

FREEDOM AND CONSTRAINT IN CONSTITUTIONAL ADJUDICATION*

HENK BOTHA**

ABSTRACT

The question of freedom and constraint in adjudication is closely related to questions about the politics of law, the possibility of the rule of law, the responsibility of judges for their decisions, and the capability of lawyers to challenge deeply held assumptions and transform their own practices. This article begins to explore these issues by examining three different understandings of freedom and constraint. In the first, constraints are conceived metaphorically as physical objects, which constitute solid boundaries between lawful and unlawful conduct. The second view is Duncan Kennedy's conception of law as the exchange of contradictory argument-bites. The third metaphor is also derived from the work of Kennedy: that of law as the field of a judge's action. The article argues that, while the first two metaphors promote an understanding of freedom and constraint as mutually exclusive and of adjudication as something mechanical, the third metaphor enables a more sophisticated understanding of freedom and constraint as graded categories, and of the role of culture, persuasion and imagination in legal reasoning. However, the idea of legal rules as long, straight boundaries which predetermine the outcomes of cases, continues to exert a powerful hold on the South African legal imagination. It is argued that the Constitution requires legal interpreters to remain open to different interpretations, and to develop a more self-conscious style of adjudication which is characterised by a willingness to challenge deeply held assumptions and to articulate the moral and political beliefs through which their interpretations are filtered.

I INTRODUCTION

Judges of the Constitutional Court often claim that they are concerned exclusively with the meaning of the Constitution; they claim that their own intuitions of right and wrong, of appropriate and inappropriate, never enter the picture. Consider, for instance, the following statement of Sachs J in the death penalty case:

Our function is to interpret the text of the Constitution as it stands. Accordingly, whatever our personal views on this fraught subject might be, our response must be a purely legal one.¹

Consider, also, the statement in the *Nevirapine* case that, despite the political controversy and animosity surrounding the case, the Court was

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** Professor of Law, University of South Africa.

1 *S v Makwanyane* 1995 (3) SA 391 (CC) para 349.

able to 'cut through the overlay of contention and arrive at a straightforward and unanimous decision'.² These statements express confidence in the ability of judges to avoid political controversy and to decide cases in accordance with the law, rather than their own political convictions. The court, it seems, regards itself as constrained by legal materials – even in the face of bitter political controversy and division over social issues, and even where the Constitution itself contains only vague norms to guide decision-making.

It is not always clear what these statements mean, and how central they are to the Constitutional Court's reasoning. Sometimes, they seem to underscore the Court's understanding that it is its task to inquire into the constitutionality (and not the political wisdom) of a particular law or policy.³ However, sometimes the Court seems to go further to imply that the political beliefs of its members played no part in their decision-making; implying that their decision was based on purely 'legal' grounds. It thus postulates the existence of a strict division between law and politics, and assumes that the law is sufficiently determinate to dispose of cases without the need for judges to have recourse to 'extra-legal' considerations. This kind of reasoning has been criticised. It is said to overestimate the constraining effect of legal materials and to underplay the court's interpretive freedom. It is argued that reliance on a clear boundary between law and politics serves to insulate the court's decisions from public debate and criticism; that candour on the part of judges about the moral and political reasons for their decisions would be more conducive to a constitutional culture of justification.⁴

It should be clear from these preliminary observations that the questions whether, and to what extent, judges are constrained by legal materials, and whether, and to what extent, they are free to choose between different interpretations, are deeply contested. The different answers given to these questions often reveal profound jurisprudential, political and ideological differences.⁵ Where some see constraint, others

2 *Minister of Health v Treatment Action Campaign (2)* 2002 (5) SA 721 (CC) para 21.

3 This point is made frequently by the Constitutional Court. For example, in the *First Certification Judgment*, the court emphasised that it had 'a judicial and not a political mandate', and that it had 'no power, no mandate and no right to express any view on the political choices made by the [Constitutional Assembly] in drafting the [new constitutional text], save to the extent that such choices may be relevant either to compliance or non-compliance with the [Constitutional Principles]. Subject to that qualification, the wisdom or otherwise of any provision of the [new text] is not this Court's business'. *Ex Parte Chairperson of the Constitutional Assembly: In Re Certification of the Constitution of the Republic of South Africa* 1996 (4) SA 744 (CC) para 27. See also *United Democratic Movement v President of the Republic of South Africa (2)* 2003 (1) SA 495 (CC) para 11.

4 See K Klare 'Legal Culture and Transformative Constitutionalism' (1998) 14 *SAJHR* 146.

5 This is evident from the fact that freedom and constraint are both associated with other terms which are politically and jurisprudentially loaded. Freedom is associated with openness, flexibility and a willingness on the part of judges to consider alternative interpretations and to take responsibility for their decisions. However, it also conjures up images of judges whose decisions are based on whim and prejudice. Constraint, on the other hand, is associated with judicial accountability and fidelity to law. It is, however, also associated with closure, rigidity, and a denial of judges' responsibility for their decisions.

see freedom. Cases which appear to some judges to be easy and straightforward, to have one clearly right answer, appear to others to be wide open and to involve a considerable degree of judicial choice.

Put differently, legal materials do not apply themselves, but are constructed by human beings. Their meaning depends as much on the interpretive habits and reflexes of the interpreter as on the materials themselves. Whether a judge feels compelled by a statutory provision or precedent to give a particular ruling, or sees room to manoeuvre, to reinterpret the relevant legal text or to distinguish the present fact situation from previous cases, is conditioned by deeply held assumptions about the nature of legal materials, the role and function of judges, the relation between law and politics, etc.

It is often argued that the interpretive practices and assumptions of South African lawyers, judges and legal scholars are at odds with the democratic-transformative aspirations of the Constitution.⁶ South African lawyers tend to assume that their legal training enables them to 'find' the law in the relevant legal materials, and then to apply it neutrally and more or less mechanically, to the fact-situation at hand. They thus experience legal meaning as stable and predictable and legal materials as determinate and capable of neutral application. But, critics point out, the stability and objectivity experienced by lawyers are not 'objective' properties of the relevant legal materials, but are, rather, a function of the background assumptions of the interpreters.⁷ For instance, the law of contract or property derives its supposed coherence and neutrality from a set of beliefs about the 'naturalness' and neutrality of the market and private ownership.⁸

The point is not only that legal meaning is shaped by background assumptions and inarticulate premises, but that in the South African context these assumptions and premises tend to be of a conservative nature. Many of the assumptions that have lent an air of coherence and neutrality to areas of law that are traditionally classified as 'private law', are at odds with the Constitution's commitment to equality, social justice and the democratisation of the private sphere. Many of the assumptions

6 See, for example, Klare (note 4 above).

7 The importance of background assumptions and interpretive reflexes in shaping our understanding of (legal) texts, and the possibility of questioning those assumptions are central concerns of hermeneutic, linguistic and critical legal theorists. See, for example, JR de Ville *Constitutional and Statutory Interpretation* (2000) 3-8; and LM du Plessis *Re-Interpretation of Statutes* (2002) 16-7, 91-2 on the role of pre-understanding in constitutional and statutory interpretation; and J Habermas *Between Facts and Norms* (1996) (trans W Rehg) 22 on the role of lifeworld contexts (ie, a horizon of shared beliefs that are perceived to be unproblematic) in securing communicative action. See also RJ Coombe 'Same As It Ever Was: Rethinking the Politics of Legal Interpretation' (1989) 34 *McGill LJ* 603; Klare (note 4 above); and AJ van der Walt 'Modernity, Normality, and Meaning: The Struggle Between Progress and Stability and the Politics of Interpretation' (2000) 11 *Stellenbosch LR* 21 and 226 on the ways in which such background assumptions tend to favour the status quo and inhibit transformation.

8 See JW Singer 'Legal Realism Now' (1988) 76 *California LR* 465.

that have traditionally shaped lawyers' responses to disputes between the state and the individual, are in conflict with the constitutional values of democratic participation, accountability, responsiveness and openness. It is therefore not surprising that legal and constitutional interpretation is still often characterised by an uncritical attitude to existing distributions of wealth and power and that it continues to be influenced by a patriarchal, authoritarian and privatistic⁹ mentality.

The question of freedom and constraint in adjudication is, then, closely related to questions about the politics of law, the possibility of the rule of law, the responsibility of judges for their decisions, and the capability of lawyers to challenge deeply held assumptions and transform their own practices. In this article, I begin to explore these issues by examining three different understandings of freedom and constraint (in parts II, III and IV respectively). In the first, constraints are conceived metaphorically as physical objects, which constitute solid boundaries between lawful and unlawful conduct. The second view is Duncan Kennedy's conception of law as the exchange of contradictory argument-bites.¹⁰ Thirdly, I consider yet another metaphor used by Kennedy: that of law as the field of a judge's action. I argue in part V that, while the first two metaphors promote an understanding of freedom and constraint as mutually exclusive and of adjudication as something mechanical, the third metaphor enables a more sophisticated understanding of freedom and constraint as graded categories, and of the role of culture, persuasion and imagination in legal reasoning. However, the idea of legal rules as long, straight boundaries which predetermine the outcomes of cases, continues to exert a powerful hold on the South African legal imagination. This is evident, *inter alia*, from the persistence of the dichotomy between rules and flexible legal standards (discussed in part VI) and some of the judicial failures over the past ten years to engage in substantive legal reasoning (discussed in part VII). I argue that the Constitution requires legal interpreters to remain open to different interpretations, and to develop a more self-conscious style of adjudication which is characterised by a willingness to challenge deeply held assumptions and to articulate the moral and political beliefs through which their interpretations are filtered.

9 See AJ van der Walt 'Un-doing Things with Words: The Colonisation of the Public Sphere by Private-Property Discourse' in G Bradfield & D van der Merwe (eds) *Meaning in Legal Interpretation* (1998) 235.

10 See D Davis 'Duncan Kennedy's *A Critique of Adjudication*: A Challenge to the "Business as Usual" Approach of South African Lawyers' (2000) 117 *SALJ* 697 for a reflection on the implications of Kennedy's work for constitutional adjudication in South Africa. See also Klare (note 4 above) 159-66.

II THE FOREST OF CONSTRAINT

In *National Media Ltd v Bogoshi*,¹¹ the Supreme Court of Appeal held that the decision in *Pakendorf v De Flamingh*,¹² in which it was held that newspaper owners, publishers and editors are strictly liable for defamation, was wrongly decided and should be overruled. Strict liability had a chilling effect on press freedom and had been rejected in a number of other democratic jurisdictions. Moreover, the adoption of a standard of strict liability rested on a policy decision that ‘set no great store by any of the previous decisions’,¹³ and was based on an English doctrine that had long been discredited and abolished in English law. A proper balance between freedom of expression and the right to reputation could be achieved by holding media defendants liable on the basis of negligence.

The court in *Bogoshi* not only substituted liability on the basis of negligence for the strict liability of the press, but also held that the press may escape liability for the publication of false allegations if the material published is in the public interest and the decision to publish is reasonable.¹⁴ It thus implicitly overruled its earlier decision in *Neethling v Du Preez*¹⁵ which held that the public interest does not constitute an independent ground of justification in defamation cases against the press.

At one level, the judgment in *Bogoshi* is a victory for press freedom and a confirmation of the policy-making function of the courts. At another level, it looks like a failure to confront the divide between an authoritarian past and a new, democratic constitutional order. The *Bogoshi* judgment treats earlier decisions, which made serious inroads into press freedom, as unwarranted deviations from the unfolding logic of the common law. It seeks to ‘cleanse’ the common law from these corrupting influences, either by overruling them (*Pakendorf*) or by ignoring them (*Neethling*). Once this has been achieved, the court declares that the balance struck at common law between the freedom of the media and the right to a good name is already in line with the Constitution.

The Supreme Court of Appeal here presents its decision not in terms of some sharp discontinuity with the past, but rather as a return to the true logic of the common law – a common law which has always taken freedom of expression seriously. In its view, the adoption of strict liability rested upon an ill-advised policy decision which constituted a departure from previous practice. The court, in overruling the decision in *Pakendorf*, thus sees itself as restoring the status quo prior to that

11 1998 (4) SA 1196 (SCA).

12 1982 (3) SA 146 (A).

13 Note 11 above, 1206E.

14 Ibid 1212G: ‘[T]he publication in the press of false defamatory allegations of fact will not be regarded as unlawful if, upon a consideration of all the circumstances of the case, it is found to have been reasonable to publish the particular facts in the particular way and at the particular time’.

15 1994 (1) SA 708 (A).

decision, rather than being involved in some new beginning. Moreover, the court not only makes it clear that its recognition of a new defence (where the publication of false allegations is in the public interest) is based upon the existing standard of reasonableness, but also creates the impression that this was the first time that it was asked to pronounce on the existence of such a defence.¹⁶ It thus presents its innovation as an extension of existing doctrine, rather than as a radical new departure.

Bogoshi provides a fascinating illustration of traditional assumptions about the nature of freedom and constraint in adjudication. Here, the common law is presented as a stock of legal rules and principles that are sufficiently clear to guide judicial decision-making, yet sufficiently flexible to allow courts to adapt the law to changing circumstances and important policy considerations. Sometimes, judges may err. They might misinterpret existing rules or standards, or stray from the general direction in which the common law is developing. It is then left to a court of appeal, or a competent court in a subsequent judgment, to correct the error, to straighten the line of legal development.

The image of the common law as a long, straight line, as a steady, linear progression which proceeds on the basis of general principles, resonates well with the idea of legal rules and standards as long, straight boundaries that separate lawful from unlawful action. Duncan Kennedy, a leading figure in the critical legal studies movement, describes the traditional understanding of judicial freedom and constraint in the United States in precisely these terms. Writing in 1986,¹⁷ Kennedy conceptualised legal cases as arrayed in fields. Judges experience legal fields as patterned, as having a particular configuration. Kennedy identifies six typical field configurations. Two of these, the impacted field and the case of first impression, 'represent constraint and freedom as they are conceived within the legal tradition itself'.¹⁸ In the impacted field, rules appear as long, straight boundaries, with 'a substantial number of cases distributed in a regular pattern along the boundary, dispelling any doubt that the rule means what it says'.¹⁹ In the case of first impression, the field 'presents itself as structured everywhere except in the vicinity of the case at hand', where the boundary is vague. The case of first impression appears as

a kind of clearing of freedom in the endless forest of constraint. Because we exercise freedom where there is no constraint, it doesn't threaten constraint. Moreover, the judge's action fills in a part of the clearing, so that the freedom of cases of first impression

16 The court calls this defence novel, as the focus in cases of the publication of false allegations has, in the past, 'always been on *animus injuriandi* and not on lawfulness' (1024H). See also 1024D.

17 D Kennedy 'Freedom and Constraint in Adjudication: a Critical Phenomenology' (1986) 36 *J of Legal Education* 518.

18 *Ibid* 539.

19 *Ibid* 538.

can be understood as self-annihilating. The more times judges exercise this freedom the less of it there will be, as the boundaries get staked out with case by case.²⁰

Constraints are conceived as physical objects (trees) that leave the judge little room to manoeuvre, and make it virtually impossible for her to manipulate the field. They are experienced as impenetrable and pervasive. Freedom, on the other hand, is viewed as something exceptional and transitory, which exists only in areas that have not yet been cultivated by precedent.

The conventional understanding of freedom and constraint described by Kennedy has been particularly influential in South Africa. The image of the judge who is merely following the rules laid down by legislation or existing at common law, who is giving effect to straight, solid boundaries and only occasionally fills in gaps in the law, has had – and still has – a powerful hold on the South African legal imagination. Even the holding in *Bogoshi* that the publication of false allegations may be lawful if reasonable and in the public interest – a clear departure from previous decisions – is presented as an extension of existing boundaries; it is a filling-in of a clearing in the endless forest of constraint.

Mention must here be made of the role of legal academics in sustaining this image. Legal academics invest enormous time and energy in rationalising the law, in attempting to demonstrate that legal fields are (or can, through appropriate reform be made) ‘rationally related to some coherent conceptual ordering scheme’.²¹ Put differently, legal scholars work hard at identifying gaps and contradictions in existing legal doctrine, and putting forward proposals that would fill the gaps and iron out the contradictions. Mainstream legal scholarship thus strives to substitute straight, clear boundaries for crooked, vague and contorted ones, to fill clearings of freedom with saplings of constraint.

The conventional understanding, then, assumes that constraint is a function of the objective properties of legal materials. The role of judges is largely passive: to follow the rules laid down, to give effect to pre-existing boundaries. This understanding is hopelessly unrealistic. It assumes that legal texts have a single, objective meaning that exists independently of their construction by human beings. It assumes, further, that answers to concrete legal problems can be derived, more or less mechanically, from general rules and concepts.²² It denies the role of perspective in legal interpretation, and assumes that all judges should see legal texts and fact situations from the same (disinterested and disembodied) vantage point. It ignores the contradictory nature of law, and assumes that legal rules and standards form clear, solid boundaries

²⁰ Ibid 539.

²¹ RW Gordon ‘Historicism in Legal Scholarship’ (1981) 90 *Yale LJ* 1017, 1018.

²² Of course, this assumption was famously refuted by Oliver Wendell Holmes’s statement that ‘general propositions do not decide concrete cases’. *Lochner v New York* 198 US 45 (1905) 76.

between conflicting values and interests. It ignores one of the central insights of American legal realism: that judges have to choose and that, in doing so, they are invariably influenced by ethical and policy considerations.²³

In the conventional understanding, freedom and constraint are conceived in all-or-nothing terms. The judge is either constrained by legal materials, in which case she has no choice but to declare the outcome determined by the materials at hand, or she is unconstrained and therefore free to develop the law in accordance with her views on social policy. Constraint is conflated with determinacy, freedom with radical subjectivity.²⁴ This leaves us with only two possible responses to the realist critique of legal formalism: we must either acknowledge that legal materials are indeterminate and therefore fail to constrain judges, or hold on, for all we are worth, to the formalist creed. This either/or logic explains why so many legal academics remain firmly in the hold of a judicial philosophy that has been severely discredited: they believe that the only alternative to formalism lies in a fatalistic acceptance of the impossibility of the rule of law.²⁵

III THE PLAY OF ARGUMENT-BITES

In 'A Semiotics of Legal Argument', Duncan Kennedy argued that legal argument takes place through the deployment of stereotyped 'argument-bites'.²⁶ Argument-bites come in pairs: for every argument-bite, there is a counter-bite 'that has an equal status as valid utterance within the discourse'.²⁷ Kennedy provides an impressive list of bites and counter-bites,²⁸ which are drawn mainly from the American law of contract and torts. For instance, the maxim *pacta sunt servanda* (promises should be kept) is likely to be countered by the counter-maxim *rebus sic stantibus* (only as long as circumstances remain the same). Or, the argument that it is the role of the judge to apply the law, not make it, is likely to be met by

23 See Singer (note 8 above) on the critical legacy of the legal realists. See also H Botha 'Democracy and Rights: Constitutional Interpretation in a Postrealist World' (2000) 63 *THRHR* 561.

24 See SL Winter *A Clearing in the Forest: Law, Life, and Mind* (2001) 310.

25 See JW Singer 'The Player and the Cards: Nihilism and Legal Theory' (1984) 94 *Yale LJ* 1 for a discussion and critique of the assumption that nihilism is the only alternative to a belief in the objectivity, neutrality and determinacy of law.

26 (1991) 42 *Syracuse LR* 75.

27 *Ibid* 77.

28 *Ibid* 78-80. Kennedy's list seems to have been partly inspired by an article of Karl Llewellyn, in which he identified a long list of opposing canons on statutory interpretation. This article was reprinted in K Llewellyn *The Common Law Tradition: Deciding Appeals* (1960) 521-35. Many of these opposing canons are familiar to South African lawyers. To mention but one example: the maxim 'if language is plain and unambiguous it must be given effect', is countered by 'not when literal interpretation would lead to absurd or mischievous consequences or thwart manifest purpose' (524).

the counter-argument that the common law evolves to meet new social conditions.

Kennedy's analysis is structured partly in terms of the conventional 'rational argument is war' metaphor.²⁹ Legal argument is presented as a ritual of attack and counter-attack, thrust and parry. Each side draws upon a stock of conventional bites and counter-bites, which reflect the law's contradictory commitments. Each side identifies the argument-bites that are most likely to enable it to gain the upper hand and to neutralise the opposition's attacks, and then tries to combine the relevant bites in a coherent strategy.

Because bite and counter-bite are both recognised as valid within legal discourse, and in the absence of a set of 'intra-legal criteria' which specify when a particular bite should enjoy precedence, judges are free to choose between conflicting arguments. Kennedy's analysis suggests that these arguments reflect a series of contradictions that are built into the structure of law.³⁰ Legal materials are, therefore, plastic and manipulable, rather than solid and determinate. In choosing which arguments to rely on in a particular judgment, judges are inevitably influenced by their political and moral beliefs. Adjudication itself is a strategic activity, in which judges employ those legal arguments that provide the best possible justification for their own preferred outcomes.

To translate Kennedy's analysis into the language of South African constitutional law: a judge is free, in many cases, to argue either that the constitutional right in question should be given a generous interpretation,³¹ or that the ordinary meaning of the language of the Constitution supports a restrictive interpretation.³² He or she may argue that the Constitution obliges us to respect diversity, to give reasonable space to ways of life that may be experienced by the majority as 'unusual, bizarre or even threatening'.³³ Or it may be countered that marginalised groups cannot claim automatic exemption from the law of the land.³⁴ The judge may strike down a law because it limits fundamental rights more than is

29 See G Lakoff & M Johnson *Metaphors We Live By* (1980) 4-5, 77-81 for a discussion of this metaphor.

30 The contradictory nature of law is a recurring theme in Kennedy's thought. See also D Kennedy 'The Structure of Blackstone's Commentaries' (1979) 28 *Buffalo LR* 205.

31 *S v Mhlungu* 1995 (3) SA 867 (CC) paras 8-9 (Mahomed J).

32 *Ibid* para 78 (Kentridge AJ, dissenting); *Soobramoney v Minister of Health, KwaZulu-Natal* 1998 (1) SA 765 (CC) paras 13; 17.

33 *Christian Education South Africa v Minister of Education* 2000 (4) SA 757 (CC) para 25. See also *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 (1) SA 6 (CC) paras 22-6; *Hoffmann v South African Airways* 2001 (1) SA 1 (CC) para 38; *Prince v President of the Law Society of the Cape of Good Hope* 2002 (2) SA 794 (CC) paras 157-63; 170-72 (Sachs J, dissenting).

34 *Christian Education* (note 33 above) para 35; *Prince* (note 33 above) paras 129-42.

necessary.³⁵ Or he or she may insist that the court should not unduly narrow the range of policy choices available to the legislature.³⁶

However, Kennedy's analysis does not suggest that judges are unconstrained by legal materials. Legal argument, according to Kennedy, is structured: it consists of conventional argument-bites and more or less standard operations for the generation of counter-bites. Accordingly, judges have available, and are constrained by, an existing repertoire of arguments and moves. This does not mean that judges are unable to come up with new, original arguments, or that such arguments cannot, in time, be incorporated into the system of conventional bites and counter-bites. It does mean, however, that such arguments are less likely than conventional arguments to persuade an audience consisting of fellow judges, judges of appeal and other legal professionals; it means that they will lack 'the resonance that comes from repetition in thousands of other cases'.³⁷

Kennedy, then, views the pool of conventional legal arguments as both a source of law's indeterminacy and a constraining factor. Judges are free to choose among a wide range of rules and principles – of bites and counter-bites – to justify their decisions. At the same time, they are not free to justify their decisions in just any terms, but are expected to engage in *legal* argument. They must draw on an existing range of bites and counter-bites, must reduce complex fact situations and personal beliefs to patterns that can be comprehended in terms of the binary structures of legal argument. This does not bode well for the possibility of a

35 Section 36(1)(e) of the Constitution of the Republic of South Africa Act 108 of 1996.

36 *S v Manamela* 2000 (3) SA 1 (CC) paras 94-5 (O'Regan J and Cameron AJ, dissenting). See also para 34 (Madala J, Sachs J and Yacoob J). Other examples of fairly standard arguments and counter-arguments which may, in time, acquire the status of 'bites' and 'counter-bites' are: (1)(a) When interpreting the Constitution, a court must promote certain fundamental democratic values.

versus

(1)(b) The language of the Constitution should not be ignored in favour of a general resort to values (*S v Zuma* 1995 (2) SA 642 (CC) paras 17-18).

(2)(a) Comparative human rights jurisprudence is an important tool in interpreting the provisions of the Bill of Rights (*S v Makwanyane* (note 1 above) para 37).

versus

(2)(b) It must be remembered that it is the South African Constitution which must be interpreted (see eg *S v Makwanyane* paras 37 and 39; and the reservations expressed by Kriegler J about the relevance of the comparative materials relied upon by other judges in his dissenting judgment in *Du Plessis v De Klerk* 1996 (3) SA 850 (CC) paras 124-27 and his concurring judgment in *Fose v Minister of Safety and Security* 1997 (3) SA 786 (CC) para 90).

(3)(a) The state may not base its decisions on, or perpetuate harmful social stereotypes (see, for example, *President of the Republic of South Africa v Hugo* 1997 (4) SA 1 (CC) para 80 (Kriegler J, dissenting); *National Coalition for Gay and Lesbian Equality v Minister of Justice* (note 33 above) paras 23; 28 (Ackermann J), 108-09 (Sachs J); *Hoffmann* (note 33 above) paras 35-7).

versus

(3)(b) Reliance on such stereotypes may nevertheless be constitutionally valid if a refusal to do so would result in even greater prejudice to vulnerable groups (*Hugo* (this note) paras 111-13 (O'Regan J)).

37 Kennedy (note 26 above) 96.

transformative legal dialogue about social issues. In Kennedy's own words:

Legal argument has a certain mechanical quality, once one begins to identify its characteristic operation. Language seems to be 'speaking the subject', rather than the reverse. It is hard to imagine that argument so firmly channelled into bites could reflect the full complexity either of the fact situation or the decision-maker's ethical stance toward it. It is hard to imagine doing this kind of argument in utter good faith, that is, to imagine doing it without some cynical strategy in fitting foot to shoe.³⁸

Kennedy has worked out these ideas more fully in subsequent writings. Law, he insists, is too contradictory to determine legal outcomes independently of the judge's ideological beliefs. However, since judges are widely expected to uphold the rule of law, to refrain from giving effect to personal beliefs and ideological preferences, they deny any such influence, and write their judgments in the language of legal necessity. Kennedy explains this behaviour in terms of the psychological mechanism of denial and the Sartrean concept of bad faith.³⁹ Many judges suffer 'anxiety produced by the dilemma of not being able to do the right thing no matter how hard [they] try, because [they] are being told to do two opposite things at the same time'.⁴⁰ Their response is to make law appear coherent, rather than contradictory, to write their judgments as if they are guided solely by the relevant legal texts, to deny any strategic motivation in their interpretation of legal materials.

Kennedy's analysis of law as the play of contradictory argument-bites forms a striking counterpoint to the metaphors in terms of which the conventional understanding is structured. In contrast to the stationary imagery of the conventional account, Kennedy's text emphasises the dynamic nature of adjudication, the choices confronting judges. Unlike the traditional understanding, Kennedy's account recognises that law is a product of human minds; it is something we do, rather than something we find.

There is much in Kennedy's analysis that I find compelling. I think he is right that legal doctrine is often contradictory; that there are no meta-principles or 'intra-legal criteria' to guide judges in choosing which rule to follow in a particular case; that judges are therefore faced with real choices and that, in making such choices, they are inevitably influenced by their personal beliefs. I find his analysis of bites and counter-bites a useful way of explaining to students that law offers rich resources of argument and contestation and that they must learn to use these resources optimally.

38 Ibid 104.

39 D Kennedy *A Critique of Adjudication (Fin de Siècle)* (1997) 191-212. See JWG van der Walt *The Twilight of Legal Subjectivity: Towards a Deconstructive Republican Theory of Law* unpublished LLD thesis (Rand Afrikaans University 1995) for a critique of the Sartrean elements in Kennedy's thought.

40 Kennedy (note 39 above) 203.

At the same time, however, I find Kennedy's conclusions deeply disquieting. For Kennedy, constraint is ultimately illusory: it is the product of collective denial. Judges are caught up in the contradiction between their own experience of law as indeterminate and contradictory, and the need to present their decisions not as their own, but as compelled by the relevant legal materials. They are therefore not in a position to take responsibility for their choices. Moreover, legal argument has a superficial quality. The complexity of social experience is reduced to and reified in stereotypical arguments, which resemble sound bites rather than attempts at serious ethical debate.

Kennedy's account of adjudication appears to be almost the exact opposite of the conventional understanding of freedom and constraint. On closer inspection there are, however, important similarities. Like mainstream legal scholars, Kennedy seems to assume that law must be either determinate, or irreducibly subjective and ideological. Kennedy, too, looks for meta-principles to demarcate the scope of application of conflicting rules. When he finds none, he declares that adjudication is simply ideology dressed up as law. In short, Kennedy's account is structured in terms of the same either/or logic as the conventional understanding.⁴¹

IV LAW AS A FIELD OF ACTION

Kennedy proposes yet another metaphor for understanding adjudication in his earlier article on 'Freedom and Constraint in Adjudication'.⁴² There, Kennedy describes the process of legal reasoning from the perspective of a hypothetical judge who is assigned a case that initially seems to present a conflict between 'the law' and 'how-he-wants-to-come-out'.⁴³ The case involves an application for an injunction by a bus company against striking workers, who are lying down in the street outside the bus station to prevent buses (driven by substitute workers) from passing. The judge suspects that there is a rule that prohibits workers from interfering with the owners' use of the means of production during a strike, and that such rule applies to the workers' lie-in. He does not agree with the rule, as he is in favour of a transformation of economic life that would allow workers greater control over the means of production. He would, therefore, like to see the workers get away with the lie-in. He would also like to 'move the law as much as possible in the direction of allowing workers a measure of legally legitimated control over the disposition of the [means of production] during a strike'.⁴⁴

41 See Winter (note 24 above) 4.

42 Note 17 above.

43 Kennedy writes in the first person, ie he imagines himself to be the judge. It is for this reason that I refer to his imaginary judge in the masculine.

44 Ibid 521.

From the outset, the judge experiences law as a constraint. He knows that he may be able to overcome his initial sense that the lie-in is covered by a general rule that prohibits interference with the means of production during a strike. He may, for instance, be able to restate the facts of the case, so that the lie-in appears to fall outside the prohibition. Or he may manage to re-interpret the rule, to restrict its scope of application. Then again, he may be unable to overcome his initial sense that the lie-in is prohibited. He is painfully aware of the possibility that the rule may just not budge – either because it is so clear that no amount of reworking is capable of overcoming its resistance, or because he (the judge) is unable to muster sufficient resources (time, energy) to do the painstaking work of creating a good legal argument, or simply because he lacks the necessary skill to pull this one off.

Kennedy uses the metaphor of the field to describe the judge's experience of constraint. The law is the field of the judge's action: 'it defines the distance that [he] will have to work through in legal argument' in order to reach a particular result.⁴⁵ In the case at hand, the judge initially sees the field as impacted, with the lie-in clearly on the side of unlawful interference with the means of production during a strike. This impression will be confirmed if there are cases holding that workers' constitutional right to freedom of expression does not extend to mass picketing during a strike. A lie-in blocking the street appears to be a greater interference than mass picketing. The lie-in is therefore not a marginal case; it is well inside the boundary defining the rule against interference.

But as the judge works his way through the materials, alternative ways of constructing the field start presenting themselves. Perhaps, he thinks, the rule can be reformulated through a restatement of the facts and holdings of decided cases along the boundary. The facts of the present case can then be restated to distinguish it from earlier cases, so that it will appear to lie in a different part of the field. The judge may accomplish this, for example, by emphasising the coercive nature of mass picketing. The real reason why previous cases held that mass picketing was not protected by the first amendment, he may argue, was to prevent forcible interference with the passage of substitute workers into the plant. The same ratio, he may argue, does not apply to the lie-in. He may present the lie-in as a form of civil disobedience, rather than direct physical confrontation, as an attempt to persuade, rather than to coerce; as a form of expression that must be protected. He may thus be able to inflect the boundary, so that mass picketing and the lie-in now appear to be on opposite sides of it. As a result, he will not only be able to deny the injunction, but also to change the shape of the field. The holdings of

45 Ibid 530.

previous anti-labour decisions will now appear narrower, while the scope for legitimate action on the part of labour will expand accordingly.

Here, Kennedy portrays the judge as free and constrained at the same time. The judge is constrained by legal materials: he is never free simply to disregard text, rule, or precedent. He is constrained by the fact that he has limited resources at his disposal: he cannot possibly find the time and energy to create good legal arguments in every area that he thinks may be in need of reform, and is therefore forced to follow the way of the lesser resistance at least some of the time. He is constrained by the need to maintain, and increase, his credibility as a judge. He is also constrained by what Kennedy calls the 'economy of the field'.⁴⁶ The choice of a particular argumentative strategy for effecting a manipulation of the field rules out moves that may be inconsistent with the logic, internal economy and even the tone and style of that strategy.

However, the judge is free to resist his initial sense that there is only one plausible outcome in the case before him. He is free to rework the materials in an effort to come out the way he wants to. This is possible because rules and precedents are texts in need of interpretation, because the meaning of rules and holdings of cases are subject to restatement. Such a restatement may cause him to see the field differently from before. It may enable him to change the course of existing boundaries, to achieve a new balance between conflicting values or policies.

It is interesting to see how Kennedy draws on, yet at the same time problematises and reconceptualises the traditional image of legal rules as boundaries. Kennedy recognises that some cases may seem to fall squarely on one side of the relevant boundary. In such cases, the application of a general rule may seem non-controversial. However, he makes it clear that it is misleading to present the impacted field, with its long, straight boundaries, as the paradigm case, and the case of first impression as the main exception. Kennedy identifies a number of other field configurations where legal doctrine abounds, but does not present itself in nearly the same orderly fashion as in the impacted field. There is, for instance, the unrationalised field, where a great number of cases have been decided, but 'with minimal argumentation and narrow or conclusory or obviously logically defective holdings'.⁴⁷ Here, a judge wishing to decide a case in terms of a general rule will have to rearrange the cases and restate their facts in an effort to rationalise the field. There is also the contradictory field, where the pull of conflicting policy arguments gives rise to 'rapid fluctuations along a contorted boundary'.⁴⁸ Here, cases decided on either side of the boundary cut deeply into the opposite side, with the result that it is impossible to straighten the boundary without overruling dozens of cases.

46 *Ibid* 543.

47 Kennedy (note 17 above) 540.

48 *Ibid*.

Moreover, even where the legal field appears to be impacted and the case at hand seems to fit squarely on one side of the boundary, it may still be possible to rearrange the legal materials to reach a different result. This is because configuration types are not objective properties of particular legal fields, but are part of the cognitive apparatus through which we order and understand legal fields.⁴⁹ When we comprehend a legal field as impacted, we relate a particular configuration type to the relevant area of law, and then set out to work to demonstrate that the field is indeed dominated by a general rule with the quality of a long straight boundary line. Alternatively, we may initially experience the field as impacted, but then, through a careful reworking of the relevant materials, conclude that it is really a case of first impression.

Kennedy adds yet another dimension to his metaphor of law as a field. He conceives of policies as vectors or forces in the field, which exert different degrees of force on different fact situations. For instance, the judge in the hypothetical lie-in case is pulled in different directions by opposing pro-speech and pro-property policies. He writes:

As we move from fact-situation to fact-situation across the field, the speech policy gets weaker, and the property policy stronger, until at the boundary they are in equilibrium. At this point a very small change in the relative forces of the policies produces a dramatic change in result . . . [A]t every point in the field, contradictory policies exert different levels of force. Boundary lines in the field represent points of equilibrium of opposing forces. At points not on boundaries, one or another set of policies predominates. The policies are to be understood as gradients; they are strongest in the 'core', where a given general rule seems utterly obvious in its application and also utterly 'appropriate as a matter of social policy'. The argument set supporting the general rule diminishes in force as we move from the core outward toward the periphery, and ultimately to a boundary with another rule.⁵⁰

This metaphor enables an understanding of legal rules and standards as radial categories,⁵¹ consisting of a core of relatively settled meaning, a highly unstable periphery where conflicting forces are in a dynamic and ever-changing equilibrium, as well as intermediate layers which display varying degrees of stability, depending on their distance from the centre of the policy. This metaphor resembles HLA Hart's distinction between a core of settled legal meaning and a penumbra of uncertainty.⁵² However, unlike Hart's metaphor, Kennedy's field metaphor does not suggest that judicial law-making can be confined to a relatively small category of

49 Kennedy describes configuration types as a function of the gestalt process by which we grasp law. *Ibid* 531.

50 *Ibid* 535.

51 On radial categories, see G Lakoff *Women, Fire, and Dangerous Things: What Categories Reveal about the Mind* (1987) 83-4; 91-2; 204-05; 287 and Winter (note 24 above) ch 4.

52 See HLA Hart 'Positivism and the Separation of Law and Morals' (1958) 71 *Harvard LR* 593, 607ff.

'penumbral' cases. Kennedy's field is characterised by constant movement and changes in the relative force of different policies. Moreover, it would be wrong to think of core areas in terms of fixed essences. As Steven Winter points out, the core areas of legal rules are grounded in particular social experiences.⁵³ The core of a legal rule is therefore also subject to redefinition in the light of new experiences and changing circumstances. Finally, the position of a particular fact situation relative to the core or periphery of a particular rule is itself a matter of interpretation and judgment. It would therefore be a mistake to think that a rule ever applies itself, independently of the interpretive work done by human actors.

V CULTURE, PERSUASION, AND IMAGINATION

So far, I have considered three different metaphors in terms of which freedom and constraint in adjudication are understood. In the first, constraints are conceived as physical objects, as innate properties of legal materials. Freedom is considered exceptional and the role of the courts is seen as that of simply following the rules laid down in legislation or at common law. This understanding results in a formalistic jurisprudence, which negates the responsibility of judges for their decisions.

The second metaphor is that of law as the exchange of argument-bites. Here, constraint is thought to inhere in the structure of legal argument. This understanding highlights the contradictory nature of legal materials and of the choices confronting judges. However, it ultimately results in an instrumentalist and cynical view of adjudication, in which constraints are seen as illusory and the possibility of a sincere normative dialogue is ruled out.

These two understandings seem to be worlds apart. However, there are similarities. In the first place, they are structured in terms of the same either/or logic. It is assumed that, unless legal rules, concepts and standards determine legal outcomes, judges are not constrained in any meaningful way. Secondly, both view adjudication as something rather mechanical – either in the sense of the impartial application of rules (in the first view) or of slotting one's argument into a stereotypical argument-bite (in the second). Thirdly, both fail to come to terms with the politics of law. The first understanding simply denies that law is political, and thus hides the contested nature of liberal legalism behind a veil of objectivity and neutrality. The second understanding submits to the politics of law, without attempting to resist it. It accepts that law is irreducibly political; that judges impose their will on society; that there is something arbitrary about the choices made by judges; that judges who claim to be constrained are acting in bad faith.

53 SL Winter 'Transcendental Nonsense, Metaphoric Reasoning, and the Cognitive Stakes for Law' (1989) 137 *Pennsylvania LR* 1105, 1183.

The third metaphor – that of law as the field of a judge's action – suggests that freedom and constraint are not mutually exclusive. Judges experience law as a constraint, as something that resists efforts to manipulate or realign it. At the same time, however, the appearance of the field is a function of cognition and the work done by interpreters, rather than a reflection of the objective properties of the relevant legal materials. Different ways of seeing and understanding often present themselves as judges do the painstaking work of legal interpretation, as they engage with statutory text, precedent and fact-situations.

The metaphor of policies as forces in a force field which exert different degrees of pressure on different fact situations, enables us to see freedom and constraint as graded categories,⁵⁴ rather than binary opposites. The closer a fact situation comes to the core of a particular policy, the stronger the judge's experience of constraint is likely to be. Conversely, as cases move towards the periphery of the policy, judges will increasingly start to feel the pull of opposing forces, and will have greater freedom to inflect, deflect, or redraw existing boundaries, to effect a better balance between contradictory policies.

Kennedy's elaboration of the field metaphor suggests that constraint is a function of a particular legal culture.⁵⁵ This is true both in the sense that the legal field is the product of the work done by judges and other decision-makers and in the sense that judges are socially situated members of an interpretive community, whose practices, commitments and expectations are shaped, to a significant extent, by their legal training, the opinions of colleagues, the possibility that their decisions may be reversed on appeal, and public perceptions of the judicial role and function. Judges have to give reasons for their decisions. The reasons they give must be addressed to members of a particular legal culture and must be capable of convincing members of that culture that the decision rests on a plausible interpretation of the relevant materials. Kennedy's imaginary judge is, from the outset, concerned with the question whether others will find his reasoning persuasive. He worries that his attempt to rearrange the legal field will be unpersuasive, in which case he will either have to abandon it or face the censure of the legal community.

The metaphor of the field, then, enables an understanding of constraint as cultural. It allows us to understand freedom and constraint as graded categories, legal reasoning as imaginative and therefore capable of resisting the conclusion that a particular outcome is necessitated by the relevant legal materials. Field configurations are not objective properties of a particular legal field, but are part of the cognitive apparatus through which we order and understand law. It is because of this that judges are

54 See Lakoff (note 51 above) 287-88 on the notion of graded categories.

55 See Klare (note 4 above) 166-72 for an incisive analysis of the ways in which legal culture constrains judicial decision-making.

often able to reconfigure the field and thus to resist the ways in which inequality, exclusion and violence are sanctioned and normalised in the name of law.

Kennedy's imaginary judge has a clear idea of his own preferred outcome, and is consciously striving to reshape the law in an effort to achieve it. This raises the question whether Kennedy's notion of constraint is not rendered meaningless by his emphasis on the judge's preferred outcome and whether, in his account, constraint must not ultimately make way for unbridled judicial subjectivity.

I believe that this is the wrong way of posing the question.⁵⁶ Kennedy makes it clear that the judge's preferred outcome is 'not a datum given externally, something that comes into the picture from outside'. It is, rather, 'relative to the field'.⁵⁷ The preferences of the judge are themselves

deeply conditioned by existence in our legalized universe. [He] simply [does not] have intuitions about social justice that are independent of [his] knowledge of what judges and legislators have done in the past about situations like the one before [him].⁵⁸

Of course, this does not make law any less political. However, it shows that the politics of law does not manifest itself only when judges act in an overtly political way. Judges' political intuitions are so closely bound up with their socialisation into a 'legalised universe', that they are often unaware of the ideological presuppositions and normative assumptions informing their judgments. The politics of law, in the words of Winter, 'is most pronounced precisely when judges are acting in good faith, unaware of the normative entailments of the conceptual materials with which they work'.⁵⁹

Kennedy's elaboration of the field metaphor does not seem to provide much scope for judges to resist the politics of law and to question their own normative assumptions. However, his understanding of constraint as a function of legal culture and his insight into the close affinity between legal culture and the politics of law, may form the basis of a more self-conscious style of adjudication, which is characterised by a greater willingness on the part of judges to subject deeply held assumptions to critical scrutiny and to articulate the moral and political reasons for their decisions.⁶⁰

56 Klare (note 4 above) 151 argues, in my view correctly, that 'the strategic pursuit of transformative projects through adjudicative practices is not, in principle, inconsistent with duties of interpretive fidelity'. See also 156-66.

57 Kennedy (note 17 above) 548 (emphasis omitted).

58 *Ibid.*

59 Winter (note 24 above) 331.

60 The idea that judges are ever able to question deeply held beliefs and interpretive assumptions is controversial. Stanley Fish has argued that our views are structured in terms of a system of beliefs, and that it is impossible to step outside that framework of background assumptions and to subject them to critical examination. For Fish, the insight that our practices and beliefs are historically contingent, offers us no hope of breaking open the strictures of a historically situated context and to choose freely the beliefs that should guide our decision-making. See,

VI OF RULES AND STANDARDS

(a) The rule of law as a ‘law of rules’

The traditional conception of legal rules as long, straight boundaries that predetermine the outcomes of cases – except in those few instances that are not yet covered by the rules and in which judges are free to make new law – still exerts a powerful hold on the South African legal imagination. This is evident from the way legal rules are distinguished from and privileged over abstract considerations and flexible legal standards. The judgment of the Supreme Court of Appeal in *Afrox Healthcare v Strydom*⁶¹ provides a clear example of the belief that the determinacy of legal rules should be protected from the potentially disruptive influence of flexible standards and constitutional values.

In *Afrox*, the SCA was asked to pronounce on the validity of a contractual term which indemnified a hospital from liability for the negligence of its nursing staff. The respondent argued that such clause was contrary to the public interest and the principle of good faith, and that the admission clerk was under a legal duty to draw his attention to the existence of the clause. The Court, in a unanimous judgment authored by Brand JA, rejected these arguments. Its holding that the impugned clause was not contrary to the public interest was based, *inter alia*, on its finding that there was no evidence that the respondent was in a weaker bargaining position than the appellant at the time of entering into the agreement. It also rejected the respondent’s contention that it would be contrary to the spirit of s 27(1)(a) of the Constitution, which guarantees the right to have access to health care, if hospitals were to be able to rely on disclaimers in standard-form contracts. Even though the court recognised that constitutional values are relevant to the determination whether a particular contractual provision is contrary to the public interest, it found that the clause in question did not block access to health

for example, S Fish *Doing What Comes Naturally: Change, Rhetoric, and the Practice of Theory in Literary and Legal Studies* (1989). While I agree with Fish that human actors can never act outside a framework of constraint, I believe that Fish is overstating his case. His conclusion that there is no such thing as freedom depends upon a contradiction in his thought. On the one hand, Fish writes that our freedom ‘is a function of – in the sense of being dependent on – some other structure of constraint without which action of any kind would be impossible’ (ibid 459); on the other hand, he identifies freedom with the ‘absence of constraints’ (ibid; emphasis in the original). The conclusion that theory offers us no hope of scrutinising the beliefs in terms of which our practice is structured, is inescapable only as long as we hold on to an all-or-nothing conception of freedom. If we reject this understanding of freedom, we are bound to recognise that there are degrees of constraint, that even though we are never able simply to transcend the constraints of some situated practice and to freely mould the context within which we think and act, we are able to reflect critically on some of the background beliefs that structure our practice. In the words of Winter: ‘Once we have noticed the tacit decisions that mark out the social field, we are in a position to rework them from the very place we stand: situated not just in our cultural and historical tradition, but in a real physical and social world that we construct and reconstruct through acts of imagination and commitment’. Winter (note 24 above) 357.

61 2002 (6) SA 21 (SCA).

care services and could not be said to promote negligent and unprofessional conduct on the part of hospital staff. It stressed that there are other constitutional values, like contractual autonomy, that were relevant to the dispute, and that require courts to 'approach their task of striking down contracts or declining to enforce them with perceptive restraint'.⁶²

The court also rejected the argument that the clause in question was unreasonable, unfair, contrary to the principle of good faith and, therefore, unenforceable. It held:

Aangaande die plek en rol van abstrakte idees soos goeie trou, redelikheid, billikheid en geregtigheid het die meerderheid in die *Brisley*-saak beslis dat, ofskoon hierdie oorwegings onderliggend is tot (sic) ons kontrakreg, dit nie 'n onafhanklike, oftewel 'n 'free floating' grondslag vir die tersydestelling of die nie-afdwingbaarheid van kontraktuele bepalinge daarstel nie . . .; anders gestel, alhoewel hierdie abstrakte oorwegings die grondslag en bestaansreg van regsreëls verteenwoordig en ook tot die vorming en die verandering van regsreëls kan lei, hulle op sigself geen regsreëls is nie. Wanneer dit by die afdwinging van kontrakbepalinge kom, het die Hof geen diskresie en handel hy nie op die basis van abstrakte idees nie, maar juis op die basis van uitgekristalliseerde (sic) en neergelegde regsreëls. . . . Derhalwe bied die alternatiewe basis waarop die respondent steun, inderwaarheid geen onafhanklike basis vir sy saak nie.⁶³

There is much in this judgment that gives cause for concern. The Court seems to adhere to a largely outmoded theory of contract, which is premised on the assumption that it is the task of the courts simply to give effect to the consensual agreements between contracting parties, and which allows very little scope for judicial interference on the basis of substantive unfairness or inequality.⁶⁴ The result is a judgment that is insufficiently contextualised and that fails to engage with the unequal bargaining position between hospital and patient. Moreover, the Court's response to the constitutional arguments raised on behalf of the respondent is, at best, unsatisfactory. Its rejection of the argument based on s 27(1) seems to rest upon a conflation of direct and indirect

62 Ibid para 22 (quoting *Brisley v Drotzky* 2002 (4) SA 1 (SCA) para 94).

63 Ibid para 32. 'The majority in the *Brisley* case held that, even though abstract ideas like good faith, reasonableness, fairness and justice are fundamental to our law of contract, these considerations do not constitute an independent, that is to say a 'free floating' ground for striking down or declining to enforce the terms of a contract. Put differently, although these abstract considerations are at the foundation of legal rules and can result in the development and amendment of legal rules, they are not in themselves legal rules. When it comes to the enforcement of the terms of a contract, the court has no discretion and does not act on the basis of abstract ideas, but on the basis of well defined (crystallised) and established legal rules. . . . For this reason, the alternative ground relied upon by the respondent does not constitute an independent basis for his action' (my free (yet not unconstrained!) translation).

64 This approach has been criticised for, inter alia, resting on a nineteenth-century model of contract, which is based on laissez-faire economics and unbridled capitalism; for failing to respond to and perpetuating substantive inequality; and for being ahistorical and out of step with developments in the rest of the world. See L Hawthorne 'The Principle of Equality in the Law of Contract' (1995) 58 *THRHR* 157; P Olivier 'Die *Bona Fide*-Beginsel in die Suid-Afrikaanse Kontrakreg' in J Smits & G Lubbe (eds) *Remedies in Zuid-Afrika en Europa* (2003) 1.

application: even though the court claims to concern itself with the indirect application of the Bill of Rights in terms of s 39(2), the questions it asks are concerned more with direct infringements than with the development of the common law in the light of constitutional values. In addition, the way in which contractual autonomy is read into the Constitution (under the rubric of freedom and dignity) and emphasised at the expense of conflicting constitutional values (such as equality and a conception of human dignity that is not based on abstract notions of individualism) smacks of a lack of even-handedness and a clear ideological bias in favour of the more or less unhindered operation of the 'free' market.⁶⁵

These, and other flaws in the judgment, have been criticised elsewhere and in far greater depth.⁶⁶ Of more concern for my immediate purposes is the court's distinction between legal rules and 'abstract considerations'.⁶⁷ In the view of the court, abstract ideas such as good faith and reasonableness are fundamental to the law of contract: they provide it with a sense of legitimacy and a basis for the development and amendment of legal rules. However, these ideas themselves are not rules and do not provide an independent basis for striking down the terms of a contract. To hold otherwise would frustrate legal certainty and substitute the rule of individual judges for the rule of law.⁶⁸ The long, straight boundaries constituting the law of contract would be replaced by crooked and distorted ones, as the incremental development of the common law would make way for judicial 'somersaults and cartwheels'.⁶⁹

A similar point is made about the power to declare contracts contrary to public policy. The court refers with approval to dicta warning against the 'arbitrary and indiscriminate use' of this power. Unless this power is exercised 'sparingly and only in the clearest of cases', contractual freedom and legal certainty would be subordinated to 'the idiosyncratic inferences of a few judicial minds'.⁷⁰ The message is clear: even though abstract considerations may be used to adapt and develop common-law rules and, in the case of public policy, to invalidate contracts, the opportunities for doing so are very narrowly circumscribed – by the stare decisis rule and the formal hierarchy of courts, on the one hand, and by the clear preference of the SCA (the highest court in non-constitutional matters)

65 See Olivier (note 64 above) 22.

66 See D Tladi 'One Step Forward, Two Steps Back for Constitutionalising the Common Law: *Afrox Healthcare v Strydom*' (2002) 17 *SA Public Law* 473; S Woolman & D Brand 'Is There a Constitution in this Courtroom? Constitutional Jurisdiction after *Afrox* and *Walters*' (2003) 18 *SA Public Law* 37; P Carstens & A Kok 'An Assessment of the Use of Disclaimers by South African Hospitals in View of Constitutional Demands, Foreign Law, and Medico-Legal Considerations' (2003) 19 *SA Public Law* 430 for critiques of this judgment.

67 See Woolman & Brand (note 66 above) 64-6.

68 See also *Brisley v Drotzky* (note 62 above) para 24.

69 *Ibid* (quoting from *Miliangos v George Frank (Textiles) Ltd* [1976] AC 443 (HL) 481-82).

70 *Afrox* (note 61 above) para 8 (quoting from *Sasfin v Beukes* 1989 (1) SA 1 (A) 9C and *Fender v St John-Mildmay* 1938 AC 1 (HL) 12).

for contractual freedom and legal certainty over substantive equality and innovation, on the other.

The same distinction between rules and abstract considerations or values is at work in the Court's discussion of the stare decisis doctrine. The judge in the court a quo had suggested that courts, when developing the common law in terms of s 39(2) of the Constitution, are not strictly bound by the stare decisis doctrine. Brand JA was quick to dismiss this notion. He pointed out that the Constitutional Court had made it clear in *Ex parte Minister of Safety and Security: In re S v Walters*⁷¹ that courts remain bound to follow the legal interpretations of higher tribunals, even where they believe such interpretations to be at variance with the Constitution. The *Walters* decision dealt only with the binding effect of post-constitutional interpretations; however, the SCA in *Afrox* placed further restrictions on the power of judges to depart from decisions that were given *before* the constitutional era. It distinguished between three possible situations. In the first place, where a court is convinced that a rule of the common law is (directly) inconsistent with a constitutional provision, it must give effect to the Constitution, despite the fact that the rule in question was laid down by a higher court. Secondly, where a pre-constitutional judgment of a higher court was based upon considerations such as the public interest or boni mores, a court must depart from that judgment if it believes, with due regard to constitutional values, that that judgment is no longer an accurate reflection of the public interest or boni mores. Thirdly, where a common-law rule enunciated in a pre-constitutional decision is not directly in breach of the Constitution and does not depend on changing considerations such as the public interest or boni mores, a court is bound by precedent and is not in a position to adapt the rule in terms of s 39(2) to promote the spirit, purport and objects of the Bill of Rights.

Why allow judges to depart from previous decisions in respect of the first two categories, but not the third? Again, the distinction between rules and abstract values appears to be decisive. As Woolman and Brand point out,⁷² the court seems to believe that the testing of common-law rules against constitutional rules (ie, the direct application of the Bill of Rights) poses less danger to the certainty, predictability and uniformity that are said to flow from the stare decisis principle, than does the development of the common law in view of constitutional values (ie indirect application).⁷³ This belief seems to rest on the 'formalist notion that legal rules and specific provisions of the Constitution have a fixed

71 2002 (4) SA 613 (CC) paras 55-61.

72 Note 66 above, 64-5.

73 See *Afrox* (note 61 above) para 30.

and neutral content while constitutional values are infinitely mutable and contingent upon the perspective of the individual interpreter'.⁷⁴

The distinction between legal rules and flexible standards is, then, closely related to the dichotomies between law and politics, law and morality, legislation and common law, objectivity and subjectivity, and stability and progress. In the conventional view, ethical and policy considerations serve to anchor legal rules in right reason; they provide the soil within which the forest of legal constraint can take root. However, to elevate ethical and policy considerations to the same level as or above legal rules, would be to conflate law with politics and to subvert the stability and certainty characterising common-law adjudication by imposing an instrumentalist aesthetic on it, which is more properly suited to the legislative function. Or, to use a different metaphor, flexible legal standards are conceived as the membrane or outer layer of the legal system which separates it from the outside world of extra-legal considerations, at the same time as it connects it and makes it receptive to these considerations. Radical uncertainty and judicial subjectivity would be the result if flexible legal standards were to be displaced to the centre of the body of legal norms, or if they were to be allowed to become detached from and hover above it.⁷⁵

Of course, the idea that judges are properly constrained only by legal rules, and that reliance on abstract considerations and open-ended standards threatens the generality, predictability and certainty that are associated with the rule of law, has been a recurrent theme in legal thinking at least since Max Weber's analysis of formal legal rationality and the dangers of deformed law.⁷⁶ One of the most prominent contemporary exponents of this idea is Justice Antonin Scalia of the United States Supreme Court.⁷⁷ Scalia distinguishes between general legal rules which genuinely constrain judges in the exercise of their powers, and broad standards which confer considerable discretion on judges to do justice in an individual case. He argues that judicial decision-making on the basis of general rules is more in line with rule-of-law virtues such as equality of treatment, uniformity, predictability and certainty. The rule of law is, therefore, best conceived as a 'law of rules'. When (appellate) judges are required to decide cases on the basis of vague statutory or constitutional provisions, it is better for them to announce a

74 Woolman & Brand (note 66 above) 65. The authors also offer a second, rather more cynical explanation: that the 'distinction between direct application and indirect application rests on the well-founded belief that common-law rules (especially those that govern private relations) are rarely subject to direct constitutional scrutiny'. Ibid.

75 Cf the warning in *Brisley and Afrox* that abstract ideas like good faith and reasonableness do not constitute a 'free floating' ground for striking down the terms of a contract. See note 63 above.

76 M Weber *Economy and Society* (1968) ch 3, 880-900. See generally H Botha 'The Legitimacy of Legal Orders (3): Rethinking the Rule of Law' (2001) 64 *THRHR* 523.

77 See A Scalia 'The Rule of Law as a Law of Rules' (1989) 56 *Univ Chicago LR* 1175.

‘firm rule of decision’ that will constrain themselves and other judges in future cases, than to base their decision on a ‘totality of the circumstances’ or multi-factor balancing test.⁷⁸ To resort to the latter mode of decision-making is, ‘in a way, a regrettable concession of defeat – an acknowledgment that we have passed the point where “law”, properly speaking, has any further application’. The result, according to Scalia, is unfortunate: ‘equality of treatment is difficult to demonstrate and, in a multi-tiered judicial system, impossible to achieve; predictability is destroyed; judicial arbitrariness is facilitated; judicial courage is impaired’.⁷⁹

(b) Rethinking the distinction between rules and standards

Despite their differences,⁸⁰ the judgment in *Afrox* and Justice Scalia’s conception of the rule of law as a law of rules have much in common: both distinguish clearly between general legal rules and vague, discretion-conferring standards; both privilege the former over the latter; both assume that rules are more constraining than standards; and both regard formal equality, predictability and certainty as more important than substantive equality and individualised justice.

The rules-centred approach espoused by the Supreme Court of Appeal and Justice Scalia is open to a number of criticisms. It can, for instance, be asked whether the ideological beliefs and commitments informing this approach can be reconciled with what has been described as the South African Constitution’s ‘commitment to a democratic, universalistic, caring and aspirationally egalitarian ethos’.⁸¹ The formal conception of equality informing the approach in *Afrox* seems to be at odds with the substantive notion of equality articulated in the Constitution. The inequitable outcomes sanctioned by the court’s endorsement of legal certainty and predictability at the expense of substantive fairness appear to make nonsense of the Constitution’s commitment to the establishment of a caring society.⁸² Above all, the attempt to present as ‘neutral’ legal rules that are in fact informed by a particular – and highly contested – conception of freedom, equality and the rule of law, and to effectively

78 Ibid 1180.

79 Ibid 1182.

80 The main difference seems to be that Scalia has doubts about the capacity of the incremental approach that characterises common-law adjudication, to constrain judicial decision-making in areas like constitutional adjudication and statutory interpretation. See *ibid* 1178-80.

81 *S v Makwanyane* (note 1 above) para 262 (Mahomed DP).

82 Decisions like *Afrox* seem to bear out Kennedy’s insight that the preference for formal (rules-centred) or substantive (standards-based) legal reasoning is an expression of an individualist and altruistic ethic, respectively. See D Kennedy ‘Form and Substance in Private Law Adjudication’ (1976) 89 *Harvard LR* 1685. But see also W Scheuerman *Between the Norm and the Exception: The Frankfurt School and the Rule of Law* (1994) 43-51, 126-33; W Scheuerman ‘Economic Globalization and the Rule of Law’ (1999) 6 *Constellations* 3 (arguing that deformed, vague legal standards tend to benefit elites, who are able to exploit the indeterminacy of such standards).

insulate them from constitutional scrutiny, seems to be inconsistent with the supremacy of the Constitution and the wish to subject all areas of law to its transformative aspirations.

Secondly, the rules-centred approach discussed above rests upon an unrealistic conception of legal rules. Its assumption that general rules constitute bright-line boundaries between lawful and unlawful behaviour and can therefore predetermine the outcomes of cases in a more or less unyielding manner, rests upon an outmoded understanding of language, meaning and categorisation which denies the role of context, purpose and imagination in the construction of meaning.⁸³ Kennedy's elaboration of the field metaphor suggests that even rules that appear to be solid and unequivocal may be subject to restatement and reinterpretation. The way a particular field of the law presents itself to us, is not a reflection of an unyielding and objective reality, but is a function of cognitive processes that are grounded in human experience and pre-understanding, and that are imaginative at their core.

Put differently, legal rules are texts, the interpretation of which is contingent upon the experience, values and imagination of the interpreter. The same, of course, is true of factual situations. The relation between the applicable rule and the facts of the case can therefore not be characterised as the more or less mechanical application of the former to the latter. It would, I think, be more appropriate to talk of the dynamic interplay between rules and facts, by means of which both are moulded and remoulded to fit each other.⁸⁴ Or, to return to the field metaphor, the way the judge relates a particular configuration type to the relevant legal field, is intimately bound up with her reading of the facts of the case. It is also inextricably linked to her assessment of the relative pull of conflicting policies.

Ironically, the very attempt in *Walters* and *Afrox* to prevent, by means of the formulation of general rules, the disruption of settled areas of law through the application of the Bill of Rights, stumbles upon the fuzziness of the concepts and categorical distinctions employed by the court. The distinction between the direct and indirect application of the Bill of Rights and that between indirect application and the re-interpretation of changing considerations such as the public interest or boni mores are sufficiently vague to allow judges a measure of discretion, in many cases, in deciding whether or not to depart from a pre-constitutional ruling of a

83 See Winter (note 24 above) ch 8 for a critique of this conception of rules and categorisation. See also H Botha 'Metaphoric Reasoning and Transformative Constitutionalism (Part 1)' (2002) *TSAR* 612.

84 This interplay is captured by the phrase 'concretisation of legal norms'. See F Müller 'Basic Questions of Constitutional Concretisation' (1999) 10 *Stellenbosch LR* 269; L du Plessis 'Re-Reading Enacted Law-Texts. The Epoch of Constitutionalism and the Agenda for Statutory and Constitutional Interpretation in South Africa' (2000) 15 *SA Public Law* 257, 266; 296; 298. According to Du Plessis (ibid) 296, concretisation refers to the process by means of which legal norms are '[brought] to life in concrete situations'.

higher court. Moreover, even a seemingly straightforward distinction such as that between pre- and post-constitutional judgments may be open to different interpretations. Woolman and Brand⁸⁵ argue that the distinction in *Walters* between decisions handed down before and after the commencement of the constitutional era is subject to at least three interpretations.⁸⁶ Whether a judge in a subsequent case gives a narrow or broad interpretation to the holding in *Walters* will depend, inter alia, on her views on the relative force of conflicting considerations, such as predictability and legal certainty, on the one hand, and the need for the transformation of the legal system, on the other.

The point is not that rules do not and cannot constrain but, rather, that their constraining force is seldom absolute. Winter argues persuasively that the categories on which rules depend, are most often flexible, variable and dependent on context. Most rules, therefore, 'operate like standards'.⁸⁷ Their interpretation and application presuppose an understanding of their purpose and surrounding context and, inevitably, draw upon culturally sedimented knowledge. Whether or not the facts of a case fall within a particular category is not a function of objective correspondence between the relevant facts and the properties in terms of which the category is defined, but rather of an imaginative process which draws upon culturally transmitted knowledge and, through prototype effects and the use of metaphoric and other forms of figurative speech, allows interpreters to engage with subtle differences of degree and context.⁸⁸

A third objection to the rigid distinction between rules and standards is that it underestimates the capacity of standards to constrain legal decision-making. Once we accept that constraint is a question of degree and a function of culture and persuasion, it should be clear that the question whether rules are more or less constraining than standards cannot be answered in the abstract, but depends on a host of factors. These factors include: the concepts and categories employed in a rule or

85 Note 66 above, 44-5 n26. See also 49; 53; 79-80.

86 In the first place, it may be taken to mean that High Courts are bound by all decisions of higher tribunals handed down after the commencement of the interim Constitution. Secondly, it may be interpreted to mean that High Courts are bound by previous decisions of higher tribunals only insofar as the latter 'possessed and also exercised constitutional jurisdiction' (ibid 45 n26, emphasis omitted). This could mean that High Courts would only be bound by decisions of the SCA handed down in terms of the 1996 Constitution, as the Appellate Division (AD) (as it was formerly called) did not possess constitutional jurisdiction under the interim Constitution. Alternatively, it could be interpreted to mean that High Courts are bound by decisions of the SCA in terms of the 1996 Constitution and by post-*Du Plessis v De Klerk* decisions of the AD and SCA in which the interim Constitution was applied indirectly. (Woolman and Brand point out that *Du Plessis v De Klerk* (note 36 above) was the first decision in which the jurisdiction of the AD to apply the Bill of Rights indirectly was recognised).

87 Winter (note 24 above) 188.

88 See ibid ch 4; 8; Botha (note 83 above) 618-21; H Botha 'Metaphoric Reasoning and Transformative Constitutionalism (part 2)' (2003) *TSAR* 20, 31-4.

standard and their capacity (within the context of a particular legal culture and set of sedimented background understandings) to generate interpersonal agreement; the relative homogeneity or heterogeneity of a particular legal community; the views on law and the judicial function that are embedded within a given legal culture. Depending on these factors, broad standards and balancing tests may well be more constraining than rules in certain contexts.⁸⁹

VII OPENNESS AND CLOSURE IN CONSTITUTIONAL ADJUDICATION

I have argued above that the view of legal rules as long, straight boundaries which yield determinate outcomes to legal problems is unrealistic and underestimates the gaps, contradictions and ambiguities inherent in legal materials. This is not to deny that judges are constrained by rules. However, the capacity of a rule to constrain depends on a complex range of factors, including the concepts and categories in terms of which the rule is formulated, the relative force of conflicting values and policies that the rule attempts to mediate, deeply ingrained beliefs about the nature of legal interpretation and adjudication, and the capacity of the judge to rework the relevant legal materials and thus to deflect or restate the rule in question.

There are additional reasons to resist the idea that legal rules are determinate. While these reasons may also apply at other times and in other places, they have a particular cogency within the context of constitutional adjudication in post-apartheid South Africa. In the first place, an understanding of legal rules as clear, impenetrable boundaries is at odds with the – widely accepted – idea that the South African Constitution institutes a culture of justification.⁹⁰ A culture of justification presupposes a commitment to ‘a communicative practice of open and intelligible reason-giving’.⁹¹ It requires candour on the part of judges about the reasons for their decisions, and is not satisfied by the kind of formalistic legal reasoning which pretends that the answers to legal questions can be derived from the relevant legal materials in a more or less neutral, mechanical manner. Put differently, judges interpreting the Constitution should not invoke some pre-existing boundary as authority for their decisions, but should explain as fully as possible why they are

89 See LB Solum ‘A Law of Rules: A Critique and Reconstruction of Justice Scalia’s View of the Rule of Law’ Loyola Law School (Los Angeles) Public Law and Legal Theory Research Paper No 2002-5 (March 2002) available at <<http://papers.ssrn.com/abstract+303575>> 18-21 for a discussion of the role of legal culture and social practice, and for examples of contexts in which broad standards may be more constraining than rules.

90 See E Mureinik ‘A Bridge to Where? Introducing the Interim Bill of Rights’ (1994) 10 *SAJHR* 3; *Prinsloo v Van der Linde* 1997 (3) SA 1012 (CC) para 25. See also J van der Walt & H Botha ‘Democracy and Rights in South Africa: Beyond a Constitutional Culture of Justification’ (2000) 7 *Constellations* 341 on the limits of constitutional justification.

91 FI Michelman ‘Foreword: Traces of Self-Government’ (1986) 100 *Harvard LR* 4, 34.

drawing the relevant boundary in the way they do, and on what basis they are situating a case in a particular part of the field.

Secondly, it is often asserted that South Africa's Constitution constitutes a fundamental break with the past and aims at the transformation of the South African social and legal order.⁹² A conception of legal rules as long, solid boundaries tends to negate the rupture introduced by the Constitution⁹³ and serves to frustrate its transformative aspirations and to entrench the status quo. For instance, there is a danger that constitutional guarantees may be reduced to common-law rules, or that common-law rules may be insulated from constitutional scrutiny, or that the adjudicative habits and assumptions which made certain outcomes appear inevitable under the apartheid legal order, will continue to go unchallenged. The decision in *Afrox* provides an example of the tendency of this conception of rules to insulate common-law norms from what is seen as the potentially disruptive impact of the Constitution. André van der Walt has also shown how assumptions that are deeply embedded in Roman-Dutch property law, continue to frustrate land reform.⁹⁴ In short, an understanding of legal rules as long, straight lines is unable to come to terms with the transformative aims of the Constitution – particularly if those lines are thought to span pre-constitutional and post-constitutional time.

Thirdly, it could be argued that the Constitution's transformative aspirations cannot be accomplished in a single shift from apartheid to post-apartheid society, but should be seen as an ongoing process by means of which power relations and received wisdom are continually challenged. In this view, it would not be appropriate to reduce constitutional norms and standards to supposedly self-applying rules, as that would induce normative closure⁹⁵ and may result in the substitution of one orthodoxy for another. Rather, constitutional interpreters should try to keep alive different constitutional imaginations, and remain open to contending interpretations.

There are good reasons to endorse this vision of transformative constitutionalism and interpretive openness. One reason has to do with the complexities of transition and the impossibility of effecting it overnight.⁹⁶ A second reason is that the legitimacy of the Constitution

92 The phrase 'transformative constitutionalism' was coined by Klare (note 4 above). See also H Botha; A van der Walt & J van der Walt (eds) *Rights and Democracy in a Transformative Constitution* (2004).

93 Cf the discussion of the *Bogoshi* judgment under II above.

94 See, for example, AJ van der Walt 'An Overview of Developments in Constitutional Property Law since the Introduction of the Property Clause in 1993' (2004) 19 *SA Public Law* (forthcoming).

95 See AJ van der Walt 'Closure and Openness on Difference and Democracy – a Response to Justice Johan Froneman' (2001) 12 *Stellenbosch LR* 28.

96 See AJ van der Walt 'Dancing with Codes – Protecting, Developing and Deconstructing Property Rights in a Constitutional State' (2001) 118 *SALJ* 258; AJ van der Walt 'Tentative Urgency: Sensitivity for the Paradoxes of Stability and Change in Social Transformation Decisions of the Constitutional Court' (2001) 16 *SA Public Law* 1.

and of judicial review depends on the courts' ability to keep different constitutional visions in play. It could be argued that the formulation of general rules that are supposed to constitute clear boundaries between what is constitutional and what is unconstitutional, may result in the permanent sidelining of certain constitutional imaginations, and risk the creation of permanent classes of constitutional winners and losers. Better, then, to decide one case at a time, and thus to postpone decision-making on deeply divisive social issues.⁹⁷ A third and related argument is that the Constitution, in the view of many authors, envisages a society that is characterised by precisely this type of openness and willingness to engage in debate about the meaning of constitutional commitments. The Constitution, in this view, does not seek simply to consolidate and preserve the outcomes of past constitutional struggles, but requires us to carry these struggles forward through political action and openness to new struggles for recognition.⁹⁸

The Constitutional Court has generally resisted the temptation to reduce constitutional norms and guarantees to rigid boundaries, or to devise 'meta-principles' that would enable it to define the precise scope of conflicting constitutional commitments. Instead, the court has tended to embrace broad, flexible standards that allow it to engage in a more contextual, case-by-case type of analysis. Examples include the balancing and proportionality test used by the court to establish whether the limitation of a fundamental right is reasonable and justifiable,⁹⁹ and the test for unfair discrimination, which requires a court to consider factors such as the position of the complainants in society, the purpose of the differentiation in question, and the impact of the discrimination on the complainants.¹⁰⁰ In a recent decision,¹⁰¹ the Constitutional Court found that the question whether a deprivation of property is 'arbitrary', can only be answered with reference to a number of contextual factors, and that the standard used by the court will vary depending on the facts of the case.

The Constitutional Court tends to view the dividing line between rights and the sphere of legitimate government action, or between the functions of different branches of government, not as fixed and unyielding but as flexible and shifting. Often, the court seems to conceptualise rights as

97 See H Klug *Constituting Democracy: Law, Globalism and South Africa's Political Reconstruction* (2000).

98 See Klare (note 4 above) 155; D Davis 'Democracy and Integrity: Making Sense of the Constitution' (1998) 14 *SAJHR* 127, 142-43; H Botha 'Judicial Dissent and Democratic Deliberation' (2000) 15 *SA Public Law* 321; Botha (note 23 above) 576; Woolman & Brand (note 66 above) 76-7.

99 This involves 'the weighing up of competing values on a case-by-case basis to reach an assessment founded on proportionality'. *S v Manamela* (note 36 above) para 33. See also *S v Makwanyane* (note 1 above) para 104.

100 See *Harksen v Lane* 1998 (1) SA 300 (CC) para 51.

101 *First National Bank v Commissioner, South African Revenue Services* 2002 (4) SA 768 (CC).

radial categories consisting of core and peripheral areas, as well as intermediate layers.¹⁰² The closer a fundamental-rights limitation comes to the core of a particular right, the more compelling the justification for the limitation needs to be.¹⁰³ By conceiving rights as graded categories which are strongest at the core and which get progressively weaker as we move from the core to the periphery, the Court is able to combine a flexible, context-sensitive approach with a certain measure of closure. By placing certain interests and activities at the core of a particular right, the court makes it difficult (but not impossible) for the state (or anyone else) to justify laws and practices that strike at that core area. On the other hand, the limitation of non-core areas calls for a more open-ended valuation of the conflicting interests concerned.¹⁰⁴

Similarly, the Constitutional Court has rejected the idea of a rigid separation of powers among the legislature, executive and judiciary, and has recognised that some degree of overlap between their respective functional spheres is inevitable.¹⁰⁵ Its warning in *Satchwell v President of the RSA*¹⁰⁶ that, when reading words into a statute, a court should not intrude *too far* into the legislative sphere, makes sense only if we conceive the separation of powers not in terms of solid, straight boundaries between narrowly circumscribed functional areas, but rather as an attempt to mediate between conflicting policies and institutional considerations; to construct a boundary that would allow no branch of government to come too close to what is perceived as the core functions of any other branch.

The Constitutional Court should be commended for its refusal to reduce constitutional guarantees to supposedly clear, solid boundaries; for its willingness to engage with social context. Flexible legal standards tend to promote judicial candour, as they allow for an articulation of the normative assumptions upon which decisions rest. For this reason it can be argued that, contrary to what conventional wisdom holds, flexible

102 See, for example, the court's jurisprudence on the right to privacy: *Bernstein v Bester* 1996 (2) SA 751 (CC) para 67; *Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd: In re Hyundai Motor Distributors (Pty) Ltd v Smit* 2001 (1) SA 545 (CC) paras 15-20; *S v Jordan* 2002 (6) SA 642 (CC) paras 29; 84; 86.

103 *Manamela* (note 36 above) para 32.

104 There is a danger that the core/periphery metaphor may be used uncritically – particularly if core areas are conceived as fixed, static essences that are not subject to redefinition in the light of new experiences, or if the position of a particular fact situation relative to the core is seen as an objective property of the legal field, rather than the result of cognitive processes by means of which we relate configuration types to particular fact situations. Cf text accompanying notes 49-53 above. Despite these dangers, I believe that the metaphor can be used reflectively and imaginatively – see Botha (note 88 above) 32-4.

105 Cf *First Certification Judgment* (note 3 above) paras 108-09; 111-12 (separation of powers can never be complete, and is not a fixed or rigid constitutional doctrine); *Minister of Health v Treatment Action Campaign (2)* (note 2 above) paras 98-9 (rejecting the idea that courts are not allowed to make orders that have an impact on government policy).

106 2002 (6) SA 1 (CC) para 33.

standards are often more constraining than supposedly determinate legal rules.¹⁰⁷

However, that is not always or necessarily the case. Often, flexible legal standards serve as a placeholder for dominant views that are considered to be so commonsensical that they are simply taken for granted. Instead of engaging in interpretive work and articulating the moral and political beliefs through which their interpretations are filtered, judges often simply invoke these standards as reasons for their decisions, as if their meaning is self-evident. Instead of concretising the standards in question, with due regard to the social and historical context and the power relations within which they are enmeshed, they are often applied mechanically. These uses of flexible legal standards seem to give credence to Kennedy's analysis of law in terms of the play of argument-bites. The result is a jurisprudence that offers little in the way of justification, fails to engage seriously with contentious normative issues and that tends to promote normative closure.

The Constitutional Court is sometimes criticised for what is seen as an uncritical reliance on values and flexible legal standards.¹⁰⁸ The Court, in the view of these critics, too readily assumes that the meaning of certain values and standards is self-evident. It tends to invoke such values and standards as reasons for its decisions, without engaging in the hard work of constructing their meaning. When used in this manner, values and standards lose their capacity to promote judicial candour and democratic dialogue. Instead, it is argued, they serve to mystify and to preclude debate.

The reasons for these failures to engage in substantive reasoning are manifold. Some of the reasons have been canvassed above: institutional considerations, assumptions about the judicial role, the tendency to see freedom and constraint in absolute terms. In what follows, I will further embroider on these broad themes, but this time focusing more specifically on the jurisprudence of the Constitutional Court.

In the first place, it is often suggested that the Court's reluctance to engage in substantive reasoning and normative analysis is rooted in its weak institutional position vis-à-vis the other branches of government. The avoidance, where possible, of politically sensitive issues, and prudential deference to the co-ordinate branches are said to be among the strategies employed by the court to secure its institutional

107 I am indebted to Joseph Singer for this insight.

108 See A Cockrell 'Rainbow Jurisprudence' (1996) 12 *SAJHR* 1; and IJ Kroeze 'Doing Things with Values: The Role of Constitutional Values in Constitutional Interpretation' (2001) 12 *Stellenbosch LR* 265 for critiques of the court's approach to constitutional values. Similar charges have been made about the court's limitation jurisprudence. See S Woolman 'Limitation' in M Chaskalson et al (eds) *Constitutional Law of South Africa* (RS 5; 1999) 12-1. See also H Botha 'Rights, Limitations, and the (Im)Possibility of Self-Government' in Botha; Van der Walt & Van der Walt (eds) (note 92 above) 13.

legitimacy.¹⁰⁹ Deciding cases on narrow rather than broad grounds enables the court to avoid becoming embroiled in issues that may bring it in direct confrontation with the legislature and executive. It also allows it to decide the case at hand without prejudging future cases and without foreclosing a range of other interpretive possibilities.

I am particularly interested here in the suggestion that judges are able, through the avoidance of contentious social issues, to keep open a space in which different constitutional imaginations and interpretive visions can contend with each other. There is force in this submission; however, it needs to be qualified. While it is true that judicial avoidance can help to keep alive different interpretive possibilities, it is by no means the only way of doing so. In fact, it would be wrong to identify avoidance with interpretive openness, and substantive legal reasoning with normative closure. Substantive legal reasoning and judicial pronouncements on the meaning and theoretical underpinnings of a constitutional provision need not and should not result in a sense that the meaning and application of the provision have been settled once and for all, or that judicial choice and discretion are precluded in that area of law. Of course, the provision of substantive reasons is likely to close off certain interpretive possibilities and to make certain outcomes appear more plausible than others. But it does not preclude a careful interpretation – and re-interpretation – of the grounds for the decision in subsequent cases, or an analysis of the meaning of the norm announced in that case within the concrete context of later cases. In fact, that is precisely the type of ongoing interpretive engagement that is invited and required by a commitment to the articulation of substantive reasons.

Moreover, judicial avoidance is not always compatible with some of the values that are commonly associated with a recognition of the plasticity of legal materials. Candour on the part of judges, a willingness to engage the parties before them and to accept responsibility for their decisions, and a commitment to dialogue are not promoted by a reluctance to engage in normative argument or to explain the substantive reasons for judicial decisions.

I cannot do justice here to the full complexity of these issues, and do not wish to suggest that there is no place for avoidance and deference, or that prudential considerations can be dispensed with. However, it seems to me that there are different reasons why a judge may decide to leave an issue open.¹¹⁰ Some of these reasons are themselves rooted in a

109 See Klug (note 97 above) ch 7-8; I Currie 'Judicious Avoidance' (1999) 15 *SAJHR* 138.

110 These range from the belief that (a) cases should, whenever possible, be decided on neutral or non-controversial grounds, to (b) it is possible and desirable to decide the present case on a less controversial or politically less sensitive ground, to (c) judgment on a particular issue should be reserved until the opportunity presents itself to canvass the arguments more fully, to (d) the questions at hand call for flexibility and alternative interpretations should not be foreclosed too quickly, to (e) a combination of these reasons.

commitment to interpretive pluralism and a willingness to reconsider contentious issues in the light of new facts or changing circumstances. Others arise from prudential considerations and may or may not, depending on the context, be compatible with a commitment to substantive legal reasoning and judicial responsibility. What should be clear, though, is that avoidance carries risks, and that there comes a point where a clever rhetorical device to cut through some of the political controversy surrounding a particular issue, looks more and more like a manifestation of a lack of commitment and a denial of judicial responsibility.¹¹¹

A second reason for the sometimes sloppy interpretive work done by judges has to do with lawyerly understandings of and assumptions about language and meaning. South African lawyers and judges sometimes assume that the meaning of words and phrases is somehow transparent; that even legal provisions that are couched in the broadest language are capable of an interpretation that is so obvious that there is no need to spell out how the court arrived at its conclusion. For instance, the Constitutional Court has often been reluctant to develop a substantive vision of individual rights guarantees.¹¹² The holding of the majority in *Bel Porto School Governing Body v Premier of the Province, Western Cape*¹¹³ provides an example of the belief that legal standards mean what they say and can be interpreted and applied without much theoretical analysis. In that case, the majority rejected the minority view that the right to administrative justice had to be ‘animated by a broad concept of fairness’.¹¹⁴ It held that the administrative justice clause had to be interpreted against the background of the common law, which had never recognised unfairness as an independent ground of review.¹¹⁵ Apart from the fact that this construction seems to reduce the requirement of justifiability to a rather thin rational connection test, it also appears to be hermeneutically naive, and places too much faith in the ability of the common law to illuminate the meaning of constitutional norms.¹¹⁶ Put differently, it underestimates the indeterminacy of broad concepts like justifiability, and fails to engage critically with the ways in which our understanding of such terms is shaped by received (and possibly outmoded) wisdom.

111 See H Botha ‘(Global) Constitutional Culture, (Local) Democratic Struggles, and the Limits of an Institutional Approach’ (2003) 18 *SA Public Law* 268, 274-76.

112 See, for example, Woolman (note 108 above) 12-17 to 12-24C. Klare (note 4 above) 174-75 makes a similar point about the court’s failure in *Makwanyane* to explain why ‘the bare phrase “right to life” must mean that the state cannot kill for purposes of punishment’ (174). What is missing from the court’s judgment, is ‘a theory or interpretation’ of the right in question (175).

113 2002 (3) SA 265 (CC).

114 *Ibid* para 152.

115 *Ibid* paras 84-90.

116 Cf text accompanying notes 91-93 above.

This leads straight into the third point: in applying constitutional norms and standards, judges often display a lack of self-consciousness about the background beliefs and assumptions shaping their responses to legal problems. The judgments of even supposedly progressive judges are sometimes informed by assumptions and beliefs that seem to be at odds with the Constitution's transformative aspirations. These include not only assumptions about the nature of language and legal interpretation and the proper role of the judge, but also social beliefs that are considered to be so commonsensical that they are not raised to the level of conscious reflection and critical evaluation. The lack of sensitivity shown by the majority of Constitutional Court judges to forms of gender inequality that are deeply ingrained in social structures and attitudes,¹¹⁷ is but one example of the ways in which such beliefs can inhibit the Constitution's transformative aspirations.

VIII CONCLUDING REMARKS

The traditional conception of legal rules as long, straight boundaries which predetermine the outcomes of cases, and of judicial freedom as something exceptional and transitory, continues to be influential among South African judges, lawyers and legal academics. This is clear, *inter alia*, from (a) the continued prevalence of the notion that legal norms mean what they say and that their meaning exists prior to and independently of concrete fact situations; (b) the way legal rules tend to be privileged over flexible standards; and (c) the understanding of common-law rules as long, straight lines which span pre-constitutional and post-constitutional time.¹¹⁸ I have argued that this conception of freedom and constraint underestimates the gaps and contradictions inherent in legal norms, and conceives freedom and constraint in all-or-nothing terms. It denies the role of context, purpose, perspective and imagination in legal interpretation, and assumes that there is a single right answer to the vast majority of legal questions. This understanding is not only unrealistic, but it is also at odds with the Constitution's transformative aspirations.

To reject this conception of freedom and constraint, is not necessarily to subscribe to the view that judges are radically free in their interpretation of legal materials, or that they can simply slot their preferred outcomes into stereotypical argument-bites. Kennedy's elaboration of the field metaphor suggests that judges are free and constrained at the same time: while they do feel constrained by legal

117 See *Harksen v Lane* (note 100 above); *Jordan* (note 102 above).

118 There are also other, more subtle manifestations of the same belief. For instance, some forms of judicial avoidance seem to rest on the idea that any pronouncement on substantive issues is likely to solidify into a hard rule that will make it virtually impossible for a court to keep an open mind in future cases. Cf text accompanying notes 109-11 above.

materials, they are free to resist their initial sense that such materials are subject to only one plausible interpretation and to try, through painstaking interpretive work, to reconfigure the relevant legal field. In doing so, they are constrained by the legal culture within which they find themselves and by the need to persuade others within – and also outside – the legal profession that theirs is a plausible interpretation.

At the beginning of the article, I referred to claims that judges interpreting the Constitution should decide cases in accordance with the law rather than their own political convictions. These statements are unexceptionable to the extent that they express the truism that, in our legal culture, judicial decisions are expected to be grounded in an interpretation of the relevant legal texts. However, it would be naive to suppose that these texts are so determinate that judges can refrain from being influenced by their own moral and political beliefs. It would be dangerous to suppose that judges' professional commitments enable them to act in an apolitical manner. The cultural and professional assumptions that make certain legal outcomes appear inescapable, are themselves steeped in normative assumptions which reflect a particular hegemony. The challenge, it seems, is to articulate these assumptions, in order to be able to confront them with alternative social visions.