

11 The Rule of Law, Legality and the Supremacy of the Constitution

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11.1	Introduction	11-1
	(a) The common law doctrine of legality	11-1
	(b) Legality as a norm of enacted constitutional law.	11-2
	(c) A product of judicial interpretation	11-2
11.2	The principle of legality and the jurisdiction of the Constitutional Court.	11-4
	(a) The scope of ‘constitutional matters’: the Constitutional Court not envisioned as a court of general jurisdiction	11-4
	(b) A problem: The rule of law as a constitutional matter.	11-6
	(i) An optimistic view of the limited-in-principle scope of ‘constitutional matters’	11-7
	(ii) The destabilizing effect of introducing the principle of legality as a constitutional matter.	11-11
	(iii) The Constitutional Court has never directly addressed this difficulty.	11-12
11.3	The causes of the constitutionalisation of the legality principle	11-15
	(a) Introduction	11-15
	(b) The straight historical account	11-16
	(c) The justificatory account	11-23
	(i) The ‘transformative’ character of the Final Constitution and the special role of the Constitutional Court.	11-24

	(ii)	The impulse and need for retention of a general principle of legality after the onset of the Bill of Rights	11–26
	(iii)	The risks of locating the legality principle ‘outside’ the Final Constitution	11–29
11.4		Supremacy of the Constitution	11–34
	(a)	Constitutional supremacy as a value (not just a rule). . .	11–34
	(b)	The unity of the legal system and the pursuit of justice.	11–36
	(c)	An all-pervasive Constitution?	11–38
	(d)	Constitutional supremacy as basic-law status	11–41
	(e)	Constitutional supremacy and discursive style.	11–42

11.1 INTRODUCTION

(a) The common law doctrine of legality

If a country has working legal and political orders, then somewhere within its *corpus juris* will be found its constitutional law, the law that structures and arranges political and legal institutions, their workings, and their interactions.¹ To that generalization, South Africa during the years preceding the recent constitutional transition was never thought to pose an exception.

As was typical for systems in the Westminster or Diceyan tradition, South Africa's pre-transition constitutional law was understood to be a part of its common law.² The twin pillars of that constitutional common law were the principles of legality and of parliamentary supremacy. According to the former doctrine: (a) government and its officials were deemed powerless to act upon the interests and concerns of persons without an authorization or chain of authorizations traceable to an act of Parliament or to the common law;³ (b) actions by officials falling foul of any restrictions or requirements contained either in the common law or in any law laid down by Parliament or by duly authorized subordinate lawmakers were deemed to that extent unlawful and judicially remediable;⁴ and (c) official actions that were judicially found to be arbitrary, according to certain inflections of that term — some of which had substantive overtones — were considered unlawful and judicially remediable, in the absence of clear and specific authorization from Parliament. Such, at least, was the formal state of doctrinal affairs.⁵ Has the onset of the Final Constitution altered that state of affairs? If so, in what ways?

* I am indebted to Dennis Davis, Andre Van der Walt, Stuart Woolman, and participants in a workshop at the University of Toronto for perceptive comments on drafts of this Chapter.

¹ See § 11.4 *infra*.

² See *Ex Parte President of the Republic of South Africa: In re Pharmaceutical Manufacturers Association of South Africa* (2000) (2) SA 674 (CC), 2000 (3) BCLR 241 (CC) ('*Pharmaceutical Manufacturers*') at para 33 ('The control of public power by the courts through judicial review is and always has been a constitutional matter. Prior to the adoption of the Interim Constitution this control was exercised by the courts through the application of common law constitutional principles.')

³ This branch of the legality principle apparently encompasses a restriction on the permissible 'vagueness' of statutory authorizations for official action. See *Affordable Medicines Trust & Others v Minister of Health & Another* 2005 (6) BCLR 529 (CC) ('*Affordable Medicines*') at paras 24, 108. The branch also ramifies directly to a norm for the interpretation of a certain class of statutes, those that base the liability of a subject to perform or forbear from an act on the existence some prior official action. An example would be a statute that attaches a penalty to the act of smoking in a posted area. See *Oudekraal Estates (Pty) Ltd v City of Cape Town & Others* 2004 (6) SA 222 (SCA) at paras 32–7 (When construed against the background of the principle of legality, such a statute normally will be taken to mean that the penalty does not ensue if the triggering official action (the posting, in our example) is shown by a person charged with violation not to have been accomplished according to law.)

⁴ In case of any discrepancy between common-law and statutory requirements, the latter would prevail *per* parliamentary supremacy.

⁵ Not within memory has the legality principle's formal status as a component of South African common constitutional law been doubted. Content is another matter, of course, as is the strength of judicial will to interpose the legality principle against questionable governmental conduct. It is notorious both that the meaning of 'arbitrary' underwent contraction and that the stringency of the demand for clear parliamentary authorization underwent dilution under the stress of apartheid-era realpolitik. For accounts of these matters, see D Dyzenhaus *Hard Cases in Wicked Legal Systems: South African Law in the Perspective of Legal Philosophy* (1991); J Dugard *Human Rights and the South African Legal Order* (1978).

(b) Legality as a norm of enacted constitutional law

Today, the judicially enforceable claim to legality inhabits South African law not as a part of the common law carried over from pre-Constitutional days but as a norm sourced directly in the Final Constitution. The claim to legality has gained recognition as a guarantee within that body of enacted, supreme law — the Final Constitution — for the implementation of which the Constitutional Court (‘CC’) bears special and final judicial responsibility. The decisions proclaiming this development — their circumstances, motivations, and implications — provide the first main topic of this chapter. The second main topic is the related notion of constitutional supremacy or hegemony developed by the CC. The central and decisive judgment is that in *Pharmaceutical Manufacturers*. However, *President of the Republic of South African & Another v Hugo*¹ and *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council*² are important way-stations, and there are several post-*Pharmaceutical* reaffirmations of the doctrine.³

(c) A product of judicial interpretation

Among the founding values of the Republic — alongside democracy, human dignity, and the achievement of equality, non-racialism and non-sexism — the Final Constitution lists ‘supremacy of the constitution and the rule of law’.⁴ As might have been foreseen from this text, the rule of law, like dignity,⁵ is today invoked in South African constitutional jurisprudence as a pervasive value that ‘informs the interpretation of many, possibly all, other rights.’⁶ But also like dignity, the rule of law (or at least its included principle of legality⁷) has achieved

¹ 1997 (4) SA 1 (CC), 1997 (6) BCLR 708 (CC) (‘*Hugo*’).

² 1999 (1) SA 374 (CC), 1998 (12) BCLR 1458 (CC) (‘*Fedsure*’). See §11.3(b) *infra* for a comprehensive account of *Fedsure* and *Pharmaceutical Manufacturers*.

³ See *Affordable Medicines* (supra) at paras 49, 108; *City of Cape Town and Another v Robertson & Another* 2005 (2) SA 323 (CC) (‘*Robertson*’); *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs & Another* 2004 (4) SA 490 (CC), 2004 (7) BCLR 687 (CC) (‘*Bato Star*’); *Bel Porto School Governing Body & Others v Premier of the Province, Western Cape & Another* 2002 (3) SA 265 (CC), 2002 (9) BCLR 891 (CC) (‘*Bel Porto*’).

⁴ Constitution of the Republic of South Africa Act 108 of 1996 (‘Final Constitution’ or ‘FC’) s 1(c).

⁵ See D Cornell ‘Dignity’ in S Woolman, T Roux, J Klaaren, A Stein & M Chaskalson (eds) *Constitutional Law of South Africa* (2nd Edition, OS, June 2005) Chapter 36.

⁶ *Dawood & Another v Minister of Home Affairs & Others* 2000 (3) SA 936 (CC), 2000 (8) BCLR 837 (CC) (‘*Dawood*’) at para 35 (On dignity). Consider, for example, the appeal to rule-of-law values in construing the Constitution of the Republic of South Africa Act 200 of 1993 (‘Interim Constitution’ or ‘IC’) s 8(1) and FC s 9(1). See *Prinsloo v Van der Linde & Another* 1997 (3) SA 1012 (CC), 1997 (6) BCLR 759 (CC) at para 25 (‘[T]he constitutional state . . . should not regulate in an arbitrary manner or manifest ‘naked preferences’ that serve no legitimate governmental purpose, for that would be inconsistent with the rule of law . . . The purpose of this aspect of equality is, therefore, to ensure that the state is bound to function in a rational manner.’); *Bel Porto* (supra) at para 120 (identifying a claim that certain governmental action was ‘irrational and thus unlawful’ as ‘the same argument as that raised in relation to the claim based on s 9(1).’) For a crisp summary of the influence of sundry dimensions of the rule-of-law ideal in recent South African constitutional adjudication, some of them tied to specific clauses in the Bill of Rights and some not, see H Botha ‘The Legitimacy of Legal Orders (3): Rethinking the Rule of Law’ (2001) 64 *THRHR* 523, 534–6.

⁷ See *Fedsure* (supra) at para 57 (‘Whether the [constitutionalised] principle of the rule of law has greater content than the principle of legality is not necessary for us to decide here.’) For a succinct review of the rule-of-law ‘philosophy’ in a somewhat fuller sense, see Y Burns ‘A Right-based Philosophy of Administrative Law and a Culture of Justification’ (2002) 17 *SAPL* 279, 284–5.

a dual status in South African constitutional law, serving not just as a pervasive value informing the interpretation of various constitutional clauses but also as a self-standing ‘justiciable and enforceable’ claim.¹

Such a conclusion was strictly inescapable with regard to dignity, for the constitutional text, in addition to declaring dignity to be a founding value of the republic, expressly proclaims it a justiciable constitutional right.² Establishing the *constitutional* (as opposed to common-law) status of a general, justiciable claim to legality required something more in the way of interpretive exertion. This is true in three respects. First, at the moment when the CC first proclaimed the constitutional moorings of the claim to legality, it was dealing with the Interim Constitution, an instrument void of any text naming the rule of law as a constitutional ‘value,’ much less declaring it a guaranteed, justiciable right. By the Court’s own testimony, the legality principle’s niche in South Africa’s tablets of judicially enforceable constitutional guarantees is one that it found to be ‘implied’ — meaning not expressly stated — within the terms of the Interim Constitution.³ It is, then, a niche that the CC at one time felt impelled to carve out in the absence of any plain-on-its-face constitutional directive to do so.

Second, while the Final Constitution’s designation of the rule of law as a ‘founding value’ of the Republic might now seem to offer a plain textual platform for the CC’s doctrine that the Final Constitution confers a general, justiciable, subjective right to legality, no such simple explanation for that doctrine can be squared with the Court’s declaration in *NICRO* that the founding values listed in FC s 1 do not in themselves ‘give rise’ to ‘discrete and enforceable rights.’⁴ Rather, as the CC went on to say in *NICRO*, the FC s 1(c) values ‘inform and give substance’ to the rights-granting sections of the Bill of Rights.⁵ When we scan the Bill of Rights, we find no mention of a general, self-standing, justiciable claim to legality. What may be more to the point, the CC has never identified any section of the Bill of Rights as a direct textual source for such a general, justiciable claim. One is left to infer that the implication of which the CC spoke in *Fedsure* and *Pharmaceutical Manufacturers* is an implication from the Final Constitution in its entirety.

Third, as we shall see later, the CC’s doctrine regarding a general claim to legality does not rest with giving such a claim a place within constitutional law.⁶ The doctrine also essentially includes a *denial* that such a claim continues to

¹ *Dawood* (supra) at para 35.

² See IC s 10 and FC s 10 (Both explicitly confer a right to have one’s dignity respected and protected.)

³ *Fedsure* (supra) at para 58.

⁴ *Minister of Home Affairs v National Institute for Crime Prevention and the Re-Integration of Offenders (NICRO) and others* 2005 (3) SA 280 (CC), 2004 (5) BCLR 445 at paras 21, 23.

⁵ On the uses of ‘the rule of law’ as a value, see *Bel Porto* (supra) at para 120; *Dawood* (supra) at para 35; *Prinsloo v Van der Linde & Another* 1997 (3) SA 1012 (CC), 1997 (6) BCLR 759 (CC) at para 25. See also *President of the Republic & Others v Modderklip Boerdery (Pty) Ltd* 2004 (6) SA 40 (CC) at paras 34, 48, 51 (*‘Modderklip’*) (Constitutional Court relies on FC s1(c) to support its conclusion that the state had limited Modderklip’s right of access to court, as guaranteed by FC s 34, by failing to provide an alternative housing location for illegal occupiers against whom Modderklip had obtained an eviction order that could not be enforced in the absence of such an alternative location.)

⁶ See § 11.3(c) infra.

subsist *beyond* the Final Constitution, as a part of South African common law that arguably would fall outside the CC's special powers of control over adjudication respecting 'constitutional matters.'

What we have here, therefore, is no tame or paltry act of judicial lawfinding but rather an event of conscious, active constitutional interpretation by the CC, and one fraught with far-reaching consequences for the administration of law in South Africa. Among these consequences, moreover, as we are about to see, is one that appears to run directly counter to an express design of the Final Constitution: that of assigning to the CC a less-than-plenary subject-matter competence and thus of dividing final appellate authority between the CC and the Supreme Court of Appeal. We shall want, therefore, to consider the possible causes and justifications for this bold stroke by the CC.¹

11.2 THE PRINCIPLE OF LEGALITY & THE JURISDICTION OF THE CONSTITUTIONAL COURT

(a) The scope of 'constitutional matters': The Constitutional Court not envisioned as a court of general jurisdiction

A court set up to have the last word on constitutional matters, as the CC indubitably is,² may or not also be a court set up to exercise a plenary jurisdiction over all legally cognizable matters that may arise. Whether a 'constitutional' court is also to serve as a court of plenary jurisdiction would seem to be a choice for constitutional drafters to make, both by their explicit delineations of the court's jurisdiction and by the prescriptive norms they write into their constitutional instrument. Taking the Final Constitution at its word, we would have to say the CC of South Africa decidedly is *not* set up to be a court of plenary jurisdiction. FC 167(3)(a) confines the CC's writ to 'constitutional matters' and 'issues connected with decisions on constitutional matters.'³ By contrast, FC s 168(3) endows the Supreme Court of Appeal ('SCA') with authority to decide appeals in 'any matter,' subject to possible review by the CC in 'constitutional matters.' The conclusion seems inescapable: 'constitutional matters' compose a proper subset of all litigable matters, and the Final Constitution, by express design and presumably for reasons consciously held, has applied to the CC not only a special principle of concentration on constitutional matters but a concomitant rule of jurisdictional *confinement* to such matters.

The CC relied squarely on this view in *S v Boesak*.⁴ The case raised the question of whether another court's judgment of the sufficiency of evidence in a criminal case to support a finding of guilt beyond a reasonable doubt is a constitutional matter falling within the CC's powers of review. The applicant maintained that

¹ See § 11.3 *infra*.

² See *S v Pennington* 1997 (4) SA 1076 (CC), 1997 (10) BCLR 1413 (CC) at para 10.

³ Constitutional matters include issues involving 'the interpretation, protection or enforcement of the Constitution.' FC s 167(7). The Interim Constitution similarly made the Constitutional Court the final judicial arbiter of 'all matters relating to the interpretation, protection and enforcement of the provisions of this Constitution.' IC s 98(2).

⁴ 2001 (1) BCLR 36 (CC), 2001 (1) SA 912 (CC) ('*Boesak*').

conviction on the basis of insufficient evidence — evidence that ‘ought to’ have left the tribunal in doubt about his guilt — infringed his right to be presumed innocent, expressly guaranteed by FC s 35(3)(b),¹ and also (because imprisonment impended) his right not to be deprived of freedom without just cause, expressly guaranteed by FC s 12(1)(a).² On their face, these contentions seem easily to meet the requirement that ‘the Constitution must be implicated in some way before a finding can be said to raise a constitutional issue within the jurisdiction’ of the CC.³ The CC nevertheless concluded that questions of the sufficiency of evidence to support a conviction of crime could not be classed as constitutional matters because, if they were, then ‘all criminal cases would be constitutional matters, and the distinction drawn in the Constitution between the jurisdiction of this Court and that of the SCA would be illusory.’⁴ However less than airtight such reasoning may be,⁵ it plainly implies as a premise that the CC may not, consistently with Final Constitution, regard its subject-matter competence as plenary.

From a legal-realist standpoint, of course, one always can doubt that it is possible to seal off ‘non-constitutional’ issues in a system where ‘the Constitution is the supreme law and all law has to conform to the Constitution.’⁶ After all, the CC not only is granted the authority to decide ‘issues connected with decisions on constitutional matters,’ it is further expressly empowered to decide, with finality, ‘whether a matter is a constitutional matter or whether an issue is connected with a decision on a constitutional matter;’⁷ and those grants may seem potentially plastic enough, in the hands of a sufficiently determined and confident court, to cover that court’s seizure of control over just about any legal issue of clear public importance once brought to litigation by a party with arguable standing to raise it.⁸

It does not follow, however, that these textual concessions of power to the CC — to decide ‘connected’ issues, and to decide which issues are constitutional or connected — detract from the clarity of the Constitution’s plan to confine the CC’s competence to a proper subset of the set of all legal issues. These texts endorse the CC’s exercise of ancillary powers that no set of words could have denied to it in practice. Making explicit what must have been true in any event, these constitutional clauses cannot be said to gainsay the Final Constitution’s apparent commitment to a *principle* of limited subject-matter competence for the CC. Rather to the contrary: By expressly pinning final responsibility for

¹ *Boesak* (supra) at para 16.

² *Ibid* at para 36.

³ *Ibid* at para 23.

⁴ *Ibid* at paras 15 and 35.

⁵ It seems the distinction would not be illusory as long as some non-criminal cases might be found that raise no constitutional matters.

⁶ *Van der Walt v Metcash Trading Ltd* 2002 (4) SA 317 (CC), 2002 (5) BCLR 454 (CC) (*‘Metcash’*) at para 32. Ngcobo J obviously wrote with the Final Constitution’s supremacy clause in mind. See FC s 2 (‘This Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled.’)

⁷ FC s 167(3)(c).

⁸ See C Loots ‘Standing, Ripeness and Mootness’ in S Woolman, T Roux, J Klaaren, A Stein & M Chaskalson (eds) *Constitutional Law of South Africa* (2nd Edition, OS, March 2005) Chapter 8.

prudent implementation of the principle on the CC — where, inevitably, such responsibility would rest in practice anyway — the Final Constitution confirms its commitment to the principle.

Neither is the Final Constitution’s apparent commitment to a contained jurisdiction for the CC belied by FC s 173, granting to the CC an ‘inherent power’ to ‘develop the common law, taking into account the interests of justice.’ Other clauses of the Final Constitution unquestionably obligate courts at all levels to develop the common law when and as required in order to ‘give effect to’ or appropriately ‘limit’ a right in the Bill of Rights (FC s 8(3)), and furthermore to develop the common law as may be required to keep the latter duly attuned to the ‘spirit, purport and objects of the Bill of Rights’ (FC s 39(2)).¹ There thus must arise cases in which constitutional matters are at stake in deciding or steering the course of common-law development, and proper oversight by the CC in such cases obviously may be aided by allowing the CC a competence to participate along with other courts in developing the common law. FC 173 thus figures as an implementation of the principle of the CC’s special competence in constitutional matters, and the CC would be expected to tailor accordingly its use of its common-law development power.²

We may conclude, therefore, that the Final Constitution’s express delineations of the subject-matter competence of the CC disclose an intention or design to restrict that competence to a proper subset of all legal issues.

(b) A problem: The rule of law as a constitutional matter

Questions obviously remain about whether a limiting formula so open to interpretation as ‘constitutional matters’ realistically can rein in the CC in practice. Questions also remain — and we shall discuss them — about whether anything like a watertight containment really was intended, or is desirable, or is consonant

¹ It makes no difference here — although it may elsewhere, see below — that the distribution of these duties between the Supreme Court of Appeal and the High Courts is a contentious issue. See *Nontembiso Norab Kate v Member of the Executive Council for the Department of Welfare, Eastern Cape* Case No 1907/03 (SEC) (Froneman J) (‘In matters where there may be doubt or ambiguity in higher court or authority, and where that doubt or ambiguity may have serious consequences for upholding the fundamental constitutional values of the supremacy of the Constitution and the rule of law, I would respectfully suggest that High Court judges of first instance are obliged to follow the interpretation of authority that in their serious and considered opinion would serve the Constitution and the rule of law best.’); *Ex Parte Minister of Safety and Security: In re S v Walters* 2002 (4) SA 613 (CC), 2002 (7) BCLR 663 (CC) (‘Walters’); *Afrox Healthcare Bpk v Strydom* 2002 (6) SA 21 (SCA) (‘Afrox’); S Woolman & D Brand ‘Is There a Constitution in this Courtroom? Constitutional Jurisdiction after *Afrox* and *Walters*’ (2003) 18 *South African Public Law* 38; S Woolman ‘Application’ in S Woolman, T Roux, J Klaaren, A Stein & M Chaskalson (eds) *Constitutional Law of South Africa* (2nd Edition, OS, March 2005) § 31.4(b)(x) (On *stare decisis* development of common law, and high Court Jurisdiction).

² The CC has done just that. See Woolman ‘Application’ (supra) at § 31.4(e)(i)–(iv) (Describes CC’s practice of deferring or standing aside while the Supreme Court of Appeal and High Courts take the labouring oar in common-law development.) See also *Gardener v Whitaker* 1996 (4) SA 337, 1996 (6) BCLR 775 (CC); *De Freitas v Society of Advocates of Natal* 2001 (6) BCLR 531 (SCA), *Carmichele v Minister of Safety and Security* 2001 (4) SA 938 (CC), 2001 (10) BCLR 995 (CC) (‘Carmichele’); *Khumalo & Others v Holomisa* 2002 (5) SA 401 (CC), 2002 (5) BCLR 771 (CC) (‘Khumalo’); *Boesak* (supra) at para 15 (‘The development of, or the failure to develop, a common-law rule by the SCA may constitute a constitutional matter.’)

with the Final Constitution's larger purposes.¹ Of course, none of these questions is independent of how the Final Constitution is construed *substantively*. Certain kinds of norms for the conduct of officials or the exercise of official powers, if found in the Final Constitution, might render the notion of a less-than-plenary jurisdiction for the CC illusory or inconceivable even in theory. Now that, indeed, is the result to which we are brought — for so we are about to see — by embrace of the CC's understanding of the place and function of the rule-of-law notion in the scheme and project of the Final Constitution. If, as the CC held in *Fedsure and Pharmaceutical Manufacturers*, the doctrine of legality is a 'rule' of supreme constitutional law giving rise to justiciable, subjective claims, it becomes impossible *in concept* (leave alone realist doubts about what will happen in practice) to see how any case coming to court in South Africa possibly can fall short of being a constitutional case. We develop this point over the next two subsections.

(i) *An optimistic view of the limited-in-principle scope of 'constitutional matters'*

To get started, we may ask how close to all-inclusive is the coverage of case-types in which the CC's subject-matter competence in constitutional matters is virtually uncontested and incontestable given the text of the Constitution. In *S v Boesak*, the CC summarised the textual position on 'constitutional matters' as follows:

If regard is had to the provisions of s 172(1)(a) and s 167(4)(a) of the Constitution, constitutional matters must include disputes as to whether any law or conduct is inconsistent with the Constitution, as well as issues concerning the status, powers and functions of an organ of state. Under s 167(7), the interpretation, application and upholding of the Constitution are also constitutional matters. So too, under s 39(2), is the question whether the interpretation of any legislation or the development of the common law promotes the spirit, purport and objects of the Bill of Rights.²

Thus, cases of the following types all raise constitutional matters:

- (a) Claims that a specific executive or administrative action falls foul of a requirement or restriction imposed by the Final Constitution.³
- (b) Claims that a statute correctly construed falls foul of a requirement or restriction imposed by the Final Constitution.⁴

¹ See § 11.3(c) *infra*.

² *Boesak* (supra) at para 14 (citations omitted).

³ See *President of the Republic of South Africa & Another v Hugo* 1997 (4) SA 1, 1997 (6) BCLR 705 (CC) ('*Hugo*') (Claim of violation of IC s 8(2) by the President's proclamation considered and upheld.) See J Kentridge 'Equality' in S Woolman, T Roux, J Klaaren, A Stein & M Chaskalson (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2005) Chapter 35.

⁴ See *National Coalition for Gay and Lesbian Equality & Others v Minister of Home Affairs & Others* 2000 (2) SA 1 (CC), 2000 (1) BCLR 39 (CC) at para 23 (Claim of violation of FC s 9(3) by s 25(5) of the Aliens Control Act 96 of 1991, considered and upheld. Court found that the word 'spouse' in the challenged statutory section could not permissibly be read to encompass a same-sex life partner.) See also *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service & Another* 2002 (4) SA 768 (CC), 2002 (7) BCLR 702 (CC) at paras 40, 109, 113 and 114 (Claim of violation of FC s 25(1) by s 114 of the Customs and Excise Act 91 of 1964 was considered and upheld. Court concluded that the statute's deprivative application could not be limited by judicial construction to the class of 'credit grantors' of customs debtors.)

- (c) Claims that a statute open to alternative plausible interpretations is rightly to be construed in the claimant's favor because the alternative construction causes the statute to fall foul of the Final Constitution.¹
- (d) Claims that a lower court has failed in the obligation imposed by FC s 39(2) to construe a statute so as to promote the spirit, purport and objects of the Bill of Rights.²
- (e) Claims that a lower court has erroneously construed and applied a statute, when the statute was enacted for the purpose of giving content to a constitutional right.³
- (f) Claims that a lower court has failed in the obligation imposed by FC ss 8(2) and 8(3) to develop the common law as required to give effect a right in the Bill of Rights, or in the obligation imposed by FC s 39(2) to develop the common law so as to promote the spirit, purport and objects of the Bill of Rights.⁴

Again, one realistically may doubt whether a sufficiently determined and confident court would have much trouble bringing any publicly salient legal issue under one or another of these six, more or less uncontested classes of constitutional matters. This is certainly so given the apparent sweeping and tentacular reach of the sundry guarantees in the Bill of Rights⁵ — including guarantees

¹ See *Daniels v Campbell NO & Others* 2004 (5) SA 331 (CC), 2004 (7) BCLR 735 (CC) ('*Daniels*') at para 16 (Claim directed by appellant against strict interpretation, in *Daniels v Campbell NO & Others* 2003 (9) BCLR 969 (C), of the term 'spouse' as used in the Intestate Succession Act and the Maintenance of Surviving Spouses Act.) See also *NEHAWU v University of Cape Town & Others* 2003 (3) SA 1 (CC), 2003 (2) BCLR 154 (CC) ('*NEHAWU*') at para 15 (CC declared that '[i]n relation to a statute a constitutional matter may arise either because the constitutionality of its interpretation or its application is in issue or because the constitutionality of the statute itself is in issue.') In speaking of cases in which the constitutionality of a statute's interpretation or its application is in issue, the CC undoubtedly had in mind cases that are in all practical respects equivalent to cases either of type C or of type D in the enumeration, above.

² See L Du Plessis 'Interpretation' in S Woolman, T Roux, J Klaaren, A Stein & M Chaskalson (eds) *Constitutional Law of South Africa* (2nd Edition, OS, July 2005) Chapter 3. Such claims need not be strictly equivalent to claims of the preceding type C. Conceivably, a type D claim could succeed where a type C claim would fail. See, eg, *Daniels* (supra) at para 25 (Whereas the judgment explains at length why the more generous construction of 'spouse' both 'aligns itself with the spirit of the Constitution and furthers the objectives of the Acts,' at no point does it expressly embrace the applicant's claim that a narrower construction would render the Acts unconstitutional.) See also D Davis 'Elegy to Transformative Constitutionalism' in H Botha, A Van der Walt & J Van der Walt (eds) *Rights And Democracy* (2003) 57, 65.

³ Although this class of cases might be thought covered by case-type D in our enumeration, the CC has distinguished this class as a discrete category of 'constitutional matters'. See *NEHAWU* (supra) at para 15. See also *Radio Pretoria v Chairperson of the Independent Communications Authority of South Africa & Another* 2003 (5) SA 451 (T), 2003 (4) BCLR 421 (T) at para 20 (Appeal raises constitutional issues because case involves application of a 'legislative framework' devised by Parliament to give effect to the requirement laid down by FC s 192 to establish an independent authority to regulate broadcasting in the public interest.)

⁴ *Carmichele* and *Khumalo* fall within this class. See Woolman 'Application' (supra) at § 31.4(e)(ii)–(iv).

⁵ See *Baloro & Others v University of Bophuthatswana & Others* 1995 (4) SA 197 (B), 1995 (8) BCLR 1018, 1054 (B) (IC s 35(3) gives judges 'an almost plenipotentiary judicial authority to decide according to a sense of natural justice, 'equity', '*ius naturalé*', '*aequitas*' all being enshrined in the Constitution.)

respecting equality before the law,¹ freedom from arbitrary treatment,² and access to court for the fair resolution of disputes.³ Given such a potentially wide-reaching set of constitutional norms, there is no chance that the CC's competence in constitutional matters can, in practice, be 'seal[ed] hermetically' from the general jurisdiction of the SCA,⁴ and there is every chance that 'all' cases within certain broad classes — for example, labour disputes — will engage the CC's competence.⁵

Nevertheless, our enumeration of six classes of constitutional matters is finite in form, and it thus may leave open the possibility that there can arise legal issues falling outside all of the six classes — just as the Final Constitution's jurisdictional clauses evidently expect. We provide below a possible example of such a case.⁶ Our point for now is that we might expect the CC to have an eye out for such cases and indeed to find sometimes that a case raises no issue within its competence to decide — thus affirming its own commitment to the apparent constitutional principle of a contained jurisdiction for the CC.

Two cases provide graphic examples of the CC apparently straining to demonstrate exactly such a commitment. In *Van der Walt v Metcash Trading Ltd*, 'on successive days in August 2001 [separate two-judge panels of the SCA] made contrary orders in two [civil] cases which were materially identical.'⁷ A disadvantageously affected party sought review by the CC, asserting several constitutional grounds for complaint, all of which turned on the proposition that the resulting differential treatment by the judiciary of two identical and virtually simultaneous cases was unconstitutionally irrational and arbitrary. After noting the absence of any claim that either of the SCA panels had acted incompetently or in bad faith, the CC concluded that there was nothing it could do to correct what it called a

¹ FC s 9(1).

² Claims to freedom from arbitrary treatment stem from multiple constitutional roots, including the guarantee of fair administrative action in FC s 33(1) and the guarantee of equal protection of the law in FC s 9(1). See *Prinsloo v Van der Linde & Another* 1997 (3) SA 1012 (CC), 1997 (6) BCLR 759 (CC) (Court prohibits irrational legislative 'differentiations' or classifications.) For cases involving neither administrative action nor legislative classifications, the Court employs the 'principle of legality'. See *Fedsure* (supra) at para 58; *Pharmaceutical Manufacturers* (supra) at para 17; J Klaaren & G Penfold 'Just Administrative Action' in S Woolman, T Roux, J Klaaren, A Stein & M Chaskalson (eds) *Constitutional Law of South Africa* (2nd Edition, OS, 2002) Chapter 62.

³ FC s 34. See *Boesak* (supra) at para 14 ('If regard is had to . . . the wide scope and application of the Bill of Rights, and to the other detailed provisions of the Constitution such as the allocation of powers to various legislatures and structures of government, the jurisdiction vested in the Constitutional Court to determine constitutional matters and issues connected with decisions on constitutional matters is clearly an extensive jurisdiction.')

⁴ *Fedsure* (supra) at para 111.

⁵ *NEHAWU* (supra) at para 16 (Such an effect, the Court explained, is 'a consequence of our constitutional democracy.' It is, in other words, a consequence of the constitutionalisation of South African democracy combined with the fact that the makers of the Final Constitution saw fit to bring labour matters under pervasive constitutional norms.)

⁶ See § 11.2(b)(ii), (iii) *infra* (Discussion of *Phoebus Apollo Aviation CC v Minister of Public Security* 2003 (2) SA 34 (CC), 2003 (1) BCLR 14 (CC).)

⁷ *Metcash* (supra) at para 1 (The orders were made in response to petitions for leave to appeal against orders of the High Court in summary judgment applications.)

misfortune,¹ and dismissed the appeal.² ‘The Constitution,’ the *Metcash* Court remarked, ‘does not and could hardly ensure that litigants are protected against wrong decisions.’³ The Court did not further explain — perhaps no further explanation was possible — why the appellant’s claim of unconstitutionally arbitrary differentiation lacked sufficient merit, in these rare circumstances, to engage the Court’s competence.

In *Phoebus Apollo Aviation CC v Minister of Public Security*, the appellants sought to hold the Minister vicariously liable for the larcenous acts of a few wayward policemen.⁴ The sole question framed in the appeal to the CC was whether the SCA had correctly applied to the facts of the case before it the established common-law test for *respondeat superior* liability. The appellant offered no contention either that the SCA’s doctrinal formulation of the test was at direct odds with the Final Constitution, or that it required modification in order to bring it into full harmony with the spirit, purport and objects of the Bill of Rights.⁵ The CC dismissed the appeal expressly on the ground of want of jurisdiction,⁶ remarking that the application of this uncontested legal standard to a particular set of facts would typically be classed as raising a question of fact, not of law — a sort of garden-variety judicial task that ‘is of course not ordinarily a constitutional issue.’⁷

As in *Metcash Trading*, such a disposition — dismissal of the appeal — seems in line with a constitutional principle of confinement of the CC to a proper subset of all possible appeals. And yet the dismissal was hardly an irresistible dictate of strict logic. Despite the appellant’s failure to frame its pleadings and its appeal so as formally to raise before the CC the issue of the constitutional adequacy of the SCA’s formulation of the common-law *respondeat superior* doctrine, the CC easily could have raised that question on its own had it seen fit to do so. Having that fact in mind, what the CC is really telling us in *Phoebus Apollo Aviation* is that it sometimes will decline to hear argument on a claim of unconstitutionality because of the extreme *prima facie* implausibility of the claim,⁸ as the CC surely has the power to do under FC 167(6) and its own Rule 20(1).⁹

But that is not how the CC chose to frame its dismissal of the appeal in *Phoebus Apollo Aviation*. By the *Phoebus* Court’s own account, that dismissal was not a discretionary withdrawal of the leave to appeal it had previously given.¹⁰ It rather

¹ *Metcash* (supra) at para 11.

² *Ibid* at para 28.

³ *Ibid* at para 14 quoting *Lane NO v Dabelstein & Others* 2001 (2) SA 1187 (CC), 2001 (4) BCLR 312 (CC) at para 4.

⁴ 2003 (2) SA 34 (CC), 2003 (1) BCLR 14 (CC) (*Phoebus Apollo Aviation*).

⁵ *Ibid* at para 9.

⁶ *Ibid* at paras 10–1.

⁷ *Ibid*.

⁸ *Ibid* at para 6.

⁹ FC s 167(6) mandates provision for appeals to the CC from other courts, where constitutional matters are involved, ‘when it is in the interest of justice and with leave of the Constitutional Court.’ Rule 20(1) of the Rules of the CC provides that an appeal to the CC against a judgment of the SCA respecting a constitutional matter ‘shall be granted only with the special leave of the Court on application made to it.’

¹⁰ Compare *Boesak* (supra) at para 12 (‘The decision to grant or refuse leave [to appeal, in terms of FC s 167(6) and Rule 20(1) of the Rules of the CC] is a matter for the discretion of the Court.’)

was forced on the *Phoebus* Court by discovery that the case raised no issue within the CC's constitutionally bounded subject-matter competence. That form of self-explanation may be an apt gesture of recognition by the CC of the Final Constitution's plan to make its jurisdiction less than plenary. For that or other reasons, the choice to dismiss one or another case on jurisdictional grounds may represent wise judicial administration and it may fall amply within the CC's proper range of self-regulation. If so, then a cost of the constitutionalisation of the legality principle in *Fedsure* and *Pharmaceutical Manufacturers* is to make it highly implausible, if not downright impossible, for the CC ever again to dismiss an appeal, or to refuse leave to appeal, on the ground of want of jurisdiction.

(ii) *The destabilizing effect of introducing the principle of legality as a constitutional matter*

Speaking rigorously and strictly, a jurisdiction that extends to all 'constitutional matters' *must* be plenary, unless the body of judicially cognizable norms of the Final Constitution is itself subject to containment, in the sense that some cases conceivably can be brought to court to which none of these norms can plausibly be claimed to extend and apply. Owing to the presence of the constitutionalised doctrine of legality, that condition does not now hold in South Africa

As expounded by the CC in *Fedsure* and *Pharmaceutical Manufacturers*, the constitutionalised doctrine of legality encompasses a demand that any exercise of official power to the detriment of any person must comply with whatever terms and conditions may be set by any applicable law as may happen to exist. Nor does the principle stop there. It contains an *ultra vires* component, demanding that any exercise of official power to the detriment of any person — and this includes exercises of legislative power¹ — be affirmatively authorized by positive law.² The CC has made clear its view that a properly presented claim of default on either of those demands raises a constitutional matter within its jurisdiction.³ From such a premise, it apparently must follow that every possible appeal in a case at law presents a constitutional question.⁴

In any possible appeal in a case at law, at least one party must be contending that at least one state body has acted in a way that either is contrary to law or is unauthorized by law. The body accused may be an executive body, charged with

¹ See *Fedsure* (supra) at paras 58–9 ('It seems central to the conception of our constitutional order that the legislature and executive in every sphere are constrained by the principle that they may exercise no power and perform no function beyond that conferred upon them by law.') See also J Klaaren & G Penfold 'Just Administrative Action' in S Woolman, T Roux, J Klaaren, A Stein & M Chaskalson (eds) *Constitutional Law of South Africa* (2nd Edition, OS, 2002) Chapter 62.

² See *Minister of Public Works & Others v Kyalami Ridge Environmental Association & Others* 2001 (3) SA 1151 (CC), 2001 (7) BCLR 652 (CC) at para 35.

³ See § 11.3(b) *infra*.

⁴ See F Snyckers 'Civil and Constitutional Procedure' (2000) *Annual Survey of South African Law* 595–6 (Asserting that the CC's conclusion, in *Fedsure*, that claims of deviation from legality raise a constitutional question, 'could, if taken to its logical conclusion, wreak havoc with the distinction between constitutional and non-constitutional matters for purposes of jurisdiction. . . . One need only postulate Kelsenian notions that all legal questions are to be answered in terms of their ultimate sanction to find that every legal question has now become "constitutional".')

acting in contravention of statute, of the Final Constitution, or of the common law, or of acting without due authorization from any of those sources. It may be a subordinate legislative body charged with acting in violation of superior legislation, of the Final Constitution, or of the common law, or of acting without due authorization from any of those sources. It may be a provincial legislature or the national parliament, charged with acting in contravention of, or without authorization from, the Final Constitution.

Or — and here comes the rub — the body complained of might be a lower court charged with having made a legally erroneous or legally unauthorized decision to the complainant's detriment. After all, even a good faith misapplication to the facts of a concededly correct legal rule or standard, as claimed in *Phoebus Apollo Aviation*, seemingly must count as a legally non-authorized exercise of power by the judge who perpetrates it, to the detriment of a presumably innocent victim — as clear a case as one might hope to see of a direct insult to the principle of legality if allowed to stand uncorrected by a superior court that knows better.¹

A charge of one or another of these kinds of legal misprision, against one or another of these kinds of bodies, is a necessary component of any appeal in a case at law. But every one of these kinds of charges also amounts to a charge of deviation from the principle of legality, which the CC holds to be a judicially cognizable mandate of the Final Constitution. Thus they all raise constitutional matters. The scope of 'constitutional matters' turns out coextensive with the scope of all claims that might appear in any viable appeal. The CC's finding that the principle of legality stands among the judicially cognizable and enforceable norms laid down by the Final Constitution is apparently at war with the principle of a less-than-plenary subject-matter competence for the CC, which the Court also repeatedly has endorsed.

(iii) *The Constitutional Court has never directly addressed this difficulty*

The CC has recognized expressly the expansive result for its subject-matter competence flowing from the constitutionalised legality doctrine: 'In *Pharmaceutical Manufacturers* ... [a] unanimous Court held that under our new constitutional order the control of public power is always a constitutional matter.'² Of course, that declaration stops short of admitting that the Court's jurisdiction now is *plenary* for all intents and purposes (for not every case need be deemed to involve the control of public power), so it is worth asking whether any sort of reasoning remains by which so awkward-seeming a conclusion might be forestalled or denied.

Consider, again, a case like *Phoebus Apollo Aviation*. The plaintiff's claim (*i*) is

¹ The CC has made clear that the unquestioned good faith an official actor does not absolve the actor's legal errors from judicial remediation as breaches of the constitutionalised principle of legality. See *Pharmaceutical Manufacturers* (supra) at para 89 ('The fact that the President mistakenly believed that it was appropriate to bring the Act into force, and acted in good faith in doing so, does not put the matter beyond the reach of the Court's powers of review. What the Constitution requires is that public power vested in the executive and other functionaries be exercised in an objectively rational manner.')

² *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs & Another* 2004 (4) SA 490 (CC), 2004 (7) BCLR 687 (CC) ('*Bato*') at para 22; *Affordable Medicines* (supra) at paras 48–9.

based on common law, hence it implicates no particular exercise of legislative power. The plaintiff concedes, or the CC finds, that (ii) the legally cognizable wrong or harm pleaded by the plaintiff was perpetrated without any use of executive powers, by persons acting without the support or connivance of any holder of executive powers.¹ Insofar as the wrong or harm is, in substance, one of a sort that arguably is covered by some provision of the Bill of Rights, the CC concludes that (iii) taking into account the nature of the right in question and the nature of any duty imposed by the right, it is not one of those rights that by force of FC s 8(2) would bind a natural or juristic person; hence, there is no occasion in terms of FC s 8(3) to develop the common law.² The CC further concludes that (iv) the common law doctrine applied below stands in no need of development in order that it duly promote the spirit, purport and objects of the Bill of Rights.³ Accordingly, the CC finds itself lacking power to look any further into the ordinary, residual common law merits of the case.

The CC has not doubted that often there will be such merits for *some* court — other than itself — to look into. The apparent premise is that there are sundry occasions for common-law doctrinal choice where either of two or more competing resolutions will correspond adequately to the Final Constitution’s spirit, purport and objects and yet only one of these will be correct or best in the eyes of a responsible common-law judge.⁴ In *Phoebus Apollo Aviation*, the CC acted on the basis that *this* decision is none of its proper business. The *Phoebus* Court purported to have acted thus not as a matter of discretion but in recognition of a legal curb on its powers. Having made the findings and conclusions we labelled (i), (ii), (iii), and (iv), the CC held itself barred by the Final Constitution’s jurisdictional mandates from proceeding further.

Absent the constitutionlised doctrine of legality, such reasoning may strike us as supportable.⁵ In the presence of that doctrine, the reasoning falters badly. A lower court judge who enters a legally erroneous judgment acts in contravention of or beyond her legally authorised powers, in apparent breach of the doctrine of legality. If legality is a requirement rooted in the Final Constitution, then a party who claims that the judge has broken it asserts a constitutional claim and raises a constitutional matter. No possible appeal escapes that logic.

¹ See *Phoebus Apollo Aviation* (supra) at paras 6, 8.

² Ibid at para 4 (Holding that the protections of FC s 25(1) ‘are aimed at protecting private property rights against governmental action and are quite irrelevant’ where the parties charged with robbery and theft have acted independently of the government.) See also S Woolman ‘Application’ in S Woolman, T Roux, J Klaaren, A Stein & M Chaskalson (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2004) Chapter 31. But see *Modderklip* (supra) at para 26 (Constitutional Court wrote as if the question of horizontal application of FC s 25(1) is still an open one, making no mention of its judgment in *Phoebus Apollo*.) Cf T Roux ‘Property’ in S Woolman, T Roux, J Klaaren, A Stein & M Chaskalson (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2003) Chapter 46.

³ See FC s 39(2); *Phoebus Apollo Aviation* (supra) at paras 9–10.

⁴ See *Carmichele* (supra) at paras 55–6 (‘Not only must the common law be developed in a way that meets the FC s 39(2) objectives, but it must be done in a way most appropriate for the development of the common law within its own paradigm. There are notionally different ways to develop the common law [relevant to this case] under s 39(2) of the Constitution, all of which might be consistent with its provisions. Not all would necessarily be equally beneficial for the common law.’)

⁵ But see § 11.4(c) *infra*.

True, but the logic depends on a premise that some might think debatable. The logic takes for granted that legality is defeated by good faith mistakes of legal judgment *by judges* in the same way as it unquestionably is defeated by judicially uncorrected good faith mistakes of legal judgment by executive officials, and by legislatures with regard to constitutional limitations and requirements.¹ Are there reasons to doubt this premise?

From *Fedsure* and *Pharmaceutical Manufacturers*, we understand that the constitutionalised principle of legality is meant to be made effective, as other legal norms are made effective, by judges enforcing the principle in litigated cases. Now, for a judge to apply the principle of legality to a case in litigation is nothing other than for that judge to decide whether certain questioned actions of *other* persons or bodies have or have not been conducted according to law. But the judge doing that is simply doing, on that particular occasion, what every judge is expected to do in every single case that ever may come before her: do the best she can to discern the relevant law correctly, and apply that law correctly, to the acts of the parties and others connected to the case.

Suppose we feel sure that the High Court judges in a particular case have decided the case in good faith and well within the bounds of legal competence. But suppose we also — being competent lawyers ourselves — disagree strongly with their rulings of law or with their applications of the law to the facts. Would it occur to us to think or to say that the judges had broken some principle of legality or the rule of law, just because we, with conviction, would have decided the matter differently? Surely not. What the rule of law requires of judges is legal competence and good faith, and mere error of legal judgment is a sign of a lack of neither. Of course, it is always open to an appellate court to find that any given lower court judgment has been rendered in bad faith or with gross incompetence. Such a finding, however, is tantamount to a finding of corrupt, malicious, or manifestly negligent conduct by the judge below, and so would require nullification of the tainted judicial handiwork quite aside from any highfalutin ‘principle of legality.’ Therefore (it might be said), it can make no sense — it would be purely redundant — to apply the legality principle to the acts of judges deciding cases. Perhaps judges engaged in the normal judicial business of deciding cases according to law should not, in that specific sense, be regarded as public officials wielding official powers.

We need not here resolve the merits of such a view. What we can say is that the CC’s jurisdictionally framed dismissals of the appeals in *Metcash* and *Phoebus Apollo Aviation* suggest that possibly the CC has adopted it. In *Metcash*, the CC offered the observation that ‘the judicial system in any democracy has to rely on decisions taken in good faith by judges’ as a reason why the bare fact of an erroneous judicial decision cannot give rise to a constitutional complaint.² Both cases show

¹ See *Pharmaceutical Manufacturers* (supra) at para 89 (‘The fact that the President mistakenly believed that it was appropriate to bring the Act into force, and acted in good faith in doing so, does not put the matter beyond the reach of the Court’s powers of review. What the Constitution requires is that public power vested in the executive and other functionaries be exercised in an objectively rational manner.’)

² *Metcash* (supra) at para 19.

how, accepting this view, the CC can contrive to give effect to a real and substantial restriction imposed on its subject-matter competence by FC s 167(3), even with the principle of legality constantly looming as a part of constitutional law capable of giving rise to a ‘constitutional matter’.¹

11.3 THE CAUSES OF THE CONSTITUTIONALISATION OF THE LEGALITY PRINCIPLE

(a) Introduction

The plain fact remains that the CC’s folding of the legality principle into the justiciable positive law laid down by the Final Constitution sits uneasily alongside the CC’s own recognition that its charter is limited by FC s 167(3) to ‘constitutional matters,’ presumably meaning some proper subset of all the litigable matters there are. The CC is explicit that, with the legality principle in tow, its jurisdiction extends to every single case in which ‘the control of public power’ is at issue,² not excluding cases in which the only laws of which infractions are claimed are pieces of ordinary statute law or of common law,³ and also not excluding cases in which the only claim against the exercise of power is that no law can be found to authorize it.⁴

At least to that extent, acceptance of the legality principle as a *constitutionally enacted* restraint on power — as distinct from a doctrine having common-law status only — exerts expansive pressure on the CC’s jurisdiction, relative to the scope of jurisdiction that one might naively expect would accrue to a supposedly specialized ‘constitutional’ court; and, in fact — as we soon shall see — the CC’s recognition of the legality principle as a piece of enacted constitutional law undoubtedly was meant to have exactly such an effect. It is in order, therefore, to ask what circumstances might have impelled, and what considerations might justify, this turn in constitutional-legal doctrine, which has the effect of very nearly transforming the CC into a court of general jurisdiction (insofar as it might see fit to act in such a capacity), contrary to the design that is apparent on the face of the Final Constitution.

¹ We are concerned in this chapter with the legality principle’s implications for the outer bounds of the CC’s authority in terms of ‘constitutional matters,’ should the Court choose to take cognizance of a case. This question is to be distinguished from other, important questions concerning the CC’s management of its authority — concerning, for example, when appeals will be steered to the Supreme Court of Appeal as a matter of Court rule, policy, and practice, and when High Court decisions will be left standing without substantive review. See *Snyckers* (supra) at 595–596. These management questions, important as they are, are beyond the scope of our treatment here.

² *Bato* (supra) at para 22 (‘In *Pharmaceutical Manufacturers* (supra) [a] unanimous Court held that under our new constitutional order the control of public power is always a constitutional matter.’) See S Woolman & D Brand ‘Is There a Constitution in this Courtroom? Constitutional Jurisdiction after *Afrrox* and *Walters*’ (2003) 18 *S.APL* 38 (Authors concur that the CC’s reasoning in *Pharmaceutical Manufacturers* entails, in effect, that ‘all manifestations of public power engage[s] the rule of law, and thus the Final Constitution.’)

³ *Bato* (supra) at para 22.

⁴ *Pharmaceutical Manufacturers* stands for this proposition.

To ask about the origins or causes of the constitutionalisation of the legality principle is to ask not one question but two. From the internal standpoint of the CC or anyone seeking sympathetically to account for its actions, the question is one of justification: How might it be thought that the CC does best by the Final Constitution's drafters, or by its constituency more broadly conceived, to conclude that the Final Constitution has enacted the legality principle as a component of judicially cognizable constitutional law, despite the trouble that makes for the jurisdictional plan that is plain on the face of the instrument? From the external standpoint of a historian, the question would be different: What factors caused or led to that action by the CC? What factors actually prompted the CC to draw the conclusion that the Final Constitution has enacted the legality principle as a component of judicially cognizable constitutional law?

(b) The straight historical account

There is, of course, a good chance that answers to the two questions will overlap. Usually, if we try to list the main, proximate causes for some legal-interpretative choice made by a court, we'll want to include in our list certain facts regarding the judges' beliefs about which choice would be the right one, legally speaking. The judges, we think, will have acted as they did because, as matter of fact, they held certain beliefs about how they, as judges of the law, ought to act in the circumstances. Having identified these beliefs as best we can, we may or may not find them consonant with what we ourselves would approve as the best legal judgment. Insofar as we do so approve them, that part of our causal explanation for the judicial act ('they did it because they thought it was normatively justified for such-and-such reasons') will, for us, subsume a justification for that act.

But the normative convictions of the judges, however well warranted we may find them to be, need not ever stand in our eyes as the *sole* cause for a court's interpretative act, nor would historians be likely to find such convictions the sole cause of the specific judicial act that concerns us here. From the standpoint of narrative history, one plain proximate cause of the CC's pronouncements in *Fedsure* and *Pharmaceutical Manufacturers* nailing down the constitutional-legal status of the principle of legality was a simmering turf war between it and the SCA.¹

This was not exactly an openly declared struggle, and indeed it is sometimes hard to tell whether a given adjudicatory episode is turf-war related or not. Take

¹ See S Woolman & D Brand 'Is There a Constitution in this Courtroom? Constitutional Jurisdiction after *Afrox* and *Walters*' (2003) 18 *SAPL* 38. On the 'widespread perception of a rivalry' between the two courts, the factual bases for it, and some reasons for deploring it, see J van der Walt 'Progressive Indirect Horizontal Application of the Bill of Rights: Towards a Co-operative Relation between Common-law and Constitutional Jurisprudence' (2001) 17 *SAJHR* 342, 358 (J van der Walt 'Towards a Co-operative Relation'). Tussles between a dedicated CC and an 'ordinary' judiciary have occurred in other legal systems. See AJ van der Walt *Constitutional Property Clauses: A Comparative Analysis* (1999) 141–5 (Describing a running disagreement in Germany between the Federal Constitutional Court and the civil courts over the availability of monetary compensation as a remedy for constitutionally improper regulation of property).

for example the SCA's decision in *Amod v Multilateral Motor Vehicle Accidents Fund*.¹ Decisions from pre-transition days had taken the view that 'potentially polygamous' (even if de facto monogamous) marriages according to Muslim rites, being *contra bonos mores*, give rise to no obligations enforceable in South African civil courts.² In *Amod*, Mahomed CJ found, to the contrary, that South African *boni mores* could no longer be found scandalised by de facto monogamous Muslim rite marriages.

Three years previously, in *Ryland v Edros*, Farlam J had ruled to similar effect in the High Court.³ Both Farlam J and Mahomed CJ relied on the Constitution to help overcome what otherwise apparently would have been a serious doubt about whether any intervening factual shift in the social ethos had occurred, sufficient to support a departure from the established doctrine that Muslim-rite marriages are *contra bonos mores*.⁴ They did so, however, in different ways. Farlam J explained that he was acting in compliance with the Interim Constitution's command to the judiciary to develop the common law with due regard to the spirit, purport and objects of the Bill of Rights.⁵ Mahomed CJ, by contrast, denied that his judgment was in any way dictated by the Interim Constitution or was, in fact, anything other than a normal, common-law adjustment of the content of *boni mores* to keep pace with objective social conditions, including facts about the prevailing social ethos.⁶ To Mahomed CJ, adoption of the Constitution was significant in the *Amod* case not by reason of any legal command the Interim Constitution might have directed to the judiciary to revise the *boni mores* doctrine as previously applied to Muslim rite marriages, but just as a historical fact evincing a relevant, factual change in the prevailing social ethos.

What might account for the differing approaches of Mahomed CJ in *Amod* and Farlam J in *Ryland*? Perhaps an answer lies in part in their different locations in the judicial hierarchy. Farlam J might have entertained some doubt regarding a High Court's authority — constitutional mandates aside — to revise clear Appellate Division precedent regarding the bearing of *boni mores* on Muslim-rite marriage cases.⁷ Mahomed CJ could not have doubted the authority of the SCA to do

¹ 1999 (4) SA 1319 (SCA) ('*Amod*').

² See *Ismail v Ismail* 1983 (1) SA 1006 (A) ('*Ismail*').

³ 1997 (2) SA 690 (C), [1996] 413 All SA 557 (C), 1997 (1) BCLR 77 (C) ('*Ryland*').

⁴ *Ibid* at 704 (As Farlam J put the matter, 'In the present case it would be difficult to find that there has been such a change in the general sense of justice of the community as to justify a refusal to follow the *Ismail* decision if it were not for the new Constitution. In the circumstances I prefer to base my decision on the fundamental alteration in regard to the basic values on which our civil policy is based which has been brought about by the enactment and coming into operation of the new Constitution.'))

⁵ IC s 35(3). See *Ryland* (supra) at 705 ('In my view it is clear that if the spirit, purport and objects of chap 3 of the [Interim] Constitution and the basic values underlying it are in conflict with the view as to public policy expressed and applied in the *Ismail* case then the values underlying chap 3 . . . must prevail.')

⁶ See *Amod* (supra) at para 29 ('I have reached [my] conclusion without any reliance on either s 35(3) of the Interim Constitution or s 39(2) of the 1996 Constitution. It is therefore unnecessary for me to consider the submission of Counsel for the appellant based on these constitutional provisions.')

⁷ In fact, Farlam J's apparent assumption that IC s 35(3) was the key to unlock High Courts from bondage to Appellate Division (later Supreme Court of Appeal) precedent later was rejected by the Supreme Court of Appeal in *Afrox*. That rejection has a bearing on the division of authority between the CC and the Supreme Court of Appeal. If High Courts are barred from taking the initiative to develop the

so. The fact remains that Mahomed CJ had the choice to follow the path marked out by Farlam J — indeed, a prior CC decision in the case had clearly anticipated that the SCA would do just that¹ — and for some reason chose not to take that course. What might have been that reason?

In the view of many, a major share of instances of common-law reconstruction impelled by FC s 39(2), at least in the near term, are likely to be cases involving applications of *boni mores* and other general common law standards such as good faith and unconscionability.² Mahomed CJ's judgment in *Amod* provides a model for High Court and SCA judges who might wish to package any given (or every) judgment of this kind so as ostensibly to keep it out of the class of constitutional matters, with a view to reserving for the SCA final control over this important stream of impending future cases.³

Was that any part of Mahomed CJ's purpose or intention in packaging his *Amod* judgment as he did? It would be rash to say so, because there is a clear and adequate alternative explanation for his choice. By placing his judgment in *Amod* squarely on non-constitutional grounds, Mahomed CJ — as he explained — avoided what could have been thorny questions about application of IC s 35(3) or FC s 39(2) to a case in which the cause of action arose prior to commencement of the Interim Constitution.⁴

Regardless of intention, however, the SCA's *Amod* judgment suggests a device of potentially broad applicability by which the SCA, if ever minded to do so, might seek to insulate its judgments in constitutionally sensitive territory from review by the CC. In that way, *Amod* prefigures the possible outbreak of open contestation between the SCA and the CC over final authority in important branches of South African jurisprudence. Such contestation did break out soon thereafter, and the bone of contention was the SCA's attempted use — this time unquestionably with jurisdiction-expanding intentions — of a device very similar to that suggested by its *Amod* judgment.

Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council was decided under the Interim Constitution. The case involved an attack on the lawfulness of property rate levies by certain local government authorities on the ground (among others) that the levies in question were *ultra vires*,

common law in the face of entrenched AD precedent, then a High Court-to-Constitutional Court channel (High Court revises common law, CC affirms on direct appeal) cannot be set up to circumvent the Supreme Court of Appeal. See Woolman & Brand (supra) at 38–83 (On how the CC's and SCA's views on both constitutional jurisdiction and *stare decisis* conspire to block the development of the common law.) The CC still could revise the common law on its own hook, so to speak, on direct appeals from High Court decisions failing to do so, but the CC has made clear its very substantial reluctance to act in that manner.

¹ See *Amod v Multilateral Motor Accidents Fund* 1998 (4) SA 753 (CC), 1998 (10) BCLR 1207 (CC) at paras 33–4.

² See, eg, J van der Walt 'Towards a Co-operative Relation' (supra) at 351–2; A J van der Walt 'Transformative Constitutionalism and the Development of South African Property Law' 2005 *TSAAR* ('Transformative Constitutionalism').

³ FC s 168(3) makes the Supreme Court of Appeal 'the highest court of appeal except in constitutional matters.'

⁴ See *Amod* (supra) at para 29.

unauthorized by the terms of any applicable law.¹ The High Court had rejected this claim, and the SCA had referred to the CC the question of whether an appeal from the High Court's ruling would more properly be directed to the CC or the SCA. The doubt arose because the Interim Constitution not only limited the CC's subject-matter jurisdiction to constitutional matters,² it also — unlike the Final Constitution — excluded the Appellate Division (predecessor of the SCA) from deciding any constitutional matter³ (aside from developing the common law under the aegis of IC s 35(3).⁴) If, but only if, *ultra vires* was considered to be a subsisting doctrine of the common law, *as separate and distinct from law laid down by the Interim Constitution*, the correctness of the High Court's rejection of the *ultra vires* claim apparently would fall to be decided exclusively and finally by the SCA.

The CC held, to the contrary, that the *ultra vires* claim raised a constitutional matter, so that review in this case fell properly to it and not the SCA. At no point does the Interim Constitution state in so many words that a local government may act only within the powers lawfully conferred upon it. The *Fedsure* Court nevertheless reasoned that it is 'a fundamental principle of the rule of law, recognised widely, that the exercise of public power is only legitimate where lawful,' and 'this principle of legality' is 'generally understood to be a fundamental principle of constitutional law.'⁵ The *Fedsure* Court explained further:

It seems central to the conception of our constitutional order that the legislature and executive in every sphere are constrained by the principle that they may exercise no power and perform no function beyond that conferred upon them by law. At least in this sense, then, the principle of legality is implied within the terms of the Interim Constitution. . . . We . . . hold that fundamental to the Interim Constitution is a principle of legality.⁶

The CC recognized, of course, that a principle opposed to *ultra vires* government action was a part of the pre-Constitutional common law, and one that 'remain[s] under the new constitutional order.'⁷ But the old doctrine now enjoys a new sort of support in the legal firmament. It is now 'underpinned (and supplemented where necessary)' by a principle of legality that is 'implicit in the Constitution.'⁸ (With an apparent eye to the future, the *Fedsure* Court took note

¹ A second ground of attack was that the procedures by which the rate-levy resolutions were adopted failed to satisfy the requirements of IC s 24, which applied to 'administrative action.' The CC concluded that the local government actions in this case were 'legislative,' not 'administrative,' so IC s 24 fell away from the case. See *Fedsure* (supra) at paras 41–2.

² IC s 98(2).

³ See FC s 101(5) ('The Appellate Division shall have no jurisdiction to adjudicate any matter within the jurisdiction of the Constitutional Court').

⁴ See *Du Plessis v De Klerk* 1996 (3) SA 850 (CC), 1996 (5) BCLR 658 (CC) ('*Du Plessis*'). See also Woolman & Brand (supra) at 42 (Authors note that most jurists and commentators did not, in fact, believe the AD possessed even this limited power of constitutional review until the CC enunciated that position in *Du Plessis v De Klerk*.)

⁵ *Fedsure* (supra) at para 56.

⁶ *Ibid* at para 58.

⁷ *Ibid* at para 59.

⁸ *Ibid*.

that the FC s 1(c), declares ‘supremacy of the Constitution and the rule of law’ to be a founding value of the Republic.¹

It would follow that the CC possessed jurisdiction in *Fedsure* and other cases like it. But would it necessarily follow that the SCA *lacked* jurisdiction in the case, by force of the Interim Constitution’s exclusion of the Appellate Division from adjudicating ‘any matter within the jurisdiction of the CC?’ Conceivably not, if *ultra vires* survives as a common-law doctrine with a footing outside as well as inside the Interim Constitution.

Today, of course, the question must take a somewhat different form. It is no longer a question of who can exercise jurisdiction but of whose decision will be final. Today, the SCA is competent in constitutional as well as non-constitutional matters. However, by force of FC s 168(3)² and by clear implication of FC s 167(3), the SCA’s decisions in constitutional matters are reviewable by the CC, whereas its decisions in non-constitutional matters are not. Thus, if *ultra vires* and other dimensions of the common-law doctrine of legality still retain a separate life outside the Final Constitution — a kind of Captain’s Paradise of legal doctrine — that might arguably leave the SCA room to render its judgments on ‘legality’ claims in a form resistant to possible reversal by the CC.³ In the *Fedsure* litigation, the SCA raised a possibility of this kind in a tentative way⁴ and the CC clearly gestured toward a rejection of it,⁵ but there was no occasion to resolve the question definitively.

The posture of the SCA turned more aggressive in *Container Logistics*.⁶ The applicants contended that the responsible official had acted arbitrarily — had failed properly to ‘apply his mind’ — in holding them liable for certain import duties. They couched this contention both as a common law and as a constitutional claim. Agreeing with the contention on the merits, and concluding that ‘at common law such a finding provides sufficient reason to set the decision aside,’ the SCA declined to decide whether the questioned administrative action also, for the same reason, fell foul of IC s 24.⁷ There can be little doubt that the SCA, by disposing of the case in this manner, expected or hoped to make its decision

¹ *Fedsure* (supra) at para 59.

² FC s 168(3) declares the Supreme Court of Appeal to be ‘the highest court of appeal except in constitutional matters.’

³ Compare the discussion of *Amod* (supra).

⁴ See *Fedsure Life Assurance Ltd & Others v Greater Johannesburg Transitional Metropolitan Council & Others* 1998 (2) SA 1115, 1124 (SCA), 1998 (6) BCLR 671, 678 (SCA) (‘It could conceivably be argued that the Interim Constitution did not exclude the jurisdiction of the Appellate Division to adjudicate on the cogency of any attack on administrative actions where such attacks are based on common-law grounds, and that the Appellate Division continues to enjoy some kind of parallel jurisdiction with the Constitutional Court where the relevant attack is founded on common-law grounds. I have some doubt as to whether this would be a sound argument.’)

⁵ See *Fedsure* (supra) at para 103.

⁶ *Commissioner for Customs and Excise v Container Logistics (Pty) Ltd; Commissioner for Customs and Excise v Rennies Group Ltd t/a Renfreight* 1999 (3) SA 771 (SCA), 1999 (8) BCLR 833 (SCA) (‘*Container Logistics*’).

⁷ *Ibid* at para 21.

proof against further examination by the CC. As the SCA explained its stand in *Container Logistics*:

Judicial review under the Constitution and under the common law are different concepts. . . . Constitutional review is concerned with the constitutional legality of administrative action, the question in each case being whether it is or is not consistent with the Constitution, and the only criterion being the Constitution itself. Judicial review under the common law is essentially also concerned with the legality of administrative action but the question in each case is whether the action under consideration is in accordance with the behests of the empowering statute and the requirements of natural justice. The enquiry in this regard is not governed by a single criterion. The grounds for review which the courts have developed over the years can never be regarded as a *numerus clausus* for the simple reason that administrative law is not static. As new notions develop and take root, so must new measures be devised to control the exercise of [official] functions. . . .¹

The SCA conceded freely that ‘it is difficult to conceive of a case where the question of legality cannot ultimately be reduced to a question of constitutionality.’² It nevertheless insisted that the common-law grounds for review had not ‘ceased to exist.’ The SCA could detect in the Interim Constitution no indication of an intention ‘to bring about a situation in which, once a court finds that administrative action was not in accordance with the empowering legislation or the requirements of natural justice, interference is only permissible on constitutional grounds.’³ (This, of course, meant ‘only on grounds regarding which the CC has final powers of review.’)

The stage thus was set for the CC’s final riposte in *Pharmaceutical Manufacturers*. Acting on mistaken and disastrous bureaucratic advice, the President, as authorized by a certain Act of Parliament, issued a proclamation bringing the Act into force. Discovering the error, the President applied to the courts for an order annulling the proclamation and its effect. The High Court granted the requested order on the ground that the issuance of the proclamation was, in the circumstances, an *ultra vires* action by the President. The CC had to decide whether it had jurisdiction to review the High Court’s ruling or whether, to the contrary, such jurisdiction would fall exclusively to the SCA to decide as court of last resort.

The CC answered by upholding its own jurisdiction. The High Court’s finding of *ultra vires* action by the President, the CC concluded, was ineluctably ‘a finding on a constitutional matter.’⁴ In the course of explaining this conclusion, the CC conveyed its flat and final rejection of the SCA’s sally in *Container Logistics* regarding the survival of the common law doctrine of legality as an extra-constitutional ground for judicial decision.

In a sense, the CC began, ‘the control of public power by the courts through judicial review is and always has been a constitutional matter,’ but now:

¹ *Container Logistics* (supra) at para 20.

² Ibid.

³ Ibid.

⁴ *Pharmaceutical Manufacturers* (supra) at para 20.

[t]he common law principles that previously provided the grounds for judicial review of public power have been subsumed under the Constitution, and in so far as they might continue to be relevant to judicial review, they gain their force from the Constitution. In the judicial review of public power, the two are intertwined and do not constitute separate concepts.¹

The CC found unacceptable any suggestion that the common law subsists as a body of norms ‘separate and distinct from the Constitution’:

There are not two systems of law, . . . each operating in its own field with its own highest court. There is only one system of law. It is shaped by the Constitution which is the supreme law, and all law, including the common law, derives its force from the Constitution and is subject to constitutional control . . . Whereas previously constitutional law formed part of and was developed consistently with the common law, the roles have been reversed. The written Constitution articulates and gives effect to the governing principles of constitutional law. Even if the common law constitutional principles continue to have application in matters not expressly dealt with by the Constitution, (and that need not be decided in this case) the Constitution is the supreme law and the common law, in so far as it has any application, must be developed consistently with it, and subject to constitutional control.²

No text in the Final Constitution intimates otherwise. Indeed, the CC continued, IC ss 33(3)³ and 35(3) and FC s 39(3)⁴ and (2) imply the contrary proposition:⁵

The reference in s 33(3) of the Interim Constitution and s 39(3) of the 1996 Constitution is to ‘other rights’, and not to rights enshrined in the respective Constitutions themselves. That there are rights beyond those expressly mentioned in the Constitution does not mean that there are two systems of law. Nor would this follow from the reference in s 35(3) of the Interim Constitution and s 39(2) of the 1996 Constitution to the development of the common law. The common law supplements the provisions of the written Constitution but derives its force from it. It must be developed to fulfil the purposes of the Constitution and the legal order that it proclaims — thus, the command that law be developed and interpreted by the courts to promote the ‘spirit, purport and objects of the Bill of Rights.’ . . . There is, however, only one system of law and within that system the Constitution is the supreme law with which all other law must comply.

The CC thus established, once and for all, that the SCA cannot insulate a decision on legality from CC review by dressing it as a merely common law (and hence *not* a constitutional) decision. But the CC’s declarations in *Pharmaceutical Manufacturers* did

¹ *Pharmaceutical Manufacturers* (supra) at para 33.

² Ibid at paras 44–45 (footnote omitted).

³ IC s 33(3) read: ‘The entrenchment of the rights in terms of this Chapter shall not be construed as denying the existence of any other rights or freedoms recognized or conferred by common law, customary law, or legislation to the extent that they are not inconsistent with this Chapter.’

⁴ FC s 39(3) reads: ‘The Bill of Rights does not deny the existence of any other rights or freedoms that are recognised or conferred by common law, customary law or legislation, to the extent that they are consistent with the Bill.’

⁵ The CC at this point was responding to remarks of the Supreme Court of Appeal made in *Container Logistics*. See *Container Logistics* (supra) at para 20.

more. They pronounced emphatically a doctrine of the unity of all South African law under the aegis and control of the Final Constitution, which has important further implications, to be explored below.

(c) The justificatory account

In *Fedsure* and *Pharmaceutical Manufacturers*, the CC conferred upon the legality principle the status of a constitutional matter falling within the purview of the CC's special powers and responsibilities in the new constitutional order. The *Pharmaceutical Manufacturers* Court took this course despite the fact that doing so goes far to undercut the principle of a contained subject-matter competence for the CC, to which the Court also professes loyalty. It did so, moreover, at least initially as a matter of 'implication' in the absence of any plain-to-the-naked-eye textual compulsion.¹

Of course there may be good grounds for such an implication. We next consider what such grounds might be.

The most promising line of justification for the implication appears to lie in the following four claims:

1. An interpretation of the Final Constitution is justified if (a) it is conducive to the Final Constitution's scheme of ends and means whereas rejection of that interpretation possibly would pose a hindrance to that scheme and (b) the interpretation is one that otherwise is open to a court under general, non-literalist principles of legal interpretation.
2. Among the Final Constitution's chief ends is the pursuit of social transformation in South Africa through the medium of law. Among its chosen means to that end is the establishment of a new and distinct branch of the South African judiciary — the CC — to serve as special judicial guardian of the Final Constitution's transformative function.
3. Survival of the legality principle in post-Constitutional South African law is required by general considerations of legal policy and by the Final Constitution's most central aims.
4. Survival of the legality principle as a doctrine of the common law independent of the Final Constitution would carry risks of endangerment of the CC's special guardianship role.

Claim 1 asserts, in effect, a purposive or teleological approach to constitutional interpretation. Claim 2 asserts a brace of leading and pervasive constitutional purposes by which interpretation accordingly should be guided, related to each other as a means (protection of the special guardianship role of the CC) to an end (the Final Constitution's socially transformative aim). Claims 3 and 4 combine to assert that this brace of purposes is assisted by acceptance of the doctrine of the constitutional-legal status of the legality principle and might stand to be endangered by rejection of that doctrine.

¹ See § 11.1 *supra*.

The CC has adhered consistently, from the outset of its work, to the sort of teleological approach to constitutional interpretation affirmed by claim 1.¹ In this respect, the CC's decisions and opinions in *Fedsure* and *Pharmaceutical Manufacturers* call for no special justification. Those opinions, moreover, show convincingly that the inference of a constitution-based, justiciable principle of legality is one that is neither precluded by the Final Constitution's text nor apparently out of kilter with main themes of that text. The merit of the inference, as a matter of purposive interpretation, thus will rise and fall with the cogency and strength of claims 2, 3, and 4.

To those claims we now turn. The brace of constitutional purposes affirmed by Claim 2 are discussed below in subsection (i). Claim 3 is the subject of subsection (ii), and Claim 4 of subsection (iii).

(i) The 'transformative' character of the Final Constitution and the special role of the Constitutional Court

Some constitutions may be called primarily *preservative*, in the sense that their aim is to consolidate and memorialise in the law, in a relatively enduring form, 'a historical consensus of values and aspirations evolved incrementally from a stable and unbroken past.'² Other constitutions are primarily transformative, aimed at bringing to pass a societal future that will differ 'starkly' and 'dramatically' from a decisively rejected past.³ The CC has declared time and again its view that the Final Constitution it sits to construe and apply is of the transformative kind,⁴ a view with which there has been and seemingly could be little or no serious disagreement. The Court also has repeatedly conveyed — perhaps most dramatically in *President of the Republic & Others v South African Rugby Football Union & Others* — its understanding that it was brought into being for the particular purpose of ensuring that judicial applications of the new Constitution would not falter from the transformative commitment.⁵ No doubt other branches of the judiciary

¹ See L du Plessis 'Interpretation' in S Woolman, T Roux, J Klaaren, A Stein & M Chaskalson (eds) *Constitutional Law of South Africa* (2nd Edition, OS, June 2005) Chapter 3.

² *S v Makwanyane & Another* 1995 (3) SA 391 (CC), 1995 (6) BCLR 665 (CC) at para 262 ('*Makwanyane*') (Mahomed J). Compare *Michael H v Gerald D* 491 US 110, 141 (1989) (Scalia J, in effect, classified the US Constitution as preservative — its purpose being not to 'enable this Court to insert new [values],' but rather, to the contrary, to 'prevent future generations from lightly casting aside traditional values.'). See also C R Sunstein *Designing Democracy: What Constitutions Do* (2001) 67–8; L Lessig *Code and Other Laws of Cyberspace* (1999).

³ *Makwanyane* (supra) at 262. A transformative constitutional vision does not ignore the values of continuity. It retains from the past whatever is 'defensible' in the envisioned future. See K Klare 'Legal Culture and Transformative Constitutionalism' (1998) 14 *SAJHR* 146; D Moseneke, 'The Fourth Bram Fischer Memorial Lecture: Transformative Adjudication' (2002) 18 *SAJHR* 309; A J van der Walt 'Transformative Constitutionalism' (supra).

⁴ See *Mkontwana v Nelson Mandela Metropolitan Municipality & Another* 2005 (1) SA 530 (CC), 2005 (2) BCLR 150 (CC) at para 81 ('*Mkontwana*') (O'Regan J) ('As this Court has emphasised on many occasions, our Constitution is a document committed to social transformation.')

⁵ 1999 (4) SA 147 (CC), 1999 (7) BCLR 725 (CC) at paras 73–6.

are expected to work toward the same end,¹ but a special responsibility to secure it has devolved upon the CC.

Both reason and history support that understanding. Let us, however, be clear that they do so only in a historically contingent way. One cannot simply say that the sentiment for transformation, dominant as it was at the moment of constitution-making, compelled or determined South Africa's choice in favour of a justiciable constitution under which judges would act as powerful agents of change. Whether, in given historical conditions, judicial constitutional review is an aid or a barrier to social transformation can be, for obvious reasons, a hotly disputed and reasonably disputable question.² Judicial review patently can be a device for impeding or 'slowing down' majority rule, and slowing down post-transition majority rule in South Africa was not beyond all possibility of argument the most expeditious route to transformative results.³ Yet substantial reasons can be summoned to support such a choice⁴ and — this really is the only point that matters just now for our discussion — the choice for justiciability is the choice that South Africans indubitably have made. The Final Constitution says so, redundantly, in words too plain to brook any question.⁵ (On some views, the mere inclusion of 'the rule of law' among the Final Constitution's founding values would have sufficed to establish the Final Constitution's justiciability.⁶)

Once the die is cast for a justiciable constitution, the question necessarily follows of how to organize the country's judiciary for optimal performance in

¹ See *Nontembiso Norab Kate v Member of the Executive Council for the Department of Welfare, Eastern Cape* Case No 1907/03 (SEC) ('*Nontembiso*') at para 16. Froneman J wrote:

All courts, including the High Court, are enjoined by the Constitution to uphold the rights of all, to ensure compliance with constitutional values, and to do so by granting 'appropriate relief, just and equitable orders', and by developing the common law 'taking into account the interests of justice'. In a new constitutional democracy such as ours that means that courts have to devise means of protecting and enforcing fundamental rights that were not recognized under the common law. . . . [Neither difficulties of practical implementation nor regard for the separation of powers] may . . . serve as an excuse for failing to fashion and enforce new remedies simply because they did not exist under the common law. In these situations the judge who fails to examine the existing law with a view to ensuring the effective realisation of constitutional rights and values that were not recognised before is not, as is often presumed by proponents of this course, merely neutrally and objectively applying the law. That will only ever be true if the existing common law proceeds from a fair and equal baseline, an assumption that will not often be open to the present judiciary in South Africa in cases such as the present, given our unequal past.

² See H Klug *Constituting Democracy* (2000) 181; P Lenta 'Democracy, Rights Disagreements and Judicial Review' (2004) 20 *SAJHR* 1.

³ Cf R M Unger *What Should Legal Analysis Become?* (1996) 164–5 (Speaking of 'constitutional arrangements that slow down transformative politics.')

⁴ See Lenta (*supra*) at 30.

⁵ See FC, Preamble ('We . . . adopt this Constitution as the supreme law of the Republic . . .'); FC s 1(*e*) (Including 'supremacy of the constitution and the rule of law' among the Republic's founding values); FC s 2 ('This Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled.');

⁶ FC ss 167(3)(*b*), 168(3), 168(*a*) (Respectively empowering the CC, the Supreme Court of Appeal, and the High Courts to 'decide' constitutional matters.)

⁶ See H Botha (*supra*) at 524–5.

light of the Final Constitution's aims and purposes. In South Africa, any answer to that question inevitably must reflect the primarily transformative role envisioned for the Final Constitution. Insofar as the judiciary has a share in the work of effectuating the Final Constitution's purposes, a leadership role within the judiciary respecting that work necessarily will carry over from the old regime if it is not explicitly assigned by the new Constitution. Those in whose eyes the new Constitution was meant to play a primarily transformative, not preservative, role in their country's legal and other affairs would have been leery of leaving judicial leadership in constitutional matters in the hands of judges and tribunals carried over from the old, repudiated regime and possibly imbued with its thoughtways and habits.¹ We should not be surprised, then, to find them choosing to turn over final judicial authority in constitutionally sensitive matters to a new tribunal, staffed with members freshly chosen for the purpose and conscious of having been thus chosen.² Historical accounts confirm that it was for precisely such a reason that introduction of the CC into the South African judicial constellation became a key component in the hard-bargained constitutional settlement of 1993.³

- (ii) The impulse and need for retention of a general principle of legality after the onset of the Bill of Rights

Even under the most muscular judicial deployments of the doctrine of legality that Westminster legal history has known, the co-doctrine of parliamentary supremacy meant that plainly worded law having a parliamentary provenance prevailed over constitutional common law in case of any apparent inconsistency regarding authorization or restriction of official action. It meant, in other words, that Parliament was free to set the terms for lawful official action however it might choose, assuming it spoke with sufficient clarity, up to and including empowerment of officials to act arbitrarily under any or all possible common-law senses of that term.

Parliamentary supremacy, needless to say, was ousted from South Africa by the

¹ See Van der Walt 'Transformative Constitutionalism' (supra).

² See *Pharmaceutical Manufacturers* (supra) at para 54 (The CC . . . 'occupies a special place in [the] new constitutional order. It was established as part of that order as a new court with no links to the past, to be the highest court in respect of all constitutional matters, and as such, the guardian of our Constitution. . . . The Constitution contains special provisions dealing with the manner in which the judges of this Court are to be appointed and their tenure which are different to the provisions dealing with other judicial officers. It has exclusive jurisdiction in respect of certain constitutional matters, and makes the final decision on those constitutional matters that are also within the jurisdiction of other courts.')

³ See R Spitz & M Chaskalson *The Politics of Transition* (2000) 191–209; Klug (supra) at 140–2; H Klug 'Historical Background' in S Woolman, T Roux, J Klaaren, A Stein & M Chaskalson (eds) *Constitutional Law of South Africa* (2nd Edition, OS, June 2005) Chapter 2.

constitutional upheaval of 1993-94.¹ Subjecting Parliament itself to a principle of legality is, after all, everywhere understood to be the first and foremost point of replacing a Westminster-style regime with ‘constitutionalism’ in the form of a supreme-law type of justiciable, written constitution. Constitutionalism in that form, we may say, is the idea of legality writ large.² And so coiled within the very certainty that the onset of constitutionalism destroys parliamentary supremacy lies the certainty that its implication for a legal system’s prior existing principle of legality must be exactly the opposite.

Enactment of a constitutionalist constitution, cannot — it simply cannot — be read to have the effect of leaving the country’s *corpus juris* bereft of a legality principle it formerly possessed.³ If, as was true in South Africa, the principle had fallen into a state of disrepair during the times preceding the constitutional transition, then the new Constitution’s aim must be to salvage and restore the principle, not to erase it.⁴ So if the new, written Constitution’s roster of textually enumerated legal guarantees leaves some significant extension of legality uncovered, the impulse will be strong to be read that principle fully into the instrument by implication or by exegesis, or else — at the very least — to confirm legality’s survival as a robust common law doctrine. No other choice is plausibly available. That a new constitutionalist Constitution would crowd out legality as an operative legal norm is unthinkable.

The case of South Africa turns out to be one in which the roster of constitutionally enumerated guarantees does, in fact, leave some extensions of legality uncovered. The property clause — FC s 25(1) — inveighs against state acts lacking authorization by non-arbitrary laws, but it applies only to deprivations of

¹ One important consequence of the replacement of parliamentary by constitutional supremacy is that the *ultra vires* branch of the legality principle no longer (as formerly) requires that governmental officials and bodies be able to justify their actions by chains of authorizations traceable to Acts of Parliament. Such powers now may be conferred directly by the Final Constitution. See, eg, *Minister of Public Works & Others v Kyalami Ridge Environmental Association & Others* 2001 (3) SA 1151 (CC), 2001 (7) BCLR 652 (CC) (Discussed at § 11.3(c) infra); *City of Cape Town & Another v Robertson & Another* 2004 (5) SA 412 (C), 2004 (9) BCLR 950 (C) (*Robertson*) at paras 55–60 (‘Now the conduct of a municipality is not always invalid only for the reason that no legislation authorises it. Its power may derive from the Constitution or from the legislation of a competent authority or from its own laws.’)

² See *Fedsure* (supra) at para 58 (It is ‘central to the conception of our constitutional order that the legislature and executive in every sphere are constrained by the principle that they may exercise no power and perform no function beyond that conferred on them by law.’)

³ See *Hugo* (supra) at para 28 (‘It would be contrary to [the] promise [of a constitutional state contained in the Interim Constitution’s Preamble] if the exercise of the presidential power [to issue pardons] is above the Interim Constitution and is not subject to the discipline of the Bill of Rights.’)

⁴ See H Botha ‘The Legitimacy of Legal Orders (3): Rethinking the Rule of Law’ (2001) 64 *THRHR* 523, 539 (‘[T]he rule of law is not an a historical construct which stands in the way of democracy and the need to redress past injustices, but is rooted in the historical struggle of black South Africans for democracy and equal rights. . . . [T]he rule of law is vital in ensuring democratic accountability and in fighting social injustice.’)

property.¹ The equality clauses — IC s 8(1) and FC s 9(1) — are construed to prohibit arbitrary legislative differentiations or classifications² but they have nothing to say about other possible cases of legislative, executive, or administrative lawlessness. The administrative justice clauses — IC s 24 and FC s 33 — may be read to cover any or every dimension of legality where administrative action is involved; but ‘administrative action’ designates a delimited category of official actions; and while the limits may be uncertain and contested, there is no doubt that a non-negligible residue of official actions lies outside them. These clauses have nothing to say, for example, about lawless legislative action;³ nor do they speak to whatever cases of executive action may be deemed to fall outside the ‘administrative’ category.⁴

In addition to picking up residual categories of official action that might not otherwise be covered, a generalised constitutional principle of legality probably carries some further, important implications pertaining to the judicial system, ones that might not be found contained in the more specific rights-granting clauses in the Bill of Rights. Such a principle has been found, for example, to imply the powers of courts to devise non-traditional remedies in response to failures by state officials to carry out judicial orders.⁵ In sum, all relevant factors considered, it is entirely understandable that the CC should have concluded that a *general* or sweeping principle of legality must have survived the most recent constitutional upheaval in South African jurisprudence.

¹ For the CC’s gloss on ‘arbitrary’, see *First National Bank* (supra) at paras 62–71, 97–100; *Mkontwana* (supra) at paras 44–64.

² *Prinsloo v Van der Linde & Another* 1997 (3) SA 1012 (CC), 1997 (6) BCLR 759 (CC) at paras 25–6, 35–6; *Harksen v Lane NO & Others* 1998 (1) SA 300 (CC), 1997 (11) BCLR 1489 (CC) at para 53. See *New National Party of South Africa v Government of the Republic of South Africa & Others* 1997 (3) SA 191 (CC), 1999 (5) BCLR 489 (CC) (‘*New National Party*’) at paras 19, 24 (In a case questioning a statutory classification, the *New National Party* Court conveyed its view that FC s 9(1) was not the only possible basis for a challenge on the ground of lack of rational connection to a valid governmental purpose. An additional basis for such a challenge, the Court said, is supplied by ‘the rule of law which is a core value of the Constitution.’ The *New National Party* Court cited *Fedsure* (supra) at paras 56–7 for this proposition.)

³ See *Fedsure* (supra) at paras 41–2.

⁴ A clear example is the President’s exercise of powers to appoint officers and create commissions of inquiry, which the CC has held to be constitutionally reviewable under the implied principle of legality, although such exercises are not administrative action covered by FC s 33. See *President of the Republic v South African Rugby Football Union* 2000 (1) SA 1 (CC), 1999 (10) BCLR 1059 (CC) at paras 146–7 (‘*SARFU*’). One might also consider the President’s exercise of his pardon power in *Hugo* and his statutorily granted power to proclaim a law into force in *Pharmaceutical Manufacturers*.

⁵ See *Nontemiso* (supra) at paras 21, 25 ([T]he State and its organs have no powers outside that granted to it by the Constitution or by legislation complying with the Constitution. . . . So on what possible legal basis may any state organ refuse to implement a court order and expect the courts to recognize its legal right to do so? . . . It is one thing to realise the possibility *as a matter of fact* that the government might refuse to comply with court orders. It is something completely different to hold *as a matter of law* that courts are powerless to devise ways to ensure compliance with court orders in a constitutional state such as ours. . . . For the courts to do the latter would be to aid and abet unconstitutional government, the very antithesis of the courts ‘duty in terms of the Constitution.’)

(iii) The risks of locating the legality principle ‘outside’ the Final Constitution

The legality principle undoubtedly is a part of South African common law, and the Final Constitution takes pains to make clear that it does not displace or destroy pre-existing common law doctrines consistent with its spirit.¹ Accordingly, one might ask: For purposes of preserving in South African jurisprudence a sweeping principle of legality (were that the only end to be considered), might not a restoration of the common law principle to full vigour have sufficed, obviating any need to ‘read up’ the Bill of Rights by implying the legality principle into it as one of the Bill’s protective clauses?²

The answer plainly would be ‘no’ insofar as one might perceive any substantial likelihood that some future Parliament, in a throwback to the old days, might see fit to legislate against a justiciable principle of legality. If or insofar as demands for adherence to legality are not protected by constitutional supreme law, parliamentary supremacy still holds with respect to such claims, just as with respect to any other legislative choices still left open by the constraints imposed by the Bill of Rights.

Be that as it may, the history we have reviewed suggests strongly that it is not any concern about possible parliamentary throwback that leads the CC to conclude that the legality principle now is irretrievably and inextricably a ‘constitutional matter’ in South Africa. For the CC, it is not enough to affirm that legality now is a justiciable guarantee of a supreme Constitution. No less urgent, in the CC’s view, is the *negative* proposition that legality has *not* survived as a principle of the common law drawing breath, so to speak, on its own, outside the tent of the Final Constitution. What the CC has found itself driven to reject is the survival of legality in a legal form or medium that would leave the SCA in a position, sometimes, to pronounce with finality that an infringement of legality has occurred. The CC’s apparent driving concern thus has not so much been a possible future *deficit* of legality as it has been a possible future *surfeit* of this presumptively good thing.

¹ See FC s 39(3): ‘The Bill of Rights does not deny the existence of any other rights or freedoms that are recognised or conferred by common law, customary law or legislation, to the extent that they are consistent with the Bill.’

² See *S v Zuma* 1995 (2) SA 642 (CC), 1995 (4) BCLR 401 (CC) (Suggests this model). In *Zuma*, the CC dealt with a claim under IC s 25(3)(c)’s guarantee of an accused person’s right to be presumed innocent and remain silent, and held unconstitutional a statutory provision placing the onus on an accused, in certain circumstances, to prove that a confession was *not* given voluntarily. The *Zuma* Court relied heavily on its view that South African common law *as it existed prior to certain apartheid-era developments* would have left the onus on the State regarding the voluntariness of any questioned confession. ‘The concepts embodied in [s 25] are by no means an entirely new departure in South African criminal procedure,’ wrote the Court. It continued: ‘The presumption of innocence, the right of silence and the proscription of compelled confessions have for 150 years or more been recognised as basic principles of our law.’ Granting that those common-law principles had ‘to a greater or lesser degree been eroded by statute and in some cases by judicial decision.’ The *Zuma* Court saw fit to appeal to them in their pre-eroded state as ‘part of the background to IC s 25.’ *Ibid* at para 12. It surely was with the pre-erosion principles in mind that the *Zuma* Court felt moved to declare that post-transition jurisprudence would not cast out or ignore ‘all the principles of law which have hitherto governed our courts.’ Those principles, the *Zuma* Court declared, ‘obviously contain much of lasting value.’ *Ibid* at para 17.

Our justificatory question, then, comes down to this: How might either the transformative commitment of the Final Constitution or the CC's role as special judicial guardian of that commitment be compromised by admitting the SCA to an autonomous, equal-footing partnership with the CC in policing compliance with legality by sundry governmental agencies and officials in South Africa?

It would not, mainly, be by way of some feared likelihood that the SCA would lean toward being too *lenient*, too ready to find compliance. That is not a significant worry, because the bar and the High Courts easily could be taught the lesson that, if you don't wish to risk the SCA unappealably rejecting your breach-of-legality claims or decisions, you have only to plead your claim, or base your decision, on constitutional and not merely common-law grounds and then the CC can have the last word whenever it sees fit. No, the main, driving concern would have to be that the SCA might sometimes *uphold* breach-of-legality claims on — and only on — common-law grounds, when those claims — in the eyes of the CC — are both debatable and possibly fraught with counter-transformative baggage.

To say that the Final Constitution was born with transformative ends in view is by no means to say that every legally defensible application of its requirements — much less of the requirements of a common-law corpus that the Final Constitution and its appointed judicial guardians do not control — is guaranteed to advance transformative ends as those most typically are envisioned. That is not how law works or possibly can work. It is not, to take the most obvious case in point, the way we expect a typical constitutional property clause to work,¹ much less the common law of property.² No more can one assume that every time a court in a debatable case finds in favour of a breach-of-legality claim the cause of transformation, as typically envisioned, will have been advanced rather than hindered.

A number of examples come to mind. Take *City Council of Pretoria v Walker*.³ In that case, the CC, conscious of the need to construe the Interim Constitution consistently with its transformative purpose,⁴ rejected a claim that the Council's temporary use of a different system for utility rate charges in 'Old Pretoria' than in two amalgamated former townships was an instance of unfair discrimination (against whites) on a racial ground, prohibited by IC s 8(2). But suppose the plaintiffs had thought to plead, as a common-law claim only, that the Council had acted in breach of legality or natural justice in regard to the differentiated-

¹ See A J Van der Walt *Constitutional Property Clauses: A Comparative Analysis* (1999).

² See A J Van der Walt 'Transformative Constitutionalism' (supra).

³ 1998 (2) SA 363 (CC), 1998 (3) BCLR 257 (CC) ('*Walker*').

⁴ *Ibid* at paras 46, 53.

rates policy¹ and the SCA had agreed (just as the CC itself came close to doing in regard to another branch of the case).²

Bel Porto presents a comparable scenario.³ The case involved a claim that administrative officials had acted arbitrarily, in contravention of the principle of legality,⁴ in a highly transformation-charged context in which the parties complaining were historically privileged, historically all-white schools. Would it have been a true reading of the Final Constitution to conclude that the SCA might have reserved to itself the final word on the case by upholding the claim on, and only on, a common-law ground?

The question here, it must be emphasised, is about constitutionally contemplated *process* — or, more precisely, institutional arrangement. The question is not about which substantive ruling in a case like *Bel Porto* — for or against the claim of a breach of legality — would have comported better on the whole with constitutional values and directives. As to that substantive issue, opinions may differ; and anyway, for aught we know, the SCA, given the opportunity, would have decided it just as the CC did. The question we face here is different. It is about whether the Final Constitution, on the better reading, assigns to the Supreme Court of Appeal or to the CC the ultimate power of decision over debatable claims of breaches of legality.

For further illustration, we may consider *Minister of Public Works and Others v Kyalami Ridge Environmental Association and Others*.⁵ Neighbouring landowners challenged the legality of the government's plan to establish, on land owned by the state, temporary shelters for persons left homeless by floods. The applicants contended that the planned actions would be *ultra vires* and hence unlawful, there being no legislation authorizing the government to act thus in the circumstances. The CC, of course, accepted the applicants' premise that 'the principle of legality is implied within the terms of the Interim Constitution,' but it ruled nevertheless in the government's favour.⁶

In order to do so, the CC had to *deny* the applicability of certain existing statutes to the case at hand, because those statutes included certain conditions

¹ *Walker* (supra) at para 56 (The CC found it necessary to deflect a claim of that very sort: 'The failure to deal openly with residents in old Pretoria is not in keeping with the new values of public accountability, openness and democracy. It is conduct that deserves censure; it is however not the central issue in the dispute.')

² See *Walker* (supra) at para 76 ('[W]here a policy is deemed by s 8(4) to constitute unfair discrimination on a ground specified under s 8(2), the fact that the policy is contrary to a fair and rational council resolution and is implemented in secrecy and in contradiction of public statements issued by the council officials, makes the burden of proving the policy not to be unfair more difficult to discharge than it might otherwise have been.' *Walker* held unconstitutional the council's policy of dealing more harshly with rate-arrears in Old Pretoria than in the ex-township areas.)

³ *Bel Porto School Governing Body & Others v Premier of the Province, Western Cape & Another* 2002 (3) SA 265 (CC), 2002 (9) BCLR 891 (CC) ('*Bel Porto*').

⁴ *Ibid* at paras 120–1.

⁵ 2001 (3) SA 1151 (CC), 2001 (7) BCLR 652 (CC) ('*Kyalami*').

⁶ *Ibid* at para 35.

and requirements that the government plainly had not met.¹ But if, then, there was no applicable statutory framework, where was the ‘law’ to authorize the government’s action with its alleged adverse impacts on the applicants? The *Kyalami* Court’s answer found the authorizing law in the Final Constitution itself, taken together with the general common law of property ownership. By force of FC s 26 as construed in *Government of the Republic and Others v Grootboom and Others*,² the government is under legal obligation to take reasonable measures to come to the aid of persons in conditions of housing crisis. FC ss 85(2)(b) and (e) provide that the President’s executive authority is exercised by ‘implementing national ... policy’ and by ‘performing any ... executive function provided for in the Constitution.’³ The CC confirmed the ‘government’s common law power to make its land available to flood victims pursuant to its constitutional duty to provide them with access to housing,’⁴ and concluded that ‘if regard is had to its constitutional obligations, to its rights as owner of the land, and to its executive power to implement policy decisions, [the government’s] decision to establish a temporary transit camp for the victims of the flooding was lawful.’⁵

This reasoning lies well within the bounds of legal plausibility. Few, however, would regard it as legally inescapable. How absolutely certain can one be that another court would have come to a like conclusion had it been the court of last resort in this case? How worrisome should that question be to South African constitutionalists who respect the apparent plan of the Final Constitution to entrust judicial leadership in constitutionally sensitive affairs to the CC?⁶ It is questions of that sort that the CC — or so we are suggesting — found itself confronting in *Fedsure* and *Pharmaceutical Manufacturers*, when presented with the thought that the principle of legality might currently have a home outside the Final Constitution but still within South African law.

Significantly, it is not only the members of the CC and the SCA to whom such questions will occur but also the litigating public, and this fact gives cause for concern. Consider the controversy that erupted in 2004 between certain private parties (pharmaceutical manufacturers and retailers) and the Minister of Health

¹ *Kyalami* (supra) at paras 44, 49 (The Court found that none of those statutes was designed ‘to regulate the temporary settlement of people rendered homeless by natural disaster.’ Hence, they did not qualify or limit the government’s exercise of any powers it might otherwise hold to provide shelter for flood victims and the government did not, by ignoring those statutes and their requirements, make itself chargeable with avoiding an applicable legislative framework and in that way ‘acting arbitrarily or otherwise contrary to the rule of law.’)

² 2001 (1) SA 46 (CC), 2000 (11) BCLR 1169 (CC) (*‘Grootboom’*).

³ *Kyalami* (supra) at para 40.

⁴ *Ibid* at para 49.

⁵ *Ibid* at para 52.

⁶ Other recent cases illustrate the importance of the question. See *Robertson* (supra) at paras 66–71 (The CC reversed a finding by the High Court that applicable legislation had withheld from municipalities the power to levy property rates on the basis of a provisional valuation roll, in circumstances where the CC had found the dispute to be fraught with transformative consequence.) See also *Affordable Medicines* (supra) at paras 41–55 (The CC condered and rejected a claim that the Minister of Health exceeded the powers granted her by statute when she issued regulations linking licenses to dispense medicines to particular locations whence the medicines are dispensed.)

over regulations issued by the Minister that would have imposed controls on prices, mark-ups, and dispensing fees for medicines. The private parties claimed that the regulations were, in various respects, unauthorized by the applicable legislation. When the High Court rejected these challenges, appeals obviously impended.¹ From the ensuing stances and skirmishings of the parties, it is evident that the two sides had strongly differing preferences respecting the venue of the first appeal — the Government preferring to have the CC review the merits directly and the private parties evidently believing that their prospects would be brightened — or at least any losses delayed — by securing first a judgment from the SCA.²

Because there could have been no possible question about the involvement in the case of constitutional matters — the case turned on questions of statutory interpretation that surely drew FC s 39(2) into play along with the guarantee of access to health care services in FC s 27 — it seemed bound to reach the CC sooner or later. For that reason, the parties' differences over whether it should or should not be routed first through the SCA probably were less acutely felt than they might have been if a judgment from the SCA would have been final. Now, final is just what an SCA judgment in this case could well have been, if the norm of legality had survived as the basis of an extra-constitutional objection to the regulation. We can see, then, that one benign consequence of the *Fedsure/Pharmaceutical* doctrine is to diminish the stakes in forum-shopping struggles. More fundamentally, one might hope that the establishment of secure roles for both the SCA and the CC in all contexts of legal disputes having even arguable constitutional sensitivity would tend over time to instill expectations of 'shared constitutional interpretation' in place of what have up to now been perceptions of a rivalrous relation between the two tribunals. Indefinite persistence into the future of the perception of rivalry cannot be a healthy thing for the rule of law in South Africa.³

¹ *New Clicks South Africa (Pty) Ltd v Msimang NO & Another; Pharmaceutical Society of South Africa & Others v Minister of Health & Another* Case No 4128/2004 (C) ('New Clicks HC'); and *Pharmaceutical Society of South Africa & Others v Minister of Health & Another; New Clicks South Africa (Pty) Ltd v Msimang NO & Another* Case Nos 542/04 and 543/04 (SCA).

² See *New Clicks HC* (supra) at paras 3–14 (The stances and manoeuvres are described in detail in the Supreme Court of Appeal's opinion.)

³ See J van der Walt 'Progressive Indirect Horizontal Application of the Bill of Rights: Towards a Co-operative Relation between Common-law and Constitutional Jurisprudence' (2001) 17 *SAJHR* 342, 362–3 ('A widespread perception of a rivalry between the two top courts in a legal system obviously casts doubt on the quality of the administration of justice in the country concerned.') On the virtues and benefits of shared interpretation, see S Woolman 'Application' in S Woolman, T Roux, J Klaaren, A Stein & M Chaskalson (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2005) § 31.4(e)(vii); M Dorf & B Friedman 'Shared Constitutional Interpretation' (2000) 2000 *Sup Ct R* 61. Woolman, Dorf, and Friedman have conceived of shared interpretation as sharing responsibility for constitutional meaning-making between the judicial and legislative branches of government. We here extend their thought to such sharing between branches of the judiciary. (Here is where welcoming rules of engagement for the High Courts could make an important difference. See Woolman & Brand (supra) at 38–83.) We also skate near the edge of debate over the possibility of merging the CC and the SCA, upon which we shall not enter beyond cautioning that our remarks here do not come close to establishing that merger is a good idea. See L Berat 'The Constitutional Court of South Africa and Jurisdictional Questions: In the Interest of Justice?' (2005) 3 *Int'l J of Constitutional Law* 39, 72–76.

11.4 SUPREMACY OF THE CONSTITUTION

In order to grasp fully what the CC is driving at in its *Fedsure and Pharmaceutical Manufacturers* decisions, we have to take our analysis one step further. Observing that FC s 1's list of the South African republic's founding values speaks not of 'the rule of law' in splendid isolation but rather of that value in a coupling with the 'supremacy of the constitution,' it is time to ask: In what way does the latter phrase signify *a value*? And how, if at all, is the value it signifies related to the value of legality with which it is textually coupled?

Three propositions, affirmed by the CC, fix the legality principle's central place in South Africa's legal order. Exercises of state power — seemingly without exception¹ — are subject to a constraint of legality. This constraint is justiciable, so that anyone suffering disadvantage from an exercise of state power may demand from some court a ruling on the lawfulness of that exercise of power, and furthermore a remedy in case the exercise is found unlawful. Every such demand for a ruling gives rise to a constitutional matter falling within the appellate purview of the CC.

As we have seen, the CC initially found these propositions to be implicit in the entirety of a constitutional instrument — the Interim Constitution — that lacks any particular text pointing explicitly at them.² Even today the CC would be prevented from basing them simply on Final Constitution s 1(c)'s proclamation of the 'rule of law' as a founding value of the Republic, by its own insistence that the FC s 1 values do not 'in themselves' give rise to 'discrete and enforceable rights.'³ To be sure FC s 1(c) is not beside the point, either, because the FC s 1 values do 'inform and give substance to' everything that is in the Final Constitution.⁴ But then what, if anything, has the coupled reference to the supremacy of the Final Constitution got to do with what we have been talking about?

(a) Constitutional supremacy as a value (not just a rule)

It goes almost without saying that the Final Constitution is supreme law in South Africa, in the plain and simple sense — let us call it the 'trumping' sense — of that term. Whenever and insofar as a legal norm or rule of decision laid down by the Final Constitution (as construed) comes into practical collision with a legal

¹ See *Hugo* (supra) at paras 28–9 (Affirming that it would be contrary to the promise of a constitutional state to treat any exercise of presidential power as entirely above the law, regardless of whether that exercise would have fallen within the royal prerogative as a matter of traditional Westminster constitutional law); *SARFU* (supra) at para 38 (Affirming judicial reviewability, under traditional 'legality' standards — such as whether the President had properly 'applied his mind' to the question — of presidential exercises of power to appoint commissions of inquiry); *Kaunda & Others v President of the Republic* 2004 (10) BCLR 1009 (CC) at paras 78–9 (Affirming that a presidential refusal of a request by a South African citizen for diplomatic protection abroad is judicially reviewable for irrationality or arbitrariness, citing *Hugo* and *SARFU*.)

² See § 11.1(c) supra.

³ See *NICRO* (supra) at para 21.

⁴ *Ibid.* The CC rested its conclusion that the FC s 1 values do not in themselves give rise to enforceable rights not only on the language of FC s 1 but also on an observation of redundancy, or, as the *NICRO* Court put it, 'the way the Constitution is structured and in particular the provisions of Chapter 2 which contains the Bill of Rights'.

norm or rule of decision laid down by any sort of non-constitutional law (as construed) — be it parliamentary legislation, subordinate legislation, common law, or customary law — the Final Constitution’s norm is to be given precedence by anyone whose project is to carry out the law of South Africa. To that extent, the Final Constitution’s norm or rule of decision is *the* rule of decision for a South African court.

Can supremacy in the trumping sense be the total sum and substance of what FC s 1(c) means to convey when it names ‘supremacy of the Constitution’ as a *founding value* of the South African Republic? There are compelling reasons to resist such a tame and facile reading. The most glaring of these is redundancy. Other clauses of the Final Constitution beat out to a fare-thee-well the message that norms of the Final Constitution prevail over other, arguably conflicting norms in the legal system. FC s 2 declares that the Final Constitution ‘is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled.’ If that were not sufficient to get the point across, FC s 173(1) obliges any court finding itself faced with such a question, at the very least and regardless of what further remedy the court may find to be just and equitable, to ‘declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency.’¹

FC s 1, captioned ‘Republic of South Africa,’ presents the Republic in terms of values on which it is founded. The mention of supremacy of the Final Constitution as one of these values is followed almost instantaneously by the Final Constitution’s official supremacy clause, FC s 2, which actually is captioned ‘Supremacy of the Constitution.’ Why the duplication? Because — one is virtually compelled to think — there really is no duplication; the two clauses are addressed to different matters, and indeed they say so on their faces. FC s 1(c) posits supremacy of the Final Constitution as a *value*. FC s 2 lays down constitutional supremacy as a rule for the construction of a determinate, hierarchical relation among legal norms emanating from various, recognized sources of law in and for South Africa. Trumping-sense constitutional supremacy — the payload of FC s 2 — is, in short, a practical rule, not a ‘value.’ We do not normally speak of ‘values’ when rules of practice are what we have in mind. Values, rather, serve as *reasons for* rules; conversely, rules (if they are any good) serve to implement values.

When we look at FC s 1 as a whole, with its references to ‘human dignity,’

¹ See also FC s 8(1) (‘The Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary and all organs of state’); FC s 83(b) (declaring that the President ‘must uphold, defend and respect the Constitution as the supreme law of the Republic’); FC s 211(c) (‘The courts must apply customary law when that law is applicable, subject to the Constitution and any legislation that specifically deals with customary law’); FC s 232 (‘Customary international law is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament.’) FC s 231(4) provides that ‘any international agreement becomes law in the Republic when it is enacted into law by national legislation; but a self-executing provision of an agreement that has been approved by Parliament is law in the Republic unless it is inconsistent with the Final Constitution or an Act of Parliament.’ Does this clause arguably imply that acts of Parliament enacting non-self-executing treaty obligations into law prevail *regardless of* inconsistency with other norms of the Final Constitution? See K Hopkins & H Strydom ‘International Law’ in S Woolman, T Roux, J Klaaren, A Stein & M Chaskalson (eds) *Constitutional Law of South Africa* (2nd Edition, OS, June 2005) Chapter 30. Even if it does, constitutional supremacy in the trumping sense is not impaired. FC s 231(4) itself is a norm of the Final Constitution.

‘achievement of equality and the advancement of human rights and freedoms,’ ‘non-racialism and non-sexism,’ the section appears to use ‘values’ to mean states of social affairs to which South Africa as a political community now is committed; states of affairs, then, to be promoted and sustained by governmental and other social means that themselves are consonant with the Final Constitution. Values, thus understood, serve as reasons for rules. That means they also are available (insofar as we can ascertain their content) to serve as guides to the interpretation and application of rules, when guidance is needed because the proper extension of the rule is not facially self-evident.

What do we find, then, if we try to put together FC ss 1(c) and 2? First, a value: a desired condition of South African society to which FC s 1(c) gives the name ‘supremacy of the Constitution and the rule of law.’ Second, a rule (likewise labelled ‘Supremacy of the Constitution’ by FC s 2) that presumably is meant to promote the achievement of the specified societal condition. Thus, achievement of the condition is an end to which the rule is related as a means. We know the content of the rule (the means): Norms of the Final Constitution trump any other, arguably conflicting norms that may be found floating around in South Africa’s legal system. But then what is the content of the desired societal condition (‘supremacy of the Constitution’) to which that rule stands as a means? That condition cannot consist simply of the state of affairs in which the trumping rule is faithfully followed, else the two supremacy clauses, those of FC ss 1(c) and (2), would be purely redundant.

The challenge thus posed to bench and bar by the ‘supremacy’ clause in FC s 1(c) is clear and somewhat daunting. It is to comprehend the sense in which ‘supremacy of the Constitution’ now is established as a polestar for the general guidance of South African government, society, and jurisprudence, *beyond* the point of establishing the trumping rule that the Final Constitution’s norms prevail, in cases of conflict, over other norms claiming recognition in the legal system.

On the face of it, this is a puzzling question. FC s 1 expressly names some of the Constitution’s motivating and guiding values. The remainder of the Final Constitution sets forth an array of prescriptive norms that presumably are meant to subserve these values directly or indirectly, no doubt along with other values that remain implicit. An obvious further step towards advancement of these same values is to lay down a rule that the Final Constitution’s prescriptive norms must take precedence over arguably conflicting norms emanating from recognized legal sources apart from the Final Constitution. That is what FC s 2 expressly does. In that instrumental way, FC s 2’s rule of trumping-sense supremacy has value (given that the items named in FC s 1 and presumably subserved by the Final Constitution’s array of prescriptive norms are true values). But how are we to understand ‘supremacy of the Constitution’ as *being itself a value* capable of giving guidance to the interpretation of other norms of the Final Constitution (which is what it ought to be if it belongs in FC s 1)?

(b) The unity of the legal system and the pursuit of justice

Our question is: in what way does the *value* of constitutional supremacy declared by FC s 1(c) transcend the *rule* of trumping-sense supremacy laid down by s 2.

Puzzling as the question may be, the extant jurisprudence of South Africa demands that it be faced, for we have the CC's word for it that indeed there is some way in which the supremacy value does and is meant to transcend the supremacy rule.

That word is given by the CC in its *Pharmaceutical Manufacturers* decision, in the well-known peroration:

There is only one system of law. It is shaped by the Constitution which is the supreme law, and all law, including the common law, derives its force from the Constitution and is subject to constitutional control.¹

In those two sentences, the CC claims for the Final Constitution not just one special virtue as compared with the rest of South Africa's laws but three of them, two of which go well beyond the claim (which also is there) for the Constitution's supremacy in the unadorned, norm-trumping sense declared by FC s 2. The first of these additional claims is for the *pervasiveness* of the Final Constitution's norms — 'all law . . . is subject to constitutional control.' The second is the claim for the Final Constitution's status as the *basic law* of South Africa — 'all law . . . derives its force from the Constitution.'² Certainly there is no *other* law in South Africa of which it may be said either that all (other) law is subject to its control or that the force of all (other) law flows or stems from it.

Now, a law to which these unique virtues are ascribed, along with trumping-sense supremacy, would be about as superlatively — or 'radically'³ — supreme as a law can get. Suppose, then, that the CC's attribution to the Final Constitution of the three special virtues combined could be seen to posit or reflect a *value* to which South Africa's embrace of the Final Constitution could defensibly be said to have committed the country; a value, that is, that stands distinct from and additive to the other human and societal goods posited as founding values by FC s 1. If we could see the threefold attribution in such a light, then we might understand 'supremacy of the Constitution' as it occurs in FC s 1's list of founding values to be the textual pointer toward the CC's claims in *Pharmaceutical Manufacturers* for the pervasiveness and the basic-law status, as well as the normative-trumping force, of the Final Constitution.

What, then, might be the value that correlates to the aggregation within a single law — the Final Constitution — of the three virtues of trumping power, pervasive application or relevance, and basic-law status? Once we have the question shaped up in that form, the answer stares us in the face: 'Supremacy of the Constitution' names the value of legal-systemic harmony in the service of the vision of the good society staked out by the entire list of founding values set forth in FC s 1 and instinct in the rest of the Final Constitution. We deal here

¹ *Pharmaceutical Manufacturers* (supra) at para 44.

² Both the idea of the pervasiveness of constitutional norms and that of the Final Constitution's basic-law status require further development, which we supply in §§ 11.4.c and 11.4.d infra.

³ See S Woolman 'Application' in S Woolman, T Roux, J Klaaren, A Stein & M Chaskalson (eds) *Constitutional Law of South Africa* (2nd Edition, OS, February 2005) § 31.4(e)(iv) ('[T]he Constitutional Court has assured the Supreme Court of Appeal and the High Courts that this radical doctrine of constitutional supremacy does not mean that every judicial decision is meant for constitutional review or that the Constitutional Court will supplant the Supreme Court of Appeal as the guardian of the common law.')

with the value of the unity of the legal system — meaning the system’s normative unity or, as one might say more poetically, its visionary unity.¹ The value in question is the value of having all the institutional sites in which the legal order resides — and especially all of its courts of law — pulling in the same and not contrary directions, working in ultimate harmony (which is not to say without difference and debate) toward the vision (the elements of which must always be open to interpretation) of a well-ordered South African society depicted in very broad-brush fashion by the other founding values listed in FC s 1: human dignity, equality, human rights and freedoms, non-racialism, non-sexism, and the basic accoutrements of an open, accountable, representative-democratic system of government. Such an understanding of the value named ‘the supremacy of the Constitution’ in FC s 1(c) accords well with that item’s coupling there with ‘the rule of law,’ for the traditional rule-of-law ideal — we need hardly point out — already strongly intimates the integrity and consistency of the compilation of norms and proto-norms composing a *corpus juris*.²

What is more, we can now see how FC s 1(c)’s linkage of ‘the rule of law’ to ‘supremacy of the Constitution’ insinuates significant glosses on both the partners to the coupling. The linkage suggests that, in the Final Constitution’s sight, legal-systemic unity — every site of law pulling in the same direction — is a relative or contingent value, not an absolute one. What that value is contingent on is the direction of the pull. It is when the sites pull together toward the vindication of human dignity, human rights, non-racialism, non-sexism, and the rest that the unity of the country’s law in their service figures as a true value. Accordingly, the Final Constitution means by the rule of law something richer than that formula’s most traditional, formal, Diceyan signification. If we read FC s 1 holistically — so that the coupling of the rule of law to constitutional supremacy signifies the value of legal-systemic unity in the service of human dignity, non-racialism, and the rest — then ‘the rule of law’ signifies not just the rule of rules but the rule of justice, as the Final Constitution envisions justice. ‘Supremacy of the Constitution and the rule of law’ signifies the unity of the legal system in the service of transformation by, under, and according to law.

That, in a nutshell, is what the CC’s work described in this chapter has been driving at; or so we would contend. But there are wrinkles still to iron out, and to them we now turn.

(c) An all-pervasive Constitution?

At any time, a case might come along that prompts the judiciary to re-examine some parcel of common law doctrine. To be provocative, let us take as our example the doctrine that decides whether acceptance by mail of a contractual offer — and therefore formation of a contract — occurs as soon as the letter of acceptance is posted or only later when it is received. The law has got to decide

¹ See *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC) para 35 (‘Rather than envisage the foundational values of the rule of law and the achievement of equality as being distinct from and in tension with each other, PIE treats these values as interactive, complementary, and mutually reinforcing.’).

² See, eg, LL Fuller *The Morality of Law* (1969) 38–9.

this question, one way or the other, by a general rule. Has the Final Constitution anything at all to do with such a matter? Are there not, after all, some questions of law that lie beneath the Final Constitution's notice, or beyond its gaze? If there are some, the choice between 'effective-on-dispatch' and 'effective-on-receipt' in the law of contract doubtless is one of them. (Notice, though, that if there are any such questions at all, then there probably are quite a few of them.)

When the CC declares, as it did in *Pharmaceutical Manufacturers*, that 'all law' is 'subject to constitutional control,' is the CC giving us its answer to the question we have just posed? Is the CC saying 'no, no legal question at all is beneath the Constitution's notice'? Just staring at those words in isolation, one might well doubt it. The words (in isolation) can easily be construed — are perhaps most naturally construed — to say simply that the Final Constitution's norms prevail wherever they extend, without implying anything about how pervasively those norms extend across the length and breadth society's affairs.

Suppose we had a constitutional instrument that addressed itself solely to the design of state institutions, and not at all to substantive limits and constraints on the acts of those institutions. Regarding such an instrument, one might perfectly aptly say that all law is subject to its control; it is just that this truism would make little difference to the substantive content of the law and of legal decrees, because all duly enacted laws and decrees, regardless of content, would satisfy the demands of the narrow-bodied constitution whose control they were under. In such a case, 'all law is subject to constitutional control' would simply repeat the doctrine of the constitution's trumping-sense supremacy. The remark would bear no implication regarding what we have termed the 'pervasiveness' of constitutional norms.

When, however, we place the CC's remark — 'all law is subject to constitutional control' — in context, we may feel strongly drawn to read it differently. The context very saliently includes the CC's repeated stresses on the unity of the legal system ('there is only one system of law'). More telling is the CC's expressed view of the Final Constitution's role in conferring that unity ('shaped by the Constitution'). The context further includes the actual stakes in the *Pharmaceutical Manufacturers* case — to wit, the sharply contested issue of whether legal cases can arise in South Africa over which the CC (restricted to deciding constitutional matters and matters ancillary to constitutional matters) is precluded from having the last word. With these contextual factors in the picture, 'all law is subject to constitutional control' almost irresistibly conveys a claim for the pervasiveness of the Final Constitution's norms. Such, after all, is the conclusion to which all the preceding discussion in this chapter has been tending. Call it the thesis of the all-pervasive Constitution.

How problematic a conclusion is it? The all-pervasive-Constitution thesis certainly contradicts the ostensible design of the Final Constitution to divide last-resort appellate jurisdiction between the CC and the SCA.¹ However, as the logicians like to tell us, you can prove anything with a contradiction. Merely

¹ See § 11.2 *supra*.

noticing a contradiction tells us nothing about how to proceed in the face of it. Merely noticing this one tells us nothing, yet, about which of the two contending ideas — the ostensible jurisdictional division or the all-pervasive Constitution — is the one that had better give way if we want to keep faith with the Final Constitution as best we can. Might our discussion in § 11.4.b, above, possibly have some light to shed on this question?

Recall our conclusion there: ‘Supremacy of the Constitution’ names the value of legal-systemic harmony in the service of the vision of the good society staked out by the entire list of founding values set forth in FC s 1 and instinct in the rest of the Constitution. The premise, unstated, is that such a vision — a comprehensive (if doubtless somewhat inchoate) vision of the good society — indeed resides in the Final Constitution. Significantly, that is a premise to which the CC has subscribed:

Our Constitution is not merely a formal document regulating public power. It also embodies, like the German Constitution, an objective, normative value system. As was stated by the German Federal Constitutional Court:

The jurisprudence of the Federal Constitutional Court is consistently to the effect that the basic right norms contain not only defensive subjective rights for the individual but embody at the same time an objective value system which, as a fundamental constitutional value for all areas of the law, acts as a guiding principle and stimulus for the legislature, executive and judiciary.

The same is true of our Constitution. . . . It is within the matrix of this objective normative value system that the common law must be developed.¹

If common law, then how not all law?² An objective normative value system is not a Swiss cheese. Something going under that name ought to have a bearing on every legal choice, even if it does not fully decide them all. There would be no way to exclude a priori the choice between ‘dispatch’ and ‘receipt’ in the law of contract. Granting that the relevant message from the objective normative value system inhabiting South Africa’s Constitution may not occur to you just now, that may be because you have not thought hard enough about it. More likely it is because the system’s implications remain far less than fully developed and resolved at this point in South Africa’s history of collective self-definition through political and juridical exchange and contestation. One may hope and expect that such a condition of openness to refreshed understanding will persist forever. Still the point would remain: some judge, some day, may grasp the Final Constitution’s message for the ‘dispatch’/‘acceptance’ choice and therefore every judge, every day, is expected to confront that choice and others like it in a state of conscious reflection on what the Final Constitution is up to. Such would appear

¹ *Carmichele v Minister of Safety and Security* 2001 (4) SA 938 (CC), 2001 (10) BCLR 995 (CC) at para 54 (citation omitted); *Du Plessis & Others v De Klerk & Another* 1996 (3) SA 850 (CC), 1996 (5) BCLR 658 (CC) at para 94. See also Woolman ‘Application’ (supra) at § 31.4(e)(vii) (On the meaning of ‘objective normative value system’).

² Compare FC s 2; FC s 8(1) (‘The Bill of Rights applies to all law.’) See Woolman ‘Application’ (supra) at § 31.4(b)(i)–(ii). (On the meaning of ‘all law’).

to be the import of FC s 1(c), ‘the supremacy of the Constitution and the rule of law,’ at least in the current view of the CC.

But if that is so, then how explain the CC’s performances in cases like *Metcash Trading* and *Phoebus Apollo Aviation*?¹ In *Phoebus Apollo Aviation*, the CC peels the onion, exposing layer by layer the absence from the case of any question of law save the acceptability of the SCA’s formulation of the general test for *respondeat superior* in ordinary delict cases. ‘None of our business, then,’ says the CC. ‘True today if you say so,’ we respond, ‘but who can say about tomorrow, when you or your successors may see further or deeper into that objective normative value system of which you speak?’ When the CC dismisses an appeal such as that in *Phoebus Apollo Aviation*, pleading want of jurisdiction, it seems we must understand the Court as confessing to a temporary shortfall in its comprehension of that objective normative value system whose inhabitation of the Final Constitution it posits. (‘We don’t know yet.’) Otherwise, why is the CC not affirming the decision below? (Granted, ‘temporary’ here may refer to a condition that is not short-term.)

(d) Constitutional supremacy as basic-law status

Let us turn now to the third of the three special legal virtues claimed for the Final Constitution by the CC in *Pharmaceutical Manufacturers*: ‘All law, including the common law, derives its force from the Constitution.’ It is hard to know what to make of this remark. On its face, as we explain just below, it registers as a proposition in the field of jurisprudence or the philosophy of law. The trouble is that the remark thus read draws the CC into a debate in legal theory that the CC surely has neither any intention of entering nor any slightest reason to enter — the theorists’ debate being entirely lacking in consequence for the CC’s work.

To state the matter as briefly and simply as possible: Truckloads of legal theorists would pronounce ‘All law derives its force from the Constitution’ an obvious mistake and moreover an impossibility. All law in South Africa, they would say, including the Final Constitution (as well as all statute law, common law, and customary law), necessarily derives its force from something called South Africa’s ‘ultimate rule of recognition,’ which is not and cannot be identical with South Africa’s enacted Final Constitution. Very roughly, South Africa’s ultimate rule of recognition consists of a set of understandings, presumably widely shared across South African society, by which South Africans are able to converge on acceptance of the Final Constitution as the highest-ranking law in South Africa. Such a convergence of pre-legal understandings must necessarily exist as a matter of ‘social fact’ — so the argument quite persuasively runs — in order for the practice of legal ordering to exist in this or any society.² Without it, the Final

¹ See § 11.2(b) supra.

² A modern *locus classicus* is HLA Hart *The Concept of Law* (1961). See also F Schauer ‘Amending the Presuppositions of a Constitution’ in S Levinson *Responding to Imperfection: The Theory and Practice of Constitutional Amendment* (1995) 147.

Constitution could not function as law. Moreover — the argument continues — once the necessary existence of this widely shared set of pre-legal understandings is acknowledged, then *it* — and not the Final Constitution — will be seen to serve as the source providing the force of law not just to the Final Constitution but also to statutes enacted in accordance with the Final Constitution’s rules, and to common-law and customary-law doctrines that emanate from sources authorized by the Final Constitution to pronounce and develop common law and customary law.

For our purposes, it does not matter whether the view just described is correct or not. More to the point is the likelihood that most if not all of the justices of the CC would happily sign on to that view if asked for their opinion regarding it. At any rate, they would have no reason not to. The CC is plainly and strongly committed to claims that the Final Constitution’s norms are all-pervasive and that they have trumping-sense supremacy over all other South African law. Those claims, however, stand, quite independent of any claim that the Final Constitution — as opposed to an ultimate rule of recognition distinct from the Final Constitution — supplies the force of law to statutes and the common law. Rather, implicit in the CC’s stance is a claim about *the content of* South Africa’s ultimate rule of recognition, the social source from which all South African law derives its force. The CC is claiming, in effect, that South Africa’s ultimate rule of recognition contemplates both the all-pervasive relevance of the Final Constitution’s norms and their trumping-sense supremacy within South Africa’s legal system.

If so, however, what are we to make of ‘all law derives its force from the Constitution?’ What is the Court trying to say by that remark, that makes any practical sense or any practical difference?

(e) Constitutional supremacy and discursive style

All else failing, let us try to find an answer by changing the subject.

When we place the Final Constitution side-by-side with the pre-constitutional South African *corpus juris* and ask ‘what is new?’, our first answers likely will speak in terms of the substantive content of the law and the values animating it. Democracy, human dignity, the achievement of equality, the advancement of human rights and freedoms, non-racialism and non-sexism¹ have gained a new ascendancy, and acquired new meanings, in the orderings of values that, in one way or another, enter into legal decision-making. In a word, what is new is every dimension of the social valuation of legal choices conveyed by the word ‘transformation.’ In *Pharmaceutical Manufacturers*, the CC plainly affirmed the point that no pocket of South African law is exempt from reconsideration in the light of the Final Constitution’s scheme of values.

But ‘transformation’ signifies to many a shift in the style as well as in the substance of the law — a shift in the law’s discursive modalities as well as in its guiding vision of human and social flourishing. Exactly what sort of stylistic or

¹ See FC s 1.

discursive shift is indicated is a matter under discussion, of course. For some observers, the relevant contrast is that between ‘doctrinal’ argument (old style) and ‘political’ argument (new style).¹ For others, it is the contrast between Roman-Dutch formalism and a legal pragmatism that opens decision-making wide to the particulars of ‘the social, political and historical context of the case.’² For still others, the contrast is best rendered in terms of choices of dominant metaphors: say, ‘rights as boundaries’ versus ‘rights as relationships.’³ And for yet others (the list is not exhaustive), the crucial contrast is the contrast between a ‘matrix mindset’ that thinks inside legal boxes containing ‘comparatively unreflective’ sets of settled rules and structures and a ‘post-matrix mindset’ that is constantly subjecting received rules and practices to the test of consistency with a guiding, global set of values.⁴ Or the contrast may similarly be defined as being that between modes of judicial analysis that allow or invite law outside the Final Constitution — above all, the common law — to ‘drive the enquiry into constitutional values,’ and modes that put the Final Constitution in the driver’s seat by forcing courts to explicate constitutional values separately *before* asking about the adequacy of the fit between — for example — this or that antecedent common-law doctrine and the Final Constitution.⁵

Tracing the commonalities and differences among these assorted views of what may be at stake discursively in the Final Constitution’s entry onto the South African legal scene is beyond the scope of this chapter. What is very much to its point is this: Among those who perceive that ‘constitutional’ denotes a transformed style of legal (no doubt some would say *faux*-legal) argumentation, there is disagreement over whether *that* transformation ought to reach into every last redoubt of juridical activity. Some maintain that the country is best served by leaving the old style (however that may be conceived) some space in which to operate alongside the new.⁶ Others disagree.⁷

¹ The former is said to employ a distinctively legal grammar that injects into the facts and events that compose a legal case their distinctly legal significance, thus shielding legal decision off from raw, consequentialist calculation. Doctrinal argument is a method, then, by which trained, specialist practitioners work out the *legally* best or aptest shadings and orderings of shared, permanent principles or values in changing contexts, where ‘legally’ connotes a time-tested, evolving, civilizational wisdom that no sheerly instrumentalist or ‘balancing’ calculus ever could capture. See D van der Merwe ‘Constitutional Colonisation of the Common Law: A Problem of Institutional Integrity’ (2000) 1 *TSAR* 15, 22–5. By contrast, political, including constitutional argument involves the parties in an open, unmediated contest of clashing interests and rights-claims that only a trade-off could resolve. *Ibid* at 24.

² See AJ van der Walt ‘Dancing with Codes — Protecting, Developing, Limiting and Deconstructing Property Rights in the Constitutional State’ (2001) 118 *SALJ* 258.

³ H Botha ‘Metaphoric Reasoning and Transformative Constitutionalism (Part 2)’ (2003) (1) *TSAR* 20, 34.

⁴ C Roederer ‘Post-Matrix Legal Reasoning: Horizontality and the Rules of Values in South African Law’ (2003) 19 *SAJHR* 57, 62.

⁵ See D Davis ‘Elegy to Transformative Constitutionalism’ in H Botha, A Van der Walt & J Van der Walt (eds) *Rights and Democracy in a Transformative Constitution* (2003) 57, 65.

⁶ See, eg, Van der Merwe (*supra*) at 15.

⁷ See, eg, Roederer (*supra*) at 57.

We cannot here go into detail. We merely suggest that when the CC spoke in *Pharmaceutical Manufacturers* of all law deriving its force from the Final Constitution, it may have been giving expression to that side of its mind that decidedly favours having constitutional values (post-matrix) drive the enquiry into the adequacy of all other law, rather than the reverse. This may have been the CC's way of conveying that there remains in South Africa no trace of law that does not act discursively like the law of the Final Constitution; no law that does not, in that sense, bear the Final Constitution's genes. To put the point another way: No legal argument, contention, or proposal is rejectable today simply because it does not 'sound' right or 'feel' right to a well-brought-up South African jurist of the current generation. To say *that* is to say something significantly more than that all law has to harmonize with the spirit, purport, and objects of the Final Constitution.