RIGHT TO FAIR LABOR PRACTICES

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Our new democracy, instituted in 1994, has as its foundation a Constitution containing a comprehensive Bill of Rights. In one of the first judgments under the new order, the Constitutional Court highlighted the importance of the Constitution as follows:

> In some countries the constitution only formalizes, in a legal instrument, an historical consensus of values and aspirations evolved incrementally from a stable and unbroken past to accommodate the needs of the future. The South African Constitution is different: it retains from the past only what is defensible and represents a decisive break from, and a ringing rejection of, that part of the past which is disgracefully racist, authoritarian, insular, and repressive, and a vigorous identification of and commit to a democratic, universalistic, caring and aspirationally egalitarian ethos, expressly articulated in the Constitution.[1]

The aspirations referred to above are reflected in the embracing, in the Bill of Rights, of a comprehensive set of labor relations rights. These rights, contained in section 23[2] of the Constitution, regulate not

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1. S v Makwanyane & Another 1995 (3) SA 391 (CC) ¶ 262 (S.Afr.).
2. S. AFR. CONST. 1996 § 23 states the following:
   (1) Everyone has the right to fair labour practices.
   (2) Every worker has the right—-
   (a) to form and join a trade union;
   (b) to participate in the activities and programmes of a trade union; and
   (c) to strike
   (3) Every employer has the right—-
   (a) to form and join an employers' organisation; and
   (b) to participate in the activities and programmes of an employers' organisation.
   (4) Every trade union and every employer's organisation has the right—-
   (a) to determine its own administration, programmes and activities;
   (b) to organise; and
   (c) to form and join a federation.
   (5) Every trade union, employers' organisation and employer has the right to engage in collective bargaining. National legislation may be enacted to regulate collective bargaining. To the extent that the legislation may limit a right in this Chapter, the limitation must comply with section 36(1).

only individual and collective freedom of association rights broadly understood, but also a right to fair labor practices. While other constitutions contain, variously, rights to freedom of association, collective bargaining, and the right to strike, it is rare to find a constitution that includes the broad and vague right to fair labor practices. The motivation for its inclusion was a demand by public sector employees for access to the unfair labor practice law on dismissals developed under the 1956 Labour Relations Act (LRA)[3] as a means of protecting their jobs during the transition to a new political dispensation. In the constitutional negotiations this concern led to the embedding of this right in Constitutional principle XXVII and its subsequent appearance as a fundamental right in both the interim and final Constitutions.

The unusual nature of the right requires a creative approach to a determining of its content and scope. The Constitution itself and pointers from other jurisdictions indicate the factors to be taken into account in deconstructing the right. The Constitution requires that in interpreting a fundamental right, regard must be had to the values underlying the Constitution,[4] which are those of an open and democratic society based on human dignity, equality, and freedom. Further, the Constitution requires that consideration must be given to relevant international law,[5] while applicable foreign law[6] may be considered. Further interpretative guidance may be provided by the concept's historical origins,[7] the language of the right,[8] and the context provided by the remaining labor rights.[9] As we have seen above, the values underlying the Constitution are those of an open and democratic society based on human dignity, equality, and freedom.[10] As stated by the Constitutional Court, these values are expressive of a

(6) National legislation may recognise union security arrangements contained in collective agreements. To the extent that the legislation may limit a right in this Chapter, the limitation must comply with section 36(1).

3. *See* H. Cheadle, *Labour Relations*, *in* 1 SOUTH AFRICAN CONSTITUTIONAL LAW: THE BILL OF RIGHTS 18-9. Cheadle has stated that the provision was inserted in the interim Constitution as part of the package of provisions to secure the support of the public service for the new constitutional dispensation and in particular for the restructuring and transformation of the public service into a single public service that would be broadly representative of the South African community.

4. S. AFR. CONST. 1996 § 39(1)(a).

5. S. AFR. CONST. 1996 § 39(1)(b).

6. S. AFR. CONST. 1996 § 39(1)(c). While an interpreter of the rights "must" consider the values underlying the Constitution and international law, regard "may" be had to foreign law.

7. *See* R v Big Drug Mart Ltd. (1985) 18 DLR (4th) 321 at 395–96 (18 CCC (3rd) 385) (S. Afr.), quoted with approval in S v Zuma & others 1995 (4) BCLR 401 (CC) (S. Afr.).

8. *Id.*

9. *Id.*

10. S. AFR. CONST. 1996 39(1)(a).

"commitment to a democratic, universalistic, caring and aspirationally egalitarian ethos . . ."[11] The effect of these constitutional values on the interpretation of the right are discussed further below. International law extensively regulates labor rights, in particular through the conventions and recommendations of the International Labour Organisation (ILO). Nowhere, however, do the latter provide specifically for a right to fair labor practices, although many of the practices so protected could fall under the right. The European Social Charter's right to just conditions of work, as well as other rights that it protects, could also be viewed as forming part of a broader right to fair labor practices.[12] Foreign law is not helpful as a source in defining the right, for where it appears in such law, such as in the United Kingdom, United States, Japan, and India, the concept has been developed in contexts very different from ours. British law, for instance, is unsatisfactory as a guide as its unfair labor practice regime is narrowly linked to its law on unfair dismissal,[13] while in the United States, unfair labor practice jurisprudence is concerned primarily with prohibitions relating to collective labor practices.[14] In India the unfair labor practice is limited to victimization for trade union activities and unfair dismissal.[15] A more fruitful avenue for determining the content of the right lies in our own labor law, specifically the unfair labor

11. S v Makwanyane & Another 1995 (3) SA 391 (CC) ¶ 262 (S. Afr.).

12. European Social Charter, Mar. 20, 1952, ,529 U.N.T.S. 89, art. 2. *See also* art. 4 (the right to fair remuneration).

13. M. BRASSEY ET AL., THE NEW LABOUR LAW: STRIKES, DISMISSALS AND THE UNFAIR LABOUR PRACTICE IN SOUTH AFRICAN LAW 71–73 (1987).

14. In summary, § 8(a) of the National Labour Relations Act (NLRA) provides that it is an unfair labor practice by an employer to:

1. interfere with employees' collective bargaining rights;
2. interfere with the formation or administration of any labor organization;
3. discriminate in hiring or regarding any term or conditions of employment as a way of influencing membership of a labor organization;
4. dismiss or discriminate against an employee for exercising rights under the unfair labor practice provision; and,
5. refuse to bargain collectively with representatives of his employees.

Labor organizations commit an unfair labor practice by

1. coercing or restraining employees in the exercise of collective bargaining rights;
2. causing an employer to discriminate against non-union members;
3. refusing to bargain collectively with an employer;
4. engaging in or pressurizing workers to engage in certain strikes and boycotts;
5. charging discriminatory agency fees;
6. requiring employers to pay for services not performed; and,
7. picketing where the object is to force an employer to bargain with a labor organization as the representative of his employees.

5 R. BLANPAIN, ENCYCLOPAEDIA OF LABOUR LAW AND INDUSTRIAL RELATIONS, LEGISLATION 124–27 (Supp. 86, 1988).

15. 6 R. BLANPAIN, ENCYCLOPAEDIA OF LABOUR LAW AND INDUSTRIAL RELATIONS, LEGISLATION 103 (Supp. 101, 1989).

practice jurisdiction of the 1956 LRA,[16] the provisions of the 1995 LRA,[17] and the 1997 Basic Conditions of Employment Act (BCEA).[18] These interpretative indicia form the basis for the deconstruction of the right that follows.

I. EVERYONE

Many of the rights in the Constitution are granted to "everyone." In respect of the right to fair labor practices, the term "everyone" should be interpreted in line with the Constitution and with reference to the rest of the right and the labor rights as a whole. The Constitutional Court in *National Education Health & Allied Workers Union v. University of Cape Town & others,*[19] although declining to essay a precise definition of the right, held that its focus was "broadly speaking the employment relationship between employer and worker."[20] This reflects the fact that labor relations have preeminently to do with the relationship between employers, workers, and their representatives, and is supported by the fact that the remaining labor rights apply variously to workers or employers or both.[21] The court's characterization of the right's ambit as "broadly speaking" relating to employers and workers is an indication, nevertheless, that the parameters of the right should remain flexible and reflects the constitutional stance that rights should not be cut down by reading implicit restrictions into them.[22] This is particularly relevant insofar as persons on the margins of the employment relationship are concerned, a prime example being applicants for employment. Previously, job applicants were protected from discrimination under the LRA's unfair labor practice provisions, a protection that is now embodied in the Employment Equity Act,[23]

16. LRA 28 of 1956.

17. LRA 66 of 1995.

18. LRA 75 of 1997.

19. Nat'l Educ. Health & Allied Workers Union v. Univ. of Cape Town & others 2003 (24) I.L.J. 95 (CC) (S. Afr.).

20. *Id.* ¶ 40.

21. *Id.*

22. *See* S v Zuma & others 1995 (4) BCLR 401 (CC) at 411 (S. Afr.). In this case the Constitutional Court stated as follows: "Constitutional rights conferred without express limitation should not be cut down by reading implicit restrictions into them, so as to bring them into line with the common law."

23. Previously schedule 7, item 2(1)(a) read with 2 (2)(a) of the 1995 LRA protected applicants for employment from discrimination by deeming them to be employees for the purposes of that item. Such persons are now protected under the Employment Equity Act 75 of 1998 (section 6(1) read with section 9) and have recourse under the constitutional right to equality.

which has the right to equality[24] as its constitutional home. The LRA currently protects persons seeking employment from being prevented from exercising their trade union and workplace forum rights.[25] Further, they may not be prevented from exercising any right conferred by the Act or from participating in any proceedings in terms of the Act,[26] nor may they be prejudiced for exercising these and other rights.[27] Whether such persons should be protected under the constitutional right to fair labor practices will depend not only on whether the term "everyone" is broad enough to encompass them, but also whether these protections are embraced by the notion of labor practices, issues that are discussed further below.

The other rights in the labor rights apply to workers and employers and their organizations, and on this basis the right should be seen as applying at least to employers and workers. The scope of these terms needs to be examined for a clearer understanding of the reach of the right. The Constitution recognizes that "everyone" may include not only natural persons, but juristic persons as well, depending on the nature of the particular right and the nature of the juristic person.[28] Employers are typically either natural or juristic persons depending on the nature of the organization and the way in which they conduct their business.[29] In *NEHAWU v. UCT*, the applicant's argument that "everyone" in the right applied only to workers and excluded employers as they were juristic persons was based on the mistaken view that all employers were juristic persons. The court, finding that the right applied equally to workers and employers, correctly held that not all employers were juristic persons and that the right should apply to all employers, juristic or otherwise.[30]

The language of the labor relations rights uses the term "worker" and not "employee." The two terms are not the same. "Worker" has a meaning that is broader than the term "employee"[31] as normally

24. S. AFR. CONST. 1996, § 9.
25. LRA of 1995 Section § 5(2)(a)(i),(ii),(iii).
26. LRA of 1995 Section § 5(2)(b).
27. LRA of 1995 Section § 5 (2)(c).
28. LRA of 1995 Section § 8(4).
29. According to company law, a juristic person comprises incorporated companies, close corporations and foundations, while it excludes partnerships and trusts. H. CILLIERS & M. BENADE, CORPORATE LAW 6 (2000).
30. Nat'l Educ. Health & Allied Workers Union v Univ. of Cape Town & others, 2003 (2) BCLR 154 (CC) at 113 (S. Afr.).
31. Both section 213 of the LRA and section 1 of the BCEA define "employee" as

> (a) any person, excluding an independent contractor, who works for another person or for the State and who receives, or is entitled to receive, any *remuneration*, and
> (b) any other person who in any manner assists in carrying on or conducting the

understood and as defined in our labor law. The scope of the term was examined in the *South African National Defence Union v. Minister of Defence & another*[32] where the Constitutional Court was called on to decide whether prohibiting members of the defense force from forming and joining trade unions was an infringement of the right to freedom of association that applies to "workers" (and employers). The court found that the term "worker" in section 23 of the Constitution was used in the context of employers and employment. It referred to those who worked for an employer, which would, primarily, be those who had entered into a contract of employment to provide services to such employer. By comparison, members of the permanent force did not enter into contracts of employment, but enrolled in the force.[33] However, the court found that in many respects the relationship between members of the permanent force and the military was "akin" to an employment relationship, which argued in favor of these members being considered "workers" for the purposes of the right.[34] They would thus fall under the protection of the right and could form and join trade unions.[35]

From the above finding of the court, it may be concluded that the notion of worker contained in the labor rights, including the right to fair labor practices, should be generously interpreted and that it will also include persons who have not entered into a formal contract of employment to provide services but are in work relationships "akin" to the employment relationship governed by a contract of employment. The effect of this will be that workers who work under one of the myriad forms of atypical employment will fall within the scope of the term "worker" and will be protected by the right.[36] Currently there is a blurring of the contract of employment[37] and the

business of an employer, and "employed" and "employment" have meanings corresponding to that of "employee."

32. South African Nat'l Def. Union v Minister of Def. & Another (1999) 20 I.L.J. 2265 (CC) (S. Afr.).

33. *Id.* at 2277.

34. *Id.* at 2277–78. The court stated that members of the armed forces rendered a service for which they received a range of benefits, the latter including salaries and allowances, leave, medical and transport benefits, and certain mess expenses. Termination of membership, in general, was on the basis of misconduct or retirement and at the request of a member. However, misconduct was punishable in terms of the Military Disciplinary Code, which provided that members were criminally liable for specific forms of misconduct and might be sentenced to prison. In that respect, at least, the relationship was different from the employment relationship.

35. *Id.* at 2280.

36. For a detailed exposition of this argument, see Cheadle *supra* note 3, at 18-4–18-7.

37. The *locatio conductio operarum.*

contract of work,[38] with many workers being considered independent contractors when in reality they are not truly independent but are subordinate to and dependent on the person for whom they undertake the work. It could be argued that even under a narrower conception of the notion of worker such persons would be protected by the constitutional right if regard is given to the true nature of the relationship rather than the form of the contract. Labor legislation is alert to the problem of workers being falsely portrayed as independent contractors when they are in fact workers, which has the effect excluding from the protections of labor law governing employees. Both the LRA[39] and the BCEA[40] provide for a process whereby the real nature of the relationship between an employer and a person providing a service may be determined, so as to ensure that persons who work in a subordinate and dependent manner[41] are counted as employees in terms of the definition of employee under the Acts. The effect of a generous interpretation of the term "worker" under the constitutional rights will be not only to constitutionally guarantee the protections in the LRA and BCEA but also to protect those dependent and subordinate workers who may still fall outside the legislative protection.[42]

In short, the term "everyone" in the right to fair labor practices should at least embrace employers, whether they are natural or juristic

38. The *locatio conductio operas.*

39. Section 200A of the 1995 LRA provides that a person who works for, or renders services to, any other person is presumed, until the contrary is proved, to be an employee, regardless of the form of the contract, if any one or more of the following factors is present:

> (a) The manner in which the person works is subject to the control or direction of another person; (b) the person's hours of work are subject to the control or direction of another person; (c) in the case of a person who works for an organization, the person is part of that organization; (d) the person has worked for that other person for an average of at least 40 hours per month over the last three months; (e) the person is economically dependent on the other person for whom that person works or renders services; (f) the person is provided with tools of trade or work equipment by the other person; or (g) the person only workers for or renders services to one person.

40. Section 83A of the 1997 BCEA. The wording of the provision is the same as that in section 200A of the 1995 LRA above.

41. Cheadle holds that the criteria for determining whether a person is a worker is the personal nature of the service and whether the person works for another in a manner that is subordinate and dependent; relying on the following: ILO Meeting of Experts, *Workers*, *in* Situations Needing Protection: Basic Technical Document (The Employment Relationship: Scope) 2000 at 4; MANFRED WEISS, FEDERAL REPUBLIC OF GERMANY 43 (1994); The United Kingdom's Employment Rights Act, 1996, c. 2, § 202(3); PAUL DAVIES & MARK FREEDLAND, EMPLOYEES WORKERS AND THE AUTONOMY OF LABOUR LAW 267 (2000); Article 1 of the Draft Convention on Contract Labour ILO Report V (2B) 1998. Cheadle, *supra* note 3.

42. In such an instance, the better route would be for the definition of employee to be amended to incorporate those persons or for the common law to be developed, rather than relying on the right directly, as this would give rise to two parallel systems of labor jurisprudence, which would be undesirable—see below.

persons, and workers in the broad conception of the term. Whether it includes persons on the margins of employment, as mentioned above, remains to be determined.

II. LABOR PRACTICES

Labor relations are essentially concerned with the employer-worker relationship, and labor practices with matters of mutual interest that arise from that relationship. Potentially, a wide range of matters may fall within the ambit of labor practices covered by the constitutional right. International and domestic law as well as the context of the right within the labor relations rights as a whole all serve to give content to the right. With respect to international law, ILO conventions and recommendations, and other instruments, such as the European Social Charter,[43] while not specifically addressing what constitutes a labor practice, provide an indication of the kinds of matters that may potentially fall under this rubric, such as those relating to health, safety, and social security;[44] working time;[45] minimum wages, equal pay, and other remuneration matters;[46] job security;[47] minimum age and forced labor protections;[48] and, discrimination.[49] However, it is domestic law in the form of the 1956 LRA and provisions of the 1995 LRA that constitutes a central source for determining what constitutes a labor practice for the purposes of

43. The Charter's right to just conditions of work (Art. 2) includes reasonable daily and working hours and a progressive reduction in the working week; public holidays with pay; two weeks' annual holiday with pay; weekly rest periods and additional holidays or reduced working hours for those in dangerous or unhealthy occupations. While "just working conditions" conveys a similar meaning to "fair labor practices" ("just" includes the notion of fairness, and "conditions" are the product of practices), the rather arbitrary inclusion of some working conditions and the exclusion of others from the category limits its usefulness as an interpretive guide.

44. *See* Social Security (Minimum Standards) Convention (No. 102) 1952, *available at* http://www.ilo.org/ilolex/cgi-lex/convde.pl?C102.

45. *See* Hours of Work (Industry) Convention (No. 1) 1919, *available at* http://www.ilo.org/ilolex/cgi-lex/convde.pl?C001; Hours of Work (Commerce and Offices) Convention (No. 30) 1930, *available at* http://www.ilo.org/ilolex/cgi-lex/convde.pl?C030; Forty Hour Week Convention (No. 47) 1935, *available at* http://www.ilo.org/ilolex/cgi-lex/convde.pl?C047.

46. *See* Minimum Wage Fixing Machinery Convention (No. 26) 1928, *available at* http://www.ilo.org/ilolex/cgi-lex/convde.pl?C026; Protection of Wages Convention (No. 95) 1949, *available at* http://www.ilo.org/ilolex/cgi-lex/convde.pl?C095; Minimum Wage Fixing Convention (No. 131) 1970, *available at* http://www.ilo.org/ilolex/cgi-lex/convde.pl?C131.

47. *See* Termination of Employment Convention (No. 158) 1982, *available at* http://www.ilo.org/ilolex/cgi-lex/convde.pl?C158.

48. *See* Minimum Age (Industry) Convention (No. 59) 1937, *available at* http://www.ilo.org/ilolex/cgi-lex/convde.pl?C059; Forced Labour Convention (No. 29) 1930, *available at* http://www.ilo.org/ilolex/cgi-lex/convde.pl?C029.

49. Discrimination (Employment and Occupation) Convention (No. 111) 1958, *available at* http://www.ilo.org/ilolex/cgi-lex/convde.pl?C111.

the constitutional right. Under the 1956 LRA, the Industrial Court fashioned an equity based jurisprudence arising from the unfair labor practice provision which had been introduced into the law in 1979 following the recommendations of the Wiehahn Commission.[50] The very broad and vague nature of the initial provision,[51] that stated that the unfair labor practice was "any labor practice which in the opinion of the industrial court is an unfair labour practice," gave the court wide scope in developing its jurisprudence. The extensive nature of the court's reach is aptly summarized in the comment that "so extensive an abrogation of legislative prerogative must surely be unique in our parliamentary history."[52] Later refinements to the provision[53] gave it greater content, and, after a perhaps inevitably erratic beginning given the open-textured nature of the provision, the court developed a body of rights-based rules in terms of which the notion of equity was seen broadly as encompassing a balancing of employers' and employees' interests in order to achieve the Act's objective of labor peace.[54] Labor practices were found to cover both individual and collective practices,[55] but were confined to the employer-employee relationship.[56] Unfairness relating to work security and employment opportunities as defined led to the court

50. COMMISSION OF ENQUIRY INTO LABOUR LEGISLATION 1979, Part 5, 4.127.17 (1979). After widespread labor unrest throughout the country in the 1970s, the government appointed the Wiehahn Commission to enquire into labor reform. The commission had a far-reaching effect on labor relations, bringing black workers and their unions into the industrial conciliation regime for the first time, and establishing the Industrial Court as a court of law and equity, among other recommendations.

51. Industrial Conciliation Amendment Act, No. 94 (1979).

52. BRASSEY ET AL., *supra* note 13, at 12.

53. In 1980 and 1991. Amendments to the Act in 1988, designed to claw back some of the worker gains occasioned by the initial definition, led to large-scale unrest that saw the reintroduction in 1991 of the 1980 version in a slightly amended form. The 1991 definition read as follows:

> "unfair labour practice" means any act or omission, other than a strike or lockout, which has or may have the effect that –
>
> (i) any employee or class of employees is or may be unfairly affected or that his or their employment opportunities or work security is or may be prejudiced or jeopardized thereby; (ii) the business of any employer or class of employers is or may be unfairly affected or disrupted thereby; (iii) labour unrest is or may be created or promoted thereby; (iv) the labour relationship between employer and employee is or may be detrimentally affected thereby.

54. Consolidated Frame Cotton Corporation v. The President, Indus. Ct. (1986) 7 I.L.J. 489 (A) (S. Afr.).

55. It has been suggested that the textual mandate for the court's adjudication of collective disputes was less assured than for individual disputes. However, the very broad definition of the provision does not support this view.

56. Under this jurisprudence, "practice" was interpreted as including both habitual action and a single act or omission, Trident Steel (Pty.) Ltd. v John NO (1987) 8 I.L.J. 27 (W) (S. Afr.); SAAWU v Border Boxes (Pty.) Ltd. (1987) 8 I.L.J. 467 (C) (S. Afr.); and "labor" as including both mental and physical labor, Bleazard v Argus Printing & Publishing Co. Ltd. (1983) 4 I.L.J. 60 (IC) at 70 (S. Afr.).

finding as unfair, among other things, unfair dismissals because of the absence of a fair reason and procedure,[57] the dismissal of strikers for participating in a lawful strike,[58] failure to reemploy in terms of an agreement, failure to renew a contract where there was a reasonable expectation of such renewal,[59] selective dismissal,[60] racial discrimination,[61] and victimization for trade union activities.[62] Among the unfair labor practices struck down by the court as conducive to labor unrest and the undermining of the employment relationship were a refusal to bargain,[63] bad faith bargaining,[64] a failure to accord rights relevant to the bargaining process,[65] the use of unfair bargaining tactics,[66] and the resort to industrial action before deadlock had been reached in negotiations.[67] The court, however, declined to consider matters relating to bargaining topics and bargaining levels, on the basis that this would have constituted an unwarranted descent into the collective bargaining arena. While the court saw as its function the adjudication of disputes relating to rights,[68] including striking down practices inimical to the process of fair collective bargaining, it saw as falling outside its jurisdiction purely economic disputes—that is disputes over new terms and conditions of work. The resolution of

57. *See* A. RYCROFT & B. JORDAAN, A GUIDE TO SOUTH AFRICAN LABOUR LAW ch. 2 (1992); BRASSEY ET AL., *supra* note 13.

58. NUM v Marievale Consolidated Mines Ltd. (1986) 7 I.L.J. 123 (IC) (S. Afr.).

59. Mtshamba v Boland Houtnywerhede (1986) 7 I.L.J. 563 (IC) (S. Afr.).

60. Fihla v Pest Control (1984) 5 I.L.J. 165 (IC) (S. Afr.).

61. MWU v East Rand Gold & Uranium Co. Ltd. (1990) 11 I.L.J. 1070 (IC) (S. Afr.).

62. Mbatha v Vleissentraal Co-operative Ltd. (1985) 6 I.L.J. 333 (IC) (S. Afr.).

63. FAWU v Spekenham Supreme (1988) 9 I.L.J. 628 (IC) (S. Afr.); SACWU v Sasol Industries (Pty.) Ltd. (1989) 10 I.L.J. 1031 (IC) (S. Afr.); Buthelezi v Labour for Africa (1991) 12 I.L.J. 588 (IC) (S. Afr.); NUM v East Rand Gold & Uranium Co. Ltd. (1991) 12 I.L.J. 1221 (A) (S. Afr.); Macsteel (Pty) Ltd v NUMSA (1990) 11 I.L.J. 995 (LAC) (S. Afr.).

64. Mawu v Natal Die Casting Co. (Pty.) Ltd. (1986) 7 I.L.J. 520 (IC) (S. Afr.).

65. NUM v Free State Consolidated Gold Mines (Operations) Ltd. (1988) 9 I.L.J. 804 (IC) (S. Afr.).

66. East Rand Gold & Uranium Co. Ltd. v NUM (1989) 10 I.L.J. 683 (LAC) (S. Afr.).

67. NUM v Henry Gould (Pty.) Ltd. (1988) 9 I.L.J. 1149 (IC) (S. Afr.).

68. Rights disputes refer to disputes arising from the application or interpretation of an existing law, collective agreement, contract etc., and are usually settled through adjudication. Interest disputes, on the other hand, refer to disputes over new terms and conditions of work, essentially the wage-work bargain, and are usually resolved through power play. Not all disputes are easily classifiable, and some may migrate from one category to another. Thus, under the LRA, disputes over dismissals for operational requirements were initially regarded as disputes of right adjudicable in the Labour Court, but now certain such disputes may be resolved through strike action. Unions may elect to follow one course or the other (sections 189 & 189A of the 1995 LRA). *See generally*, CONCILIATION AND ARBITRATION PROCEDURES IN LABOUR DISPUTES: A COMPARATIVE STUDY 5 (International Labour Organization 1989); Wiehahn Commission Report part 1, at 89–90 ¶ 4.5.

such disputes was left to collective (and individual) bargaining between the parties.[69]

Drawing on the jurisprudence of the Industrial Court on unfair labor practices, the 1995 LRA has codified as unfair labor practices unfair conduct in relation to workers' security (unfair dismissal, including dismissal during a transfer of a business, unfair suspension and the failure to re-employ or reinstate), unfair treatment in relation to work opportunities (promotion, demotion, probation, training and benefits, and victimization arising from whistleblowing[70]), and unfair disciplinary action.[71] However, in contrast to the 1956 Act, the legislation, while promoting collective bargaining through the creation of the mechanisms for such bargaining, the protection of trade unions and employer organizations, the according of organizational rights, the establishment of industrial councils and the right to strike, has not codified a right to collective bargaining and the correlative duty to bargain, nor does it regulate issues relating to such bargaining, such as bargaining in good faith. The stance of the Act is that these and other bargaining issues, such as bargaining agents and levels, are issues to be decided by power play. In accordance with the previous regime, the Act also leaves to power play the resolution of disputes over the substantive economic demands of the parties, in other words, interest disputes. This schema does not ignore the situation of more vulnerable, non-unionized workers: they are protected through minimum standards legislation in the form of the BCEA, which sets a floor of rights in respect of a wide range of terms and conditions of work.

The Constitutional Court has held that the right to fair labor practices is incapable of precise definition. This argues for a flexible approach to the content of the right but not that no attempt at all should be made to define it. Taking into account the development of the law outlined above, the scope of the notion of "labor practices" may embrace at least the following practices. First, the right should provide protection against unfair practices relating to work security

69. NUM v Henry Gould (Pty.) Ltd. (1988) 9 I.L.J. 1149 (IC) at 1154–55 (S. Afr.); Olivier v AECI Plofstowwe & Chemikaliee, Bethal (1988) 9 I.L.J. 1052 (IC) at 1058–59 (S. Afr.).

70. In terms of an amendment (section 42 of Act 12 of 2002) to the LRA victimization due to whistleblowing was included as an unfair labor practice (section 186(2)(c)). This followed the promulgation of the Protected Disclosures Act 26 of 2000, which protects an employee from victimization for having made a protected disclosure defined in that Act.

71. Unfair discrimination originally fell under the provision on unfair labor practices in the LRA (Schedule 7 item 2(1)(a)), but is now regulated separately in terms of the Employment Equity Act. It was always the intention that unfair labor practices would be incorporated into a separate Act. This has occurred in respect of unfair discrimination, while the remaining unfair labor practices have now been included in the main body of the LRA under section 186(2).

and employment opportunities as codified in the 1995 LRA, both of a substantive and procedural nature.[72] Second, it should protect the minimum standards rights accorded in the BCEA. As in the case of the LRA, the BCEA provides that one of its objects is to give effect to and regulate the right to fair labor practices in section 23(1) of the Constitution.[73] In other words, the Act sees itself as giving content to this right. Whether the right should encompass rights regulated in other labor legislation, such as health and safety rights at work, is debatable, but there is no apparent reason why these should be excluded although this would constitute a broadening of the right from its previous confines. Third, following previous and current labor jurisprudence principles, the right should not be interpreted as encompassing a determination of the wage-work bargain, the latter to be determined by economic power play between the parties. In other words, it should be concerned with the adjudication of disputes of right as opposed to disputes of interest. The fourth issue relates to whether the right should be viewed as an overarching right encompassing the other labor rights or whether it should be viewed as distinct from them. The fact that each of the rights is specifically regulated suggests that the legislative intention is that they are distinct, each traversing a different terrain, although there is a close relationship between the freedom of association rights. This was not the approach of the High Court in *South African National Defence Union & another v. Minister of Defence & others.*[74] Without considering the scope of the right to fair labor practices, the court assumed that it included collective bargaining rights, finding that restrictions[75] in the military regulations[76] on matters over which

72. In South African National Defence Union & another v. Minister of Defence & others (2003) 24 I.L.J. 2101 (T) (S. Afr.), the High Court found that regulation 73 of the Military Regulations (Amendment to the General Regulations for the South African National Defence Force and Reserve, Government Gazette vol. 411 no. 20425, 1 September 1999 promulgated in terms of section 87(1)(rB) read with section 126C of the Defence Act 44 of 1957), which provides for the Minister of Defence to appoint "independent persons" to the Military Arbitration Board infringed the right to fair labor practices as it amounted to an unfair procedure. The function of the board to determine disputes (referred to it in terms of regulation 71(5)(b)) would include disputes involving the Minister in his capacity as employer. The court held that the independence and impartiality of the arbitration board would be compromised as it was appointed by the Minister who would also appear before it in his representative capacity as employer. The court (at 2125) referred inter alia to article 6(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms which provides that civil and criminal matters must be heard by an "independent and impartial tribunal" and, following case law of the European Court (Ringeirsen v Austria judgment of June 16, 1971 Series A, No. 13 ¶ 95), held that "independent" meant "independent of the executive and also the parties."

73. Section 2(a) of the BCEA.

74. (2003) 24 I.L.J. 2101 (T) (S. Afr.).

75. Regulation 3(c) provides for collective bargaining on "certain" issues of mutual interest while regulation 36 provides that military trade unions "may negotiate in collective bargaining,

bargaining could take place in the military infringed both this right and the right to engage in collective bargaining.[77] A similar approach was adopted by Sachs, J., is his minority judgment in the 1999 SANDU[78] case where, taking issue with the basis of O'Regan's finding[79] that the notion "worker" was extensive enough to include military personnel and thus the applicants could pursue a claim under the right to form and join trade unions, he suggested that this claim could have been prosecuted instead under the constitutional right to fair labor practices,[80] on the basis that the term "everyone" was broad enough to incorporate such personnel. The effect of his approach would be to extend the scope of the right to include trade union rights, even though such rights are protected separately under the labor rights. As stated above, the structure of the labor rights as a whole militates against an interpretation that sees the right to fair labor practices as a catchall right, capable of embracing anyone and any kind of matter. A related point is whether matters that are specifically excluded from the ambit of one of the other rights could, nevertheless,

and may negotiate on behalf of their members, only in respect of: a) the pay salaries and allowances of members, including the pay structure; b) general service benefits; c) general conditions of service; (d) labour practices; and e) procedures for engaging in union activities within units and bases of the Defence Forces." The court found that these provisions derogated from the right of a military trade union to negotiate over all matters of mutual interest between the employer and the military trade union and its members (at 2123) as they prevented a military trade union from bargaining over matters falling outside of matters dealt with in paragraphs (a)–(e). The provision, it found, infringed the right to fair labor practices and the right to engage in collective bargaining. The court found that the minister had failed to justify the restriction. It ordered that the word "certain" be severed from regulation 3(c) and declared regulation 36 inconsistent with the Constitution and invalid to the extent that it purported to limit the right of military trade unions to engage in collective bargaining in respect of the matters in paragraphs (a)–(e).

76. Amendment to the General Regulations for the South African National Defence Force and Reserve *supra* note 72.

77. Similarly, the court, again without considering the nature of the right, found that the prohibition on a military trade union representative representing a member in grievance and disciplinary proceedings in terms of regulation 27 of the Military Regulations infringed the right. This particular claim should have been considered instead under the freedom of association rights, in particular the right to form and join a trade union and the right of a trade union to organize as it falls squarely within the scope of those rights. By contrast, in National Union of Metalworkers of South Africa & others v Bader Bop (Pty.) Ltd. & another (2003) 24 I.L.J. 305 (CC) (S. Afr.), the Constitutional Court, considering a similar issue relating to trade union representation, did so in terms of the constitutional rights to form and join a trade union and to organize. A similar point can be made in relation to the High Court's assessment under the fair labor practices right of the power granted to the registrar to oversee the functioning of military trade unions, including the right to deregister them. This matter specifically relates to freedom of association and therefore should have been considered under the right of a trade union to determine its own administration, programs and activities (section 23(4) of the FC).

78. South African Nat'l Def. Union v Minister of Def. & Another (1999) 20 I.L.J. 2265 (CC) (S. Afr.).

79. But not the finding itself.

80. Sachs, J., also held that the matter should rather have been considered under the general freedom of association right in the Constitution (section 18).

be protected by the right to fair labor practices. This is of particular relevance in the case of the constitutional right to engage in collective bargaining. One interpretation of that right is that it does not impose a correlative duty to bargain, and that disputes over a refusal to bargain, including the related issues of bargaining in good faith, bargaining levels, bargaining topics, and bargaining tactics, should be resolved through industrial action rather than adjudication. If that is the case, as adjudication has been eschewed as an appropriate avenue for the resolution of disputes over collective bargaining, it should not be possible to seek redress in relation to those matters under the right to fair labor practices.

III. FAIRNESS

The Constitutional Court in *NEHAWU v. UCT*[81] stated that the focus of section 23(1) was, broadly speaking, the relationship between worker and the employer and the continuation of that relationship on terms that were fair to both.[82] The interests of both employers and workers should be taken into account to arrive at the balance required by the concept of fair labor practices. However, because of the tension between the interests of workers and employers, the concept was incapable of precise definition and it was neither necessary nor desirable to define it. What was fair would depend on the circumstances of each case and "essentially involved a value judgement." While the concept of fairness does indeed present difficulties of interpretation, nevertheless, some understanding needs to be reached on the principles embodied by the notion as a basis for the scrutiny of law, the interpretation of such law, and conduct, and the development of a consistent constitutional jurisprudence under the right.

We have seen earlier that the main focus of the right is the employment relationship: it follows then that the notion of fairness must apply to employers and workers; both their interests should be taken into account. The interests of employers are underpinned by the right to the economic development of their enterprises through enhanced production and efficiency. Informing the interests of workers is the principle of social justice in the workplace, incorporating workers' rights to job security and advancement, a democratic work environment, and to be treated with dignity and

81. Nat'l Educ. Health & Allied Workers Union v Univ. of Cape Town & others 2003 (24) I.L.J. 95 (CC) at 110 (S. Afr.).

82. *Id.* at 113.

equality. While the right indicates that both parties' interests should be considered, it does not identify where the balance between these interests should be struck in any situation. A consideration of the values[83] articulated in the Constitution and international law provides some assistance in this regard. The relevant constitutional values are those of human dignity, equality, and freedom:[84] they are the bedrock of an open and democratic society. Explicating how these values articulate within the context of the employment relationship, the Constitutional Court, while acknowledging the legitimacy of the commercial requirements of the employer, has pointed to the role the Constitution plays in protecting the vulnerable in society. "Our Constitution," it has said, "protects the weak, the marginalised, the socially outcast, and the victims of prejudice and stereotyping. It is only when these groups are protected that we can be secure that our own rights are protected."[85] Although this finding was made under another right,[86] it nevertheless has resonance for the labor rights. As far as international law is concerned, ILO conventions in particular are critical to a greater appreciation of where the balance between the interests of employers and workers should be struck so as to give effect to the notion of fairness. The conventions that are relevant to those practices that may fall under the rubric of fair labor practices in the constitutional right have in common a focus on the protection of workers.[87] Again, this is not to suggest that the notion of fairness is exclusive of employers' legitimate commercial interests, but indicates that a central concern of modern employment law is to guarantee the

83. S. AFR. CONST. 1996, § 39.

84. S. AFR. CONST. 1996, § 39(1)(a).

85. Hoffman v South African Airways (2001) (1) SA 1 at 18H–19A (S. Afr.). The court was considering the refusal of SAA to appoint a flight attendant because of his HIV status. The High Court had upheld the employer's argument that employing an HIV positive person as an attendant would, among other things, have an adverse impact of the airline's commercial interests.

86. The right to equality—section 9 of the Constitution.

87. Thus, for instance, the ILO Convention on the Termination of Employment 1982 stipulates the parameters for a fair dismissal or retrenchment, which would be of relevance in testing the constitutionality of the provisions in the LRA on dismissal. An examination of the terms of the convention reveals that the provisions in the LRA closely reflect the requirements for a fair dismissal contained therein. Similarly, other conventions, such as the Holidays with Pay Convention 1970, Protection of Wages Convention 1949, and Hours of Work (Industry) Convention 1919, would be relevant in testing the constitutionality of provisions in the BCEA. Although South Africa has not ratified the conventions mentioned here, nevertheless, they represent universally accepted norms and therefore constitute a touchstone against which the notion of fairness may be gauged. Not all conventions focus only on the rights of workers; for instance, the conventions on freedom of association and collective bargaining (conventions 87 and 98) are concerned with guaranteeing rights to both workers and employers.

protection of workers.[88] Thus, the constitutional values and those of international law operate to ensure that proper consideration be given to the vulnerable position of workers and their rights to equality and dignity when their interests are weighed against the legitimate commercial interests, and greater power, of employers.

Under the 1956 LRA, the definition of an unfair labor practice held the interests of employees and employers as equivalent:[89] workers were to be protected in relation to work security and opportunities[90] and employers against conduct detrimental to their businesses.[91] In effect, however, it was employees who, not surprisingly given the imbalance in power between them and employers, relied overwhelmingly on the provision to build increased rights in the workplace.[92] In adjudicating the individual rights disputes before it, the Industrial Court developed over time a jurisprudential standard of fairness that required that both the employer's commercial interests and the legitimate workplace interests of the employees be taken into account. In essence the employer's conduct in the realm of individual rights had to be based on a fair reason and executed in terms of a fair procedure. The 1995 LRA, in codifying the

88. PAUL DAVIES & MARK FREEDLAND, KAHN-FREUND'S LABOUR AND THE LAW 18 (3d ed. 1983) where it is stated:

> The main object of labour law has always been, and we venture to say will always be, to be a countervailing force to counteract the inequality of bargaining power which is inherent and must be inherent in the employment relationship. Most of what we call protective legislation – legislation on the employment of women, children and young persons, on safety in mines, factories, and offices, on payment of wages in cash, on guarantee payments, on race or sex discrimination, on unfair dismissal, and indeed most labour legislation altogether – must be seen in this context.

89. The notion of equivalence is given expression, for instance, in the holding of the court in National Union of Metalworkers of SA v Vetsak Co-operative Ltd. & others (1991) 12 I.L.J. 564 (LAC) at 593G-H (S. Afr.), where the court stated,

> The fairness required in the determination of an unfair labour practice must be fairness towards both employer and employee. Fairness to both means the absence of bias in favour of either. In the eyes of the LRA of 1956, contrary to what counsel for the appellant suggested, there are no underdogs.

However, it is not the case that striking a balance between the interests of workers and employers, which is not always in strict parity, is necessarily based on bias. It might just be that in the circumstances of the case, taking into account applicable factors such as constitutional and international law values and the particular context, that the interests of one side outweigh those of the other.

90. The definition stated that an unfair labor practice was any practice that had the effect that "(i) any employee or class of employees is or may be unfairly affected or that his or their employment opportunities or work security is or may be prejudiced or jeopardized thereby. . . ."

91. As far as employers were concerned the definition of an unfair labor practice stated that it was a practice which had the effect that "(ii) the business of any employer or class of employers is or may be unfairly affected or disrupted thereby. . . ."

92. Employers very rarely relied on the provision protecting their interests. The only case this author was able to locate was that of Westpro (Cape Town) v Stephenson (1995) 16 I.L.J. 452 (IC) (S. Afr.), in which the employer was compensated for its loss due to the summary and unfair resignation of the employee.

jurisprudence of the Industrial Court, has approached the issue somewhat differently. Unfair labor practices as broadly defined[93] are practices by the employer against the employee and not vice versa. This is suggestive of a notion of fairness that does not hold employer and workers' interests as always equivalent and is more congruent with an approach that sees the main object of labor law as protecting worker interests. To the extent that the constitutional right requires that fairness means that both parties' interests be taken into account, the legislation could be found to be wanting when judged against the constitutional standard. This is not to say that employers have no recourse to the law to defend their conduct in terms of the 1995 LRA: employers may escape a claim of unfairness by demonstrating that there was a substantively fair reason for their actions and that these actions were conducted in accordance with a fair procedure.[94] However, they cannot prosecute a claim for an unfair labor practice themselves.

In *NEHAWU v. UCT*,[95] the Constitutional Court was called on to establish whether the interpretation of section 197 of the LRA by the Labour Appeal Court (LAC) infringed the right to fair labor practices. Congruent with its interpretation that fairness requires a consideration of both the interests of employers and workers, the court held that the purpose of section 197 of the LRA, which regulates

93. Including unfair dismissals.

94. Thus an employer may fairly dismiss where the dismissal has a commercial rationale based on conduct, capacity or operational requirements, and providing that the dismissal is not premature, that it is in accordance with consistent rules in the workplace of which the employee is aware, and provided the dismissal is effected in terms of a fair procedure based on principles of natural justice. While the unfair labor practices which are specified in the Act are less extensively explicated, nevertheless they are governed by the same principles of substantive and procedural fairness. *See* sections 185, 186, 187, and 188 of the 1995 LRA, and the Code of Good Practice: Dismissal (Schedule 8 of the 1995 LRA); and the Code of Good Practice on Dismissal based on Operational Requirements, promulgated by General Notice 1517 in GG 20254 of 16 July 1999.

95. The University of Cape Town (UCT) had outsourced parts of its services to independent contractors, leading to the retrenchment of staff, some of whom were employed by the contractors but on less favorable conditions. NEHAWU sought an interdict and declaratory relief. The legal question was whether, in terms of section 197 of the 1995 LRA on the transfer of a business as a going concern, the workers were automatically transferred without prior agreement between the old and new employers to this effect. The LC held that section 197 did not provide for an automatic transfer of contracts in the case of the transfer of a business as a going concern. The court's view was that contracts of employment may only be transferred without the consent of the employees if the seller and purchaser of the business agree that the contracts will be transferred together with the business. NEHAWU appealed to the LAC. The majority of that court dismissed the appeal. It held that in terms of section 197 a business is transferred as a going concern only if its assets, including the workforce, are transferred by prior agreement between the seller and the purchaser and the workers are part and parcel of the transaction. As there had been no prior agreement between UCT and the contractors that the workforce would be transferred as part of the transaction, there was no transfer of a business as per 197(1)(a).

the transfer of contracts of employment during a transfer of a business, was to protect workers' rights to job security as well as the interests of employers by facilitating the transfer of a business.[96] This, the court found, was the balance that was consistent with the right to fair labor practices. On this basis, the court held that the majority decision of the LAC—that the contract of employment could be transferred only if there was agreement between the old and new owners of the business—was not reflective of the legislative intent. Nor, however, was the applicant's argument that the provision was designed solely to protect the interest of workers.[97] In support of its approach the court had regard to the purpose of the LRA to promote economic development and social justice; the section of the Act protecting workers from unfair dismissal, of which section 197 forms part; and international law on the transfer of a business, which protects workers from dismissal during such a transfer.[98]

The Constitutional Court's approach to the notion of fairness as articulated in the case has much in common with that of the Industrial Court under the 1956 LRA. Its adoption of an equivalence of interest approach meant that both parties' interests had to be given equal weight—there could be no yielding of the one to the other. Thus, although the court found that section 197 was couched in similar language to the two international instruments mentioned above, it was unable to find that the purpose of section 197 was solely to protect the interests of workers, as provided in those instruments. Similarly, even though section 197 forms part of the section of the Act on dismissals that is specifically designed to protect workers and not employers, the court chose not to give emphasis to this factor. Arguably, if the court had started out with a different conception of the constitutional right—one that could encompass the notion that a different weighing might be given to the parties' respective interests—it could have settled on an interpretation of section 197 that would

96. Nat'l Educ. Health & Allied Workers Union v Univ. of Cape Town 2003 (24) I.L.J. 95 (CC) at 121 (S. Afr.).

97. *Id.* at 118. The court found that section 197 has a dual purpose to facilitate commercial transactions while at the same time protecting the workers against unfair job losses.

98. The court referred to the Acquired Rights Directive 77/187 EEC adopted by the European Commission in 1977 and the British Transfer of Undertakings (Protection of Employment) Regulations 1981/1794 (TUPE) enacted pursuant to the directive. Case law, in terms of the European Directive, the court stated, for instance, Landsorganisatioen I Danmark for Tjenerforbundet I Danmark v. Ny Molle Kro 1987 E.C.R. 5465 at ¶ 12, had construed the directive as holding that its purpose was to protect workers against the loss of employment in the event of the transfer of a business. The title of the regulations promulgated by the United Kingdom pursuant to the British Directive, the court said, also demonstrated an intention to protect workers against unfair dismissals in the event of the sale of a business—*see Id.* at 115–17.

have been more congruent with international law. Be that as it may, its finding that the constitutional right required section 197 be interpreted to include workers' interests was critical in rectifying the misconception of the section by the LAC.

As we have seen above, the implication of the court's approach to the notion of fairness could be that the LRA's provisions on unfair dismissal and unfair labor practices infringe the constitutional right in that they protect employees only. If this is the case, the question that then arises is whether the constitutional right may be relied upon directly for the fashioning of a remedy. The High Court[99] has warned against this, arguing that because of the complex social and policy issues marking the employment relationship, the right to fair labor practices is not a right that may, without "an intervening regulatory framework, be applied directly in the workplace."[100] If this were to occur, the court stated, it would lead to the development of parallel streams of jurisprudence in the labor arena. The High Court's stance has merit. If the right may be relied upon directly, the Constitutional Court would then be involved in a process of judicial lawmaking reminiscent of the role played by the Industrial Court under the unfair labor practice provision in the 1956 LRA. The better approach would be for the court to direct that the LRA be amended to remedy the limitation, or develop the common law accordingly.

In general, the development of the notion of fairness as it applies to the conduct between employers and workers will take place through the specialist courts and arbitration mechanisms established under the LRA. The Constitutional Court acknowledged this in *NEHAWU v. UCT*, stating that the concept of a fair labor practice "must be given content by the legislature and thereafter left to gather meaning, in the first instance from the decisions of the specialist tribunals including the LAC and the labour court," having regard to the domestic and international law.[101] Nevertheless, the Constitutional Court saw itself as having a supervisory role to play in assessing the legislation's constitutionality to ensure that the rights guaranteed in section 23(1) were honored. The legislation, it held, will "always be subject to constitutional scrutiny to ensure that it is not inconsistent with the Constitution."[102] So, too, will the

99. NAPTOSA & others v Minister of Education, Western Cape & others (2001) 22 I.L.J. 889 (CC) (S. Afr.).

100. *Id.* at 897.

101. Nat'l Educ. Health & Allied Workers Union v Univ. of Cape Town & others 2003 (24) I.L.J. 95 (CC) at 110 (S. Afr.).

102. *Id.* at 105. This stance was congruent with the court's statement in the certification judgment that the development of labor law would "in all probability" occur via the labor courts

interpretation of that legislation. Thus, although the concept of fairness will be developed primarily by the specialist labor institutions, the ultimate adjudicator over its development will be the Constitutional Court. This points to the importance of developing a consistent approach to the concept as between the Constitutional Court on the one hand and the specialist labor dispute fora on the other. This approach, it has been argued, should resonate with the central imperative of the Bill of Rights to protect the vulnerable and marginalized in our society. The effect of this is an interpretation of the right to fair labor practices that, while it takes into consideration the interests of both workers and employers, does not hold those interests to be in strict parity.

in terms of labor legislation. Nevertheless, the legislation would always be subject to constitutional oversight to ensure that the rights of workers and employers as entrenched in section 23 would be honored. In Re Certification of the Constitution of the Republic of South Africa 1996, 1996 (4) SA 744 (CC); 1996 (10) BCLR 1253 (CC).