that due to the sheer incapacity of government, many of the people who live in the Democratic Republic of the Congo have 'liberty' – they can do as they please without fearing interference from political authorities. But this liberty is not protected in law and is therefore precarious.

Where there is to be civil liberty – freedom under law – there needs to be the Rule of Law. The Rule of Law is distinguished from 'rule of individual Ministers or officials' or even 'any and every statute or regulation that has force'. Instead, the Rule of Law comprises 'basic principles of right',[12] and even where government is allowed to replace the Rule of Law as a matter of *benevolent* discretion, it 'would mean the end of civil liberty'.[13]

The 'Law' referred to in the Rule of Law, then, is not simply whatever legislation or regulations the government decides to adopt, but a set of principles that relate to the proper adoption, content, interpretation, enforcement, and application of those laws. Lord Bingham helpfully expresses various principles that make up the Rule of Law: 'the law is accessible, clear, predictable, non-arbitrary, just, applies equally, protects human rights, resolves disputes without prohibitive cost or delay, and is enforceable.'[14]

2.2 Social engineering

The Institute of Race Relations' John Kane-Berman wrote that both left-wing and right-wing ideologies seek to utilise the state to 'shape society'. Pursuant to this social engineering:

> 'Man must be re-made into a higher ethical being, society purged of socially undesirable elements and behaviour, the common good promoted, etc. Implicit in all of these visions are several other assumptions. One is that these more desirable forms of society can be defined. Another is that everyone will agree what they are. A third is that the state has the wisdom and the ability to bring them about.'

The path of civil liberty, in contrast, is one where the government protects 'people from harming one another in the pursuit of their rights', according to Kane-Berman. This is because 'individuals pursuing their own interests are better judges of what those interests are than governments which claim to be promoting the general good but which in practice are often promoting the interests of particular groups or classes or lobbies'.[15]

Civil liberty, then, is akin to what has been referred to as 'negative rights' or so-called 'first generation' rights.[16] It is to be distinguished from the various welfare entitlements that are also often – no less in South Africa – grouped alongside civil liberties as entrenched constitutional rights. This contribution focuses on the civil liberties guaranteed by law, not welfare entitlements.

12 Brookes and MacAulay 1.
13 Brookes and MacAulay 13. For a detailed inquiry into the Rule of Law, see also Van Staden M. *The Constitution and the Rule of Law: An Introduction*. (2019). Johannesburg: FMF Books. https://ruleoflaw.org.za/the-constitution-and-the-rule-of-law/.
14 Stein R. 'Rule of Law: What does it mean?' (2009). 18: *Minnesota Journal of International Law*. 293-303. 301.
15 Kane-Berman J. 'The case for a liberal strategy.' (2002). *Fast Facts*. 1-7. 4 (*Liberal strategy*).
16 See Bankston CL. 'Social justice: Cultural origins of a perspective and a theory.' (2010). 15(2): *Independent Review*. 165-178. 169.

Kane-Berman continues:

> 'The less free people are, the less responsibility they can exercise. So a liberal society is one in which individuals not only have the maximum freedom compatible with the rights of others but also one in which they can exercise a commensurately wide range of responsibilities for their own lives and progress.'[17]

Brookes and MacAulay emphasise that any powers the state takes for itself are difficult to later roll back, due to public complacency. In particular, they write that, 'Those who feel for civil liberty must surely accept the obligation to defend it from encroachments by their political friends, no less than by their political enemies'.[18] Moreover, they note pertinently:

> 'It is difficult for those who have not themselves lived through the gradual establishment of a tyranny to understand the subtle dangers of the "softening-up" process, the effect on all but very strong personalities of intimidation. [People] take for granted interventions in private life which they still dislike but to which they are becoming conditioned.'[19]

Kane-Berman nonetheless notes that, 'The liberal state is not a weak state: it is an efficacious state, in particular in its core functions of protecting life, liberty, and property'.[20] The Institute of Race Relations' Anthea Jeffery expands on the role of the liberal state:

> 'Clear rules and a generally accepted code of moral values are needed to guide and constrain individual conduct and inhibit people from doing harm to others. The liberal state should adopt and enforce such rules. It should also respect moral values and encourage their transmission through the institutions traditionally responsible for this vital task: families, schools, and faith-based organisations. The liberal state should also uphold the rule of law. It should act only in terms of powers expressly entrusted to it, and it should be neutral. Instead of seeking to advance or hold back particular races or classes, it should ensure that laws of general application are enforced fairly and equally against all. For a government which acts to further the interests of particular groups violates both the notion of a limited state and the principle of neutrality.'[21]

17 Kane-Berman *Liberal strategy* 4.
18 Brookes and MacAulay 11.
19 Kane-Berman *Liberal strategy* 4.
20 Kane-Berman *Liberal strategy* 3.
21 Jeffery A. *Chasing the Rainbow: South Africa's move from Mandela to Zuma*. (2010). Johannesburg: Institute of Race Relations.

Brookes and MacAulay's *Civil Liberty in South Africa* was an important but ultimately unappreciated contribution to the anti-Apartheid literature, as it clearly represented a systematised attack on legalised racial separation from an avowedly classical liberal perspective. It is perhaps the most important source for the factual claim that the first generation of rights is not exclusively about the 'protection of privilege' or the entrenchment of 'white interests', as some claim them to be. Indeed, since 1958, and especially today, many point to an ostensible commonality between Apartheid and the free-market system. Brookes and MacAulay's contribution proves beyond doubt that civil liberty – understood to include the protection of private property and freedom of economic activity – was not a priority during the era of separate development.

Summing up the philosophy behind civil liberty, Kane-Berman writes:

> 'The individual should be free to do as he pleases subject to the constraint that in exercising his rights and enjoying his freedoms he does not undermine the ability of others to enjoy the same rights and freedoms. These rights and freedoms are in the nature of man as a sentient being with free will and the ability to imagine, reason, and create. These in turn are God-given faculties which man is not entitled to take away. The role of the state is to protect my rights and freedoms from invasion by others just as I must be prevented from invading theirs.'[22]

Indeed, while limitations on freedom are expected in any political community, these limitations must be to protect the same freedom of others.[23] And in this process of limiting freedom, the state must itself be limited by checks and balances.[24]

Kane-Berman writes that 'there is a fundamental conflict between the liberal concept of the state and the view of the state as an agent for social engineering.' The result is that in a liberal democracy the state is subject to constitutional limitations, with concomitant constitutional entrenchment of civil liberty, where courts and the press, among other formations, work toward limiting the hegemonic power of government.[25]

Brookes and MacAulay had to respond to the peculiar state of civil liberty during their time, and so divided their inquiry into chapters on the rule of law, the police force, racial discrimination, freedom of movement, freedom of expression, economic freedom, educational freedom, social freedom, the franchise, and the administration of native reserves. Today's South Africa, to take a term from Allister Sparks, is another country. Nonetheless, Brookes and MacAulay's approach has provided much guidance to the formatting of this contribution.

22 Kane-Berman *Liberal strategy* 4.
23 Kane-Berman *Liberal strategy* 2.
24 Brookes and MacAulay 1.
25 Kane-Berman *Liberal strategy* 4.

3. Civil liberty since 1994

3.1 The Constitution and the Rule of Law

3.1.1 Constitutional supremacy

Perhaps the most important difference between the context of this contribution and that of Brookes and MacAulay is that when the latter was written, the South African constitution was one founded upon the principle of parliamentary sovereignty.[26] While there was a constitutional text, it was not supreme, and the courts were not authorised to test legislation or government conduct against it. Needless to say, there was also no charter setting out rights that enjoyed entrenched legal protection.[27] Since the adoption of the interim Constitution, formal constitutional supremacy had been established in South Africa. Section 1(a) of the Constitution states that South Africa is founded upon the values of dignity, equality, and the 'advancement of human rights and freedoms'; and section 1(c) adds the supremacy of both the Constitution itself and the doctrine of the Rule of Law.

Brookes and MacAulay paid special attention to the Rule of Law in 1958. In particular, they wrote:

> 'Tyranny involves the rule of man rather than the rule of law, and official discretion in the hands of men intoxicated with power liberates them from the control of law and leads to tyranny. Some official discretion there must be, and properly exercised it may well be beneficial. But the wider its bounds are set, the more it touches the fundamental rights of human beings; and the less it is subject to the safeguard of appeals to impartial courts, the more baneful it becomes.'[28]

During the Apartheid era, unbounded government discretion that invariably touched on civil liberty was widespread. The jurisdiction of the courts was also, on occasion, ousted and, more usually, the courts were not authorised to reject the principle of unbounded discretion or infringement of liberty with reference to any higher-order law.

Today, the imperatives in sections 1(a) and (c) of the Constitution permeate the remainder of the Constitution and, as a result, the whole legal order.[29] As has been established, one of the fundamental objectives of the Rule of Law and constitutionalism is to preserve civil liberty. If it were otherwise, enforcing legal restrictions on governmental behaviour would be a pointless exercise.

26 In states subscribing to parliamentary sovereignty, the legislature has the formal power to adopt, amend, or repeal any statute it deems appropriate. While these states might have a statute referred to as 'the Constitution', this law is not supreme and can be changed by the legislature with a simple majority. There is some debate as to whether South Africa truly subscribed to parliamentary sovereignty between 1910 and 1961, as Parliament was – depending on who one asks – formally subject to some constitutional limitations. However, parliamentary sovereignty obtained in practice during this period, if not totally in theory, and certainly in both theory and practice between 1961 and 1994. See generally Marshall G. *Parliamentary Sovereignty and the Commonwealth*. (1957). Oxford: Clarendon Press. 139–248; May HJ. *The South African Constitution*. (1955). Cape Town: Juta. 22–78; Van Staden M. 'The liberal tradition in South Africa, 1910-2019'. (2019). 16(2): *Econ Journal Watch*. 258-341. 273-277; and Van Staden M. '*Fraus legis* in constitutional law: The case of expropriation "without" or for "nil" compensation'. (2021). 24: *Potchefstroom Electronic Law Journal*. 1-31. 4-9 (*Fraus legis*).

27 This is not to say South Africans did not, in law, enjoy civil liberty. South Africa's mixed legal heritage of English and Roman-Dutch common law recognises and prizes all the basic civil liberties that are found in the Constitution today. Prior to 1994, however, civil liberty was not constitutionally entrenched and was therefore not subject to any greater legal protection than any other ostensibly legitimate government interest.

28 Brookes and MacAulay 26.

29 *Kaunda & Others v President of the Republic of South Africa* 2005 (4) SA 235 (CC) para 66.

In the minority judgment of Khampepe J in the Constitutional Court case of *AB & Another v Minister of Social Development*, the constitutional value of freedom is described as follows:

> 'What animates the value of freedom is the recognition of each person's distinctive aptitude to understand and act on their own desires and beliefs. The value recognises the inherent worth of our capacity to assess our own socially-rooted situations, and make decisions on this basis... Our Constitution actively seeks to free the potential of each person; a goal which can only be achieved through a deep respect for the choices each of us makes.'[30]

In *Barkhuizen v Napier*, Ngcobo J explained it more concisely: 'Self-autonomy, or the ability to regulate one's own affairs, even to one's own detriment, is the very essence of freedom and a vital part of dignity.'[31]

The Constitutional Court clearly acknowledges that freedom is the means by which each South African realises their unique potential and destiny. A person's potential and destiny are not, or at least are no longer, decided by the government from birth to death. Instead, these decisions are (supposed to be) made by people themselves.

While government today may limit civil liberty, it may only do so according to a strict constitutional mechanism. The rights entrenched in the Bill of Rights all contain logical limitations,[32] some contain internal limitations,[33] and section 36, discussed below, contains general principles for the limitation of all rights.

No matter how one conceives of freedom – whether it is more constrained or expansive – the language of section 1(a) makes it clear that constitutional freedom is to be *advanced*. Hence, outside of sections 36 and 37[34] of the Constitution, civil liberty may not be compromised, since doing so would be unconstitutional. Various recommendations are offered below that would, it is submitted, go a long way to entrenching civil liberty in South African law.

3.1.2 Threats

There are various threats to constitutionalism and the Rule of Law in South Africa today.

The most common threat, that is not exclusive to South Africa, is the omnipresent assignment of unrestrained discretion to government officials in legislation. In addition, legislation also regularly assigns law-making powers to ministers and even regulators – when these powers must properly remain with Parliament – under the guise of 'regulation'. Virtually every piece of legislation does this, and exceptions are difficult to find.

30 *AB & Another v Minister of Social Development* [2016] ZACC 43 para 56 (citations omitted).
31 *Barkhuizen v Napier* 2007 (5) SA 323 (CC) para 57. See also Langa CJ in *MEC for Education: KwaZulu-Natal & Others v Pillay* 2008 (1) SA 474 (CC) para 53.
32 For example, a logical limitation on the right to freedom of association (section 18) is that one may not use one's freedom of association to deny others' rights, for example by establishing a union of professional contract killers.
33 For example, there is an internal limitation to the right to freedom of trade, occupation, and profession, which is that the 'practice' of a chosen profession may be legally regulated.
34 Section 37 provides for the suspension of constitutional rights during periods of declared states of emergency.

This is at base the same unbounded discretion that Brookes and MacAulay noted during the Apartheid era. Today, discretion that is abused must be measured against constitutional standards. However, the discretion is nonetheless unbounded in the legislation in which it is assigned, which opens the door to widespread uncertainty. The scope for abuse is undoubtedly still too great, despite the supremacy of the Constitution. Legislation ought to contain criteria constraining how discretion is to be exercised. Such criteria should take cognisance of the liberty and property interests of legal subjects.

The inadequate utilisation of section 36 of the Constitution by the courts, which will be dealt with more fully below, also poses a risk to the integrity of the constitutional text and civil liberty.

Another threat is how the courts have repeatedly and without sound footing 'found' a 'transformative mission' at the 'heart' of the Constitution. The Constitution at no juncture uses the term 'transform' or 'transformation', or even 'reform' (outside of the term 'land reform').[35] The integrity of the Constitution is threatened by judicial officers assigning mystical and ill-defined 'missions' to it that are not evident from its text, or twisting the existing text to fit their preconceived conception of transformation.[36] The 'transformative mission' that is referred to is precisely the social engineering Kane-Berman warned against in 2002. It has been used to justify all manner of government reordering of social and economic relations and interests. This so-called transformative mission goes significantly beyond government's constitutional mandate to simply create a framework of prosperity within which society and commerce function freely.

3.2 Law enforcement

3.2.1 Emergency rule

Between March 2020 and April 2022, the central government imposed a 'lockdown' upon South African society in response to the COVID-19 pandemic. It did so in terms of a 'state of disaster' under section 27 of the Disaster Management Act.[37]

At the highest 'levels' of this lockdown, the government assumed near total control over many facets of society, to the point of confining South Africans to their homes and prohibiting them from going to work or purchasing specific products. The executive branch of government, usually responsible only for law enforcement, at once assumed the role of lawmaker as well. Even the courts were required to implement the executive's diktat.

This level of control is more reminiscent of a state of emergency, regulated by section 37 of the Constitution. No state of emergency was ever declared, however. Instead, the legislative avenue of a 'state of disaster' was utilised.[38] The government in fact replaced the constitutional phenomenon of a state of emergency with a different, legislative institution. Indeed, given the wide powers government assumed under the 'state of disaster', there seems to be no reason for it to ever declare a state of emergency.

35 Kane-Berman J. 'Transformation and the Constitutional Court'. (2018). *AfriForum Report*. 1-27. 4.
36 In *Agri South Africa v Minister for Minerals and Energy* 2013 (4) SA 1 (CC), for instance, Mogoeng CJ at para 62 notes an 'obligation imposed by section 25 not to over-emphasise private property rights at the expense of the state's social responsibilities.' This 'obligation' is in no way evident from the constitutional text.
37 Disaster Management Act (57 of 2002).
38 This summary is drawn from Van Staden M. 'Constitutional rights and their limitations: A critical appraisal of the COVID-19 lockdown in South Africa.' (2020). 20: *African Human Rights Law Journal.* 484-511 *(Constitutional rights and their limitations).*

The lockdown was the greatest single suspension of constitutional rights in South African history since the adoption of the Constitution. At no point during the height of the lockdown was the government required to justify its limitations to an independent tribunal according to the constitutional standard.

3.2.2 Crime

This contribution is concerned with freedom under law, that is, freedom that is effectively recognised and protected by law. Discourse on civil liberty tends to focus on active government infringements on individual freedom. However, as Kane-Berman noted in 2002, the South African government was already failing in all three its core functions of protecting life, liberty, and property by allowing crime rates to reach unacceptably high levels.[39]

The most recent crime statistics of the third quarter of 2022 show that this state of affairs remains unaddressed. 82 people are murdered every day in South Africa, translating to 3.4 people every hour. There are also 169 sexual offences daily, against just over 7 people every hour on average.[40]

Being murdered or sexually assaulted is an unequivocal denial of civil liberty, especially when this situation is in large part a result of a failing criminal justice system. Even worse, the central government refuses to devolve law enforcement powers to other spheres of government despite these failures.[41] In other words, crime in South Africa is not merely an unfortunate circumstance with which society and government are saddled. It is also a phenomenon that can be traced back in part to government negligence and a refusal to utilise a constitutional mechanism, such as devolution, to solve the problem.

3.3 Racial discrimination

Section 1(b) of the Constitution provides that South Africa is founded upon the value of non-racialism and non-sexism. With a small handful of exceptions,[42] the Constitution obliges government to make no distinction based on race in its dealings with legal subjects.

As of November 2022, however, the democratic government had adopted at least 116 new Acts of Parliament since 1994 that in some or other fashion makes or keeps race a relevant consideration in matters of law. These were either racial from the outset or subsequently amended to be racial. Several pre-1994 non-racial Acts of Parliament have also been amended to be racial.[43]

This is regrettable given not only the clear constitutional imperative of non-racialism, but also the damage caused by racial discrimination in public policy throughout South African history. Kane-Berman wrote in 2002:

39 Kane-Berman *Liberal strategy* 3.
40 https://mg.co.za/news/2023-02-17-crime-stats-violence-in-south-africa-is-getting-worse/.
41 https://www.news24.com/news24/southafrica/news/cele-says-western-cape-govts-demand-for-devolution-of-police-powers-is-just-a-lot-of-noise-20220804.
42 https://dailyfriend.co.za/2022/11/10/south-africas-constitution-pretty-good-could-be-better/.
43 See https://racelaw.co.za/index-of-race-law/; https://irr.org.za/media/new-index-reveals-how-the-anc-has-failed-to-deracialise-south-african-law; and https://dailyfriend.co.za/2022/12/01/the-good-intentions-of-race-law-sas-enduring-legislative-tradition/.

> 'Had South Africa followed a natural path of economic and political development instead of being confined for so long within a straitjacket of racial laws, we would today be a more prosperous society.'[44]

Kane-Berman continues:

> 'Racial regulation has changed in that roles of black and white have been reversed, while the industrial relations system, though colour blind, is more regulated than in the past.'[45]

The principal pieces of legislation today that could be categorised as racial accept, with little modification, the logic of the 1950 Population Registration Act,[46] which was the cornerstone law in South Africa that divided the population into the four categories of white, black, coloured, and Indian. The Population Registration Act, for instance, appears to function effectively as the *grundnorm* of, among others, the Employment Equity Act of 1998[47] and the Broad-Based Black Economic Empowerment Act of 2003.[48] In both these statutes the Population Registration Act has been implicitly incorporated by reference, despite having been repealed in 1991.

The prevalence of race law in South Africa after Apartheid is considered more fully in a separate contribution to this series. It is recommended below that Parliament consider adopting a Promotion of Non-Racialism Act to give due recognition to the constitutional antipathy toward racial discrimination.

3.4 Personal freedom

3.4.1 The good

As a general rule, the South African government has been respectful of personal freedoms.

In December 2022, the Department of Justice and Correctional Services published the draft Sexual Offences Amendment Bill to fully decriminalise prostitution and expunge the records of those who have been convicted of sex work in the past.[49] This is long overdue, given section 22 of the Constitution's apparent protection of professional choice. It is a very welcome development.

44 Kane-Berman *Liberal strategy* 3.
45 Kane-Berman *Liberal strategy* 3.
46 Population Registration Act (30 of 1950).
47 Employment Equity Act (55 of 1998).
48 Broad-Based Black Economic Empowerment Act (53 of 2003).
49 https://irr.org.za/media/great-promise-in-sex-work-decriminalisation-initiative-2013-irr.

Additionally, Afrobarometer found in 2016 that South Africa was one of only four countries in Africa where a majority of citizens accepted homosexual neighbours, at 67% of those surveyed.[50] Homosexual activities are lawful, and homosexual couples may enter into the marriage stand-in of civil unions.[51] Government is constitutionally prohibited by section 9(3) from discriminating unfairly against people based on their sexual orientation, and the South African government has shown no notable intention of wanting to do so.

In parallel to the welcoming approach to the LGBT community, religious freedom is also well respected in South Africa, despite some tensions – which manifest globally – arising. This tension was manifested, for instance, in March 2019, when the High Court struck down a policy of the Dutch Reformed Church on the grounds that it unfairly discriminated against homosexuals by disallowing gay ministers.[52]

Despite this isolated tension, such interference seems exceptional.

It is finally worth noting that the right to privacy was utilised by the Constitutional Court in *Minister of Justice and Constitutional Development and Others v Prince* to discover a right to the recreational use of marijuana in private. This resulted in the Court ordering Parliament to adopt legislation that finally decriminalises marijuana use;[53] a process that is still ongoing.[54]

3.4.2 The bad

These good indicators aside, the government's record on personal freedom is not spotless. While there are other areas in which the government is making inroads into civil liberty – such as consumer freedom – only freedom of expression will be considered for the purpose of this contribution.

The most obvious and pressing threat to freedom of expression in contemporary South Africa is the Prevention and Combating of Hate Crimes and Hate Speech Bill.[55] The Bill prohibits any intentional communication that is harmful or incites harm, and which advocates or propagates hatred, based on several listed grounds.[56] The problems with the Bill are multifaceted, but come down to how 'harm' is conceived and what is included under the listed grounds.[57]

Harm is defined to include 'social or economic detriment', and the listed grounds include gender identity and gender expression.[58] Prohibiting the hateful incitement of economic detriment might have the consequence of prohibiting perfectly legitimate endeavours such as an economic boycott. Ridicule is also an uncomfortable, and perhaps unfortunate, feature of a free society, which might be outlawed by the prohibition of 'social detriment'. Finally, the concepts of gender, gender identity, and gender expression, are fluid – there is a wide-ranging global debate on what these terms mean and how they find application in day-to-day life. Including them as protected grounds in the Bill could stifle this debate.

50 https://www.afrobarometer.org/wp-content/uploads/2022/02/ab_r6_dispatchno74_tolerance_in_africa_eng1.pdf 11-12.
51 Civil Union Act (17 of 2006).
52 https://mg.co.za/article/2019-04-18-00-court-to-clarify-ng-kerk-queer-ruling/.
53 *Minister of Justice and Constitutional Development and Others v Prince (Clarke and Others Intervening); National Director of Public Prosecutions and Others v Rubin; National Director of Public Prosecutions and Others v Acton* 2018 (6) SA 393 (CC) para 129.
54 Cannabis for Private Purposes Bill (B19-2020).
55 Prevention and Combating of Hate Crimes and Hate Speech Bill (B9B-2018).
56 Clause 4(1) of the Bill.
57 For a more comprehensive analysis, see https://irr.org.za/reports/submissions-on-proposed-legislation/irr-submission-hate-crimes-and-hate-speech-bill-2018-1-october-2021.pdf.
58 Clause 1 of the Bill.

The Hate Speech Bill includes a circular exemption provision[59] that will have no practical effect and falls foul of the international standard that prohibiting expression must be a measure of last resort, and reserved only for extreme circumstances. South Africa already has legal institutions that regulate hate speech as a matter of civil[60] and criminal law,[61] meaning the Hate Speech Bill is by no means necessary.

Also in the realm of expression, the Equality Court in 2019 effectively imposed a blanket ban on displays of the old South African flag, holding that 'the gratuitous display [of it] amounted to prohibited hate speech, unfair discrimination, and harassment.'[62] Whether one agrees or disagrees with what the old flag represents, it is undoubtedly an infringement on civil liberty to prohibit conduct that on any sober and non-ideological analysis is harmless. The best way to challenge such offensive displays is through discourse.

There is also the question of selective prosecution. Powerful politicians who routinely engage in what is obviously hate speech – Julius Malema, 'Commander in Chief' of the Economic Freedom Fighters, being the most prominent example – tend to be let off the hook, whereas ordinary and hitherto unknown, tending-to-be-harmless, South Africans – the estate agents Penny Sparrow and Vicki Momberg – who might harbour bigoted views, have been fined hundreds of thousands of rands and have even been imprisoned for it.

3.5 Economic freedom

3.5.1 The nature of economic freedom

The boundaries between so-called 'personal' and 'economic freedom' are porous. Kane-Berman explained that despite the fact that classical economic civil liberties have been controversial, there are in fact:

> '... no walls between politics and economics and that freedom of contract, freedom to trade, and freedom to engage in economic activity are logical extensions of individual liberty, as are property rights.'[63]

It would be incorrect to regard a society that ostensibly respects personal freedom but denies economic freedom as a free society, as such an arrangement would point to what Brookes and MacAulay characterised as a benevolent but nonetheless despotic exercise of discretion. It becomes unsustainable to try to separate these two 'kinds' of freedom when one realises that almost any exercise of personal freedom has clear economic dimensions and implications. The decriminalisation of sex work is treated herein as an example of 'personal freedom' – given the intimacy of sexual intercourse to the individual – but it could just as easily be treated as an 'economic freedom'. The same applies to the legalisation of marijuana use. Is freedom of the press an aspect of freedom of expression – as it is treated in the Constitution – or a matter of property rights, that is, the freedom of press houses to be privately owned and managed? What about religious institutions?

59 Clause 4(2) of the Bill.
60 The Promotion of Equality and Prohibition of Unfair Discrimination Act (4 of 2000) contains civil penalties for hate speech.
61 The doctrine of *crimen iniuria* has been utilised, controversially, to combat hate speech in the realm of criminal law. 62 https://www.news24.com/news24/southafrica/news/blanket-ban-on-display-of-old-sa-flag-is-overbanning-afriforum-20220511.
63 Kane-Berman *Liberal strategy* 4.

The ostensible distinction between personal and economic freedom is arbitrary, which is why this contribution treats civil liberty as a holistic phenomenon: a threat to any 'aspect' of civil liberty is a threat to civil liberty, and South Africa's status as a free society, *per se*.[64]

This – attempting to separate liberty in the sphere of economics from the remainder of human freedom – is where South Africa is potentially at the greatest risk of becoming an unfree society.

As Kane-Berman explains:

> 'Liberal economics and liberal democracy go hand in hand. Markets are **a logical extension of individual choice:** they are the meeting place, whether physical or electronic, which ensures that the free choices made by consumers are satisfied by producers who make free choices to provide consumers with what they desire and in so doing make themselves a profit.'[65] (my emphasis)

3.5.2 The nature of expropriation and the redistribution of property

The Expropriation Bill[66] and its associated legislation and policies,[67] might represent the biggest contemplated incursion on civil liberty in South Africa today, perhaps second only to the 2020 COVID-19 lockdown.

There are many problematic aspects to the Bill. Only those deemed most notable will be briefly considered here.[68]

The Expropriation Bill is intended to be used for the 'redistribution' of land.[69] Redistribution is a political phenomenon dedicated, in theory, to the government seizure of property from some people and its distribution to others. In South Africa, this is directed at land ownership patterns reflecting an ostensibly more appropriate racial proportionality. In other words, because white South Africans in general are thought to own 'too much' land, some of this land must be seized and 'redistributed' to black South Africans, who form the majority of the population, so that land ownership patterns would more 'accurately' reflect racial population ratios. In practice, however, 'redistribution' in South Africa simply means private land is seized by government, *kept* by government, and *leased out* to select beneficiaries.[70]

Expropriation, as an historical legal institution, is meant to allow government to acquire private property that it requires as a matter of strict necessity to fulfil its legitimate obligations. It is not meant to be utilised for politically expedient purposes – indeed, it is an institution of last resort that government in theory does not wish to invoke – and certainly not to exact punishment on owners.[71]

64 See generally Flanigan J. 'All liberty is basic'. (2018). 24(4): *Res Publica*. 455-474.
65 Kane-Berman *Liberal strategy 4*.
66 Expropriation Bill (B23B-2020).
67 For example, the Land Court Bill (B11B-2021).
68 For a more comprehensive analysis, see https://irr.org.za/reports/submissions-on-proposed-legislation/2023-march-irr-submission-on-expropriation-bill-ncop-2023_kjuizi.pdf.
69 https://www.anc1912.org.za/wp-content/uploads/2022/09/6th-ANC-National-Policy-Conference-Reports-2022.pdf.
70 https://www.news24.com/news24/opinions/columnists/guestcolumn/opinion-terrence-corrigan-what-does-the-handover-at-tafelkop-mean-20210604.
71 See https://dailyfriend.co.za/2022/10/06/the-expropriation-bill-is-dangerously-misnamed/.

The redistribution of property is not within the legitimate scope of government, being the safeguarding of liberty and property, the provision of public services, and keeping public order.[72] Section 25(5) of the Constitution, which is often invoked as the provision justifying property redistribution, makes no reference to redistribution:[73]

> 'The state must take **reasonable** legislative and other measures, within its available resources, to **foster conditions** which **enable citizens** to **gain access** to land on an equitable basis.' (my emphasis)

Redistribution is not 'reasonable', in that it is necessarily arbitrary. The goal to make property ownership patterns reflect a country's racial profile can only ever be an ideological one. There is no good practical reason to pursue such a goal outside of narrow racialist and socialist thinking.

Seizing property and distributing it to others – or keeping it in state ownership and leasing it out – is not akin to 'fostering conditions'. Fostering conditions clearly refers to government creating a legislative and policy environment wherein South Africans can more easily access land, for instance by removing red-tape obstacles such as subdivision restrictions or excessive property transfer taxes.

Finally, again, seizing property and distributing it to others or leasing it out does not 'enable citizens' to gain 'access' to land – it theoretically *gives* them land. The Constitution did not have in mind the taking of property and handing it over, but rather allowing citizens to themselves engage in the landed property market – to 'enable access'.

If the Constitution contemplated redistribution, section 25(5) could and would have been written in a far more directly redistributionist fashion. Indeed, it may be argued that government adopting a free-market approach to its policy regime would satisfy the requirements of section 25(5), as this would, in fact, lead to more South Africans having the resources necessary to gain access to land. Finally, the Expropriation Bill is an exercise in what could be regarded as political or constitutional fraud. This is because the governing party in Parliament sought to amend the Constitution to allow government to confiscate property without compensation. This intention, despite protestations to the contrary,[74] manifested that government believed it *necessary* to amend the highest law to make compensationless confiscation a legal reality.

In the event, the Constitution was not amended. However, the Expropriation Bill, which provides government the power to confiscate property without compensation, is nonetheless still being considered. In other words, through government's own conduct it has acknowledged that the Bill is unconstitutional, because the enabling circumstances it sought to create through the constitutional amendment have not resulted. This is a threat to constitutional integrity.

72 'Redistribution' is not to be confused with 'restitution', which is a distinct and constitutionally mandated institution. Restitution entails the identification of specific property that was taken non-consensually from its rightful owners and returning that property to those specific rightful owners or their specific descendants. Redistribution is not directed at specific property, specific owners, and specific descendants, but at a very nebulous conception of 'the land' and general racial categories. Restitution is an individualised phenomenon, and redistribution is a collectivist phenomenon.

73 To interpret a seemingly benign constitutional provision in a way that is not benign and that includes the clear infringement of civil liberty is not allowed in a constitutional democracy. When a legal provision is ambiguous or unclear, it must always be construed in a way that respects civil liberty and the interests of the legal subject.

74 Proponents of the amendment argued that they wished merely to 'make explicit' what is already 'implicit' in the Constitution. This argument is unconvincing. See Van Staden *Fraus legis* 11.

3.5.3 The Expropriation Bill's provisions

The Expropriation Bill will make it significantly easier for government to expropriate and confiscate[75] private property.[76]

It does so, among other things, by providing more security of property to organs of state than it does to civilian owners.[77] This is a basic violation of the notion that both the governing and governed are to be bound by the same law.[78] It also forces the Minister of Public Works to expropriate property for other organs of state when requested,[79] when the minister should be able to exercise judgment as to whether the request for expropriation is rational, reasonable, and lawful.

When various provisions are considered together, the Bill provides that expropriation may take place before compensation is paid and before judicial proceedings about the legality of the expropriation, or the amount of compensation, have concluded.[80] This could result in owners being left penniless for days, weeks, months, or years after their breadwinning property had been seized.

The Bill explicitly requires that the non-consensual nature of expropriation not be considered when determining the amount of compensation.[81] This falls foul of section 25(3) of the Constitution, which requires that 'all relevant circumstances' be taken into account when compensation is determined. As property owners are blameless, the fact that expropriation is non-consensual is a relevant consideration.

The Bill also explicitly puts an end to the practice of paying *solatium*. This is the payment of compensation for the inconvenience of expropriation. *Solatium* is an important institution which acknowledges that expropriation is not meant to be an exercise in punishment, but rather something government does out of necessity.

Most contentiously, the Bill introduces compensationless confiscation – or so-called 'expropriation without compensation' – alongside making ordinary expropriation significantly easier. Property may be confiscated under an indeterminate number of circumstances.[82] These clauses fall foul of sections 25(2) and (3) of the Constitution, which unambiguously require compensation whenever the government seizes property.[83] There can be no good reason in law for a government to seize property from a blameless owner without providing them with any compensation.

Given these and other provisions, there is a strong impression that government is reconfiguring the institution of expropriation into one of punishment or spite. This in a constitutional democracy where the institution of expropriation is not meant to be an institution of punishment.

75 Expropriation is a legal institution that always entails the payment of compensation, and seizes property only toward the realisation of social improvement. Confiscation is a lawful form of property robbery, and does not necessarily entail compensation and may be directed at nakedly partisan political goals. See Van Staden *Fraus legis* 11-19.
76 Only some problematic clauses are considered in this contribution.
77 Clauses 2(2) and 3(5)(d) of the Bill.
78 As encapsulated in the notion of the Rule of Law and equal application of the law.
79 Clause 3(2) of the Bill.
80 Clauses 3(5)(a), 8(3)(h), 8(3)(f), 8(4)(a), 9(1)(a), and 17(3) of the Bill.
81 Clauses 12(2)(a) of the Bill.
82 Clauses 12(3) and (4) of the Bill.
83 The Constitution distinguishes between 'deprivation' and 'expropriation'. It makes no provision for confiscation. When the government seizes property, it must do so as a matter of expropriation, and therefore pay compensation.

If the owner is to 'blame' for something requiring punishment, they must be prosecuted in terms of criminal law or sued under the law of delict. Under both criminal law and delict various judicial safeguards come into play to ensure the government proves its case and does not abuse its power. The Expropriation Bill contains no such safeguards.

It is recommended below that Parliament adopt a Protection of Property Act to adequately recognise the right to own and enjoy secure property that the Constitution envisages.

3.5.4 Other threats to economic freedom

Aside from the Expropriation Bill, there are too many threats to economic freedom in South Africa to discuss in this contribution.

To name but a few: the proposed requirement that private sport and recreation bodies be registered and regulated by government,[84] the competition authorities' relentless targeting of private enterprise in a difficult economic environment whilst government freely engages in monopolistic behaviour,[85] the government's practice of leasing agricultural property to farmers rather than transferring ownership,[86] the continued effective prohibition on anyone but Eskom providing coal- or nuclear-based electricity,[87] the new requirement for all online content to be classified in order to 'protect children',[88] one of the highest tax burdens in the world,[89] highly-regulated labour relations that discourage job creation,[90] and significant restrictions on commercial ownership entitlements in the name of 'empowerment' policy,[91] among many more.

3.6 Democracy

Brookes and MacAulay justified their inclusion of 'the Franchise' as a chapter in their contribution on the basis that in a parliamentary democracy (as South Africa then ostensibly was, before becoming a constitutional democracy), the defence of civil liberty depends on political participation. Indeed, it is the underlying assumption within the parliamentary system – especially where Parliament is sovereign – that when the government oversteps the bounds of acceptable interference with individual freedom, this will be righted at the ballot box.[92] This was not possible under circumstances of widespread political exclusion during Apartheid.

84 Clauses 5 and 10 of the Sport and Recreation Amendment Bill (B-2020).
85 https://www.businesslive.co.za/bd/opinion/2022-04-11-martin-van-staden-its-time-to-abolish-or-overhaul-the-competition-commission/.
86 https://www.news24.com/news24/opinions/columnists/guestcolumn/opinion-terrence-corrigan-what-does-the-handover-at-tafelkop-mean-20210604.
87 Although Eskom is nowhere in law granted a monopoly, section 7 of the Electricity Regulation Act (4 of 2006) requires every generator, transmitter, distributor, importer or exporter, and trader of electricity to be licenced. To my knowledge, outside of select municipalities, no private enterprise has been licenced to construct coal- or nuclear-based electricity facilities to the end of supplying electricity to the grid.
88 https://www.dailymaverick.co.za/article/2022-05-17-red-flags-as-film-and-publication-board-becomes-regulator-of-all-online-content/.
89 https://businesstech.co.za/news/business-opinion/635987/how-south-africas-tax-rates-compare-to-australia-the-uk-and-other-countries/.
90 https://mg.co.za/news/2022-03-31-want-jobs-reform-south-africas-labour-market/.
91 See Jeffery A. 'A new empowerment strategy to liberate the poor'. (2019). 42(3): *@Liberty*. 1-16.
92 Brookes and MacAulay 13-14

Today, democracy in South Africa is generally in good shape as far as policy is concerned. The right to free political activity has been respected, allowing a wide range of political parties to compete in elections. The governing party has also tended to respect electoral outcomes, in 2009 handing over the governance of the Western Cape province, and since 2016 multiple economically and politically important metropolitan municipalities – including the Tshwane municipality wherein the national administrative capital Pretoria is situated – to the opposition.

The government has, however, for several years been sceptical of non-governmental organisations (NGOs) winning cases against it in court. This has regularly been characterised, especially if these organisations receive foreign funding, as a threat to sovereignty and democracy by political insiders. Most recently, the government proposed an amendment to the Nonprofit Organisations Act[93] that would have required non-profits to register with the state. This proposal was swiftly abandoned.

In May 2023, Kenny Kunene, a leader of the Patriotic Alliance (partner of the governing African National Congress) and at the time acting Mayor of Johannesburg, for example, expressed himself strongly against NGOs that criticised his official conduct vis-à-vis housing policy, saying these entities should contest elections if they desire involvement in governance. Kunene spoke favourably of moves in other countries to outright ban NGOs.[94]

The government's approach to public participation on its proposed bills, regulations, and policies, has also been lacking. There are numerous examples of government departments and parliamentary committees making available too little time and information to the public to study the background and nature of their proposals and write comprehensive submissions. Additionally, it is questionable whether most submissions, especially on very contentious proposals, are considered at all, or whether the proposals are *faits accomplis*. There is also an unfortunate practice among certain political parties, including the African National Congress, of 'loading' physical public hearing events with their own supporters. It is not uncommon, again especially when it comes to contentious bills, policies, or regulations, for busses full of individuals in party regalia to arrive at townhall meetings around South Africa, and for these individuals to repeat party talking points and shout down those with opposing views. This has the effect of dissuading good-faith participants from going to these meetings, and as such delegitimises the public hearing aspect of public participation.[95]

The democratic system is also burdened by extra-political phenomena like unacceptable levels of political violence, particularly at the municipal sphere; although this violence does seem to lack backing by political authorities that would make it a threat to the system *per se*.[96] Additionally, the recent Electoral Amendment Bill[97] poses a threat to the integrity and accurate outcome of elections,[98] as do the hints of partisanship emanating from the Electoral Commission.[99]

93 Nonprofit Organisations Act (71 of 1997).
94 https://www.timeslive.co.za/politics/2023-05-21-i-now-understand-why-mugabe-banned-ngos-says-kenny-kunene/
95 For example, see https://irr.org.za/media/parliamentary-committees-in-breach-of-constitutional-obligations-on-ewc-measures-2013-irr.
96 See https://mg.co.za/opinion/2022-03-14-what-drives-south-africas-political-violence/. The violence appears to be primarily concerned with political factions vying for access to patronage rather than being a concerted effort by political authorities to suppress democracy.
97 Electoral Amendment Bill (B1-2022).
98 See Atkins M. 'The road to electoral reform'. (2022). Occasional Report, Institute of Race Relations. 1-26 and https://irr.org.za/reports/submissions-on-proposed-legislation/irr-parliamentary-submission-electoral-amendment-bill.pdf.
99 In March 2023, the Electoral Commission deemed all the ballots of a particular opposition caucus in the Tshwane Municipal Council to be 'spoiled' when in fact the ballots clearly communicated the intention of the voters. This was an election to choose the Speaker of the Council. The Electoral Commission's conduct ensured that a distant second candidate, representing minority parties, was elected. While the Electoral Commission might have good reason to question the legality of the way in which the ballots were marked, this ought to have been dealt with in a judicial setting rather than through unilateral anti-democratic conduct.

The state of South Africa's democracy is more fully explored in a different contribution to this series. It is additionally recommended below that Parliament adopt a Promotion of the Rule of Law Act to cure many threats to open democracy.

4. The limitation of civil liberty

4.1 A culture of justification

In the early days of the Supreme Court of the United States, constitutional 'due process' was regarded as requiring 'legislatures to establish to the satisfaction of an independent tribunal that its restrictions on liberty were necessary and proper.'[100] Randy E Barnett elaborates:

> 'Given the pervasiveness of political motives in conflict with the original constitutional scheme of limited powers, the Supreme Court would not simply take the legislature's word for its claim that some restriction of liberty was necessary to accomplish an appropriate end. The Court began requiring some proof that this was the case. It required states to show that legislation infringing upon the liberties of the people really was a necessary exercise of the state's police power – a power that it held, quite expansively, to include the protection of the health, safety, and morals of the general public.'[101]

This was what is today known as the controversial *Lochner* doctrine, named for the infamous 1905 case of *Joseph Lochner v People of the State of New York*.[102] In this judgment, a New York law setting maximum working hours for bakers was struck down, because the New York government had failed to adequately justify the law's limitation on freedom of contract under the due process clause of the Fourteenth Amendment to the United States Constitution. *Lochner* was later reversed across multiple Supreme Court judgments in the 1930s (during the administration of Franklin Delano Roosevelt and his 'New Deal') and into the 1950s. Today, American courts no longer scrutinise government infringements on (primarily economic) liberty as the US Constitution arguably requires.

Barnett summarises the *Lochner* doctrine as such:

> 'When the liberty of the individual clashes with the power of the state, the Court would not accept the "mere assertion" by a legislature that a statute was necessary and proper. Instead, it required a showing that a restriction of liberty have [sic] a "direct relation, as a means to an end," and that "the end itself must be appropriate and legitimate." Having offered no such evidence, the State of New York lost.'[103]

100 Barnett RE. *Restoring the Lost Constitution: The presumption of liberty*. (2014 revised edition). Princeton: Princeton University Press. 212.
101 Barnett 213.
102 *Joseph Lochner, Plaintiff in Error v People of the State of New York* 198 US 45 (1905).
103 Barnett 216.

The *Lochner* doctrine has been misconstrued – even by South Africans[104] – as placing abstract (primarily economic[105]) freedoms above democratic will. In reality, it simply requires government to justify its limitations upon (any) rights.

Like the regime established by the United States Constitution, South Africa's constitutional scheme is also one of 'limited powers'. It is submitted that section 36 of the Constitution, in effect, incorporates the *Lochner* doctrine into South Africa's formal constitutional law. Shed of its ostensibly tainted American context, even left-of-centre South African legal thinkers have endorsed the justification inquiry.

Indeed, before the Constitution was adopted, legal scholar Etienne Mureinik wrote that 'it will be impossible to fully undo apartheid without a legal order which makes every law, every government decision, indeed every decision having governmental effect, amenable to scrutiny; one which empowers the judges to demand to know the reasons for the law, or the decision'. If government were forced to justify itself in this manner before the courts, the quality of governance would necessarily be improved.[106] Writes Mureinik:

> 'The knowledge that any government programme could be summoned into court for searching scrutiny would force its authors closely to articulate their reasons for dismissing the objections and the alternatives to the programme, and precisely to articulate the reasons that link evidence to decision, premises to conclusion. The need to articulate those reasons during decisionmaking would expose weaknesses in the programme that might force reconsideration long before the need arose for judicial challenge.'[107]

The interim Constitution, and the current Constitution after it, adopted the spirit of Mureinik's recommendation, primarily in the form of the limitations provision – section 33 in the interim and section 36 in the current Constitution.[108]

104 Davis D. *Democracy and Deliberation: Transformation and the South African legal order*. (1999). Cape Town: Juta. 55-59.
105 In the classical sense, economic rights such as the right to property and freedom of contract.
106 Mureinik E. 'Beyond a charter of luxuries: Economic rights in the Constitution'. (1992). 8(4): *South African Journal on Human Rights*. 464-474. 471 (*Beyond a charter of luxuries*).
107 Mureinik *Beyond a charter of luxuries* 472-473.
108 Mureinik E. 'A bridge to where? Introducing the interim Bill of Rights'. (1994). 10(1): *South African Journal on Human Rights*. 31-48. 33.

4.2 Section 36 of the Constitution

4.2.1 The constitutional text

Section 36 of the Constitution – titled 'Limitation of rights' – provides as follows:

> '(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 –
>
> (a) the nature of the right;
> (b) the importance of the 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.' (my emphasis)

The free exercise of constitutional rights is the default position, whereas their limitation must always be the exception.[109] Limitations must therefore be exceptional, and for valid constitutional purposes only.[110] This is what section 36 seeks to guarantee.

Section 36(b) and (d) of the Constitution, it is submitted, clearly encapsulate the *Lochner* doctrine as described above by Barnett.

4.2.2 Conceptualising section 36

Conceptually, the limitations provision is often regarded – even by the likes of Mureinik – as a way to 'limit' rights that are not 'absolute'.[111] This is precisely the wrong mentality with which to approach this provision.

109 Erasmus G. 'Limitation and suspension' in Van Wyk D *et al* (eds). *Rights and Constitutionalism: The New South African Legal Order*. (1996). Clarendon Press. 642.
110 Erasmus 647.
111 Currie I and De Waal J. *The Bill of Rights Handbook*. (2005, 5th edition). Cape Town: Juta. 163.

In fact, limitations provisions, especially when they are included in a supreme bill of rights – like South Africa's is – should be interpreted as a limitation on *government's authority to infringe on rights*, rather than a limitation on *the legal subject's civil liberty*. Section 36, then, is part of the regime of limiting the power of government, not part of a regime empowering government to limit civil liberty.[112] Governments by their very nature already possess this power. An explicit limitations provision is about channelling and circumscribing that inherent power.[113]

The fact that section 36 provides explicitly that a right may 'only' be limited as provided for in section 36(1), lends credence to this submission. The provision is there to protect rights, not open the way for government to limit them more easily.

There are, then, two conceptual approaches to section 36. While they deal with the same text and (hopefully) the same meaning of the text, they do vary what the outcome of a section 36(1) analysis would be. It all depends on the mentality with which the judge applies the provision.

The first approach – which is submitted to be the present approach – understands section 36 as a provision that empowers government to limit the rights in the Bill of Rights. This approach, in other words, *vests government with a power*: it creates exceptions to constitutional rights. This traditional approach is identified with the idea that section 36 is a 'weasel clause' that allows government to weasel its way out of having to respect the rights of legal subjects as guaranteed in the Constitution.

The second approach – which one might term the 'liberal' approach – understands section 36 as a provision that constrains how government may infringe the rights in the Bill of Rights. This approach *limits how government may exercise its power*: it protects constitutional rights. This approach would hold section 36(1) out as a guarantor of civil liberty rather than a weasel clause.

One might argue that there is no difference between these two approaches. A judge must apply section 36(1) as written. However, *how* one reads section 36 very much determines how it is applied. Here follows an example.

Section 36(1)(e) provides that a court must take into account whether there are 'less restrictive means' available to achieve the purpose of a limitation of rights when determining whether the limitation is reasonable and justifiable. On the weasel-clause approach, a court would construe this leg of the analysis very narrowly, if at all. In the initial Constitutional Court judgment in *Prince v Cape Law Society* (since overturned as discussed above), for example, the Court acknowledged that there *were, in fact* means that were less restrictive than Parliament's total ban on marijuana, but nonetheless upheld the limitation.[114]

112 Erasmus 640.

113 Take, for example, the situation in the United States. There is no limitations provision in the United States Constitution. This has forced the courts to almost exclusively rely on the logical limitations inherent in every right to construct a jurisprudence of how constitutional rights may be limited. There is no talk, anywhere in the world, of government being in no way allowed to limit rights, whether there exist limitation provisions or not. A limitation provision, then, does not create the entitlement of government to limit rights, but rather creates the constraining framework in which government must exercise this power lest it overstep.

114 *Prince v President of the Law Society of the Cape of Good Hope* 2002 (2) SA 794 (CC) para 142. The Court does not only acknowledge that there are less restrictive means, but clearly does not dispute that these less restrictive means are reasonably available to government: they could be implemented. The Court's rejection of these less restrictive means effectively comes down to the Court's belief that even though they are not as restrictive as a total prohibition on marijuana use, they would not satisfy the applicant's rights claim. In other words, even though the Court had it within its power to constrain a limitation of constitutional rights, it decided not to do so because this would not completely solve the dispute.

On the liberal approach, where the limitation provision is taken seriously as a guarantor of freedom, a court would emphasise whatever less restrictive means are available and require them be preferred over the more restrictive means, because section 36(1)(e) unambiguously and clearly requires the courts to do so.

5. Recommendations for enhancing the protection of civil liberty

This contribution offers recommendations on the protection of civil liberty divided into three categories: those for the judiciary, those for the legislature, and those for the executive and public service. None of the recommendations are mutually exclusive.

5.1 A new judicial approach to section 36

5.1.1 A higher standard

The courts must insist on a higher standard of justification in terms of section 36 than is presently the case. While there are various ways to do this, seven discrete recommendations are explored here:

1 The courts must *always* insist on a section 36 justification *per se*. The Constitutional Court, in the case of *Phillips v Director of Public Prosecutions, Witwatersrand Local Division*, held that a limitation could be constitutionally justifiable even if government did not submit evidence or argument in favour of the limitation – that is, government did not even attempt to justify the limitation. The courts themselves will inquire into justification in such an event.[115]

In other cases, the courts effectively take 'judicial notice' that a certain restriction on civil liberty is justified without anyone – government or judge – applying any limitation analysis at all. The Constitutional Court in the infamous case of *Agri South Africa v Minister for Minerals and Energy*, for example, failed to apply section 36. While this judgment can be criticised for misconstruing what 'expropriation' means in South African law, the Court did acknowledge that at least a 'deprivation' of property had taken place and that deprivations must be justified according to section 36.[116] This acknowledgement should have led immediately to testing the Mineral and Petroleum Resources Development Act against section 36(1). *Agri SA* is regrettably only one example among many of the superior courts' haphazard approach to section 36.

Both the approaches represented by *Phillips* and *Agri SA* are wrongheaded. If the government does not include a section 36(1) justification of a limitation on constitutional rights in its submissions before the courts, the courts must find against the limitation and declare it unconstitutional without further ado.

115 *Phillips v Director of Public Prosecutions, Witwatersrand Local Division* 2003 (3) SA 345 (CC) para 20. The Court did acknowledge that it would count against government's case if it offered no justification.
116 *Agri SA* para 49.

2 The section 36 justification must be *comprehensive*. The justification must not skip any leg of the inquiry listed in section 36(1)(a) to (e).[117] A common leg that is usually skipped is that of 'less restrictive means' in section 36(1)(e), in large part due to the notion that the courts should not 'second-guess the wisdom of policy choices made by legislators'.[118] However, insofar as inquiring into whether there are policy choices available to government that would have a less deleterious impact on the constitutional rights of legal subjects (compared to the avenue government has embarked upon), the Constitution unequivocally empowers the courts to so 'second-guess'. If the government wishes to avoid the courts doing so, it would do well to choose the least restrictive means reasonably at its disposal to achieve the purpose of the limitation, before the matter even gets to court.

The courts have been lax in inquiring whether some other means was reasonably available to government to achieve the same purpose of the limitation, without going as far as that limitation. It would in all likelihood fall to those complaining of their rights being limited to show the courts that there are in fact such less restrictive means, but the courts should ask the question even in its absence.

3 Following from this, in any case of rights limitations, the courts must initiate a section 36 inquiry even if the wronged party does not plead section 36. Brookes and MacAulay write:

> 'Oppression and official control are not synonymous. Laws may be oppressive even if they leave no discretion to officials. Officials can be, and sometimes are, kindly and just within the limits left them by higher authority. But the saying "all power corrupts and absolute power corrupts absolutely" has much truth in it. And the system of leaving fundamental rights to official discretion is inherently wrong as contrasted with the protection afforded by true courts.'[119]

The unfortunate reality is that section 36 has itself become a matter of discretion. It is a matter of official discretion, in that it rarely seems that public servants apply the section 36(1) test when they are engaging in the limitation of constitutional rights; and it is a matter of judicial abdication. Whereas the courts must always apply section 36 when a right has been limited, in practice this is not always done.

In the *Esau v Cogta* matter where lockdown regulations were challenged on grounds of rationality (rather than section 36), for instance, the High Court followed along and simply considered rationality.[120] This should not be the case.

117 Erasmus 640.
118 Currie and De Waal 184.
119 Brookes and MacAulay 27.
120 *Esau & Others v Minister of Cooperative Governance and Traditional Affairs & Others* (11) BCLR 1371 (WCC) paras 236-244. The Court did make reference to section 36, but did not apply it, nor did the government attempt to justify the regulations in terms of it. Most worryingly, the Court seemed to reason that government had itself undertaken a 'proportionality exercise' to determine, for itself, whether the limitations were justifiable, and the Court accepted this without further ado.

Bear in mind the distinction with the first recommendation considered above: government *must* show a section 36 rationalisation for a limitation on rights, but when an *applicant* (a legal subject whose civil liberty has been infringed) brings a case but does not plead that their rights have been limited – and it is nonetheless clear that they have – the court must consider section 36. This is the correct common law approach *in favorem libertatis*.

4 The courts must insist on strict necessity, not merely reasonable necessity, and certainly not expediency, for a justifiable limitation of rights. In other words, when section 36(1)(d) – 'the relation between the limitation and its purpose' – is considered, the courts must insist that the limitation be *strictly necessary* to achieve the lawful purpose for which it is being imposed, not merely expedient.

5 The courts must always approach a section 36 justification *in favorem libertatis*.[121] This means that at each leg of the justification analysis, the benefit of the doubt (the presumption) must lie with the liberty of the subject, not with the agenda of the government.[122]

6 When considering section 36(1)(b) – 'the importance of the purpose of the limitation' – the courts must not consider any purpose outside of the Constitution as a lawful purpose. In other words, only if the purpose is directly concerned with giving effect to a constitutional obligation can government hope to justify its limitation. If the government submits a reason that cannot reasonably be traced back to a clear constitutional provision, it must be treated as *ultra vires* insofar as section 36 is concerned.

7 The courts must have regard to the substance of the limitation, not merely its form.[123] In other words, the actual effect of the limitation on the constitutional rights of the legal subject, rather than how the limitation is stated in the text of the legislation or regulation, or how it is rationalised by the government, must be the primary consideration.

This recommendation might seem trite; however, the courts have in the past engaged in purely formal limitation analyses. For instance, in the *FITA v President of the RSA* judgment, the High Court acknowledged that the lockdown prohibition on tobacco product sales had *not* led to the purpose of the limitation – widespread reduction in smoking – being achieved. In fact, the Court acknowledged that *more widespread* smoking of unregulated, black-market cigarettes was the result of the prohibition. Nonetheless, the Court believed the regulation was still rational because the prohibition was *theoretically capable of achieving* its intended purposes. This was a form-over-substance analysis that inquired only into the limitation as it appeared in the text of the regulation, rather than the irrational and counterintuitive consequences it was yielding in practice.[124]

121 Erasmus 629.
122 This applies to the civil liberties in the Bill of Rights, not welfare entitlements. Where a welfare entitlement entails the limitation of civil liberty – for instance, the supposed right to education read with section 8(2), which provides for the horizontal application of the Bill of Rights – the freedom of the subject must remain the Court's point of departure, without rendering the entitlement nugatory.
123 Erasmus 633.
124 *Fair-Trade Independent Tobacco Association v President of the Republic of South Africa & Another* 2020 (6) SA 513 (GP) paras 50, 69. It must be noted that in *FITA*, the High Court again only inquired into rationality and did not apply a section 36(1) analysis. Nonetheless, even on the rationality test the Court came to a clearly incorrect conclusion. See Van Staden *Constitutional rights and their limitations* 505.

5.1.2 Harmonising the general with internal limitations

As Marius van Staden argues, it is an accepted principle of interpretation that no legal provision may be assumed or construed as being redundant or of no effect.[125] It is submitted that this applies doubly in the case of supreme constitutions. In other words, the constitutional text must be taken seriously.

There are three kinds of limitations (mentioned above) in the Bill of Rights: logical limitations, internal limitations, and the general limitation. None of these limitations – part of the constitutional text – but in particular internal limitations, may be disregarded as pointless fluff that can be overridden by simply going straight to section 36.

Section 36(1) provides that 'any' right in the Bill of Rights may be limited by its application. This has been interpreted to mean that over and above the internal limitations, section 36 can also be applied.[126] This approach has the result that internal limitations are effectively redundant. What would have been the point of including internal limitations in certain constitutional rights formulations if section 36 can simply be used for them all?

Another approach, to only apply internal limitations,[127] would have the result that section 36 is redundant vis-à-vis those rights.

To take an example: section 16, the right to freedom of expression, contains three exclusions from the protection of free expression in section 16(2): advocacy for war, incitement to imminent violence, and advocacy of hatred that is based on race, ethnicity, gender, or religion, and that constitutes incitement to cause harm. The constitutional logic is that if an instance of expression is not covered by the exclusions, it is constitutionally protected expression. Section 16(2) functions as an internal limitation on expressive freedom, as it allows government to regulate expression falling within the exclusions.

The first approach (*section 36-over-internal limitations*) would disregard these limitations and allow government to simply limit freedom of expression any way it desires by application of section 36(1). This renders section 16(2) superfluous – it may as well have been excluded from the Constitution entirely when it was drafted. The second approach (*internal limitations-over-section 36*) would tend to disregard section 36(1) – which clearly provides that 'any' right may be limited by that provision – and require government only to ask whether its limitation complies with the wording of section 16(2).

There is a third approach, that is recommended here, that gives both internal limitations and section 36 their due recognition.

125 Van Staden M. 'A comparative analysis of common-law presumptions of statutory interpretation'. (2015). 26: *Stellenbosch Law Review*. 550-582. 564.
126 Currie and De Waal 165.
127 This is what I advocated for some time ago here: https://rationalstandard.com/correcting-pierre-de-vos-on-the-limitation-of-rights/.

This approach is as follows:

- Any right *without* an internal limitation may be limited by section 36(1);
- In the case of rights *with* internal limitations, those limitations themselves must *also* be tested against section 36(1); *but*
- Those internal limitations represent a *closed list of allowable limitations* vis-à-vis those rights.

In the example of section 16, using the third approach, the right to freedom of expression may *only* be limited under the circumstances stated in section 16(2), and when it is, those limitations must be justified in terms of section 36(1). Sections 36(1)(b) and (c) in particular would allow government to cite section 16(2) as a clear constitutional justification for the contemplated limitation.

Under this approach, the function of an internal limitation is to indicate that the constitutional right may only be limited under the circumstances of the internal limitation, but that section 36 must still be utilised to justify such limitations. The already existing two-stage analysis[128] adopted by the courts would be left undisturbed: the proposal will change how the courts apply the second stage.

5.2 Parliamentary interventions

Parliament is meant to be the representative of the people in the corridors of political power. In theory, it should guard the civil liberties of the people more jealously than the courts do, but this has not usually been the case in practice. These recommendations – Acts of Parliament that would serve to protect freedom under law – could position Parliament as the guardian of liberty it is meant to be.

Depending on the preferences of legislators, these interventions could be consolidated into an omnibus law aimed at the promotion of constitutional democracy, but here they are expressed separately.

Given that these laws would be 'fundamental' in the sense that they would set down general principles, each must include a provision that resolves any conflict between these and any prior or subsequent law in favour of these laws. This would mean that any subsequent law that seeks to depart from the principles laid down in these laws, must explicitly amend these laws.

These recommendations focus on the most important interventions that Parliament could introduce, however each proposed piece of legislation could – and likely should – include other provisions further protecting and advancing civil liberty.

128 Currie and De Waal 166. The courts inquire into (1) whether there has been an infringement of a constitutional right and, (2) if so, whether that infringement is a justifiable limitation under section 36.

5.2.1 Promotion of the Rule of Law Act

This legislation should be primarily aimed at the following interventions:

1 Require that all legislators in both houses of Parliament, provincial legislatures, and municipal councils, must read the entirety of a bill before any vote is taken on adopting that bill into law. This would not be an easily enforceable rule, but it could serve an important democratic purpose. The public will rightly identify slacking legislators as falling foul of their legal duties.

2 Require socio-economic impact assessments on all bills and regulations as a matter of law.[129] No bill should legally be allowed to go beyond the committee stage without the public having had time to consider such an assessment. These assessments must be subject to quality assurance processes. The courts must be empowered to inquire into the quality and accuracy of an assessment.

3 Require good-faith public participation on all bills and regulations as a matter of law. No bill should legally be allowed to go beyond the committee stage without a minimum period of public participation in the bill's conceptualisation, drafting, and adoption. The absolute minimum period is recommended to be 30 days, excluding the December-January holiday period. Constitutional amendments to the Founding Provisions and Bill of Rights must be subject to at least six months of public participation. The courts must be empowered to inquire into the rigour and integrity of the public participation process.

4 Introduce *general* criteria that constrain any discretionary power assigned to a minister or an official in all previous or subsequent legislation. This is done because, as a general rule, new legislation contains no substantive constraining criteria applicable to the discretionary powers it creates. Legislative drafters and the State Law Adviser must also be required to analyse bills before they proceed beyond the committee stage and consider the introduction of *specific* constraining criteria for discretionary powers that make sense in the context of that legislation.

5 Clearly define the ambit of what 'regulation' means. Most legislation contains a 'regulation' provision that is effectively interpreted in practice as giving ministers a law-making power. Traditionally, however, 'regulation' means the executive must adopt technical rules for the implementation of the substantive content of legislation made by the legislature.[130] The traditional position must be re-established by this legislation, to ensure that every previous or subsequent regulation-making power is interpreted as referring only to technical matters.

129 Presently, impact assessments are only required as a matter of Cabinet policy.

130 The basic theory applicable here relates to the so-called 'social contract'. Laws, the rules that bind legal subjects, derive their legitimacy from the fact that the people elect legislators to create those rules on their behalf. As a result, only the legislature may create substantive rules that bind the people, and the executive must administer and implement these rules. A 'regulation' that in fact creates substantive rules that bind legal subjects is an instance of the executive stepping into the legislative domain without the concomitant democratic legitimacy.

5.2.2 Advancement of Human Rights and Freedoms Act

This legislation should be primarily aimed at the following interventions:

1 The recommendations made vis-à-vis the judicial approach to section 36 above can be laid down in this legislation.

2 Require the sponsors of any bill or regulation – usually a government department or member of Parliament – to append a comprehensive section 36 justification to the proposal if it has the aim or reasonably likely consequence of limiting a constitutional freedom. If there is more than one limitational effect in the bill or regulation, additional section 36 justifications should be appended. The State Law Adviser could provide this justification, but in the absence of a justification, the Adviser must clearly mark the bill or regulation as non-compliant with the Advancement of Human Rights and Freedoms Act before it is adopted by a committee or minister.

3 Standardise the section 36 justification without infringing on judicial discretion. There is no discretion for the courts to apply or not apply section 36: limitations on rights *must* be justified under section 36 or else they are unconstitutional. This legislation should make it clear that section 36 must always be applied under these circumstances.

4 Introduce a new rule of interpretation that no provision of any legislation or regulation shall be interpreted as *implicitly* limiting a constitutional freedom. The law of general application must *explicitly* state that the provision is intended as a limitation on a specific (and named) right. If this is not stated, but it does limit a right, the courts must declare that provision unconstitutional. The Constitution does not allow the government to implicitly limit a right. Section 36(1) clearly requires that when the government limits a right, it must do so by applying the formula stated in that section, and this could never happen implicitly.

5 Require that all public servants, during their training, complete a course in the theoretical foundations of civil liberty and constitutionalism and the legal principles of the Bill of Rights.

5.2.3 Protection of Property Act

This legislation should be primarily aimed at the following interventions:

1 Define strictly what 'deprivation' means, and how it is distinguished from 'expropriation'. Although it is not constitutionally required, this legislation should introduce a form of compensation that is paid to owners subjected to severe deprivation that nonetheless falls short of expropriation.

2 Make the practice of trespassing on property with the intention of erecting a 'dwelling' to acquire the protection of anti-eviction laws a criminal offence. This would not apply to good-faith unlawful occupiers.[131] Any person who clearly, whether it is direct, indirect, express, or implicit, threatens, advocates, or incites others to trespass in this fashion should also be held criminally liable.

131 One might here for instance think of a group of people who settled on land they believed to be municipal or abandoned land that proved in reality to be private land, or formerly lawful occupiers who have been formally evicted but nonetheless remain on the property.

3 Codify general principles (that could be limited under defined circumstances) of property rights, including the freedom of owners to dispose, alienate, utilise, enjoy, or modify their property as they deem fit.

4 Introduce a comprehensive provision that regulates and defines what the implementation of section 25(8) of the Constitution could lawfully mean in practice. Section 25(8) is regrettably framed in a way that could be abused, and this legislation must place it within a proper, defined legal framework. It provides:

> 'No provision of this section [25] may impede the state from taking legislative and other measures to achieve land, water and related reform, in order to redress the results of past racial discrimination, provided that any departure from the provisions of this section is in accordance with the provisions of section 36(1).'

5 Clarify that section 8(2) of the Constitution cannot be interpreted to mean that private property may be co-opted into serving the political agenda of any organ of state. Section 8(2) is said to introduce the so-called 'horizontal application' of the Bill of Rights, which is thought to mean every right in the Bill of Rights applies *inter se* and not merely between the state and the legal subject. This is in fact not a new phenomenon: subjective rights in common law (from whence constitutional freedoms originate) unequivocally apply *inter se*. Section 8(2) must be interpreted in this light, in particular as it relates to property, and must not be allowed to give rise to the perverse situation where, for example, an agricultural landowner is legally forced to construct a school on their property to give effect to the right to education (section 29 of the Constitution) of labourers' children.

5.2.4 Promotion of Non-Racialism Act

This legislation should be primarily aimed at the following interventions:

1 Prohibit organs of state or their functionaries from classifying or categorising legal subjects with respect to their race, ethnicity, or skin-colour. This includes direct, indirect, express, or implicit requirement or encouragement of self-classification. Effectively, outside of the census, no representative of government should be allowed to inquire into the racial identity of any person.

2 The only exception to the prohibition on racial classification is the census. This legislation should strictly regulate how this information is gathered and utilised, including a requirement that the counting of the number of people comprising the racial groups in South Africa must be de-linked from the identity of specific and identifiable individuals.

3 Prohibit racialist expression by or on behalf of organs of state. Functionaries may in their personal capacity express racial views within the confines of section 16 of the Constitution, but when speaking in their official capacities no racial sentiment may be evident.

4 Require that where an organ of state provides benefits of whatever nature to persons historically or currently disadvantaged by unfair discrimination, such disadvantage must be determined without reference to race or skin-colour.

5 Prohibit the Electoral Commission from registering a political party that promotes ill-will or hostility between racial groups. This provision would evidently be a limitation upon sections 18 and 19 of the Constitution – freedom of association and political rights – and a comprehensive justification for this limitation must be elaborated.

5.2.5 Promotion of Home Rule Act

This legislation should be primarily aimed at the following interventions:

1 Recognise that South Africa is, constitutionally, a federal state. Decentralisation of political power has long been identified as an important method to protect civil liberty. This recognition alone is not enforceable but would go a long way in changing how people think about South Africa's vertical separation of powers.

2 Entrench a method for provinces and municipalities to claim powers that properly should reside with them from the central government (or provincial governments in the case of municipalities). This method should include cooperation from the central government, but must include a failsafe that allows provincial or municipal governments to acquire those powers even where the central government denies them for political purposes. This claim for authority would either be based on existing constitutional provisions or on the constitutional principle of subsidiarity: that powers must be exercised at the lowest possible level that they can be effectively exercised.

3 Clearly recognise the existing discretion in section 217 of the Constitution that individual organs of state may decide, for themselves, whether to implement racial considerations in public procurement – so-called 'preferential procurement' – for provinces and municipalities.

4 Limit the power of 'higher'[132] spheres of government to place 'lower' spheres under administration. In particular, municipal councils or provincial legislatures, as the case may be, should be empowered to override being placed under administration, perhaps by a greater threshold than an ordinary majority.

5 At the same time, allow these 'higher' spheres of government, on a strictly evidentiary basis that is testable in court, to identify provincial or municipal governments that do not have the capacity to enjoy greater self-determination, and to intervene in their affairs on that basis. Strict safeguards must be elaborated that allow the identified provincial or municipal governments to rehabilitate themselves without being politically undermined by the 'higher' spheres.

132 According to sections 40 and 41 of the Constitution, no sphere of government is subordinate or superior to any other.

5.3 Inculcating respect for civil liberty in government

This recommendation is perhaps the simplest but most difficult to realise in practice.

It is not immediately obvious that South Africa's many millions[133] of public servants are immersed in an institutional culture that prizes civil liberty as a significant background value to the work that they do. Public servants must be trained to respect and embrace civil liberty rather than treating it indifferently or, at worst, looking at it askance.

The legal requirement recommended above that public servants be enrolled in this training will not alone suffice to inculcate a culture of respect for freedom under law. A mindset shift is required. Public servants must realise at a fundamental level that they are not there to 'rule over' legal subjects, but that in the final analysis the purpose of government is to legally guarantee the freedom of legal subjects. Everything public servants do must ultimately be aimed at this goal.

An earlier intervention, such as including a module on the classical history and development of constitutionalism and civil liberty in the university and college courses associated with public policy, might be considered. Ministers must also provide intellectual leadership to their departments in this regard. Ministers are political functionaries, and instilling a culture favourable toward important constitutional phenomena like civil liberty would fall squarely within their responsibility.

133 By 2019, South Africa had between 1.295 million and 2.108 million full- and part-time employees across the central, provincial, and municipal spheres of government and other organs of state. See https://africacheck.org/fact-checks/factsheets/factsheet-south-africas-civil-service-numbers.

6. Conclusion

It is often claimed, usually by executive or legislative functionaries, that a system wherein the protection, rather than the limitation, of rights is primary, is inimical to the public interest. For instance, to insist upon an even stronger protection of the right to property in section 25 of the Constitution than South Africans enjoy today is portrayed as something that would undermine the government's land reform agenda.

Even the courts have misconstrued section 25 in this way. In the judgment of *FNB v SARS*, Ackermann J says, 'The purpose of section 25 has to be seen both as protecting existing private property rights as well as serving the public interest.'[134] In so doing, the judge creates a dichotomy that does not exist for, in fact, the overriding protection of civil liberty, including the right to property, is in the public interest. This is not least because this protection is the *raison d'être* of government in a constitutional democracy. Indeed, Kane-Berman writes:

> 'Liberalism offers a solution based upon its confidence that free individuals in a society governed by the rule of law can seek their own happiness and prosperity. But they must be free to do so.'[135]

The package of reforms recommended in this contribution would solidify South Africa's position as a free society among a community of free states, and allow South Africans more room to 'seek their own happiness and prosperity'. However, even if all these reforms are adopted, freedom under law will always be vulnerable if civil society is not enthusiastic about and willing to defend it against inevitable political onslaughts. If South Africa succeeds in having a vigilant civil society – which it is submitted it has – the future looks promising for civil liberty.

134 *First National Bank of SA Limited t/a Wesbank v Commissioner for the South African Revenue Services and Another; First National Bank of SA Limited t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) para 50.
135 Kane-Berman *Liberal strategy* 7.

IRR

South African Institute of Race Relations

www.irr.org.za

info@irr.org.za

(011) 482 7221