IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

CASE NUMBER: CCT 5/95

In the matter between:

FERREIRA, CLIVE Applicant

and

LEVIN, ALLAN NO 1st Respondent

WILKENS, ANDREW DAVID 2nd Respondents

COOPER, BRIAN ST CLAIR
VAN DER MERWE, SCHALK WILLEM NO
In their capacities as the joint provisional liquidators of Prima Bank Holdings Limited

THE MASTER OF THE SUPREME COURT 3rd Respondent

and

VRYENHOEK, ANN 1st Applicant

VRYENHOEK, LUKE JOHN 2nd Applicant

VRYENHOEK, ANDREW 3rd Applicant

and

POWELL, OLIVER NO 1st Respondent

BRETT, JJ NO 2nd

Respondent

AVFIN INDUSTRIAL FINANCE (PTY) LTD

3rd Respondent

Heard on: 9 May 1995

Delivered on: 6 December 1995

JUDGMENT

Ackermann J.

The issues

[1] The two referrals before us (the "Ferreira referral" and the "Vryenhoek referral") were heard together for the sake of convenience (as they were in the Witwatersrand Local Division of the Supreme Court by Van Schalkwyk J) because identical issues arise in both cases. These issues concern the alleged inconsistency of certain provisions in section 417 of the Companies Act, No. 61 of 1973, as amended ("the Act") relating to the examination of persons in winding-up proceedings, with the Constitution of the Republic of South Africa, 1993 ("the Constitution" or "the transitional Constitution"). Section 417 of the Act provides as follows -

> "**417. Summoning and examination of persons as to affairs of company.**
>
> (1) In any winding-up of a company unable to pay its debts, the Master or the

Court may, at any time after a winding-up order has been made, summon before him or it any director or officer of the company or person known or suspected to have in his possession any property of the company or believed to be indebted to the company, or any person whom the Master or the Court deems capable of giving information concerning the trade, dealings, affairs or property of the company.

(1A) Any person summoned under subsection (1) may be represented at his attendance before the Master or the Court by an attorney with or without counsel.

(2)(*a*) The Master or the Court may examine any person summoned under sub-section (1) on oath or affirmation concerning any matter referred to in that subsection, either orally or on written interrogatories, and may reduce his answers to writing and require him to sign them.

(*b*) Any such person may be required to answer any question put to him at the examination, notwithstanding that the answer might tend to incriminate him, and any answer given to any such question may thereafter be used in evidence against him.

(3) The Master or the Court may require any

such person to produce any books or papers in his custody or under his control relating to the company but without prejudice to any lien claimed with regard to any such books or papers, and the Court shall have power to determine all questions relating to any such lien.

(4) If any person who has been duly summoned under subsection (1) and to whom a reasonable sum for his expenses has been tendered, fails to attend before the Master or the Court at the time appointed by the summons without lawful excuse made known to the Master or the Court at the time of the sitting and accepted by the Master or the Court, the Master or the Court may cause him to be apprehended and brought before him or it for examination.

(5) Any person summoned by the Master under subsection (1) shall be entitled to such witness fees as he would have been entitled to if he were a witness in civil proceedings in a magistrate's court.

(6) Any person who applies for an examination or enquiry in terms of this section or section 418 shall be liable for the payment of the costs and expenses incidental thereto, unless the Master or the Court directs that the whole or any part of such costs and expenses shall be paid out of the assets of the company concerned.

(7) Any examination or enquiry under this section or section 418 and any application therefore shall be private and confidential, unless the Master or the Court, either generally or in respect of any particular person, directs otherwise."

Although the matters before us are referrals, and not appeals or applications in the ordinary sense,

the parties will be referred to (and described) as they were in the Court below.

[2] In the winding-up of two companies unable to pay their debts, the applicants

were summoned for examination ("the section 417 examination" or "the section 417 enquiry") pursuant to the provisions of sub-sections (1) and (2) of section 417 of the Act. During the course of their examination, the applicants in both the Ferreira and the Vryenhoek cases objected to being compelled, by virtue of the provisions of section 417(2)(b), to answer questions put to them which might tend to incriminate them. They applied to the Witwatersrand Local Division of the Supreme Court for a temporary interdict against the respondents, prohibiting the further interrogation of the applicants pending the determination of the constitutionality of section 417(2)(b) of the Act.

[3] On 28 November 1994 Van Schalkwyk J dismissed both the applications for interim relief, granted leave to appeal against such dismissal to the full bench of the Transvaal Provincial Division or the Witwatersrand Local Division, if the Judge President so directed, and referred the following matters to the Constitutional Court in terms of section 102(1) of the Constitution -

> "1. Whether section 417(2)(b) of the Companies Act 68 of 1973, as amended ("the Act"), is unconstitutional in that it compels a person summoned to an enquiry to testify and produce documents, even though such person seeks to invoke the privilege against self-incrimination.
>
> 2. Whether evidence given by a person at an enquiry in terms of section 417 of the Act falls to be excluded in any subsequent criminal proceedings brought against such person where the evidence may be

incriminating and was extracted without recognition of such person's privilege against self-incrimination.

3. Whether a person appearing at an enquiry in terms of section 417 of the Act is entitled to have prior access to:

   3.1 a copy of the record of the examination of all other persons examined at the inquiry;

   3.2 all documents in the possession of the liquidator or those prosecuting the inquiry relevant to the interrogation of such person.

4. Whether a person is required to give testimony at an inquiry in terms of section 417 which testimony may tend or have the effect of supporting a civil claim against such person.

5. Whether a person who has given testimony at an enquiry in terms of section 417, which testimony tends to support a civil claim against such person, may have such testimony excluded in any subsequent civil proceedings."

The referral took place before the current rules of the Constitutional Court were promulgated on 6 January 1995.

[4] Of the respondents in the two matters, only the second respondent in the Ferreira application and the third respondent in the Vryenhoek application opposed the relief sought and were represented at the hearing in this Court. The third respondent in the Ferreira application (the Master) lodged a memorandum in the form of an affidavit but did not oppose the relief sought. Certain of the partners and employees of Coopers and Lybrand, the auditors of Prima Bank

Holdings Ltd. (one of the companies in liquidation) were granted leave to intervene as amici curiae in terms of Constitutional Court rule 9 and to present viva voce argument as well. Written memoranda were invited and accepted from the Association of Law Societies, the Public Accountants' and Auditors' Board, the South African Institute of Chartered Accountants and the Association of Insolvency Practitioners of Southern Africa. We are at the beginning stages of utilising the amicus curiae intervention procedures for which provision is made in Constitutional Court rule 9. We wish to acknowledge the valuable assistance derived by this Court from the argument on behalf of the amici curiae, JSN Fourie and others, as well as from the memoranda filed by the above mentioned professional bodies.

[5] All parties were in agreement (expressly or tacitly) that the matter in paragraph 1 of the order of referral had been properly referred to this Court by Van Schalkwyk J in terms of the provisions of section 102(1) of the Constitution. The correctness of this agreement (or assumption) was not questioned at the hearing of the matter before us. On reflection, the assumption appears to be wrong in law and the correctness of it, inasmuch as it involves a matter of law (constitutional law in fact), must be considered by this Court. In so doing it is necessary to say something about the meaning and use of section 102(1) in general.

[6] For present purposes the relevant part of section 102(1) provides that -

> "If, in any matter before a provincial or local division of the Supreme Court, there is an issue which may be decisive for the case, and which falls within the exclusive jurisdiction of the Constitutional Court in terms of section 98(2) and (3), the provincial or local division concerned shall, if it considers it to be in the interest of justice to do so, refer such matter to the Constitutional Court for its decision: ....".

Section 102(1) does not confer a general discretion on the Court in question to refer matters to the Constitutional Court. The referral is mandatory ("the provincial or local division concerned shall ... refer") and the power and duty to refer only arises when the following three conditions are fulfilled:

(a) there is an issue in the matter before the Court in question which may be decisive for the case;

(b) such issue falls within the exclusive jurisdiction of the Constitutional Court;

and,

(c) the Court in question considers it to be in the interests of justice to refer such issue to the Constitutional Court.

(I use the word "issue" in paragraph (c) above instead of the word "matter", which appears in the text of section 102(1), because this is the construction which

Didcott J, writing for the Court in S v. Vermaas; S v. du Plessis[1] gave to the word "matter" where it appears for the second time in section 102(1)).

These conditions are conjunctive and all have to be fulfilled before the Court has the power to refer an issue to the Constitutional Court in terms of section 102(1). It is true that the fulfilment of conditions (a) and (c) depends upon the Court in question reaching particular conclusions on the basis of the criteria there stated, but these conclusions have to be reached (and condition (b) must exist) before the Court is empowered and obliged to refer the issue.

[1]1995 (3) SA 292 (CC); 1995 (7) BCLR 851 (CC) at para 10.

[7] Section 103(4) of the Constitution deals inter alia with the referral by a Provincial or Local division of the Supreme Court to this Court of issues originating in Courts other than Provincial or Local divisions of the Supreme Court and, in particular, with the referral to this Court of an issue regarding the validity of a law falling within the exclusive jurisdiction of this Court. In addition to stipulating other conditions precedent for such referral, the sub-section requires the Povincial or Local Division of the Supreme Court to be of the opinion "that there is a reasonable prospect that the relevant law or provision will be held to be invalid." Although there is no such express requirement in section 102(1), Kentridge AJ, in Mhlungu and Others v. The State[2], held that "it was implicit therein".[3] He further explained that

> "[t]he reasonable prospect of success is, of course, to be understood as a sine qua non of a referral, not as in itself sufficient ground. It is not always in the interests of justice to make a reference as soon as the relevant issue has been raised".[4]

(It is clear from the context of the above passage, that Kentridge AJ was dealing only with condition (c) of my above analysis.) He explained why it was not always in the interests of justice to make a referral immediately (an exposition which I need not repeat here) and laid down "as a general principle" that "where it is

[2]1995 (7) BCLR 793 (CC).

[3]At para 59.

possible to decide any case, civil or criminal, without reaching a constitutional issue, that is the course which should be followed".[5] Although the Court was divided in Mhlungu as to the construction and application of section 241(8), there was unanimous agreement with Kentridge AJ's construction and application of section 102(1).

[8] I round off this general discussion of section 102(1) by pointing out that Constitutional Court rule 22(2) obliges the judge or judges referring an issue in terms of section 102(1) to

> "formulate in writing .... the reason why he or she or they consider it to be in the interest of justice that the matter be referred."

On the construction which this Court in Mhlungu placed on the third pre-condition for referral (i.e. that it must be in the interest of justice to do so), it therefore follows that the judge or judges referring to the Constitutional Court the issue of the constitutionality of an Act of Parliament are obliged to furnish written reasons

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[4] Id.

[5] Id.

why it is considered that

(a) there is a reasonable prospect that the Act of Parliament in question will be held to be invalid; and

(b) the interest of justice requires this issue to be referred at this particular stage.

(I hasten to add that when Van Schalkwyk J referred the matter to this Court the judgment in Mhlungu had not been delivered and rule 22(2) had not been promulgated).

[9] These principles have to be applied to the referral in the present case. The only matters before Van Schalkwyk J were the applications for interim interdicts against the relevant respondents to prohibit further interrogation of the applicants. In dismissing both applications for interdicts Van Schalkwyk J in fact disposed of all (and the only) matters properly before him. At this stage the issue of the validity of section 417(2)(b) had become irrelevant. He had decided, on the view he took of the law, that the issue of the validity of section 417(2)(b) was not relevant to the matter before him. He could not, on his view of the law, even consider the validity issue as part of the interdict enquiry. In adopting this approach he in fact decided (albeit implicitly) that the matter before him could and should be decided without reference to the validity issue, in other words, that

the validity issue could not be decisive for the case. The implication of this is that the first condition for a section 102(1) referral, mentioned in paragraph [6](a) above, has not been fulfilled. Accordingly the learned judge was precluded from referring the constitutional validity of section 417(2)(b) of the Act to this Court. He in fact precluded the operation of section 102(1) by deciding the "case" or the "matter" before him.

[10] The possibility that the referral of the paragraph (1) issue might be incompetent was not alluded to during argument nor raised by the Court with counsel. When, however, the question of the competence of the referrals of the issues in paragraphs (2) - (5) of the referral order was raised with Mr. Levine, he requested the Court to grant the applicants direct access on these issues in terms of section 100(2) of the Constitution. I have no doubt that, if the incompetence of the referral of the paragraph (1) issue had been raised with him, Mr. Levine would likewise have urged the Court to grant direct access on this issue as well. The matter has been fully argued before us and all the parties are clamant for a decision from the Court. We were informed that many section 417 enquiries were being held up because the issue of the constitutionality of section 417(2)(b) had been raised in such enquiries. This is substantially hampering the proper liquidation of companies and is therefore a matter of such urgency and

public importance that a ruling should be given thereon. Under the exceptional circumstances of this case it would be surrendering to the merest formalism if we did not deal with the paragraph (1) issue as one which was before us by way of direct access in terms of section 100(2) of the Constitution. It should therefore be treated as such. The interested parties are amenable to the issue being dealt with on this basis.

[11] It was contended on behalf of the respondents that the referral to this Court of the issues in paragraphs (2) - (5) of the referral order were not competent in terms of section 102(1) of the Constitution because none of these issues falls within the exclusive jurisdiction of the Constitutional Court and, consequently, a condition precedent to referral has not been fulfilled.

[12] It is not immediately apparent whether the issue referred in paragraph (2) of the referral order is premised on the finding that section 417(2)(b) of the Companies Act is inconsistent with the Constitution by this Court or premised on the finding that it is consistent. On either premise it is difficult to see how it can be contended that this issue was properly referred. The only issue before van Schalkwyk J was the interdict sought by the applicants "to prohibit their further interrogation pending the determination of the constitutionality of section

417(2)(b) of the Companies Act, by the Constitutional Court."[6] The matter detailed in paragraph (2) of the referral order, namely the admissibility of testimony given pursuant to the provision of section 417(2)(b) of the Act in subsequent criminal proceedings, was simply not an issue before Van Schalkwyk J. The wording of section 102(1) of the Constitution is perfectly clear. The only issue which can be referred to the Constitutional Court is one "in any matter before a provincial or local division of the Supreme Court." Van Schalkwyk J did not therefore have the power to refer the paragraph (2) issue to this Court.

[13] Even if the question of admissibility had been an issue before Van Schalkwyk J, for example by way of an application for a declaratory order, it ought not to have been be referred to us, because it does not fall within our exclusive jurisdiction. Although section 101(3) nowhere expressly confers power on the Provincial or Local Divisions of the Supreme Court to construe the Constitution, this is an implied power, as found by Kentridge AJ in S v. Mhlungu and Four Others.[7] These Courts are obliged to decide constitutional questions within their jurisdiction, together with discharging their customary duties of construing

[6]At p. 2 - 3 of Van Schalkwyk J's judgment.

[7]Supra note 2 at para 55. Although the judgment of Kentridge AJ was the minority judgment, there was no disagreement on this issue.

statutes and applying them, as well as the common law, under the ever present influence of the Constitution. These are the Courts which must, in the first instance, construe the Constitution and statutory law, even (or perhaps especially) when portions of a statute have been declared to be invalid. In this context the following remarks of Kentridge AJ, in S v. Zuma and Others bear repeating:

> "The jurisdiction conferred on judges of the Provincial and Local Divisions of the Supreme Court under section 101(3) is not an optional jurisdiction. The jurisdiction was conferred in order to be exercised."[8]

[14] The issue in paragraph (2) relates exclusively to the admissibility of evidence in subsequent criminal proceedings against persons who have testified pursuant to the provisions of section 417 and given evidence which tends to incriminate them. The question of the admissibility of evidence is, in the first instance, a matter for the Court dealing with the criminal proceedings in question. Should evidence be admitted incorrectly, and this raises a constitutional issue, the Constitutional Court may ultimately be called upon to decide the issue, but not before; unless the issue is one falling within its exclusive constitutional

[8] 1995 (2) SA 642 (CC); 1995 (4) BCLR 401 (CC) at para 10.

jurisdiction.

[15] We were pressed in argument to deal with such other issues because they are ancillary to the issue of the invalidity of section 417(2)(b) of the Act. Neither the context, wording nor purpose of the sections in the Constitution dealing with this Court's jurisdiction gives this Court jurisdiction to deal with matters of evidential admissibility on the basis that they are ancillary to a section 98(5) declaration of invalidity. It was certainly not the purpose of the institution of the Constitutional Court, or the framing of its jurisdiction, to require it to give an advisory opinion (for this is in essence what the applicants seek) as to the admissibility of evidence in some future criminal proceedings which might be brought against the applicants. The admissibility of evidence is traditionally, and for very good reasons, a matter which the trial Court must in the first instance always decide. There is no contextual or teleological indication that the framers of the Constitution wished to depart from this fundamental and self-evident rule. We are not here dealing with a case where a criminal trial Court (on a proper application of section 102(1) of the Constitution as explained above[9]) has referred to us an issue regarding the validity of a provision in an Act of Parliament which directly or indirectly bears on the admissibility of evidence. I accordingly conclude that the

matter set forth in paragraph (2) of the referral order was incorrectly referred to this Court.

[16] The matters referred to in paragraph 3 of the referral order relate to the construction of section 417 of the Act and the conduct of proceedings pursuant to it. These were not, for the reasons previously mentioned, issues before van Schalkwyk, J. If examinees feel aggrieved by the way a section 417 enquiry is being conducted, they have their ordinary remedies (including review remedies) in the Supreme Court.[10] Had these issues been properly before van Schalkwyk J he would have had the jurisdiction to deal with them. They do not fall within the exclusive jurisdiction of the Constitutional Court. I conclude that these issues were also incorrectly referred.

[17] The issue in paragraph (4) of the referral order is formulated as follows:

"Whether a person is required to give testimony at an enquiry in

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[9]At paras 6 - 8.

[10]See Ferreira v Levin NO and Others 1995(2) SA 813 (W) at 843 H.

terms of section 417 which testimony may tend or have the effect of supporting a civil claim against such person."

This issue does not raise the constitutional validity of section 417(2)(b) or any other statutory provision. In essence it seeks a ruling from this Court as to whether the examinee has a privilege to refuse to answer a question which might tend to support or have the effect of supporting a civil claim against such person. This was not an issue before van Schalkwyk J and could not therefore have been referred to this Court. If it had been an issue, it would have been one within his jurisdiction and with which he was competent to deal. For both these reasons, it ought not to have been referred to this Court.

[18] The issue referred in terms of paragraph 5 of the referral order relates to the admissibility in subsequent civil proceedings of testimony given pursuant to the provisions of section 417 of the Act. For the reasons set forth, above this too is an issue which could not competently be referred to this Court.

[19] The applicants, in their written argument handed in at the hearing (as distinct from their heads of argument lodged pursuant to Constitutional Court rule 19), sought to counter the problems relating to the competence of paragraph 3 of the referral order by submitting that:

"The proper exercise of this court's jurisdiction under section 98(5) would ... be to declare under such section as follows: .....

Section 417(2) of the Companies Act is declared to be inconsistent with the Constitution of the Republic of South Africa Act, no. 200 of 1993, to the extent that it provides that a person summoned to give evidence under section 417(1) of the Companies Act is not entitled, as of right, to prior access to -

(a) all documents in the possession of the liquidator for an examination or inquiry under section 417 or 418 of the Companies Act, in so far as it relates to such person and the reason or purpose of requiring him to give evidence at, and to produce any books or papers in his custody or under his control relating to the company under winding-up;

(b) A copy of the record of the examination of all other persons examined at the enquiry, in so far as it relates to such person and the reason or purpose of requiring him to give evidence at, and to produce any books or papers in his custody or under his control relating to the company under winding-up."[11]

This contention cannot prevail. The invalidity of section 417 of the Act on this ground was not an issue before Van Schalkwyk J and was not referred to this Court in the order of referral. In any event, section 417(2) simply does not contain the provision imputed to it in the above quoted passage. What applicants are seeking to obtain from this Court, under the guise of an attack on the validity of section 417(2), is a declaration of rights concerning the proper conduct of a section 417 hearing. This they cannot expect to achieve and will not be permitted to achieve under a referral pursuant to section 102(1) of the Constitution, because it was not an issue before Van Schalkwyk J and is not an issue within

the exclusive jurisdiction of the Constitutional Court.

The Constitutional validity of section 417(2)(b) of the Companies Act

[20] The way is now open to consider the only issue properly before this Court, namely, the constitutional validity of section 417(2)(b) of the Companies Act. The grounds of constitutional inconsistency were formulated as follows in the referral order:

> ".... it compels a person summoned to an enquiry to testify and produce documents even though such person seeks to invoke the privilege against self-incrimination."

Section 417(2)(b) does not compel the production of documents; section 417(3) does. The constitutionality of section 417(3) was not referred to this Court and no amendment of the referral order was sought to incorporate an attack on section 417(3). This ground for the invalidation of section 417(2)(b) is unfounded. Appreciating this difficulty, the applicants limited their attack to seeking an invalidation of section 417(2)(b)

> ".... to the extent that it requires a person examined under section 417(2) of the Act to answer questions which might tend to

[11] In para 37 thereof.

> incriminate him and provides that any answers given to any such question may thereafter be used in evidence against him."

The issue properly before this Court is therefore a relatively narrow one. In the case of Bernstein and Others v. L.V.W. Bester NO and Others, CCT 23/95, heard subsequent to this case on 19 September 1995, a broader attack was launched against sections 417 and 418 of the Companies Act. Nothing contained in the present judgment is to be interpreted as a prejudgment in any way of this broader attack.

The attack based on section 25(3) of the Constitution

[21] The main attack which Mr. Levine, on behalf of the applicants, launched on the constitutionality of section 417(2)(b) of the Act was that its provisions were inconsistent with an accused's rights "to a fair trial" as provided in section 25(3) of the Constitution. For the sake of brevity these rights will be referred to as "the section 25(3) rights" or "an accused's section 25(3) rights." It was submitted that the right against self-incrimination is not limited to detained, arrested or accused persons (which are the classes of persons to which the section 25 rights apply) but that "the right against self-incrimination is a right recognised under the Constitution in extra-curial proceedings including proceedings at an enquiry constituted in terms of section 417 of the Companies Act."

[22] Mr. Levine submitted that, properly construed, the issue before this Court relating to the constitutionality of section 417(2)(b) of the Companies Act, was whether:

(a) the statutory duty to give answers which might tend to incriminate the person examined; and

(b) the statutory provision that such answers may thereafter be used in evidence against the examinee,

limit any right entrenched in Chapter 3 of the Constitution. Mr. Cilliers, on behalf of second respondents in the Ferreira referral, submitted that the attack based on section 25 of the Constitution was, on the clear and unambiguous wording of the Constitution, fundamentally flawed. As to (a), Mr. Cilliers submitted that there was no general right against self-incrimination expressly enumerated in Chapter 3. Mr. Cilliers rightly conceded that some protection against self-incrimination was extended by section 25(2) of the Constitution to "[e]very person arrested for the alleged commission of an offence" and in terms of section 25(3)(c) and (d) to "[e]very accused person" as part of such person's right to a fair trial. However, the rights enumerated in section 25(2)(a) to (d) only apply to arrested persons and the rights enumerated in section 25(3)(c) and (d) only to an accused person while such person is on trial.

[23] As to (b), Mr. Cilliers submitted that "the right to a fair trial" enacted in section

25(3) would, unless the context otherwise indicates, require self-incriminating evidence, involuntarily given, to be excluded in the criminal trial of an accused. That is the rule of our common law. In R v. Camana,[12] Innes CJ observed as follows:

> "Now, it is an established principle of our law that no one can be compelled to give evidence incriminating himself. He cannot be forced to do that either before the trial, or during the trial."[13]

Mr. Cilliers also submitted that, unless the context of section 25(3) otherwise indicated, the provisions of section 417(2)(b) of the Act, which enable the State to use self-incriminating evidence obtained under the legal compulsion of the latter section during a criminal trial, limit the accused's section 25(3) right to a fair trial. On this approach it is no answer to contend that, at the time of the

[12]R v. Camana 1925 AD 570 at 575.

[13]Id at 575. See also S v. Zuma supra note 8 at para 31; S v. Mabaso and Another 1990 (3) SA 185 (A) at 208 G; S v. Shangase and Another 1995 (1) SA 425 (D) at 431 D; Nkosi v. Barlow NO en Andere 1984 (3) SA 148 (T) at 151 I; S v. Evans 1981 (4) SA 52 (C) 56 A; S v. Robinson 1975 (4) SA 438 (RA).

examination under section 417 of the Act, the examinee is not yet an accused person. The concluding words of section 417(2)(b) of the Act "and any answer given to such question may thereafter be used in evidence against him" do refer to and find application, inter alia, during a subsequent criminal trial. On the other hand, the mere statutory obligation to answer self-incriminating questions in extra-curial proceedings is not inconsistent with the "right to a fair trial" (for the examinee is not an accused and therefore not entitled to invoke the section 25(3) rights); only the subsequent use of such answers at any criminal trial against the examinee would fall within the purview of section 25(3). The applicants are not accused nor is there any suggestion that they will be accused. Accordingly they cannot, at the time of their examination under section 417(2)(b) of the Act, rely on the section 25(3) rights.

[24] The correctness of this attack by Mr. Cilliers on the applicants' argument from section 25(3) of the Constitution needs to be considered first, before dealing with his other submissions. It seems to me that the only line of reasoning which might counter Mr. Cilliers' objection would be along the following lines. There is authority in Australia and Canada for the proposition that the common law privilege against extra-curial self-incrimination is a substantive right and not

merely a rule of evidence;[14] that, without being able to invoke such a right at trial, an accused cannot obtain a fair trial, and therefore reliance upon such right must be regarded as an unenumerated section 25(3) right.[15] When the examinee at a section 417 of the Act enquiry is asked a question which might tend to incriminate the examinee, he or she objects and raises the common law right against self-incrimination. In so doing, the examinee is not invoking a section 25(3) right, but a substantive common law right. The examiner counters this objection by pointing to the repeal of this common law right, in the context of section 417 enquiries, by section 417(2)(b) of the Act. The rejoinder of the examinee is that such purported repeal is invalid on the grounds that section 417(2)(b) is unconstitutional by virtue of the fact that it is inconsistent with the section 25(3) rights of an accused. The objection that the examinee is not an accused in a criminal trial, and cannot therefore rely on a section 25(3) right which only accrues to an accused, is met by appealing to section 4(1) and 7(4)(b) of the Constitution. Section 4(1) provides in part that -

> "This Constitution shall be the supreme law of the Republic and any law inconsistent with [the Constitution's] provisions shall, unless otherwise provided expressly or by necessary implication in this

[14]See Pyne Board Pty. Ltd. v. Trade Practices Commission (1983) ALJR 236 at 240 G; Sorby and Another v. The Commonwealth of Australia and Others (1983) ALJR 248 at 260 and Solsky v. R. (1979) 105 D.L.R. (3d) 745 at 757.

[15]This is of course challenged, but its correctness is assumed for purposes of this part of the argument.

Constitution, be of no force and effect to the extent of this inconsistency."

This provision came into operation on 27 April 1994. Section 7(4)(b) provides, inter alia, that the relief referred to in section 7(4)(a) (which includes a declaration of rights) may be sought by -

"(i) a person acting in his or her own interest;
(ii) .....
(iii) .....
(iv) .....
(v) a person acting in the public interest."

[25] There are four parts to the above line of reasoning. The first relates to the question whether the invalidity (being of "no force and effect") of a statute (as a species of "law") is determined by an objective or a subjective enquiry. The second relates to the question of the time at which such invalidity occurs. The third relates to the circumstances under which an appeal to invalidity may be made (the question of justiciability) and the fourth to the question as to who may invoke the invalidity (locus standi in the narrower sense).

[26] The answer to the first question is that the enquiry is an objective one. A statute is either valid or “of no force and effect to the extent of its inconsistency”. The subjective positions in which parties to a dispute may find themselves cannot have a bearing on the status of the provisions of a statute under attack. The

Constitutional Court, or any other competent Court for that matter, ought not to restrict its enquiry to the position of one of the parties to a dispute in order to determine the validity of a law. The consequence of such a (subjective) approach would be to recognise the validity of a statute in respect of one litigant, only to deny it to another. Besides resulting in a denial of equal protection of the law, considerations of legal certainty, being a central consideration in a constitutional state, militate against the adoption of the subjective approach. This also follows from the wording of section 4(1). The words "shall be" do not refer to a date beyond 27th April 1994. On 27 April 1994, and subject to the qualification in the text of section 4(1) ("unless otherwise provided expressly or by necessary implication in this Constitution"), a law which is inconsistent with the Constitution ceases to have legal effect. For this reason, it was necessary to enact a provision such as section 98(6)(a) of the Constitution which provides that, unless the Constitutional Court otherwise orders -

> "... the declaration of invalidity of a law or a provision thereof -
> (a) Existing at the commencement of this Constitution, shall not invalidate anything done or permitted in terms thereof before the coming into effect of such declaration of invalidity;"

[27] The Court's order does not invalidate the law; it merely declares it to be invalid. It is very seldom patent, and in most cases is disputed, that pre-constitutional laws

are inconsistent with the provisions of the Constitution. It is one of this Court's functions to determine and pronounce on the invalidity of laws, including Acts of Parliament. This does not detract from the reality that pre-existing laws either remained valid or became invalid upon the provisions of the Constitution coming into operation. In this sense laws are objectively valid or invalid depending on whether they are or are not inconsistent with the Constitution. The fact that a dispute concerning inconsistency may only be decided years afterwards, does not affect the objective nature of the invalidity. The issue of whether a law is invalid or not does not in theory therefore depend on whether, at the moment when the issue is being considered, a particular person's rights are threatened or infringed by the offending law or not.

[28] A pre-existing law which was inconsistent with the provisions of the Constitution became invalid the moment the relevant provisions of the Constitution came into effect. The fact that this Court has the power in terms of section 98(5) of the Constitution to postpone the operation of invalidity and, in terms of section 98(6), to regulate the consequences of the invalidity, does not detract from the conclusion that the test for invalidity is an objective one and that the inception of invalidity of a pre-existing law occurs when the relevant provision of the Constitution came into operation. The provisions of sections 98(5) and (6), which

permit the Court to control the result of a declaration of invalidity, may give temporary validity to the law and require it to be obeyed and persons who ignore statutes that are inconsistent with the Constitution may not always be able to do so with impunity.

[29] There is also Canadian authority for such an objective approach.[16] Peter Hogg describes the position in that country as follows:

> "This practice of 'prospective overruling' is difficult to justify in theory, however attractive it may be in practice, and it has never been accepted by Canadian Courts. For a Canadian Court, a constitutional restriction operates of its own force, even if judicial recognition of the fact has been delayed. Once the Supreme Court of Canada has held that a law is unconstitutional, there can be no doubt about the status of the law: it is invalid, and need not be obeyed."[17] (Emphasis added)

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[16] See Re Edward v. Edward (1987) 39 D.L.R. (4th) 654 (Sask. C.A.) at 661 - 664 and R v. Big M Drug Mart Ltd. (1985) 13 C.R.R. 64 at 80 where the following was stated:

> "Any accused, whether corporate or individual, may defend a criminal charge by arguing that the law under which the charge is brought is constitutionally invalid. Big M is urging that the law under which it has been charged is inconsistent with s. 2(a) of the Charter and by reason of s. 52 of the Constitution Act, 1982, it is of no force or effect.
>
> .....
>
> The argument that the respondent, by reason of being a corporation, is incapable of holding religious belief and therefore incapable of claiming rights under s. 2(a) of the Charter, confuses the nature of this appeal. A law which itself infringes religious freedom is, by that reason alone, inconsistent with s. 2(a) of the Charter and it matters not whether the accused is a Christian, Jew, Muslim, Hindu, Buddhist, atheist, agnostic or whether an individual or a corporation. It is the nature of the law, not the status of the accused, that is in issue."

[17] Constitutional Law of Canada 3ed (1992) 1242.

The German Federal Constitutional Court follows a similar approach. Klaus Schlaich puts it as follows:

> "Das verfassungswidrige Gesetz ist, wie das BverfG formuliert, 'mit dem Grundgesetz unvereinbar und daher nichtig'. Das verfassungswidrige Gesetz ist von Anfang an (ex tunc) und dies ohne weiteren gestaltenden Akt (ipso iure) unwirksam....Nach deutscher Auffassung hebt das BverfG verfassungswidrige Gesetze nicht auf, es vernichtet sie nicht: Es stellt die Nichtigkeit nur (deklaratorisch) fest....” (An unconstitutional law is, as the Federal Constitutional Court puts it, 'inconsistent with the Basic Law and therefore invalid'. An unconstitutional law is from its inception (ex tunc) and without need for any further constitutive act (ipso iure) inoperative... The German view is that the Federal Constitutional Court does not annul a statute, [the Court] does not invalidate: it merely establishes the invalidity (in a declaratory way)).[18]

[30] The second question has really been resolved in the course of answering the first. The pre-constitutional law becomes invalid when the relevant provision of the Constitution came into operation (i.e. 27 April 1994), notwithstanding the fact that this Court declares it to be invalid at a later date and has, in terms of section 98(5) and 98(6) of the Constitution, the power to postpone and regulate the operation of invalidity.

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[18] Das Bundesverfassungsgericht 3ed (1994) 220 - 1. See 1 BVerfGE 14 at 37.

[31] For the sake of convenience, the fourth question (locus standi in the narrower sense) will be addressed next. The question in the present case is whether the applicants, as examinees, are acting in their own interest. Few, if any, countries have at all times allowed all persons to invoke the jurisdiction of Courts to solve all legal problems. Some restrictions have always been placed on the locus standi of a complainant. Section 7(4)(b) of the Constitution determines which persons are entitled to apply to a competent Court of law for appropriate relief. They are:

> "(i) a person acting in his or her own interest;
> (ii) an association acting in the interest of its members;
> (iii) a person acting on behalf of another person who is not in a position to seek such relief in his or her own name;
> (iv) a person acting as a member of or in the interest of a group or class of persons; or
> (v) a person acting in the public interest."

[32] When an examinee at a section 417 enquiry attacks the validity of section 417(2)(b) on the grounds that it conflicts with the implied residual rights of an accused in terms of section 25(3) of the Constitution, the examinee's contention (properly understood) is not that the examinee is entitled, as an accused, to invoke the implied right against extra-judicial self-incrimination in section 25(3) of the Constitution, but rather that section 417(2)(b) of the Companies Act is, as an abstract and objective proposition, inconsistent with the aforementioned constitutional right and the examinee is entitled to a ruling thereon. The real

question which must therefore be posed is whether an examinee who has previously been compelled under section 417(2)(b) to give answers which incriminate him or her may, at a subsequent criminal trial of the examinee, successfully attack the introduction of such incriminating answers on the basis that section 417(2)(b) conflicts with the unenumerated right against self-incrimination in section 25(3). If the answer is in the affirmative, the only remaining question is whether the examinee may raise the issue of the unconstitutionality of section 417(2)(b) of the Act at the stage when a question, the answer to which might tend to incriminate him or her, is put to the examinee in the section 417 examination.

[33] In terms of section 418(5)(b)(iii) of the Companies Act, any person who has been duly summoned under section 417(1) of the Companies Act and who

> "fails, without sufficient cause - ... to answer fully and satisfactorily any question lawfully put to him in terms of section 417(2) ..."

is guilty of an offence and, in terms of section 441(1)(f), liable upon conviction to a fine not exceeding R2000 or to imprisonment for a period not exceeding six months or to both such fine and such imprisonment. The witness is surely entitled to know whether a question, the answer to which might tend to incriminate him or her, is a "question lawfully put" and whether the witness has

"sufficient cause" to refuse to answer it. This is dependant on whether section 417(2)(b) is constitutionally valid. If it is not, the witness can with equanimity refuse to answer. If it is valid, the choice arises between refusing to answer and being punished, possibly with a prison sentence, or answering and possibly prejudicing the witness's defence in a subsequent criminal trial. This dilemma, with the possible adverse consequences on either choice the witness makes, gives the witness sufficient interest of "his or her own" to entitle the witness "to apply to a competent court of law for appropriate relief, which may include a declaration of rights" in terms of section 7(4)(a) of the Constitution.

[34] It seems to me, however, that the suggested line of reasoning fails to meet the third requirement, namely that of justiciability. Section 7(4)(a) of the Constitution is introduced by the phrase -

> "When an infringement of or threat to any right entrenched in this Chapter [Chapter 3] is alleged ..."

It is only when this condition is fulfilled that the persons referred to in paragraph (b) "shall be entitled to apply to a competent court of law for appropriate relief." The crucial question is whether, when an examinee is compelled by section 417(2)(b) to answer a question which might tend to incriminate him or her and the section further provides that "any answer given to such question may

thereafter be used in evidence against him", a section 25(3) right to a fair criminal trial is being infringed or threatened with infringement.

[35] Textually, the relevant wording of section 7(4)(a) is clear. It is only when a Chapter 3 right is actually infringed or threatened with infringement that the prescribed persons are entitled to seek relief from a competent Court of law. The purpose seems clear. However widely the framers extended locus standi in section 7(4)(b), they did not wish abstract questions of constitutionality to be pursued in the Courts; the only exceptions being those specifically enacted in the Constitution, such as sections 98(2)(d) and 101(3)(e) of the Constitution, which, respectively, confer jurisdiction on the Constitutional Court over any dispute over the constitutionality of any Bill before Parliament or a provincial legislature and, in the case of a Provincial or Local Division of the Supreme Court, over any dispute as to the constitutionality of a Bill before a provincial legislature.

[36] The locus standi of all persons referred to in subparagraphs (i) - (v) of subsection (4)(b) is governed by the introductory phrase:

" (b) The relief referred to in paragraph (a) may be sought by - ...".

In my view the whole of subsection (4)(b) of section 7 must be read as being subject to the qualification in subsection (4)(a). Subsection 4(a) expressly

renders the right “to apply to a competent court” conditional upon “when an infringement of or threat to any right entrenched in this Chapter is alleged.” The purpose of the introductory phrase in subsection (4)(b), “[t]he relief referred to in paragraph (a) may be sought by”, is to indicate by whom such relief may be sought. It neither textually, contextually nor teleologically alters the condition stipulated in subsection (4)(a); in particular it does not in any way affect the impact of the words “when an infringement of or threat to any rights entrenched in this Chapter is alleged”.

[37] Against this background, the provisions of subparagraph (4)(b)(iii) become clear and lend further weight to the above construction. This subparagraph refers to “a person acting on behalf of another person who is not in a position to seek such relief in his or her own name.” The words “such relief” can only refer to the “relief referred to in paragraph (a)” mentioned in the introductory words of paragraph (b), i.e. the relief which may be sought “when an infringement of or threat to any right entrenched in this Chapter is alleged." Subparagraph (4)(b)(iii) means that when it is alleged that a Chapter 3 right of A has been infringed or threatened and A is not in a position to seek relief, B may do so on behalf of A.

[38] Under these circumstances the provisions of subparagraph (4)(b)(i), namely -

"The relief referred to in paragraph (a) may be sought by -
(i) a person acting in his or her own interest"

can only mean that there must be an "infringement of or threat to" a Chapter 3 right of the "person acting in his or her own interest", for the "relief referred to in paragraph (a)" only becomes available when there is "an infringement of or threat to" a Chapter 3 right. In terms of subparagraph (4)(b)(iii) B acts for A when A's Chapter 3 right is infringed or threatened with infringement and A is not in a position to seek such relief in his or her own name. In terms of subparagraph (4)(b)(i) A acts for himself or herself when A's Chapter 3 right is infringed or threatened with infringement and A is in a position to seek such relief in his or her own name. Paragraph (4)(a) determines when the right to invoke the aid of a Court arises; subsection (4)(b) determines by whom that right (when it accrues) may be exercised. The locus standi of all categories of persons in paragraph (4)(b) is qualified by paragraph (4)(a).

[39] It was not suggested that such limitation of justiciability was contrary to the values mentioned in section 35(1). The contrary was not argued. Neither was it suggested that such limitation of justiciability was contrary to the values mentioned in section 35(1), namely, "the values which underlie an open and democratic society based on freedom and equality"; nor that public international

law or foreign law would lead one to a different answer. The jurisdictions of the United States of America,[19] Canada[20] and Germany[21] all have "case and controversy" and locus standi provisions which limit justiciability. There being no other justification for not doing so, the aforementioned words in section 7(4)(a) must therefore be given their plain, ordinary, grammatical meaning.[22]

[40] To my mind the inescapable construction of subsection 7(4) leads to the conclusion that, if section 25(3) of the Constitution is to be relied upon, there must be an “infringement of or threat to” a section 25(3) right, whether the right accrues to the person seeking the relief (subparagraph (4)(b)(i)), or a person on

[19]See in general Tribe American Constitutional Law 2ed (1988) 67 - 155.

[20]See in general Hogg Constitutional Law of Canada 3ed (1992) 1263 - 1278.

[21]See in general Umbach and Clemens Bundesverfassungsgerichtsgesetz (1992) 1039 - 46.

[22]See S v. Zuma and Others supra note 8 at paras 17-18, per Kentridge AJ.

whose behalf someone else seeks relief (subparagraph (4)(b)(iii)) or for whom a person acts in the public interest (subparagraph (4)(b)(v)). This all follows from the express qualification in paragraph (4)(a) which is incorporated by reference in paragraph (4)(b) in the manner referred to above.

[41] The section 25(3) rights accrue, textually, only to "every accused person". They are rights which accrue, in the subjective sense, when a person becomes an "accused person" in a criminal prosecution. The examinee is not such an "accused person". It is a matter of pure speculation whether the applicants will ever become accused persons. Even should they become accused persons, their rights against extra-curial self-incrimination (assuming for the moment that such a right is an implied right in the larger category "right to a fair trial") are not automatically infringed when they become accused persons. It will depend upon whether self-incriminating evidence given by the applicants at the section 417 enquiry is tendered in evidence against them. At that moment, for the first time, there is a threat to any section 25(3) right against extra-curial self-incrimination. The inescapable conclusion, therefore, is that section 417(2)(b) does not constitute an infringement or threat of infringement of any section 25(3) rights of the applicants and that their attack on section 417(2)(b) on this basis can accordingly not succeed. This was in fact the prima facie conclusion reached in

Lynn NO and Another v. Kreuger and Others.[23]

[42] In the alternative, the applicants, for their constitutional challenge to section 417(2)(b) of the Act, relied with differing degrees of enthusiasm and persistence on the rights protected in sections 8, 10, 11, 13, 15, 22 and 24 of the Constitution. The main alternative argument was, however, based on the rights to "freedom and security of the person" and "personal privacy", respectively entrenched in sections 11(1) and 13.

[43] Section 7(4)(a) of the Constitution does not present any difficulty to the applicants in so far as they seek to rely on such rights, since these rights are not limited to any category of persons nor restricted to any particular factual context. Such reliance does not raise mere "academic" questions of law, but ones which become justiciable the moment the applicants invoke these rights.

[23]1955 (2) BCLR 167 (N) per Hurt J at 169 I - 170 A.

[44] The task of determining whether the provisions of section 417(2)(b) of the Act are invalid because they are inconsistent with the guaranteed rights here under discussion involves two stages[24] first, an enquiry as to whether there has been an infringement of the section 11(1) or 13 guaranteed right; if so, a further enquiry as to whether such infringement is justified under section 33(1), the limitation clause. The task of interpreting the Chapter 3 fundamental rights rests, of course, with the Courts, but it is for the applicants to prove the facts upon which they rely for their claim of infringement of the particular right in question. Concerning the second stage, "[it] is for the legislature, or the party relying on the legislation, to establish this justification (in terms of section 33(1) of the Constitution), and not for the party challenging it, to show that it was not justified."[25]

The infringement of the section 11(1) right to freedom and security of the person

[45] In order to determine, at the first stage of the enquiry, whether the provisions of section 417(2)(b) of the Act are inconsistent with the section 11(1) right to freedom and security of the person, it is necessary, as a matter of construction,

[24]See generally S v. Zuma and Others supra note 8 at para 21 and S v. Makwanyane and Another 1995(6) BCLR 665(CC); 1995 (3) SA 391 (CC) at paras 100 - 102.

[25]S v. Makwanyane and Another supra note 24 at para 102.

to define or circumscribe the section 11(1) right to the extent necessary for purposes of this decision. It is obviously unwise and undesirable (if not impossible) even to attempt an exhaustive or comprehensive definition or circumscription of the right designed to hold good indefinitely and for all further cases. Yet, even if the exact nature and boundaries of the right are to be defined on a case to case basis, some attempt must be made at this stage to determine the meaning, nature and extent of the right. As part of this enquiry it is also necessary to determine more precisely what it is about the nature and operation of the provisions of section 417(2)(b) of the Act, and their impact upon the examinee, which can be said to be inconsistent with the right to freedom.

[46] This Court has given its approval to an interpretive approach

> "which, whilst paying due regard to the language that has been used, is 'generous' and 'purposive' and gives expression to the underlying values of the Constitution"[26]

as well as to that expressed in the following passage in the Canadian case of R v. Big M Drug Mart Ltd.:

> "The meaning of a right or freedom guaranteed by the Charter was to be ascertained by an analysis of the purpose of such a guarantee; it was to be understood, in other words, in the light of the interests it was meant to protect.
>
> In my view this analysis is to be undertaken, and the purpose of

[26] Id at para 9.

> the right or freedom in question is to be sought by reference to the character and larger objects of the Charter itself, to the language chosen to articulate the specific right or freedom, to the historical origins of the concepts enshrined, and where applicable, to the meaning and purpose of the other specific rights and freedoms with which it is associated within the text of the Charter. The interpretation should be ... a generous rather than legalistic one, aimed at fulfilling the purpose of the guarantee and securing for individuals the full benefit of the Charter's protection."[27]

In the words of Chaskalson P, the provisions of Chapter 3

> "must not be construed in isolation, but in its context, which includes the history and background to the adoption of the Constitution, other provisions of the Constitution itself and, in particular, the provisions of Chapter 3 of which it is part. It must also be construed in a way which secures for 'individuals the full measure' of its protection."[28]

I would, in the first place, read "freedom" disjunctively from "security of the person" in section 11(1). The legislative history of the section would seem to confirm this. It was only in the Sixth Report of the Technical Committee on Fundamental Rights During the Transition that the right to "personal liberty" was combined with the right to "security of the person".[29] The right "to freedom" must be construed as a separate and independent right, albeit related to the right to

[27](1985) 13 C.R.R. 64 at 103.

[28]Id at para 10.

"security of the person."

[47] Conceptually, individual freedom is a core right in the panoply of human rights. The right to human dignity ("menswaardigheid") is specifically entrenched in section 10 and has been categorised by this Court, together with the right to life, as

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[29]Compare p. 6 of the Fifth Report with p. 6 of the Sixth Report.

"the most important of all human rights ... ."[30]

[48] In Makwanyane O'Regan J pointed out that "without dignity, human life is substantially diminished"[31] and pronounced the prime value of dignity in the following terms:

> "The importance of dignity as a founding value of the new Constitution cannot be overemphasised. Recognising a right to dignity is an acknowledgement of the intrinsic worth of human beings: human beings are entitled to be treated as worthy of respect and concern. This right therefore is the foundation of many of the other rights that are specifically entrenched in

[30] S v. Makwanyane and Another supra note 24 at para 144.

[31] Id at para 327.

Chapter 3."[32]

I agree with these views. O'Regan J also pointed out, rightly in my view, that

> "[the] recognition and protection of human dignity is the touchstone of the new political order and is fundamental to the new Constitution."[33]

[32]Id at para 328.

[33]Id at para 329.

[49] Human dignity cannot be fully valued or respected unless individuals are able to develop their humanity, their "humanness" to the full extent of its potential. Each human being is uniquely talented. Part of the dignity of every human being is the fact and awareness of this uniqueness. An individual's human dignity cannot be fully respected or valued unless the individual is permitted to develop his or her unique talents optimally. Human dignity has little value without freedom; for without freedom personal development and fulfilment are not possible. Without freedom, human dignity is little more than an abstraction. Freedom and dignity are inseparably linked. To deny people their freedom is to deny them their dignity. Although freedom is indispensable for the protection of dignity, it has an intrinsic constitutional value of its own.[34] It is likewise the foundation of many of the other rights that are specifically entrenched.[35] Viewed from this perspective, the starting point must be that an individual's right to freedom must be defined as widely as possible, consonant with a similar breadth of freedom for others.

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[34]"[T]hose who have ever valued liberty for its own sake believed that to be free to choose, and not to be chosen for, is an inalienable ingredient in what makes human beings human." Isaiah Berlin "Introduction" in Four Essays on Liberty Oxford University Press (1969) lx.

[35]Amongst others, the rights entrenched in sections 12, 14, 15, 16, 17, 18, 19, 20, 21, 25(2)(c) and (d), 25(3)(c) and (d), 27, 28, 30(1)(e), 30(2) and 31.

[50] There are other and more specific indications in the Constitution that the right to freedom is to be extensively interpreted. Section 35(1) embodies an injunction that, generally, in interpreting the Chapter 3 provisions, a Court of law must promote the values which underlie an "open" and democratic society "based on freedom and equality". An "open society" most certainly enhances the argument that individual freedom must be generously defined. It is a society in which persons are free to develop their personalities and skills, to seek out their own ultimate fulfilment, to fulfill their own humanness and to question all received wisdom without limitations placed on them by the State. The "open society" suggests that individuals are free, individually and in association with others, to pursue broadly their own personal development and fulfilment and their own conception of the "good life".[36]

[51] A teleological approach also requires that the right to freedom be construed generously and extensively. In Makwanyane O'Regan J, adopting such a teleological approach, correctly observed as follows:

> "Respect for the dignity of all human beings is particularly

[36]Karl Popper in The Open Society and its Enemies 4 ed (1962) Vol. I at 173 refers to the "open society" as:

> "the society in which individuals are confronted with personal decisions" and the "closed

important in South Africa. For apartheid was a denial of a common humanity. Black people were refused respect and dignity and thereby the dignity of all South Africans was diminished. The new Constitution rejects this past and affirms the equal worth of all South Africans. Thus recognition and protection of human dignity is the touchstone of the new political order and is fundamental to the new Constitution."[37]

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society" as "the magical or tribal or collectivist society".

[37]Supra note 24 at para 329.

In my view exactly the same approach needs to be adopted in the case of the right to freedom. This is not the place to enumerate or elaborate on the vast number of limitations which, in the recent past and prior to the Constitution, had been placed on personal freedom, nor on the extent or variety of such limitations.[38] No right minded person in any society which claimed to be democratic and based on freedom and equality would today even try to justify these limitations. They started at birth and continued relentlessly until death. For the purposes of illustration, the most selective outline of such restrictions must suffice. The Population Registration Act and associated legislation eliminated or severely restricted the freedom to identify one's child[39] and hospitalise[40] or educate[41] one's child. As an adult the curtailments of freedom related, amongst other things, to where one could reside[42], work[43] or own property[44]; what work

[38]Some of the most egregious are catalogued in Dugard Human Rights and the South African Legal Order (1978) 107 - 145 and Matthews Law, Order and Liberty in South Africa (1971) and Freedom, State Security and the Rule of Law (1988).

[39]Sections 4 - 7 of the Population Registration Act 30 of 1950.

[40]The old provinces had original legislative powers i.t.o. s 84(1) of the Constitution of the Republic of South Africa Act 32 of 1961 to deal with, inter alia, public health. This power was used to segregate the provision of health services. See, for example, Section 20(2)(A) of Ordinance 8 of 1971 of the Orange Free State in its original version.

[41]Bantu Education Act 47 of 53; Indians Education Act 60 of 1965; Coloured Persons Education Act 47 of 1963; Extension of University Education Act 45 of 1959.

[42]Section 4 of the Group Areas Act 41 of 1950.

[43]Section 5 of the Natives (Urban Areas) Act 21 of 1923; Section 10 - 15 of the Black (Urban Areas) Consolidation Act 25 of 1945.

[44]Section 1 of the Natives Land Act 27 of 1913, section 2 of the Asiatic Land Tenure and Indian Representation Act 28 of 1946, Section 5 of the Group Areas Act 41 of 1950; Section 7 of the Black

one could do[45]; who one could marry[46]; how one could express[47] or organise oneself politically[48] or where one could be buried.[49] A feature common to all or many of these denials of freedom was a denial of the freedom to choose or develop one's own identity, a denial of the freedom to be fully human. One of the main objects of the Constitution is to eradicate such denial or restriction of freedom, not in a casuistic way but as a profound constitutional commitment. In Makwanyane I had occasion to emphasise "the importance, in our new constitutional state, of reason and justification when rights are sought to be curtailed"[50] and to refer to the fact that the Constitution is, in the words of Prof E Mureinik, "... a bridge to ... a culture of justification".[51] This further supports an extensive definition of freedom at the first stage of the enquiry. It may, in the State's interest, be necessary to limit the right to freedom, but then it is for the

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(Urban) Areas Consolidation Act 25 of 1945.

[45]Section 4 of Act 12 of 1911; Section 14 of the Black Building Workers Act 27 of 1951; Bantu Labour Act 67 of 1964; Section 15(1) of Occupational Diseases in Mines and Works Act 78 of 1973.

[46]Section 1 of the Prohibition of Mixed Marriages Act 55 of 1949.

[47]Section 47(2) of the Publications Act 42 of 1974; Section 29 of the Black Administration Act 38 of 1927; Section 15 of the Internal Security Act 74 of 1982.

[48]Section 2 of the Suppression of Communism Act 44 of 1950; Section (1) of the Unlawful Organisations Act 34 of 1960; Prohibition of Political Interference Act 51 of 1968; Affected Organisations Act 31 of 1974; Section 4(1) of the Internal Security Act 74 of 1982.

[49]Local government structures were specifically authorised to segregate burial grounds through passing appropriate by-laws. See, for example, Section 146(1) of Orange Free State Ordinance 8 of 1962 in its original form.

[50]Supra note 24 at para 156.

body or person relying upon such limitation to establish in terms of section 33(1) inter alia, in the case of the limitation of a section 11(1) right, that such limitation is reasonable, justifiable in an open and democratic society based on freedom and equality, and necessary.

[52] I do not think that, in the context of the Constitution as a whole, there is any difference between freedom and liberty.[52] In the negative sense freedom is, as pointed out by Isaiah Berlin,

> "involved in the answer to the question 'What is the area within which the subject - a person or a group of persons - is or should be left to do or be what he is able to do or be, without interference by other persons?'"[53]

In the positive sense freedom, so contends Berlin,

> "is involved in the answer to the question 'What, or who, is the source of control or interference that can determine someone to do, or be, this rather than that?'"[54]

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[51]Id at para 156 note 1.

[52]Isaiah Berlin "Two Concepts of Liberty" in Four Essays on Liberty Oxford University Press (1969) at 121.

[53]Id at 121-122.

[54]Id at 122.

Section 11(1) is concerned with freedom in the negative sense and that is the sense in which I shall hereafter use it. It is essential to distinguish between freedom (liberty) and the conditions of its exercise. It could be dangerous to conflate the two concepts.

> "If a man is too poor or too ignorant or too feeble to make use of his legal rights, the liberty that these rights confer upon him is nothing to him, but it is not thereby annihilated. The obligation to promote education, health, justice, to raise standards of living, to provide opportunity for the growth of the arts and the sciences, to prevent reactionary political or social or legal policies or arbitrary inequalities, is not made less stringent because it is not necessarily directed to the promotion of liberty itself, but to conditions in which alone its possession is of value, or to values which may be independent of it. And still, liberty is one thing, and the conditions for it another .... . Useless freedoms should be made usable, but they are not identical with the conditions indispensable for their utility. This is not a merely pedantic distinction, for if it is ignored, the meaning and value of freedom of choice is apt to be downgraded. In their zeal to create social and economic conditions in which alone freedom is of genuine value, men tend to forget freedom itself; and if it is remembered, it is liable to be pushed aside to make room for these other values with which the reformers or revolutionaries have become pre-occupied ..... . To provide for material needs, for education, for such equality and security as, say, children have at school or laymen in a theocracy, is not to expand liberty. We live in a world characterized by régimes (both right- and left-wing) which have done, or are seeking to do, precisely this; and when they call it freedom, this can be as great a fraud as the freedom of the pauper who has a legal right to purchase luxuries. Indeed, one of the things that Dostoevsky's celebrated fable of the Grand Inquisitor in The Brothers Karamazov is designed to show is precisely that paternalism can provide the conditions of freedom, yet withhold freedom itself."[55]

[55]Berlin "Introduction" in Four Essays on Liberty supra note 52 at liii to lv.

The fact that the right to freedom must, in my view, be given a broad and generous interpretation at the first stage of the enquiry, must therefore not be thought to be premised on a concept of the individual as being in heroic and atomistic isolation from the rest of humanity, or the environment, for that matter. I wish to emphasise quite explicitly that a broad and generous interpretation of freedom does not deny or preclude the constitutionally valid, and indeed essential, role of state intervention in the economic as well as the civil and political spheres. On the contrary, state intervention is essential to resolve the paradox of unlimited freedom (where freedom ultimately destroys itself) in all these spheres.[56] But legitimate limitations on freedom must occur through and be

[56]The solution to this paradox is eloquently stated by Popper as follows in The Open Society and its Enemies 4 ed (1962) Vol. II at 124 -- 5:

> "Freedom, we have seen, defeats itself, if it is unlimited. Unlimited freedom means that a strong man is free to bully one who is weak and to rob him of his freedom. This is why we demand that the state should limit freedom to a certain extent, so that everyone's freedom is protected by law. Nobody should be at the mercy of others, but all should have a right to be protected by the state.
>
> Now I believe that these considerations, originally meant to apply to the realm of brute force, of physical intimidation, must be applied to the economic realm also. Even if the state protects its citizens from being bullied by physical violence (as it does, in principle, under the system of unrestrained capitalism), it may defeat our ends by its failure to protect them from the misuse of economic power. In such a state, the economically strong is still free to bully one who is economically weak, and to rob him of his freedom. Under these circumstances, unlimited economic freedom can be just as self-defeating as unlimited physical freedom, and economic power may be nearly as dangerous as physical violence; for those who possess a surplus of food can force those who are starving into a 'freely' accepted servitude, without using violence. And assuming that the state limits its activities to the suppression of violence (and to the protection of property), a minority which is economically strong may in this way exploit the majority of those who are economically weak.
>
> If this analysis is correct, then the nature of the remedy is clear. It must be a political remedy - a remedy similar to the one which we use against physical violence. We must construct social institutions, enforced by the power of the state, for the protection of the economically weak from the economically strong.

justified under the principles formulated in section 33(1), not by giving a restricted definition of the right to freedom in section 11(1). Kant luminously conceptualises freedom as the "only one innate right" in the following terms:

> "Freedom (independence from the constraint of another's will), insofar as it is compatible with the freedom of everyone else in accordance with a universal law, is the one sole and original right that belongs to every human being by virtue of his humanity."[57]

[53] I also accept that it is not possible in all circumstances to fully harmonise all the Chapter 3 rights with one another and that, in a given case, one right will have to be limited in favour of another. As Berlin points out:

> The state must see to it that nobody need enter into an inequitable arrangement out of fear of starvation, or economic ruin."

[57] The Metaphysical Elements of Justice (tr. John Ladd) Macmillan (1985) at 43.

> "... since some values may conflict intrinsically, the very notion that a pattern must in principle be discoverable in which they are all rendered harmonious is founded on a false a priori view of what the world is like. If ... the human condition is such that men cannot always avoid choices ... [this is] for one central reason ... namely, that ends collide; that one cannot have everything ... The need to choose, to sacrifice some ultimate values to others, turns out to be a permanent characteristic of the human predicament";[58]

and further comments:

> "If we wish to live in the light of reason, we must follow rules and principles; for that is what being rational is. When these rules or principles conflict in concrete cases, to be rational is to follow the course of conduct which least obstructs the general pattern of life in which we believe. ... [E]ven those who are aware of the complex texture of experience, of what is not reducible to generalisation or capable of computation, can, in the end, justify their decisions only by their coherence with some over-all pattern of a desirable form of personal or social life, of which they may become fully conscious only, it may be, when faced with the need to resolve conflicts of this kind. If this seems vague, it is so of necessity."[59]

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[58]Supra note 52 "Introduction" at Ii.

[59]Id at Iv.

Although Berlin's views pertain to the field of political and moral philosophy, they are in my view equally applicable, mutatis mutandis, to constitutional interpretation and adjudication, where for the touchstone of "some over-all pattern of a desirable form of personal or social life" one could substitute "some over-all pattern of the norms and values of the Constitution." Section 35(1) of our Constitution points to the norms and values "which underlie an open and democratic society based on freedom and equality." As a prerequisite for the limitation of rights entrenched in Chapter 3 of the Constitution, section 33(1)(a)(ii) provides that such limitation shall be permissible only to the extent that it is "justifiable in an open and democratic society based on freedom and equality". However, rights of freedom and equality are not always reconcilable and in concrete situations difficult choices may have to be made, because section 33(1)(a)(ii) does not provide an obvious answer to the choice between freedom and equality. Nor does section 35(1). It is, however, neither necessary nor desirable, for purposes of this case, to pursue this aspect of the matter any further.[60]

[60]I would, however, refer in passing to the analysis and suggested resolution by Prof Louis Henkin of the clash, in constitutional law, between freedom and privacy on the one hand and equality on the other, in his seminal article, "Shelley v. Kraemer: Notes for a Revised Opinion" (1962) 110 U Pa L Rev 473

particularly at 487-492 and 494-496.

[54] In the light of all the aforegoing I would, at this stage, define the right to freedom negatively as the right of individuals not to have "obstacles to possible choices and activities"[61] placed in their way by (for present purposes we need go no further) the State. I am indeed mindful of the fact that, as alluded to in paragraph [44] above, specific “freedom rights” are separately protected in Chapter 3. So, for example, the freedom to choose one’s place of residence is specifically protected in section 19, as is the right to enter, remain in and leave the Republic in section 20. The meaning and ambit of these specifically and separately protected freedom rights must of course, in my view, be construed in the context of their specific entrenchment with due regard to the rules of constitutional construction and, in particular, the purpose they were intended to serve. It is also important to bear in mind that, when considering possible limitations on these section 19 and 20 rights in terms of the provisions of section 33(1) of the Constitution, such limitations do not, in addition to being reasonable, also have to be “necessary” for purposes of the provisos in subparagraphs (aa) or (bb) of

[61]Berlin supra note 52 "Introduction" at xxxix. See also R v. Big M Drug Mart supra note 27 at 97, where Dickson CJC, in the context of the freedom of conscience and religion guaranteed in section 2(a) of the Canadian Charter, characterised freedom "primarily ... by the absence of coercion or constraint" and stated that,

> "[i]f a person is compelled by the state or the will of another to a course of action or inaction which he would not otherwise have chosen, he is not acting of his own volition and he cannot be said to be truly free. One of the major purposes of the Charter is to protect, within reason, from compulsion or restraint. Coercion includes not only such blatant forms of compulsion as direct commands to act or refrain from acting on pain of sanction, coercion includes indirect forms of control which determine or limit alternative courses of conduct available to others."

subsection 33(1).

[55] Similarly the freedoms of expression, assembly, demonstration and petition, association, and movement, are dealt with separately and specifically in sections 15 to 18 respectively. These rights, too, have to be construed and defined separately, as indicated above. Legitimate limitations on these rights are not subject to the additional requirement of being "necessary" in terms of proviso (bb) to section 33(1) unless and insofar as any such right "relates to free and fair political activity".

[56] There are also specifically enumerated freedom rights where any limitation, in addition to being reasonable, must under all circumstances also be necessary in order to pass section 33(1) scrutiny. Such rights include the section 14(1) rights to freedom of conscience, religion, thought, belief and opinion and the section 21 political rights.

[57] The implication of this separate enumeration and independent protection of specific freedom rights is of course that the freedom rights protected by section 11(1) should more properly be designated "residual freedom rights". Consequently, when it is alleged that any freedom right has been infringed, the

proper methodology would be first to determine whether the right infringed is a specifically enumerated freedom right. This will be done by analysis and construction of the specific section entrenching the right in question and applying it to the case at hand. If any limitation of such right is relied upon, regard will then be had to the specific provision in section 33(1) relating to such enumerated freedom right. If the alleged infringement is not of an enumerated freedom right, then the enquiry will be directed to determining whether a residual freedom right protected by section 11(1) has been infringed. If so, any limitation of such residual freedom right must, in addition to being reasonable, also be necessary because section 11 is included in proviso (aa) to section 33(1). I have had the benefit of reading the President's judgment in draft. I fully agree with his view that the ambit of the section 11(1) freedom right "does not depend on the construction of the section in isolation but on its construction in the context of Chapter 3 of the Constitution." It is, in fact, such an approach which has led me to the conclusion that it is a residual freedom right. I also agree, and have indeed adopted this approach, that in considering a constitutional challenge based on an alleged denial or limitation of freedom the first step is to enquire whether the impugned act falls within the freedoms elsewhere protected in Chapter 3.

[58] It might be suggested that, because the legislature has sought fit to subject any

limitation of a residual freedom right to stricter scrutiny, that such residual freedom rights ought to be more narrowly construed. In my view there is no warrant for such an approach, for at least two reasons. First, it would constitute an unjustified "second-guessing" of the framers' intention. They must have been only too well aware that at least some of the section 11(1) rights were residual freedom rights in view of the fact that so many freedom rights were specifically enumerated in other sections of the Constitution. Despite this awareness, they chose to confer the higher level of protection on these rights in proviso (aa) to section 33(1). In my view, this decision, which is quite unambiguous, must be respected by this Court. It is not our function to cut down artificially the patent protection afforded by section 11(1) to residual freedom rights by giving a limited construction, and a strained one at that, to these residual freedom rights. Second, such a construction would be in conflict with the "generous" and "full benefit" interpretative approach unanimously approved by this Court in S v Zuma and Others[62] and in particular the following quotation approved of by Kentridge AJ:

> "Constitutional rights conferred without express limitation should not be cut down by reading implicit restrictions into them, so as to

[62]1995 (4) BCLR 401 (SA); 1995 (2) SA 642 (CC); at paras 14-15.

bring them into line with the common law."[63]

[63]Id at para 15.

I respectfully disagree with the President's view that those freedoms (and by implication other rights) whose limitation is made subject to the "necessary" test by section 33 of the Constitution are necessarily of a "higher order" than those freedoms which are not subjected to such an onerous test. A limitation of the section 8 equality right, for example, is not made subject to the more stringent "necessary" test, yet in my view it could scarcely be said that this right is of a "lower" order. I therefore consider it unhelpful to focus, as the President does, on the fact that a limitation of the section 13 right to privacy is only subject to the "reasonable" test. I certainly disagree, with respect, that this is anomalous. Even if it were anomalous, I do not believe that the anomaly assists this Court in construing the section 11(1) right to freedom. It certainly does not call for what I would consider a strained and limited construction. There may well be good reason why the limitation of a section 13 right is only subject to the "reasonable" test. It may be because of the natural tension between this right and the right to freedom, or for some other reason, about which it is unprofitable to speculate. The fact that the guarantee against "torture" in section 11(2) is made subject to any limitation at all (particularly when regard is had to the fact that both the International Covenant on Civil and Political Rights and the European Convention on Human Rights outlaw any derogation from this right even in times of war[64] or

[64]European Convention on Human Rights articles 3 and 15(2).

public emergency threatening the life of the nation[65]) I find far more anomalous, but I do not consider such anomaly useful in construing other provisions of Chapter 3.

[59] It needs to be emphasised that what is being contended for in this judgment is not an unlimited right to freedom or that the section 11(1) residual freedom rights are unlimited. What is being postulated is a broad and generous construction of these rights, which is quite different from contending that they are unlimited. These rights are indeed subject to limitation, but limitation justified in terms of section 33(1) of the Constitution.

[60] It might be contended that, by giving a broad and generous construction to the section 11(1) residual freedom rights, the Court will, in the fields of criminal law and general regulatory provisions for example, be dragged into what are essentially legislative functions, because the state will be called upon to show in

[65]European Convention on Human Rights articles 3 and 15(2); International Covenant on Civil and Political Rights articles 4(2) and 7.

all these cases that the limitations imposed are necessary. I cannot, however, see that this differs in any principled way from the task which the Court has to discharge when it tests any legislative or regulatory provision against the provisions of the Constitution in order to determine the validity of the former. Provisos (aa) and (bb) to section 33(1) embody an extensive array of Constitutional rights which, if infringed by any criminal statute or regulatory provision, would require the state (when rights enumerated in proviso (aa) are infringed and, in certain circumstances, when rights enumerated in proviso (bb) are infringed) to establish that limitations are, in addition to any other requirement, also necessary.

[61] It might also be contended that, by giving such a broad and generous construction to the section 11(1) residual freedom rights, the Court will be inviting an intolerable workload because it will be obliged to test a multitude of criminal and other statutory provisions which are challenged on the grounds, inter alia, that the limitations thus placed on residual freedom rights are not necessary. Such an argument could proceed on the following basis:

(a) that the majority of these statutory provisions will only be attacked if the right to freedom in section 11(1) is not narrowly construed;

(b) that the court will be flooded with frivolous complaints; and

(c) that the court is powerless to prevent this.

In my view none of these premises can be assumed and all are unfounded.

[62] Depending on the nature of the criminal or other regulatory statutes involved, there are likely to be many other Chapter 3 rights which are facially involved. It cannot simply be postulated that an internally unlimited residual freedom right will open the floodgates.

[63] It is patent that the overwhelming substance of criminal and other regulatory legislative provisions constitute constitutionally justified limitations on rights, a fact which I believe is well recognised even by the lay public. It is unduly pessimistic to expect a deluge of frivolous challenges to legislation based simply on a broad reading of the section 11(1) right to freedom. In any event it is reasonable to suppose that most challenges will arise either in the Provincial and Local Divisions of the Supreme Court or in other Courts. In both cases the Supreme Courts (either through section 102(1) of the Constitution or section 103(4), in the case of matters originating in other Courts) are well able, by a proper application of these provisions in the Constitution, to dispose of challenges where there is not a reasonable prospect that the law or provision is invalid.

[64] This Court itself controls direct access through the provisions of section 100(2) of the Constitution and the Constitutional Court rules, in particular rule 17. The United States and German courts of equivalent jurisdiction have devised effective means of preventing docket overload and there is no reason to believe that this Court is not able to do likewise. If a frivolous or vexatious matter does succeed in slipping through the net there are appropriate ways (including an appropriate punitive order as to costs) by which this Court could discourage such matters from being brought before it.

[65] There may also be the anxiety that, unless freedom is given a more restricted meaning, this Court will inevitably be drawn into matters which are the concern of the Legislature rather than the Courts and could stand accused of what Tribe has described as being the error in decisions such as Lochner v New York[66] which was "a misguided understanding of what liberty actually required in the industrial age."[67] I believe this fear to be unfounded. Lochner, a case in which the United States Supreme Court invalidated maximum hour work laws as violative of contractual liberties protected by the Constitution, was decided in 1905 at a time

[66]198 US 45 (1905).

[67]Tribe American Constitutional Law 2ed (1988) at 769.

and in a socio-economic context completely different from ours in 1995. I do not believe that we ought to allow ourselves to be haunted by the Lochner ghost. It is to me inconceivable that the broad sweep of labour legislation in this country[68] could be struck down because of an argument that it infringed rights of contractual freedom protected by the Constitution. This is so for a number of reasons.

[68]One is not here concerned with discrete provisions which might give rise to constitutional controversy even with a narrowly construed right to freedom.

[66] First, the interventionist role of the state is no longer seen, in broad terms, as being limited to protecting its citizens against brute physical force and intimidation from others only, but is seen as extending to the economic and social realm as well.[69] Second, there are specific provisions in the Constitution itself which will ensure that appropriate labour and other social legislation will not be invalidated because of a "misguided understanding" of what liberty requires.[70] Third, statutory limitations on contractual freedom will (quite apart from the

[69]See Popper's analysis supra note 56. The German Basic Law emphasises the social as well as the democratic character of the state (article 20(1)) and that property imposes duties and should serve the public weal (article 14(2)): In fact a very considerable jurisprudence has been built up around the concept of the social responsibility of the state, as to which, in general, see the comprehensive list of literature on the topic in Maunz-Dürig Grundgesetz Kommentar (1994) Vol. II, commentary on article 20 at 295-302.

[70]The section 8 right to equality before the law and the freedom from unfair discrimination is qualified in subsection (3) as follows:

"(3)(a) This section shall not preclude measures designed to achieve the adequate protection and advancement of persons or groups or categories of persons disadvantaged by unfair discrimination, in order to enable their full and equal enjoyment of all rights and freedoms.

(b) Every person or community dispossessed of rights in land before the commencement of this Constitution under any law which would have been inconsistent with subsection (2) had that subsection been in operation at the time of the dispossession, shall be entitled to claim restitution of such rights subject to and in accordance with sections 121, 122 and 123."

The section 26 right to free economic activity is qualified in subsection (2) as follows:

"(2) Subsection (1) shall not preclude measures designed to promote the protection or the improvement of the quality of life, economic growth, human development, social justice, basic conditions of employment, fair labour practices or equal opportunity for all, provided such measures are justifiable in an open and democratic society based on freedom and equality."

Section 27 is to the following effect:

"(1) Every person shall have the right to fair labour practices.

(2) Workers shall have the right to form and join trade unions, and employers shall have the right to form and join employers' organisations.

(3) Workers and employers shall have the right to organise and bargain collectively.

(4) Workers shall have the right to strike for the purpose of collective bargaining.

(5) Employers' recourse to the lock-out for the purpose of collective bargaining shall

importance in this field of the provisions of section 26(2) of the Constitution)[71] be justified under section 33(1), assuming the other requirements for limitation to have been fulfilled, if they are, in terms of section 33(1)(a)(ii), “justifiable in an open and democratic society based on freedom and equality”. As a general proposition it is difficult to see how labour and other social legislation would be struck down where such legislation easily passes constitutional scrutiny in countries such as the United States of America, Canada and Germany.

[67] It has been suggested that the “due process” provisions of section 25, the prohibition against cruel, inhuman or degrading punishment in section 11(2) and the fact that substantive criminal law must not be inconsistent with the provisions of Chapter 3, provide accused persons with all the protection that one expects in an “open and democratic society based on freedom and equality” and that this is a strong reason for holding that “freedom and security of the person" in section

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not be impaired subject to section 33(1)."

[71]See previous note 70.

11(1) should not be construed as including freedom from criminal prosecution and imprisonment in accordance with the laws of the land. This is a very broad proposition which would, in my view, require for its justification a very detailed examination of our criminal law and the possible abuses to which it could be put. It is a proposition with which I am in any event unable to agree. One can think offhand of many prohibitions (such as an unqualified prohibition against the possession of any fire-arm, the possession of liquor in any form, the playing of sport on Sunday, and the proscription of various activities or where or when they may be carried out) which might be difficult to challenge under provisions of Chapter 3 other than the section 11(1) residual freedom rights, but would be unacceptable in an "open and democratic society based on freedom and equality".

[68] A major difficulty with reading a limitation into section 11(1) where the framers have not seen fit to do so is the absence of any neutral principle or norm for doing so. Neither the text, context nor purpose of Chapter 3 requires it. To read a limitation into the subsection in these circumstances is to run the risk of injecting subjective values into the text at the expense of a proper interpretation of the Constitution.

[69] Even though the freedom rights in section 11(1) are residual freedom rights, there is no justification for not giving these residual freedom rights the broad and generous interpretation I have suggested. They constitute the residual rights of individuals (where such or similar rights are not protected elsewhere in Chapter 3) not to have "obstacles to possible choices and activities" placed in their way by (for present purposes we need not, as already indicated, go any further) the State.[72]

[70] What is it about the nature and operation of the provisions of section 417(2)(b) of the Act, and their impact upon the examinee, which can be said to be inconsistent with the right in question? Although it is section 417(2)(b) of the Act which is under attack, it must be analysed in the full context of its operation with other relevant provisions of the Act. In the first place, the examinees, if they fall within the classes of persons referred to in sub-section (1) of section 417 of the Act (which all the applicants do) appear at the examination under compulsion, for if they are duly summoned and fail to attend voluntarily, the Master or the Court

[72]See supra paragraph [49] and note 61.

may, by virtue of the provisions of sub-section (4) cause them to be apprehended and brought before the Master or Court for examination. The examinee has no choice but to attend. The examinee is, in terms of sub-section (2) obliged to submit to examination. Moreover, any examinee who fails, without sufficient cause, to answer fully any question lawfully put to the examinee in terms of sub-section (2) is, in terms of the provisions of section 418(5)(b)(iii) of the Act, guilty of an offence and, in terms of section 441(1)(f), liable upon conviction to a fine not exceeding R2000 or to imprisonment for a period not exceeding six months or to both such fine and such imprisonment. Section 417 obliges the examinee to answer all questions even though the answer given to any such question may tend to incriminate him or her. Examinees thus have a very restricted choice if they have in the past acted in a way which might make them liable to criminal prosecution in connection with the trade, dealings, affairs or property of the company and they are examined in connection with such acts. If they refuse to answer, they face conviction and sentence to a fine or imprisonment (or both). If they answer, they run the risk of prosecution and conviction under circumstances where they might not have been prosecuted or convicted but for their answers at the examination, because section 417(2)(b) explicitly provides that even an answer which tends to incriminate the examinee may thereafter be used in evidence against him or her.

[71] It must be remembered that this stage of the enquiry is not concerned with whether any infringement of an examinee's section 11(1) right is justified in terms of section 33(1) but merely whether the right has been infringed. On the basis of the general principles set forth above, I would conclude that, prima facie, the restrictions placed by section 417(2)(b) on an examinee's choices and activities constitute an infringement of section 11(1).

[72] It is appropriate to consider whether comparable foreign case law would lead to a different conclusion. Direct comparison is of course difficult and needs to be done with circumspection because the right to personal freedom is formulated differently in the constitutions of other countries and in the international and regional instruments. Nevertheless, section 33(1) of our Constitution enjoins us to consider, inter alia, what would be "justifiable in an open and democratic society based on freedom and equality" and section 35(1) obliges us to promote the values underlying such a society when we interpret Chapter 3 and encourages us to have regard to comparable case law. In construing and applying our Constitution, we are dealing with fundamental legal norms which are steadily becoming more universal in character. When, for example, the United States Supreme Court finds that a statutory provision is or is not in accordance

with the “due process of law” or when the Canadian Supreme Court decides that a deprivation of liberty is not “in accordance with the principles of fundamental justice” (concepts which will be dealt with later) we have regard to these findings, not in order to draw direct analogies, but to identify the underlying reasoning with a view to establishing the norms that apply in other open and democratic societies based on freedom and equality.

[73] Section 7 of the Canadian Charter entrenches the right to liberty and security of the person in terms narrower than section 11(1) of our Constitution. It provides:

> "7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice." (Emphasis added).

Section 8 of the Charter is to the following effect:

> "8. Everyone has the right to be secure against unreasonable search and seizure."

In Canada the general approach of the Courts is that there is a deprivation of liberty within the meaning of section 7 of the Charter where conduct is prescribed or proscribed by law, and imprisonment is a possible consequence of disobeying

the law in question.[73] In Reference Re ss 193 and 195.1(C) of the Criminal Code Dickson CJC, writing for three of the six Justices, held that

> "... there is a clear infringement of liberty in this case given the possibility of imprisonment contemplated by the impugned provisions."[74]

[73]Hogg Constitutional Law of Canada 3 ed (1992) at 1026 - 1027 states that,

> "'Liberty' certainly includes freedom from physical restraint. Any law that imposes the penalty of imprisonment, whether the sentence is mandatory or discretionary, is by virtue of that penalty a deprivation of liberty and must conform to the principles of fundamental justice."

[74][1990] 48 C.R.R. 1 at 15.

[74] The decision of the Supreme Court of Canada in Thomson Newspapers Ltd. et al. v. Director of Investigation and Research et al[75] is particularly instructive. The Canadian Combines Investigation Act[76] (the "CI Act") provided for a system of investigation and research which allowed the Director to determine facts relevant to particular issues of market behaviour, including breaches of prescribed guidelines set forth in the Act. Section 17 of the Act allowed the Director of Investigation and Research, in the course of carrying out an investigation under the Act, to apply for an order requiring any person to be examined under oath and to produce business records. Section 20(2) of the Act protected examinees who were compelled to testify against subsequent use of their oral testimony in criminal proceedings against them, but not against the subsequent use of evidence derived from that testimony. Officers of Thomson Newspapers were served with orders to appear before the Restrictive Trade Practices Commission to be examined under oath and to make production of certain documents. They attacked section 17 of the CI Act on the grounds of its violation of sections 7 and

[75][1990] 67 D.L.R. (4th) 161.

[76]R.S.C. 1970, c. C-23.

8 of the Canadian Charter. The Supreme Court of Canada ultimately held, Lamer and Sopinka JJ dissenting in part, and Wilson J dissenting, that section 17 of the CI Act violated neither section 7 or section 8 of the Charter.

[75] Each member of the Supreme Court (Lamer, Wilson, La Forest, L'Heureux-Dubé and Sopinka JJ) gave a separate judgment. The reasons for all the judgments are not readily amenable to brief, accurate summary. They are, however, instructive both on the issue of the ambit of the right to liberty in section 7 of the Charter (the right to freedom in section 11(1) of our Constitution) and the possible limitation of such right in terms of section 1 of the Charter (section 33(1) of our Constitution). For the present part of this judgment I refer only to the former.

[76] Section 17(1) of the CI Act makes provision, inter alia, for the examination on oath of persons before a member of the Commission who may make orders for securing the attendance of witnesses and their examination and "may otherwise exercise, for the enforcement of such orders or punishment for disobedience

thereof, all the powers that are exercised by any superior Court in Canada for the enforcement of subpoenas to witnesses or punishment of disobedience thereof."

Lamer J, without pronouncing on the section 7 issue, dismissed the section 7 challenge on the basis that the wrong section of the CI Act had been challenged, section 20(2) thereof and section 5(1) of the Canadian Evidence Act being the relevant statutory provisions which had to be challenged in order for the applicants to succeed.[77] Wilson J held that section 17 of the CI Act violated a person's right to liberty and security of the person within the meaning of section 7 of the Charter[78], stating that:

> "There is, however, in my view a vast difference between a general regulatory scheme (such as the rules of the road for motorists) designed to give some order to human behaviour and a state-imposed compulsion on an individual to appear at proceedings against his will and testify on pain of punishment if he refuses. The difference is even greater, in my view, where the compelled testimony given by the individual may be used to build a case

[77] Thomson supra note 75 at 175 a - b.

[78] Id at 186 h.

against him in what is, in effect, a subsequent criminal prosecution. It is my opinion that this compulsion, linked as it is to the criminal process, touches upon the physical integrity of the individual as well as that individual's reasonable expectation of privacy. The fact that the s. 17 procedure is in itself 'investigatory' as opposed to 'prosecutorial' seems to me to be irrelevant when a criminal prosecution is a potential consequence of the s. 17 enquiry."[79]

The learned Judge also found that the infringement by section 17 of the appellants' section 7 rights was not "in accordance with the principles of fundamental justice"[80] (the phrase qualifying the section 7 right to "liberty and security of the person"), stating that:

"Although s. 20(2) of the Act protects a witness who testifies under s. 17 from use of the testimonial evidence in a subsequent prosecution if one takes place, it does not protect the witness against use of the derivative evidence. Accordingly, s.17 violates the residual s.7 right of an individual not to be compelled to testify in an investigatory proceeding with a view to possible subsequent prosecution absent legislative assurance that any derivative

[79]Id at 186 d - f.

[80]Id at 204 e - h.

evidence obtained as a result of his testimony cannot be used against him in such prosecution."[81]

[81] Id at 204 f - h.

Section 11(1) of the South African Constitution of course contains no such limitation to the "right to freedom and security of the person"; but the possible significance of this aspect of the Thomson judgment for the present enquiry will be dealt with later. La Forest J also found that section 17 of the CI Act constituted a deprivation of liberty within the meaning of section 7,[82] but concluded that it did so in accordance with the principles of fundamental justice, holding that

> ".... complete immunity against such use [of derivative evidence] is not required by the principles of fundamental justice. The immunity against use of actual testimony provided by s. 20(2) of the Act together with the judge's power to exclude derivative evidence where appropriate is all that is necessary to satisfy the requirements of the Charter."[83]

L'Heureux-Dubé J came to a similar conclusion.[84] Sopinka J, concurring with Wilson J in this respect, held that section 17 of the CI Act violated section 7 of the Canadian Charter, "in particular, the principle of fundamental justice in which the right to remain silent is embodied" to the extent that the provisions of section 17 compelled testimony.[85] The learned Judge's reasons for concluding that section 17 violated this principle of fundamental justice will be considered in due course, but it is clear that he considered that "the right of a suspect to remain

[82]Id at 242 c.

[83]Id at 264 d - e.

[84]Id at 271 g and 281 e - f.

silent during the investigative stage" had the "status of a principle of fundamental justice" and that it was included in section 7, "the repository of many of our basic rights which are not otherwise specifically enumerated."[86]

[77] The Fifth Amendment to the United States Constitution provides in part that -

> "[No person] ... shall be compelled in any criminal case to be witness against himself, nor be deprived of life, liberty, or property, without due process of law".

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[85]Id at 290 e - f.

[86]Id at 294 a.

In dealing with the Fifth Amendment it must of course be borne in mind, as pointed out by Wilson J in Thomson Newspapers[87], that the United States Constitution has no limitation clause (such as section 1 in the Canadian Charter or section 33(1) of our Constitution) and that, accordingly, any limitation on a constitutional right has to be read into the right itself. Nevertheless it is significant that the United States Fifth Amendment right not to be so compelled "has consistently been accorded a liberal construction"[88] and "is available outside of criminal court proceedings and serves to protect persons in all settings in which their freedom of action is curtailed in any significant way from being compelled to incriminate themselves."[89] It is regarded as a right in the broad panoply of freedom rights which were added to the original Constitution "in the conviction that too high a price may be paid even for the unhampered enforcement of the criminal law and that, in its attainment, other social objects of a free society

[87]Id at 206 h - 207 a.

[88]Miranda v. Arizona 384 US 436 (1965) at 461.

[89]Id at 467.

should not be sacrificed."[90] It is viewed as one of the fruits of "[t]he battle for personal liberty".[91] In defining explicitly the spirit in which this privilege against self-incrimination should be approached, Frankfurter J stated that

[90]Feldman v. United States 322 US 487 (1944) 489. See also Hoffman v .United States 341 US 479 (1950) at 486.

[91]United States v. James 60 F. 257 (1894) at 264 - 265 and Ullmann v. United States 350 US 422 (1955) at 454.

"[t]his command of the Fifth Amendment ... registers an important advance in the development of our liberty - 'one of the great landmarks in man's struggle to make himself civilized.'"[92]

[78] As far as the breadth of our present Constitution's section 11(1) right to freedom and security of the person is concerned, Thomson's case[93] provides some useful guidance. Reference has already been made[94] to the fact that the right to freedom is the foundation of many of the other rights that are specifically entrenched in the present Constitution. The existence of these other freedom-

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[92]Ullmann v. United States supra note 91 at 426. In Bolling v. Sharpe 347 US 497 (1953) (a school segregation case) Chief Justice Warren pointed out the following at 499 - 500:

> "Although the Court has not assumed to define 'liberty' with any great precision, that term is not confined to mere freedom from bodily restraint. Liberty under law extends to the full range of conduct which the individual is free to pursue, and it cannot be restricted except for a proper governmental objective. Segregation in public education is not reasonably related to any proper governmental objective, and thus it imposes on Negro children of the District of Columbia a burden that constitutes an arbitrary deprivation of their liberty in violation of the Due Process Clause."

Generally speaking the right to liberty is given a broad definition by the United States Supreme Court, even in modern times and it is certainly not limited to mere freedom from bodily restraint. In Board of Regents of State College v. Roth 408 US 564 (1972) at 572, Stewart J explained the broad reach of the concept of liberty as embodied in the Fourteenth Amendment by quoting with approval the following passage from Meyer v. Nebraska 262 US 390 (1923) at 399:

> "While this Court has not attempted to define with exactness the liberty ... guaranteed [by the Fourteenth Amendment], the term has received much consideration and some of the included things have been definitely stated. Without doubt, it denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized ... as essential to the orderly pursuit of happiness by free men."

The learned Judge then added:

> "In a Constitution for a free people, there can be no doubt that the meaning of 'liberty' must be broad indeed."

[93]Supra note 75.

[94]Para 44 above.

based or freedom-inspired rights does not warrant a restrictive interpretation being given to the section 11(1) rights. Section 13 of the Canadian Charter provides an individual with a limited protection against self-incrimination in the following terms:

> "13. A witness who testifies in any proceedings has the right not to have any incriminating evidence so given used to incriminate that witness in any other proceedings, except in a prosecution for perjury or for the giving of contradictory evidence."

Section 11(c) embodies a limited right of non-compellability:

> "11. Any person charged with an offence has the right
> .....
> (c) not to be compelled to be a witness in proceedings against that person in respect of the offence."

In Thomson's case the appellants could not take advantage of either section 13 or section 11(c) but contended that section 7 protects similar rights in contexts other than those to which section 13, and section 11(c) relate. This contention was upheld by Wilson J who stated the following:

> "The principle of statutory construction, expressio unius, is ill-suited to meet the needs of Charter interpretation. It is inconsistent with the purposive approach to Charter interpretation which has been endorsed by this court and which focuses on the broad purposes for which rights were designed and not on mechanical rules which have traditionally been employed in interpreting detailed provisions

of ordinary statutes in order to discern legislative intent",

and,

"Sections 8 to 14 of the Charter are illustrative, but not exhaustive, of deprivations of life, liberty and security of the person which are not in accord with the principles of fundamental justice. Otherwise, s. 7 would have no role to play. I conclude therefore that the specific enumerations in ss.11(c) and 13 do not prevent residual content being given to s.7."[95]

[95] Thompson's case supra note 75 at 192 h - 193 and 193 c - d.

This part of Wilson J's judgment was concurred in by Lamer J,[96] La Forest J,[97] L'Heureux-Dubé J[98] and Sopinka J (but only in regard to the section 11(c) right to remain silent).[99] For the reasons advanced by Wilson J, I would hold that the fact that many other freedom rights are entrenched in our present Constitution does not for that reason mean that the section 11(1) right to freedom does not protect similar rights in contexts other than those to which the more particular freedom rights in the Constitution relate; the Court is not thereby precluded from giving "residual content" to section 11(1). The same considerations also do not warrant giving this residual freedom right a narrow construction. In Thomson, Wilson J construed the words "life, liberty and security of the person" disjunctively, holding that:

> "it is not necessary for the citizen to show that his right to life, his right to liberty and his right to security of the person have all been violated in order to constitute a breach of the section. It is sufficient that one of them has been violated: see Singh v. Can. (Minister of Employment & Immigration) (1985), 17 D.L.R. (4th) 422, [1985] 1

[96]Id at 172 f.

[97]Id at 243 g - 244 c.

[98]Id at 277 f, 278 a - b and 280 a.

[99]Id at 293 g - 294 a.

S.C.R. 177, 14 C.R.R. 13."[100]

This is further support for the disjunctive reading of "freedom and security of the person" which I have favoured in para [41] above.

[100]Id at 185 c - d.

[79] I would, more specifically and in the context of this case, apply the above interpretative approach to the rights enumerated in section 25(3)(c) and (d) respectively of the Constitution, namely the right of an accused person "to be presumed innocent and to remain silent during plea proceedings or trial and not to testify during trial" and "not to be a compellable witness against himself or herself". In Zuma[101] Kentridge AJ, writing for the Constitutional Court, pointed out that South African courts have over the years recognised the origins and the importance of the common law rule placing the onus of proving the voluntariness of a confession on the prosecution.[102] In this context he quoted with approval the following passage from R v. Camane 1925 AD 570 at 575:

> "Now, it is an established principle of our law that no one can be compelled to give evidence incriminating himself. He cannot be forced to do that either before the trial, or during the trial. The principle comes to us through the English law, and its roots go far back in history. Wigmore, in his book on Evidence (Volume 4, section 2250) traces very accurately the genesis, and indicates the limits of the privilege. And he shows that however important the doctrine may be, it is necessary to confine it within its proper limits.

[101] Supra note 8.

[102] Id at para 31.

What the rule forbids is compelling a man to give evidence which incriminates himself"[103] (Emphasis added).

After tracing the history of the embodiment of this rule in South African legislation, Kentridge AJ concluded that:

"the common law rule in regard to the burden of proving that a confession was voluntary has not been a fortuitous but an integral and essential part of the right to remain silent after arrest, the right not to be compelled to make a confession and the right not to be a compellable witness against oneself. These rights, in turn, are the necessary reinforcement of Viscount Sankey's 'golden thread' - that it is for the prosecution to prove the guilt of the accused beyond reasonable doubt (Woolmington's case (supra)). Reverse the burden of proof and all these rights are seriously compromised and undermined. I therefore consider that the common law rule on the burden of proof is inherent in the rights specifically mentioned in section 25(2) and 3(c) and (d), and forms part of the right to a

[103] Id.

fair trial."[104]

Even if it were not otherwise sufficiently clear from the wording of section 25(3)(c) or (d) that these rights include the right of accused not to be compelled to give evidence which incriminates themselves, the aforementioned approach unquestionably does. I conclude that the right of a person not to be compelled to give evidence which incriminates such person is inherent in the rights mentioned in section 25(2) and (3)(c) and (d). The fact that such rights are, in respect of an accused person, included (implicitly or otherwise) in section 25(3) of the Constitution, does not for that reason preclude the Court from giving residual content to section 11(1) and holding that section 11(1) protects rights similar to those in section 25(3)(c) or (d) in contexts and in respect of persons other than those there mentioned.

[80] For this reason, the contention advanced by Mr. Cilliers that, because the section 25(3) rights were enumerated in such detail, it was not possible, on the proper construction of the Constitution as a whole, to interpret the section 11(1) right to

[104] Id at para 33.

freedom in such a way as to include a residual right not to be compelled to give evidence against oneself in a section 417 enquiry, cannot be sustained.

[81] In Reference re s.94(2) of Motor Vehicle Act Wilson J observed:

> "Indeed, all regulatory offences impose some restrictions on liberty broadly construed. But I think it will trivialize the Charter to sweep all those offences into s. 7 as violations of the right to life, liberty and security of the person even if they can be sustained under s. 1."[105]

I cannot, with due respect to so distinguished a Judge, comprehend why an extensive construction of freedom would "trivialize" the Charter, either in theory or in practice, or, more relevantly for our purposes, our present Constitution. It might trivialise a constitution (it would indeed cause chaos) if it resulted in the regulating measures being struck down. But that is not the consequence. An extensive construction merely requires the party relying thereon to justify it in terms of a limitation clause. It does not trivialise a constitution in theory; in fact it

[105] (1985) 24 D.L.R. (4th) 536 at 565.

has the reverse effect by emphasising the necessity for justifying intrusion into freedom. It does not trivialise a constitution in practice because in the vast majority of cases dealing with regulatory matters, the justification is so obviously incontestable that it is taken for granted and never becomes a live issue. In the borderline cases (and even in mundane regulatory statutes such cases may arise) there is no pragmatic reason why the person relying on the measure ought not to justify it.

[82] Section 11(1) of the transitional Constitution contains no internal limitation such as is found in section 7 of the Canadian Charter. There seems to be no reason in principle why the limitation of the right should not consistently be sought for and justified under section 33(1). The drafters of section 11(1) were undoubtedly well aware of the provisions of section 7 of the Canadian Charter, yet they decided not to place any limitation in section 11(1). Instead a detailed limitation clause has been crafted. It would seem to further the norms of the rule of law and of constitutionalism better for Courts, in applying the Constitution, to seek for any limitation to section 11(1) rights in section 33(1), where the Constitution lays down criteria for limitation, than to seek limits in section 11(1) by means of an interpretative approach which must of necessity, having regard to the nature of the right to freedom, be more subjective, more uncertain and more

constitutionally undefined. In Zuma[106] this Court recognised the difference between the "single stage" approach and the "two-stage" approach to determining whether there has been an unconstitutional infringement of an entrenched right. It was further recognised that -

> "The single stage approach (as in the United States constitution or the Hong Kong Bill of Rights) may call for a more flexible approach to the construction of the fundamental right, whereas the two-stage approach may call for a broader interpretation of the fundamental right, qualified only at the second stage."[107]

The fact that such a "two-stage" approach is prescribed by the Constitution, and that section 33(1) prescribes fully the criteria that have to be met before an entrenched right can be limited, in my view lends constitutional and policy support to an interpretative approach which requires that the broadest interpretation be given to the entrenched right. If a limitation is sought to be made at the first stage of the enquiry, it requires, at best, an uncertain, somewhat subjective and generally constitutionally unguided normative judicial judgment to be made. The temptation to, and danger of, judicial subjectivity is great. This

[106]Supra note 8 at para 21.

[107]Id.

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

[83] Article 2 of the German Basic Law deals with the right to freedom in two separate sub-paragraphs, namely:

> "(1) Everybody has the right to self-fulfilment in so far as they do not violate the rights of others or offend against the constitutional order or morality.
>
> (2) Everybody has the right to life and physical integrity.
>
> Personal freedom is inviolable. These rights may not be
>
> encroached upon save pursuant to a law."

The formulation is patently different from that in section 11(1) of the transitional Constitution. The purpose of alluding to its provisions is not to attempt a direct

comparison, but to illustrate that a Constitution can operate effectively where the widest possible construction is given to a freedom right. Article 2(2) is, it is generally agreed, given a very narrow construction which limits "personal freedom" to freedom from physical restraint.[108] Article 104 contains detailed rights applying to detention and arrest. The legislative history of article 2(2), the systematic structure of the fundamental rights and the existence of article 104 are used to support a narrow construction of article 2(2).[109]

[108]Maunz-Dürig Grundgesetz Kommentar (1944) Vol. I, commentary on article 2 at 110 - 111; 10 BVerfGE 302 at 318.

[109]Maunz-Dürig supra note 108 at 110 - 111; 10 BVerfGE 302 at 322 - 323.

[84] By contrast Article 2(1) of the Basic Law has been interpreted so broadly by the Federal Constitutional Court that it presently allows the Court to subject any legislative norm (statutory instrument) to constitutional scrutiny, the culmination of a process the basis for which was laid in the late 1950's when the Court interpreted the right to self-fulfilment as a protection of the general "freedom to act".[110] The freedom to act is guaranteed to the extent that it does not offend against the constitutional order, which includes all statutory instruments[111], but, in order to pass constitutional scrutiny, all statutes must conform formally and substantively with the Basic Law. Formally the Court may, for example, examine whether the legislative provision was passed by the appropriate Legislature, but the substantive content of all legislative provisions are tested against the principle of proportionality.[112] The Federal Constitutional Court requires the principle of proportionality to be respected even if a special limitation to the right, such as the "constitutional order" is invoked by the Legislature.[113] The consequences of the extremely wide interpretation given to Article 2(1) is that, in effect, all legislative provisions must be tested for compliance with the principle of

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[110]6 BVerfGE 32 at 36 - 37; 55 BVerfGE 159 at 165; 74 BVerfGE 129 at 151; 80 BVerfGE 137 at 152 - 3.

[111]6 BVerfGE 32 at 37 - 38.

[112]55 BVerfGE 159 at 165; 75 BVerfGE 108 at 155; 80 BVerfGE 137 at 153.

[113]80 BVerfGE 137 at 153.

proportionality.[114]

[85] The phrase "in so far as they do not violate the rights of others or offend against the constitutional order or morality" which qualifies the "right to self-fulfilment" in article 2(1) of the German Basic Law is not an internal qualification of this right for, as indicated above, the German Constitutional Court requires that all statutory provisions which prima facie limit this right be tested for compliance with the principle of proportionality. This is the equivalent of requiring all prima facie infringements of the residual freedom rights in section 11(1) of our Constitution to pass section 33(1) scrutiny. The German Constitutional Court has insisted on such justification according to the principles of proportionality in many cases.

[114]Isensee and Kirchhof Handbuch des Staatsrechts (1988) Vol. vi at 1192.

[86] In Elfes[115], the decision which laid the basis for the German Constitutional Court's approach to section 2(1) as the general and residual freedom right ("Auffanggrundrecht"), the Court was concerned with the denial of an application for thepassport renewal of a leading member of a political party which opposed the West German government's re-armament policy in the 1950s. Having rejected the petitioner's reliance on the right to freedom of movement (section 11 of the Basic Law), on the basis that the right only guaranteed the right to move freely within the boundaries of the Federal Republic of Germany, the Court proceeded to consider the state's justification for the legislation with reference to section 2(1) and the principle of proportionality. In casu the Court found that considerations of national security justified the law limiting the issuing of passports. Similarly, in 1980 the Court held that a government prohibition on the feeding of doves in a particular city passed constitutional muster.[116] The Court accepted that section 2(1) of the Basic Law had been infringed, but held that the prohibition related to the public's interest in keeping the city clean and protecting property from damage caused by the doves. The public's interest, the Court stated, had to be balanced against the relatively minor infringement of individuals' section 2(1) right to express their affection for animals. In the same

[115] 6 BVerfGE 32.

[116] 54 BVerfGE 143.

year, however, the Constitutional Court invalidated a requirement in Federal hunting laws which compelled those who sought to hunt with falcons to demonstrate their competence in the use of firearms[117]. Again none of the specific freedoms entrenched in the Basic Law applied to the situation, but the applicants successfully relied on the disproportionate infringement of section 2(1). The Court held that the required skill had no connection with the practice of falconry; in fact, the Court stated, falconers who discharged a firearm during the hunt would merely distract or even frighten their falcons. Other examples which illustrate the effect of the residual content found by the German Court in section 2(1) are those decisions dealing with the freedom not to be compelled to join public - as opposed to private - associations. In a long line of decisions[118] the Court has excluded the possibility of relying on the freedom of association (section 9(1)) against this form of compulsion. The reasoning is that, since individuals may not invoke the right of freedom of association to establish public associations (the state retains a discretion whether or not to confer public status on an association), individuals may also not rely on the right of freedom of association to refrain from joining such public associations. While excluding

[117]55 BVerfGE 159.

[118]4 BVerfGE 7 at 26; 10 BVerfGE 89 at 102; 10 BVerfGE 354 at 361; 11 BVerfGE 105 at 126; 12 BVerfGE 319 at 323; 38 BVerfGE 281 at 297.

reliance on the right to freedom of association, the Court has acknowledged that the individual is protected from state compulsion to join public associations through the residual protection afforded by section 2(1) of the Basic Law.

[87] One's sense is that the German Federal Constitutional Court seldom strikes down laws on the basis of section 2(1) - the general freedom of action. The reason seems to be that the Court shows deference to the legislature in many of the areas protected by the freedom and not because it is not prepared to test legislation against the principles of proportionality or because it subjects the legislation to a different type of limitation test. The German Court is more inclined to exercise a stricter form of scrutiny on the basis of section 2(1) when the infringement is somehow analogous to the infringement of another right or freedom, not dissimilar to the heightened scrutiny the US Supreme Court employs through the "fundamental rights" strand of jurisprudence under that part of the 14th Amendment that deals with due process.[119] In other words, when the other rights or freedoms, for some reason or another, do not apply, section 2(1) is activated. This is the situation with which we are dealing here. It is important to define section 11(1) broadly in the first stage of the enquiry because it cannot

[119]See Gunther Constitutional Law 12ed (1992) at 433; Stone et al Constitutional Law 2ed (1991) at 786.

function as a residual freedom right if narrowly defined at this stage. If a broad residual freedom right is not acknowledged by the Court, the Court will not be able to develop any form of due process jurisprudence - procedural or substantive. There may be concerns about substantive due process and Lochner, but in the absence of a broad interpretation of section 11(1) we will not have a general procedural due process right either. In the present case we are concerned with process as much as with substance. We are not creating a right, we are asking the state to be consistent - procedurally - when it denies individuals their rights.

[88] Article 9(1) of the International Covenant on Civil and Political Rights provides that-

> "Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law."

The other sub-articles ((2) to (5)) of Article 9 deal with arrest and detention. In any event the last sentence in article 9(1) does not constitute an internal limitation of the right but provides scope for statutory limitation and it is not any ground or any procedure, even though established by law, which will justify

deprivation of liberty.

[89] Article 5(1) of the European Convention of Human Rights provides that-

"Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law."

The remaining provisions of article 5 (paragraphs 5(1)(a) - (f) and sub-articles 5(2) - 5(5)) deal exclusively with arrest and detention. The structure of the Convention is determinative of the interpretation of article 5. The Convention contains no general limitation provision, but special limitations are enumerated in relation to virtually all the protected rights and freedoms. The specialized order of limitation is of particular importance for the interpretation of article 5 since the exceptions enumerated in article 5(1)(a) - (f) constitute the only form of limitation to the right to freedom and security of the person. The exceptions merely recognise the legitimacy of arrest and detention in certain circumstances. The Commission and the Court, responsible for the interpretation of the Convention, are therefore confronted with the problem that it is not possible to assign a wide meaning to the terms "liberty" and "security" of the person in article 5(1) since the special limitation provisions deal exclusively with arrest and detention. If forms of conduct, other than the activity of being arrested or detained, were to be brought

under the protection afforded by the right to liberty, those forms of conduct would in effect be insulated from state regulation altogether. A narrow definition of "liberty" also follows from the fact that the rights mentioned in sub-articles 5(2) - 5(5) only accrue to "arrested and detained" persons and not to persons who are deprived of their freedom in other respects. In this context it comes as no surprise that the Commission has held that:

> "The term 'liberty' and 'security' must be read as a whole and, in view of its context, as referring only to physical liberty and security. 'Liberty of person' in Article 5(1) thus means freedom from arrest and detention and 'security of person' the protection against arbitrary interference with this liberty." [120] (emphasis added)

[120] In applications 5573/72 and 5670/72, Adler and Bivas v. Federal Republic of Germany, Yearbook XX (1977) 102 at 146, as cited in Van Dijk and Van Hoof Theory and Practice of the European Convention on Human Rights 2ed (1990) at 252. The same learned authors point out at 252-253 that the case-law "seems to share Fawcett's view when he says: 'liberty and security are the two sides of the same

This narrow definition also flows from the fact that the exceptions dealt with in paragraphs (a)-(f) of sub-article 5(1) deal only with deprivation of liberty, and only in the context of arrest or detention. The context of section 11(1) in our Constitution is quite different, inasmuch as arrest and detention are dealt with in section 25(1) and (2) and the concluding phrase "which shall include the right not to be detained without trial" in section 11(1) indicates quite clearly that the preceding rights to freedom and security of the person do not constitute a numerus clausus.

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coin; if personal liberty spells actual freedom of movement of the person, security is the condition of being protected by law in that freedom'."

[90] In the end result there appears to me to be no good reason for not giving section 11(1) the broad construction which I have suggested and requiring an infringement of its provisions to be justified under 33(1). The examinee, facing compulsion under section 417(2)(b) of the Companies Act to give self-incriminating testimony, is subjected "to the cruel trilemma of self-accusation, perjury or contempt".[121] On the basis of the considerations mentioned by Wilson J in Thomson's case, to which I have already referred, I have no doubt that the provisions of section 417(2)(b) of the Companies Act, which require an examinee summoned under sub-section (1) to answer, under pain of fine or imprisonment, or both, any question put to the examinee, notwithstanding that the answer might tend to incriminate the examinee and notwithstanding that any answer to any such question may thereafter be used in evidence against the examinee, infringe the examinee's section 11(1) right to freedom, more particularly the residual section 11(1) right of an examinee at a section 417 enquiry not to be compelled to incriminate himself or herself.

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[121] Murphy et al v. Waterfront Commission of New York Harbor 378 US 52 (1964) at 55; 12 L Ed 2nd 678 at 681 - 2.

The right against self-incrimination.

[91] Before dealing with the actual application of the provisions of section 33(1) to the infringement of the section 11(1) right in question, it is necessary to examine our own common law as well as the common law in other jurisdictions relating to provisions of the kind with which we are here dealing. This is necessary for general jurisprudential and constitutional reasons[122], but particularly so because section 33(1)(a) (ii) requires any limitation of a right to be justified in the context of an "open and democratic society based on freedom and equality" and section 35(1) mandates us, in interpreting Chapter 3, to "promote the values which underlie" precisely such a society.

[92] In Zuma[123] Kentridge AJ briefly traced the history of the privilege against self-incrimination in English law. I propose to say nothing further on that score, save to suggest that it may at some future occasion become necessary in the light of recent research,[124] to reconsider the received wisdom (for which Wigmore has

[122]See also the concluding phrase in section 35(1) of the Constitution.

[123]Supra note 8 at paras 29 - 30.

[124]E.g. Prof JH Langbein of Yale Law School "The Historical Origins of the Privilege against Self-incrimination at Common Law" in 92 (1994) Michigan Law Review 1047 and Prof. E Moglen of Columbia

generally been credited[125]) that the privilege developed in response to the oppressive and often barbaric methods of the Star Chamber.

Law School "Taking the Fifth: Reconsidering the Origins of the Constitutional Privilege against Self-incrimination" in 92 (1994) Michigan Law Review 1086. Both learned authors conclude that the privilege did not develop in the way commonly suggested but that it became functional only because of the fact that the advent of defence counsel and adversary criminal procedure substantially changed the nature of the criminal trial.

[125]See, for example, Thompson's case, supra note 75 at 193 g - 194 f and Bishopsgate Investment Management Ltd (In Provisional Liquidation) v. Maxwell and Another (1993) Ch 1 (CA) at 17 D - H.

[93] That the "privilege" or "immunity" against self-incrimination applies generally in the English common law in extra-judicial settings is beyond doubt. In Regina v. Director of Serious Fraud Office, Ex Parte Smith[126] Lord Mustill regarded it as a general immunity in "a disparate group of immunities, which differ in nature, origin, incidence and importance" which he categorised collectively as "the right of silence" and which he described as:

> "A general immunity, possessed by all persons and bodies, from being compelled on pain of punishment to answer questions the answers to which may incriminate them."[127]

[126](1993) AC 1.

[127]Id at 30 F - G.

[94] This also emerges clearly from the fact that, in a wide variety of situations, reliance on the immunity could only be rejected on the ground that it had been expressly or by implication abrogated by statute. In In re London United Investments Plc[128] it was held that the privilege against self-incrimination was not available to persons who were being examined by inspectors appointed by the Department of Trade and Industry under section 432 of the Companies Act 1985, because sections 434, 436 and 452(1) of the Act excluded the privilege by necessary implication. In Bank of England v. Riley and Another[129] it was held that it was not available to persons who were being examined by inspectors of the Bank of England under the Banking Act 1987, because it had been excluded by necessary implication. A relevant consideration in the latter judgment, however, was the fact that section 31(1) of the Theft Act 1968 provided that no information or documents produced in consequence of the order in question would be admissible in the prosecution pending against the respondent or in any further prosecution under the Theft Act 1968. Bishopsgate Investment Management Ltd. (In Provisional Liquidation) v. Maxwell and Others[130] was concerned with sections 235 and 236 of the Insolvency Act 1986, the purpose whereof was to

[128](1992) Ch 578 (CA).

[129](1992) Ch 475.

[130](1993) Ch 1 (CA).

bring together the law as to personal and corporate insolvency and, in the public interest, to provide a statutory framework in which the law could deal adequately with dishonesty and malpractice on the part of the bankrupt individual or the officers of a company. It was held that it would be contrary to the purposes of the Act if company directors, unlike an individual bankrupt, could rely on the privilege against self-incrimination to defeat the statutory right of the liquidator or other office-holder to obtain the necessary information required to manage the affairs of the company and that, accordingly, sections 235 and 236 of the Act had abrogated the privilege.[131]

[131]At 46 D - H; 48 B.

[95] In England, therefore, Parliament may abrogate the privilege against self-incrimination by statute. In doing so Parliament sometimes provides that a person may be compelled to answer questions which tend to incriminate but limits the use that may be made of his or her answers in any subsequent prosecution. There are other examples of this approach. In Rank Film Distributors Ltd. and Others v. Video Information Centre and Others[132] the House of Lords held that the privilege against self-incrimination applied in the context of two respondents against whom certain "Anton Piller" orders[133] had been granted in connection with alleged acts of piracy of video tapes of films and which orders inter alia required them to furnish information concerning the video tapes.[134] In consequence of this judgment[135], section 72(1) of the Supreme Court Act 1981 was enacted to abrogate the privilege in intellectual property infringement or passing off proceedings; but it also provided that a statement or admission made by a person in answering questions put in such proceedings could not be used in a prosecution against such person for any related offence, or for the recovery of any related penalty, save in proceedings for perjury or contempt of court. The

[132](1982) AC 380.

[133]See Anton Piller KG v. Manufacturing Processes Ltd. (1976) Ch 55 (CA).

[134]Rank Film Distributors, supra note 114 at 438 H - 439 H; 443 H.

[135]See the invitation to legislate by Lord Russel of Killowen in Rank Film Distributors Ltd supra note 114 at 448 G.

Criminal Justice Act 1987 established the Serious Fraud Office. Section 2 of the Act provides for the questioning of suspected offenders but it is expressly provided in section 2(8) that a statement made by a person in response to a demand for information under the section may only be used in evidence against such person in proceedings relating to the making of a false or misleading statement or in proceedings of a similar nature.[136]

[96] In South African law the privilege is not limited to criminal or civil trial proceedings because

[136]For further examples see J.D. Heydon "Statutory Restrictions on the Privilege Against Self-Incrimination" in 87 (1971) LQR 214.

> ".... it is an established principle of our law that no one can be compelled to give evidence incriminating himself. He cannot be forced to do that either before the trial, or during the trial."[137]

The privilege has been described as one of the personal rights to refuse to disclose admissible evidence the particular right in terms whereof "a witness may refuse to answer a question where the answer may tend to expose him to a criminal charge"[138] and is also available, for example, to a person called as a witness in inquest proceedings.[139] With reference to the above quoted passage from R v. Camane, Thirion J observed in S v. Khumalo that

> "[t]here is indeed even a greater need for protection of the accused against forced self-incrimination before the trial than there is at the trial."[140]

Hoffmann and Zeffert[141] also point out that the privilege may be claimed in administrative or quasi-judicial hearings. Lastly, mention should be made of section 65(2) of the Insolvency Act, No. 24 of 1936 which makes provision for the interrogation of the insolvent and other witnesses and stipulates that a person

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[137] R v. Camane 1925 AD 570 at 575 per Innes CJ.

[138] Magmoed v. Janse van Rensburg and Others 1993 (1) SA 777 (A) at 819I.

[139] Id at 820 F and S v. Ramaligela en _ Ander 1983 (2) SA 424 (V) at 428 - 430.

[140] 1992 (2) SACR 411 (N) at 421 E.

[141] The South African Law of Evidence 4ed (1988) at 239.

interrogated -

> "shall not be entitled at such interrogation to refuse to answer any question upon the ground that the answer would tend to incriminate him or upon the ground that he is to be tried on a criminal charge and may be prejudiced at such trial by his answer."

Sub-section (2A)(b) does, however, confer use immunity on such incriminating answers given by the witness by providing that they shall not -

> "be admissible in any criminal proceedings, except in criminal proceedings where the person concerned stands trial on a charge relating to the administering or taking of an oath or the administering or making of an affirmation or the giving of false evidence or the making of a false statement in connection with such questions and answers, and in criminal proceedings contemplated in section 139(1) relating to a failure to answer lawful questions fully and satisfactorily."

[97] Two recent Australian decisions, Pyne Board Pty. Ltd v. Trade Practises Commission[142] and Sorby and Another v. The Commonwealth of Australia and

[142] [1983] 57 ALJR 236.

Others[143], handed down on the same day by the High Court of Australia, may cast further light on the scope of the privilege against self-incrimination at common law. In both cases the majority of the High Court reached the conclusion that the privilege against self-incrimination is not inherently incapable of application in non-judicial proceedings, but that the availability of the privilege depends on a construction of the statute in question.[144] In Pyne Board the Court held that the statute by implication excluded reliance on the privilege and in Sorby the Court held that it did not. The reasoning of the Court in the latter case is of importance. In response to the argument that the provision of a "use immunity" excludes reliance on the privilege against self-incrimination the Court said, per Gibbs, CJ:

[143] [1983] 57 ALJR 248.

[144]In Pyne Board, at 240 G. In Sorby, at 260.

> "In the absence of binding authority the matter must be approached from the standpoint of principle. If a witness is compelled to answer questions which may show that he has committed a crime with which he may be charged, his answers may place him in real and appreciable danger of conviction, notwithstanding that the answers themselves may not be given in evidence. The traditional objection that exists to allowing the executive to compel a man to convict himself out of his own mouth applies even when the words of the witness may not be used as an admission. It is a cardinal principle of our system of justice that the Crown must prove the guilt of an accused person, and the protection which that principle affords to the liberty of the individual will be weakened if power exists to compel a suspected person to confess his guilt. Moreover, the existence of such power tends to lead to abuse and to 'the concomitant moral deterioration in methods of obtaining evidence and in the general administration of justice'. Validity of Section 92(4) of the Vehicles Act, 1957 [Sask.], [1958] S.C.R. 608, at p. 619. It is true that in some cases the legislature may consider that it can only achieve the intended purpose of the statute by limiting or abrogating the privilege against self-incrimination, but, as I have said, if the legislature intends to render the privilege unavailable it must manifest clearly its intention to do so. To provide that the answers may not be used in evidence is not to reveal clearly an intention that the privilege should be unavailable, although, if the legislature did intend to remove the privilege, it might, in fairness, at the same time prevent the use in criminal proceedings of statements which otherwise would have been privileged: cf. Rank Film Ltd. v. Video Information Centre, at p. 448, per Lord Russel of Killowen."[145]

The Court held that the privilege

> "protects the witness not only from incriminating himself directly under a compulsory process, but also from making a disclosure which may lead to incrimination or to the discovery of real evidence of an incriminating character."[146]

[145] At 253.

[146] At 260. See also the Court's dicta at 253 and 261.

Equally firm, however, was the rejection by the Court of the argument that the privilege against self-incrimination is constitutionally entrenched:

> "It was then submitted on behalf of the plaintiffs that s. 6A was not validly enacted. This argument cannot be accepted. The privilege against self-incrimination is not protected by the Constitution, and like other rights and privileges of equal importance it may be taken away by legislative action. Counsel for the plaintiffs sought to find some constitutional protection for the privilege in Ch III of the Constitution, and submitted that to remove the privilege would be to infringe the guarantee given by s. 80 and to interfere impermissibly with federal judicial power. ....[T]he argument that the compulsory examination of a suspected person is inconsistent with the right to trial by jury was rejected unanimously by the members of this Court in Huddart Parker & Co Pty. Ltd. v. Moorehead (1909), 8 C.L.R 330; see particularly at pp. 358, 375, 385-386, 418. With all respect, I agree with the view that the privilege against self-incrimination is not a necessary part of a trial by jury."[147]

[98] In Canada, the courts have recognised the different nature and the consequently wider ambit of the privilege even before the adoption of the Canadian Charter of Rights and Freedoms. In Solosky v R the Supreme Court remarked:

> "Recent case law has taken the traditional doctrine of the privilege and placed it on a new plane. Privilege is not longer regarded merely as a rule of evidence which acts as a shield to prevent privileged materials from being tendered in evidence in a courtroom. The Courts, unwilling to so restrict the concept, have extended its application well beyond these limits".[148]

Moreover, the position in Canada never quite corresponded to that in the English common law, because sections 4(1) and 5 of the Canada Evidence Act[149]

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[147] At 255 A - C per Gibbs CJ.

[148] [1979] 105 D.L.R. (3d) 745 at 757.

[149] R.S.C. 1985, c. C-5.

effected a change in the Canadian common law from 1893 onwards. Wilson J, dissenting in Thomson Newspapers, summarised the Canadian position as follows:

> "The effect of s. 4(1) was to maintain the common-law rule of non-compellability at the investigatory stage, subject to the modification by the terms of a particular statute, and to make the accused at his trial a competent witness for the defence but not a compellable witness for the Crown. The effect of s. 5 was to abolish the common- law rule of allowing a witness to refuse to answer a question on the ground that it would tend to incriminate him and replace it with the rule that the witness must answer the question but the answer could not be used against him in a subsequent criminal case. This legislation reflects the state's interest in having all available information before the tribunal so that a proper determination in that case can be made. This state interest is achieved in derogation of the common-law rule protecting a witness from answering a question on the basis of the right against self-incrimination."[150]

After stating that the right against compellability and the right against self-

incrimination are “fundamental precepts of democratic societies which respect individual rights and freedoms”, Wilson J went on to describe the rationale for the right against self-incrimination as follows:

> “Having reviewed the historical origins of the rights against compellability and self-incrimination and the policy justifications advanced in favour of their retention in more modern times, I conclude that their preservation is prompted by a concern that the privacy and personal autonomy and dignity of the individual be respected by the state. The state must have some justification for interfering with the individual and cannot rely on the individual to produce the justification out of his own mouth. Were it otherwise, our justice system would be on a slippery slope towards the creation of a police state.”[151]

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[150]Supra note 75 at 195 h - 196 a.

[151]Id at 200 a - c.

[99] The Fifth Amendment to the United States Constitution, which provides, inter alia, that "[n]o person... shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law..." was initially interpreted as affording protection to individuals from federal authorities only. It was the passing of the Fourteenth Amendment in 1868, especially its prohibition - "nor shall any State deprive any person of life, liberty, or property, without due process of law..." - which brought about the decisive change in the protection of individual rights against the exercise of State power in that country. At first hesitantly and selectively, but from the beginning of the 1960's with greater conviction, the Supreme Court began to apply the Bill of Rights to the States via the Fourteenth Amendment.[152]

[152]White J explains this approach in Duncan v. Louisiana 391 US 145 (1968) at 147:

"In resolving conflicting claims concerning the meaning of this spacious language [of due process], the Court has looked increasingly to the Bill of Rights for guidance; many of the rights guaranteed by the first eight Amendments to the Constitution have been held to be protected against state action by the Due Process Clause of the Fourteenth Amendment. That clause now protects the right to compensation for property taken by the State; the rights of speech, press, and religion covered by the First Amendment; the Fourth Amendment rights to be free from unreasonable searches and seizures and to have excluded from

criminal trials any evidence illegally seized; the right guaranteed by the Fifth Amendment to be free of compelled self-incrimination; and the Sixth Amendment rights to counsel, to a speedy and public trial, to confrontation of opposing witnesses, and to compulsory process for obtaining witnesses.

The test for determining whether a right extended by the Fifth and Sixth Amendments with respect to federal criminal proceedings is also protected against state actions by the Fourteenth Amendment has been phrased in a variety of ways in the opinions of this Court. The question has been asked whether a right is among those 'fundamental principles of liberty and justice which lie at the base of all our civil and political institutions', Powell v. Alabama 287 US 45, 67 (1932); whether it is 'basic in our system of jurisprudence,' In re Oliver 333 US 257, 273 (1948; and whether it is “a fundamental right, essential to a fair trial,” Gideon v Wainwright; ..." (footnotes omitted).

[100] The freedom against self-incrimination was effectively incorporated against the states in Malloy v. Hogan.[153] The jurisprudence is important since it shows that the US Supreme Court is prepared to utilise the Fourteenth Amendment to extend procedural guarantees, such as the protection against self-incrimination, to situations where it did not seem to apply textually. The question as to whether the right against self-incrimination applies in extra-curial proceedings was not resolved, as one would have expected, in the context of the Fourteenth Amendment. Instead a broad and purposive interpretation of the Fifth Amendment's right against self-incrimination made a resort to the Fourteenth Amendment unnecessary. As early as 1892 Justice Blackford remarked in Counselman v. Hitchcock that the "[privilege] is as broad as the mischief against which it seeks to guard".[154] By the 1920's Justice Brandeis, writing for the Court, declared that "[t]he privilege [against self-incrimination] is not ordinarily dependent on the nature of the proceedings in which the testimony is sought or is to be used. It applies alike to civil and criminal proceedings, wherever the answer might tend to subject to criminal responsibility him who gives it."[155]

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[153] 378 US 1 (1964). Previously the Supreme Court refused to apply the right against self-incrimination against the States. See Adamson v. California, 332 US 46 (1947).

[154] 142 US 547 (1892) at 562; 35 L Ed 1110 at 1114.

[155] McCarthy v Arndstein 266 US 34 (1924) at 40, where the privilege was upheld in bankruptcy proceedings.

Finally, in 1973 Justice White stated that "[t]he [Fifth] Amendment not only protects the individual from being involuntarily called as witness against himself in a criminal prosecution but also privileges him not to answer official questions put to him in any other proceeding, civil or criminal, formal or informal, where the answers might incriminate him in future criminal proceedings."[156] US Bankruptcy laws nowadays explicitly recognise the constitutional right against self-incrimination.[157] There can be little doubt that proceedings similar to the ones envisaged by section 417 of the Companies Act would have been interpreted to constitute a deprivation of liberty and that this would have triggered the due process clause, and more specifically, the right against self-incrimination which forms part of it.

The approach in the USA and Canada to resolving the tension between the privilege

[156] Lefkowitz v Turley 414 US 70 (1973) at 77.

[157] See section 344 of the Bankruptcy Code 11 USC.

against self-incrimination and the interest of the State in investigative procedures of various kinds

[101] In seeking guidance from the jurisprudence of other countries it is well to heed the warning that

> "[e]ach legal system, intertwined with a particular legal tradition, is predicated on a number of integrated elements, and to look at each piece-meal through a magnifying glass cannot provide an accurate picture of the whole nor can such an exercise take into account differences between the systems ... Fundamental justice may take different forms in different societies, given their own legal traditions."[158]

Nevertheless we are obliged, in construing and applying section 33(1), to give content to the phrase "justifiable in an open and democratic society based on freedom and equality". At the same time it is necessary to recognise (gratefully) that the roots of South African law draw sustenance from Western Europe, the United Kingdom (and derivatively from the other so-called "common law" countries) and from indigenous sources. It is also a fact that since 1945 fundamental human rights are steadily becoming internationalised (albeit not always or everywhere at the same pace and not without set-backs) at the

international, regional and domestic constitutional levels.

[102] Both in the United States and Canada, and also elsewhere, legislatures have sought a legislative solution to the tension between the privilege against self-incrimination and the interest of the State in investigative procedures of various kinds. This has been achieved by compelling examinees to answer questions even though the answers thereto might tend to incriminate them and, at the same, protecting the interests of the examinees by granting them either an indemnity against prosecution or conferring some form of use immunity in respect of compelled testimony. What is important to note is that the privilege has not, in most cases, simply been abolished by statute without providing some form of protection to the examinee. The somewhat fragmentary treatment in England has been alluded to above.

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[158] Thomson supra note 75 per L'Heureux-Dubé J at 279 f - g.

[103] Initially in the United States, this compromise was attempted by legislation which excluded use of the evidence given by the examinee, but which did not indemnify the examinee against prosecution. The use immunity only applied to the evidence given by the examinee; it did not prevent the use of the examinee's testimony to search out other evidence to be used against the examinee in a criminal proceeding, which other evidence had not been gained by the compulsion to testify and to give self-incriminating evidence. In Counselman v. Hitchcock[159] the Supreme Court considered the constitutional validity of such a use immunity (a "direct use immunity") provided by section 860 of the Revised Statutes in the context of Grand Jury testimony and held that it was unconstitutional.[160] Under Section 2486 (c) of the Immunity Act of 1954, 18 USC an indemnity against prosecution was accorded to grand jury witnesses.[161] In

[159]Supra note 154.

[160]Id at 585-6 where Justice Blatchford, writing for the Court said:

> "no statute which leaves the party or witness subject to prosecution after he answers the criminating questions put to him, can have the effect of supplanting the privilege conferred by the Constitution of the United States. Section 860 of the Revised Statutes does not supply a complete protection from all the perils against which the constitutional prohibition was designed to guard, and is not a full substitute for the prohibition. In view of the constitutional provision, a statutory enactment, to be valid, must afford absolute immunity against future prosecution for the offence to which the question relates."

[161]"But no such witness shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he is compelled, after having claimed his privilege against self-incrimination, to testify or produce evidence, nor shall testimony so compelled be used as evidence in any criminal proceeding (except prosecution described in sub-section (d) hereof (essentially for perjury and contempt) against him in any court."

Ullmann v. United States[162] Justice Frankfurter delivered the judgment of the majority of the Court. While emphasising that "the Fifth Amendment's privilege against self-incrimination ... registers an important advance in the development of our liberty"[163] and approaching the petitioner's claims "in this spirit of strict, not lax, observance of the constitutional protection of the individual",[164] he reaffirmed[165] the Court's earlier judgment in Brown v. Walker, decided some sixty years earlier, that compulsion to testify under protection of a similar immunity was constitutional:

> "While the constitutional provision in question is justly regarded as one of the most valuable prerogatives of the citizen, its object is fully accomplished by the statutory immunity, and we are, therefore, of opinion that the witness was compellable to answer ..."[166]

[104] In Kastigar v. United States[167] the Supreme Court had to consider the

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[162]350 US 422 (1955).

[163]Id at 426.

[164]Id at 429.

[165]Id at 439.

[166]Brown v. Walker 161 US 591 (1896) at 610.

[167]406 US 441 (1972).

constitutionality of the following use immunity in 18 U.S.C. section 6002, which was afforded to a witness in a District Court when compelled to testify over a claim of Fifth Amendment privilege against compulsory self-incrimination:

> ".... no testimony or other information compelled under the order (or any information directly or indirectly derived from such testimony or other information) may be used against the witness in any criminal case, except a prosecution for perjury, giving a false statement, or otherwise failing to comply with the order."

An exclusion of this nature will be referred to as "a direct and derivative use immunity". The Court upheld the constitutionality of this provision on the basis that it left the witness and the prosecutorial authorities in substantially the same position as if the witness had claimed the Fifth Amendment privilege; consequently the immunity was "co-extensive with the privilege and suffices to supplant it".[168] In the course of giving judgment for the majority, Justice Powell stated the following:

> "This total prohibition on use provides a comprehensive safeguard, barring the use of compelled testimony as an 'investigatory lead,' and also barring the use of any evidence obtained by focusing investigation on a witness as a result of his compelled disclosures.
>
> A person accorded this immunity under 18 U.S.C. § 6002, and subsequently prosecuted, is not dependent for the preservation of his rights upon the integrity and good faith of the prosecuting

[168] Id at 462.

authorities. As stated in Murphy:

> 'Once a defendant demonstrates that he has testified, under a state grant of immunity, to matters related to the federal prosecution, the federal authorities have the burden of showing that their evidence is not tainted by establishing that they had an independent, legitimate source for the disputed evidence. 378 US at 79 n. 18.'

This burden of proof, which we reaffirm as appropriate, is not limited to a negation of taint; rather, it imposes on the prosecution the affirmative duty to prove that the evidence it proposes to use is derived from a legitimate source wholly independent of the compelled testimony.

This is very substantial protection, commensurate with that resulting from invoking the privilege itself. The privilege assures that a citizen is not compelled to incriminate himself by his own testimony. It usually operates to allow a citizen to remain silent when asked a question requiring an incriminatory answer. This statute, which operates after a witness has given incriminatory testimony, affords the same protection by assuring that the compelled testimony can in no way lead to the infliction of criminal penalties. The statute, like the Fifth Amendment, grants neither pardon nor amnesty. Both the statute and the Fifth Amendment allow the government to prosecute using evidence from legitimate

independent sources."[169] (Footnotes omitted)

[105] The use immunity in section 20(2) of the CI Act which qualified the compulsion to testify and was the subject of enquiry in Thomson Newspapers read as follows:

> "... but no oral evidence so required shall be used or receivable against such person in any criminal proceedings thereafter instituted against him, other than a prosecution under section 121 of the Criminal Code for perjury in giving such evidence or a prosecution under section 124 of the Criminal Code in respect of such evidence."[170]

It was a direct use immunity only and did not include a derivative use immunity such as was considered by the US Supreme Court in Kastigar. We are concerned with the constitutionality of a statutory compulsion to testify and an override of the privilege against self-incrimination with no indemnity against prosecution or use immunity of any nature. It is important, for our purposes, to consider the way in which policy considerations relating to use immunity were

[169]Id at 460 - 461.

[170]Supra note 75 at 174, 183.

dealt with in Thomson. This will emerge more clearly later.

[106] As indicated above,[171] it was only Wilson J and Sopinka J who came to the conclusion that the direct use immunity was insufficient to prevent section 17 of the CI Act from violating the "fundamental justice" provision in section 7 of the Canadian Charter (which qualified the right to "liberty and security of the person"). The purpose of the CI Act has authoritatively been stated to be the following:

> "From this overview of the Combines Investigation Act I have no difficulty in concluding that the Act as a whole embodies a complex scheme of economic regulation. The purpose of the Act is to eliminate activities that reduce competition in the market-place. The entire Act is geared to achieving this objective. The Act identifies and defines anti-competitive conduct. It establishes an investigatory mechanism for revealing prohibited activities and provides an extensive range of criminal and administrative redress against companies engaging in behaviour that tends to reduce competition."[172]

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[171]Para 55.

[172]General Motors of Canada Ltd. v. City National Leasing (1989) 58 D.L.R. (4th) 225 at 280,

Wilson J also pointed out that

> "the Act contains numerous provisions enabling the Director to collect information relating to anti-competitive behaviour. Once this information has been obtained a variety of uses can be made of it, including the referral of the matter to the Attorney-General of Canada for possible prosecution."[173]

The Attorney-General is empowered, in terms of section 15(2) of the CI Act, to exercise all the powers and functions conferred by the Criminal Code on the Attorney-General of a province in any ensuing prosecution. Section 13 of the Canadian Charter which provides that

> "[a] witness who testifies in any proceedings has the right not to have any incriminating evidence so given used to incriminate that witness in any other proceedings, except in a prosecution for perjury or for the giving of contradictory evidence"

only affords a limited protection against self-incrimination (I pause to point out that the immunity in the section is only a direct use and not a derivative use

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quoted with approval in Thomson supra note 75 at 290 h and 223 h - 224 b.

[173]Thomson, supra note 75 at 184 d - e.

immunity). Likewise section 11(c) of the Charter, which enacts that -

> "Any person charged with an offence has the right .....
> (c) not to be compelled to be a witness in proceedings against that person in respect of the offence;"

only affords a limited right of non-compellability.

[107] Wilson J held that the examinees could not avail themselves of either section 13 or 11(c) of the Charter. After reviewing the historical origins of the rights against compellability and self-incrimination in a comparative perspective, Wilson J concluded that their preservation was

> "prompted by a concern that the privacy and personal autonomy and dignity of the individual be respected by the state. The state must have some justification for interfering with the individual and cannot rely on the individual to produce the justification out of his own mouth. Were it otherwise, our justice system would be on a slippery slope towards the creation of a police state."[174]

Whilst appreciating

> "the importance of getting at the truth in any proceedings, criminal or otherwise ...[o]therwise our justice system might grind to a halt

[174] Id per Wilson J at 200 b - c.

through important evidence not being brought forward"[175]

the learned Judge nevertheless considered that this goal had to be subservient to the protection of the fundamental rights of the accused.[176] Following the reasoning of the United States Supreme Court in Kastigar[177], Wilson J concluded as follows:

> "It seems to me that in order to prevent a suspect from being conscripted against himself in a criminal or quasi-criminal proceeding (which would clearly include a charge of predatory pricing under the Combines Investigation Act), the suspect must be protected against the use of evidence derived from testimony given at the earlier investigatory proceeding as well as against the use of the testimony itself. Otherwise the suspect is convicted,

[175]Id at 200 d - e.

[176]Id.

[177]406 US 441 (1972).

metaphorically if not literally, out of his own mouth. He has, as the US Supreme Court put it, through the use of the derivative evidence been 'forced to give testimony leading to the infliction of penalties affixed to criminal acts'."

and,

"The judge's discretion under S. 24(2)[178] is no guarantee of protection against the use of derivative evidence obtained as a result of a witness's compelled testimony. It is merely a discretion and one which is required to be exercised on a very specific basis, namely, whether or not the admission of the evidence would bring the administration of justice into public disrepute."

and,

"That exclusion must be a matter of principle and of right, not of discretion .....
I conclude, therefore, that s. 7 protects the witness in a subsequent criminal proceeding against the use of evidence derived from testimony given by him in an earlier proceeding, which protection is not available under either s. 11(c) or s. 13. Where a person's right

[178]Section 24(2) of the Canadian Charter reads as follows:

"(2) Where, in proceedings under subsection (1), a court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this Charter, the evidence shall be excluded if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute."

to life, liberty and security of the person is either violated or threatened, the principles of fundamental justice require that such evidence not be used in order to conscript the person against himself."[179]

[179]Thomson supra note 75 at 202 c - e; 202 g - 203 a; 203 a - d.

[108] In dealing with the section 1 limitation provisions of the Canadian Charter, Wilson J held that both the "effective investigation of suspected criminal and quasi-criminal activity" and the opportunity "to monitor economic activity in Canada so as to ensure that the government's economic objectives are met" were each of sufficient importance to warrant infringement of individual rights and freedoms because "[s]ociety has a very real interest both in controlling crime and in ensuring the stability of the marketplace."[180] The learned Judge found, however, that, inasmuch as the legislation in question did not impair the right in question as little as possible, the limitation was not justified under section 1 of the Charter.[181] In this regard Wilson J stated the following:

> "There is no evidence to suggest that the government's objective in this case would be frustrated if individuals compelled to testify were afforded derivative use protection. Certainly, the monitoring of the Canadian economy would not be injuriously affected by such protection. Moreover, while there may be instances when the investigation of crime or the effective enforcement of legislation may be hampered if suspects are not conscripted against themselves, such a case has not been made out here. No

[180] Thomson, supra note 75 at 206 a - c.

[181] Id at 207 c - e.

> evidence has been presented to the Court to show that the enforcement of the Combines Investigation Act will be drastically impaired if derivative use protection is given to persons testifying under s. 17"[182] (emphasis added)

Sopinka J held that, for the reasons given by Wilson J, section 17 of the CI Act "violates s. 7 of the Canadian Charter of Rights and Freedoms, in particular, the principle of fundamental justice in which the right to remain silent is embodied."[183] In this context he also expressed himself as follows:

> "Obtaining evidence from suspects as a basis for commencing criminal proceedings is not a merely incidental effect of s. 17 of the Act. In this field of anti-competitive crime the police work is carried out largely, if not exclusively, by the Director and his staff."[184]

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[182] Id.

[183] Id at 290 e - f.

[184] Id at 297 d - e.

Sopinka J also concluded, for the reasons expressed by Wilson J, that the violation of section 7 could not be justified under section 1 of the Charter.[185]

[109] I have referred somewhat extensively to the judgments of Wilson and Sopinka JJ, although their judgments were in dissent, because they represent the high-water mark in the judgment for striking down a provision which compels self-incrimination and only affords a direct use immunity. The judgment of La Forest J is particularly instructive. La Forest J points to the difference in discovering and investigating ordinary crimes on the one hand and violations of combines legislation on the other; in the former there is usually no question that an offence has been committed and the concern is to establish who committed the offence, while in the latter the position is quite different and the difficulty relates equally to establishing whether an offence has been committed.[186] It has been emphasised that

> "economic crimes are far more complex than most other federal offences. The events in issue usually have occurred at a far more remote time and over a far more extensive period. The 'proof' consists not merely of relatively few items of real evidence but of a large roomful of often obscure documents. In order to try the case effectively, the Assistant United States Attorney must sometimes master the intricacies of a sophisticated business venture. Furthermore, in the course of doing so, he, or the agents with

[185]Id at 297 g.

[186]Id at 232 - 233.

> whom he works, often must resolve a threshold question that has already been determined in most other cases: Was there a crime in the first place? To use the colloquial, it is not so much a matter of 'Whodunit' as 'what-was-done'."[187] (Emphasis in original)

I shall revert to this aspect of the problem later. La Forest J also observed that,

[187]S.V. Wilson and A.H. Matz, "Obtaining Evidence for Federal Economic Crime Prosecutions: An Overview and Analysis of Investigative Methods" (1977), 14 Am. Crim. L. Rev. 651 at 651, quoted with approval by La Forest J in Thomson supra note 75 at 233 f - g.

> "the community's interest is one of the factors that must be taken into account in defining the content of the principles of fundamental justice."[188]

In this regard the learned Judge made the following point, which is also relevant in the context of this case:

> "I see a significant difference between investigations that are truly adversarial, where the relationship between the investigated and investigator is akin to that between accused and prosecution in a criminal trial, and the broader and more inquisitorial type of investigation that takes place under s. 17 of the Act. The lower probability of prejudice the latter represents to any particular individual who comes within its reach, together with the important role such investigations play in the effective enforcement of anti-combines and possibly other regulatory legislation, suggests that a more appropriate balance between the interests of the individual and the state can be achieved by retention of the power to compel testimony and the recognition of the right to object to the subsequent use of so much of the compelled testimony as is self-incriminatory."[189]

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[188] Thomson supra note 75 at 246 e.

[189] Id at 247 d - f.

[110] In dealing with the difference between "use immunity" and "derivative use immunity", the learned Judge observed that

> "Simply because Parliament has provided for the inadmissibility of certain evidence does not mean that it thereby intended that other evidence should be admitted, even when either at common law or under the Charter, such evidence would be rejected on the ground that admitting it would be unfair. It is quite reasonable for Parliament to have dealt with the obvious case of unfairness resulting from the use of self-incriminating testimony, leaving more subtle situations to be dealt with in the application of general principles."[190] (emphasis added).

and that

[190] Id at 250 h - 251 a.

"The witness's oral testimony cannot, of course, be used against him or her. Section 20(2) so provides and I have no doubt that this would, in any event, be the case either under s. 7 or s. 11(d) of the Charter.[191] (emphasis added).

[111] In the following significant passages La Forest J points to a fundamental distinction between the direct use of compelled testimony and derivative use:

> "The fact that derivative evidence exists independently of the compelled testimony means, as I have explained, that it could also have been discovered independently of any reliance on the compelled testimony. It also means that its quality as evidence does not depend on its past connection with the compelled testimony. Its relevance to the issues with which the subsequent trial is concerned, as well as the weight it is accorded by the trier of fact, are matters that can be determined independently of any consideration of its connection with the testimony of the accused. If it were otherwise, it would not, in fact, be derivative evidence at all, but part of the actual testimony itself. Taken together, these aspects of derivative evidence indicate that it is self-sufficient, in the sense that its status and quality as evidence is not dependent on its relation to the testimony used to find it. In this regard, the very phrase "derivative evidence" is somewhat misleading.
>
> Seen from this light, it becomes apparent that those parts of derivative evidence which are incriminatory are only *self*-incriminatory by virtue of the circumstances of their discovery in a particular case. They differ in this respect from incriminatory portions of the compelled testimony itself, which are by definition *self*-incriminatory, since testimony is a form of evidence necessarily unique to the party who gives it.

[191] Id at 252 c.

> I would think that this, without more, raises doubts as to whether we should be as wary of prosecutorial use of derivative evidence as we undoubtedly must be of such use of pre-trial testimonial evidence. What prejudice can an accused be said to suffer from being forced to confront evidence 'derived' from his or her compelled testimony, if that accused would have had to confront it even if the power to compel testimony had not been used against him or her? I do not think it can be said that the use of such evidence would be equivalent to forcing the accused to speak against himself or herself; once the derivative evidence is found or identified, its relevance and probative weight speak for themselves. The fact that such evidence was found through the evidence of the accused in no way strengthens the bearing that it, taken by itself, can have upon the questions before the trier of fact. In this respect, if reference to its origins was not precluded by an immunity such as that presently found in s. 5 of the Canada Evidence Act, it would in most cases be precluded by simple irrelevance."[192]

and,

> "This raises a question of crucial importance in understanding the Collins line of cases and their relevance to a determination of the scope of testimonial immunity required by the principles of fundamental justice; why is the prior existence of evidence regarded as relevant to the fairness of the trial in which it is introduced?
>
> There can be only one answer to this question. A breach of the Charter that forces the eventual accused to created evidence necessarily has the effect of providing the Crown with evidence it would not otherwise have had. It follows that the strength of its case against the accused is necessarily enhanced as a result of the breach. This is the very kind of prejudice that the right against self-incrimination, as well as rights such as that to counsel, are intended to prevent. In contrast, where the effect of a breach of the Charter is merely to locate or identify already existing evidence, the case of the ultimate strength of the Crown's case is not necessarily strengthened in this way. The fact that the evidence already existed means that it could have been discovered anyway. Where this is the case, the accused is not forced to confront any evidence at trial that he would not have been forced to confront if his Charter rights had been respected. In such circumstances, it would be the exclusion rather than the admission of evidence that would bring the administration of justice into disrepute."[193]

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[192] Id at 253 f - 254 e.

[193] Id at 256 a - e.

[112] La Forest J, favouring a flexible approach to the question of derivative use immunity, stated:

> "In this country, where the question of immunity falls to be determined under the principles of fundamental justice, I think we can achieve a more flexible balance between the interests of the individual and that of the state. In a case like this, where the statute does not provide for the evidence to be admitted, there can really be no breach of the Charter until unfair evidence is admitted. Until that happens, there is no violation of the principles of fundamental justice and no denial of a fair trial. Since the proper admission or rejection of derivative evidence does not admit of a general rule, a flexible mechanism must be found to deal with the issue contextually. That can only be done by the trial judge."

and,

> "I see no reason why an approach like that in the now constitutionalized rule adopted in the case of prejudicial evidence should not be extended to derivative evidence which, like other prejudicial evidence within the rule, can only be dealt with having due regard to the need to balance the right of the accused and that of the public in a specific context. In my view, derivative evidence that could not have been found or appreciated except as a result of the compelled testimony under the Act should in the exercise of the trial judge's discretion be excluded since its admission would violate the principles of fundamental justice. As will be evident from what I have stated earlier, I do not think such exclusion should take place if the evidence would otherwise have been found and its relevance understood. There is nothing unfair in admitting relevant evidence of this kind, a proposition consistent with the cases under s. 24(2) of the Charter. The touchstone for the exercise of the discretion is the fairness of the trial process."[194]

The learned Judge concluded by stating:

> "I conclude, then, that the use of derivative evidence derived from the use of the s. 17 power in subsequent trials for offences under the Act does not automatically affect the fairness of those trials. It follows that complete immunity against such use is not required by

the principles of fundamental justice. The immunity against use of actual testimony provided by s. 20(2) of the Act together with the judge's power to exclude derivative evidence where appropriate is all that is necessary to satisfy the requirements of the Charter."[195] (emphasis added)

[113] L'Heureux-Dubé J, without commenting on whether or how derivative use of compelled testimony should be controlled, also came to the conclusion that

"use immunity satisfies the requirements of fundamental justice under s. 7 of the Charter. In the present appeal, such protection is afforded by s. 20(2) of the Act which was referred to earlier."[196]

Can the limitation of the examinee's section 11(1) constitutional residual right against self-incrimination by section 417(2)(b) of the Companies Act be justified under section 33(1) of the Constitution?

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[194]Id at 260 h - 261 a; 262 c - e.

[195]Id at 264 d - e.

[196]Id at 281 a.

[114] To meet the requirements of section 33(1) of the Constitution, any limitation of the section 11(1) right to freedom must:

(a) be "reasonable";

(b) be "justifiable in an open and democratic society based on freedom and equality";

(c) "not negate the essential content of the right";

(d) be "necessary".

(i) The legislative history of sections 417 and 418 of the Companies Act

[115] In order to determine the nature, extent and weight of the state's interest in the limitation in question, the legislative history and purpose of the investigation and examination procedures embodied in sections 417 and 418 of the Companies Act need to be examined. South African statutory company law has followed closely similar English legislation and drawn heavily on it, all the pre-Union statutes being based on earlier English company legislation.[197] The adoption of the South African Companies, Act 61 of 1973 has, however, "cut the umbilical cord between English and South African company law" which "though still based on the general principles of English law ... goes in many respects its own way."[198] Nevertheless, South African courts have considered English decisions to be

[197]See, generally, Joubert (ed) The Law of South Africa Vol. 4 at paras 3 - 7; Pretorius et al, Hahlo's South African Company Law Through the Cases 5 ed (1991) at 1 - 3; Cilliers et al, Corporate Law 2 ed (1992) at 18 - 24; De la Rey "Aspekte van die vroeë Maatskappyereg: _ Vergelykende Oorsig" (1986) Codicillus 4, 18.

[198]Pretorius et al, supra note 197 at 2 - 3.

authoritative (though of course not binding) in interpreting statutory provisions which are substantially the same, this being particularly the case in interpreting section 417 of the Companies Act and corresponding provisions.[199]

[199]See, for example, Partnership in Mining Bpk v. Federale Mynbou Bpk en Andere 1984 (1) SA 175 (T) at 179 G - H; Kotze v. De Wet NO and Another 1977 (4) SA 368 (T) at 374 B - C and S v. Heller 1969 (2) SA 361 (W) at 363 A - 366 A.

[116] The concept of private examination was first introduced in England in the Companies Act of 1862. Section 115 of the English Companies Act of 1862 empowered the Court, after a winding-up order had been made, to summon before it any officer of the company or person known or suspected to have in his possession any of the estate or effects of the company or supposed to be indebted to the company or any person whom the Court might deem capable of giving information concerning the trade, dealings, estate or effects of the company. The Court could require any such officer or person to produce documents and, under section 117, the Court was empowered to examine on oath, either by word of mouth or upon written interrogatories, any person so appearing concerning the affairs, dealings, estate or effects of the company. The provisions were continued in the English Companies (Consolidation) Act of 1908, the Companies Act of 1929 and the Companies Act of 1948.[200] These provisions were repeated, without significant amendment, by sections of the 1985 Companies Act. The Insolvency Acts of 1985 and 1986 introduced major reforms both to the law of personal bankruptcy and to winding-up, the aim of these statutes being to promote harmony between the systems of personal and corporate insolvency. The result of the Insolvency Acts was to remove from the 1985 Companies Act all provisions relating to winding-up and receiverships. The

[200]The private examination provisions were contained in section 268 of this Act.

English private examination provisions are now contained in sections 236 and 237 of the 1986 Insolvency Act.

[117] The Joint Stock Companies Limited Liability Act 23 of 1861 of the Cape contained no winding up or examination provisions. These were introduced by the Cape Winding-Up Act, 12 of 1868, based on similar provisions in the English Companies Act of 1862. Section 33 of the Cape Act (which was taken over verbatim from section 115 of the English Act) provided that the Court, after it had made an order for winding up, could summon before it -

> "any officer of the company or person known or suspected to have in his possession any of the estate or effects of the company, or supposed to be indebted to the company, or any person whom the court may deem capable of giving information concerning the trade, dealings, estate, or effects of the company ..."

Section 34 of the Cape Act, following closely the provisions of section 117 of the English Act, authorised the Court to examine any person appearing or brought before it "in manner aforesaid, or whom it may be desired to examine," concerning "the affairs, dealings, estate, or effects of the company...". The passage emphasised above was an addition to the corresponding English provision.

[118] The Transvaal Act, 31 of 1909, which borrowed heavily from the English Companies (Consolidation) Act of 1908, served as a model for the first South African Companies Act (46 of 1926).[201] Section 151(1) of the Transvaal Act, 31 of 1909, (which was in terms identical to section 174(1) of the English Companies (Consolidation) Act 1908 and closely resembled section 33 of the Cape Winding-up Act, 12 of 1868, provided for the private examination of -

> "any officer of the company or person known or suspected to have in his possession any property of the company or supposed to be indebted to the company, or any person whom the Court deems capable of giving information concerning the trade, dealings, affairs, or property of the company."

Section 152(1) (which in terms closely resembled section 175(1) of the aforementioned English Act) provided for the public examination of the promoter, director or officer of a company who, in the opinion of the Master, had committed a fraud in relation to the company. It should be noted that section 151(2) of the

[201] See L.P. Pyemont "The Companies Bill for the Union of South Africa" 40 (1923) SALJ 389.

Transvaal Act obliged the examinee to answer any question put to him or her in the private examination "notwithstanding that the answer might tend to incriminate him", but that a direct use immunity was given in the following terms:

> "Provided that any answer given to any such question shall not be used against him in any prosecution other than for perjury or for the offence under this Act of giving false evidence."

Section 152(5) contained a similar ouster of the examinee's privilege against self-incrimination in the public examination, without providing any indemnity against prosecution or use immunity. This appears to be the first occasion in South Africa where the privilege against self-incrimination has been ousted completely without provision for use immunity in the context of an examination following on the winding up of a company.

[119] Section 155 of the Companies Act, 46 of 1926, made provision for private examinations in terms identical to those in section 151(1) of the Transvaal Act mentioned above and section 156 provided for public examination before the Court in terms very similar to that provided in section 152(1) of the Transvaal Act, save that section 156(1) included any creditor of the company in the list of persons who could be examined. Both sections 155 and 156 ousted the examinee's right against self-incrimination, but provided no indemnity or use

immunity to the examinee in either case. Section 194 introduced, for the first time, a provision allowing the Court to appoint a commissioner for the purpose of taking evidence or holding an enquiry under the Act, which provision was the forerunner of section 418 of the 1973 Companies Act. Sections 180 bis and 180 ter were introduced into the 1926 Companies Act by section 105 of the Companies Amendment Act of 1952.[202] In terms of section 180 bis, all the directors, the manager and the secretary of a company in liquidation were to attend meetings of creditors. The Master, or other presiding officer at such a meeting, could also, in terms of section 180 bis, subpoena to the meeting -

> "any person who is known or on reasonable grounds believed to be or to have been in possession of any property which belongs or belonged to the company or to be indebted to the company, or any person who in the opinion of the Master or such other officer may be able to given any material information concerning the company or its affairs ..."[203]

Section 180 ter made provisions for the examination, at a meeting of creditors of a company being wound up and unable to pay its debts, of a director or any other

[202]Act 46 of 1952. This was an Act passed in consequence of the report of the Millin Commission. (Report of the Commission of Enquiry on the Amendment of the Companies Act (UG 69 of 1948)).

[203]This section corresponded to section 64(1) of the Insolvency Act 24 of 1936.

person present at the meeting -

> "concerning all matters relating to the company or its business or affairs ... and concerning any property belonging to the company ..."[204]

Section 180 quat inter alia made the provisions of sections 64 to 68 of the Insolvency Act 1936 applicable to 180 bis and 180 ter. In terms of the proviso to section 65(2) of the Insolvency Act 1936, as it existed at the time, a person interrogated under subsection (1) was "not entitled at such interrogation to refuse to answer any question upon the ground that the answer would tend to incriminate him" and subsection (5) provided that any evidence given under section 65 "shall be admissible in any proceedings instituted against the person who gave that evidence."

[204]This section corresponded to section 65(1) of the Insolvency Act of 1936.

[120] Sections 180 bis and 180 ter of the 1926 Companies Act have been repeated in the extant Companies Act, 1973, in sections 414 and 415 respectively. The present Companies Act makes no provision for public examinations before the Court.[205] Section 417 of the present Act does, however, make provision for private examinations in terms not dissimilar to section 155 of the 1926 Companies Act. It is to be noted that section 416 (1) of the Companies Act inter alia makes the provisions of section 65 of the Insolvency Act applicable to the interrogation of any person under section 415, "in so far as they can be applied and are not inconsistent with the provisions of this Act," as if such person were being interrogated under section 65 of the Insolvency Act 1936. In 1989 subsection (2A) was inserted in section 65 of the Insolvency Act.[206] It reads as follows:

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[205]Section 156 of the 1926 Companies Act was not repeated in the Companies Act 1973. This was on the recommendation of the Van Wyk de Vries Commission of Enquiry into the Companies Act: Main Report (1970) para 50.21.

[206]By section 3(b) of Act No. 89 of 1989.

"(2A) (a) Where any person gives evidence in terms of the provisions of this section and is obliged to answer questions which may incriminate him or, where he is to be tried on a criminal charge, may prejudice him at such trial, the presiding officer shall, notwithstanding the provisions of section 39(6), order that such part of the proceedings be held in camera and that no information regarding such questions and answers may be published in any manner whatsoever.

(b) No evidence regarding any questions and answers contemplated in paragraph (a) shall be admissible in any criminal proceedings, except in criminal proceedings where the person concerned stands trial on a charge relating to the administering or taking of an oath or the administering or making of an affirmation or the giving of false evidence or the making of a false statement in connection with such questions and answers, and in criminal proceedings contemplated in section 139(1) relating to a failure to answer lawful questions fully and satisfactorily.

(c) Any person who contravenes any provision of an order contemplated in paragraph (a), shall be guilty of an offence and liable on conviction to the penalty mentioned in subsection (5) of section 154 of the Criminal Procedure Act, 1977 (Act No. 51 of 1977)."

[121] It has been suggested[207] that the person interrogated in proceedings under section 415 of the Companies Act enjoys the benefits of the direct use immunity provided for in section 65(2A)(b) of the Insolvency Act, by virtue of the operation of the particular provision in section 416(1) of the Companies Act, referred to above; and it has also been so held in Podlas v. Cohen and Bryden NNO and

[207] For example, Meskin et al (eds) Henochsberg on the Companies Act 5 ed Vol 1 at 876 - 877.

Others,[208] where Spoelstra J stated the following:

[208]1994 (4) SA 662 (T) at 671 G - I.

"I am not persuaded that the judgment of van Niekerk J[209] is correct and that those of Goldblatt J[210] and De Villiers J[211] are clearly wrong. On the contrary, Van Niekerk J's judgment is open to criticism that it overlooked important considerations which, had they been considered, might have resulted in a different conclusion. First, s. 416 of the Companies Act provides that S. 65 of the Insolvency Act shall be applied to interrogations under s. 415 of the Companies Act. Section 65(2A) of the Insolvency Act provides that incriminating evidence shall be ordered to be given in camera and that no information regarding such questions and answers may be published in any manner whatsoever. No evidence regarding incriminating questions and answers shall be admissible in any criminal proceedings except in perjury proceedings. Had these provisions been brought to Van Niekerk J's attention, it is very doubtful that he would have found that there

[209]In Wehmeyer v. Lane NO and Others 1944 (4) SA 441 (C).

[210]In Rudolph and Another v. Commissioner for Inland Revenue and Others NNO, 1994 (3) SA 771 (W).

[211]In De Kock en _ Ander v. Prokureur-Generaal, Transvaal, 1994 (3) SA 785 (T). We are not here concerned with the central issue involved in Wehmeyer, Rudolph and De Kock, viz. whether a Provincial or Local Division of the Supreme Court had jurisdiction (as the law then stood) to grant a temporary interdict on the basis that an Act of Parliament might be invalid, pending the decision of the issue of such validity by the Constitutional Court. Section 101(7) of the Constitution, as introduced by section 3 of the Constitution of the Republic of South African Second Amendment Act 44 of 1995 now provides expressly for such jurisdiction.

was any real prejudice to the applicant." (emphasis and footnotes added).

The inescapable inference from the above is that Spoelstra J considered that the direct use immunity provided for in section 65(2A)(b) of the Insolvency Act applied to incriminating evidence given by a person interrogated under section 415 of the Companies Act. Spoelstra J has, in my view, overlooked the important qualification in section 416(1) itself, namely that the provisions of section 65 of the Insolvency Act are only applicable to the interrogation of a person under section 415 of the Companies Act "in so far as they can be applied and are not inconsistent with the provisions" of the Companies Act. Subsection (3) of section 415 provides expressly that -

"No person interrogated under subsection (1) shall be entitled at such interrogation to refuse to answer any question upon the ground that the answer would tend to incriminate him."

and subsection (5) further expressly provides that -

"Any evidence given under this section shall be admissible in any proceedings instituted against the person who gave that evidence or the body corporate of which he is or was an officer."

When these two provisions are read in conjunction with one another they leave open no possible construction other than that the testimony of persons interrogated under section 415, even though it might tend to incriminate them, is

admissible against such persons in subsequent proceedings against them, even in subsequent criminal prosecutions. The expression "... admissible in any proceedings instituted against the person who gave that evidence" is too wide and unqualified to admit of any other construction. The direct use immunity, provided for in section 65(2A)(b) of the Insolvency Act, is therefore clearly inconsistent with the combined effect of these provisions in section 415 and to that extent are inapplicable. I accordingly disagree with Spoelstra J's conclusion that "[n]o evidence regarding incriminating questions and answers shall be admissible in any criminal proceedings except in perjury proceedings."

(ii) The statutory purpose of the section 417 and 418 procedures

[122] The way is now clear to determine the statutory purpose of the interrogation and other procedures in the Companies Act 1973 and, in particular, those in section 417 and 418. Some of the major statutory duties of the liquidator in any winding-up are:

> (i) to "proceed forthwith to recover and reduce into possession all the assets and property of the company, movable and immovable ..."[212]
>
> (ii) to "give the Master such information ... and generally such aid as may be requisite for enabling that officer to perform his duties under this Act."[213]

[212] Section 391 of the Companies Act 61 of 1973.

[213] Id section 392.

(iii) to "examine the affairs and transactions of the company before its winding-up in order to ascertain -

(a) whether any of the directors and officers or past directors and officers of the company have contravened or appear to have contravened any provision of this Act or have committed or appear to have committed any other offence; and

(b) in respect of any of the persons referred to in paragraph (a), whether there are or appear to be any grounds for an order by the Court under section 219 disqualifying a director from office as such."[214]

(iv) Except in the case of a members' voluntary winding-up, to report to the general meeting of creditors and contributories of the company, the causes of the company's failure, if it has failed.[215]

If the liquidator's report contains particulars of contraventions or offences committed or suspected to have been committed or of any of the grounds mentioned in (iii)(a) and (b) above, the Master must transmit a copy of the report to the Attorney-General.

[123] The purpose of the enquiry under sections 417 and 418 is undoubtedly to assist liquidators in discharging these duties

"so that they may determine the most advantageous course to

[214] Id section 400(1).

[215] Id section 402(b).

adopt in regard to the liquidation of the company";[216]

and

"to achieve his primary object, namely the ascertainment of the assets and liabilities of the company, the recovery of the one and the payment of the other, according to law and in a way which will best serve the interests of the company's creditors".[217]

[216]Per van Winsen J in Western Bank Ltd v. Thorne NO and Others NNO 1973 (3) SA 661 (C) at 666 F.

[217]Merchant Shippers SA (Pty) Ltd v. Millman NO and Others 1986 (1) SA 413 (C) at 417 D - E.

As was pointed out in Moolman v. Builders and Developers (Pty) Ltd (In Provisional Liquidation): Jooste Intervening[218]:

> "Appellant's counsel is plainly correct in his submission that to enquire into the company's affairs forms part of a liquidator's functions just as much as reducing the assets of the company into his possession and dealing with them in the prescribed manner does. In performing the former part of his functions he exercises an ancillary power without which the second part cannot properly be performed. It is only by enquiring that he is able to determine what is and what is not the property of the company, or who is and who is not a creditor or contributory. It is, moreover, obviously in the interest of creditors that doubtful claims which the company may have against outsiders be properly investigated before being pursued and that claims against the company also be properly investigated before they are admitted or rejected. It is for such reasons that both the South African and the Transkeian Companies Act contain elaborate provisions relating to the interrogation of directors and other persons at meeting of creditors or by a commissioner..."

[218]1990 (1) SA 954 (A) at 960 G - I per Hefer JA.

The purpose of the interrogation may be directed exclusively at the general credibility of an examinee, where the testing of such person's veracity is necessary in order to decide whether to embark on a trial to obtain what is due to the company being wound up.[219]

[124] It happens not infrequentlythat the liquidation of a company is the result of mismanagement, indeed mismanagement involving fraud and theft, on the part of the directors and other officers of the company. Such persons are the only eyes, ears and brains of the company and often the only persons who have knowledge of the workings of the company prior to liquidation. They are often, because of their part in the mismanagement, fraud and theft, reluctant to assist the liquidators voluntarily in the discharge of their duties. This on occasion also applies to outsiders who, for reasons of their own, are reluctant to assist the liquidator voluntarily. That it is necessary, in the interest of creditors and indeed the wider public interest, to compel them to assist, is widely recognised. In Lynn NO and Another v. Kreuger and Others the following was said:

[219] Pretorius and Others v. Marais and Others 1981 (1) SA 1051 (A) at 1063 H - 1064 A.

"In my view the procedure provided by sections 417 and 418 of the Companies Act is not primarily concerned with the prosecution of offenders. The sections are aimed at assisting officers of the court in the performance of their duty to the creditors of companies in liquidation, the Master and the Court. It is very often of fundamental importance for the liquidator of a company to find out what has been done with the assets of that company and how the company's business has been run. Speed is of the essence of effectiveness in such an enquiry because, all too often the liquidator must take early and urgent action in order to recover mismanaged or misappropriated assets for the benefit of creditors. The case under consideration seems to be an excellent example of the importance of the need for full information, at a comparatively early stage of the winding up. In this case, on the evidence which is before me, the probabilities indicate very strongly, if not overwhelmingly that the only person who can give the applicants the information which they require is the first respondent. I think that the first respondent's prospects of persuading the Constitutional Court that the 'interrogation procedure' in respect of people who have been involved in the dealings of a company

before its liquidation is unconstitutional are remote indeed. I cannot conceive of any other procedure which would enable liquidators, effectively and efficiently, to fulfil their task."[220]

In Cloverbay Ltd v. Bank of Credit and Commerce International SA[221] Browne-Wilkinson V-C, dealing with an examination under section 236 of the English Insolvency Act 1986, stated the following:

"[T]he reason for the inquisitorial jurisdiction contained in s. 236 is that a liquidator or administrator comes into the company with no previous knowledge and frequently finds that the company's records are missing or defective. The purpose of s. 236 is to enable him to get sufficient information to reconstitute the state of knowledge that the company should possess." (emphasis added.)

As explained by Buckley J in Re Rolls Razor, Ltd the position under section 236 of the Insolvency Act 1986 is broadly the same as that under section 268 of the

[220]1995 (2) BCLR 167 (N) at 170 D - F per Hurt J.

[221][1991] 1 All ER 894 (CA) at 900 e.

Companies Act:

> "The powers conferred by s. 268 are powers directed to enabling the court to help a liquidator to discover the truth of the circumstances connected with the affairs of the company, information of trading, dealings, and so forth, in order that the liquidator may be able, as effectively as possible and, I think, with as little expense as possible ... to complete his function as liquidator, to put the affairs of the company in order and to carry out the liquidation in all its various aspects, including, of course, the getting in of any assets of the company available in the liquidation. It is, therefore, appropriate for the liquidator, when he thinks that he may be under a duty to try to recover something from some officer or employee of a company, or some other person who is, in some way, concerned with the company's affairs, to be able to discover, with as little expense as possible and with as much ease as possible, the facts surrounding any such possible claim."[222]

This passage was subsequently approved by the Court of Appeal.[223] In Re Rolls

[222][1968] 3 All ER 698 (ChD) at 700.

[223]In Re Esal (Commodities) Ltd [1989] BCLC 59 at 64.

Razor Ltd (No. 2) Megarry J said the following:

> "The process under s. 268 is needed because of the difficultly in which the liquidator in an insolvent company is necessarily placed. He usually comes as a stranger to the affairs of a company which has sunk to its financial doom. In that process, it may well be that some of those concerned in the management of the company, and others as well, have been guilty of some misconduct or impropriety which is of relevance to the liquidation. Even those who are wholly innocent of any wrongdoing may have motives for concealing what was done. In any case, there are almost certain to be many transactions which are difficult to discover or to understand merely from the books and papers of the company. Accordingly, the legislature has provided this extraordinary process so as to enable the requisite information to be obtained. The examinees are not in any ordinary sense witnesses, and the ordinary standards of procedure do not apply. There is here an extraordinary and secret mode of obtaining information necessary for the proper conduct of the winding-up. The process, borrowed from the law of bankruptcy,

can only be described as being sui generis."[224]

In British and Commonwealth Holdings plc v. Spicer and Oppenheim Lord Slynn, speaking for the House of Lords, approved the passages from Rolls Razor and Rolls Razor (2) quoted above and then said the following:

[224][1969] 3 All ER 1386 at 1396 - 1397.

"I am therefore of the opinion that the power of the Court to make an order under s. 236 is not limited to documents which can be said to be needed 'to reconstitute the state of the company's knowledge' even if that may be one of the purposes most clearly justifying the making of an order."[225]

(iii) The application of section 33(1) of the Constitution

[125] In applying section 33(1) I propose adopting the approach followed in S v.

[225][1992] 4 All ER 876 (HL) at 884 b - h and 884 j. See also Anderson and Others v. Dickson and Another NNO 1985 (1) SA 93 (N) at 111 F - G where Booysen J said the following:

"It seems that the object of an examination under ss 417 and 418 is similar to that of an examination at a meeting of creditors under s 415 and that it is to gain information which the creditors, or some of them, and the liquidator do not have or cannot otherwise effectively possess. It is a means of obtaining discovery of facts which may be of financial benefit to creditors of the company with the important limitation that it should be of financial benefit to them qua creditors of the company."

Makwanyane and Another[226], where, as in the present case, the justification had to be necessary as well as reasonable and in which Chaskalson P formulated the approach as follows:

[226]Supra note 24.

"The limitation of constitutional rights for a purpose that is reasonable and necessary in a democratic society involves the weighing up of competing values, and ultimately an assessment based on proportionality. This is implicit in the provisions of section 33(1). The fact that different rights have different implications for democracy, and in the case of our Constitution, for 'an open and democratic society based on freedom and equality', means that there is no absolute standard which can be laid down for determining reasonableness and necessity. Principles can be established, but the application of those principles to particular circumstances can only be done on a case by case basis. This is inherent in the requirement of proportionality, which calls for the balancing of different interests. In the balancing process, the relevant considerations will include the nature of the right that is limited, and its importance to an open and democratic society based on freedom and equality; the purpose for which the right is limited and the importance of that purpose to such a society; the extent of the limitation, its efficacy, and particularly where the limitation has to be necessary, whether the desired ends could reasonably be achieved through other means less damaging to the

right in question. In the process regard must be had to the provisions of section 33(1), and the underlying values of the Constitution, bearing in mind that, as a Canadian Judge has said, 'the role of the Court is not to second-guess the wisdom of policy choices made by legislators'."[227] (footnotes omitted)

[126] Because of the statutory duties which liquidators have to discharge in the winding-up of companies and the serious difficulties they face in recapturing the knowledge of the company prior to liquidation, in determining the cause of the company's failure and in establishing what assets (including claims) the company has, it is clearly reasonable (in the sense of there being a rational connection between mischief and remedy) to compel persons to be interrogated in relation to affairs of the company which are relevant to the discharge by liquidators of their duties, even where the testimony given tends to incriminate the person giving it. It is also necessary, in the sense that there is a pressing or compelling state interest to ensure that assets (including claims) of the company are recovered, for the benefit of creditors, especially from directors and officers of the company who may have been responsible, even criminally so, for the failure of the company. It is also necessary, in this sense, to compel persons to answer all

[227] Id at para 104.

relevant questions put to them even when the answers might incriminate them, for without this compulsion there would be a great reluctance by such persons to make a full and frank disclosure of their knowledge of the affairs of the company and their dealings with it.

[127] The real question is whether it is necessary in the sense that no other method exists which achieves the desired objective, but which is less intrusive of the examinee's section 11(1) rights. Differently stated, is there an acceptable proportionality between the legitimate objective sought to be achieved and the means chosen? The answer must clearly be in the negative. The state interest in achieving full information must be just as compelling in the United States of America, Canada and the United Kingdom. Yet these countries, more consistently the United States and Canada, have achieved this objective by means which are less invasive of the examinee's rights, namely by conferring on the examinee either a direct or both a direct and a derivative use immunity in respect of self-incriminating evidence given at the enquiry. There is nothing to suggest that in South Africa the objective cannot be fully achieved if some form of use immunity were to be appended to section 417(2)(b) of the Companies Act. Section 65(2A)(b) of the Insolvency Act provides for direct use immunity in respect of enquiries held under that Act and, while there may be legitimate

reasons for distinguishing between enquiries held in respect of personal bankruptcies and those relating to company liquidations, I can think of no proper justification for providing direct use immunity in respect of the former but not the latter. In the light of the aforegoing it is unnecessary to consider whether the essential content of the section 11(1) right has, within the meaning of section 33(1)(b), been negated by this provision. The conclusion is therefore reached that, as currently formulated, the provisions of section 417(2)(b) of the Companies Act, which infringe the examinee's section 11(1) rights, cannot be justified under section 33(1) of the Constitution. These provisions are accordingly found to be inconsistent with the section 11(1) right to freedom.

The attacks based on sections 8, 10, 13, 15, 22 or 24 of the Constitution

[128] In view of the above finding it is unnecessary to consider whether the provisions of section 417(2)(b) of the Companies Act are inconsistent with any of the rights protected in sections 8, 10, 13, 15, 22 or 24 of the Constitution.

The extent of the inconsistency of the provisions of section 417(2)(b) of the Companies Act with the section 11(1) right to freedom

[129] Section 98(5) of the Constitution provides that:

"In the event of the Constitutional Court finding that any law or any

> provision thereof is inconsistent with this Constitution, it shall declare such law or provision invalid to the extent of its inconsistency: Provided that the Constitutional Court may, in the interests of justice and good government, require Parliament or any other competent authority, within a period specified by the Court, to correct the defect in the law or provision, which shall then remain in force pending correction or the expiry of the period so specified."

The above subsection enjoins this Court, on finding that any law or any provision thereof is inconsistent with this Constitution, to declare such law or provision invalid "to the extent of its inconsistency." This raises two issues, one of severability and the other of judicial policy. We were urged on behalf of the applicants to strike down section 417(2)(b) in its entirety, leaving it to Parliament to decide whether to re-instate the obligation to give self-incriminating evidence, but coupled this time with a suitable indemnity against prosecution or a suitable use immunity (whether a direct or a direct and derivative use immunity). On behalf of the applicants we were urged not to express our own views as to what an appropriate and constitutionally valid use immunity would be, under the guise of a section 98(5) declaration as to the extent of the inconsistency of section 417(2)(b) with the Constitution. To do so would, it was submitted, be trespassing

on Parliament's legislative sphere. On behalf of the second respondents in the Ferreira matter we were invited, in the alternative and in the event of finding section 417(2)(b) to be inconsistent with the Constitution, to make a qualified order in the following terms:

> "To the extent only that the words 'and any answer given to any such question may thereafter be used in evidence against him' in section 417(of the Companies Act apply to the use of any such answer by an accused against him or her in criminal proceedings (other than proceedings for common law or statutory perjury in giving evidence under this section), the provisions are declared to be invalid."

[130] On the issue of severability it is unnecessary on the issue before us to do more than apply the test which Kriegler J formulated for this Court in Coetzee v. Government of the Republic of South Africa and Others; Matiso and Others v. Commanding Officer, Port Elizabeth Prison and Others as follows:

> "Although severability in the context of constitutional law may often require special treatment, in the present case the trite test can properly be applied: if the good is not dependent on the bad and can be separated from it, one gives effect to the good that remains after the separation if it still gives effect to the main objective of the statute. The test has two parts: first, is it possible to sever the invalid provisions and second, if so, is what remains giving effect to

the purpose of the legislative scheme?"[228]

Both tests are satisfied in the present case, whether the order takes the form suggested by the applicants, or by second respondents in the Ferreira matter. On the applicants' approach the remainder of the legislative scheme in sections 417 and 418 is not dependent on the bad in section 417(2)(b). On the approach suggested by the second respondent in the Ferreira matter a person examined would still be obliged to answer all questions put, including those that might be self-incriminating, but the deletion of the words "and any answer given to any such questions may thereafter be used in evidence against him" would merely exclude the use of incriminating answers in all subsequent criminal proceedings against the examinee. The exclusion would be limited to criminal proceedings. Such a deletion would not have any effect on the efficacy of the section 417 and 418 proceedings; the removal of the bad would only affect subsequent use of the answers. On the second leg of the test, that which will remain clearly still gives

[228]1995 (10) BCLR 1382 (CC) at para 16. The footnote reference in the text quoted has been omitted but the footnote itself reads: "Johannesburg City Council v. Chesterfield House 1952 (3) SA 809 (A) at 822 D - E. See also S v. Lasker 1991 (1) SA 558 (CPD) at 566."

effect to the purpose of the legislative scheme, which has been analysed above.

[131] The more difficult problem relates to the way in which the Court should declare the extent of the inconsistency of section 417(2)(b) with the Constitution. There is great force in the warning that this Court ought not to prescribe or even suggest to Parliament how best it should legislate in order to address any statutory vacuum or deficiency caused by a declaration of invalidity. By doing this we might be seen to be trespassing on Parliament's legislative terrain. At the same time, however, the injunction in section 98(5) of the Constitution requires the Court to indicate the "extent" of the inconsistency. This qualification was not essential. The injunction could merely have read "it shall declare such law or provision invalid." The Constitution therefore reflects a choice for a narrow striking down. In certain cases such a narrow striking down is technically and linguistically simple where the constitutional inconsistency is encapsulated in (and limited to) a discrete subsection or paragraph containing nothing but the inconsistent provision. However, the excision cannot always be so surgically neat. The Constitution seems to have foreseen this by using the expression "to the extent of its inconsistency" as a qualification to the bald declaration of invalidity of "any law or any provision thereof." It permits the Court greater latitude in formulating its declaration of invalidity.

[132] A not inconsiderable part of the argument was directed to the nature of (a) an indemnity against prosecution, or (b) a direct use immunity or (c) a derivative use immunity which, if coupled with the compulsion to give self-incriminating evidence, might render such compulsion constitutionally unobjectionable. This debate was an important feature in the judgments in Thomson's case.[229] It is not inconceivable (in fact it seems likely) that, if we were simply to strike down section 417(2)(b) in its entirety, Parliament would consider introducing more limited provisions along the lines of the provisions of section 65(2A) of the Insolvency Act. In so doing, Parliament might decide to provide for a direct use immunity only, which might very well give rise to another constitutional challenge, resulting in another suspension of the section 417 and 418 procedures, the halting of liquidation enquiries and a hearing in this Court simply duplicating the arguments that have been addressed to us in the present case. Such a course of events would be both unnecessary and unfortunate, particularly if it could legitimately be avoided. It can properly, in my view, be avoided. It would be permissible for us, in the process of determining the extent of the inconsistency of section 417(2)(b) with the Constitution, to decide whether, in the South African context, both a direct and a derivative use immunity is necessary to save such a

provision from being unconstitutional, or whether a direct use immunity would suffice. Without doing so, it would be difficult, if not impossible to indicate accurately the extent of the inconsistency. I now proceed to address myself to this question.

[133] It has been pointed out above that, in the United States of America, both derivative and direct use immunity is necessary in order to escape constitutional challenge to a statute which limits the right against self-incrimination. In Thomson Newspapers La Forest J pointed out, however, that

> "the absolutist position the courts in the United States have adopted in this area is undoubtedly rooted in the explicit and seemingly absolute right against self-incrimination found in the country's constitution"[230]

and that

> "one should not automatically accept that s. 7 comprises a broad right against self-incrimination on an abstract level or, for that matter, on the American model, complete with all its residual doctrines. If that had been intended, it would have been very easy

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[229]Supra note 75.

to say so."[231]

[230]Supra note 75 at 260 g.

[231]Id at 244 a - b.

In embarking on this enquiry regarding derivative use immunity, it is salutary to bear in mind that the problem cannot be resolved in the abstract but must be confronted in the context of South African conditions and resources - political, social, economic and human.[232] The fact that a particular obligation may be placed on the criminal investigative and prosecutorial authorities in one country with vast resources, does not necessarily justify placing an identical burden on a country with significantly less resources. One appreciates the danger of relativising criminal justice, but it would also be dangerous not to contextualise it. The aphorism proclaims that it is better for ten guilty accused to go free than to have one innocent accused wrongly convicted. Does the same hold true if the proportion is stretched to a hundred to one or to a thousand to one? And must a system, which only produces one in a hundred wrong acquittals in one country, be maintained in another if it would consistently give rise to three in five wrong acquittals in the latter?

[134] The distinction which La Forest J draws between the direct use of compelled

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[232] As La Forest J observed in Thomson Newspapers supra note 75 at 241 e:

> "The courts in Canada ... cannot remain oblivious to the concrete social, political and economic realities within which our system of constitutional rights and guarantees must operate."

The learned Judge further pointed out at 245 e that,

> "these principles [of natural justice] vary with the context,"

and at 245 g that the entitlement of an accused,

> "to a fair hearing ... does not entitle him to the most favourable procedures that could possibly be imagined",

testimony and the use of evidence derived from compelled testimony is, in my view, important:

(a) In the case of the direct use of compelled testimony,

> "[i]t is only when the testimony itself has to be relied on that the accused can be said to have been forced to actually create self-incriminatory evidence in his or her own trial. The compelled testimony is evidence that simply would not have existed independently of the exercise of the power to compel it; it is in this sense evidence that could have been obtained only from the accused."[233]

(b) By contrast,

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citing from R. v. Lyons (1987) 44 D.L.R. (4th) 193 at 237.

[233]Id generally at 252 - 260 and specifically at 252 h.

"evidence derived from compelled testimony is, by definition, evidence that existed independently of the compelled testimony ... Although such evidence may have gone undetected or unappreciated in the absence of the compelled clues ... [this] is not the same thing as non-existence ... [which in turn means] that it could have been found by some other means, however low the probability of such discovery may have been."[234]

[135] This last mentioned feature means that the relevance, quality and weight of derivative evidence can be determined independently of the testimony of the accused and is therefore self-sufficient.[235] This distinguishing feature is significant. In Lam Chi-Ming v. R[236], an appeal to the Privy Council from Hong Kong, Lord Griffiths, in a passage quoted with approval by this Court in Zuma[237], identified three reasons for excluding confessions obtained by improper methods: (a) possible unreliability, (b) the privilege or principle against self-incrimination and (c) the desire to ensure proper behaviour by the police towards those in their

[234]Id at 253 a.

[235]Id at 252 f - h.

[236](1991) 2 AC 212 (PC).

[237]1995 (4) BCLR 401 (SA) at para 31.

custody and then added:

> "the more recent English cases established that the rejection of an improperly obtained confession is not dependent only upon possible unreliability but also upon the principle that a man cannot be compelled to incriminate himself and upon the importance that attaches in a civilised society to proper behaviour by the police towards those in their custody."[238]

[238] Id at 220.

The policy considerations (a) and (c) above do not apply at all to the admission of derivative evidence. For this reason alone, it is legitimate to approach the admissibility of derivative evidence somewhat differently, the more so when regard is had to the independent existence of derivative evidence, quite apart form the testimony of the person disclosing it. In Thomson Newspapers, La Forest J, in dealing with the admissibility of derivative evidence, drew an analogy to section 24(2) Charter jurisprudence.[239] This subsection of the Charter has adopted an intermediate position with respect to the exclusion of evidence obtained in violation of the Charter. In R. v. Collins the Canadian Supreme Court explained that -

> "[S. 24(2)] rejected the American rule excluding all evidence obtained in violation of the Bill of Rights and the common law rule that all relevant evidence was admissible regardless of the means by which it was obtained."[240]

Apart from the obvious statutory exceptions relating to confessions and

[239]Supra note 75 at 255 e. Section 24(2) of the Canadian Charter reads:

> "(2) Where, in proceedings under subsection (1), a court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this Charter, the evidence shall be excluded if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute."

[240](1987) 38 D.L.R. (4th) 508 at 522 - 523 per Lamer J.

admissions, the English common law rule is applied in South Africa.[241] No doubt this rule will have to be reconsidered at some stage in the light of the provisions of Chapter 3 of the present Constitution.

[136] In Collins, evidence had been discovered on the accused in pursuance to a search which was in breach of the accused's rights under section 8 of the Charter. Lamer J, in the course of considering whether the admission of such evidence would bring the administration of justice into disrepute, stated the following:

[241]The English rule is formulated in Kuruma v. R, [1995] AC 197 (PC) at 203; [1985] 1 All ER 236 at 239. See Ex Parte Minister of Justice: In re R. v. Matemba 1941 AD 75; S v. Nel 1987 (4) SA 950 (W) at 953 E - J and see, generally, Hoffmann and Zeffert The South African Law of Evidence 4 ed (1988) 278 - 281.

> "Real evidence that was obtained in a manner that violated the Charter will rarely operate unfairly for that reason alone. The real evidence existed irrespective of the violation of the Charter and its use does not render the trial unfair. However, the situation is very different with respect to cases where, after a violation of the Charter, the accused is conscripted against himself through a confession or other evidence emanating from him. The use of such evidence would render the trial unfair, for it did not exist prior to the violation and it strikes at one of the fundamental tenets of a fair trial, the right against self-incrimination."[242]

In Thomson Newspapers, La Forest J pointed out that Lamer J had not, in Collins:

> "intended to draw a hard-and-fast line between real evidence obtained in breach of the Charter and all other types of evidence that could be so obtained. ... what Lamer J had in mind was the much broader distinction between evidence which the accused had been forced to create, and evidence which he or she has been forced to merely locate or identify. In other words, he had in mind the kind of distinction which I have attempted to draw between

[242]Supra note 240 at 526.

compelled testimony and evidence derived from compelled testimony."[243]

[137] La Forest J also drew attention to the fact that

"... the testimony of third parties obtained as a result of the pursuit of such clue facts is clearly evidence that exists regardless of whether or not the person who provided the clue facts was compelled to give testimony. As much as the murder weapon or the stolen car, it is evidence that could have been found in the absence of any assistance, compelled or otherwise, from the person subsequently charged. I do not see why this factor should be relevant to the admissibility of the murder weapon under s. 24(2), but irrelevant to the admissibility of the third party's testimony under the same section, or to the admissibility of either

[243]Supra note 75 at 255 f - 256 a.

piece of evidence under s. 7 or s. 11(d)."[244]

The learned Judge considered it

[244]Id at 257 f - g.

> "overly broad to say that there must be an absolute prohibition against the use at trial of all evidence derived from testimony compelled before trial on the ground that the admission of such evidence can in some cases affect the fairness of the trial. ... [I]n defining the scope of the immunity required by the Charter, we are called upon to balance the individual's right against self-incrimination against the state's legitimate need for information about the commission of an offence."[245]

[138] In outlining the advantages to the community as a whole (including the fact that investigation and detection is speeded up and the law's effectiveness as a deterrent enhanced) if there was not a blanket exclusion of derivative evidence, La Forest J made, to my mind, the important point, particularly for our context, that

> "[t]he limited resources that society has to spend on law enforcement activity in general will be utilised in a more cost-effective manner ... [which will mean] the effective investigation of a greater proportion of offences ... [enhancing in turn] the law's

[245] Id at 258 f - h.

potency as a deterrent to potential wrongdoers."[246]

He concluded that

> "[a]ll of these benefits of a power to compel testimony would either be lost or severely limited if the Constitution required that the legislative grant of any such power must be accompanied by a grant of full use and derivative use immunity."[247]

[139] The learned Judge adopted a flexible approach to balancing the interests of the individual and that of the state, which in his view could only be achieved by the trial judge exercising a discretion.[248] This discretion was, as La Forest formulated it in R. v. Corbett[249] and confirmed it in Thomson Newspapers,

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[246]Id at 259 c.

[247]Id at 259 d.

[248]Id at 260 - 261.

[249](1988) 41 C.C.C. (3rd) 385 at 416.

> "to exclude matters that may unduly prejudice, mislead or confuse the trier of fact, take up too much time, or that should otherwise be excluded on clear grounds of law or policy".[250]

This discretion "is ultimately grounded in the trial judge's duty to ensure a fair trial."[251] A similar flexible approach could, La Forest J argued, be adopted in regard to the admissibility of derivative evidence, having due regard to the need to balance the right of the accused and that of the public in a specific context:

> "... derivative evidence that could not have been found or appreciated except as a result of the compelled testimony under the Act should in the exercise of the trial judge's discretion be excluded since its admission would violate the principles of fundamental justice ... such exclusion should [not] take place if the evidence would otherwise have been found and its relevance understood ... The touchstone for the exercise of the discretion is the fairness of the trial process."[252]

La Forest J concluded by holding that:

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[250]Supra note 75 at 261 C.

[251]Thomson Newspapers supra note 75 at 261 F and see also R v. Potvin (1989) 47 C.C.C. (3d) 289.

[252]Id at 262 c - e.

"... complete immunity against such use is not required by the principles of fundamental justice. The immunity against use of actual testimony provided by s. 20(2) of the Act together with the judge's power to exclude derivative evidence where appropriate is all that is necessary to satisfy the requirement of the Charter."[253]

[140] I respectfully favour the approach adopted by La Forest J, for the reasons stated by him, rather than that preferred by Wilson J. Wilson J criticized La Forest J's approach on basically two grounds. Firstly because,

[253]Id at 264 d - e.

> "[t]he public repute of justice is not the relevant consideration in determining whether derivative evidence should be excluded on the ground that it was obtained as a direct result of testimonial compulsion in violation of the principles of fundamental justice."[254]

I do not understand La Forest J to have advanced such a proposition so rigidly. The learned judge was arguing by way of analogy in an attempt (perfectly permissible in my view) to find an acceptable norm on the basis whereof the right of the individual could fairly be balanced against the interests of the state. This is encapsulated in the following observation the learned judge made:

> "I find it difficult to imagine how the use of evidence which does not bring the administration of justice into disrepute can at the same time be contrary to the principles of fundamental justice. The consequence of the former finding is, in effect, to declare that the Charter breach by which evidence was obtained was non-prejudicial, and in a sense nominal. To argue that the same reasoning cannot be used to determine whether the use of derivative evidence constitutes a breach of the rights guaranteed under s. 7 would be to take an unduly formalistic approach to the interpretation of the Charter. As I mentioned earlier, the discussion

[254] Id at 202 h.

might equally be framed in terms of the right to a fair trial under s. 11(d) with similar results, a matter to which I shall return."[255]

The second criticism was to the effect that

"[the] exclusion [of derivative evidence] must be a matter of principle and of right, not of discretion."[256]

If, as a result of the proper exercise of a discretion, a fair trial is ensured, I fail to see how principle is lacking, any more than when such evidence is admitted in a way which is "in accordance with the principles of fundamental justice", the qualification to section 7 of the Charter.

[255]Id at 255 a - b.

[256]Id at 203 a.

[141] A recent decision in the Canadian Supreme Court, R.J.S. v. The Queen; Attorney-General et al., Interveners[257] (hereinafter "R.v.S. (R.J.)"), which bears on the issue of derivative use immunity as a constitutional requirement, came to our attention after argument. It concerned two young offenders who were both charged with the same offence of "break, enter, and theft" but, because of their age and by virtue of relevant Ontario legislation, were to be tried separately. At the trial of the one young offender ("the accused"), the other young offender ("the witness") was subpoenaed by the Crown to testify against the accused. On an application brought by the witness's counsel, the subpoena against him was quashed on the basis that to require the witness to testify would violate section 7 of the Canadian Charter of Rights and Freedoms. Because of the resultant lack of evidence the accused was acquitted. On appeal by the Crown, the quashing of the subpoena was set aside and a new trial ordered, a decision confirmed by the Supreme Court. It is necessary to point out the obvious, namely, that this particular problem could not arise in our law because of the transactional indemnity which, in similar circumstances, would be available to the witness by virtue of the provisions of section 204 of the Criminal Procedure Act.[258]

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[257](1995) 121 D.L.R. (4th) 589.

[258]Act 51 of 1977.

[142] Nevertheless the decision is of significance for a number of reasons. First, it clearly affirms the principle that in all cases "a statutory compulsion to testify engages the liberty interest of s. 7" but that normally "the liberty interest is affected in accordance with the principles of fundamental justice."[259] Second, it confirms that a "deprivation of liberty may arise by virtue of a compulsion to speak per se ..."[260] regardless of the character of the compelled speech. The character of the speech which is compelled (for example, self-incriminatory speech) may, however, depending on the particular construction of the Charter, be determinative of the issue as to whether such deprivation of liberty is in accordance with the principles of fundamental justice or whether an infringement is justified under section 1 of the Charter.[261] Third, it makes clear that the liberty interest in section 7 of the Charter "may be engaged although there is no coincident deprivation in respect of the other s. 7 interests, life or security of the

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[259] R.v.S. (R.J.) supra note 257, per Iacobucci J at 607 in fin - 608 b. At 612 e - g the learned Judge further stated the following:

> "[T]he encroachment upon liberty is complete at the moment of compelled speech, regardless of its character. David Stratas, in The Charter of Rights in Litigation: Direction from the Supreme Court of Canada, vol. 1 (Aurora, Ont: Canada Law Book Inc., 1990)(loose-leaf [updated 1994]), has noted that an uncertainty which currently exists is 'just how immediate a threatened deprivation of liberty must be' (at p. 17 - 2.1). Inasmuch as a statutory compulsion to give oral testimony engages the liberty interest, it is unnecessary to resolve this uncertainty today. When J.P.M. challenged the subpoena in this case, he faced an imminent deprivation of liberty."

La Forest, Cory and Major JJ concurred fully in the entire judgment of Iacobucci J. L'Heureux-Dubé J (Gonthier J concurring) did not differ with Iacobucci J on this part of his judgment see p. 677) and in fact specifically confirmed his approach thus (at 692 a):

> "The compulsion to testify subject to possible imprisonment for failure to comply is, itself, a deprivation of liberty which brings the issue of witness compellability within the scope of a s. 7 examination."

Neither Lamer CJC, Sopinka J nor McLachlin J questioned the correctness of the aforegoing approach.

[260] Id at 612 b - c.

[261] Id.

person".[262] Fourth, it holds, relying on earlier dicta, that not every restriction of absolute freedom constitutes a deprivation of liberty. Fifth, the judgment also confirms that, notwithstanding the provisions of sections 11(c)[263] and 13[264] of the Canadian Charter, section 7 of the Charter contains residual protections against self-incrimination extending beyond sections 11(c) and 13 and that this is necessary, in part, to protect the section 11(c) right.[265] Iacobucci J, highlighting "the vigour of section 7", held that there was "a functional, unifying principle" against self-incrimination and that pre-trial silence was no longer merely "a particular manifestation of the general freedom to do as one pleases" but had "been elevated to the status of a constitutional right."[266] Lastly, it considers extensively the nature of derivative evidence and whether and to what extent a derivative use immunity is necessary in order to render compelled testimony in accordance with the principles of fundamental justice. I shall endeavour to deal as briefly as possible with this last aspect.

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[262]Id at 608 h, relying on Singh v. Canada (Minister of Employment and Immigration) (9185), 17 D.L.R. (4th) 422.

[263]Which provides that "[a]ny person charged with an offence has the right ... not to be compelled to be a witness in proceedings against that person in respect of the offence".

[264]Which provides that "[a] witness who testifies in any proceedings has the right not to have any incriminating evidence so given used to incriminate that witness in any other proceedings, except in a prosecution for perjury or for the giving of contradictory evidence."

[265]Id at 631 b - h. See also R v Hebert (1990) 57 C.C.C. (3d) at 33 where McLachlin J, recognising in section 7 of the Charter a residual protection against self-incriminated because of (in part) a need to protect the section 11(c) right, states the following:

> "From a practical point of view, the relationship between the privilege against self-incrimination and right to silence at the investigatory phase is equally clear. The protection conferred by a legal system which grants the accused immunity from incriminating himself at trial but offers no protection with respect to pre-trial statements would be illusory".

McLachlin J at 34 also postulates a principle of fundamental justice involving "the right of the individual to choose whether to make a statement to the authorities or to remain silent, coupled with concern with the repute and integrity of the judicial process."

[266]Id at 632 b- e.

[143] The issue of derivative use evidence was considered on the basis that the principle of fundamental justice which operated in the case was the "principle against self-incrimination".[267] It was pointed out that the Canada Evidence Act had abolished the witness's (as opposed to the accused's) privilege and replaced it with a limited form of immunity, applicable in respect of subsequent proceedings and not at the moment of compelled testimony, in as much as section 5(2) of the Canada Evidence Act currently provides that a witness's self-incriminatory answers cannot "be used or admissible in evidence against [the witness] in any criminal trial or other criminal proceeding against him thereafter taking place, other than a prosecution for perjury".[268] Iacobucci J describes the policy justification for the common law protections as resting "on the idea that the Crown must establish a 'case to meet'"[269] and reflecting "a basic distaste for self-

[267]Id at 613 b.

[268]Id at 620 c - e.

[269]Id at 626 h.

conscription".[270]

[270]Id at 627 f.

[144] The learned Judge's approach was to seek a compromise[271] between, on the one hand, full transactional immunity if self-incriminating testimony is compelled and, on the other, mere direct use immunity where it is only the witness's direct communication which is protected against subsequent use. In the course of his enquiry, Iacobucci J agreed[272] with the following statement by La Forest J in Thomson Newspapers:

> "A right to prevent the subsequent use of compelled self-incriminating testimony protects the individual from being 'conscripted against himself' without simultaneously denying an investigator's access to relevant information. It strikes a just and proper balance between the interests of the individual and the state."[273]

The conclusion reached by Iacobucci J was that the Canadian Charter did not demand absolute derivative use immunity.[274] The learned judge approved[275] of the distinction drawn by La Forest J between compelled testimony and derivative evidence and stated succinctly that

> "compelled testimony is evidence which has been created by the witness, whereas derivative evidence is evidence which has independent existence. It is only the class of created evidence

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[271]Id at 637-650.

[272]Id at 649 e.

[273]Supra note 75 at 246 e - f.

[274]Supra note 257 at 659 a.

[275]Id at 662 a - e.

which is, by definition, self-incriminatory."[276]

[276]Id at 662 f.

[145] Of importance is the fact that Iacobucci J[277], like La Forest J in Thomson Newspapers[278], drew heavily, by way of analogy, on Canadian Charter section 24(2) jurisprudence in dealing with the question of the exclusion of derivative evidence. Nowhere in his judgment does Iacobucci J express disagreement with La Forest J in Thomson Newspapers; in fact it is written in terms of general approval with and further explication of La Forest J's judgment. Iacobucci J accordingly concludes that

> "derivative evidence which could not have been obtained, or the significance of which could not have been appreciated, but for the testimony of a witness, ought generally to be excluded under s. 7 of the Charter in the interests of trial fairness."[279]

The qualification "ought generally" was introduced because the learned judge advocated[280] the same discretion on the part of the trial judge as is employed in the case of section 24(2) Charter exclusion, namely, that the exercise of the discretion "will depend on the probative effect of the evidence balanced against the prejudice caused to the accused by its admission."[281] In other words, there is no automatic rule of exclusion. Iacobucci J was, quite correctly in my view, hesitant to elaborate any further on the test and stated:

> "Since this test for exclusion can only arise in the context of

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[277]Id at 661 - 669.

[278]Supra note 75 and see also para [135] above.

[279]R.v.S. (R.J.) supra note 257 at 669 d.

[280]Id at 670 h - 671 a.

[281]Iacobucci J quoted this passage with approval from R. v. Sweitzer (1982) 137 D.L.R. (3d) 702 at 706.

proceedings subsequent to a witness' testimony ... [i]ts form will become known, as it should, in the context of concrete factual situations."[282]

[146] There is, in my judgment, no reason why this approach cannot and ought not to be adopted in regard to the enquiry concerning the admissibility of derivative evidence in the context of section 417(2)(b) of the Companies Act. I have little doubt that two different but related areas concerning the law of evidence will, in due course, have to be reconsidered fully in the light of Chapter 3 of the Constitution and section 25(3) in particular. The one relates to the way in which evidence, particularly in criminal proceedings, is obtained and the second to the question of when and to what extent a trial judge has a discretion to exclude otherwise admissible evidence.

[282] R.v.S.(R.J.) supra note 257 at 669 g.

[147] Prior to the coming into operation of the Constitution, courts in South Africa were not particularly concerned with the way in which evidence was obtained. Notable exceptions of course related to admissions, confessions and, more recently, to acts of pointing out.[283] In other cases, however, the general approach was that, provided the evidence was relevant, it was admissible.[284] It is unnecessary in the present case to reconsider this issue beyond the very narrow area of the derivative use of compelled self-incriminating evidence. It can be noted, however, that since the Constitution came into effect, a new approach is beginning to emerge in decisions of the Supreme Court.[285]

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[283]See, particularly in the latter regard, S v. Sheehama 1991 (2) SA 860 (A).

[284]See Kuruma v. R [1955] 1 All ER 236 (PC) at 239; R v. Uys and Uys 1940 TPD 405; S v. Nel 1987 (4) SA 950 (W) at 953 G and Du Toit et al Commentary on the Criminal Procedure Act 24 - 98. In Nel van der Walt J added, however, with reference to Ex Parte Minister of Justice in re R. v. Matemba 1941 AD 75, that evidence illegally obtained could be excluded on the basis that accused could not be compelled to provide evidence against themselves and that evidence obtained under duress from an accused could not be used against such an accused.

[285]In S v. Hammer and Others 1994 (2) SACR 496 (C) at 498 g, Farlam J held that, in the exercise of a general discretion to exclude improperly obtained evidence on the grounds of unfairness and public policy, the Court should endeavour to strike a careful and credible balance, since although it was important for a criminal court to maintain high standards of propriety in its own process, public confidence could be undermined by indiscriminate exclusions of improperly obtained evidence. Farlam J considered the following factors to be useful in the exercise of the discretion (at 499 a - e):

"(a) society's right to insist that those who enforce the law themselves respect it, so that a citizen's precious right to immunity from arbitrary and unlawful intrusion into the daily affairs of private life may remain unimpaired;

(b) whether the unlawful act was a mistaken act and whether in the case of mistake, the cogency of evidence is affected;

(c) the ease with which the law might have been complied with in procuring the evidence in question (a deliberate 'cutting of corners' would tend towards the inadmissibility of the evidence illegally obtained);

(d) the nature of the offence charged and the policy decision behind the enactment of the offence are also considerations;

(e) unfairness to the accused should not be the only basis for the exercise of the discretion;

(f) whether the administration of justice would be brought into disrepute if the evidence was admitted;

(g) there should be no presumption in favour of or against the reception of the evidence, the question of an onus should not be introduced;
(h) it should not be a direct intention to discipline the law enforcement officials;
(i) an untrammelled search for the truth should be balanced by discretionary measures, for in the words of Knight Bruce VC, 'Truth, like other good things, may be loved unwisely - it may be pursued too keenly - may cost too much'."

In S v. Melani en Andere 1995 (2) SACR 141 (ECD) at 153 a Froneman J reaches the conclusion that a judge should have a discretion to exclude unlawfully obtained evidence on a case by case basis. The learned judge considered (at 154 B) the Canadian criterion of "bringing into disrepute the administration of justice" as the appropriate guideline for exercising the discretion.

[148] As far as the discretion to exclude otherwise admissible evidence is concerned, there appears to be little doubt that similar fact evidence may be excluded if the probative value is outweighed by the prejudice it would cause.[286] The existence of a general discretion to exclude admissible evidence is, however, disputed. As Professor Zeffertt points out:

> "There can be no more controversial an issue in the South African law of evidence than whether there is a judicial discretion, in criminal proceedings, to exclude admissible evidence. Some authorities say it exists; others deny it".[287]

[286] R v. Roets and Another 1954 (3) SA 512 (A) at 521 A.

[287] Annual Survey of South African Law (1990) at 498 - 9.

Those in favour[288] of the existence of the general discretion to exclude admissible evidence usually rely on an obiter dictum of Rumpff CJ in S v. Mushimba[289], who referred to the English case of R v. Kuruma,[290] where it was stated that there could be no doubt that "the judge always has a discretion to disallow evidence if the strict rules of admissibility would operate unfairly against the accused"; but those opposed to the discretion point to the fact that the English rule referred to in Kuruma has been narrowly construed in subsequent cases[291] and has in England been affected by statute.[292] In South Africa most decisions of the Provincial and Local Divisions of the Supreme Court seem to confirm the existence of such a discretion, but the decisions are divided as to the basis for exercising the discretion.[293] Some of the decisions merely recognise

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[288]See Hoffmann and Zeffertt The South African Law of Evidence 4 ed (1988) at 284 - 292; Du Toit et al Commentary on the Criminal Procedure Act (1995) 24 - 98.

[289](1977) (2) SA 629 (A) at 840 E.

[290][1955] 1 All ER 236 at 239.

[291]In particular the case of R v. Sang [1979] 2 All ER 1222 at 1231 where the House of Lords held that

> "[a] trial judge in a criminal case has always a discretion to refuse to admit evidence if in his opinion its prejudicial effect outweighs its probative value."

See also C. Tapper Cross on Evidence 7 ed (1990) 180 - 193.

[292]S. 78 of the Police and Criminal Evidence Act 1984 which provides that:

> "(1) In any proceedings the court may refuse to allow evidence on which the prosecution proposes to rely to be given if it appears to the court that, having regard to all the circumstances in which the evidence was obtained, the admission of the evidence would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it.
> (2) Nothing in this section shall prejudice any rule of law requiring a court to exclude evidence."

[293]I deliberately exclude the question as to whether the rule applies to an otherwise admissible confession. See, in this regard S v. Mkanzi en _ Ander 1979 (2) SA 757 (T) at 759 E and on appeal 1982

that the rule relating to similar fact evidence applies in other situations as well, for example in criminal proceedings, where a judge has a general discretion to exclude evidence where its probative value is outweighed by its prejudicial effect.[294] Others appear to support the existence of a discretion, along the lines suggested by Lord Goddard in Kuruma's case, to exclude admissible evidence that would operate unfairly against the accused.[295] The more recent decisions, before the commencement of the Constitution, suggest that the discretion should

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(4) SA 509 (A) at 512 H - 513 E and S v. Zuma supra note 8 at para 28.

[294]See S v Holshausen 1983 (2) SA 699 (D) at 704 F - H; S v Mbatha 1985 (2) SA 26 (D) at 30 - 31.

[295]See, apart from the obiter dictum in Mushimba referred to above, S v Lebea 1975 (4) SA 337 (W) at 339 D.

be based on considerations of public policy, rather than fairness.[296]

[296]See S v Boesman 1990 (2) SACR 389 (E) at 399 J - 401 C; Shell SA (Edms) Bpk en Andere v Voorsitter, Dorperaad van die Oranje-Vrystaat en Andere 1992 (1) SA 906 (O) at 916; and the earlier dictum in S v Forbes and Another 1970 (2) SA 594 (C) at 598 H - 599 A.

[149] In considering matters of evidential admissibility or inadmissibility we ought not to limit the focus of our attention exclusively on the state of the law of evidence which existed prior to the present Constitution coming into operation. Section 25(3) of the Constitution guarantees to every accused person the broad right to a fair trial, which is not limited to the specific enumerated rights in paragraphs (a) - (j) of the subsection. In certain areas of criminal procedure, the specific provisions of these paragraphs will settle debates concerning criminal procedure and criminal justice generally which previously were uncertain or controversial. Thus, the application of section 25(3)(e) of the Constitution in S v. Vermaas; S v. du Plessis[297] settled the

> "lively controversy in our law [as to] whether persons standing trial on criminal charges who could not afford to pay for their legal representation were entitled to be provided with it at public expense once its lack amounted to a handicap so great that to try them on their own lay beyond the pale of justice."[298]

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[297]Supra note 1.

[298]Id at paragraph 1 per Didcott J and compare with S v. Khanyile and Another 1988 (3) SA 795 (N); S v. Davids; S v. Dladla 1989 (4) SA 172 (N) and S v. Rudman and Another; S v. Mthwana 1992 (1)

SA 343 (A).

The general discretion to exclude evidence in a criminal trial is a principle accepted, for example, both in England and in Canada.[299] As La Forest J pointed out in Thomson Newspapers, the discretion to exclude evidence which would otherwise have been admissible, has been applied in various areas of criminal procedure because this discretion is "ultimately grounded in the trial judge's duty to ensure a fair trial."[300] La Forest J had no hesitation in concluding that this discretion ought also to be exercised in the determination of when, and when not, derivative evidence relating to compelled self-incriminating testimony should be admitted against an accused.[301] This approach, subject to its passing the test of section 33(1) of the Constitution, ought to apply in this country as well inasmuch as, just as in Canada, the right to a fair trial has been constitutionalised.[302]

[150] In my view an approach whereby a blanket exclusion of derivative evidence is not applied but where instead it is dealt with on the flexible basis of discretionary admissibility, as outlined above, passes section 33(1) muster. We are not obliged to follow the absolutist United States approach which, as pointed out in Thomson

[299]See R v. Sand [1980] AC 402 and Thomson Newspaper supra note 75 at 261, respectively.

[300]Supra note 75 at 261 F.

[301]Id at 262 c and 264 d - e.

[302]In Canada under sections 7 and 11(d) of the Charter; see Thomson Newspapers supra note 75 at 261 h. In South Africa under section 25(3) of the Constitution.

Newspapers in a passage already referred to

> "is undoubtedly rooted in the explicit and seemingly absolute right against self-incrimination found in that country's Constitution."[303]

The holding of a section 417 enquiry is lawful and serves an important public purpose. Evidence obtained as a result of such an enquiry cannot be equated with evidence obtained as a result of unlawful conduct. Where, for example, derivative evidence is obtained as a result of torture there might be compelling reasons of public policy for holding such evidence to be inadmissible even if it can be proved independently of the accused. Otherwise, the ends might be allowed to justify the means. The admission of evidence in such circumstances could easily bring the administration of justice into disrepute and undermine the sanctity of the constitutional right which has been trampled upon. The same considerations do not apply to derivative evidence obtained as a result of the application of section 417(2)(b) at a section 417 enquiry.

[303]Supra note 75 at 260 g.

[151] Companies are used to raise money from the public and to conduct business on the basis of limited liability. There are obvious advantages to doing so. But there are responsibilities which go with it. Part of the responsibility is to account to shareholders for the way in which the company conducts its affairs and, if the company goes insolvent, to account to shareholders and creditors for the failure of the business. These responsibilities are well known to all who participate in the running of public companies. Giving evidence at a section 417 enquiry is part of the responsibility to account. It cannot simply be said that the administration of justice would necessarily be brought into disrepute by the subsequent use, even in criminal proceedings against the examinee, of derivative evidence obtained as a result of the application of section 417(2)(b) of the Act. Indeed, the public, and especially the victims of the crime, might find a denial of the right to use such evidence inexplicable. Although it has been held that an auditor is not an officer of the company within the meaning of that expression in section 184(1) of the 1926 Act (corresponding to section 423(1) of the present Act)[304] and it has been suggested that there is no basis for regarding an auditor as being an officer of the company for any purpose of the Act,[305] in my view the same public policy

[304] Lipschitz NO v. Wolpert and Abrahams 1977 (2) SA 732 (A) at 742 - 750 and particularly at 750 G.

[305] Meskin et al (eds) Henochsberg On the Companies Act 5ed Vol. 1 at 523.

considerations apply to the use of derivative evidence of an auditor of the company compelled to testify under section 417(2)(b) of the Act. The auditor has, inter alia, many statutory duties under the Companies Act[306] and the Public Accountants' and Auditors Act,[307] the purpose of which duties is, inter alia, to protect shareholders and creditors. The knowledge and expertise of the auditor is of particular importance in reconstructing the affairs of the company in liquidation and in achieving the other aims of the section 417 enquiry. An auditor is not obliged to become the auditor of a particular company nor to discharge the attendant duties without remuneration. In accepting appointment as an auditor of any particular company the auditor is aware of these duties.

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[306]For example, sections 282, 300 and 301 and see, generally, Henochsberg supra note 305 at 535 - 539 and 580 - 588.

[307]Act 80 of 1991. See in particular section 20(5) (a) which prescribes the action to be taken by an auditor when he or she is "satisfied or has reason to believe that in the conduct of the affairs of such undertaking a material irregularity has taken place or is taking place which has caused or is likely to cause financial loss to the undertaking or to any of its members or creditors".

[152] Although no statistical or other material was placed before us, it is quite apparent that the United States has vastly greater resources, in all respects and at all levels, than this country when it comes to the investigation and prosecution of crime, more particularly when regard is had to the particularly high crime rate, which one can take judicial notice of, currently prevalent in South Africa. This in my view gives added weight to the considerations of efficiency, economy of time and the most prudent use of scare resources, highlighted by La Forest J in Thomson Newspapers and to which I have already referred, and supporting the adoption of a flexible approach in dealing with the admissibility of derivative evidence. The flexible approach is narrowly tailored to meet important state objectives flowing from the collapse and liquidation of companies and the resulting duties of liquidators to protect the interests of creditors and the public at large, while at the same time interfering as little as possible with the examinee's right against self-incrimination. It is balanced and proportional and, in my view, fully justifiable in an open and democratic society based on freedom and equality. To the extent that this conclusion is in conflict with any of the general views expressed in Park-Ross and Another v. The Director, Office of Serious Economic

Offences,[308] I disagree with those views.

[153] A compulsion to give self-incriminating evidence, coupled with only a direct use immunity along the lines indicated above, and subject to a judicial discretion to exclude derivative evidence at the criminal trial, would not negate the essential content of the section 11(1) right to freedom or the section 25(3) right to a fair trial. Only a discrete and narrowly defined part of the broad right to freedom is involved which could not conceivably be described as a "negation" of its essential content. As far as section 25(3) is concerned, the trial judge is obliged to ensure a "fair trial", if necessary by his or her discretion to exclude, in the appropriate case, derivative evidence. Ultimately this is a question of fairness to the accused and is an issue which has to be decided on the facts of each case. The trial judge is the person best placed to take that decision. The development of the law of evidence in this regard is a matter for the Supreme Court. The essential content of the right is therefore not even touched.

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[308]1995 (2) BCLR 198 (C) at 213 D - H; 1995 (2) SA 148 (C) at 165 D - J per Tebbutt J (Scott J concurring).

[154] There is one further matter on the merits which needs to be mentioned. In the applicants' written argument and in the oral argument on their behalf in this Court, fleeting reference was made to the fact that section 417(2)(b) was also inconsistent with the Constitution to the extent that it permitted incriminating testimony to be used in a subsequent civil trial against the examinee. The argument was not pressed or developed and no authority, academic, judicial or otherwise, from any jurisdiction, was cited in support of the contention. Nor was any specific provision in the Constitution relied upon in this regard. I am unaware of any authority which would support such a submission. It is therefore unnecessary to express any view on it at this stage, particularly since the issue was raised and more fully argued in the Bernstein case supra. If there is any merit in the argument it will be dealt with in the Bernstein judgment.

Costs

[155] Apart from a formal request for costs in the respective written arguments delivered on their behalf, none of the parties developed further argument on this question in such written arguments. Nor was there any specific argument addressed to the Court relating to the principles which ought to apply to the question of costs in constitutional litigation before this Court. It does not

obviously or necessarily follow that the rules as to costs which have been developed in pre-constitutional litigation must apply to constitutional litigation. One of the general rules is that, although an award of costs is in the discretion of the Court, successful parties should usually be awarded their costs and that this rule should be departed from only where good grounds for doing so exist.[309] One can think off-hand of at least one reason why this general rule might not apply to constitutional litigation, namely, that it could have a chilling effect on litigants, other than the wealthiest, desirous of enforcing their constitutional rights. It might also not apply where the constitutionality of a statute is challenged, a matter which would usually be one of public interest. I think it inadvisable that we should express ourselves on this issue, without the benefit of comprehensive argument. Until such time the issue should remain completely open. It therefore seems to me that the best course is to make no order as to costs. Should any of the applicants or respondents wish to pursue the matter of costs further, such party is at liberty to notify the Registrar in writing, within fourteen days of the order in this matter and upon notice to all other parties, of an intention so to do, whereupon further directions will be given.

[309]See, generally, Cilliers Costs (1972) at 11 - 17.

The Order

[156] I conclude that section 417(2)(b) of the Companies Act is inconsistent with the right to freedom protected in section 11(1) of the Constitution to the extent indicated above. It must therefore, pursuant to section 98(5) of the Constitution, be declared invalid to the extent of such inconsistency. This is not a case where an order in terms of the proviso to section 98(5) ought to be made. The declaration of invalidity is very narrow. Its only effect will be to render inadmissible, in criminal proceedings against a person previously examined pursuant to the provisions of section 417(2)(b), incriminating evidence given by such person under compulsion of the provisions of section 417(2)(b). Neither the interests of justice nor good government require that these provisions should be kept in force any longer. A declaration of invalidity will not affect any of the other provisions of sections 417 or 418 of the Companies Act and will have insignificant, if any, impact on the purpose or efficacy of enquiries under these proceedings.

[157] The following order is accordingly made:

1. The provisions of section 417(2)(b) of the Companies Act 1973 are, with immediate effect declared invalid, to the extent only that the words

"and any answer given to any such question may thereafter be used in evidence against him"

in section 417(2)(b) apply to the use of any such answer against the person who gave such answer, in criminal proceedings against such person, other than proceedings where that person stands trial on a charge relating to the administering or taking of an oath or the administering or making of an affirmation or the giving of false evidence or the making of a false statement in connection with such questions and answers or a failure to answer lawful questions fully and satisfactorily.

2. As from the date of this order, no incriminating answer given pursuant to the provisions of section 417(2)(b) of the Companies Act on or after 27 April 1994 shall be used against the person who gave such answer, in criminal proceedings against such person, other than proceedings excepted in 1. above.

3. No order is now made as to costs, but should any of the applicants or respondents in either matter wish to pursue the matter of costs further, such party is required to notify the Registrar in writing, within fourteen days of this order and upon notice to all other parties, of an intention so to

do, whereupon further directions will be given.

[158] **CHASKALSON P.**

I have read the meticulous judgment of Ackermann J. I agree with paragraphs [1] to [33] of his judgment. I also agree with his conclusion that section 417(2)(b) of the Companies Act, 1973 is inconsistent with the Constitution and with the order that he proposes as the remedy for that situation. I am, however, unable to agree with his analysis of the issue of standing and with his interpretation of section 11(1) of the Constitution on which he ultimately relies for his decision. In my view the matter is one in which the Applicants have standing and which can and should be dealt with under section 25(3) of the Constitution.

[159] The finding that section 417(2)(b) of the Companies Act is inconsistent with the Constitution is in essence based on a finding that the section infringes the rule against self incrimination. This is apparent from the reasons given by Ackermann J for holding the section to be inconsistent with the Constitution. The rule against self incrimination is not simply a rule of evidence. It is a right which by virtue of the provisions of section 25(3) is, as far as an accused person is

concerned, entitled to the status of a constitutional right.[1] It is inextricably linked to the right of an accused person to a fair trial. The rule exists to protect that right. If that right is not threatened the rule has no application. Thus a person who has been indemnified against prosecution, or a person convicted of a crime who is subsequently called to give evidence against a co-conspirator, would not be entitled to claim the privilege in respect of evidence covered by the indemnity or the conviction.[2] This connection between the unconstitutionality of section 417(2)(b) and the privilege is recognised in the order made by Ackermann J which is designed to eliminate the conflict by ensuring that evidence given by a witness at a section 417(2)(b) enquiry cannot be used against that witness if he or she is subsequently prosecuted.

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[1]Compare: S v Zuma and Others 1995(4) BCLR 401(CC), para. 33; see also, Ackermann J's judgment at para. 79.

[2]R v Kuyper 1915 TPD 308; R v Hubbard 1921 TPD 433; Ramsay v Attorney General for the Transvaal 1937 WLD 70; HALSBURY'S LAWS OF ENGLAND, vol. 17, para. 240 (4th ed. 1976).

[160] A challenge to the constitutionality of section 417(2)(b) should therefore, in my view, be characterised and dealt with as a challenge founded on the right to a fair criminal trial. It is precisely because section 417(2)(b) is inconsistent with that right, that its validity can be impugned. It is also the basis upon which the Applicants launched their constitutional challenge in the present case. Although they relied on various provisions of Chapter 3 to support their argument, at the core of their complaint was the concern that they were required to answer questions at the enquiry which might incriminate them, and which might thereafter be used in evidence against them. That they had such a fear was not disputed in argument. Although the matter was initially dealt with as directed by this Court on the basis of a referral of what was then an abstract question of law, the Applicant in the Ferreira matter had previously lodged with the Court extracts from the record of the enquiry which showed that he was indeed being called upon to answer incriminating questions. Heher J pointed out in his judgment in this case in the Witwatersrand Local Division[3] that both Applicants had reasonable grounds for such an apprehension. As this was never disputed I see no need to delay the proceedings further by calling for the record in the Supreme Court case to be lodged with us. The Applicants' desire to secure a ruling on the

[3]Reported as Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others (1995) (4) BCLR 437(W) at 456C-G.

constitutionality of the section cannot be characterised as being hypothetical or academic. It raises a real and substantial issue as far as the Applicants are concerned, and I have no doubt that they have an interest in having that issue resolved. Whether that interest is sufficient to give them standing to challenge the constitutionality of section 417(2)(b) is the matter to which I now turn.

[161] Section 4 of the Constitution provides that any law inconsistent with the provisions of the Constitution shall "be of no force and effect to the extent of the inconsistency". Section 98(2)(c) of the Constitution gives this Court jurisdiction to enquire into "the constitutionality of any law, including an Act of Parliament, irrespective of whether such law was passed or made before or after the commencement of this Constitution." Under section 98(5) the Court is directed to declare such law or a provision thereof to be invalid if it is found to be inconsistent with the Constitution. Other provisions of sections 98(5) and 98(6) enable the Court to control the consequences of such a declaration of invalidity. What is clear, however, is that the Court has a general jurisdiction to enquire into and declare an Act of Parliament or any provision thereof to be invalid.

[162] In the present case the Applicants allege that section 417(2)(b) is inconsistent with section 25(3) of the Constitution. This is a matter which this Court has

jurisdiction to enquire into, and it can do so in the present case if the Applicants have standing to seek such an order from it. Ordinarily a person whose rights are directly affected by an invalid law in a manner adverse to such person, has standing to challenge the validity of that law in the courts.[4] There can be no question that the Applicants have such an interest in the present case. Their right to refuse to answer questions that incriminate them is in issue and they seek to vindicate that right by challenging the only obstacle to their assertion of it.

It was argued, however, that this does not apply to the present Applicants because section 7(4) of the Constitution limits constitutional challenges to persons whose constitutional rights have been impaired or threatened. And, so the argument went, this could occur only if they are charged with a criminal offence and the evidence given by them at the enquiry is tendered against them at the criminal trial.

[163] If there is a conflict between section 25(3) of the Constitution and section

[4] Roodepoort-Maraisburg Town Council v Eastern Properties (Prop.) Ltd. 1933 AD 87 at 101 (Wessels, CJ, concurring).

417(2)(b) which, viewed objectively, renders section 417(2)(b) invalid to the extent of that inconsistency, it seems to me to be highly technical to say that a witness called to a section 417(2)(b) enquiry lacks standing to challenge the constitutionality of the section. A witness who genuinely fears prosecution if he or she is called upon to give incriminating answers cannot be said to lack an interest in the decision on the constitutionality of the section. To deny the witness the right to challenge the constitutionality of the section in such circumstances is in effect to say to the witness: the only obstacle to your right to refuse to answer incriminating questions is an unconstitutional provision, but you cannot ask this Court to declare the provision unconstitutional because you have not yet been charged. What if the witness refuses to answer and is threatened with imprisonment? Surely the witness would then be entitled to challenge the constitutionality of the section on which the prosecution is based. The fact that the witness might be entitled to turn to section 11(1) of the Constitution to found a constitutional challenge is not in my view an adequate answer to that dilemma. The right to challenge the constitutionality of a statute which affects you directly cannot be made dependent on the finding of some other constitutional right on which to base the challenge. What if there is no such right?

[164] The objection to constitutional challenges brought by persons who have only a

hypothetical or academic interest in the outcome of the litigation is referred to in Zantsi v Council of State, Ciskei and Others.[5] The principal reasons for this objection are that in an adversarial system decisions are best made when there is a genuine dispute in which each party has an interest to protect. There is moreover the need to conserve scarce judicial resources and to apply them to real and not hypothetical disputes. The United States courts also have regard to "the proper role of the Courts in a democratic society" which is to settle concrete disputes, and to the need to prevent courts from being drawn into unnecessary conflict with coordinate branches of government.[6] These objections do not apply to the present case. The Applicants have a real and not a hypothetical interest in the decision. The decision will not be academic; on the contrary it is a decision which will have an effect on all section 417 enquiries and there is a pressing public interest that the decision be given as soon as possible. All the requirements ordinarily set by a court for the exercise of its jurisdiction to issue a

[5]1995(10) BCLR 1424 (CC), para. 7.

[6]LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW, at 109 (2d ed. 1988).

declaration of rights are therefore present.[7] The question is whether different considerations apply in constitutional cases.

[7] Ex Parte Nell 1963(1) SA 754 (A) at 759G-760A; Ex Parte Prokureur-General, Transvaal 1978(4) SA 15 (T) at 20B-D; Ex Parte Chief Immigration Officer, Zimbabwe 1994(1) SA 370 (ZSC) at 376B-377F.

[165] Whilst it is important that this Court should not be required to deal with abstract or hypothetical issues, and should devote its scarce resources to issues that are properly before it, I can see no good reason for adopting a narrow approach to the issue of standing in constitutional cases. On the contrary, it is my view that we should rather adopt a broad approach to standing. This would be consistent with the mandate given to this Court to uphold the Constitution and would serve to ensure that constitutional rights enjoy the full measure of the protection to which they are entitled.[8] Such an approach would also be consistent in my view with the provisions of section 7(4) of the Constitution on which counsel for the Respondents based his argument. I will deal later with the terms of this section and the purpose that it serves.

[166] The Canadian courts accept that persons

> have a standing to challenge unconstitutional law if they are liable to conviction for an offence under the law even though the unconstitutional effects are not directed against [them] per se.[9]

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[8]See, e.g., R v McDonough [1989] 40 CRR 151 at 155.

[9]Morgentaler, Smoling and Scott v R [1988] 31 CRR 1 at 26.

It is sufficient for the accused to show that he or she is directly affected by the unconstitutional legislation. If this is shown "...it matters not whether he is the victim".[10] Thus in the Morgentaler case (cited above) a male doctor was entitled to challenge the constitutionality of legislation dealing with abortion under which he was liable to be prosecuted, although the rights upon which the constitutional challenge were based were the rights of pregnant women, which did not and could not vest in the male doctor. Although corporations do not have rights under the Canadian Charter and cannot institute Charter challenges in their own behalf, they can challenge the constitutionality of a statutory provision at a criminal trial on the grounds that it infringes the rights of human beings and is accordingly invalid.[11] Where, as in the present case, the impugned section of the Companies Act has a direct bearing on the Applicants' common law rights, and noncompliance with the section has possible criminal consequences, they have sufficient standing in my view to secure a declaration from this Court as to

[10] R v McDonough (supra) at 155 (citation omitted).

[11] R v Wholesale Travel Group Inc. [1992] 7 CRR (2d.) 36 at 84-86; R v Big M Drug Mart Ltd. 18 DLR (4th) 321; HOGG, CONSTITUTIONAL LAW OF CANADA, para. 37.2(d) (3rd ed 1992).

the constitutionality of the section.

[167] I do not read section 7(4) as denying the Applicants this right. The section deals with the situation where "...an infringement of or threat to any right entrenched in this Chapter is alleged..." It therefore applies specifically to the jurisdiction vested in the courts by section 98(2)(a) and 101(3)(a) of the Constitution to deal with "any alleged violation or threatened violation of any fundamental right entrenched in Chapter 3". But section 98(2) vests a general jurisdiction in this Court to interpret, protect and enforce the provisions of the Constitution. Section 7(4) in dealing with the section 98(2)(a) jurisdiction provides that where an infringement or threat to the infringement of a constitutional right is alleged, any of the persons referred to in section 7(4)(b) will have standing to bring the matter to "a competent court of law". The category of persons empowered to do so is broader than the category of persons who have hitherto been allowed standing in cases where it is alleged that a right has been infringed or threatened, and to that extent the section demonstrates a broad and not a narrow approach to standing.[12] Section 7(4) does not, however, deal specifically with the jurisdiction vested in this Court by the other subsections of section 98(2). Section 98(2)(c)

[12] Cf. Roodepoort Maraisburg Town Council (supra) and the comments there made concerning the *actio popularis*.

vests in this Court the jurisdiction to enquire into "the constitutionality of any law, including an Act of Parliament, irrespective of whether such law was passed before or after the commencement of this Constitution." The constitutionality of a law may be challenged on the basis that it is inconsistent with provisions of the Constitution other than those contained in Chapter 3. Neither section 7(4) nor any other provision of the Constitution denies to the Applicants the right that a litigant has to seek a declaration of rights in respect of the validity of a law which directly affects his or her interests adversely.

[168] Once it is accepted, as Ackermann J has, that the issue of constitutionality has to be tested objectively and not subjectively, there is no valid reason for denying persons in the position of the Applicants standing to secure a ruling on the validity of a law that directly affects their interests. Even if section 7(4) were to be read extensively as applying by inference to all the subsections of section 98(2), I would not see it as an obstacle to the Applicants' case. In that event it would have to be read as meaning "where an infringement of or threat to any right entrenched in this Chapter [or any dispute over the constitutionality of any executive or administrative act or conduct or threatened administrative act or conduct of any organ of the state, or any enquiry into the constitutionality of any law, including an Act of Parliament, irrespective of whether such law was passed

or made before or after the commencement of this Constitution...] is alleged" the persons referred to in paragraph (b) shall have standing. There would be no need on this extensive interpretation of the section to construe section 7(4)(b)(i) as meaning that the person acting in his or her own interest must be a person whose constitutional right has been infringed or threatened. This is not what the section says. What the section requires is that the person concerned should make the challenge in his or her own interest. It is for this Court to decide what is a sufficient interest in such circumstances. In my view, on the facts of the present case, the Applicants have a sufficient interest to seek such a ruling. If that is so they can rely on the argument that viewed objectively section 417(2)(b) is inconsistent with the Constitution because it infringes the right to a fair trial guaranteed by section 25(3).

[169] Because of his analysis of the issue of standing Ackermann J was driven to base his judgment on section 11(1) of the Constitution and not on section 25(3). In giving the judgment of the majority of this Court in Coetzee v Government of the Republic of South Africa,[13] Kriegler J declined to examine "...the philosophical foundation or the precise content of the right"[14] to freedom under section 11(1) or

[13]1995(10) BCLR 1382 (CC).

[14]Id. at para. 10.

to attempt to "...determine the outer boundaries of the right."[15] Wilson J adopted a similar approach in her dissent in Thomson Newspapers v Canada,[16] saying that she did not consider it necessary in that case "to attempt to determine the perimeters of "liberty" and "security of the person"."[17] This is a complex and difficult undertaking which has previously been alluded to in the judgment of Sachs J in Coetzee's case. The approach of the majority in Coetzee's case is in accordance with the principle laid down by this Court in Zantsi's case.[18] If the same approach had been followed in the present case I would not have entered the debate on the meaning of "freedom" in section 11(1). In dealing with section 11(1), however, Ackermann J proceeded on the basis that "freedom" should be "defined as widely as possible" and as embracing the right of individuals "not to have obstacles to possible choices and activities placed in their way by...the State". I disagree with this approach and feel constrained in the circumstances

[15]Id.

[16][1990] 67 DLR (4th) 161 ("Thomson").

[17]Id. at 186.

[18]Supra note 5, at para. 5.

to express my disagreement and my reasons therefor.

[170] The primary, though not necessarily the only, purpose of section 11(1) of the Constitution is to ensure that the physical integrity of every person is protected. This is how a guarantee of "freedom (liberty) and security of the person" would ordinarily be understood. It is also the primary sense in which the phrase, "freedom and security of the person" is used in public international law. The American Declaration of the Rights and Duties of Man, the International Covenant on Civil and Political Rights, the European Convention for the Protection of Human Rights and Fundamental Freedoms, and the African Charter on Human and People's Rights, all use the phrase "liberty and security of the person" in a context which shows that it relates to detention or other physical constraints.[19] Sieghart,[20] notes that although "...all the instruments protect these two rights jointly in virtually identical terms, they have been interpreted as being separate and independent rights", and that the European Commission of Human Rights and The European Court of Human Rights have found that what is protected is "physical liberty" and "physical security". There is

[19]Guzzardi v Italy 3 EHRR 333 at 362, para. 92 (with respect to that wording in Article 5 of the European Convention).

[20]SIEGHART, THE INTERNATIONAL LAW OF HUMAN RIGHTS, Clarendon Press, Oxford (1992) 139-142 (citing Guzzardi's case, supra; Arrowsmith v United Kingdom (7050/75) Report: DR 19,5; and X v United Kingdom (5877/72) CD 45,90).

nothing to suggest that the primary purpose of section 11(1) of our Constitution is different. It finds its place alongside prohibitions of "detention without trial", and of "torture" and "cruel, inhuman or degrading treatment or punishment" - all matters concerned primarily with physical integrity. This does not mean that we must construe section 11(1) as dealing only with physical integrity. Whether "freedom" has a broader meaning in section 11(1), and if so, how broad it should be, does not depend on the construction of the section in isolation but on its construction in the context of Chapter 3 of the Constitution.

[171] Chapter 3 is an extensive charter of freedoms. It guarantees and gives protection in specific terms to equality, life, human dignity, privacy, religion, belief, opinion (including academic freedom in institutes of higher learning), freedom of expression, freedom of assembly, freedom of demonstration and petition, freedom of association, freedom of movement, freedom of residence, freedom to enter, remain in and leave the Republic of South Africa, political rights, access to court, access to information, and administrative justice. Chapter 3 also provides guarantees and protection in respect of fair arrest, detention and trial procedures, economic activity, labour relations, property, the environment, language and culture, education and the rights of children.

[172] This Court has adopted a purposive interpretation of the Constitution,[21] and as Ackermann J points out, it has also held that section 11:

> must not be construed in isolation, but in its context, which includes the history and background to the adoption of the Constitution, other provisions of the Constitution itself and, in particular, the provisions of Chapter 3 of which it is part. It must also be construed in a way which secures for "individuals the full measure" of its protection.[22]

These considerations must be borne in mind in construing section 11(1). I agree with Ackermann J that the mechanical application of the *expressio unius* principle is not appropriate to an interpretation of Chapter 3. This does not mean, however, that the structure of Chapter 3, the detailed formulation of the different rights, and the language of section 11 can be ignored.[23]

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[21] S v Zuma 1995 (4) BCLR 401 (CC), para. 15; S v Makwanyane 1995 (6) BCLR 655 (CC), para. 9; and S v Mhlungu 1995 (7) BCLR 793 (CC), para. 8.

[22] S v Makwanyane 1995 (6) BCLR 655 (CC), para. 10.

[23] See in this regard the comments of L'Heureux-Dubé J in the Thomson case, supra, at p.269-

270.

[173] Chapter 3 of the Constitution enumerates the wide range of fundamental freedoms to which I have referred. All are subject to section 33, the limitations clause. The criteria according to which Chapter 3 rights may be limited are referred to in paragraph 125 of Ackermann J's judgment. Some grounds are common to all rights, but a distinction is drawn between those rights in respect of which a limitation must also be shown to be "reasonable" and those which require the limitation to be both "reasonable" and "necessary". The differentiation pointedly made in section 33 of the Constitution between different categories of freedom has a bearing on the meaning to be given to section 11(1). Limitations of section 11(1) are subject to the "necessary" test, which is an indication that the section is concerned with a freedom of a "higher order" than those enumerated freedoms which are not subjected to such an onerous test. A guarantee of the physical integrity of all persons is a freedom of the highest order which calls for the more onerous test of limitation. I am not persuaded, however, that this could be said of section 11(1) generally if it is given as wide a meaning as Ackermann J gives it in paragraph 54 of his judgment. I have found nothing in the legislative history to suggest that the framers of the Constitution intended section 11(1) to have such a meaning; nor do I consider it necessary, as Ackerman J has suggested that it may be, to adopt such a construction in order to give substance to the right to human dignity. In the context of the multiplicity of rights with which

it is associated in Chapter 3, human dignity can and will flourish without such an extensive interpretation being given to section 11(1).

[174] It would in my view be highly anomalous to give to unenumerated rights forming a "residue" in section 11(1) a higher status, subject to closer scrutiny, than a right so important to freedom as privacy, which is subject only to the "reasonable' test. If there are residual freedom rights within section 11(1), that residue should be confined to freedoms which, though not enumerated elsewhere in Chapter 3, are entitled to be characterised as fundamental freedoms and thus properly claimable under section 11(1). If freedom were to be given the wide meaning suggested by Ackermann J.[24] all regulatory laws, which are a feature of any modern society, would have to be justified as being necessary. In my view this is not what is contemplated by the provisions of section 11(1), nor is it a conclusion to which we need be driven. It would require courts to sit in judgment on what are essentially political decisions, and in doing so to require the legislature to justify such decisions as being necessary. This is not something that is required either by the words or the context of the section. If the intention had been to vest the control of freedom in that sense in the courts, I would have

[24] I.e., "the right not to have "obstacles to possible choices and activities" placed in [the way of any person] by ... the State", para. 54 (citation omitted).

expected this to have been clearly stated and not left to be inferred from an extensive interpretation of the section.

[175] Reference is made in the judgment of Ackermann J to the manner in which the courts have construed the Constitutions of the United States of America, Canada and Germany. It is important to appreciate - as Ackermann J is at pains to point out - that these Constitutions are formulated in different terms, and the rights protected under them are not dealt with in the same way as the rights protected in Chapter 3 of our Constitution are.

[176] In the United States of America the courts have given a wide meaning to the provisions of the Fifth and Fourteenth amendments which contain prohibitions against the deprivation of "life or personal liberty or property without due process of law". The jurisprudence on the Fourteenth amendment has been of particular importance in this regard; it has also been extremely contentious. The Fourteenth Amendment is the means through which the courts have extended the Bill of Rights to provide protection against State action. In doing so they have held explicitly that "...that term [liberty] is not confined to mere freedom from

bodily restraint...".[25] The United States Constitution, however, contains none of the detail found in Chapter 3 of our Constitution. The Fourteenth amendment is the only provision of the Constitution that protects individuals against the legislative power of the States. This protection has had to be spelt out of the terse injunction of section 1 of the Fourteenth amendment that: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

[177] The Fourteenth Amendment guarantees of "privileges" and "immunities" of " life, liberty, or property" and the "equal protection of the laws" have been the basis of the jurisprudence of freedom in the United States. They are the source of unenumerated rights of personal freedom which have been identified and enforced by the courts in judgments, some of which have been the subject of great controversy.

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[25] Bolling v Sharpe 347 US 497 (1954) at 499; Board of Regents v Roth 408 US 564 (1972) at

[178] The jurisprudence of the United States is influenced by the fact that the Constitution is 200 years old. To give effect to the aspiration set out in the preamble to the Constitution to "secure the Blessings of Liberty to ourselves and to our Posterity" the courts have construed the notion of liberty in the Fifth and Fourteenth amendments in the light of the needs of a changing society. They have given a broad meaning to "liberty" to enable them to do so. At the same time they have adopted different levels of scrutiny as a means of addressing institutional conflict which might otherwise have existed between the courts and the Federal and State legislatures. In some instances, particularly in the field of economic regulation, all that is required is that there should be a rational basis for the legislation that infringes the right. At the other extreme, infringements of certain unenumerated rights such as privacy - characterised as fundamental - are subjected to strict scrutiny, whilst in between, infringements of other rights are subjected to "intermediate" scrutiny.

572.

[179] The passages from the judgment of Wilson J in the Canadian Supreme Court referred to by Ackermann J in para 76 of his judgment, describe the situation confronting a witness at an enquiry such as that conducted under section 417(2)(b) and characterise it as being one touching "upon the physical integrity of the individual as well as the individual's reasonable expectation of privacy." The decision in this case cannot be relied upon for the proposition that freedom should be "defined as widely as possible" and as far as I am aware the Canadian Supreme Court has not suggested that this is how liberty should be construed in section 7 of the Charter.[26] Wilson J, a vigorous upholder of liberty, found it necessary to say in the Thomson case that "liberty" and "personal security" as used in section 7 of the Canadian Charter must "[c]learly be subject to some limits; otherwise any tenuous restriction placed on an individual would constitute a violation of liberty and security of the person."[27] She declined, however, to attempt to determine those limits. It is also important to bear in mind that the guarantee of "liberty" and "security of the person " in section 7 of the Canadian Charter is subject to the qualification that it may be encroached upon in accordance with the principles of fundamental justice". Liberty is implicated by

[26]See, in this regard, the judgment of Lamer J in Reference Re Criminal Code s. 192 and 195 (1)(c) [1990] 48 CRR 1 at 46, and HOGG, supra, para. 44.7 and 44.8 (3rd ed 1992).

[27] Thomson, supra, at 186 (Wilson J, dissenting); see also, Edward Brooks and Art v The Queen 35 DLR (4th) 1 at 54 (per Dickson, CJC).

laws which impose imprisonment as a penalty for their non-observance, but under Canadian law a person objecting to the constitutionality of the law on these grounds has the onus of showing that it is not in accordance with the fundamental principle of justice Reference Re Criminal Code,[28] and to discharge this onus it must be established that the legislative scheme is so unfair as to violate that principle Reference Re Criminal Code.[29] Even if this is done it is still open to the prosecution to justify the law under section 1 of the Charter.[30] Section 7 of the Charter is therefore both in substance and form materially different to section 11(1) of our Constitution.

[180] Liberty is dealt with in article 2 of the German Constitution The wording of this article is also different to the wording of section 11 of our Constitution. The

[28]Supra, at 46.

[29]Supra, at 17.

[30]Morgentaler, Smoling and Scott v R [1988] 31 CRR 1 at 33.

provision closest to section 11(1) is article 2(2) which provides:

> Everyone shall have the right to life and to the inviolability of his person. The liberty of the individual shall be inviolable. These rights may be encroached upon pursuant to law.[31]

[31]THE BASIC LAW OF THE FEDERAL REPUBLIC OF GERMANY, Press and Info. Office of the Government of the Federal Republic of Germany (1977).

As Ackermann J points out in paragraph 83 of his judgment "liberty" in the context of article 2(2) is construed as referring to freedom from physical constraint. The fact that it is found alongside a provision which explicitly lays down that "everyone shall have the right to the free development of his personality" which in turn has been construed by the German Federal Constitutional Court as protection of a general freedom to act,[32] is no reason for us to give that meaning to "freedom" in section 11(1) of our Constitution. Currie indicates that the extensive interpretation of the right to free development of the personality by the German Federal Constitutional Court was influenced by the legislative history of the provision.[33] He also points out that in Elfe's case,[34] referred to in paragraph 86 of Ackermann J's judgment, the court held that the general right to freedom of action is limited "...both by the Basic Law itself and 'by every legal norm that conforms procedurally and substantively with the Constitution.'"[35] That apparently requires laws to conform with "the principles of the rule of law and the social welfare state."[36] Implicit in the social welfare state

[32]DAVID P. CURRIE, THE CONSTITUTION OF THE FEDERAL REPUBLIC OF GERMANY, at 316 (Univ. of Chicago Press 1994).

[33]Id.

[34]6 BverfGE 32.

[35]Supra note 32 at 317-318 (citation omitted).

[36]Supra note 32 at 318 (citation omitted).

is the acceptance of regulation and redistribution in the public interest. If in the context of our Constitution freedom is given the wide meaning that Ackermann J suggest it should have, the result might be to impede such policies. Whether or not there should be regulation and redistribution is essentially a political question which falls within the domain of the legislature and not the court. It is not for the courts to approve or disapprove of such policies. What the courts must ensure is that the implementation of any political decision to undertake such policies conforms with the Constitution. It should not, however, require the legislature to show that they are necessary if the Constitution does not specifically require that this be done.

[181] In terms of our Constitution we are enjoined to protect the freedom guaranteed by section 11(1) against all governmental action that cannot be justified as being necessary. If we define freedom in the context of section 11(1) in sweeping terms we will be called upon to scrutinise every infringement of freedom in this broad sense as being "necessary". We cannot regulate this power by mechanisms of different levels of scrutiny as the courts of the United States do, nor can we control it through the application of the principle that freedom is subject to laws that are consistent with the principles of "fundamental justice", as the Canadian courts do.

[182] We should be careful to avoid the pitfall of Lochner v New York[37] which has been described by Professor Tribe in his seminal work on American Constitutional Law, as being "not in judicial intervention to protect "liberty" but in a misguided understanding of what liberty actually required in the industrial age."[38] The Lochner era gave rise to serious questions about judicial review and the relationship between the court and the legislature, and as Professor Tribe points out, the collapse of Lochner gave "credence to the notion that the legislative process should be completely wilful and self-controlled, with absolutely no judicial interference except where constitutional provisions much more explicit than due process were in jeopardy".[39]

[183] The protection of fundamental freedoms is pre-eminently a function of the court. We should not, however, construe section 11 so broadly that we overshoot the mark and trespass upon terrain that is not rightly ours. In a famous dissent in Lochner's case, Holmes J said:

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[37]198 US 45 (1905).

[38]Supra note 6, at 769.

[39]Id. at 582.

> I think that the word liberty in the Fourteenth Amendment is perverted when it is held to prevent the natural outcome of a dominant opinion, unless it can be said that a rational and fair man necessarily would admit that the statute proposed would infringe fundamental principles as they have been understood by the traditions of our people and our law.[40]

The fundamental principles to which we must look for guidance in this regard are those laid down by our Constitution. They are the principles of an open and democratic society based on freedom and equality. In a democratic society the role of the legislature as a body reflecting the dominant opinion should be acknowledged. It is important that we bear in mind that there are functions that are properly the concern of the courts and others that are properly the concern of the legislature. At times these functions may overlap. But the terrains are in the main separate, and should be kept separate.

[184] This does not mean that we must necessarily confine the application of section 11(1) to the protection of physical integrity. Freedom involves much more than that, and we should not hesitate to say so if the occasion demands it. But, because of the detailed provisions of Chapter 3, such occasions are likely to be rare. If despite the detailed provisions of Chapter 3 a freedom of a fundamental

[40]Supra note 37 at 76.

nature which calls for protection is identified, and if it cannot find adequate protection under any of the other provisions in Chapter 3, there may be a reason to look to section 11(1) to protect such a right. But to secure such protection, the otherwise unprotected freedom should at least be fundamental and of a character appropriate to the strict scrutiny to which all limitations of section 11 are subjected.

[185] Against this background I can see no objection to accepting provisionally that section 11(1) is not confined to the protection of physical integrity and that in a proper case it may be relied upon to support a fundamental freedom that is not otherwise protected adequately under Chapter 3. This, however, is not such a case. The reason why the Canadian Courts have dealt with this issue under section 7 of the Charter is that the requirement of "fundamental justice" which is part of that section has been construed as "...obviously requir[ing] that a person accused of a crime receive a fair trial."[41] Section 11(1) of our Constitution contains no comparable provision. In the context of our Constitution, and having regard to the specific wording of the section itself, and the fact that the right to a fair trial is dealt with specifically and in detail under section 25(3), I cannot read section 11(1) as including a residual fair trial right.

In paragraph 3 of this judgment I indicated that "a challenge to the constitutionality of section 417(2)(b) should...be characterised and dealt with as a challenge founded on the right to a fair criminal trial." It is precisely because section 417(2)(b) is inconsistent with this right that its validity can be impugned. As long as incriminating evidence is not admissible at the criminal trial and the use of "derivative evidence" at such trial is made dependant on such use being subject to "fair criminal trial" standards, the rule against self incrimination is adequately protected. If this is so, the first of the two requirements which would have to be established in order to invoke section 11(1) to protect a residual right of freedom, i.e., that the right is not otherwise protected adequately by Chapter 3, has not been met, and it is not necessary to consider the second requirement, i.e., whether the "residual right" claimed is of a character appropriate for protection under section 11(1).

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[41]HOGG, supra note 11, at 44.16.

[186] Ackermann J has demonstrated that the rule against being compelled to answer incriminating questions is inherent in the right to a fair trial guaranteed by section 25(3).[42] Because he held that the Applicants could not rely on section 25(3) he analysed the issues in the present case in terms of section 11(1). The reasoning that led him to conclude that section 417(2)(b) is inconsistent with section 11(1) would also have led him to conclude that it is inconsistent with section 25(3). It seems to me to be clear that this is so. To some extent his reasons are shaped by the fact that the issue is treated as one implicating freedom and not the right to a fair trial. In substance, however, they can be applied to a section 25(3) analysis and I have nothing to add to them, nor to his reasons for the conclusion that the issue of derivative evidence is one that ought properly to be decided by a trial court. I agree, therefore, with the order proposed by him.

Mahomed DP, Didcott J, Langa J, Madala J and Trengove AJ concur in the judgment of Chaskalson P.

[187] **KRIEGLER J**:

Regretfully I cannot agree with the conclusions of any one of my four colleagues

[42] See paragraph 79 of his judgment.

(Chaskalson P and Ackermann, O'Regan and Sachs JJ) whose draft judgments I have had the privilege of considering. Notwithstanding the erudition and persuasive force of their two distinct lines of reasoning, I cannot subscribe to their joint conclusion. I also dissent from the order they unanimously propose.

[188] In essence Ackermann and Sachs JJ conclude that the applicants do not have standing to seek relief under the fair trial protection of the Constitution,[1] against a provision in the Companies Act[2] relating to the admissibility of evidence.[3] They do not non-suit the applicants, however, holding that they qualify for assistance under section 11(1) of the Constitution, which guards personal liberty. Chaskalson P and O'Regan J do not see the applicants' complaint as falling under section 11(1) of the Constitution. They nevertheless agree that the applicants are entitled to an order invalidating the qualification in section 417(2)(b) of the Companies Act on the basis of its irredeemable conflict with rights protected in the Constitution. They analyse the standing provisions of the Constitution[4] and hold that witnesses at a section 417 enquiry have *locus standi*

[1]Section 25(3) of the Constitution of the Republic of South Africa No. 200 of 1993.

[2]Companies Act No. 61 of 1973.

[3]The qualification to section 417(b) of the Companies Act which renders admissible at a subsequent criminal trial evidence compulsorily obtained from persons at an enquiry into the affairs of an insolvent company.

[4]Contained in section 7(4).

to raise the alleged unconstitutionality of the qualification under the fair trial rubric.

[189] I both agree and disagree with those views - up to point. I agree with Ackermann and Sachs JJ that witnesses at a section 417 enquiry cannot be brought within the ambit of the fair trial procedures of section 25(3). At the same time however I agree with Chaskalson P and O'Regan J that section 11(1) is inapposite in these cases.

[190] In my view, therefore, no invalidation of section 417(2)(b) of the Companies Act, or any part of that subsection, is warranted in either of these cases. This Court is neither called upon nor empowered to consider the constitutionality of section 417(2)(b) now. And if and when that issue does arise, I would urge a much closer consideration of its possible saving under section 33(1) of the Constitution than that conducted by my colleagues in the present cases. In particular I would require to be persuaded that the differences between South Africa on the one hand, and the foreign jurisdictions used as lodestars, on the other, are not so great that a local departure is not warranted. That will entail, *inter alia*, a comparison of the safeguards against corporate fraud in the countries concerned and the relative competence of the supervisory, investigatory and prosecuting

authorities in the particular countries compared with what is available in this country. I would also want to be persuaded that it is apt to equate the admissibility provisions of the Insolvency Act[5] with those under scrutiny here. That debate would embrace the question whether the materially greater scope of activities conducted under the shield of corporate anonymity and limited liability does not justify a distinction. Because of my view that a cost/benefit analysis of that kind can not arise in the present circumstances, no more need be said on the topic.

[191] My line of thinking is relatively straightforward and I hope to make it plain in a few pages. That is possible, primarily because the issues have been so crisply identified by Ackermann J.

[5] Insolvency Act No. 24 of 1936.

[192] The cases do not belong here, neither as referrals under section 102(1) of the Constitution, nor as instances of direct access under section 100, read with Constitutional Court Rule 17. Ackermann J's discussion of section 102(1)[6] omits any reference to the proviso to the subsection, namely:

> Provided that, if it is necessary for evidence to be heard for the purposes of deciding such issue, the provincial or local division concerned shall hear such evidence and make a finding thereon, before referring the matter to the Constitutional Court.

The words are quite unequivocal - cases dependent upon particular evidence cannot be referred to this Court unless and until such evidence has been heard and a finding thereon has been made.

[6] Especially in paragraph [6] of his judgment.

[193] Therefore, although I am in respectful agreement with the view of Ackermann J,[7] concurred in by Chaskalson P and O'Regan and Sachs JJ, that the dismissal of the applications in the Court *a quo* rendered referrals under section 102(1) legally incompetent, there was, however, in my view, an even more fundamental ground for this Court rejecting them. As I will try to show, the question whether any constitutionally protected right of the applicants had been infringed (or could be said to have been threatened) merely by a *subpoena* to attend an inquiry in terms of section 417 of the Companies Act for the purposes of interrogation concerning the trade, dealing, affairs or property of the company,[8] cannot conceivably be answered on any tenable allegation that could be made at this stage by the applicants in the instant cases.

[194] In terms of the proviso to section 102(1) that would be an insurmountable obstacle to a referral of the kind - and at the time - in issue here. One simply cannot be heard to say: "I do not know what they want to ask me; I do not know what my answers will be; because of my guilty knowledge, however, I am afraid that such answers may turn out to evidence some offence on my part; I do not know whether it is so, but I may be prosecuted for such offence; I do not know

[7] At Paragraph [9] of his judgment.

[8] See section 417(1) of the Companies Act.

whether such evidence will be used against me by the prosecution; nor do I know what its cogency will be; I do not know whether the trial court will uphold or reject an objection on my behalf to such evidence; I do not know what the weight of the other evidence will be; I do not know if I will be convicted. But this I do know - I may be convicted on the strength of what I am obliged to disclose at an enquiry instituted at the instance of the Supreme Court or the Master concerning an insolvent company's affairs. Therefore, please declare, at this juncture already, that I need not answer questions that may reveal my deeds."[9]

[195] But the substantive point to be made is not directed at the formal obstacle constituted by the proviso to section 102(1). The crucial point is that no witness subpoenaed to testify at a section 417 enquiry can at that stage possibly formulate allegations essential for relief based on fair trial provisions. And if the witness cannot bring the case within those provisions, I see nothing in the Constitution that avails. There simply is no general prohibition against self-incrimination to be found anywhere in the Constitution, nothing express and

[9] I do not overlook but regard as remote the kind of case where the witness is not sure whether the particular conduct does or does not constitute a crime.

nothing implicit. It is only if and when the production of evidence obtained pursuant to a section 417 enquiry jeopardizes the fairness of the trial that the Constitution can be invoked.

[196] I do not wish to be misunderstood. I am not distinguishing between evidence of what the accused said *qua* section 417 witness (i.e. direct evidence) and evidence based on such disclosures (i.e. derivative evidence). That is a thicket that we may have to penetrate at some stage; but not now. Nor am I referring to any possible proceeding against the witness for non-compliance with the duty to testify at the section 417 enquiry. It is the production at a subsequent criminal trial of evidence (directly or derivatively) elicited at such an enquiry that may render the trial unfair, and then a breach of the provisions of Chapter 3 of the Constitution may arise. It is only then that a court would have to decide whether the unfairness of producing the involuntarily extracted evidence in question can be saved under section 33(1). It will be a value judgment based on all the data then available. Previously an accused had no general right to demand a fair trial. Now such a right exists under section 25(3) and may be invoked where section 417(2)(b) works an injustice.

[197] I am also satisfied that a prayer for direct access under section 100(2) of the

Constitution and Rule 17, founded on such allegations as the applicants can possibly make, should receive short shrift from this Court. The subsection postulates that such access must be "in the interest of justice" and the Rule explains that an applicant must ordinarily establish exceptional circumstances prejudicing the ends of justice and good government. I cannot accept that the case of an applicant who, on his own showing, has done things for which he fears prosecution if the truth be revealed, can ordinarily be brought within those strict criteria.

[198] I wish to emphasize that I am saying nothing about the propriety of using involuntarily elicited evidence to convict the person from whom it was obtained. That aspect does not arise here. All we are discussing now is whether, at the stage when the evidence is being elicited, the witness can be heard to complain about its possible use later. If the applicants were accused persons against whom the prosecution had adduced or had indicated that it intended adducing such evidence, other considerations would be in issue. Those issues do not arise here. The current discussion focuses exclusively on the right of audience of a probable criminal at the stage of the enquiry contemplated by section 417(2)(b) of the Companies Act.

[199] The essential flaw in the applicants' cases is one of timing or, as the Americans and, occasionally, the Canadians call it, "ripeness". That term has a particular connotation in the constitutional jurisprudence of those countries which need not be analysed now. Suffice it to say that the doctrine of ripeness serves the useful purpose of highlighting that the business of a court is generally retrospective; it deals with situations or problems that have already ripened or crystallized, and not with prospective or hypothetical ones.[10] Although, as Professor Sharpe points out[11] and our Constitution acknowledges,[12] the criteria for hearing a constitutional case are more generous than for ordinary suits, even cases for relief on constitutional grounds are not decided in the air. And the present cases seem to me, as I have tried to show in the parody above, to be pre-eminent examples of speculative cases. The time of this Court is too valuable to be frittered away on hypothetical fears of corporate skeletons being discovered.

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[10] See Laurence H. Tribe, AMERICAN CONSTITUTIONAL LAW 78 - 82, paragraph 3.10 (1988); Peter W. Hogg, CONSTITUTIONAL LAW OF CANADA paragraphs 56.4 and 56.17 (1992); Robert J. Sharpe, CHARTER LITIGATION 340-2 (1987).

[11] Supra note 10, at 328 et. seq.

[12] See section 7(4) and the analysis of the section in the judgment of Chaskalson P, at paragraphs [166] to [169]. See also

Zantsi v Council of State, Ciskei and Others, 1995 (10) BCLR 1424 (CC) at paragraph 7.

[200] The challenge to the relevant provision of section 417(2)(b) of the Companies Act arises from the conflict it engenders between two interests. On the one hand society at large has a material interest in ascertaining as fully and reliably as possible why a defunct company went under. A company is not a live human being from whom one can enquire what went wrong in the business, or where its books of account, records and assets are. It is a legal fiction. Over time human ingenuity devised and developed the limited liability company as a vehicle for amassing venture capital, while limiting the risk involved. It worked wonderfully and served as the blueprint for the growth of commerce and industry around the world.

[201] But there were risks, one of which was that the size and anonymity of corporations rendered it more difficult to conduct post-mortems when they collapsed. Obviously those characteristics could also serve as a shield for dishonesty. Consequently special safeguards were evolved to protect the interests of outsiders (i.e. creditors and ordinary investors) against those involved in the running of a company. Section 417 of the Companies Act is an example. Without a mechanism of this kind the danger to creditors would be materially increased, their protection attenuated.

[202] The other interest involved lies at a more atavistic level. In open and democratic societies based on freedom and equality,[13] it is regarded as impermissible for the state to use incriminating evidence extorted from an accused person in order to procure his or her conviction. This so-called privilege against self-incrimination has proved a powerful bulwark against governmental excesses, as Ackermann J so lucidly illustrates in his extensive and instructive survey of comparable foreign jurisprudence.[14] The survey demonstrates that different societies have at different times devised a variety of subsidiary rules to ensure that the prosecution must make out its case without any claim to assistance by an accused person.

[13]The values of which we and the other courts of land are enjoined by section 35(1) of the Constitution to promote.

[14]See paragraphs [72] to [113] of his judgment in the course of which he reviews on an array of relevant Canadian, American, English, German and European Union sources.

[203] To that end South African common law honours the principle that one should not be compelled to produce evidence against oneself.[15] Conformably rules of evidence and of criminal procedure were evolved to give practical effect to the principle. Those rules and the various statutory endorsements thereof fall outside the scope of this discussion. We are not being asked to intervene because any rule of the common law or of statute law is being, or is about to be, breached to the irreparable detriment of the applicants. Had that been the prayer before us, we would have been obliged to dismiss it for lack of jurisdiction, because that is not a constitutional issue. What we are concerned with here is an invocation of, specifically, the Constitution. Chapter 3 thereof, as Chaskalson P points out,[16] is an extensive and detailed charter of freedoms. Yet nowhere is there any mention of a general - or independent - right against self-incrimination. What one does find, is the right referred to in section 25(3)(c) and (d), i.e. as a subsidiary part of the right to a fair trial, to maintain silence and not to be a compellable witness against oneself. Those provisions, on the clear wording and self-evident context thereof, relate to the proceedings during a criminal trial - and to nothing else. To my mind it is not possible to read those provisions as embodying the general privilege against self-incrimination. Nor can I read them

[15] The maxim "nemo pro se prodere tenetur" of ancient lineage, encapsulates the principle.

[16] In paragraphs [171] and [184] of his judgment.

as referring to any process so far removed from, and antecedent to, a trial as an enquiry under section 417 of the Companies Act.

[204] Indeed, where the Constitution wants to refer to proceedings related to but preceding a criminal trial, it does so quite explicitly and clearly in section 25(2). In that subsection, dealing with arrested persons, paragraph (a) lays down that one is to be warned of the right to silence. That right of course is one of the main supporting struts of the privilege against self-incrimination.

[205] I do not believe that these cases can be entertained on any reading of section 7(4) of the Constitution. However widely one may read the provisions of that subsection, and I agree that they should be read generously and purposively, they cannot extend to persons in the position of the applicants. Paragraph (a) of section 7(4) speaks of both an alleged infringement of a right and a "threat to any right." That is not surprising. The concept of an anticipated invasion of rights is well known in our law and forms the cornerstone of our system of interdictory relief. But a threat to a right, or a tenable allegation of such a threat, does not include and can never include someone as remote from a possible consequence as the applicants are removed from the use of their involuntary evidence against them here. Put differently, it is only when there is an actual criminal trial at which

evidence, tainted by compulsion under section 417, and harmful to the accused and *quondam* witness is produced (or at least sought to be produced) that any threat arises. That is a threat to the right of the accused to be tried fairly.

[206] In the circumstances it is of no consequence to seek to slot the applicants into one or other of the categories of standing enumerated in subparagraph (i) to (v) of subsection 7(4)(b). At present they cannot be fitted into any of those categories. If it should transpire that the one or other of them is confronted at a criminal trial with evidence he or she had to give at a section 417 enquiry, that might be the time to consider a resort to section 25(3)(c) or (d) of the Constitution. Unless and until that comes to pass this Court should adopt the attitude that their case is not ripe.

[207] I would therefore dismiss both applications.

[208] **MOKGORO J.**

I have had the opportunity of reading the judgments of Chaskalson P. And Ackermann J. I agree with Ackermann J. that section 417(2)(b) is unconstitutional and the order that he proposes. I however, agree with Chaskalson P. that the Applicants do have standing to secure a ruling on the

validity of section 417(2) (b) of the said Act. I therefore concur in his judgment for the reasons that he gives. Although I am in agreement with him regarding the meaning of "freedom" in section 11(1) of the Constitution, this brief concurring note reflects the difference I have with him regarding his interpretation of "freedom" in section 11(1) of the Constitution.

[209] Section 11(1) is entitled "Freedom and security of the person". Textually, this section, in my view, protects the two related rights of "freedom of the person" and "security of the person", as opposed to "freedom" on the one hand and "security of the person" on the other. The conjunctive "and" in this section serves to connect "freedom" to "of the person". Once "freedom" in section 11(1) is textually separated from "security of the person", we run the risk of giving it a construction of an all-embracing "right to freedom", which it certainly is not. Attributing so broad a meaning to "freedom" in this section, has the effect of extending it too far beyond the perimeters of physical integrity. That "freedom" in section 11(1) means freedom in the sense of physical integrity emerges from the plain meaning of the text and not from the narrowing of an all-embracing freedom right. This, however, does not mean that section 11(1) cannot be given a broad meaning sufficient to provide protection to an unenumerated right akin to freedom of the person, within the context of the rest of Chapter 3.

[210] Section 11(1) provides for the "right to freedom and security of the person" and section 11(2) protects persons against "torture" and "cruel, inhuman and degrading treatment and punishment". Therefore, viewed within the context of the whole of section 11, "freedom" in section 11(1) undoubtedly points toward physical integrity and not a broad, all-embracing right to freedom. This perspective is confirmed in various international human rights instruments, as has already been pointed out by Chaskalson P. in his judgment.[1]

[211] For the aforesaid reasons, I have no doubt in my mind that section 11(1) is not a resort for unenumerated residual freedom rights, which do not find adequate protection under any other provision of Chapter 3 of the Constitution.

[1]See paragraph 170 of the judgment of Chaskalson P.

[212] Chapter 3 makes detailed provision for the protection of a variety of enumerated freedom rights[2] . As the President of this Court so correctly points out, there is therefore a rare likelihood that we may find occasion to protect an unenumerated freedom which calls for protection.[3] While it is his view that we may have to look to section 11(1) to protect such rights, I respectfully do not share this view with him. As pointed out earlier[4], section 11(1) does not provide protection for unenumerated freedom rights. If occasion for the protection of such an unenumerated right arises, that right may have to be classified under a Chapter 3 right to which it is most akin and or give that Chapter 3 right a generous and full benefit construction to embrace that unenumerated right.

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[2]See paragraph 171 of the judgment of Chaskalson P.

[3]See paragraph 184 of the judgment of Chaskalson P.

[4]See paragraph 211.

[213] The generous, full benefit and purposive approach to constitutional interpretation has already been adopted in previous decisions of this Court (S v Zuma 1995(4) BCLR 410 (CC), para. 15; S v Makwanyane 1995 (6) BCLR 655 (CC), para 9; and S v Mhlungu 1995(7) BCLR 793 (CC), para. 8). Although section 11(1) should also be generously construed, there would be no need to give it such a strained construction[5] to accommodate an outcome which we may nevertheless reach by invoking a generous, full-benefit and purposive construction of one or other enumerated right in Chapter 3. In this way, the limitations tests in section 33 would apply appropriately, without any undue elevation or downgrading of an enumerated freedom right *vis a vis* any unenumerated freedom right, in Chapter 3 of the Constitution.

[214] **O'REGAN J**:

I have had the opportunity of reading the judgments of Chaskalson P, Ackermann J and Sachs J. I concur in the order proposed by Ackermann J for the reasons given in this judgment.

[215] The following five issues were referred to this court by the Transvaal Provincial

[5] S v Mhlungu (supra) at para.108.

Division of the Supreme Court in terms of section 102(1) of the Republic of South Africa Constitution Act, 200 of 1993 (' the Constitution'):

1. Whether section 417(2)(b) of the Companies Act, 61 of 1973 as amended, ('the Act'), is unconstitutional in that it compels a person summoned to an enquiry to testify and produce documents, even though such person seeks to invoke the privilege against self-incrimination.

2. Whether evidence given by a person at an enquiry in terms of section 417 of the Act falls to be excluded in any subsequent criminal proceedings brought against such person where the evidence may be incriminating and was extracted without recognition of such person's privilege against self-incrimination.

3. Whether a person appearing at an enquiry in terms of section 417 of the Act is entitled to have prior access to:

3.1 a copy of the record of the examination of all other persons examined at the enquiry ;

3.2 all documents in the possession of the liquidator or those prosecuting the enquiry relevant to the interrogation of such

person.

4. Whether a person is required to give testimony at an enquiry in terms of section 417 which testimony may tend or have the effect of supporting a civil claim against such person.

5. Whether a person who has given testimony at an enquiry in terms of section 417, which testimony tends to support a civil claim against such person, may have such testimony excluded in any subsequent civil proceedings.

[216] As Ackermann J has stated (at para 6), section 102(1) contemplates only the referral of issues which fall within this court's exclusive jurisdiction. Of the five issues referred, only the first falls within that exclusive jurisdiction and the referral of the four other issues was therefore not competent in terms of section 102(1). At the hearing of this case, Mr Levin, for the applicants, requested that direct access be granted in respect of those four issues. The propriety of the referral of the first issue was not questioned at the hearing and no direct access application was made in that regard. However I agree with Ackermann J that the referral was also incompetent in relation to that issue (at paragraphs 5 - 10 of his judgment).

Because the application had been disposed of by the provincial division, the constitutionality of section 417(2)(b) of the Companies Act, 61 of 1973 ('the Act') could not be decisive of any matter before that court and could not be referred to this court in terms of section 102(1) of the Constitution.

[217] In terms of section 100(2) of the Constitution, it is provided that:

> 'The rules of the Constitutional Court may make provision for direct access to the Court where it is in the interest of justice to do so in respect of any matter over which it has jurisdiction.'

Rule 17 of the Rules of the Constitutional Court provide that:

> '(1) The Court shall allow direct access in terms of section 100(2) of the Constitution in exceptional circumstances only, which will ordinarily exist only where the matter is of such urgency, or otherwise of such public importance, that the delay necessitated by the use of the ordinary procedures would prejudice the public interest or prejudice the ends of justice and good government.'

[218] In *S v Zuma* 1995 (2) SA 642 (CC); 1995 (4) BCLR 401 (CC), the question of the constitutionality of

section 217(1)(b)(ii) of the Criminal Procedure Act, 51 of 1977, was referred to this court by the Natal Provincial Division of the Supreme Court. It became clear at the hearing of

the matter that the referral was incompetent and accordingly, the Attorney-General made application for direct access to the court in terms of Rule 17. In his judgment, Kentridge

AJ, speaking for the court held:

'The Attorney-General of Natal submits in his supporting affidavit that if the matter is sent back to the trial court without our deciding the issue it would have to be referred again to this Court at the end of the trial. More importantly, he informs us that prevailing uncertainty as to the constitutionality of section 217(1)(b)(ii) has resulted in inconsistency in practice in Natal and elsewhere in the Republic. That uncertainty would remain unresolved until a suitable case came properly before this Court. We agree with the Attorney-General of Natal and with Mr d'Oliveira SC, the Attorney-General of the Transvaal, who appeared for the State, that this state of affairs must seriously prejudice the general administration of justice as well as the interests of the numerous accused persons affected. The admissibility of confessions is a question which arises daily in our criminal courts and prolonged uncertainty would be quite unacceptable. As appears from the terms of Rule 17, direct access is contemplated in only the most exceptional cases, and it is certainly not intended to be

> used to legitimate an incompetent reference. But in the special circumstances set out in the affidavit the application under Rule 17 was fully justified.' (At para 11.)

The application for direct access was granted. Similarly, in *Executive Council of the Western Cape Legislature and others v The President of the Republic of South Africa* CCT 27/1995, an unreported judgment of the Constitutional Court handed down on 22 September 1995, direct access was granted to the Applicants to challenge the validity of certain proclamations relevant to impending local government elections. In the light of the imminence of those elections, Chaskalson P held that 'urgent and direct access to this Court is warranted' (at para 17).

[219] I agree with Ackermann J that, had the propriety of the referral on the first issue been disputed at the hearing, Mr Levin would have made application for direct access in terms of Rule 17 in regard to that issue as well. Subsequently, in response to a written enquiry by this court, all the parties in this case have indicated that they have no objection to the grant of an application for direct access in relation to the first issue, should the referral of that issue be held to be incompetent.

[220] There are two considerations relevant to the grant of direct access: exceptional circumstances must be shown as contemplated by the terms of rule 17; and the applicant must demonstrate that he or she has standing to seek the relevant relief from this court. There are overlapping considerations relevant to these enquiries, but it appears to me that reliance on rule 17 will not relieve an applicant of the need to establish standing sufficient to seek the relief sought and that, therefore, standing and the requirements of rule 17 must both be considered. The relief sought in this case is a declaration of the invalidity of section 417(2)(b) of the Act on the grounds that it 'compels a person summoned to an enquiry to testify and produce documents, even though such person seeks to invoke the privilege against self-incrimination.'

[221] The uncertainty caused by doubts concerning the constitutionality of section 417 must seriously hamper the procedures in terms of that section, which in turn will materially disrupt the administration of insolvent companies. In many cases, inquiries will have been suspended pending a determination by this court and creditors and other interested parties will be awaiting anxiously a determination on the constitutionality of the section, so that proceedings may be finalised. Prolonging this situation is highly undesirable. It is clearly in the public interest that certainty be reached. Often this court will be reluctant to grant direct access

in cases where the referral is shown to be incompetent. However, in this case, the uncertainty that surrounds section 417 procedures, and the need to clarify the constitutional status of section 417(2)(b) in particular, are sufficiently cogent grounds for the grant of direct access.

[222] The urgent need to obtain clarity on the constitutionality of a statutory provision was also the reason for the grant of direct access in *Zuma's* case. In the circumstances of the political transition in South Africa, it is not surprising that a considerable number of statutory provisions have come under constitutional challenge and that this process is leading to uncertainty and dislocation in the broader community. The transition that has occurred in South Africa is from a political system not based on the democratic values of openness, freedom and equality, to a constitutional state premised upon them. (See *S v Makwanyane* 1995 (3) SA 391 (CC); 1995 (6) BCLR 665 (CC) at paragraphs 262, 310 and 322.) Legislation adopted under the old constitutional order was drafted without consideration of those values and may, accordingly, be in conflict with the provisions of chapter 3 of the Constitution. Uncertainty surrounding the constitutionality of such legislation may cause considerable disruption in our society. As a result, it may well be that resort to Rule 17 and direct access applications will be considerably more common in the early years of our

constitutional democracy. New legislation will be drafted and adopted by Parliament in full knowledge of the values upon which the Constitution is based and will be less likely therefore to require urgent constitutional scrutiny.

[223] The second question then is whether these applicants have sufficient standing to seek relief by way of direct access. The grounds on which the constitutionality of section 417(2)(b) is challenged are that it constitutes an infringement of rights enshrined in chapter 3 of the Constitution. As such, the question of standing is governed by section 7(4). I respectfully disagree with Chaskalson P (at para 168) when he states that, because the issue before the court concerns the constitutionality of an Act of Parliament, the rules for standing contained in section 7(4) do not apply in this case. In my view, section 7(4) governs any constitutional challenge where the grounds for the challenge arise out of an infringement or threatened infringement of a right contained in chapter 3, whether it be a matter which falls within the court's jurisdiction under section 98(2)(a), 98(2)(b) or 98(2)(c). Constitutional challenges based on grounds other than alleged violations of chapter 3 are, on a straightforward reading of section 7(4), not governed by its terms. In this case, the constitutional attack is based on the provisions of chapter 3 and section 7(4) is accordingly applicable.

[224] The applicants allege that section 417(2)(b) constitutes a breach of the rights of accused persons, in that it permits the admission of evidence in a criminal trial which has been compelled from those accused persons in a section 417 enquiry. The difficulty the applicants face is that they have not yet been charged, nor is there any allegation on the record to suggest that they consider that there is a threat that a prosecution may be launched against them, after they have given evidence at the section 417 enquiry, in which that evidence will be used against them.

[225] Section 7(4) of the Constitution provides that:

> '(a) When an infringement of or threat to any right entrenched in this Chapter is alleged, any person referred to in paragraph (b) shall be entitled to apply to a competent court of law for appropriate relief, which may include a declaration of rights.
>
> (b) The relief referred to in paragraph (a) may be sought by -
>
> (i) a person acting in his or her own interest;
>
> (ii) an association acting in the interest of its members;
>
> (iii) a person acting on behalf of another person who is not in a position to seek such relief in his or her own name;
>
> (iv) a person acting as a member of or in the interest of a group

or class of persons; or

(v) a person acting in the public interest.

[226] Ackermann J (at para 38) finds that persons acting in their own interest (as contemplated by section 7(4)(b)(i)) may only seek relief from the court where their rights, and not the rights of others, are infringed. I respectfully disagree with this approach. It seems clear to me from the text of section 7(4) that a person may have an interest in the infringement or threatened infringement of the right of another which would afford such a person the standing to seek constitutional relief. In addition, such an interpretation fits best contextually with the overall approach adopted in section 7(4).

[227] There are many circumstances where it may be alleged that an individual has an interest in the infringement or threatened infringement of the right of another. Several such cases have come before the Canadian courts. In *R v Big M Drug Mart Ltd* [1985] 13 CRR 64, a corporation was charged in terms of a statute which prohibited trading on Sundays. The corporation did not have a right to religious freedom, but nevertheless it was permitted to raise the constitutionality of the statute which was held to be in breach of the Charter. A similar issue arose in *Morgentaler, Smoling and Scott v R* [1988] 31 CRR 1 in which male doctors,

prosecuted under anti-abortion provisions, successfully challenged the constitutionality of the legislation in terms of which they were prosecuted. In both of these cases, the prosecution was based on a provision which itself directly infringed the rights of people other than the accused. The Canadian jurisprudence on standing is not directly comparable to ours, however, for their constitutional provisions governing standing are different, but the fact that situations of this nature arise is instructive of the need for a broad approach to standing.

[228] In this case, however, although the challenge is section 417(2)(b) in its entirety, the constitutional objection lies in the condition that evidence given under compulsion in an enquiry, whether incriminating or not, may be used in a subsequent prosecution. There is no allegation on the record of any actual or threatened prosecution in which such evidence is to be led.

[229] There can be little doubt that section 7(4) provides for a generous and expanded approach to standing in the constitutional context. The categories of persons who are granted standing to seek relief are far broader than our common law has ever permitted. (See, for a discussion, Erasmus *Superior Court Practice* (1994) A2-17 to A2-33.) In this respect, I agree with Chaskalson P (at paras 165 - 166).

This expanded approach to standing is quite appropriate for constitutional litigation. Existing common law rules of standing have often developed in the context of private litigation. As a general rule, private litigation is concerned with the determination of a dispute between two individuals, in which relief will be specific and, often, retrospective, in that it applies to a set of past events. Such litigation will generally not directly affect people who are not parties to the litigation. In such cases, the plaintiff is both the victim of the harm and the beneficiary of the relief. In litigation of a public character, however, that nexus is rarely so intimate. The relief sought is generally forward-looking and general in its application, so that it may directly affect a wide range of people. In addition, the harm alleged may often be quite diffuse or amorphous. Of course, these categories are ideal types: no bright line can be drawn between private litigation and litigation of a public or constitutional nature. Not all non-constitutional litigation is private in nature. Nor can it be said that all constitutional challenges involve litigation of a purely public character: a challenge to a particular administrative act or decision may be of a private rather than a public character. But it is clear that in litigation of a public character, different considerations may be appropriate to determine who should have standing to launch litigation. In recognition of this, section 7(4) casts a wider net for standing than has traditionally been cast by the common law.

[230] Section 7(4) is a recognition too of the particular role played by the courts in a constitutional democracy. As the arm of government which is entrusted primarily with the interpretation and enforcement of constitutional rights, it carries a particular democratic responsibility to ensure that those rights are honoured in our society. This role requires that access to the courts in constitutional matters should not be precluded by rules of standing developed in a different constitutional environment in which a different model of adjudication predominated. In particular, it is important that it is not only those with vested interests who should be afforded standing in constitutional challenges, where remedies may have a wide impact.

[231] However, standing remains a factual question. In each case, applicants must demonstrate that they have the necessary interest in an infringement or threatened infringement of a right. The facts necessary to establish standing should appear from the record before the court. As I have said, there is no evidence on the record in this case which would meet the requirements of section 7(4)(b)(i). The applicants have alleged neither a threat of a prosecution in which compelled evidence may be led against them, nor an interest in the infringement or threatened infringement of the rights of other persons. This

situation, may have arisen because the case was referred by Van Schalkwyk J in terms of section 102(1); it did not arise originally as an application for direct access. Accordingly, there are no affidavits before the court in support of a direct access application. The only document on the record in this court was the decision of Van Schalkwyk J.

[232] In his judgment, Chaskalson P has noted that, in the appeal from the judgment of Van Schalkwyk J to the Full Bench of the Transvaal Provincial Division of the Supreme Court, a majority of the court found that the applicants had demonstrated on the affidavits before that court a reasonable apprehension of harm sufficient to warrant the issue of an interim interdict. These affidavits upon which those findings were made were not before this court as part of the record, nor was the judgment of that court. It may well be that, if we had called for the record from the court *a quo,* it would have been sufficient to establish standing for the applicants on the basis of section 7(4)(b)(i). In my respectful view, however, this court cannot make factual findings required by section 7(4)(a) by relying on that judgment. In any event, I do not think it is necessary.

[233] In the special circumstances of this case, it appears to me that the applicants may rely upon section 7(4)(b)(v), as applicants acting in the public interest. The

possibility that applicants may be granted standing on the grounds that they are acting in the public interest is a new departure in our law. Even the old *actiones populares* of Roman Law afforded a right to act in the public interest only in narrowly circumscribed causes of action. Section 7(4)(b)(v) is the provision in which the expansion of the ordinary rules of standing is most obvious and it needs to be interpreted in the light of the special role that the courts now play in our constitutional democracy.

[234] This court will be circumspect in affording applicants standing by way of section 7(4)(b)(v) and will require an applicant to show that he or she is genuinely acting in the public interest. Factors relevant to determining whether a person is genuinely acting in the public interest will include considerations such as: whether there is another reasonable and effective manner in which the challenge can be brought; the nature of the relief sought, and the extent to which it is of general and prospective application; and the range of persons or groups who may be directly or indirectly affected by any order made by the court and the opportunity that those persons or groups have had to present evidence and argument to the court. These factors will need to be considered in the light of the facts and circumstances of each case.

[235] Although in this case too, section 7(4)(a) requires applicants to allege an

infringement of or threat to a right contained in chapter 3, applicants under section 7(4)(b)(v) need not point to an infringement of or threat to the right of a particular person. They need to allege that, objectively speaking, the challenged rule or conduct is in breach of a right enshrined in chapter 3. This flows from the notion of acting in the public interest. The public will ordinarily have an interest in the infringement of rights generally, not particularly.

[236] In this case, it is clear from the referral that the applicants consider that section 417(2)(b) is, objectively speaking, in breach of chapter 3. Although the challenge could be brought by other persons, a considerable delay may result if this court were to wait for such a challenge. It is also clear that the challenge is to the constitutionality of a provision contained in an Act of Parliament and that the relief sought is a declaration of invalidity. It is relief which falls exclusively within the jurisdiction of this court and it is of a general, not particular, nature. In addition, adequate notice of the constitutional challenge has been given and a wide range of different individuals and organisations have lodged memoranda and amicus curiae briefs in the matter. At the hearing also, the matter of the constitutionality of section 417 was thoroughly argued. There can be little doubt that those directly interested in the constitutionality of section 417 have had an opportunity to place their views before the court.

[237] In these special circumstances, it seems to me that the applicants have established standing to act in the public interest to challenge the constitutionality of section 417(2)(b). It is also clear that the exceptional circumstances necessary to warrant a grant of direct access exist. Accordingly, I agree with Ackermann J that the applicants should be granted direct access in respect of the first issue referred to this court by the Transvaal Provincial Division of the Supreme Court. In my view, however, the application for direct access on the other issues referred to this court should fail. None of these issues fall within the exclusive jurisdiction of this court. They are best dealt with by the Supreme Court, as they arise in litigation before it.

[238] Once the court has considered and granted direct access, it must then decide the issue upon which it has granted direct access. No further considerations of standing arise. To that extent, I respectfully disagree with Ackermann J who, after granting direct access to the applicants, finds that they have no standing to challenge section 417(2)(b) on the grounds that it is in breach of section 25 (at paras 34 - 41). He does of course find that they have standing to challenge the section on the grounds that it is in breach of section 11(1).

[239] It is now necessary to consider whether section 417(2)(b) of the Act is unconstitutional. Section 417(2)(b) provides that, where a person has been summoned to an enquiry in connection with an investigation into the insolvency of a company,

> 'Any such person may be required to answer any question put to him at the examination, notwithstanding that the answer might tend to incriminate him, and any answer given to any such question may thereafter be used in evidence against him.'

[240] Section 25(3) of the Constitution provides that:

> 'Every accused person shall have the right to a fair trial, which shall include the right -
>
> ...
>
> (d) to adduce and challenge evidence, and not to be a compellable witness against himself or herself;'

The clear consequence of section 417(2)(b) is that incriminating evidence given in a section 417 enquiry is admissible in the subsequent criminal trial of such person. In effect, that person has been compelled to give evidence against himself or herself. In *S v Zuma, supra,* Kentridge AJ noted that the rule that accused persons should not be compelled to give evidence in a criminal trial is a

long-standing rule of the common law. He cited *R v Camane and Others* 1925 AD 570 at 575 where Innes CJ held that:

> 'Now, it is an established principle of our law that no one can be compelled to give evidence incriminating himself. He cannot be forced to do that either before the trial, or during the trial. The principle comes to us through the English law, and its roots go far back in history.'

[241] It seems clear to me that the purpose of section 25(3)(d) is to give this common law principle constitutional force. Any departure from it will constitute a breach of section 25(3) which will have to be justified in terms of section 33. Section 33(1) requires that any limitation of a right entrenched in section 25 must be shown to be reasonable, necessary and justifiable in an open and democratic society based on freedom and equality. If the limitation passes this test, it must also be shown not to be a negation of the essential content of the right. In *S v Makwanyane, supra,* Chaskalson P held that section 33 requires that the purpose and importance of the infringing rule be measured against the nature and effect of the infringement (at para 104).

[242] There can be little doubt that the provisions of section 417(2)(b) constitute a grave inroad on an accused person's right to a fair trial. As such the infringement caused by the subsection is a substantial one which would require substantial

justification.

[243] I agree with Ackermann J (at paras 123 - 124) that the primary purpose of section 417 is to assist a liquidator in identifying the assets and liabilities of the company in the best interests of creditors. This task is greatly facilitated by the obligation imposed upon persons who have knowledge of the company to answer questions in connection with the company's affairs. However, it does not seem central to this purpose to require that any such answers be admissible in subsequent criminal proceedings. Even if the legislation had as a secondary purpose the facilitation of the prosecution of white collar offenders, I am not persuaded that this purpose could not be achieved by less invasive means as outlined by Ackermann J at para 127.

[244] It is my view, after weighing these considerations, that section 417(2)(b) constitutes an unjustifiable breach of section 25. In the light of this finding, it is unnecessary for me to consider whether section 417(2)(b) constitutes a breach of any of the other rights entrenched in chapter 3. In particular, I do not find it necessary to consider whether it constitutes a breach of section 11 and I decline to express any view at all on that question. For the above reasons, I concur in the order proposed by Ackermann J.

[245] **SACHS J**:

I have had the advantage, and, I might say, the pleasure of reading the judgments of Ackermann J and Chaskalson P respectively. I concur in their conclusions, but since I agree with the critique each makes or implies of the other, I will advance my own reasons. In essence, I accept Ackermann J's contention that the issue engaged is a freedom one and not a fair trial one, and Chaskalson P's argument that the concept of constitutionally protected freedom as advanced by Ackermann J is too broad.

[246] It is not difficult to establish that in our system of criminal justice, the introduction of enforced confessions into criminal trials is as a general rule[1] not reasonable, justifiable or necessary; the right to silence, the right not to be a compellable witness against oneself, the right to be presumed innocent until proven guilty and the refusal to permit evidence of admissions that were not made freely and voluntarily, are all composite and mutually re-enforcing parts of the adversarial system of criminal justice that is deeply implanted in our country[2] and resolutely

[1] I say 'as a general rule' because special attention has to be given to the question whether answers elicited in a Companies Act enquiry constitute an exception, the tendering of which can be justified in terms of section 33(1) of our Constitution.

[2] It could have been different. Had Dutch overlordship in the Cape not been replaced by that of the British, we could well be extolling the virtues of the inquisitorial system of criminal justice, in terms of which

the interrogation of potential accused persons is normal. See H R Hahlo and Ellison Kahn: *The South African Legal System and its Background*,Juta & Co 1968 at p576; also Jonathan Burchell and John Milton, *Principles of Criminal Law*, Juta & Co. 1991 at pp20-21, and CJR Dugard, *South African Criminal Law and Procedure Vol IV Introduction to Criminal Procedure*, Juta and Co. 1977 p26 where he says

> ...a welcome innovation of English origin was the abolition of the judicial practice of interrogating an accused. The accused was now warned that he was not obliged to make a statement which might incriminate him, and no confession was admissible in evidence against him unless it was shown to have been freely and voluntarily made (s.28 of Ordinance 72 of 1830).

Hoffmann and Zeffert in *South African Law of Evidence* (4th ed) at p7, point out that this Ordinance formed a model from which virtually all subsequent South African legislation on the subject was taken. See also *S v Sesetse 'n Ander* 1981 (3) SA353(A) at 355 F, where the court stated that our criminal law is based on two principles, the first being that

> we have an accusatorial system where an accused is considered to be innocent until he is found guilty.

affirmed by the Constitution.[3]

[3]See the fair trial guarantees contained in section 25, especially in subparagraphs 2(c), 3(c) and 3(d).

[247] What is more complex is to decide the question which logically should be anterior, namely, precisely what constitutional right, if any, would such an enforced confession unjustifiably limit? More particularly, what protected right, if any, would be violated if a potentially punishable confession were compulsorily extracted outside the context of detention or trial? By not including in the South African Constitution a general and free-floating Fifth Amendment-type prohibition against self-incrimination, the framers presumably did not intend to establish a right as powerful and generalized as that contained in the US Constitution.[4] Yet the mere fact that in South Africa the right against self-incrimination is located expressly in the context of a criminal trial,[5] does not mean that it was by implication excluded from other areas. Section 33(3) clearly rules out such an implication.[6] At the same time, the existence of such a common law principle outside of but not inconsistent with Chapter 3, as recognized by section 33(3),

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[4] *R v S* (RJ)]121 D.L.R. (4th) 589 at p620 where Iacobucci J points out that in the United States both the accused person and the witness benefit from a constitutionalised version of the common law privilege against self-incrimination. Later he says (at p657)

> .....what should be obvious in the American context... is that a statute in that country which purports to abrogate a testimonial privilege is in direct violation of the Fifth Amendment. As a general rule, a statute which purports to do the same thing in Canada is in direct violation of nothing at all.

The same could be said for this country.

[5] Section 25(2): Every person arrested for the alleged commission of an offence shall ..... have the right - (c) not to be compelled to make a confession or admission which could be used in evidence against him or her.

25(3): Every accused person shall have the right to a fair trial which shall include the right - (c) to be pressumed innocent and to remain silent during plea proceedings or trial and not to testify during trial; (d) ..... not to be a compellable witness against himself or herself .....

[6] Section 33(3): The entrenchment of the rights in terms of this Chapter shall not be construed as denying the existence of any other rights or freedoms recognised or conferred by common law, customary

would not in itself provide the basis for invalidating a statute. However long and honourable the pedigree of such a common law principle might be, without embodiment in a specific constitutional text, it could not render a statute unconstitutional; we deal not with rights in the air, but with rights anchored in the wording of the Constitution. Furthermore, we are concerned not with invasion of rights in abstract but with infringements of rights at a particular time and in a concrete factual setting.

[248] The specific question we have to decide is not what constitutional rights of the examinee could be violated as a matter of abstract reasoning, nor what rights could be infringed at a subsequent criminal trial, but, rather, what rights, if any, are violated at the moment that he or she is summoned to answer questions about the company's affairs, or, more particularly, when the potentially incriminating questions are put. I have difficulty in accepting that the examinee's right to a fair trial as guaranteed by section 25 of the Constitution is trespassed upon at that moment. It may be that the examinee's right to have a fair trial at

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law or legislation to the extent that they are not inconsistent with this Chapter.

some time in the future is threatened, and in a manner far from academic, namely, by the express provision that the answers may indeed by used against him or her at a subsequent criminal trial. What might have been fair compulsion in the context of reconstituting information about the affairs of the company, could cease to be fair when it becomes a forced confession, actually tendered for the purposes of a criminal trial. Yet even if the examinee's right to a fair trial in the future is being threatened, the examinee is still not an 'arrested' or an 'accused' person as contemplated by section 25, and might never become such. The time to assert a fair trial right would be when a trial was pending or imminent, and the use of the incriminating answers actually threatened. In the absence of imminent prosecution, the jeopardy in which the examinee is placed relates to the potentially unconscionable and concrete pressures of the moment, rather than the hypothetical, even if grave, possibility of future penalisation. What is in issue, then, is a right to a fair examination, not a right to a fair trial.

[249] In this connection, I find myself in agreement with Ackermann J that the answer to the problem before us is to be found in a recognition of the existence of a residuary and unenumerated right protected by section 11(1).[7] At the same

[7]Virtually all the judges in *R v S* (RJ) and *Thomson Newspapers v Canada*, 67 DLR (4th) 161, located the right against self-incrimination in a residual protection against self-incrimination under section 7 of the Canadian Charter, which deals with life, liberty and personal security, rather than in a penumbra

time, I am far from convinced that the concept of freedom contained in section

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relating to the specific Charter provisions dealing with protections accorded to an accused in the course of a trial. Freedom comes from two barrels of our Constitution, the protected freedom interest in section 11, and the interpretive freedom value in section 35(1). One might say that freedom is squared. In my view, the case before us lends itself readily to treatment in terms of the freedom interest contained in section 11, as interpreted by the freedom value urged upon us by section 35(1). I accordingly do not find it necessary to offer a definitive opinion in the the present case as to whether or not a fair trial right can be said actually to be threatened.

11(1) should be given as expansive a treatment as Ackermann J suggests,[8] or that the residual space is as large as he indicates. I accordingly offer the following tentative observations to indicate where I differ.

[8]To replicate the broad American approach to liberty in the context of the structure of our Constitution, would mean that just about every law would, simply by virtue of its compulsory character, represent an invasion of freedom and as such have to be justified by section 33(1) criteria. The two-stage enquiry which our Court normally adopts - see *S v Zuma* 1995 (4) BCLR 401; *S v Makwanyane and another* 1995 (6) BCLR 665 (CC); *S v Williams and others* 1995 (7) BCLR 861 (CC) - would in effect be reduced to a one-stage enquiry. The further consequence would be to over-extend the judicial power by allowing this Court to review virtually all legislation in terms of its 'necessity'. In addition, there is the danger of many of the remaining provisions of Chapter 3 being subsumed under the right to freedom and becoming redundant, with consequent impoverishment of the texture of the Chapter and a weakening of its internal balance. Sometimes less is more - a narrowly defined concept of freedom can be more easily defended against invasion than a broad one - see Peter W Hogg - *Constitutional Law of Canada*, 3ed (1992) Carswell Chapter 4.

[250] To equate freedom simply with autonomy or the right to be left alone does not accord with the reality of life in a modern, industrialized society.[9] Far from violating freedom, the normal rules regulating human interaction and securing the peace are preconditions for its enjoyment. Without traffic regulation, it would be impossible to exercise freedom of movement in a meaningful sense; absent government compulsion to pay taxes, the expenditure necessary for elections to be held, for Parliament to pass legislation, or for this court itself to uphold fundamental rights, would not be guaranteed. The rechtsstaat, as I understand it, is not simply a state in which government is regulated by law and forbidden to encroach on a constitutionally protected private realm. It is one where government is required to establish a lawfully regulated regime outside of itself in

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[9] *Thomson Newspapers v Canada* supra note 7 per La Forest J. at p220

> .....in a modern industrialised society it is generally accepted that many activities in which individuals can engage must never the less to a greater or lesser extent be regulated by the state to ensure that the individual's pursuit of his or her self-interest is compatible with the community's interest in the realization of collective goals and aspirations.

He goes on to point out at 228 that

> ..... the ultimate justification for a constitutional guarantee of the right to privacy is our belief...that it is for the individual to determine the manner in which he or she will order his or her private life.....to decide what persons or groups he or she will associate with. One does not have to look far in history to find examples of how the mere possibility of the intervention of the eyes and ears of the state can undermine the security and confidence that are essential to the meaningful exercise of the right to make such choices. But where the possibility of such intervention is confined to business records and documents, the situation is entirely different. <u>These records and documents do not normally contain information about one's lifestyle, intimate relations or political or religious opinions. They do not, in short, deal with those aspects of individual identity which the right of privacy is intended to protect from the overbearing influence of the state.</u> On the contrary..... it is imperative that the state have power to regulate business and the market both for economic reasons and for the protection of the individual against private power. Given this, state demands concerning the activities and internal operations of business have become a regular and predictable part of doing business. (My emphasis.)

which people can go about their business, develop their personalities and pursue individual and collective destinies with a reasonable degree of confidence and security.[10] I accordingly cannot accept that the laws that guarantee my freedom - for example, my right to vote, or to litigate, or to receive education - represent invasions of my freedom, simply because they are subject to governmentally enforced rules and contain penal clauses. We should ever be mindful of the fact that the review powers of this Court are not concerned with maintaining good

[10]See Dennis Davis, Matthew Chaskalson and Johan de Waal, *The Role of Constitutional Interpretation in Rights and Constitutionalism* Van Wyk et al eds, Juta 1994 at p88

> The classical approach sees rights as the protection of those historically vulnerable areas of individual and societal freedom against state interference. The individual's dependence on the state for the realisation of his/her rights and the individual's need for protection from societal infringements of his/her rights is addressed by the objective dimension.

And at p100:

> The state must therefore establish the necessary social preconditions for the exercise of Grundrechte.

government, or correcting governmental error, but with keeping government within constitutional limits.

[251] The reality is that meaningful personal interventions and abstinences in modern society depend not only on the state refraining from interfering with individual choice, but on the state helping to create conditions within which individuals can effectively make such choices. Freedom and personal security are thus achieved both by protecting human autonomy on the one hand, and by acknowledging human interdependence on the other.[11] The interdependence is not a limitation on freedom, but an element of it. It follows that the definition of freedom requires not the exclusion of inter-dependence, but its embodiment, bearing in mind that such incorporation should be accomplished in a manner which reinforces rather than undermines autonomy and upholds rather than

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[11]Dawn Oliver, *The Changing Constitution*, 3rd ed, Jowell and Oliver eds, Clarendon Press (1994) p461,

> To define people as autonomous individuals is to underestimate the extent to which we are, inevitably and indeed beneficially, dependent on one another.

Lawrence Tribe, *American Constitutional Law*, 2nd ed, p1305,

> Meaningful freedom cannot be protected simply by placing identified realms of thought or spheres of action beyond the reach of government, anymore than it can be defended entirely by establishing minimum levels of specific services for government to provide.

Nedelsky, *Reconceiving Rights as Relationships*, p7, paper delivered at the Centre for Applied Legal Studies, University of Witwatersrand (1993), quoted in van Wyk et al p63

> dependence is no longer the antithesis of autonomy, but a pre-condition in the relationships - between parent and child, student and teacher, state and citizen - which provide the security, education, nurturing and support that make the development of autonomy possible ... the collective is a source of autonomy as well as a threat to it.

See also, Nedelsky, *Private Property and the Limits of American Constitutionalism*, University of Chicago Press (1990).

reduces the value of maximising effective personal choice.

[252] In my view, the values of an open and democratic society require an application of Chapter 3 which is centred on what - in a culture dedicated to freedom and equality - have come to be regarded as real issues of fundamental rights.[12] Ordinary rights are protected by the common law and statute;[13] only fundamental rights are safeguarded by the Constitution.[14] The Constitution accordingly requires this Court to focus its attention on real and substantial infringements[15] of

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[12]For a Canadian example of this kind of reasoning see *Morgantaler v Queen* (1988) 44 D.L.R. (4th) 385 at p493 per McIntyre J (dissenting)

> to invade the s.7 right of security of the person, there would have to be more than state-imposed stress or strain. A breach of the right would have to be based upon an infringement of some interest which would be of such nature and such importance as to warrant constitutional protection.

The majority of the court in that case, which dealt with abortion, felt that the physical and psychological integrity of the pregnant woman did engage such an interest.

[13]In terms of section 35(3),

> in the interpretation of any law and the application and development of common law and customary law, a court shall have due regard to the spirit, purport and objects of Chapter 3.

Chapter 3 is headed 'Fundamental Rights'. Guarding the fundamental rights framework is the function of this Court; interpreting and developing the law within this framework is the task of the ordinary courts.

[14]If one looks at other rights entrenched in our Constitution, then the need to impose sensible functional restrictions on the circumstances where proof of reasonable limitation is required, becomes even clearer. Thus, the right to dignity is expressed in a totally unqualified manner in section 10. Could this mean that every statute and each and every action by a state official causing embarrassment, discomfort or a loss of composure to any person, would have to be justified in terms of section 33(1) criteria? Could it be appropriate to regard the right to dignity as being so wide as to catch the fragments of state-induced inconvenience that escape even the residuary net said to be provided by the right to freedom? To carry the matter even further, could the right to privacy be the ultimate barrier, requiring justification of any state action whatsoever?

[15]In *R v Edwards Books and Art Ltd* (1986) 35 D.L.R. (4th) 1 at p55 Dixon CJC wrote

> in my opinion 'liberty' in s.7 of the Charter is not synonymous with unconstrained freedom.

In another case, *Reference re s.94(2) of Motor Vehicle Act* (1985), 24 D.L.R. (4th) 536 at 565 Wilson J observed:

> Indeed, all regulatory offences impose some restriction on liberty broadly

fundamental rights, and not to risk dispersing energies, losing its sharp critical gaze and over-extending its legitimate functioning, by being drawn into testing the reasonableness or necessity for each and every piece of regulation undertaken by the State.

[253] For the purposes of the present case, I accordingly regard Ackermann J's valuable analysis as providing a broad framework within which to approach the question of freedom, rather than as establishing a focused and operational definition of the concept. I find his approach particularly useful as a guide to what

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> construed. But I think it will trivialize the Charter to sweep all those offences into s.7 as violations of the right to life, liberty and security of the person even if they can be sustained under s.1.

See also her remarks in *Operation Dismantle Inc* (1985) 1SCR 441 at pp489-91; Patrice Garant in *The Canadian Charter of Rights and Freedom,* Beaudoin and Ratushny eds, (1989) Carswell 2nd ed at p352:

> Countless standards, provisions and measures which affect the security of individual citizens are established by public authorities. Would it be necessary to see in each case an interference with or threat to the security of the individual?

is meant by the values of freedom and equality which the Constitution requires us to promote. Freedom and equality are at one and the same time in tension with each other, and mutually supportive; in the context in which the Constitution has to be interpreted, the quest for equality should not be used as a justification for suppressing freedom, just as the need to protect freedom should not become a means for denying equality.

[254] In relation to the definition of what is meant by the words 'freedom and personal security' in section 11(1), I therefore believe that something more is required than a broad philosophical framework allied to a concept of residual, constitutionally protected liberty. My view is that it is not necessary for the purposes of this case to go beyond treating freedom and personal security as two elements of a single basic right which encompasses protection from interferences, of a substantial rather than a trivial kind, with the basic freedoms known to our legal culture, of which freedom from physical restraint is the most pungent example, but not the

only one.[16]

[16]The definition which I propose, is, unavoidably I believe, the result of a certain degree of circular reasoning. In my view, it is inevitable that the definitional ambit of section 11 should be influenced by a considered evaluation, structured by the text and the overall purposive design of the Constitution, as to the kinds of state intervention that by their nature are so potentially injurious to fundamental rights, that they can only be condoned if they meet the strict justificatory requirements of section 33. For a forceful critique of this kind of 'definitional balancing', however, see David Beatty, *Constitutional Law in Theory and Practice*, Toronto (1995) at p84 et seq.

[255] The text of section 11, which includes a prohibition against detention without trial, as well as the exclusion of torture and other forms of physical and emotional ill-treatment, indicates a narrow concern with the theme of bodily restraint or abuse, rather than a sweeping repudiation of any impediment whatsoever to the orderly pursuit of happiness. On the other hand, the express acknowledgement of the rights to dignity and privacy in sections 10 and 13 respectively, read together with the preamble and the afterword, establish a setting which allows for a more expansive role for the word freedom. Similarly, the general injunction to interpret Chapter 3 in such a way as to promote the values which underlie an open and democratic society based on freedom and equality, also encourages a broad rather than a narrow interpretation of the concept of freedom. Where the text permits, the different provisions should be read together in such a way as to maintain rather than reduce hard-won freedoms.[17] The antiquity of an institution is, of course, no guarantee in itself of its constitutional virtue.[18] Yet tried and

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[17]This is consistent with the approach adopted by Kentridge AJ in *S v Zuma* supra note 8, where he said at para 33,

> I therefore consider that the common law rule on the burden of proof is inherent in the rights specifically mentioned in section 25(2) and 3(c) and 3(d), and forms part of a right to a fair trial. In so interpreting these provisions of the Constitution I have taken account of the historical background, and comparable foreign case law. I believe too that this interpretation promotes the values which underlie an open and democratic society and is entirely consistent with the language of section 25.

[18]Garant supra note 15 at p344 points out that in Canada certain fundamental legal traditions, such as those associated with patriarchy and the treatment of aboriginal people, were in fact in contradiction with the Charter. Quoting Tanya Lee in *Section 7 of the Charter*: *An Overview* (1985) 43 U.T. Fac. L. Rev. 1 at p8 where she states

> .....the traditions of a society are not necessarily admirable.

tested principles generally associated with fundamental fairness and manifestly in harmony with the Constitution, should, if the text so allows, be subsumed into rather than blotted out from the Constitution.

The afterword to our Constitution speaks unequivocally of a past characterised by untold suffering and injustice and gross violations of human rights.

[256] The question arises whether or not a violation of the privilege against self-incrimination could enter into this penumbra of protected liberties. I think it would be incorrect to regard the express inclusion of protections against self-incrimination in section 25(2) and 25(3) in favour of detained or accused persons, as representing an intention by the framers to restrict the right purely to the pre-trial and trial situations. I feel it is more appropriate to regard these provisions as constituting evidence in a particularly pungent and impermeable form of a wider underlying and unifying principle, that which in Canada has been summed up as 'the case to meet'.[19] One's right to freedom and personal security is jeopardised when any part of this inter-related structure is touched. In the celebrated words of Mr Justice Frankfurter;

> the history of liberty has largely been the history of procedural observance of safeguards.[20]

Freedom and procedural safeguards are closely inter-related, and the principal focus of this Court's activity should accordingly not "lie in the realm of general public policy but in the inherent domain of the judiciary as guardian of the justice

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[19]See Iacobucci J in *R v S* (RJ) supra note 7 at p632. In Thomson Newspapers supra note 7 at p195 Wilson J quotes Stephen's classic statement of what is meant by the phrase 'criminating himself',

> It is not that a man must be guilty of an offence and say substantially, 'I am guilty of the offence, but am not going to furnish evidence of it.' I do not think the privilege is so narrow as that, for then it would be illusory. The extent of the privilege is I think this: the man may say 'if you are going to bring a criminal charge, or if I have reason to think a criminal charge is going to be brought against me, I will hold my tongue. Prove what you can, but I am protected from furnishing evidence against myself out of my own mouth'.

[20]*McNabb v. United States* 318 U.S. 332 at 347 (1943).

system"[21] .

[21]Per Lamer J, as he then was, in *Reference re s.94(2) of Motor Vehicle Act*, supra note 15 at p549-50. He was dealing with the 'principles of fundamental justice' in the Canadian Charter.

[257] Adopting this approach, which I do, allows for an amplified interpretation of the concept of freedom and personal security, one capable of giving shelter under its wing to protections which have evolved over the ages against abusive state power while recognising that such protections will be primarily, but by no means exclusively, related to freedom from physical restraint. The words of section 11 should then be construed in such a manner as to provide constitutionally defensible space against invasions of freedom of a kind analogous in character and intensity to the imposition of physical restraint. Legal traditions, both positive and negative, would help to define what this analogous or penumbral area would include: legal institutions developed and applied in the past with a view to curtailing abusive State action, would readily fit; similarly, negative memories of past oppressive State behaviour in our country and elsewhere, would help define whether or not a freedom issue is being raised.[22] The first step is to establish the existence of what is a real or substantial invasion of freedom, and not a normal regulatory act;[23] only when this is done should the need to justify the infringement arise. Once a substantial breach of this kind has been shown to

[22]The 'never again' principle as in the USA after Independence and Germany after the Second World War, has particular relevance in respect of interpreting our Constitution. In the present context, issues such as banning orders and abusive use of Commissions of Enquiry, come to mind. Professor Dugard, supra note 2 at p86, writing contemporaneously, shows how the fairness of trials in security matters was jeopardized by pre-trial interrogations of witnesses and potential accused in solitary confinement, even where their statements were not directly used in evidence at subsequent trials.

[23]See discussion in paras 250 - 252.

exist, however, the scrutiny for justification required by section 33(1) can be truly stringent.[24]

[24]See Hogg supra note 8.

[258] In my view, a breach of the long-standing right not to be compelled to incriminate oneself out of one's own mouth would, in any context, raise a question of fundamental freedom. At the same time, the absence of an explicitly stated generalized right against self-incrimination in the Constitution, indicates that the operation of the principle outside of a trial situation is weaker than within. The privilege against self incrimination should therefore neither be reduced to a restricted immunity confined to the trial situation, nor be enlarged so as to become an absolute right to be used on all occasions. Its application depends on time, place and context.[25] The closer to a trial situation, the more powerful the principle; the more remote from a trial, the weaker it will be. Thus there would be little scope, if any at all, for possible weakening of the right of a detained or accused person [so firmly protected by sections 25(2) and 25(3)] not to be compelled to testify. The interests of shareholders and creditors, however aggrieved they may feel, would not even be put into the balance in this context,

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[25]Per Iacobucci J in *R v S* (RJ) supra note 7 at p636:

> the principle against self-incrimination may mean different things at different times and in different context [It] admits of many rules.

See also Lord Mustill's reference in *Reg. v Director of Serious Fraud Office, Ex p. Smith* [H.L.(E)] 1993 A.C. p1 at p24G, to what is

> compendiously, albeit inaccurately, called the 'right of silence'.

A term which

> arouses strong but unfocused feelings (but) does not denote any single right, but rather refers to a disparate group of immunities, which differ in nature, origin, incidence and importance

at p30F. One of these motives is

> the instinct that it is contrary to fair play to put the accused in a position where he is exposed to punishment whatever he does. If he answers, he may condemn himself out of his own mouth: if he refuses he may be punished for his refusal .....

let alone weighed. Their very real concerns are subsumed into the general interest of the community in ensuring that crime does not pay and criminals are duly punished. The further away from the trial situation one gets, however, and the more residual rather than primary the application of the privilege, the more does it submit itself to countervailing interests. Accordingly, the claims of shareholders and creditors would firmly enter the scales at a section 417 enquiry, to be balanced against the principle that people should not be compelled to condemn themselves out of their own mouths.

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at p32B.

[259] Similarly, the more that self-incrimination takes the form of oral communication, the more compelling will the protection be; the more objective or real the existence of the incriminating material, on the other hand, the more attenuated. Accordingly, pre-trial procedures of a non-communicative or non-testimonial kind, such as compulsory fingerprinting, blood tests, blood-alcohol tests, attendance at identity parades, DNA and other tests of an objective nature,[26] or, in company fraud matters, hand-writing tests, all of which would seem to fall directly under the concept of freedom and personal security, have become well-established processes regarded in many parts of the world as being consistent with the

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[26]L'Heureux-Dube J in *R v S* (RJ) supra note 7 at p702-3 mentions that all these activities enlist the individual's co-operation in his or her own investigation.

> The dignity of the individual,
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> she says,
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> > is a fundamental value underlying both the common law and the Charter. Although the search of an individual's home is an invasion of privacy, and although the taking of fingerprints, breath samples or bodily fluids are even more private, there is no doubt that the mind is the individual's most private sanctum. Although the state may legitimately invade many of these spheres for valid and justifiable investigatory purposes vis-a-vis the accused, it is fundamental to justice that the state not be able to invade the sanctum of the mind for the purpose of incriminating that individual. This fundamental tenet is preserved, in its entirety, by the principle against self-incrimination.' I would support this approach.

values of an open and democratic society based on freedom and equality, and in suitably controlled conditions, would have far less difficulty in passing section 33 scrutiny in terms of our Constitution.

[260] Section 417 procedures involve both oral and documentary elements, and cover areas that are both far removed from the context of a criminal trial and quite proximate to it. Its most remote aspect in relation to the privilege against self-incrimination is the summons to appear at the enquiry. In my view, applying the reasoning advanced in the earlier part of this judgment, this obligation to attend the enquiry and submit to questions does not raise a question of fundamental freedom as envisaged by section 11. The holding of an enquiry is an integral part of regulating companies. The duty to attend such an enquiry after the company has failed, flows not from intrusive State action, but from the need to wind up the company in an orderly way and protect the interests of creditors and shareholders. As far as the company director or other official is concerned, it goes with the job, and does not require section 33(1) justification. Similarly, I would hold that the compulsion to answer non-incriminating questions does not constitute an infringement of section 11 rights of sufficient substance to require special sanction in terms of section 33(1).

[261] Section 417 read with section 424 goes further, however. The examinee is obliged to answer questions which may be incriminating;[27] and the answers may be used in subsequent criminal proceedings.[28] Once one enters the zone of possible self-incrimination and potential punishment, a freedom interest is clearly engaged, and section 33(1) justification is required. In my opinion, the compulsion to answer all questions dealing with stewardship of the company, whether incriminating or not, can be justified in terms of section 33 criteria with relative ease. The whole purpose of getting to the bottom of the collapse so as to inform and reimburse as much as possible those who invested or traded in good faith, would be defeated if the director could shield him or herself behind the right not to answer incriminating questions. It is precisely in areas where assets have been fraudulently disposed of, that specially penetrative investigations for their recovery might be required. Company directors and other officials who appeal to the public for funds and engage in public commercial activity with the benefit of not being personally liable for company debts, cannot complain if they are

[27]Section 417(2)b, first part.

[28]Section 417(2)b, latter part. In terms of section 424(1) and (3) concerning liability of directors and others for fraudulent conduct of business

> every person who was knowingly a party to the carrying on of the business in the manner aforesaid, shall be guilty of an offence.

subsequently called upon to account for their stewardship, at least, for the purposes of discovering all assets so as to minimize the loss to creditors and give full information to shareholders. When raising funds and trading with the protection of not being personally liable for company debts, the company officials implicitly undertake to submit to such enquiry, and effectively waive in advance any claim not to answer questions of an incriminating kind that relate to their management of the company's affairs. Indeed, it would be ironical if crooked directors were more able to avoid submitting themselves to enquiry than honest ones.[29] The problem therefore lies not in the interrogation per se, however, discomfiting to the examinee it might be, but in the knowledge that the answers can be used in subsequent criminal proceedings. It is this that gives rise to the constitutionally questionable situation of being damned with prison if you do, and damned with prison if you don't. Hence the examinee's quadrilemma: confess to a crime, refuse to answer, commit perjury, or seek refuge in the Constitutional Court.[30] Justification in terms of section 33(1) for using state compulsion to

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[29]MacKenna J in *Regina v Harris (Richard) and another*, 1970 (1) WLR 1252 G.

[30]Iacobucci J in *R v S* (RJ) supra note 7 at p635 quotes Wigmore as referring to the
3 horns of the triceratops - harmful disclosure, contempt, perjury.
Mr Justice Goldberg converted this into
the cruel trilemma of self-accusation, perjury or contempt.
Murphy v Waterfront Com. of New York Harbor 378 U.S. 52 (1964) 678 at 681. The full quotation bears repetition:
The privilege against self-incrimination ..... reflects many of our fundamental values and most noble aspirations: Our unwillingness to subject those suspected

create such a situation is accordingly far more difficult to achieve.

[262] This is not to say that no case can be made out for justifying interrogatory procedures not only to collect information but also to help secure the conviction of fraudulent company officials, that is, for elements of the inquisitorial system of criminal justice to be used in our procedures for the specific purpose of combatting company fraud. This would not constitute a startling innovation but, rather, represent the continuation of an established practice. In the well known English case of *Reg. v Scott*,[31] Lord Campbell said that the interpolation of an implied clause to the effect that the examination should not be used as evidence

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of crime to the cruel trilemma of self-accusation, perjury or contempt; our preference for an accusatorial rather than an inquisitorial system of criminal justice; our fear that self-incriminating statements will be elicited by inhumane treatment and abuses; our sense of fair-play which dictates 'a fair state-individual balance by requiring the government to leave individual alone until good cause is shown for disturbing him and by requiring the government in its contest with the individual to shoulder the entire load'; our respect for the inviolability of the human personality and of the right of each individual 'to a private enclave where he may lead a private life'; our distrust of self-deprecatory statements; and our realisation that the privilege, while sometimes 'a shelter to the guilty' is often 'a protection to the innocent'.

against the bankrupt on any criminal charge, would be more likely to defeat than to further the intention of the legislature.

> Considering the enormous frauds practised by bankrupts upon their creditors,

he observed,

> the object may have been, in an exceptional instance, to allow a procedure in England universally allowed in many highly civilised countries.

This was in 1856. More recently, Lord Mustill has pointed out that the statutory interference with the right against self-incrimination is almost as old as the right itself. Since the 16th century, he says

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[31](1856) Dears. & B. 47 at p58.

> legislation has established an inquisitorial form of investigation into the dealings and assets of bankrupts which is calculated to yield potentially incriminating material, and in more recent times there have been many other examples in widely separated fields, which are probably more numerous than is generally appreciated.[32]

[263] The question must, however, still be asked: does the fact that the exception is a longstanding one mean that it would constitute a reasonable, justifiable, and necessary limitation of the general protection accorded against self-incrimination? It is, of course, not for the Constitution to conform to legislation, however antique the latter may be, but for legislation to be consistent with the Constitution.[33] Nevertheless, the well-established nature of the legislative

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[32] *Reg. v Director of Serious Fraud Office, Ex p. Smith* supra note 25 at p40 D-E. It should be borne in mind that these remarks were made in the context of the interpretation of a statute where parliamentary supremacy prevailed and no issue of constitutionally inviolable fundamental rights could be raised. Furthermore, the statute in question expressly excluded the use of answers in a subsequent criminal trial. Nevertheless, the passage does indicate that the common law privilege against self-incrimination has, as far as company officials are concerned, been honoured as much in the breach as in the observance.

[33] Section 4(1) of the Constitution reads

> This Constitution shall be the supreme law of the Republic and any law or act inconsistent with its provisions shall, unless otherwise provided expressly or by

exception, both in our country[34] and abroad, when measured against the relatively inchoate and adaptive nature of the common-law principle, indicates that it could well pass the test at least of reasonableness and justifiability. In *S v Zuma*, supra, Kentridge AJ asked

> why it should be thought reasonable to undermine a long-established and now entrenched right.

In the present case, however, the limitation itself is almost as ancient as the right it impinges on, and furthermore the right is not directly and robustly entrenched, but only subsumed in a residuary manner into a broader right. This would, of

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> necessary implication in this Constitution, be of no force or effect to the extent of the inconsistency.

See the remarks by Wilson J on a similar provision in the Canadian Charter, in the *Thomson Newspapers* case supra note 7 at p203.

[34]As Ackermann J points out in paras 118 - 119, legislation in the Transvaal, the commercial hub of the country, has, at least since 1926, expressly authorised the use of incriminating answers in subsequent criminal proceedings.

course, not make it a ‘lesser right’ as such, but would affect its intensity and weight in the balancing process.

[264] In South Africa today, ‘enormous fraud’ is unfortunately a continuing occurrence. As I have said, it might well be reasonable and justifiable to continue with inquisitorial procedures against officials of failed companies. The public interest undoubtedly requires both that fraudulent dealings be exposed and set aside where possible, and that those responsible be punished. The corporate veil functions not only at the legal level to promote corporate identity and create the conditions for limited liability, but also at the evidential level to hide the doings of dishonest company officials. Front companies and nominee holdings can obscure the true economic nature of transactions. Frauds can be intricate, take place over a long period of time, and depend on the effect of activities which in their separate detail appear lawful, but in their cumulative conjunction are fraudulent. There is no ‘smoking gun’ to be detected by ordinary police enquiry methods. Yet, even allowing for the fact that special procedures of ancient provenance, designed to pierce the corporate veil and ensure that fraud is properly uncovered and punished, may pass the tests of reasonableness and justifiability, do they as well overcome the third hurdle provided by section 33(1) in relation to section 11, namely, that they are necessary?

[265] The concept of necessity gives central place to the proportionality of the means used to achieve a pressing and legitimate public purpose.[35] In positive terms, the public interest served by the challenged provisions would have to be so compelling as clearly to outweigh the questionable pressure to which the examinees would be put at the time of their interrogation, and the consequent sense of unfairness that would flow from their being obliged to convict themselves out of their own mouths. Expressed negatively, the burden imposed should not go beyond what would be strictly required to meet the legitimate interests both of shareholders and creditors and of society as a whole. The means adopted by Parliament should thus be shown to fall within the range of options which would not be unduly burdensome, overbroad or excessive, considering all the reasonable alternatives. In making this assessment of proportionality, a structured value judgment, taking account of all the established elements, is required. Applying what I consider the wise counsel of Dickson CJC of the Canadian Supreme Court to focus on

> the synergetic relation between the values underlying the Charter and the circumstances of the particular case,[36]

I have grave doubts as to whether the materials placed before us indicate that

the test of necessity has been met.

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[35] In *Coetzee v Government of the Republic of South Africa and Matiso and others v Commanding Officer Port Elizabeth Prison and others* 1995 (10) BCLR 1382 at paras 55 - 60, I had occasion to cite a large number of international instruments and commentaries on the subject, and I will not repeat them here.

[36] R v Keegstra (1990) 3 C.R.R. (2d) 193 at p221.

[266] The Serious Economics Offences Act,[37] which, with the sole objective of investigating economic crimes, establishes inquisitorial procedures not dissimilar to those contained in section 417, expressly immunises answers from subsequent use at a criminal trial.[38] There is nothing before us to show why the legislature can balance the securing of effective investigatory capacity, and the maintenance of sensitivity to basic rights, when it comes to fraud investigated as such in terms of the Serious Economic Offences Act, and not manage to do so in respect of fraud discovered as a result of a broader enquiry in terms of section 417 of the Companies Act. Similarly, the Insolvency Act provides that no evidence regarding questions and answers at an Insolvency Enquiry shall be admissible in subsequent criminal proceedings.[39] Far from being manifestly necessary, therefore, the provisions of section 417(2)(b) appear to be out of step with what is considered appropriate in sibling statutory material.

[267] I would add that unfortunate experiences in the past suggest that we should

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[37]Act No. 117 of 1991.

[38]See section 5(b);

> No evidence regarding any questions and answers contemplated in paragraph (a) shall be admissible in any criminal proceedings, except in criminal proceedings where the person concerned stands trial on a charge contemplated in subsection (10) (b) or (c), or in section 319 (3) of the Criminal Procedure Act, 1955 (Act No. 56 of 1955).

These latter exceptions refer essentially to perjury and making contradictory statements on oath.

[39]Act No. 24 of 1936 section 65(2A)(b); the only exceptions relate to the giving of false evidence or the failure to answer lawful questions fully and satisfactorily.

exercise great caution in accepting any departure from the 'case to meet' principle. Failure to do so could open up the way to justifying pre-trial interrogations of persons suspected of treason or sedition, and the wheel could then turn full circle, with the Star Chamber - type inquisition which gave rise to the right against self-incrimination in the first place, ending up being legitimized by the very chapter in the Constitution designed to protect fundamental rights. In the words, once more, of Mr Justice Frankfurter,[40]

> No doubt the constitutional privilege (against self-incrimination), may, on occasion, save a guilty man from his just deserts. It was aimed at a more far-reaching evil - a recurrence of the Inquisition and the Star Chamber, even if not in their stark brutality. Prevention of the greater evil was deemed of more importance than occurrence of the lesser evil. Having had much experience with a tendency in human nature to abuse power, the Founders sought to close the doors against like future abuses by law enforcing-agencies.

[40]In *Ullman v United States*, 350 U.S. 422 (1956) at p428.

The framers of our Constitution no doubt had more recent South African experience in mind when they drafted Chapter 3.[41]

[41]Writing in 1977, Professor Dugard supra note 2 points out supra at p86,

> While the Criminal Procedure Act introduces a procedure with slight resemblances to the inquisitorial system, 'the drastic process' has produced a procedure with striking similarities to the inquisitorial method. The 90 day detention law (section 17 of Act No. 37 of 1963), the 14 day detention law(section 22 of Act No. 62 of 1966), section 6 of the Terrorism Act and section 13 of the Abuse of Dependence-producing Substances and Rehabilitation Centres Act all authorise police interrogation in solitary confinement before the arrested person is brought to trial .....Thus as an example of the inquisitorial method it is closer to the Roman-Dutch extra-ordinary procedure than it is to modern continental inquisitorial methods where the person subjected to interrogation is assured all the guarantees normally accorded to a person under the accusatorial system.

(Original emphasis).

[268] To sum up: I agree with the implications of Ackermann J's judgment that section 417 should not be seen as a piece of criminal procedure legislation deliberately targeting company officials for specially harsh treatment, but rather as an integral part of an Act designed to consolidate the law relating to companies. If meaningful regulation of companies requires compulsory disclosure of information to interested persons while the company is in existence, such a duty to 'come clean', or in modern parlance to manifest transparency, should not cease, but if anything become stronger, when the company enters its demise. The duty to disclose does not entirely eliminate the right against self-incrimination, but does attenuate it. When the principle of the duty to reveal all material information is balanced against the privilege against self-incrimination, the scales come to rest in such a way as to compel the production of the testimony, while ensuring that it is not used in evidence at a criminal trial.[42] The granting of use immunity thus saves the authorities from being put to an invidious (and not necessary) election between the option of examining and recovering, on the one hand, and that of prosecuting and punishing, on the other. The public

[42]The judges in both *Thomson Newspapers* case supra note 7 and *R v S* (RJ) supra note 7 were all agreed that use immunity should be co-extensive with the oral testimony given. They disagreed on the question of derivative immunity. The coupling of compellability with protection in the form of evidentiary immunity, was regarded as a unique Canadian balancing of individual and societal interests. See Iacobucci J in *R v S* (RJ) at p649. In *Thomson Newspapers* case at p246 La Forest J said

> A right to prevent the subsequent use of compelled self-incriminating testimony protects the individual from being 'conscripted against himself' without simultaneously denying an investigator's access to relevant information. It strikes a just and proper balance between the interests of the individual and the

interest requires that both possibilities remain open, subject to the former not trespassing unduly on the latter.[43] Once the provision authorizing the admission of the answers at a subsequent criminal trial is removed, and use immunity is

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state.

[43]I agree with Ackermann J that at this stage that we are not called upon to make a definitive finding on whether the use of derivative evidence, or so called 'clue facts', should at the subsequent criminal trial automatically be regarded as either permissible or impermissible. The trial court would, at that stage, not be dealing with the 'fruits of a poisoned tree', but rather with the product of a legitimate and legally controlled enquiry. Nor would it be concerned with evidence existing solely of words used by the accused, but instead with objective evidence existing independently of any oral communication. In addition, if all incriminating evidence possibly derived from the examinee's answers were automatically to be excluded in the same way as the incriminating answers themselves, then a subtle and crooked examinee could gain effective immunity from prosecution by answering questions in such a manner as to cover all possible sources of evidence at a subsequent criminal trial. In *Thomson Newspapers* case supra note 7 at 260 Le Forest J says that

> a general requirement of derivative use immunity would mean that in many cases the use of the power to compel testimony would furnish wrongdoers with the type of 'immunity baths' that were characteristic of the transaction immunity formerly available in the United States:

Sopinka J in *R v S* (RJ) supra note 7 at p721 expresses the further fear that even challenges to derivative use could lead to interminable admissibility proceedings resulting in virtual transactional immunity. I feel, however, that there could well be circumstances where it would manifestly not be fair to admit such derivative evidence. These are matters, which, in my view, should be determined by the trial court, using a voir dire if necessary.

granted, as Ackermann J proposes, the dilemma that remains is the constitutionally non-problematic one which faces any witness in any proceedings: whether or not to tell the truth.

[269] Subject to these observations, I agree with the conclusions of Ackermann J and the order he proposes.

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