CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 14/96

NTANDAZELI FOSE Applicant

versus

THE MINISTER OF SAFETY AND SECURITY Respondent

Heard on: 10 September 1996

Decided on: 5 June 1997

JUDGMENT

ACKERMANN J:

Introduction and procedural issues

[1] This is an application for leave to appeal against a judgment of Van Schalkwyk J upholding an exception in the Witwatersrand Local Division of the Supreme Court.[1] The exception was taken by the respondent ("defendant") to claim "C" in the particulars of claim of the applicant ("plaintiff"). It raises the issue whether so-called "constitutional damages" (a concept which will be explained later) can and ought to be awarded as "appropriate relief " under the provisions of section 7(4)(a) of the Constitution of the Republic of South Africa, Act 200 of 1993 ("interim Constitution") for a breach of plaintiff's right, guaranteed by section 11(2) of the interim Constitution, not to be tortured

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[1] Van Schalkwyk J's judgment is reported as *Fose v Minister of Safety and Security* 1996 (2) BCLR 232 (W).

and not to be subject to cruel, inhuman or degrading treatment.

[2] Having upheld the exception, and upon application being made to him under the provisions of Constitutional Court rule 18(*a*),[2] Van Schalkwyk J granted an unqualified

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[2] The relevant parts of rule 18 provide the following:

> "*(a)* The appellant shall within 15 days of the judgment given by the provincial or local division of the Supreme Court which heard the case and after giving notice to the other party or parties concerned, apply to the judge or judges of that provincial or local division who gave the judgment or, if such judge or judges are not available, to another judge or judges of that provincial or local division to certify that the only issue (or issues) remaining in the case is (or are) of a constitutional nature and that there is reason to believe that the Court may give leave to the appellant to note an appeal against the decision on such issue given by the provincial or local division concerned.
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> . . . .
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> *(e)* If it appears to the judge or judges of the division of the Supreme Court concerned, hearing the application made in terms of paragraph *(a)*, that -
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> (I) the constitutional issue is one of substance on which a ruling by the Court is desirable; and
> (ii) the evidence in the proceedings is sufficient to enable the Court to deal with and dispose of the matter without having to refer the case back to the division concerned for further evidence; and
> (iii) there is a reasonable prospect that the Court will reverse or materially alter the decision given by the division concerned if permission to bring the appeal is given, such judge or judges of the division concerned shall certify on the application that in his or her or their opinion, the requirements of subparagraphs (I), (ii) and (iii) have been satisfied or, failing which, the judge or judges shall certify which of such requirements have been satisfied, and which have not been satisfied.
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> . . . .
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> *(I)* (I) The President, after consulting the judges, shall decide whether or not to grant the appellant leave to appeal.

positive certificate in terms of rule 18*(e)* to the effect, inter alia, that there was a reasonable prospect that the Constitutional Court would reverse or materially alter the decision given by him if permission to bring the appeal was given. The learned judge did so without the application having been formally set down and without hearing the parties. It was his understanding that this was the procedure required by rule 18*(e)*, his reasoning being that it was not his function but that of the President of the Constitutional Court, in terms of rule 18*(i)*(i), to grant the leave to appeal. In this respect the learned judge erred.

(ii) Applications for leave to appeal may be dealt with summarily, without hearing oral or written argument other than that contained in the application itself."

[3] It is true that it is the President who is empowered to grant leave to appeal in terms of rule 18. Although rule 18*(i)*(ii) provides that applications for leave to appeal may be dealt with summarily without hearing oral or written argument other than that contained in the application itself, it is clear from the context that this latter provision relates to the decision by the President and not to the grant of the certificate by the judge or court a quo. The purpose of rule 18*(e)* certification is to assist in ensuring that appeals are not heard by the Constitutional Court which are not of substance, or which cannot be dealt with and disposed of by the Constitutional Court because of the insufficiency of the evidence, or which have no reasonable prospect of success. Apart from the fact that the person in whose favour the decision has been given in the court a quo has an interest in the granting of the certificate and is entitled to be heard on that ground alone, proper argument is important to ensure that the objects of certification are achieved.[3] Rule 18 does not in terms require that reasons be furnished for the grant of a rule 18*(e)* certificate. Where, however, a matter comes directly to this Court from a Provincial or Local Division of the Supreme Court it would greatly assist this Court in dealing with a new and complex point of constitutional law if it had the benefit of the views of the Supreme Court issuing the certificate, in addition to any judgment previously given in the case.

[4] Pursuant to directions given by the President, argument on the application for leave to appeal and on the merits of the appeal itself was, as a matter of convenience, heard together. Condonation for the late lodging by the plaintiff of his application for

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[3] Compare the procedure and rationale for applications for leave to appeal generally. See, for example, *S v Sikosana* 1980 (4) SA 559 (A) at 562H-563C.

leave to appeal was granted, the delay being occasioned by the plaintiff's ignorance of the fact that Van Schalkwyk J had granted a rule 18*(e)* certificate under the circumstances mentioned above.

The amici curiae

[5] Mr JHA Munnik, an advocate of the Supreme Court and the duly appointed police reporting officer of the Witwatersrand charged with monitoring the investigation of complaints concerning alleged police misconduct which might detrimentally affect police/community relations, was admitted as an amicus curiae and filed full written argument, although he did not present viva voce argument. We have given due consideration to his written argument. In addition, however, Mr Munnik tendered a bundle of documents on which he sought to rely testimonially in his argument. Rule 34(1) permits an amicus curiae to canvass factual material which is relevant to the determination of the issues before the Court and which do not specifically appear on the record, provided that such facts –

> "*(a)* are common cause or otherwise incontrovertible; or
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> *(b)* are of an official, scientific, technical or statistical nature, capable of easy verification."

[6] The defendant admitted the correctness of the content of certain factual material[4] so tendered but placed the correctness of the rest in issue. Save to the extent that any of the disputed factual averments might be so notorious as to justify the Court taking

[4] Namely, that referred to in paragraphs 2.1, 6.1 and 6.2 of Mr Munnik's written argument.

judicial notice thereof, none of the material falls within the provisions of rule 34(1) and is accordingly not admitted.

[7] The Human Rights Commission, established under the provisions of section 115 of the interim Constitution, also sought admission as an amicus curiae in terms of Constitutional Court rule 9(1) on the basis that all the parties in the matter had consented in writing thereto.[5] For an amicus curiae to be admitted on this basis in an application for leave to appeal the written consent of all the parties must be given within 10 days after such application has been lodged with the registrar of the Constitutional Court.[6] In the present case the application for leave to appeal was lodged with the

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[5] Constitutional Court rule 9(1) provides as follows:

> "Subject to the provisions of section 102(10) of the Constitution and the provisions of these rules, any person interested in an appeal or a reference or any other matter before the Court may, with the written consent of all the parties in the matter before the Court, given not later than the time specified in subrule (5), be admitted therein as an *amicus curiae* upon such terms and conditions and with such rights and privileges as may be agreed upon in writing with all the parties before the Court or as may be ordered by the Court in terms of subrule (3)."

Subrule (3) provides, however, that the terms and conditions so agreed upon between the amicus curiae and all the parties may be amended in accordance with the directions given by the President.

[6] Rule 9(1) read with rule 9(5)*(b)*.

registrar on 26 March 1996 whereas the consent of the parties was not obtained until 4 September 1996, nearly five months out of time and only six days before the hearing of the matter. The Human Rights Commission brought no application for condonation in this regard.

[8] The Human Rights Commission is unquestionably an important constitutional body charged with the task of advancing and protecting human rights in South Africa. The interim Constitution imposes on it extensive duties, to be executed in a variety of ways, to further respect for and the observance and protection of fundamental rights.[7] It is a body which has and will continue to acquire expertise regarding the constitutional protection of fundamental rights and it undoubtedly has a real and substantial interest in a wide range of cases with which this Court is and will be concerned. As an amicus curiae it can be expected to play an important role, in appropriate circumstances, in the work of this Court but it does not, by virtue of the Constitution or other statutory provision, enjoy any privileged position and its admission as amicus in any particular case must therefore be governed by rule 9.

[9] It is clear from the provisions of rule 9 that the underlying principles governing the admission of an amicus in any given case, apart from the fact that it must have an interest in the proceedings, are whether the submissions to be advanced by the amicus

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[7] See section 116(1). In terms of section 116(2) the Human Rights Commission must when it is of the opinion that any proposed legislation might be contrary to Chapter 3 or to the norms of international law which form part of South African law or to other relevant norms of international law, report that fact to the relevant legislature. It also has the competence, in terms of section 116(3), to investigate alleged violations of fundamental rights and to assist persons to secure redress, if needs be from a competent court, for such violations.

are relevant to the proceedings and raise new contentions which may be useful to the Court.[8] The fact that a person or body has, pursuant to rule 9(1), obtained the written consent of all parties does not detract from these principles; nor does it diminish the Court's control over the participation of the amicus in the proceedings, because in terms of subrule (3) the terms, conditions, rights and privileges agreed upon between the parties and the person seeking amicus status are subject to amendment by the President.

[10] In the present case the parties agreed that the Human Rights Commission could file written argument and the defendant further agreed that it could address oral argument for a period of approximately 30 minutes at the hearing. The Human Rights Commission's purported admission by consent as an amicus curiae was, as mentioned, well out of time and no proper application for condonation of its late admission was brought. Moreover the written argument which it lodged did not raise any substantially new contentions which might have been useful for the Court. Under these circumstances the Court declined to permit the Human Rights Commission to address argument to it.

The issues

[11] The plaintiff, in its particulars of claim, sued the defendant (the Minister of Safety

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[8] See, in particular, subrules (6) and (7).

and Security) for damages arising out of a series of assaults alleged to have been perpetrated on 2 and 3 May 1994 by members of the South African Police Force acting within the course and scope of their employment with the defendant. Claim "A" is not relevant to the present proceedings. Claim "B1" and "B2" relate to assaults which are alleged to have taken place at the premises of the Vanderbijlpark Riot and Related Crimes Investigation Unit.

[12] The details of the serious assaults alleged and which form the basis of claims "B1" and "B2" are pleaded in paragraphs 9 and 11 respectively of plaintiff's particulars of claim. Claim "C" is based on these same assaults, the relevant allegations being the following:

> "15. The conduct referred to in paragraphs 9 and 11 above constitutes an infringement of the Plaintiff's fundamental rights as enshrined and entrenched in chapter 3 of the Constitution of the Republic of South Africa, 1993 (Act 200 of 1993), as amended, more particularly the Plaintiff's right to:
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> 15.1 human dignity (Section 10);
> 15.2 freedom and security of the person (Section 11(1) and 11(2));
> 15.3 privacy (Section 13); and
> 15.4 to be arrested and detained in accordance with the provisions of Section 25(1) and 25(2) of the Constitution. [What the pleader of course really intended, and this is what the pleading will be taken to mean (for so it was apparently understood throughout the case), was to assert plaintiff's right "not to be arrested or detained except in accordance with the provisions of Section 25(1) and 25(2) of the

Constitution".]

16. The aforesaid infringement of the Plaintiff's fundamental rights forms part of wide-spread and persistent similar infringements of the fundamental rights of other South African citizens by members of the South African Police Services, in particular in Vanderbijlpark.

17. Having regard to the conduct of the Defendant's employees, referred to in paragraphs 9 and 11 above, and to the infringements of the Plaintiff's fundamental rights, the Plaintiff is entitled to be awarded constitutional damages in the amount of R200 000,00, which amount includes an element of punitive damages."

[13] For claims "B1" and "B2" damages in a total amount of R130 000,00 are claimed comprising R50 000,00 for pain and suffering, R50 000,00 for loss of enjoyment of the amenities of life and shock, R10 000,00 for contumelia and R20 000,00 as special damages in respect of past and future medical expenses. Claim "C" is pertinently limited to recovering "constitutional damages" in the sum of R200 000,00 which amount is stated to include "an element of punitive damages". Such damages are being sought in consequence of the same events and conduct which found claims "B1" and "B2" but only in respect of the infringement of plaintiff's Chapter 3 rights as detailed in paragraph 15 of the particulars of claim. In claim "C" plaintiff is therefore limiting his relief to the recovery of specific damages over and above those to which he would be entitled at common law in consequence of the aforementioned events and conduct. These additional damages are characterised by plaintiff as "constitutional damages" which include "an element of punitive damages."

[14] The exception that claim "C" does not disclose a cause of action was formulated as follows –

> "3.1 an action for damages in the nature of constitutional damages does not exist in law; and/or
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> 3.2 an order for the payment of damages does not qualify as appropriate relief as contemplated in Section 7(4)(a) of the Constitution."

Although the exception is pleaded in wide and rather abstract terms, it is to be limited to the facts of the claim under attack. The narrow issue is whether, for the same assaults as are pleaded in claims "B1" and "B2" the plaintiff is entitled, in addition to the damages claimed for these assaults in these claims, to recover "constitutional damages" which include "an element of punitive damages."

The judgment in the court below

[15] Section 7(4)(*a*) of the interim Constitution provides as follows:

> "When an infringement of or threat to any right entrenched in this Chapter is alleged, any person referred to in paragraph (*b*) shall be entitled to apply to a competent court of law for appropriate relief, which may include a declaration of rights."

In dealing with the foreign jurisprudence on constitutional damages Van Schalkwyk J referred to section 24(1) of the Canadian Charter of Rights and Freedoms ("Canadian Charter") which provides:

> "Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances." (Emphasis supplied)

The learned judge pointed out[9] that although certain of the lower Canadian courts have awarded constitutional damages, the Canadian Supreme Court has not yet done so. In considering the United States authorities he pointed out that while the Supreme Court had recognised a claim for constitutional damages, this remedy had grown out of the peculiarities intrinsic to United States jurisprudence and provided little real guidance.[10] He reached a similar conclusion in relation to judgments of the European Court of Human Rights which have awarded damages for infringements of rights under the European Convention for the Protection of Human Rights and Fundamental Freedoms ("European Convention").[11]

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9 Supra n 1 at 238B-F, referring to *McKinney v University of Guelph* (1990) 76 DLR (4th) SCC 545.

10 Id 242C.

11 Id 242D-G.

[16] In dealing with the submission of plaintiff's counsel that the common law does not provide a remedy sufficient to accentuate the importance of human rights violations, Van Schalkwyk J referred to passages from certain Appellate Division judgments where it was held that in the case of aggravated and malicious defamation, substantial damages should be awarded, not only by way of compensation for the plaintiff but also "by way of penalty upon the defendant for his aggravated and malicious defamation"[12] and that in the case of abuses of authority involving deliberate aggression upon the personal dignity and liberty of prisoners the award of damages could properly serve a penal purpose.[13] In view of these judgments the learned judge considered the following dicta of Hattingh J in *Esselen v Argus Printing and Publishing Co Ltd and Others*[14] to be overstated –

> "In general, a civil court, in a defamation case, awards damages to solace plaintiff's

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12 *Salzmann v Holmes* 1914 AD 471, 483.

13 *Whittaker v Roos and Bateman* 1912 AD 92, 118 and 125 and *Manamela v Minister of Justice and Others* 1960 (2) SA 395 (A) 401E-H.

14 1992 (3) SA 764 (T).

wounded feelings and not to penalise or to deter the defendant for his wrongdoing nor to deter people from doing what the defendant has done. Clearly punishment and deterrence are functions of the criminal law, not the law of delict."[15]

[15] Id 771H; supra n 1, 237E.

Relying on the provisions of sections 35(1) and (3) of the interim Constitution,[16] Van Schalkwyk J considered that in the circumstances created by the interim Constitution the common law could, in most cases by only slight modification, be adapted to the extent necessary to bring it into harmony with the Constitution and that in this way the plaintiff's needs for an adequate remedy, which might include punitive damages, could be met.[17] While accepting that, strictly speaking, there is no delict of "torture" in its own name in our law, the learned judge pointed out that the common law does recognise different degrees of assault and that where plaintiffs prove that they have been tortured the

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[16] Which provide as follows:

> "(1) In interpreting the provisions of this Chapter a court of law shall promote the values which underlie an open and democratic society based on freedom and equality and shall, where applicable, have regard to public international law applicable to the protection of the rights entrenched in this Chapter, and may have regard to comparable foreign case law.
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> . . . .
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> (3) In the interpretation of any law and the application and development of the common law and customary law, a court shall have due regard to the spirit, purport and objects of this Chapter."

[17] Supra n 1, 235H-I; 237E; 246B-C.

particular malevolence associated with such unlawful acts "can be accommodated within the common law by an appropriate (and if needs be, punitive) order for the payment of damages."[18]

The contentions in this Court

[17] In their helpful arguments, counsel for the respective parties followed substantially the same lines as in the court a quo, although much elaborated. The plaintiff's argument can be summarised as follows. Section 7(4)(a) of the interim Constitution establishes a separate cause of action, a public law action directed against the state, based on the infringement of a fundamental right entrenched in Chapter 3. The objectives of the law of delict differ fundamentally from those of constitutional law. The primary purpose of the former is to regulate relationships between private parties whereas the latter, to a large extent, aims at protecting the Chapter 3 rights of individuals from state intrusion. Similarly the purpose of a delictual remedy differs fundamentally from that of a constitutional remedy. The former seeks to provide compensation for harm caused to one private party by the wrongful action of another private party whereas the latter has as its objective (a) the vindication of the

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[18] Id 245D-E.

fundamental right itself so as to promote the values of an open and democratic society based on freedom and equality and respect for human rights; (b) the deterrence and prevention of future infringements of fundamental rights by the legislative and executive organs of state at all levels of government; (c) the punishment of those organs of state whose officials have infringed fundamental rights in a particularly egregious fashion; and (d) compensation for harm caused to the plaintiff in consequence of the infringement of one or more of the plaintiff's rights entrenched in Chapter 3. The common law remedies are not directed to the achievement of the first three of these objectives and the common law should not be distorted by requiring it to perform these functions and fulfil the purposes of constitutional law. Hence the necessity, so the argument concludes, for a specific and separate public law constitutional damages remedy.

[18] In essence the issues raised by the plaintiff turn on the proper construction of section 7(4)(a) of the interim Constitution which entitles any (relevant) person "to apply to a competent court of law for appropriate relief, which may include a declaration of rights". The interim Constitution is the supreme law. It confers rights on persons and tells them that they may look to the courts for the protection and enforcement of such rights. The interim Constitution is prescriptive as to how rights should be enforced or protected only to the extent that it requires the competent court, if it finds that "any law or any provision thereof" is inconsistent with the interim Constitution, to "declare such law or provision invalid to the extent of its inconsistency".[19] But even then, the court is given the power by section 98(5) to direct that the unconstitutional law shall remain in force for a period of time to enable Parliament to correct the law and bring it into

[19] Section 98(5) and see also section 101(4) of the interim Constitution.

conformity with the interim Constitution. Otherwise, the only requirement of the interim Constitution is that the relief given by a competent court in any particular case should be "appropriate relief". It is left to the courts to decide what would be appropriate relief in any particular case.

[19] Appropriate relief will in essence be relief that is required to protect and enforce the Constitution.[20] Depending on the circumstances of each particular case the relief may be a declaration of rights, an interdict, a mandamus or such other relief as may be required to ensure that the rights enshrined in the Constitution are protected and enforced. If it is necessary to do so, the courts may even have to fashion new remedies to secure the protection and enforcement of these all important rights.

[20] It needs to be emphasised again that the issue we are called upon to decide is a narrow one. We are not required to answer the question raised by the exception in the broad terms in which it was framed, nor as it was presented in plaintiff's argument; namely, whether an action for damages in the nature of constitutional damages exists in

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[20] Section 98(2) of the interim Constitution provides that:

> "The Constitutional Court shall have jurisdiction in the Republic as the court of final instance over all matters relating to the interpretation, protection and enforcement of the provisions of this Constitution . . ." (Emphasis supplied.)

law and whether an order for payment of damages qualifies as appropriate relief for purposes of section 7(4)(a) of the interim Constitution in respect of a threat to or infringement of any of the rights in Chapter 3. We are concerned with the much narrower task of answering these questions only in relation to the rights allegedly infringed in the present case and then only in respect of the separate claim for constitutional damages as formulated in paragraph 17 of claim "C".

[21] This is, however, the first occasion on which this Court has been required to rule on the meaning and effect of section 7(4)(a) of the interim Constitution. Particularly in the new legal order introduced by the interim Constitution, a judgment on the construction of a provision such as this is of concern not only to the immediate litigants in the case but also to all other persons whose Chapter 3 rights might have been or might be infringed; indeed it has implications for constitutional litigation generally. It may well be that, generally speaking, it is prudent not to "anticipate a question of constitutional law in advance of the necessity of deciding it".[21] There are, however, occasions when such an approach, if it were to preclude all discussion of matters not strictly relevant to the decision at hand, could be misleading to the public and could incorrectly or incompletely portray the effect of a judgment and indeed the development of constitutional jurisprudence on a particular topic.[22] I believe that such dangers lurk in deciding the present case for reasons which are too narrowly formulated, albeit that they

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[21] *Liverpool, New York and Philadelphia Steamship Co v Commissioners of Emigration* 113 US 33, 39 (1885), referred to in *Zantsi v Council of State, Ciskei and Others* 1995 (10) BCLR 1424 (CC); 1995 (4) SA 615 (CC) at para 2.

[22] It was for basically these reasons, I would suggest, that in *S v Zuma and Others* 1995 (4) BCLR 401 (CC); 1995 (2) SA 642 (CC) at para 41 Kentridge AJ went out of his way "to emphasise what this judgment does

might be technically sufficient. In the present case it is essential to place the issue, narrow as it may be, in its correct jurisprudential context, both nationally and internationally. The issue is limited to constitutional damages. Plaintiff sought no non-pecuniary relief whether by way of prohibitory or mandatory interdict or otherwise. Nothing in this judgment must therefore be construed as foreclosing any future consideration of any of these or other remedies as constituting appropriate relief in the circumstances of a particular case.

[22] As the matter is to be dealt with as on exception, the correctness of the allegations made in the summons must be assumed. The allegations included not only an averment that certain of the plaintiff's fundamental rights have been infringed, but also that the infringement formed part of "widespread and persistent similar infringements of the fundamental rights of other South African citizens by members of the South African Police Services, in particular in Vanderbijlpark". It was contended that in these circumstances the "constitutional damages" claimed would be an appropriate form of relief.

[23] The "constitutional damages" are claimed by the plaintiff in addition to the common law damages to which he would be entitled for the assault on which the action is founded. It is contended that these "constitutional damages" are required to enforce

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not decide." (See also id at para 42.)

the provisions of the Constitution and are appropriate in order to achieve any of the ends mentioned in paragraph 17(a), (b) and (c) above.

[24] The plaintiff placed considerable reliance on foreign law, alleged to be comparable for purposes of section 35(1) of the Constitution, in support of his argument both on the nature as well as on the content of the relief envisaged by section 7(4)(a). More than the usual caution[23] is necessary in the present enquiry since the law of delict/torts differs in various legal systems, certain judicial systems and their legal remedies are divided along federal and state lines, sovereign immunity is not treated identically and the nature and histories of the various constitutional dispensations are not the same. In order to avoid tedious repetition, the nature and the content of the remedy will be considered together when evaluating the foreign authorities.

United States

[23] *Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others* 1996 (1) SA 984 (CC); 1996 (1) BCLR 1 (CC) at para 72; *Bernstein and Others v Bester and Others* NNO 1996 (4) BCLR 449 (CC); 1996 (2) SA 751 (CC) at paras 132-3.

[25] A few preliminary observations may be helpful in trying to evaluate the relevance of United States jurisprudence. In the first place it should be noted that the federal/state divide plays a significant role in United States jurisprudence in this regard. Second, it is to be observed that remedies for constitutional infringement arise from basically two sources, the relief provided by section 1983 of the Civil Rights Act, 1871[24] and constitutional damages based directly on the Constitution. Third, it must be borne in mind that claims in tort fall within the jurisdiction of state courts.[25] Fourth, the role of state immunity must not be lost sight of.[26]

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[24] Now 42 United States Code ("USC"), section 1983 and hereinafter simply cited as "Section 1983 USC" or "Section 1983".

[25] *Bivens v Six Unknown Named Agents of Federal Bureau of Narcotics* 403 US 388, 390-1, 409 (1971).

[26] See, in general, the following instructive and specialist contributions on constitutional damages as a remedy for Constitutional infringements, on which reliance has been placed in dealing with United States and Canadian jurisprudence: Cooper-Stephenson *Charter Damages Claims* (Carswell, Toronto 1990); Whitman "Constitutional Torts" (1980) 79 *Michigan Law Review* 5 and Pilkington "Damages as a Remedy for Infringement of the Canadian Charter of Rights and Freedoms" (1984) 62 *The Canadian Bar Review* 517.

[26] Section 1983 United States Code ("USC") has been an important federal statutory remedy, in respect whereof the states have concurrent jurisdiction, to enforce rights protected by the Constitution.[27] In 1961 in *Monroe v Pape*[28] the Supreme Court held that section 1983 afforded a federal remedy which was supplementary to any appropriate state remedy and that the latter need not be exhausted before invoking the

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[27] The Fourteenth Amendment which, in section 1, provides for the extension of certain guaranteed rights against the states, in addition, in section 5, empowers Congress "to enforce, by appropriate legislation, the provisions of this article." Section 1983 of the Civil Rights Act, 1871 was passed "in reaction to serious infringements of civil rights in the Reconstruction period, but . . .[i]t was not until the 1960's that the remedy became effective . . .". Pilkington supra n 26 at 520-1. Section 1983 provides -

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

[28] 365 US 167 (1961).

federal one.[29] It was abundantly clear, so the Court pointed out, that -

> "one reason the legislation was passed was to afford a federal right in federal courts because, by reason of prejudice, passion, neglect, intolerance or otherwise, state laws might not be enforced and the claims of citizens to the enjoyment of rights, privileges, and immunities guaranteed by the Fourteenth Amendment might be denied by the state agencies."[30]

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[29] Id at 183 where Douglas J stated -

> "It is no answer that the State has a law which if enforced would give relief. The federal remedy is supplementary to the state remedy, and the latter need not be first sought and refused before the federal one is invoked. Hence the fact that Illinois by its constitution and laws outlaws unreasonable searches and seizures is no barrier to the present suit in the federal court."

[30] Id at 180.

The action could initially only be used against state and other local officials and employees in their personal capacities, for the Court held that a municipality was not a "person" for purposes of section 1983 and consequently not liable to be sued.[31] This part of the judgment was overruled in *Monell v New York City Department of Social Services*[32] which held that municipalities and other local authorities could be directly liable but only in very limited circumstances[33] and expressly not on grounds of vicarious liability only.[34] Since 1961 section 1983 claims in federal courts have rapidly escalated.[35]

[27] States themselves are immune from section 1983 claims brought by individuals in federal courts because of the provisions of the Eleventh Amendment,[36] as is the US

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31 Id at 191.

32 436 US 658 (1977)

33 Id at 690-691 per Brennan J -

> "Local governing bodies, therefore, can be sued directly under §1983 for monetary . . . relief where, as here, the action that is alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers"

and

> "local governments . . . may be sued for constitutional deprivations visited pursuant to governmental 'custom' even though such a custom has not received formal approval through the body's official decisionmaking channels." (internal footnotes omitted)

34 Id at 691, 694.

35 From 296 in 1961 to 12,829 in 1978 (see Pilkington supra n 26 at 521 note 15).

36 See, generally, Tribe *American Constitutional Law* 2ed (The Foundation Press Inc, New York 1988) 173-95; *Hans v Louisiana* 134 US 1 (1890); *Pennhurst State School and Hospital v Halderman (II)* 465 US 89, 98-9 (1984); *Quern, Director, Department of Public Aid of Illinois v Jordan* 440 US 332 (1979) and Pilkington supra n 26 at 522.

Government under common law,[37] unless and to the extent that such sovereign immunity

[37] *Bivens*' case supra n 25 at 410 and Pilkington supra n 26 at 525.

is waived.[38] Although the Federal Tort Claims Act 28 USC sections 2671 et seq ("FTCA"), as amended, constitutes a waiver of the sovereign immunity of the United States and permits an injured claimant to recover damages from the United States, the position of the United States is not fully equated with that of the private defendant; the claimant pursuing a claim in terms of the FTCA is "remitted to the vagaries of state law" and in many cases will recover even less than under state law "because the statute is hedged with protections for the United States" and "simply is not an adequate remedy."[39] These aspects are relevant to and must be kept in mind when evaluating the United States Supreme Court cases most relied upon by the plaintiff, namely those establishing an action for damages directly under the Constitution.

[28] Before turning to those decisions, it is convenient to consider briefly the content of the damages awarded in section 1983 claims. Consistent with the availability of punitive damages in ordinary tort suits in the United States, punitive damages against officials in their personal capacities are, in the appropriate circumstances, available in

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38 Tribe supra n 36 at 178-9.

39 *Carlson v Green* 446 US 14, 28, 28 n 1 (1980).

section 1983 actions.[40]

[40] *Smith v Wade* 461 US 30, 53-56 (1983).

[29] It is significant, however, that punitive damages are not available against municipalities.[41] The public policy reasons advanced for such finding are relevant to the eventual decision to be reached in this judgment. In *Newport v Facts Concerts Inc*[42] Blackmun J, after reviewing common law authorities covering over a century which had consistently denied such punitive damages, examined the objectives of punitive damages in general and their relationship to the goals of section 1983. He rejected the concept of retribution against a municipality, pointing out that punitive damages only punished innocent taxpayers and constituted a windfall to a fully compensated plaintiff.[43] The learned judge also rejected the deterrence rationale for making punitive damages available against municipalities.[44]

[30] It is also to be noted that even in the case of constitutional breaches no damages for the abstract value of the right infringed are awarded, only nominal damages. In the case of *Carey v Piphus*[45] two public school students had been suspended from school without procedural due process. The Court held that, in the absence of proof that the lack of due process had caused actual damages, the students were entitled to recover nominal damages of $1 only.[46] The Court held that although mental and emotional distress caused by the denial of procedural due process itself is compensable under

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41 *Newport v Facts Concerts Inc* 453 US 247, 271 (1981) per Blackmun J delivering the opinion of the Court.

42 Id.

43 Id at 266-7.

44 Id at 268-9

45 435 US 247 (1978).

46 Id at 248, 264, 267.

section 1983, “neither the likelihood of such injury nor the difficulty of proving it is so great as to justify awarding compensatory damages without proof that such injury actually was caused.”[47]

[47] Id at 264.

[31] The judgment in *Memphis Community School District v Stachura*[48] concerned the violation of the plaintiff's First Amendment right to academic freedom as a teacher. It confirmed the approach adopted in *Carey v Piphus*,[49] and emphasised that when plaintiffs invoke section 1983 to seek damages for violations of constitutional rights the level of damages is ordinarily determined according to principles derived from the common law of torts[50] and that, punitive damages aside, the basic purpose of section 1983 damages is to "*compensate persons for injuries* that are caused by the deprivation of constitutional rights"[51] and that there was simply no room for "noncompensatory damages measured by the jury's perception of the abstract 'importance' of a constitutional right."[52] The court also considered that the award of such damages was not necessary to vindicate the constitutional rights that section 1983 protects; damages that compensate for actual harm normally sufficing to deter constitutional violations.[53]

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48 477 US 299 (1986).

49 Supra n 45.

50 Supra n 48 at 306.

51 Id at 307 quoting from *Carey v Piphus* supra n 45.

52 Id at 309-10 per Powell J writing for the court.

53 Id at 310.

The court moreover considered that damages based on the "value" of constitutional rights were "an unwieldy tool for ensuring compliance with the Constitution".[54]

[54] Id at 310.

[32] In a separate concurring judgment, Justice Marshall (joined by Justices Brennan, Blackmun and Stevens) was at pains to point out, as was stated in *Carey v Piphus*[55] that common-law tort rules would not necessarily provide a complete solution to the damages issue, that compensation should be tailored to the interests protected by the particular right in question and that the elements and prerequisites for damages appropriate to compensating the infringement of one right might not be appropriate in the case of an infringement of another.[56] Justice Marshall warned against the "wooden application of common-law damages rules"[57] and pointed out that deprivation of a constitutional right could give rise to damages not contemplated by the common law.[58]

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55 Supra n 45.

56 Supra n 48 at 314.

57 Id at 314.

58 Id at 315.

[33] The United States Supreme Court has also developed, directly under the Bill of Rights, a damages remedy against federal officials. In *Bivens*[59] the petitioner's complaint alleged that agents of the Federal Bureau of Narcotics without warrant or probable cause entered the petitioner's apartment and arrested him for alleged narcotics violations. The petitioner was manacled in front of his family, his apartment searched and at the federal courthouse he was subjected to a visual strip search. The majority of the Supreme Court, per Brennan J, held that it had the power to fashion a damages remedy directly under the Constitution for the invasion of Bivens' personal interests protected by the Fourth Amendment, despite the fact that the Fourth Amendment made no express provision for a remedy in damages; Bivens was not limited to seeking a remedy under ordinary tort law.[60] It is important to appreciate that, at the time of the *Bivens* judgment, sovereign immunity had not yet suffered the substantial curtailment effected by the 1976 amendment of the FTCA.[61] This is markedly different from the position in South Africa.[62] A further relevant, and distinguishing feature, is the majority's view in *Bivens* that the "niceties of local trespass

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59 Supra n 25.

60 Id at 396.

61 28 USC section 2680(h), *Bivens* supra n 25 at 410 per Harlan J, *Carlson v Green* supra n 39 at 28, 28 footnote 1, and Pilkington supra n 26 at 526. At the time of the *Bivens* decision, the Federal Tort Claims Act prohibited recovery against the Government for –

> "Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights. 28 U.S.C. §2680(h)."

See *Butz v Economou* 438 US 478 (1978), 504-5 footnote 31. Even after the amendment sovereign immunity was not completely abrogated. See *Carlson v Green* supra n 39 at 28, 28 footnote 1.

62 See section 1 of the State Liability Act 20 of 1957.

laws" were remedially inadequate,[63] and that the interests protected by state laws regulating trespass and the invasion of privacy might be inconsistent with the Fourth Amendment guarantee.[64] While these features certainly counsel considerable caution when seeking guidance from United States Supreme Court jurisprudence regarding the content of a suitable constitutional damages remedy, the views expressed concerning the essential nature of the remedy might, in a more general normative sense, be instructive.

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[63] Supra n 25 at 393-4 per Brennan J and 409-10 per Harlan J.

[64] Id at 394.

[34] In *Bivens* Brennan J stressed the completely independent nature of the constitutional damages remedy to protect Fourth Amendment rights.[65] He regarded the Fourth Amendment right in question as "an independent limitation upon the exercise of federal power".[66] The learned justice stressed the different function of the law when dealing with the rights of individuals inter se as compared to dealing with individual rights against the State[67] and Justice Harlan in his concurring opinion stressed the particular responsibility on the judiciary to vindicate the constitutional interests of individuals entrenched in the Bill of Rights.[68]

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65 Id at 390-2, 394-5.

66 Id at 394 and see also at 395.

67 Id 391-2:

> "Respondents seek to treat the relationship between a citizen and a federal agent unconstitutionally exercising his authority as no different from the relationship between two private citizens. In so doing, they ignore the fact that power, once granted, does not disappear like a magic gift when it is wrongfully used. An agent acting - albeit unconstitutionally - in the name of the United States possesses a far greater capacity for harm than an individual trespasser exercising no authority other than his own."

and, at 394-5:

> ". . . we may bar the door against an unwelcome private intruder, or call the police if he persists in seeking entrance. The availability of such alternative means for the protection of privacy may lead the State to restrict imposition of liability for any consequent trespass. A private citizen, asserting no authority other than his own, will not normally be liable in trespass if he demands, and is granted, admission to another's house . . . But one who demands admission under a claim of federal authority stands in a far different position . . . The mere invocation of federal power by a federal law enforcement official will normally render futile any attempt to resist an unlawful entry or arrest by resort to the local police; and a claim of authority to enter is likely to unlock the door as well.
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> > 'In such cases [. . .] [t]here remains to [the citizen] but the alternative of resistance, which may amount to crime.' *United States v Lee* 106 US 196, 219 (1882)." (Other authorities omitted).

68 Id at 407:

"These arguments for a more stringent test to govern the grant of damages in constitutional cases seem to be adequately answered by the point that the judiciary has a particular responsibility to assure the vindication of constitutional interests such as those embraced by the Fourth Amendment . . . [I]t must also be recognized that the Bill of Rights is particularly intended to vindicate the interests of the individual in the face of the popular will as expressed in legislative majorities; at the very least, it strikes me as no more appropriate to await express congressional authorization of traditional judicial relief with regard to these legal interests than with respect to interests protected by federal statutes." (Footnotes and authorities omitted).

[35] *Bivens* has been followed by the Supreme Court in subsequent cases, applying the damages remedy to violations of the Fifth and Eighth Amendments.[69] In *Davis v Passman*[70] the complainant based her claim on sex discrimination and founded it on a direct violation of the Fifth Amendment. The Supreme Court held that she had a cause of action for damages, implied directly under the equal protection component of the Fifth Amendment.[71] In evaluating the relevance of this judgment in regard to the content of the relief granted, it must be borne in mind that the petitioner had no other remedy she could avail herself of[72] and "[f]or Davis, as for Bivens, 'it is damages or nothing.'"[73]

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69 See, for example, *Davis v Passman* 442 US 228 (1979); and *Carlson v Green* supra n 39.

70 Id.

71 Id at 243, 245, 248-9.

72 Id at 243 and 243 n 21, 245.

73 Id at 245 (footnote and authority omitted).

[36] In *Carlson v Green*[74] the plaintiff sued on behalf of her deceased son's estate alleging that her son had died as a result of personal injuries because defendant's prison officials violated, inter alia, his Eighth Amendment rights by failing to give him proper medical attention. She claimed compensatory and punitive damages. The Court held that the plaintiff could avail herself of a *Bivens*-type action for damages.

[74] Supra n 39.

[37] Delivering the opinion of the Court, Brennan J pointed out that such a cause of action can be defeated inter alia when the defendant shows "that Congress has provided an alternative remedy which is explicitly declared to be a *substitute* for recovery directly under the Constitution and viewed as equally effective"[75] and detailed four factors which demonstrated that the *Bivens* remedy was more effective than the FTCA remedy. First, because it is recoverable against individuals it is a more effective deterrent than the FTCA remedy against the United States.[76] (I pause to point out that this distinction does not apply in our law of delict, where the vicarious liability of the state does not exclude recourse against the individual tortfeasor). Second, because punitive damages may be awarded in a *Bivens* suit, such damages normally being available in the federal courts, whereas punitive damages in a FTCA suit are statutorily prohibited; the latter action therefore being much less effective than a *Bivens* action as a deterrent to unconstitutional acts.[77] Third, a plaintiff cannot opt for a jury in a FTCA action as he may in a *Bivens* suit.[78] Fourth, an action under the FTCA exists only if the State in which the alleged misconduct occurred would permit a cause of action for that misconduct to go forward, whereas the liability of federal officials for violations of citizens' constitutional rights should be governed by uniform rules.[79] The judgment in this case aptly illustrates how unique the United States situation is when it comes to constitutional torts.

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75 Id at 18-19.

76 Id at 21.

77 Id at 21-2.

78 Id at 22.

79 Id at 23.

Canada

[38] Unlike the United States of America, but like South Africa in this regard, the Canadian Charter of Rights and Freedoms ("the Charter") provides expressly in section 24(1) for an "appropriate and just" remedy when rights or freedoms guaranteed by the Charter have been infringed or denied.[80] The Saskatchewan Court of Appeal has held that appropriateness relates to the efficacy and suitability of the remedy viewed from the perspective of the complainant and the right violated, whereas justness is a wider concept relating to the interests of all affected by the remedy.[81] Section 7(4)(a) of the

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[80] Section 24(1) states:

> "Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate or just in the circumstances."

[81] *Saskatchewan Human Rights Commission* v *Kodellas* (1989) 60 DLR (4th) 143 at 162 (Sask CA) where Bayda CJS said the following:

> "Appropriateness connotes efficaciousness and suitability from the standpoint of the violation itself - a remedy 'to fit the offence' as it were. It suggests a remedy that, from the perspective of the person whose right was violated, will effectively redress the grievance brought about by the violation. The quality of justness, on the other hand, has a broader scope of operation. It must fill a more extensive set of criteria than the quality of appropriateness. To be just a remedy must be fair to all who are affected by it. That group may well include

interim Constitution speaks only of "appropriate relief". Construed purposively, however, I see no material difference between the two concepts. It can hardly be argued, in my view, that relief which was unjust to others could, where other available relief meeting the complainant's needs did not suffer from this defect, be classified as appropriate. In applying section 7(4)(a) the interests of the both the complainant and society as a whole ought, as far as possible, to be served.

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persons other than the person whose right was violated."

[39] The Canadian Supreme Court has not yet pronounced on the issue whether constitutional damages constitute, in suitable cases, an appropriate and just remedy for Charter violations but it appears to be generally accepted that this is the case,[82] although such a remedy has not as yet been extensively used.[83] In *McKinney v University of Guelph*[84] the majority of the Canadian Supreme Court found it unnecessary to decide the issue. Wilson J, in dissent, having found that plaintiffs' rights to equality, guaranteed by section 15 of the Charter, had been infringed by the universities' mandatory retirement age of 65, and that such infringement could not be justified in terms of section 1, considered it appropriate and just, in addition to full reinstatement, to award compensatory damages for the loss of income and benefits sustained by the plaintiffs through the breach of their section 15 rights. Wilson J held that the purpose of the damages was to make the "injured party whole" and that there was no need for additional relief.[85] The judgment makes plain that the nature of the

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82 Cooper-Stephenson *Charter Damages Claims* supra n 26 at 1; Tarnapolsky & Beaudoin (eds) *Canadian Charter of Rights and Freedoms: Commentary* (1982) 502-3; and Roach *Constitutional Remedies in Canada* (Canada Law Book Inc, Ontario 1995) at Chapter 11 paras 11.10 et seq.

83 Roach id at para 11.10.

84 Supra n 9.

85 Id at 623:

> "Similarly, I believe it is appropriate and just in these circumstances to award compensatory damages for the loss of income and benefits sustained by the appellants through the breach of their s.15 rights. Compensation for losses which flow as a direct result of the infringement of constitutional rights should generally be awarded unless compelling reasons dictate otherwise . . . I also appreciate that an award of damages in addition to reinstatement will place an additional monetary burden on these already financially strapped institutions. Impecuniosity and good faith are not, however, a proper basis on which to deny an award of compensatory damages . . . In my view the appellants are 'made whole' by virtue of their having been awarded the declaration, the order for reinstatement and the order for damages. There is no apparent need for additional relief and I would deny it on that basis."

relief thus proposed is constitutional, Wilson J expressly holding that "the remedial scope of s. 24(1) was not intended to be limited to that available at common law."[86] Various appellate courts in Canada have found that an action for constitutional damages is an appropriate and just remedy.[87] The real issue is what the content of the damages remedy ought to be.

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86 Id at 621. It is implicit in the judgment in *Nelles v Ontario* (1989) 60 DLR (4th) 609 (SCC) at 640-3 that a constitutional damages claim can run concurrently with one for malicious prosecution.

87 In *Vespoli v The Queen* (1984) 12 CRR 185 (Fed CA) at 189 Pratte J writing for the majority of the Federal Court of Appeal "d[id] not doubt that the court, under [section 24(1)], has the power to award damages to those whose rights and freedoms have been infringed" but did not consider it appropriate and just under the circumstances because there was "no solid evidence that the appellants really suffered damage as a consequence of the illegal seizures." In *Patenaude v Roy* (1994) 123 DLR (4th) 78 (Que CA) exemplary damages of $50 000 were awarded by the trial judge for a deliberate violation of the Quebec Charter of Human Rights and Freedoms, where police officers used excessive and unnecessary force in executing a search warrant. This decision was upheld on appeal and the appeal court increased the award of exemplary damages to $100 000. Leave to appeal to the Supreme Court of Canada was refused on 3 February 1995. See Roach supra n 82 at para 11.800 footnote 187.

[40] Exemplary or punitive damages as Charter remedies have been awarded in several cases.[88] This must, however, be seen in the light of the fact that Canada's private law system of torts which, in common with that of other common law countries, recognises exemplary or punitive damages in appropriate circumstances in ordinary tort claims, but goes somewhat further even than courts in the United Kingdom.[89]

[41] Concerns about punitive damages were expressed by the Supreme Court of Canada in the *Vorvis* case[90] where the following was stated by McIntyre J for the majority -

> "Problems arise for the common law wherever the concept of punitive damages is posed. The award of punitive damages requires that:
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> > '. . . a civil court . . . impose what is in effect a fine for conduct it finds worthy of punishment, and then to remit the fine, not to the State Treasury, but to the individual plaintiff who will, by definition, be over-compensated.'
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> (Waddams, *The Law of Damages* [2nd Ed. (1983)] at 563). This will be accomplished in the absence of the procedural protections for the defendant - always present in criminal trials where punishment is ordinarily awarded - and upon proof on a balance of

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88 See generally, Cooper-Stephenson supra n 82 at 364-8 and Roach supra n 82 at para 11.800. In *Collin v Lussier* (1983) 6 CRR 89 at 107 and *Lord v Allison* (1986) 3 BCLR (2d) 300 (SC) at 324 punitive damages of $7,500 and $1,500 respectively were awarded in addition to compensatory damages. Cooper-Stephenson at 367 considers these punitive awards to be "significant sums".

89 *Vorvis v ICBC* (1989) 58 DLR (4th) 193 (SCC) at 206, where the limitations placed on the award of punitive damages formulated in *Rookes v Barnard* [1964] AC 1129 (HL) were rejected.

90 Supra n 89.

probabilities instead of the criminal standard of proof beyond a reasonable doubt."[91]

The United Kingdom

[91] Id at 205-6.

[42] The nature of the United Kingdom constitution is such that it does not offer assistance on the question of constitutional remedies or damages in the present enquiry. Its judgments are instructive, however, on the issue of punitive damages generally. In the leading United Kingdom case of *Rookes v Barnard*[92] an important distinction was drawn between an award of exemplary damages and one of aggravated damages.[93] The object of damages is normally to compensate whereas the object of exemplary damages is to punish and deter.[94] Aggravated damages fall under the compensatory principle, and are awarded where the injury to the plaintiff has been aggravated by the way in which the defendant has behaved.[95] Lord Devlin saw the true purpose of exemplary damages in "restraining the arbitrary and outrageous use of

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92 Supra n 89.

93 Id at 1221-30 per Lord Devlin who, on the issue of exemplary damages, spoke on behalf of the House.

94 Id at 1221.

95 Id at 1221, 1226, 1229-30.

executive power"[96] and limited their award to three categories, the nature of which is not relevant for present purposes.

[96] Id at 1223.

[43] Lord Devlin did, however, express considerable misgivings about the award of exemplary damages. He considered that "[i]t may well be thought that [the object of exemplary damages] confuses the civil and criminal functions of the law" and that it was "an anomaly".[97] The learned Law Lord was concerned that exemplary damages could also be used against liberty.[98] Pointing out that aggravated damages could do most, if not all, the work that could be done by exemplary damages he remarked –

> "I do not care for the idea that in matters criminal an aggrieved party should be given an option to inflict for his own benefit punishment by a method which denies to the offender the protection of the criminal law."[99]

[44] *Broome v Cassell & Co*[100] was a libel case in which a jury had inter alia awarded £25,000 exemplary damages to the successful plaintiff. An ultimate appeal to the House of Lords against such award was dismissed, the House in its judgment confirming Lord Devlin's main conclusions in *Rookes v Barnard*.[101] While not a case of constitutional damages, the judgment contains instructive passages on public policy in

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97 Id at 1221.

98 Id at 1227:

> "Some of the awards that juries have made in the past seem to me to amount to a greater punishment than would be likely to be incurred if the conduct were criminal; and, moreover, a punishment imposed without the safeguard which the criminal law gives to an offender".

99 Id at 1230.

100 [1972] AC 1027 (HL).

101 Supra n 89.

regard to the award of exemplary (punitive) damages generally, which go beyond the technicalities of damages for libel in English law or particular and distinguishable features of jury trials.

[45] The condemnation in principle of punitive damages in civil cases by Lord Reid (who had concurred with Lord Devlin's judgment in *Rookes v Barnard*) but who considered the principle so firmly established that only Parliament could intervene, is worthy of repetition. The learned Law Lord pointed out that -

> "[d]amages for any tort are or ought to be fixed at a sum which will compensate the plaintiff, so far as money can do it, for all the injury which he has suffered."[102]

He explained that aggravated damages, although in a sense punitive, still fell within the true compensatory principle.[103] His principal objection was to purely punitive damages, where the plaintiff was given "a pure and undeserved windfall at the expense of the defendant [who] . . . was being subjected to pure punishment".[104] He considered punitive damages to be highly anomalous, that they confused the functions of the civil law with

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102 Supra n 100 at 1085D.

103 Id at 1085H - 1086A where the following was observed:

> "The defendant was being punished or an example was being made of him by making him pay more than he would have had to pay if his conduct had not been outrageous. But the damages though called punitive [in cases before *Rookes v Barnard*] were still truly compensatory: the plaintiff was not being given more than his due."

104 Id at 1086C.

those of the criminal law and contravened almost every principle which has been evolved for the protection of offenders.[105]

Trinidad and Tobago

[105] Id at 1086D; 1087D-E; 1087F.

[46] *Maharaj v Attorney-General of Trinidad and Tobago (No. 2)*[106] is even more explicit in its categorisation of the remedy for breach of a constitutional right as a public law remedy which goes beyond that available in the common law. The appellant, a member of the Bar of Trinidad and Tobago, had been wrongly committed for contempt of court in breach of his constitutional right not to be deprived of liberty without due process of law,[107] for which breach a plaintiff was entitled "without prejudice to any other action with respect to the same matter which is lawfully available" to "apply to the High Court for redress".[108] In rejecting an argument that the granting of a remedy for such a breach would "subvert the long established rule of public policy that a judge cannot be made personally liable in court proceedings for anything done by him in the exercise or

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106 [1979] AC 385 (PC).

107 Section 1(a) of the Constitution of Trinidad and Tobago of 1962, referred to in the judgment, which gave constitutional recognition to "the right of the individual to life, liberty, security of the person and enjoyment of property, and the right not to be deprived thereof except by due process of law; . . .".

108 Id in section 6(1).

purported exercise of his judicial functions",[109] Lord Diplock, delivering the judgment of the majority of the Privy Council, stressed the public law nature of the remedy as follows:

[109] Supra n 106 at 399B-C.

> "The claim for redress under section 6(1) for what has been done by a judge is a claim against the state for what has been done in the exercise of the judicial power of the state. This is not vicarious liability; it is a liability of the state itself. It is not a liability in tort at all; it is a liability in the public law of the state, not of the judge himself, which has been newly created by section 6(1) and (2) of the Constitution."[110] (emphasis supplied)

and,

> "The claim is not a claim in private law for damages for the tort of false imprisonment, under which the damages recoverable are at large and would include damages for loss of reputation. It is a claim in public law for compensation for deprivation of liberty alone."[111] (emphasis supplied)

The Privy Council found it unnecessary to express any view as to whether money compensation by way of redress could ever include an exemplary or punitive award.[112]

New Zealand

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110 Id at 399F-G.

111 Id at 400B-C.

112 Id at 400C-D.

[47] In *Simpson v Attorney-General* (*Baigent's* case),[113] decided in the New Zealand Court of Appeal, the same conclusion regarding the public law nature of the remedy was reached, where it was held that such a remedy existed despite the fact that the New Zealand Bill of Rights Act 1990 made no express provision therefor. The plaintiff had instituted, amongst others, an action for damages for an unreasonable search of premises in violation of section 21 of the New Zealand Bill of Rights Act 1990[114] and the judgment was premised on an acceptance of the fact that such a violation had occurred. One of the defences raised was that certain New Zealand statutes provided exemption from state liability.[115] This was rejected, firstly on the basis that none of these provisions was directed to "Bill of Rights liability"[116] and, secondly, because of the particular nature of the constitutional remedy provided.[117]

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113 [1994] 3 NZLR 667 (CA).

114 Which provides:

> "Everyone has the right to be secure against unreasonable search or seizure, whether of the person, property, or correspondence or otherwise."

115 Namely, section 6(5) of the Crown Proceedings Act 1950 and sections 26(3) and 27 of the Crimes Act 1961 and Section 39 of the Police Act 1958 as referred to in *Baigent's* case supra n 113 at 684.

116 Supra n 113 at 677.

117 Id, where Cooke P said the following:

> "the effect of s 6 of the Bill of Rights Act is that [these provisions] are all to be given, so far as reasonably possible, a meaning consistent with the rights affirmed in s 21. Section 5 of the Bill of Rights Act allows for reasonable limits prescribed by law (which of course includes judicial decision) on the rights and freedoms contained in the Bill of Rights, if the limits can be demonstrably justified in a free and democratic society. I accept that this provision is relevant in shaping a judicial remedy for breach of s 21. But it would be paradoxical to hold that a search unreasonable within the meaning of s 21 can be reasonably exempted from actionability by invoking s 5. That degree of subtlety should be foreign to the approach to a Bill of Rights."

[48] After accepting and approving the analysis in *Maharaj*'s case, Cooke P emphasised that the remedy was a constitutional public law remedy and not a common law one:

> "The [*Maharaj*] analysis has procedural consequences of practical importance. As Casey J points out, the question of the appropriate remedy, among the range available, for a particular case clearly does not lend itself to determination by a jury. It is naturally the responsibility of a Judge. Further, it seems to me that monetary compensation for breach of the Bill of Rights is not 'pecuniary damages' within the meaning of the Judicature Act 1908, s 19A. That section is referring to common law damages, not public law compensation. This is more than a fine point as to the meaning of 'damages' . . ." (emphasis supplied)[118]

In his concurring judgment Casey J emphasised the overarching nature of the public law remedy involved and cautioned against attempts simply to adapt common law remedies to this end.[119] The learned Judge was of the view that an adequate public law remedy could be some non-monetary option and that a remedy ought to be selected which best vindicated the right infringed.[120]

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118 Id at 677-8.

119 Id at 691 where the learned Judge of Appeal said the following:

> "It is clear . . . that only limited [common law] remedies are available against the Crown in the case of unreasonable search. . . . There would also be problems in adapting traditional common law remedies such as negligence, trespass etc, to encompass all the rights and freedoms in the Bill in order to give appropriate redress for their infringement. Clearly legislation of this kind, with its emphasis on human rights in relation to state activity, is something new in our legal pantheon."

120 Id at 692. The concurring judgments of Hardie Boys J (at 697-8, 702-3) and McKay J (at 718) have a similar thrust.

[49] As to the objectives and content of the remedy, and how possibly overlapping remedies are to be dealt with, Cooke P said the following in the context of a case where damages was the only appropriate and effective remedy:

> "As to the level of compensation, on which again there is much international case law, I think that it would be premature at this stage to say more than that, in addition to any physical damage, intangible harm such as distress and injured feelings may be compensated for; the gravity of the breach and the need to emphasise the importance of the affirmed rights and to deter breaches are also proper considerations; but extravagant awards are to be avoided. If damages are awarded on causes of action not based on the Bill of Rights, they must be allowed for in any award of compensation under the Bill of Rights so that there will be no double recovery. A legitimate alternative approach, having the advantage of simplicity, would be to make a global award under the Bill of Rights and nominal or concurrent awards on any other successful causes of action."[121]

Ireland

[50] The Irish Courts have recognised that, as custodians of constitutional rights, their powers in regard to the infringement of such rights are as ample as the defence of the Constitution requires; that even where such infringement does not constitute a tort the state may still be held liable; that sovereign immunity cannot be invoked by the state as a defence when its organs have breached such rights or failed to discharge their constitutional obligations; and that such rights can be protected or enforced by action even though such action might not fit into any previously recognised form of relief.[122]

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121 Id at 678.

122 See, for example, *The State (At the Prosecution of Quinn) v Ryan* [1965] IR 70, 122; *Kearney v Minister for Justice Ireland and the Attorney General* [1986] IR 116, 122; *Byrne v Ireland* [1972] IR 241, 264-265, 297-9, 303 and *Meskell v Córas Iompair Eireann* [1973] IR 121, 132-133.

India

[51] The courts in India have recognised the public law nature of the remedy for the infringement of a constitutional right.[123] In the *Nilabati Behera* case[124] it was pertinently held that the defence of sovereign immunity was inapplicable and alien to the concept of guaranteeing fundamental rights and that there could be "no question of such a defence being available in the constitutional remedy". Verma J pointed out that for this public law remedy to serve its proper function the Court was obliged to forge new tools in order to do complete justice.[125] The remedy for constitutional damages has been fashioned from Article 32 of the Constitution[126] despite the fact that it contains no express reference to

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123 See, for example, *Nilabati Behera v State of Orissa* [1993] AIR 1960 (SC) 1969.

124 Id at 1969.

125 Id at 1969-70 (para 19).

126 Subsection (2) of which reads:

damages. A wide range of creative remedial remedies have also been granted under its terms.[127]

Sri Lanka

> "The Supreme Court shall have power to issue directions or orders or writs, including writs in the nature of *habeas corpus*, *mandamus*, prohibition, *quo warranto* and *certiorari*, whichever may be appropriate, for the enforcement of any of the rights conferred by this Part."

[127] Orders have, for example, been granted to detain children below 16 only in children's homes and not in gaol, to faithfully enforce labour laws, to rehabilitate under-trial victims, to follow principles and norms laid down by the Court in the matter of adoption of Indian children by foreigners, to fix the minimum age for superannuation, to observe guide-lines in the allotment of cars, to provide better facilities to the inmates of government protective homes and mental hospitals, to preserve ecological balance, to submit proposals for the effective control of pollution, to hold eye camps according to standard medical guidelines, to provide and facilitate environmental awareness and education, etc. See, VN Shukla *The Constitution of*

India revised by Mahendra P Singh (Eastern Book Company, Lucknow 1996) at 280-1.

[52] In *Saman v Leeladasa and Another*[128] the Sri Lankan Supreme Court has, in its application of Article 126 of the Sri Lankan Constitution,[129] unequivocally recognised that the claim for redress provided therein for the violation of a fundamental right is a new public law remedy, imposed directly on the state by the constitution and not one in delict based on vicarious liability.[130] The Sri Lankan jurisprudence is also instructive on the content of these remedies, emphasising that where compensation is awarded for the breach of a fundamental right it is by way of a solatium for the hurt caused and "not as a punishment for duty disregarded or authority abused."[131] The idea of using a constitutional damages remedy as a deterrent against the state is rejected, not only as being futile but also because it ultimately shifts the burden to the taxpayer.[132] Orders,

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128 [1989] 1 Sri LR 1 (SC). The petitioner claimed relief in respect of the alleged violation of his fundamental right under Article 11 of the Constitution in regard to an assault by the first respondent, a prison guard.

129 Which empowers the Supreme Court, among other things, to grant "such relief or make such directions as it may deem just and equitable" where any person alleges that a fundamental right or language right recognised by the Constitution and relating to such person has been infringed or is about to be infringed by executive or administrative action.

130 Supra n 128 where Amerasinghe J, delivering the judgment of the majority of the Supreme Court (Ranasinghe CJ concurring), held at 35 that –

> "[O]ur Court has preferred to treat a violation of a fundamental right as something *sui generis* created by the Constitution and not as a delict. Their Lordships of the Supreme Court have consistently steered away from the vicarious liability approach.
>
> In *Velmurugu*'s case, (*supra*) [*Velmurugu v Attorney-General* 1 FRD 180], at p. 210 Wanasundera, J. said:
>
> > '[. . .] We are here dealing with the liability of the State under public law, which is a new liability imposed directly on the State by the constitutional provisions.'"

131 *Saman*'s case supra n 128 at 42 (footnote excluded).

132 Id at 44 where Amerasinghe J said the following:

> "To attempt to deter it [the State] would be hopelessly futile . . . It is extremely

other than for compensation, have been made for violations of fundamental rights. A mandamus has been granted against the Commissioner of Elections to register a political party when this had been refused in breach of the prohibition against discrimination;[133] authorities have been directed to take disciplinary action against the delinquent officer who perpetrated an assault on a prisoner[134] and guidelines indicated for the training and deployment of railway officers.[135]

Germany

> unlikely that we shall ever know the deepness of the treasury pocket and it is therefore hardly ever likely that we would be so placed as to make a proper assessment of punitive damages. It behoves us also to be mindful of the fact that large awards will only increase the burden of the tax-payer . . ."

133 *Gooneratne v Commissioner of Elections* [1987] 2 Sri LR 165 (SC).

134 *Vivienne Goonewardene v Hector Perera and Others* 2 FRD 426 at 440 and *Velmurugu v Attorney-General* (1 FRD 180 at 242).

135 *Laxamana and Others v Weerasooriya, General Manager, Railways* [1987] Sri LR 172 (SC).

[53] On the question of constitutional damages generally, the German law provides no direct assistance. I have found no reference to a remedy categorized as a constitutional remedy derived directly from the German Basic Law ("GG"). The GG has no specific remedial provision for the infringement of any of the basic rights entrenched in articles 1 to 19. Article 34 merely enacts remedies for neglect of duty by a state official,[136] which are developed in detail by section 839 of the German Civil Code ("CC"). Section 823 is the main provision in the CC establishing general delictual liability, which is elaborated in the later provisions. Section 839 is regarded as a lex specialis and is the only provision which can be invoked to provide a remedy in the case of a breach of official

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[136] Article 34 provides:

> "Should anybody, in exercising a public office, neglect their duty towards a third party liability shall rest in principle with the state or the public body employing them. In the event of wilful intent or gross negligence remedy may be sought against the person concerned. In respect of claims for compensation or remedy recourse to the ordinary courts shall not be precluded." (Official translation published by the Press and Information Office of the Federal Government, Bonn, June 1994.)

duty.[137] Apparently a claim for breach of a basic right cannot be instituted directly under the GG. Of greater significance, however, is the fact that there are no punitive damages under German law.[138]

The European Convention for the Protection of Human Rights

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137 See Stern *Staatsrecht* Bd I, 2 Aufl 1984, 384 and BGHZ 34, 99 at 104.

138 See Klaus Vieweg "The Law of Torts" in Ebke and Finkin *Introduction to German Law* (Kluwer Law International, The Hague 1996). Section 328(1) no 4 of the ZPO (The German Act on Civil Procedure) stipulates that a foreign judgment may not be recognized if it violates essential principles of German law. (See Hartmann in *Baumbach/Lauterbach ZPO* 55 Aufl Munich (1997) s 328 para 44.) In 1991 the German Federal Supreme Court in *BGHZ 118, 312* had to consider whether a judgment of a court in the USA granting patrimonial damages, damages for pain and suffering and punitive damages ought to be recognized and executed in Germany. The Federal Supreme Court refused to recognize and order the execution of the punitive damages award because to do so would violate the German ordre public and be in conflict with the abovementioned section of the ZPO.

[54] The jurisprudence under the European Convention offers at most marginal assistance in the present enquiry, due in part to the fact that it is an international, albeit regional, instrument applicable to sovereign states.[139] Its interpretation and application bring different considerations into play such as having to determine the bounds of national sovereignty[140] and at the same time having to interpret the independent standards set by the convention against which domestic laws are tested.[141] Article 13 of the Convention[142] provides that everyone whose Convention rights or freedoms have been violated has a right to "an effective remedy before a national authority." It is to be noted that this is not a direct remedy granted by the European Court of Human Rights itself but an obligation on the contracting states. The Court itself can, in terms of Article 50,[143] award "just satisfaction to the injured party" if only "partial reparation" is allowed

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139 Van Dijk and Van Hoof *Theory and Practice of the European Convention on Human Rights* 2ed (Kluwer Law and Taxation Publishers, Boston 1990) at 12 sum the position up as follows:

> "In other words, international law leaves the States free to decide for themselves in what way they will fulfil their international obligations and implement the pertinent international rules within their national legal system . . ."

140 As illustrated in *Tyrer v United Kingdom* (1979-80) 2 EHRR 1 at 12-14.

141 See, for example, *Lingens v Austria* (1986) 8 EHRR 407 at 420-1.

142 Which reads:

> "Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."

143 Which provides:

> "If the Court finds that a decision or a measure taken by a legal authority or any other authority of a High Contracting Party is completely or partially in conflict with the obligations arising from the present Convention, and if the internal law of the said Party allows only partial reparation to be made for the consequences of this decision or measure, the decision of the Court shall, if necessary, afford just satisfaction to the injured party."

by domestic law and several monetary awards have been made under Article 50,[144] but this is unhelpful in deciding what the nature of the remedy in domestic law is. Article 13 does not specify the nature of the domestic remedy it prescribes and jurisprudence under the Convention tends to emphasise the necessity of access to a domestic forum for the investigation and redress of the complaint rather than the nature of such remedy.[145] Deference is also shown to the constitutional structure of a contracting state. The Commission has held that Article 13 does not impose an obligation on a state to create a constitutional remedy.[146] It does not go so far as to guarantee a remedy whereby a law of a contracting state which contravenes the Convention must be judicially reviewable by a domestic tribunal, where the Convention is not part of the domestic law of the state in question and where no constitutional right to judicial review of legislation for non-observance of fundamental rights exists in that state, as in the case of the United Kingdom.[147] Of some significance, however, is the view expressed by the Commission that the provision "notwithstanding that the violation has been committed by persons acting in an official capacity" in Article 13 is "mainly directed to

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144 See *Silver v United Kingdom* (1984) 6 EHRR 62 at 66 et seq; *Young, James and Webster v United Kingdom* (1983) 5 EHRR 201 at 206 and *Lingens v Austria* supra n 141 at 421 et seq.

145 In *Klass v Federal Republic of Germany* (1979-80) 2 EHRR 214, 238 para 64 the Court held that Article 13 requires that –

> "where an individual considers himself to have been prejudiced by a measure allegedly in breach of the Convention, he should have a remedy before a national authority in order both to have his claim decided and, if appropriate, to obtain redress."

146 *X v Federal Republic of Germany* (448/59) CD 3; *X v Federal Republic of Germany* (2717/66) CD 29, 1, as cited in Sieghart *The International Law of Human Rights* (Clarendon Press, Oxford 1983) 71 n 43.

147 See the report of the Commission in the *Young, James and Webster Case Report of 14 December 1979*, B.39 (1984) 12, 49; para 177 and the *Leander v Sweden* case (1987) 9 EHRR 433, 457-8 and Van Dijk and Van Hoof supra n 139 at 527.

exclude any doctrine of immunity of State organs"[148] which is compatible only with the remedy being a public law one, excluding reliance on sovereign immunity which might be available in common law or private law actions.

Summary of Foreign Jurisprudence

[148] The *Young, James and Webster Case Report* id at 49 para 177.

[55] The foregoing survey of the remedies granted in other jurisdictions for the breach of a constitutional right indicates that in most cases they are "public law" remedies (to employ for the moment the nomenclature used in certain of the foreign jurisdictions). My understanding of the United States jurisprudence is that both the section 1983 relief as well as the award of constitutional damages based directly on the Constitution should be seen as legislative and judicial responses to the perceived inadequacy of the common law tort remedies. This inadequacy arises from the limitations placed on relief in tort by various manifestations of the principle of sovereign immunity and vicarious liability and by the vagaries and inconsistencies of tort law, which falls within the jurisdiction of state courts. The responses differ, however. The section 1983 response is basically a statutory extension of a remedy which still is fundamentally a common law tort remedy. On the other hand the remedy developed in the *Bivens*[149] and similar cases discussed above appears to have a marked "public law" character. The plaintiff is not limited to a remedy under ordinary tort law. The remedy is a completely independent remedy. It differs from that granted between two private citizens and it is one particularly intended to "vindicate the interests of the individual in the face of the popular will as expressed in legislative majorities".[150] The "public law" nature of the remedy under the Canadian Charter is clearly albeit perhaps implicitly recognised and express recognition of the "public law" nature of similar remedies has been given under the New Zealand Bill of Rights and the Constitutions of Trinidad and Tobago, India and

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149 Supra n 25.

150 Supra n 68 and generally paragraphs 34 et seq.

Sri Lanka.

The nature of the remedy under section 7(4) of the Interim Constitution.

[56] The operative words in section 7(4), "infringement of or threat to any right entrenched in this Chapter" and "shall be entitled to apply to a competent court of law for appropriate relief "(emphasis added) are of wide import. They are conceptually similar to the corresponding provisions in the constitutional instruments of Canada,[151] Trinidad and Tobago,[152] and Sri Lanka.[153] It must moreover be borne in mind that in the

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151 The corresponding provisions in section 24(1) of the Canadian Charter (see n 80 supra) are "rights or freedoms . . . [which] have been infringed or denied" and "such remedy as the court considers appropriate and just in the circumstances."

152 The corresponding provisions in section 6(1) of the Trinidad and Tobago Constitution referred to in *Maharaj* supra n 106 at 393 were "[any of the relevant provisions] has been, is being, or is likely to be contravened . . ." and " . . . that person may apply to the High Court for redress."

153 The corresponding provision in Article 126(2) of the Sri Lankan Constitution is "[a relevant right] has been infringed or is about to be infringed" and in Article 126(4) which empowers the Supreme Court "to grant such relief or make such directions as it may deem just and equitable in the circumstance . . .".

United States, Ireland and New Zealand these constitutional public law remedies have been granted in the absence of any express constitutional remedial provision.

[57] While the foreign jurisprudence referred to emphasises that the proper protection of entrenched fundamental rights requires a "public law" remedy, it is preferable, for the present, to refer to the "appropriate relief" envisaged by section 7(4) merely as a "constitutional remedy". It is both undesirable and unnecessary, for purposes of this case, to attempt to do that which has seemingly eluded scholars in the past and given rise to wide differences of opinion among them, namely, the drawing of a clear and permanent line between the domains of private law and public law and the utility of any such efforts.[154] Much of this interesting debate is concerned with an analysis of power relations in society; the shift which has taken place in the demarcations between "private law" and "public law"; how functions traditionally associated with the state are increasingly exercised by institutions with tenuous or no links with the state; how remedies such as judicial review are being applied in an ever widening field and how

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[154] See, for example, Hahlo & Kahn *The South African Legal System and its Background* (Juta, Cape Town 1968) 115-7; De Wet en Swanepoel *Strafreg* 3ed (Butterworths, Durban 1975)1; Wiechers *Administrative Law* (trnsl. G Carpenter) (Butterworths, Durban 1985) 2-4; Baxter *Administrative Law* (Juta, Cape Town 1984 reprint 1989) 56-63; Van Wyk "Privaatreg, Publiekreg en Subjektiewe Regte" (1980) 13 *De Jure* 1 at 5-10 where reference is made to twenty or more theories regarding the difference; and Harlow "'Public' and 'Private' Law: Definition Without Distinction" (1980) 43 *MLR* 241 who, at 256-8, argues that the distinction is an entirely outmoded classification; Mureinik "Natural Justice for Students: The Case of the Undisciplined Contract" (1985) 1 *SAJHR* 48, 50; and RM Unger in *Law in Modern Society: Toward a Criticism of Social Theory* (The Free Press, New York 1976). For more recent illuminating writings on this and related topics see, for example, Gerhard Lubbe "*Bona fides*, billikheid en die openbare belang in die Suid-Afrikaanse kontraktereg" (1990) 1 *Stellenbosch LR* 7, "Estoppel, vertrouensbeskerming en die struktuur van die Suid-Afrikaanse privaatreg" (1991) *TSAR* 1, and, together with Schalk van der Merwe, "*Bona fides* and public policy in contract" (1991) 2 *Stellenbosch LR* 91*;* LF van Huyssteen & Schalk van der Merwe "Good faith in contract: proper behaviour amidst changing circumstances" (1990) 1 *Stellenbosch LR* 244; and Alfred Cockrell "Substance and Form in the South African Law of Contract" (1992) 109 *SALJ* 40 and "'Can You Paradigm' - Another Perspective on the Public Law/Private Law Divide" 1993 *Acta Juridica* 227.

legal principles previously only associated with private legal relations are being applied to state institutions. Suffice it to say that it could be dangerous to attach consequences to or infer solutions from concepts such as "public law" and "private law" when the validity of such concepts and the distinctions which they imply are being seriously questioned.

[58] In considering how other jurisdictions have forged new remedies to deal with breaches of constitutional rights it is important to bear in mind differences that exist between South African law and procedure and the law and procedure in force in those jurisdictions. These differences have already been referred to in the discussion of the foreign law. The most important differences for present purposes are:

(a) Chapter 3 of the interim Constitution is binding on all legislative and executive organs of state at all levels of government. The separate federal and state court systems, resulting from the federal/state divide, which has influenced the development of the United States law in regard to "constitutional damages", do not exist in South Africa. Here we have a unitary and not a federal court system, and it follows that claims for damages under the common law and claims for damages for breaches of constitutional rights will ordinarily be dealt with at first instance by the same court.[155]

[155] It is unnecessary to consider here the position of special courts such as the Labour Court. The section 7(4)(a) entitlement is to seek "appropriate relief " from a "competent court of law". Whether a special court falls within this definition is not a matter which has to be decided in this case. Even if this were to be assumed, such a consequence would give rise to no difficulty. In terms of section 98(2) this Court has jurisdiction in the final instance over matters relating to the interpretation, protection and enforcement of the interim Constitution (see *Du Plessis and Others v De Klerk and Another* 1996 (5) BCLR 658 (CC);

(b) The South African common law of delict is flexible and under section 35(3) of the interim Constitution should be developed by the courts with "due regard to the spirit, purport and objects" of Chapter 3.[156] In many cases the common law will be broad enough to provide all the relief that would be "appropriate" for a breach of constitutional rights. That will of course depend on the circumstances of each particular case. It is unnecessary, for purposes of this judgment to consider whether, for purposes of the relief envisaged by section 7(4)(a), vicarious liability is an adequate or acceptable basis for state liability in the circumstances of a

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1996 (3) SA 850 (CC) at para 63) and subsection 3(a) read with subsection (7) of the 1996 Constitution is to similar effect. Whether or not a remedy granted by any court which is subject to the provisions of section 7(4)(a) of the interim Constitution meets the "appropriate relief" criterion, is a matter on which this Court has the power to speak the final word. None of this is affected by the way in which the "appropriate relief" is categorized.

156 Section 39(2) of the 1996 Constitution is to the same effect.

case such as this.[157]

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[157] Section 1 of the State Liability Act 20 of 1957 provides the following:

> "Any claim against the State which would, if that claim had arisen against a person, be the ground of an action in any competent court, shall be cognizable by such court, whether the claim arises out of any contract lawfully entered into on behalf of the State or out of any wrong committed by any servant of the State acting in his capacity and within the scope of his authority as such servant."

In *Mhlongo and Another NO v Minister of Police* 1978 (2) SA 551 (A) at 566D-567B, the Appellate Division rejected the suggestion that in regard to delictual wrongs committed by a policeman the liability of the state could be direct and not founded on vicarious liability and confirmed that section 1 of the above Act was the sole foundation for state liability. Such an approach to state liability is criticised and rejected by Baxter *Administrative Law* (Juta, Cape Town 1984) at 631-2 and J A van S d'Oliveira *State Liability for the Wrongful Exercise of Discretionary Powers* (unpublished doctoral thesis, University of South Africa 1976) at 486 and 492.

(c) The South African law of sovereign immunity differs materially from the law in force in those jurisdictions where it has been necessary to develop a "public law" remedy in order to hold the state liable for conduct which constitutes a breach of the Constitution, but in respect of which the state would have been immune from liability under the common law or particular statutes. These considerations do not apply with nearly the same force under South African law; but the question must be left open whether the current South African law relating to state liability is consistent with the interim Constitution and in particular with the provision for "appropriate relief" in section 7(4)(a).[158]

[158] Section 1 of the State Liability Act quoted in supra n 157.

[59] These differences are material to the applicability, within the framework of South African law, of constitutional remedies developed in other jurisdictions. A further relevant factor is that certain rights in Chapter 3 of the interim Constitution may be,[159] and Chapter 2 of the 1996 Constitution (to the extent indicated in section 8 thereof) will be,[160] applicable to relationships governed by "private law".

[60] Notwithstanding these differences it seems to me that there is no reason in principle why "appropriate relief" should not include an award of damages, where such an award is necessary to protect and enforce Chapter 3 rights. Such awards are made to compensate persons who have suffered loss as a result of the breach of a statutory right if, on a proper construction of the statute in question, it was the legislature's intention that such damages should be payable,[161] and it would be strange if damages

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159 See *Du Plessis and Others v De Klerk and Another* supra n 155 at para 62.

160 Section 8 in Chapter 2 (entitled the "Bill of Rights") of the 1996 Constitution provides the following:

> "(1) The Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary and all organs of state.
> (2) A provision of the Bill of Rights binds a natural or a juristic person if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right.
> (3) When applying a provision of the Bill of Rights to a natural or juristic person in terms of subsection (2), a court –
> (a) in order to give effect to a right in the Bill, must apply, or if necessary develop, the common law to the extent that legislation does not give effect to that right; and
> (b) may develop rules of the common law to limit the right, provided that the limitation is in accordance with section 36(1).
> (4) A juristic person is entitled to the rights in the Bill of Rights to the extent required by the nature of the rights and the nature of that juristic person."

161 *Callinicos v Burman* 1963 (1) SA 489 (A) at 497H-498C; *Da Silva and Another v Coutinho* 1971 (3) SA 123 (A) at 134H-135A, 140E-F; *Goldberg and Others v Minister of Prisons and Others* 1979 (1) SA 14 (A) at 27A-C.

could not be claimed for, at least,[162] loss occasioned by the breach of a right vested in the claimant by the Supreme law. When it would be appropriate to do so, and what the measure of damages should be, will depend on the circumstances of each case and the particular right which has been infringed.

[61] For the purposes of the present case I will assume that "appropriate relief" in section 7(4)(a) includes an award of damages where such award is required to enforce or protect Chapter 3 rights. What has to be decided is whether on the allegations made in the pleadings the plaintiff would be entitled to the particular damages with which the exception is concerned. These are –

(a) damages to vindicate the fundamental rights of the plaintiff alleged to have been infringed, and

(b) punitive damages to deter and prevent future infringements of the fundamental rights in question by organs of the state and to punish those organs of the state whose officials infringed the plaintiff's rights in a particularly egregious fashion.

"Punitive damages" or "exemplary damages" under South African law

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[162] It is unnecessary, for present purposes, to consider in general whether or what damages could be claimed for breach of a constitutional right which did not cause bodily injury or patrimonial loss to the plaintiff.

[62] The question whether, in addition to compensatory damages, "penal" or "punitive" or "exemplary" damages (expressions often used interchangeably and confusingly) are (or ought to be) awarded in delictual claims is a matter of some debate in South Africa.[163] It appears to be accepted that in the Aquilian action and in the action for pain and suffering an award of punitive damages has no place.[164] The Appellate Division has, however, recognised that in the case of defamation punitive damages may in appropriate cases be awarded.[165] In the case of damages for adultery it has been accepted that a penal component is still appropriate.[166] It must of course be borne in mind that it is not always easy to draw the line between an award of aggravated, but still basically compensatory damages, where the particular circumstances of or surrounding the infliction of the injuria have justified a substantial award and the award of punitive damages in the strict and narrow sense of the word. There appears to be scant authority for the award of punitive damages in the case of assault, over and above the damages awarded for patrimonial loss, pain and suffering and for the contumelia suffered, which can itself be aggravated by the circumstances of and surrounding the assault. We were referred in argument to certain passages in the Appellate Division

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163 See, for example, Visser and Potgieter *Law of Damages* (Juta, Cape Town 1993) at 417 and the authorities cited therein in footnotes 259-61.

164 Id at 156, 157 and *Dippenaar v Shield Insurance Co Ltd* 1979 (2) SA 904 (A) at 917A.

165 In the leading case of *Salzmann v Holmes* 1914 AD 471, 480, 483 the conclusion was reached after brief reference to the fact that in Roman-Dutch Law the sum awarded was originally in the form of a penalty and that ordinary verbal slander was not only a crime in Holland but also still in the Transvaal. In *South African Associated Newspapers Ltd and Another v Yutar* 1969 (2) SA 442 (A) at 458D-E the principle was accepted without further discussion or debate.

166 *Bruwer v Joubert* 1966 (3) SA 334 (A) at 338C-D, where reliance was placed on the following observation of Solomon CJ in *Viviers v Kilian* 1927 AD 449 at 457 – ". . . it is only right that profligate men should realise that they cannot commit adultery with married women with impunity."

judgments in *Whittaker v Roos*[167] and *Manamela v Minister of Justice and Others*[168] as authority for the proposition that in these cases recognition had been given to the principle of awarding punitive damages in delictual claims based on assault. I am by no means certain that, seen in their proper context, these passages support the submission advanced.[169] They appear to be explicable on the basis of aggravated (but still compensatory or at least non-punitive) damages. It is unnecessary, however, to pursue this aspect any further, for in both cases the remarks were made in passing and do not constitute considered judgments regarding punitive damages for assault. On the somewhat different, but in the present context related issue of nominal damages, the position appears to be that in the past number of decades they have very seldom if ever been awarded in delictual claims.[170]

[63] Serious judicial doubts have been expressed concerning, and considerable

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167 Supra n 13 at 118, 125.

168 Supra n 13 at 401G-H.

169 In the *Whittaker* case supra n 13 at 118 Lord De Villiers CJ remarked as follows:

> "In my opinion, abuse of authority, such as has been brought home to the defendants, ought not to be treated as a venial act to be condoned by the payment of a few pounds. By all means let the authorities use all their efforts to put criminals and suspected criminals under lock and key, but when once they have done this let them remember that punishment should only begin when the guilt of the prisoners has been established by judgment of a court of law."

In the immediately succeeding passages it is made clear that the damages to be awarded must be "commensurate with the degree of indignity, hardship and disgrace to which [the plaintiff] has been subjected". Innes JA's remarks at 125 go no further, in my view, than pointing out that the motive of the wrongdoer is relevant to the assessment of compensation. In *Manamela*'s case supra n 13 Schreiner JA did no more than refer in passing to the above remarks of De Villiers CJ and to a passage in the judgment of Innes JA to emphasise the gravity of the invasion of the plaintiff's rights. In assessing the plaintiff's damages Schreiner JA refers only to the actual injuries suffered by him.

170 See Visser and Potgieter supra n 163 at 157-9 and the authorities cited therein in footnotes 114-6.

academic criticism levelled against, the award of punitive damages in delictual claims.[171] Prof Van der Walt, whose views are broadly representative of academic criticism generally, expresses his misgivings succinctly as follows:

[171] In *Innes v Visser* 1936 WLD 44 at 45 Greenberg J referred to the punitive element in damages as an "incongruity [which] is no doubt a relic of the law as it existed when the clear distinction of modern law, at any rate in England and South Africa, between civil and criminal relief was not known." For comments in similar vein see *Lynch v Agnew* 1929 TPD 974 at 978 and *Esselen v Argus Printing and Publishing Co Ltd and Others* 1992 (3) SA 764 (T) at 771H-I. For the main academic criticism reference can be made to McKerron *The Law of Delict* 7ed (Juta, Cape Town 1971) 207 (n 89); Neethling *Persoonlikheidsreg* (Butterworths, Durban 1991) at 60, 61 (n 167), 168 (n 355); Van der Walt *Delict: Principles and Cases* (Butterworths, Durban 1979) at 5-7; Burchell *The Law of Defamation in South Africa* (Juta, Cape Town 1985) 290-4, and *Principles of Delict* (Juta, Cape Town 1993) at 187.

"The historical anomaly of awarding additional sentimental damages as a penalty for outrageous conduct on the part of the defendant is not justifiable in a modern system of law. The basic purpose of a civil action in delict is to compensate the victim for the actual harm done. In the case of impairment of personality by wrongful conduct it may be difficult to determine the amount of the solatium which will confer personal satisfaction or compensation for the injury, but in principle all factors and circumstances tending to introduce penal features should be rigorously excluded from such an assessment. The aim of discouraging evil and high-handed conduct is foreign to the basic purposes of the law of delict. It is for criminal law to punish and thereby discourage such conduct. The policy of awarding punitive damages unduly enriches the plaintiff who is entitled only to compensation for loss suffered. This policy has the added disadvantage of putting a wrongdoer in jeopardy of being punished twice - in the civil proceedings and in the criminal proceedings which could conceivably follow or which have preceded the civil action."[172]

[172] Van Der Walt id at 6.

[64] The United States judgments do not present a uniform or cohesive picture. As far as the section 1983 remedy is concerned the States themselves are not automatically liable. Whereas punitive damages are, in appropriate circumstances, awarded against officials in their personal capacities in section 1983 actions such damages are not available against municipalities because it is considered unfair in the result to burden taxpayers, who took no part in the commission of the tort, with the obligation of providing a windfall to a fully compensated plaintiff and because it is questionable whether such an award against municipalities would have any deterrent effect at all.[173] Although nominal damages are awarded, none are awarded for the abstract value of the right infringed or, which probably amounts to the same thing, for the vindication of such right.[174] In Trinidad and Tobago, New Zealand, Ireland, India and Sri Lanka, awards of damages are made which can only properly be categorised as constitutional damages. In Canada various appellate courts have accepted that constitutional damages, including punitive damages, constitute an "appropriate or just" remedy for purposes of section 24(1) of the Canadian Charter. German law rejects the notion of punitive damages.

[65] But even the most ardent supporters of a "public law" or constitutional remedy draw attention to anomalous and unsatisfactory features of a constitutional damages remedy aimed at punishment or deterrence or to such part of a constitutional damages remedy which has this object:

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[173] See, in particular the judgment of Blackmun J in *Newport v Facts Concerts Inc* supra n 41.

[174] Supra at paras 29-31.

(a) It has been suggested that to give punitive damages the primary focus runs counter to the Anglo-Canadian tradition "which favours carefully calculated compensatory damages".[175]

[175] Cooper-Stephenson supra n 26 at 61; see also Pilkington supra n 26 at 574.

(b) "[A]n expanded notion of types of loss, of the legitimacy of claims for non-material loss, and of the availability of aggravated damages will serve some of the objectives of punitive damages just as well; and that, in contrast to the focus of punitive damages on future potential defendants by way of deterrence, compensatory damages focus on the plaintiff as an individual - which is correct in the context of the Charter since individual interests are very much in the spotlight."[176]

(c) "[T]he deterrent effect of any damage award is difficult to assess, empirical evidence of deterrent impact being conspicuous by its absence."[177]

(d) While punitive awards may lead to systemic change, the process might well be a slow one requiring a substantial number of such awards before change is induced which a government is reluctant to institute of its own accord; equitable relief on the other hand could achieve such change far more speedily and cheaply.[178]

(e) "[A] focus on deterrence is a focus on the future behaviour of potential defendants, only

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176 Cooper-Stephenson Id.

177 Cooper-Stephenson "Tort Theory for the Charter Damages Remedy" (1988) 52(1) *Saskatchewan Law Review* 2 (hereinafter "Tort Theory") at 82. See also Pilkington supra n 26 at 539 where the learned author concedes that equitable remedies which direct future conduct might be "more effective than damage awards to deter constitutional infringements, particularly when they arise from 'systemic problems' within government institutions".

178 Whitman supra n 26 at 50.

distantly and indirectly beneficial to potential individual claimants. It would be unfortunate if the damages remedy . . . oriented as it surely should be towards individual redress, was manipulated by instrumentalists in the pursuit of lofty but relatively uncertain long-term public ends - to the ultimate detriment of litigants simply seeking compensation for the consequences of a constitutional wrong."[179]

[179] Cooper-Stephenson "Tort Theory" supra n 177 at 85.

(f) It provides an unjustifiable windfall for the plaintiff.[180]

(g) "Equity deters specifically - through a clear message . . . [W]hen funds are limited, it may make more sense to require that any available money be used directly to improve the conditions that caused the problems and promise to give rise to future wrongs, rather than to repay a particular victim who has had the resources and staying power to bring and win a lawsuit."[181]

(h) The deterrent justification for awarding damages for breach of rights per se falls short in those cases in which the breach does not realistically lend itself to the pursuit of deterrent policies.[182]

(i) "A substantial award, as opposed to a nominal one, is not demonstrably required to mark the inherent worth of rights, especially when alternative non-pecuniary forms of redress may convey effectively the symbolic importance of constitutional guarantees."[183]

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180 Otis *Constitutional Liability for the Infringement of Rights per se: A Misguided Theory* (1992) 26 *UBC* 21, 31; Pilkington supra n 26 at 574.

181 Whitman supra n 26 at 50.

182 Otis supra n 180 at 33.

183 Id at 39.

(j) Awards of punitive damages would be inappropriate in class actions where it would be virtually impossible to assess the damage suffered by each claimant.[184]

[184] Pilkington supra n 26 at 540.

(k) Punitive damages exact punishment without the protection which the criminal law affords and can lead to multiple sanctioning.[185]

(l) Where punitive damages are awarded against the government it is almost inevitable that the costs involved will be shifted to the public at large.[186]

The damages claimed by the plaintiff

[66] In the present case the court is confronted with the narrow issue of whether, in addition to the damages which plaintiff has pleaded in claims "B1" and "B2", he is entitled to any further constitutional damages which, on the plaintiff's argument, would include an amount for the vindication of the infringed rights in question and for punitive damages.

Damages for the Vindication of the Plaintiff's Rights

[67] In the present case there can, in my view, be no place for further constitutional

185 Id at 574. It is worth drawing attention to the trenchant criticism of exemplary damages on this very ground by Lord Devlin in *Rookes v Barnard* supra n 89 and by Lord Reid in *Broome v Cassel & Co* supra n 100 quoted in paras 42 and 44 supra respectively.

186 Id at 574.

damages in order to vindicate the rights in question. Should the plaintiff succeed in proving the allegations pleaded he will no doubt, in addition to a judgment finding that he was indeed assaulted by members of the police force in the manner alleged, be awarded substantial damages. This, in itself, will be a powerful vindication of the constitutional rights in question requiring no further vindication by way of an additional award of constitutional damages.

[68] I have considerable doubts whether, even in the case of the infringement of a right which does not cause damage to the plaintiff, an award of constitutional damages in order to vindicate the right would be appropriate for purposes of section 7(4). The sub-section provides that a declaration of rights is included in the concept of appropriate relief and the Court may well conclude that a declaratory order combined with a suitable order as to costs would be a sufficiently appropriate remedy to vindicate a plaintiff's right even in the absence of an award of damages. It is unnecessary, however, to decide this issue in the present case.

Punitive Damages

[69] This brings me to the final and most debated question, namely, whether in the present case any additional amount of punitive constitutional damages can be awarded to the plaintiff over and above the amounts he would be entitled to recover for patrimonial loss, pain and suffering, loss of amenities, contumelia and other general damages. Given the historical context in which the interim Constitution was adopted and the extensive violation of fundamental rights which had preceded it, I have no doubt

that this Court has a particular duty to ensure that, within the bounds of the Constitution, effective relief be granted for the infringement of any of the rights entrenched in it. In our context an appropriate remedy must mean an effective remedy, for without effective remedies for breach, the values underlying and the rights entrenched in the Constitution cannot properly be upheld or enhanced. Particularly in a country where so few have the means to enforce their rights through the courts, it is essential that on those occasions when the legal process does establish that an infringement of an entrenched right has occurred, it be effectively vindicated. The courts have a particular responsibility in this regard and are obliged to "forge new tools" and shape innovative remedies, if needs be, to achieve this goal.[187]

[70] All this notwithstanding, I have come to the conclusion that we ought not, in the present case, to hold that there is any place for punitive constitutional damages. I can see no reason at all for perpetuating an historical anomaly which fails to observe the

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[187] See the observations of Verma J in the *Nilabati Behera* case supra n 123 as quoted in para 51 supra and the remarks of Harlan J in the *Bivens* case supra n 25 at 407 quoted in paras 33, 34 and n 67 supra. In *Nelles v Ontario* 60 DLR (4th) 609 (SC)(1989) at 641-2 Lamer J observed as follows:

> "When a person can demonstrate that one of his Charter rights has been infringed, access to a court of competent jurisdiction to seek a remedy is essential for the vindication of a constitutional wrong. To create a right without a remedy is antithetical to one of the purposes of the Charter which surely is to allow courts to fashion remedies when constitutional infringements occur."

distinctive functions of the civil and the criminal law and which sanctions the imposition of a penalty without any of the safeguards afforded in a criminal prosecution. I can do no better than repeat and adopt the following telling condemnation of Lord Devlin –

> "I do not care for the idea that in matters criminal an aggrieved party should be given an option to inflict for his own benefit punishment by a method which denies to the offender the protection of the criminal law."[188]

and the incisive comments of Lord Reid –

> "To allow pure punishment in this way contravenes almost every principle which has been evolved for the protection of offenders. There is no definition of the offence . . . [t]here is no limit to the punishment except that it must not be unreasonable . . . [a]re we wasting sympathy on vicious criminals when we insist on proper legal safeguards for them?"[189]

In my view it becomes even more unacceptable in a country which has become a constitutional state, which has enacted an interim Constitution which is the supreme law of the land and in which extensive criminal procedural rights are entrenched.

[71] I agree with the criticisms of punitive constitutional damages referred to in para 65 above. Nothing has been produced or referred to which leads me to conclude that the idea that punitive damages against the government will serve as a significant deterrent against individual or systemic repetition of the infringement in question is

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188 *Rookes v Barnard* supra n 89 at 1230.

189 *Broome v Cassel & Co* supra n 100 at 1087.

anything but an illusion. Nothing in our own recent history, where substantial awards for death and brutality in detention were awarded or agreed to, suggests that this had any preventative effect. To make nominal punitive awards will, if anything, trivialise the right involved.

For awards to have any conceivable deterrent effect against the government they will have to be very substantial and the more substantial they are the greater the anomaly that a single plaintiff receives a windfall of such magnitude. And if more than one person has been assaulted in a particular police station, or if there has been a pattern of assaults, it is difficult to see on what principle, which did not offend against equality, any similarly placed victim could be denied comparable punitive damages. This would be the case even if, at the time the award is made, the individuals responsible for the assaults had been dismissed from the police force or other effective remedial steps taken.

[72] In a country where there is a great demand generally on scarce resources, where the government has various constitutionally prescribed commitments which have substantial economic implications and where there are "multifarious demands on the public purse and the machinery of government that flow from the urgent need for economic and social reform",[190] it seems to me to be inappropriate to use these scarce resources to pay punitive constitutional damages to plaintiffs who are already fully compensated for the injuries done to them with no real assurance that such payment will have any deterrent or preventative effect. It would seem that funds of this nature

[190] Per Didcott J in *S v Vermaas; S v Du Plessis* 1995 (7) BCLR 851(CC); 1995 (3) SA 292 (CC) at para 16.

could be better employed in structural and systemic ways to eliminate or substantially reduce the causes of infringement.

[73] In the present case it must, for purposes of the exception, be assumed that the averments in the plaintiff's particulars of claim are correct. It must therefore also be assumed that plaintiff will in any event be awarded substantial damages for the same serious assaults which found claim "C". Under all these circumstances, and having regard to the problems inherent in punitive constitutional damages mentioned above, I am of the view that the plaintiff is not entitled to any punitive constitutional damages.

[74] The decision in this case must perforce be a narrow one because the issue before the Court is very limited. Accordingly, the question of damages in relation to the breach of other Chapter 3 rights; the creative fashioning of constitutional remedies which do not sound in money and other matters concerned with substantive and procedural aspects of the "appropriate" relief provided by section 7(4)(a) cannot and ought not to be decided now. They, and similar issues under the 1996 Constitution, will be dealt with as they arise on a case by case basis and in this way a more complete jurisprudence concerning constitutional remedies will gradually develop.

Conclusion

[75] It follows from all the above conclusions that the averments pleaded in plaintiff's claim "C" do not disclose a cause of action for any further constitutional damages over and above the relief claimed in claims "B1" and "B2". It follows that the exception was

rightly upheld by Van Schalkwyk J and that the application for leave to appeal against such dismissal must be dismissed. The defendant did not seek an order for costs against the plaintiff in this Court.

Order

[76] The application for leave to appeal is dismissed.

Chaskalson P, Mahomed DP, Langa J, Madala J, Mokgoro J, and Sachs J concur in the judgment of Ackermann J.

DIDCOTT J:

[77] The question formally posed by the exception to the particulars of claim which the defendant took in this case was whether constitutional damages, as the pleaders on both sides called them,[1] were claimable under section 7(4)(a) of the interim Constitution (Act 200 of 1993) for the invasion of a right protected by its chapter 3.[2] The answer to so general and broadly formulated a question will not necessarily resolve, however, the dispute which has arisen over the conceptual soundness of the claim that the exception

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1 A better description, I suggest, would have been damages for the infringement of a constitutional right.

2 I speak of the interim Constitution in the past tense because it has now been repealed and replaced by the final one (Act 108 of 1996). It continues to govern the present proceedings, however, since those were pending when that happened.

attacked. I say so because an affirmative answer would not in itself clear the way for the claim. Another issue would then remain, the narrower and more specific issue whether damages of the particular kind claimed now, which are quite foreign to our jurisprudence, were nevertheless obtainable on the strength of the subsection.

[78] In considering that second question, the only one with which we need to deal on the view I take of it, I shall assume for its purposes that section 7(4)(a) did authorise awards of conventional damages for violations of constitutionally protected rights where neither our common nor ordinary statutory law catered for such awards or offered any other satisfactory remedy, usually because the rights were not even legal ones at that time. I shall also assume that the "appropriate relief" envisaged by the subsection was not limited to remedies of the various natures and types available at common law, but covered in addition fresh remedies neither used nor even recognised yet which the Courts could fashion in suitable circumstances to cope with the exigencies and to meet the special demands of constitutional litigation.

[79] The claim assailed at present must be characterised and treated, in my opinion, as one for punitive or exemplary damages in the sense of those sought not to compensate the plaintiff for any loss or other harm suffered by him or her, but solely to punish or make an example of the wrongdoer for extremely egregious misbehaviour on his or her part. That we are concerned with such a claim alone is, to my mind, clear. The amount claimed under the heading which is now in dispute was said by the plaintiff in his particulars of claim to include "an element of punitive damages". But that was an

understatement and a gross one. For no further purpose which any award of damages might serve was mentioned under the same heading, and the claims lodged elsewhere had already exhausted every other purpose for which damages could conceivably have been awarded. So it is hard either to see or even to imagine what besides punitive or exemplary damages the disputed claim could possibly have encompassed. In substance it was a claim for punitive or exemplary damages and nothing else. Indeed, I understood that to have become common cause by the end of the argument here.

[80] Past awards of general damages in cases of defamation, *injuria* and the like coming before our Courts have sometimes taken into account a strong disapproval of the defendant's conduct which was judicially felt. That has always been done, however, on the footing that such behaviour was considered to have aggravated the actionable harm suffered, and consequently to have increased the compensation payable for it. Claims for damages not purporting to provide a cent of compensation, but with the different object of producing some punitive or exemplary result, have never on the other hand been authoritatively recognised in modern South African law. Whether they now should be, at least when constitutionally protected rights have been outrageously violated, is therefore the enquiry on which we have to embark.

[81] In doing so we must suppose that every allegation of fact contained in the particulars of claim is true and will be substantiated in due course. That is the right approach to our consideration of the exception because, like all others, it attacked the pleading at which it was aimed on the hypothesis of the version presented there. One

such allegation is especially pertinent to the disputed claim. According to that, the torture of which the plaintiff complained was no isolated incident affecting him alone, but a "widespread and persistent" feature of the treatment administered by policemen to suspects. His counsel contended that an award of punitive or exemplary damages was warranted in those circumstances. For, as well as teaching the policemen concerned a lesson by the condemnation of their conduct which explained the award, its first effect would be to vindicate and emphasise the force of the constitutional right enjoyed by all to immunity from torture[3] and its second to deter others in general from future resorts to similar violence.

[3] See section 11(2) of the interim Constitution and section 12(1)(d) of the final one.

[82] Deterrence speaks for itself as an object. But the idea of vindication, used in the sense that it conveys at present, calls for some elaboration. One of the ordinary meanings which "to vindicate" bears, the aptest now so it seems to me, is "to defend against encroachment or interference".[4] Society has an interest in the defence that is required here. Violations of constitutionally protected rights harm not only their particular victims, but it as a whole too. That is so because, unless they are adequately remedied, they will impair public confidence and diminish public faith in the efficacy of the protection, and for a good reason too since one invasion discounted may well lead to another. The importance of the two goals is obvious and does not need to be laboured. How they are best attained is the question.

[83] In some measure at least both effects could be achieved, in the event of the plaintiff's victory, by a heavy award of general damages under the heading of the conventional claims that are not in issue at present, an award which took into account the gravity of the matter in the assessment of the compensation payable to him for the *contumelia* suffered. Such an award would vindicate the right invoked clearly and firmly enough. It might also tend to daunt policemen who were not involved in the case from emulating the misbehaviour of the guilty ones.

[84] I can see no reason to believe that an award of punitive or exemplary damages would serve either purpose more effectively. Their payment would come from the public purse and go to the plaintiff alone. Few potential torturers would be scared greatly by

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4 *Oxford English Dictionary* (2nd ed), vol XIX at 642.

such a sequel, one not affecting their own pockets. Nor could it strengthen the cause of vindication for an individual claimant, or even a series of them, to be enriched at the expense of the taxpayer. In short, I agree with the criticisms which Ackermann J has levelled at those damages.[5] They simply do not rank as the "appropriate relief" which section 7(4)(a) allowed.

[85] Then there is an overriding consideration. We would be most unwise to introduce into our law so radical an innovation as awards of punitive or exemplary damages, even if we felt inclined to do that. Nothing less would appear to be necessary, were it wanted despite its cogent disparagement, than the enactment of a statutory provision specifically recognising the awards and thus bringing those within the ambit of "appropriate relief". The very notion of them is fraught with difficulties and poses problems of principle and policy which are fundamental, profound and controversial. The matter would clearly be one for prior and detailed investigation by the South African Law Commission and for consultation with all those experienced in the field. A judicial commission of enquiry might even be thought advisable. Without that sort of investigation and consultation we are not equipped to take such a bold and adventurous line.

[86] Once that is so it leaves no room for the possibility that some circumstances may

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[5] See paras 71 and 72 of his judgment in this matter.

arise, different from those of the present matter, where a judicial adoption of the innovation might be on the cards. Nor do I see, in any event, why that should be suggested. The sort of case postulated by the enquiry is *ex hypothesi* one so appalling that the wrongdoer deserves unusually strong censure, whatever his or her actual conduct may happen to have been. That factor is common, in other words, to all the litigation that we have in mind. The case which the plaintiff sought to make did not turn on anything distinguishing his matter from any other falling into the same category. His counsel contended, indeed was bound to contend throughout, that in principle the damages claimed were obtainable whenever the behaviour impugned had been sufficiently deplorable. Nor does the reasoning of either Ackermann J or myself depend in the least on any circumstance of the present case besides the common one which I have mentioned. The logic of that reasoning drives us inexorably, I believe, to the conclusion that in no matter at all did section 7(4)(a) authorise awards of punitive or exemplary damages.

[87] What I have just said about the substantial uniformity of the cases in which punitive or exemplary damages might be sought is subject, however, to an important qualification. There, indeed throughout the preceding parts of this judgment, my mind has been attuned to and I have focussed my attention on actions brought against the state, usually on account of its vicarious liability for the delictually culpable acts and omissions of its servants. In our historical experience, after all, those would have been the likeliest cases for the laying of such claims, had they been cognizable. In all probability they still are. But another possibility emerges, now that we have entered an

era when rights which formerly enjoyed no legal recognition are constitutionally protected ones and the protection operates horizontally. It is that institutions other than the state, large and wealthy industrial companies for instance, may well become more vulnerable to and more frequent targets of heavy delictual claims than they used to be.[6] In two respects such cases would differ significantly from those directed at the state, when it came to the factors militating against awards of punitive or exemplary damages. The first difference is that no award would be payable from the public coffers. The second is the appreciably enhanced plausibility and effectiveness of deterrence. The blame for the harm done would lie not with underlings for whose behaviour a vicarious responsibility arises, but with those at the very top who determine the policies and direct the activities of the companies, and thus with the companies themselves. And the latter would inevitably be more susceptible to deterrence than the former. To that extent, it follows, the argument in favour of punitive or exemplary damages would be stronger, were they not sought against the state. It is obviously unnecessary and would be most imprudent to express any view on the effect of those considerations, and I refrain from doing so. Indeed, I have nothing more to say about the possibility raised by me than this. My judgment is not intended to apply, as should be clear by now, to claims lodged against any defendant but the state. And, if awards of punitive or exemplary damages against others are thought appropriate at some future time, their introduction into our law must still, I maintain, be the product not of judicial innovation but of legislative action.

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[6] One thinks of the litigation resulting from the Bhopal disaster in India and the proliferation of suits launched in the United States against tobacco companies.

[88] I accordingly agree that the exception was rightly allowed, and concur in the grant of the order proposed by Ackermann J dismissing the application for leave to appeal.

KRIEGLER J:

~~[89]~~ This case raises an important question regarding remedies for infringement of rights protected by chapter three of the interim Constitution.[1] Although the final Constitution[2] has come into operation since the case was decided in the court below, the relevant provisions of the interim Constitution have been sufficiently closely echoed in the final Constitution to render the question of long-term importance. More specifically the question is whether it was competent in law to award the plaintiff damages, over and above the common law damages to which he may be entitled in delict, for egregious infringement of his constitutional rights and those of others. The plaintiff, having already claimed damages from the state for torture inflicted upon him by certain policemen, went on to ask for "constitutional damages", including "an element of punitive damages", because the torture had infringed various of his fundamental rights guaranteed by chapter three and formed part of "widespread and persistent [police] infringements" of the corresponding rights of others.

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1 The Constitution of the Republic of South Africa, Act 200 of 1993.

2 The Constitution of the Republic of South Africa, Act 108 of 1996.

~~[90]~~ My colleagues Ackermann and Didcott JJ conclude that such a claim is excipiable and propose dismissal of the application for leave to appeal against a corresponding finding in the court below. I agree with their conclusion and with the order they propose. My reasoning on this important issue differs somewhat from that of my colleagues, however. In my respectful view it is neither necessary nor prudent to range as wide as does Ackermann J in his judgment. I decline to engage in a debate about the merits or otherwise of remedies devised by jurisdictions whose common law relating to remedies for civil wrongs bears no resemblance to ours and whose constitutional provisions have but a passing similarity to our s 7(4)(a). Nor do I attempt to divine the distinction between private and public law remedies; and I eschew adopting any stance on the jurisprudential basis of the state's liability for damage wrongfully (or unconstitutionally) done by government officials, and the effect thereof, if any, on the doctrine of sovereign immunity, and vice versa. These are extremely difficult questions. They do not arise for determination here and are best left well alone.

~~[91]~~ On one point, I respectfully suggest, Ackermann J is uncharacteristically ambivalent. As I understand the reasoning in paragraphs 69 to 73 of his judgment, my learned colleague in principle condemns punitive damages as a potential remedy for infringements of constitutional rights but at the same time seeks to found the current rejection on the particular facts of this case. For reasons that I hope to make plain shortly, I agree that we should unequivocally reject punitive damages as a remedy in this case. I do believe, however, that we should refrain from any broad rejection of any particular remedies in other circumstances.

~~[92]~~ On that same point my colleague Didcott J holds that punitive or exemplary damages are not claimable from the state, the defendant in the present case, for breaches of constitutional rights. He, however, leaves open the case of other infringers of such rights. Notwithstanding the circumscribed ambit of the rejection of punitive/exemplary damages, I believe that we need not and should not go as far as Didcott J in rejecting for all time the possibility that a case may arise where punitive or exemplary damages are "appropriate" redress for infringement of constitutionally protected rights.

[93] In the court below the respondent excepted to this claim on the dual basis that,

> "3.1 an action for damages in the nature of constitutional damages does not exist in law; and/or
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> 3.2 an order for payment of damages does not qualify as appropriate relief as contemplated in s 7(4)(a) of the interim Constitution."

Van Schalkwyk J upheld the exception as framed, holding in essence that the common law remedies in delict were adequate to meet the exigencies of such cases and that there was consequently no room for the special remedy sought to be invoked by the plaintiff. During the hearing of the case in this Court the respondent amended his notice of exception to read:

> "3.1 an action for damages in the nature of constitutional damages does not exist *on*

facts such as those in this case in law; and/or

3.2 an order for payment of *constitutional* damages does not qualify as appropriate relief as contemplated in s 7(4)(a) of the Constitution."

The amendment to paragraph 3.1 of the notice of exception substantially narrowed the scope of the exception. My decision focuses on this paragraph alone. I understand its reference to "constitutional damages" to mean damages recoverable as "appropriate relief" under s 7(4)(a) of the interim Constitution. I also understand "damages" to mean punitive damages - which is what the plaintiff claimed in paragraph 17 of his pleadings.

[94] Although imperfectly drafted, the core meaning of s 7(4)(a) is clear: violations of chapter three rights must be remedied. The provision states in the context of chapter three that persons who have standing "shall be entitled to apply to a competent court of law for appropriate relief". The provision does not provide relief "where appropriate" but "appropriate relief" per se.[3] We did not need s 7(4)(a) to tell us that infringements of constitutional rights must be remedied. Section 4(1) makes unconstitutional conduct a nullity, even before courts have pronounced it so.[4] When courts give relief, they attempt to synchronise the real world with the ideal construct of a constitutional world created in the image of s 4(1). There is nothing surprising or unusual about this notion. It merely

[3] I would also suggest that the entitlement is not to apply for relief, which would render the provision redundant, but to the relief itself.

[4] It is interesting to note that in s 98(5) this Court *finds* that laws are inconsistent with the Constitution, but that in s 98(7) it *declares* that administrative or executive conduct is unconstitutional. I would suggest that, even in the latter case, it is not the declaration itself that renders the conduct unconstitutional. The declaration is merely descriptive of a pre-existing state of affairs. The philosophical underpinnings of this conviction are articulated by Ronald Dworkin in *Taking Rights Seriously* (Duckworth, London 1977) 338.

restates the familiar principle that rights and remedies are complementary. The relationship holds true and is uncontroversial at common law.[5] The Constitution is also a body of legal rules and we should expect to find in it the same pairing of rights and remedies. Indeed, how much more so in the case of an instrument that seeks to "to create a new order"[6] and provide a bridge

> "between the past of a deeply divided society characterised by strife, conflict, untold suffering and injustice, and a future founded on the recognition of human rights, democracy and peaceful co-existence and development opportunities for all South Africans, irrespective of colour, race, class, belief or sex."[7]

~~[95]~~ If constitutional rights have complementary remedies, the question is what these remedies should be. I would suggest that the nature of a remedy is determined by its

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5 The concept is articulated by Centlivres CJ in *Minister of the Interior and Another v Harris and Others* 1952 (4) SA 769 (A) at 780H-781B and subsequently followed in a legion of cases.

6 See the Preamble which states in part that,

> ". . . there is a need to create a new order in which all South Africans will be entitled to a common South African citizenship in a sovereign and democratic constitutional state in which there is equality between men and women and people of all races *so that all citizens shall be able to enjoy and exercise their fundamental rights and freedoms* . . ." (emphasis added).

7 Postamble.

object. I agree with the contention advanced on behalf of the appellant that the object of remedies under s 7(4)(a) differs from the object of a common law remedy. This appears from the liberal standing provisions of s 7(4)(b) and the useful discussion of them by O'Regan J in *Ferreira v Levin.*[8] Explaining why an expanded approach to standing is appropriate, she contrasts what she terms public and private litigation:

[8] *Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others* 1996 (1) SA 984 (CC); 1996 (1) BCLR 1 (CC).

> "[a]s a general rule, private litigation is concerned with the determination of a dispute between two individuals, in which relief will be specific and, often, retrospective, in that it applies to a set of past events. Such litigation will generally not directly affect people who are not parties to the litigation. In such cases, the plaintiff is both the victim of the harm and the beneficiary of the relief. In litigation of a public character, however, that *nexus* is rarely so intimate. The relief sought is generally forward-looking and general in its application, so that it may directly affect a wide range of people. In addition, the harm alleged may often be quite diffuse or amorphous."[9]

I would add that the harm caused by violating the Constitution is a harm to the society as a whole, even where the direct implications of the violation are highly parochial. The rights violator not only harms a particular person, but impedes the fuller realisation of our constitutional promise.

[9] Id para 229.

[96] Our object in remedying these kinds of harms should, at least, be to vindicate the Constitution, and to deter its further infringement.[10] Deterrence speaks for itself as an object, but vindication needs elaboration. Its meaning, strictly defined, is to "defend against encroachment or interference".[11] It suggests that certain harms, if not addressed, diminish our faith in the Constitution. It recognises that a Constitution has as little or as much weight as the prevailing political culture affords it. The defence of the Constitution - its vindication - is a burden imposed not exclusively,[12] but primarily on the judiciary.[13] In exercising our discretion to choose between appropriate forms of relief, we must carefully analyse the nature of a constitutional infringement, and strike effectively at its source.

~~[97]~~ Once the object of the relief in s 7(4)(a) has been determined, the meaning of "appropriate relief" follows as a matter of course. When something is appropriate it is "specially fitted or suitable".[14] Suitability, in this context, is measured by the extent to which a particular form of relief vindicates the Constitution and acts as a deterrent

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10 It is possible that remedies under s 7(4)(a) may have other objects as well. The oft-cited article by M Pilkington "Damages as a Remedy for Infringements of the Canadian Charter of Rights and Freedoms" (1984) 62 *Canadian Bar Review* 517, 535 suggests compensation "where appropriate" and punishment "in egregious cases". For the purposes of this judgment - and given that s 7(4)(a) has been invoked to claim non-compensatory relief - I am content to focus on vindication and deterrence alone.

11 See "vindicate" in the *Shorter Oxford English Dictionary*, vol 2 N-Z (Oxford University Press, Oxford 1993).

12 Section 81(1) requires the President as head of state to "defend and uphold the Constitution".

13 Section 98(2) gives this Court the responsibility to interpret, protect and enforce the Constitution, and s 98(4) makes its decisions binding on all other organs of state. See also the powerful concurrence of Harlan J in *Bivens v Six Unknown Named Agents of Federal Bureau of Narcotics* 403 US 388, 407 (1971).

14 See 'appropriate' in *The Oxford English Dictionary* Second Edition vol 1 A-Bazouki (Oxford University Press, Oxford 1989).

against further violations of rights enshrined in chapter three. In pursuing this enquiry one should consider the nature of the infringement and the probable impact of a particular remedy. One cannot be more specific. The facts surrounding a violation of rights will determine what form of relief is appropriate.

[98] I have argued that "appropriate relief" vindicates the Constitution and deters further violations of it. I see no reason in principle why common law and statutory remedies can never be suitable for this purpose. The appellant has not persuaded me to the contrary. Of course, there will be instances where these remedies are ill-suited. For example, a common law remedy is unlikely to address a diffuse and systematic pattern of rights violations.[15] Nevertheless, common law remedies - particularly delictual remedies - have been designed to protect personality interests such as dignity which are central to chapter three.[16] In cases where the harm arising from a rights violation is highly localised, a common law remedy may well be appropriate, that is, it may effectively vindicate the Constitution and deter further violations of it. This is not to speak of the wide range of common law administrative remedies which are readily

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[15] See Sunstein *The Partial Constitution* (Harvard University Press, Cambridge, Massachusetts 1993) 319-46.

[16] See Burchell, "Beyond the Glass Bead Game: Human Dignity in the Law of Delict" (1988) 4 *SA Journal on Human Rights* 1, describing the salutary development of the *actio injuriarum* during the state of emergency.

harnessed to our constitutional needs.

[99] There are powerful reasons for not excluding common law and statutory relief from the ambit of s 7(4)(a). Many recent statutes such as the Labour Relations Act[17] seek to codify constitutional rights, and are expressly designed to provide suitable relief for the infringement of constitutional rights. It would undermine the best efforts of the legislature to exclude these remedies from a court's arsenal of remedial options. In the case of the final Constitution, the indications are more compelling, and I would have thought conclusive, that the drafters had no intention of excluding common law and statutory remedies from the remedial scheme.[18]

[100] A court has a wide range of remedies in exercising its s 7(4)(a) powers. These remedies include common law relief (developed if necessary by s 35(3)), statutory relief, declaratory relief (expressly mentioned in s 7(4)(a)) and a number of potential remedies under ss 98 and 101(4). There is no reason, at the outset, to imagine that any remedy

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[17] Act No 66 of 1995.

[18] In our interpretation of s 32(2) of the final Constitution in *Ex Parte Chairperson of the Constitutional Assembly: In Re Certification of the Constitution of the Republic of South Africa, 1996* 1996 (4) SA 744 (CC); 1996 (10) BCLR 1253 (CC) **at para 83, we explained that s 32(2) is intended to form the impetus for legislation within a three year period. We said that**

> **"[t]he transitional measure is obviously a means of affording Parliament time to provide the necessary legislative framework for the implementation of the right to information. Freedom of information legislation usually involves detailed and complex provisions defining the nature and limits of the right *and the requisite conditions for its enforcement*" (emphasis added; footnote omitted).**

It is clear from provisions such as s 32(2) and others such as s 33(3), that the drafters of the final Constitution contemplated that statutory remedies would give effect to constitutional rights. There is no reason to believe that this perspective marks a departure from the view taken of rights enforcement under the interim Constitution.

is excluded. Provided the remedy serves to vindicate the Constitution and deter its further infringement, it may be "appropriate relief" under s 7(4)(a).[19]

[101] I turn now to the question whether a remedy of punitive damages is "appropriate relief" in this case. The test I apply is whether granting punitive damages to the appellant will serve to vindicate the Constitution and deter its further violation. The facts, assumed for the purposes of the exception are those relied upon in claim "C" of the plaintiff's pleadings. These include the conduct referred to in paragraphs 9 and ll of the pleadings which contain a litany of brutal torture. Then follows the averment in paragraph 16 which is crucial to this case. That paragraph contends that:

> "[t]he aforesaid infringement of the Plaintiff's fundamental rights forms part of widespread and persistent similar infringements of the fundamental rights of other South African citizens by members of the South African Police Services, in particular in Vanderbijlpark."

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[19] Notice that while applicants are entitled to relief if their fundamental rights have been violated, they have no right to a particular remedy. The language of the Constitution in relation to particular remedies is permissive. For example, s 7(4)(a) states that the court "may" issue declarations, and s 98(7) provides, in the context of administrative violations of the Constitution, that the court "may" grant what amounts to a mandamus.

This is a key additional fact which Van Schalkwyk J appears to have overlooked in his conclusion that '[t]here is . . . no scope for a separate action, *based upon the same facts*, for a claim for constitutional damages".[20] In the absence of this averment, I might have been inclined to conclude, with Van Schalkwyk J, that delictual remedies (supplemented where necessary by s 35(3)) would have constituted "appropriate relief" under s 7(4)(a). In other words, an isolated act of torture which does not point to a pattern of more widespread harms, might require only the application of standard (or modified) delictual remedies in order to meet the demands of s 7(4)(a).

~~[102]~~ The allegation in paragraph 16 of the pleadings places an entirely different complexion on the matter. Where there are systematic, pervasive and enduring infringements of constitutional rights, delictual relief compensating a particular plaintiff does not seem adequate as a means of vindicating the Constitution and deterring further violations of it.

[103] I am not able to accept, however, that punitive damages are any better for this purpose. The problem here is a profound and a disturbing one. According to paragraph 16 torture is a widespread and persistent phenomenon at South African police stations. I cannot see that this form of harm is adequately repaired by the award of punitive damages to the appellant. The relief in this case would come from the public coffers

[20] See *Fose v Minister of Safety and Security* 1996 (2) BCLR 232 (W) at 246C. Emphasis added.

and be directed towards the appellant. The policemen implicated in the appellant's claim could not possibly be deterred by a payment of damages bearing no relation to their own finances. Nor do we vindicate the Constitution by enriching a particular claimant at the cost of the taxpayer - particularly when the problem is far larger than the claimant concerned. In other words, we do not adequately defend the Constitution by merely granting punitive damages in this case, or even in several cases. In this conclusion I am in agreement with some of the criticisms of punitive damages set out by Ackermann J in paragraph 65 of his judgment, in particular the objections in sub-paragraphs (d), (f), (g) and (l). I should stress that punitive damages is not "appropriate relief" on these facts because it is inefficacious for dealing with the kind of problem that the appellant posits. I am not saying, nor need I decide, that punitive damages can never be "appropriate relief" under s 7(4)(a). That is not an issue presently before the Court.

~~[104]~~ Having explained my narrow reasons for concurring in the order proposed by Ackermann J, I also wish to pinpoint the other respects in which, I believe, we are in agreement. The following links in my line of reasoning are, as I understand my learned colleague, common cause between us:

i. Section 7(4)(a) confirms that chapter three rights have complementary remedies;

ii. the object of these remedies includes vindicating the Constitution and deterring its further violation;

iii. an effective means of achieving this dual object will constitute "appropriate relief" under s 7(4)(a);

iv. in principle a common law remedy can constitute "appropriate relief" under s 7(4)(a);

v. but the range of remedies from which such "appropriate relief" is to be selected is not restricted to existing common law remedies;

vi. the facts in this case - especially the fact that the infringements of chapter three rights are pervasive and systematic - render punitive damages inappropriate for the purpose of vindicating the Constitution and deterring its further violation.

[105] For the reasons given I concur in the order that leave to appeal be refused.

O'REGAN J:

[106] I concur fully in the order proposed by Ackermann J and I concur in his judgment with one reservation. For the reasons given in paragraph 58 of his judgment, it is my view that the appellant's reliance on foreign jurisprudence is of little value in interpreting the provisions of our Constitution. Accordingly I wish to express no view upon the law applicable in the jurisdictions discussed by Ackermann J at paragraphs 25 to 57 of his judgment.

For the applicant:	DI Berger, BE Leech and DB Spitz instructed by the Campus Law Clinic of the University of the Witwatersrand
For the respondents:	JR Gautschi SC, PF Rossouw and J Kentridge instructed by the State Attorney, Johannesburg
For the amicus curiae - JHA Munnik:	JHA Munnik in person
For the amicus curiae - The Human Rights Commission:	DC Mpofu instructed by Mashile - Nthloro