

THE RIGHTS OF THE STATE, AND THE STATE OF RIGHTS IN STATE INFORMATION TECHNOLOGY AGENCY SOC LIMITED V GIJIMA HOLDINGS (PTY) LIMITED

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‘I can't explain myself, I'm afraid, Sir, because I'm not myself you see.’

Lewis Carroll, *Alice in Wonderland*

Are organs of state entitled to the rights in the Bill of Rights? This question sits at the heart of the Constitutional Court's judgment in *State Information Technology Agency Soc Limited v Gijima Holdings (Pty) Limited*.¹ Madlanga J and Pretorius J find for a unanimous Court that because they are not protected by fundamental rights, organs of state cannot review their own administrative decisions by relying on the right to just administrative action, nor the Promotion of Administrative Justice Act (PAJA).² Instead, they ought to pursue review under the rule of law.³ Administrative decision-makers may – and in some cases must⁴ – review their own administrative decisions where wrongly made, but only as breaches of the Constitution's expectation that all exercises of public power be lawful.⁵

The Court's finding has garnered criticism because it narrows the domain of rights, while simultaneously expanding the ambit of rule of law review. It is by now customary around law-school water-coolers to remonstrate over the proliferation of the principle of legality, and for good reason: the precise and detailed provisions of PAJA provide a consistency and nuance that rule of law review seldom exhibits.⁶ Similarly, some ten years ago in *The Amazing, Vanishing Bill of Rights*, Stu Woolman warned that the sort of rights-avoidance strategy epitomised by *Gijima*, ‘grants the court the licence to decide each case as it pleases, unmoored from its own precedent’.⁷ The increasingly creative strategies for ‘disappearing’ doctrinal law in favour of discretionary legal principles suggests that the reasons behind the Court's evasions are in need of address.

¹ *State Information Technology Agency v Gijima Holdings* 2018 (2) BCLR 240 (CC); 2018 (2) SA 23 (CC).

² Ibid at paras 18 and 37.

³ See further *Albutt v Centre for the Study of Violence and Reconciliation* 2010 (3) SA 293 (CC); 2010 (5) BCLR 391 (CC) at para 49; *Affordable Medicines Trust v Minister of Health* 2006 (3) SA 247 (CC); 2005 (6) BCLR 529 (CC) at para 49.

⁴ *Merafong City Local Municipality v AngloGold Ashanti Limited* 2017 (2) BCLR 182 (CC); 2017 (2) SA 211 (CC) at para 58; *Khumalo v Member of the Executive Council for Education: KwaZulu Natal* 2014 (5) SA 579 (CC); 2014 (3) BCLR 333 (CC) at para 45.

⁵ Ibid at n 1 above para 38.

⁶ In the context of *Gijima*, see Cora Hoexter ‘South African Administrative Law at a Crossroads: The PAJA And the Principle of Legality’ *Administrative Law in the Common Law World* (2018) available at <https://adminlawblog.org/2017/04/28/cora-hoexter-south-african-administrative-law-at-a-crossroads-the-paja-and-the-principle-of-legality/> accessed 22 July 2018.

⁷ Stu Woolman ‘The Amazing, Vanishing Bill of Rights’ 124 *South African Law Journal* 762 (2007) at p. 784.

At the same time – and unlike in other ‘avoidance’ cases – Madlanga J and Pretorius J do directly confront the question of whether PAJA should be applied.⁸ While Melanie Klein might say this confrontation signals unconscious desire, the reasoning in *Gijima* remains only peripherally rooted in a preference for eschewing the Act.⁹ In fact, the Court is careful to narrow the ambit of its precedent to cases where an administrative decision-maker seeks review of its own decision; organs of state can still administratively review each other’s decisions, and even different decision-makers within the same organ may be entitled to rely on PAJA.

My contention in this paper is that the most overt problem with the judgment – and the most pressing cause for jurisprudential disquiet – is instead the Court’s distorted view of the *application* of the rights in the Bill of Rights. In short, *Gijima* both misconstrues rights as constitutively bound up with the relationship between private persons and the state, and misunderstands the ‘nature’ of the state for the purposes of section 8(4) of the Constitution.¹⁰ These descriptive inaccuracies then result in the Court barring organs of state from relying on the right to just administrative action, and associatively on PAJA.

This is an application rather than an interpretation problem because it speaks to who bears, and who is bound, by the Bill of Rights; rather than to how we determine the meaning of the rights themselves, or who has standing to enforce them. Addressing the version of rights application adopted in *Gijima* is important both because the Court’s picturing impacts administrative review, and because its conception of the state, and the state’s relationship with private persons, has serious implications for determining the ambit of other rights.

In Part I of this note I outline the Constitutional Court decisions that led up to *Gijima*, and in Part II the reasoning of the Court in this case. Part III argues that *Gijima*’s conclusion is grounded in ideas about the application of the Bill of Rights, rather than on an interpretation of section 33 or PAJA. Parts IV and V then considers Madlanga J and Pretorius J’s claims about the relationship between the state and private persons, and the nature of the state as a prospective rights-bearer.

I Legal Background

The judgment in *Gijima* ends a dispute that has simmered in South African law for some time. The Constitutional Court faced it for the first time, if obliquely, in *MEC for Health, Eastern Cape v Kirkland Investments*.¹¹ In that case the Superintendent-General for Health in the Eastern Cape (Mr Boya) was confronted by a decision, made in his absence, licensing the establishment of a private hospital. The decision was taken, apparently unlawfully, by an acting Superintendent-General who had been appointed while Mr Boya was on leave. The

⁸ Ibid at n 1 above para 30.

⁹ For Klein on desire, conflict and avoidance, see generally Melanie Klein *Love, Hate and Reparation* Hogarth Press, London (1967).

¹⁰ Section 8(4) of the Constitution of the Republic of South Africa, 1996 (Constitution) states that, “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.”

¹¹ *MEC for Health, Eastern Cape v Kirland Investments (Pty) Ltd* 2014 (3) SA 481 (CC); 2014 (5) BCLR 547 (CC) (Kirland).

Constitutional Court was asked to determine Mr Boya's responsibilities when faced with the alleged unlawful act on his return to work.

In deciding that Mr Boya had a duty to review the decision – as oppose to simply ignoring it – the majority of the Court relied on a close reading of several of PAJA's provisions.¹² It also grounded its reasoning in the constitutional obligation on the state to 'provide for review of administrative action'.¹³ This suggests that the court saw Mr Boya's review of the acting Superintendent-General decision as the vindication of the right to just administrative action through its statutory extension; PAJA.

In the subsequent case of *Khumalo and Another v Member of the Executive Council for Education: KwaZulu Natal (Khumalo)*, matters became more opaque.¹⁴ Mr Khumalo had been promoted to a post three levels above his extant paygrade in the Kwazulu-Natal Education Department, seemingly unlawfully. Following a protracted labour dispute brought by those overlooked for the position, the MEC for Education sought to review Mr Khumalo's promotion. The majority of the Constitutional Court found that the 'true nature' of the application was one of 'judicial review under the principle of legality'.¹⁵ By contrast, the minority decision of Zondo J found that 'the procedure for bringing [the] application to Court was governed by the PAJA'.¹⁶ The majority itself moreover finds that should the granting of the promotion have been administrative action – as appose to an act in the dominion of a labour relationship – then the MEC would have had to bring the review through PAJA.¹⁷ While steeped in ambiguity, both the majority and the minority decision therefore seem to imply that organs of state are, in general, permitted to rely on the right to just administrative action.

The opacity inherent to *Khumalo* became both more obvious and more acute in three subsequent cases, decided within a year of each other. The first of these, *Merafong City Local Municipality v AngloGold Ashanti Limited (Merafong)*, involved a decision of the Minister of Water Affairs and Forestry to overturn a previous decision made by the Merafong Municipality placing a surcharge on the price AngloGold paid for water in the District.¹⁸ Deciding that the Municipality was obliged to obey the Ministers decision – lawful or otherwise – the majority of the Court reasoned that PAJA contained provisions that required the Municipality to institute review even if the administrative decision was patently unlawful. Like in *Kirland*, this line of argument suggests that a state entity – exemplified here by the Municipality – should bring a review in terms of PAJA when faced with an unlawful decision by an organ of state.

The majority made clear, however, that it was not deciding the question of whether PAJA or 'legality' was the appropriate avenue of review. When considering Merafong's tardiness in

¹² Ibid at para 82.

¹³ Ibid.

¹⁴ *Khumalo and Another v Member of the Executive Council for Education: KwaZulu Natal* 2014 (3) BCLR 333 (CC); (2014) 35 ILJ 613 (CC); 2014 (5) SA 579 (CC).

¹⁵ Ibid at para 28.

¹⁶ Ibid at para 92.

¹⁷ Ibid at para 27.

¹⁸ Ibid at n 4 above.

seeking to challenge the Minister's decision, Cameron J noted that 'Whether under PAJA, or legality review, [Merafong] was obliged to institute proceedings to review the decision without unreasonable delay.'¹⁹ This suggests that the Court had no intention of prescribing the pathway to review that Merafong should have utilised. Later, the majority emphasised that the application the Court was asked to decide had been brought by AngloGold in order to enforce the Minister's decision, rather than being a review on behalf of Merafong. For this reason, the Court did not need to determine if PAJA applied.²⁰

Faced with a similar legal quandary in *Department of Transport v Tasima (Tasima)*, the Court once more sidestepped the question of which pathway to review was apposite.²¹ In that case, the Director-General of the Department of Transport extended a contract with a private company, Tasima, to provide road management services in Gauteng. The extension was, again, granted on tremulous legal grounds. Under duress from Tasima to perform in terms of the contract, the department sought to subsequently reactively challenge its own decision. Unlike in Merafong, the Court considered, and upheld, the Department of Transport's reactive challenge. It did not, however, decide under what auspices the department's review should have been brought. In a footnote, the Court instead found that: 'The question of whether challenges, reactive or otherwise, to exercises of public power by the state can be initiated through PAJA need not be decided here.'²²

Unlike *Merafong* and *Tasima*, the third of this triptych of cases, *City of Cape Town v Aurecon South Africa (Aurecon)*, did take the form of a direct review of its own decision by an organ of state.²³ Here, the City of Cape Town sought to review its own decision to award a contract to decommission a power station to Aurecon. While opting to use the 180 day rule set out in PAJA as a benchmark for determining if the review had been brought too late, the Court made explicit that it was not determining the question of whether PAJA or the rule of law was the preferable pathway to review; chiefly because arguments on the question were not properly before it.²⁴

These cases suggest that while no definite pronouncement had been made, the Constitutional Court more often than otherwise assumed that PAJA could be used where the state sought to review its own administrative action. Remarkably, in none of the cases was the question of whether or not the state is entitled to rely on rights as a whole even canvassed. Instead, emphasis was always put squarely on whether or not the decision itself was administrative action, and whether any sort of review could be brought. It was therefore something of a surprise when the *Gijima* Court reversed the prevailing view.

II Gijima, the state and rights

Gijima, a private company, contracted with the State Information Technology Agency (SITA), an organ of state, to provide I.T. support to the South African Police Services

¹⁹ Ibid at para 73.

²⁰ Ibid at para 75.

²¹ *Department of Transport v Tasima* 2017 (2) SA 622 (CC); 2017 (1) BCLR 1 (CC).

²² Ibid at fn 78.

²³ *City of Cape Town v Aurecon South Africa* 2017 (6) BCLR 730 (CC); 2017 (4) SA 223 (CC).

²⁴ Ibid at paras 34-37.

(SAPS). Primed by the imminent threat of litigation to enforce the contract, SITA sort to review and set aside the tender on grounds that proper procurement mechanisms had not been followed when it was awarded.

The High Court found that the granting of the tender constituted administrative action under PAJA, and that the review should consequently be determined in terms of that Act. The Supreme Court of Appeal agreed. It also confirmed that the principle of subsidiarity required that the review be conducted in terms of PAJA, rather than directly through section 33 of the Constitution, or under the rule of law.

Madlanga J and Pretorius J, writing for a unanimous Constitutional Court, come to a different conclusion. They find that an organ of state can never rely on PAJA, nor the right to just administrative action, when seeking to review its own decision. Instead, SITA's review can only have been brought as a breach of the principle of legality.

The *Gijima* Court supports its finding by characterising PAJA as an extension of the constitutional right to just administrative action.²⁵ It then reasons that as section 33 is a right, the Court must first determine the 'philosophical underpinnings of the very notion of whom fundamental rights are meant to protect'.²⁶ As the Court sees it, whether SITA is entitled to rely, in general, on the rights in the Bill of Rights should 'inform' the interpretation of the right to just administrative action.²⁷ Madlanga J and Pretorius J find that it is 'quite axiomatic that fundamental rights are meant to protect warm-bodied human beings primarily against the State.'²⁸ Those who are not 'human beings' (seemingly inclusive of private juristic persons), are therefore not entitled in general to directly invoke rights. As organs of state like SITA fall into this category, they cannot have recourse to the right to administrative justice, and so cannot rely on PAJA when orchestrating review.

The Court substantiates its line of reasoning in two ways. First, through an analysis of existing decisions and the context in which the rights-regime in South Africa emerged, it looks to show that the Constitution only ever meant to afford private persons rights so that they could respond to state action or inaction. Second, the judgment contends that it is 'inconsonant that the State can be both the beneficiary of the rights and the bearer of the corresponding obligation that is intended to give effect to the rights.'²⁹ In other words, the state cannot be both the giver and receiver of the same legal entitlement. Madlanga J and Pretorius J argue that this is especially true in the case of the right to just administrative action, where to argue otherwise would mean that an organ of state would be entitled to ask itself for reasons, or that it act reasonably, or in accordance with the law.

²⁵ The Court's claim that, 'the concept of "administrative action" in whatever section of PAJA cannot suddenly have a meaning wider than that envisaged by the source of the concept, namely the Constitution', is troubling in its own right: legislation – even constitutionally mandated legislation – can surely offer more entitlements than the Constitution sets out.

²⁶ Ibid at n 1 above para 18.

²⁷ Ibid.

²⁸ Ibid.

²⁹ Ibid at para 27.

The *Gijima* Court finds it ‘axiomatic’ that rights are tools used to protect private persons from the state.³⁰ But is this how the Constitution envisages rights? And should the state have such a central role in how we define rights either way? Madlanga J and Pretorius J purport to answer the first of these questions with reference to existing law. They begin by citing the *First Certification* judgement, in which the Court found that, ‘The movement to recognise and protect the fundamental rights of all human beings gained increased momentum in the international arena from the end of the Second World War.’³¹ The Court puts emphasis on the words ‘human beings’ to find that, from the outset, South Africa’s constitutional rights were aimed at protecting individual persons and their collective associations.³² They note further that the Constitutional Principles that gave rise to the Bill of Rights in the Interim Constitution were described by the *First Certification* Court ‘as the inalienable rights of *human beings*’ (Italics in the original).³³

The Court next genealogically connects the rights in the Bill of Rights, through the Constitutional Principles, to the ‘fundamental rights and freedoms’ enshrined in the United Nations Universal Declaration of Human Rights (UDHR) and other international human rights instruments.³⁴ Madlanga J and Pretorius J construe these international entitlements as ‘universal’ only to the extent that all human beings have them against the state. Noting that South Africa’s Bill of Rights protects different rights to those protected by international legal instruments, Madlanga J and Pretorius J nevertheless find that the rights in the Bill of Rights maintain the same character of applying only to private persons.

The Court then turns to interpreting the content of the section 33 and PAJA against the background of its previous analysis.³⁵ Madlanga J and Pretorius J track the abusive history of administrative law in South Africa. Noting that the object of this abuse was private persons, and the subject the state, they find that ‘the intended beneficiaries of the change’ in South Africa’s approach to holding administrative decision-makers to account ‘were private persons’.³⁶ For this reason, they conclude that the right to administrative justice exists solely to protect private persons from the abuse of state-sanctioned administrative decision makers. Resultantly, organs of state cannot utilise PAJA.

III The application of rights

The most glaring criticism of the approach adopted in *Gijima* is that it focuses on who brings an application so as to demarcate the content of a right. It is a long standing principle that the constitutionality of law or conduct is independent of the parties to a dispute.³⁷ That different

³⁰ Ibid at para 18.

³¹ Ibid at para 19; citing *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa* 1996 (4) SA 744 (CC); 1996 (10) BCLR 1253 (CC) at fn 46.

³² Ibid at para 22.

³³ Ibid at para 19.

³⁴ Ibid at para 23.

³⁵ Ibid at para 24.

³⁶ Ibid at para 26.

³⁷ See *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* 2000 (2) SA 1 (CC); 2000 (1) BCLR 39 (CC) at para 29: ‘On the objective theory of unconstitutionality adopted by this Court a litigant who has standing may properly rely on the objective unconstitutionality of a statute for the relief sought, even

litigants alleging unconstitutionality in the form of a violation of a right should get different results runs contrary to good sense. In the context of *Gijima*, what matters is surely whether SITA's awarding of the contract constituted administrative action as defined in PAJA, rather than who it is that makes the claim.³⁸

This principle – sometimes referred to as the doctrine of objective constitutional invalidity – does not imply that a right cannot be *interpreted* to mean that a party is excluded from its protection.³⁹ Various constitutional provisions explicitly limit the ambit of rights to 'citizens', 'workers', 'children', and so on. Using interpretative tools to determine what these terms include, and consequently who is entitled to the associated privileges, is a regular feature of Constitutional adjudication. In *Gijima*, the Court purports to be doing just this sort of interpretative work when it finds that 'everyone' in section 33 of the Constitution does not include organs of state.⁴⁰ It argues that as section 33(3) 'imposes a duty *on the state* to give effect to the rights in section 33(1) and (2)' (Court's italics), it would be 'inconsonant' for the state to also be the beneficiary of the right.⁴¹

Notably, however, the facts of *Kirland*, *Merafong* and *Tasima* illustrate that, in practice, there are many occasions when the state does have reasons for wanting to review its own decisions; while *Aurecon*, as well as *Gijima* itself, show that this ambition can even extend to the same decision-maker. These cases often arise in the context of mismanagement or corruption, and the review is generally brought to avoid the consequences of a past wrong. The important point is that the Court has entertained the review (or rejected it on the basis of delay) in each case. The *Gijima* Court is also happy to accept the principle, first established in *Kirland*, that organs of state *must* sometimes frontally challenge their own decisions. It is therefore not opposed to organs of state reviewing their own decisions as a general proposition.

All of which indicates that the Court's opposition to organs of state bringing administrative reviews must stem from section 33 being a *right*. This accords with the bulk of its analysis having to do with the historical and philosophical roots of rights in general. As the previous section set out, Madlanga J and Pretorius J think that rights are the entitlements of private persons, 'primarily' against the state. This they take as both an apodictic truth, and a feature of existing law.⁴² In their words, 'the creation of fundamental rights was about the protection of *human beings*' (Court's italics).⁴³ It is this character of rights as a whole that prevents organs of state from relying on section 33.

though the right unconstitutionally infringed is not that of the litigant in question but of some other person.'; See also *Member of the Executive Council for Development Planning and Local Government, Gauteng v Democratic Party* 1998 (4) SA 1157 (CC); 1998 (7) BCLR 855 (CC) at para 64; and *Ferreira v Levin NO; Vryenhoek v Powell NO* 1996 (1) SA 984 (CC); 1996 (1) BCLR 1 (CC) at paras 26-28.

³⁸ Assuming we accept the Court's analysis of the relationship between section 33 and PAJA.

³⁹ See further Stu Woolman 'Category mistakes and the Waiver of Constitutional Rights: a response to Deeksha Bhana on *Barkhuizen*' 125 *South African Law Journal* 1 (2007).

⁴⁰ Ibid at n 1 above para 27.

⁴¹ Ibid.

⁴² Ibid at para 18.

⁴³ Ibid at para 19.

This is not an interpretative claim about the right to just administrative action. The Court's reasoning is rooted in its overarching understanding of what rights are, rather than a finding about the practice or ambit of administrative review. Nor are Madlanga J and Pretorius J suggesting that the standing of litigants has any impact on the validity of law or conduct that breaches the Constitution. Instead, *Gijima* is concerned with the *application* of rights: the core of its argument is that rights only apply when a private person claims one of the normative entitlements in Chapter 2 of the Constitution, usually against the state.⁴⁴

When the Court shifts from its analysis of the meaning of 'fundamental rights' to its interpretation of section 33, it claims to be moving from sketching the 'background' of the Bill of Rights into defining the ambit of the right to administrative justice. But if this background incorporates claims about when rights apply in general – as I have suggested is the case – then the Court has moved beyond purposive and contextual analysis into a hazardous elision of application and interpretation. Application sets the scope and form of the Bill of Rights. Interpretation establishes the meaning of the rights themselves. The interpretation of a particular right does not define the application of rights as a whole; the application of rights instead sets the parameters of the right's interpretation. Shoe-horning an application finding into an interpretation analysis therefore puts the cart before the horse.

The Court's incorporation of a point about the application of rights into the interpretation of section 33 has the affect of avoiding facing head-on the existing law pertaining to rights application, sourced principally in section 8 of the Constitution. The remainder of this paper uses a fuller engagement with the existing section 8 jurisprudence to argue that the Court's claims about the application of rights are, in fact, unsound. As a result, its interpretation of section 33 is also questionable. I suggest finally that whether or not an organ of state should be entitled to rely on the right to administrative justice should instead be based on (to use a justifiably well-worn cliché) case-by-case analysis, grounded in the contextual factors set out section 8(4).

IV Rights as the claim of private persons against the state

On its face, the Court's findings about who *bears* rights can be excised from any disputes over whether rights are bound up with the relationship between the state and private persons. It is possible that Madlanga J and Pretorius J are correct that rights are the entitlements of private persons alone, but wrong that rights exist constitutively between private persons and the state. The *Gijima* court seems, however, to interweave the two arguments. It explains that the reason why the state cannot rely on rights is *because* rights exist to off-set the threat posed by the state to private persons.⁴⁵ On the *Gijima* reading, the whole schema of rights is

⁴⁴ In this respect, it is no surprise that the Court begins its discussion of the 'philosophical underpinnings of the very notion of whom fundamental rights are meant to protect' by referring to the assessment of section 8 of the Constitution in the *First Certification* Judgment.

⁴⁵ Ibid at n 1 above at paras 18 and 26.

dependent on holding state power to account; if there was no political force exerted by the state on private persons, there would be no need for rights.⁴⁶

Later on the judgement, the court also makes the claim that there is something illogical about an organ of state enforcing a right against itself. It maintains that a single administrator – as a representative of the state – cannot coherently be bifurcated agonistically against its own decision. I deal with this argument in Part V below. The current section is concerned only with the Court’s first finding that the application of the Bill of Rights does not extend beyond claims made by private persons against the state.

Gijima’s historical analysis rightly shows that viewing rights as the claims of private against the state has deep historical roots: the discourse of human rights in its modern form *did* emerge as a response to state oppression.⁴⁷ But the record of rights in the years since the passing of the UDHR has brought this rigid structuring into question.⁴⁸ In particular, proponents of rights now generally acknowledge that the power dynamics rights police do not present solely between the state and private persons. Indeed, with the rise of deregulated economies, it is increasingly the relationships between private persons themselves that need supervision.⁴⁹

A prescient example is the rise of international agreements on business and human rights. Article 12 of the Guiding Principles on Business and Human Rights sets out, ‘The responsibility of business enterprises to respect human rights’.⁵⁰ This responsibility includes businesses avoiding causing or contributing to human rights abuses, and acting to mitigate the negative human rights consequences of their work.⁵¹ South Africa has committed to developing a binding international treaty on Business and Human Rights, suggesting awareness on the part of the Executive that human rights obligations extend beyond the relationship between the state and private persons.

More tellingly, that the application of the Bill of Rights extends beyond the vertical private-state dichotomy is embedded in section 8 of the Constitution. Section 8(2) states that, ‘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’. In *Khumalo v Holomisa*, the Constitutional Court found this to mean that at least

⁴⁶ An important facet of the *Gijima* court’s approach is that it necessarily associates rights and institutions. There may be moral or agency-based support for what a private person is entitled to ask of the state, but these are not free-floating entitlements. They exist because people and the state exist. This is a *political* conception of human rights: we identify what rights are by illustrating what role they play in some political sphere. Ref: Rawls, Beitz etc.

⁴⁷ Ibid at n 1 above at paras 26-31.

⁴⁸ See, for example Jack Donnelly *Universal Human Rights in Theory and Practice* Cornell University Press Ithaca (2003); Christian Tomuschat *Human Rights: Between Idealism and Realism* Oxford University Press Oxford (2008).

⁴⁹ See Deeksha Bhana ‘The Horizontal Application of the Bill of Rights: A Reconciliation of Sections 8 and 39 of the Constitution’ 29 *South African Journal on Human Rights* 2 (2013) at p. 353.

⁵⁰ Guiding Principles on Business and Human Rights Art 12.

⁵¹ Ibid Art 13.

some rights in the Bill of Rights bind private persons some of the time.⁵² In *Juma Masjid Primary School v Essay*, the Court extended this interpretation to ‘require private parties not to interfere with or diminish the enjoyment of a right’.⁵³ Recently, in *Daniels v Scribante*, this finding was extended further to mean that, ‘the duty imposed by the right to security of tenure, in both the negative and positive form, does rest on private persons’.⁵⁴ These cases show that there are at least some occasions where the Constitution requires both the positive and negative horizontal application of rights – it is simply not true that rights are inherently claims made by private person of the state.

There are also strong theoretical reasons for holding that rights apply beyond the vertical private-state relationship. Stu Woolman argues convincingly that section 8(1)’s use of ‘all law’ means that every extant legal artefact is bound by the Bill of Rights.⁵⁵ This includes common law agreements between private parties, and, on what Woolman calls a ‘Hohfeldian’ view of the law, also the body of norms that governs social relationships outside of explicitly codified rules.⁵⁶ If this is the case, then it is clear that the Bill of Rights finds application even where the state is not a duty-bearer.

Curiously, the *Gijima* Court acknowledges this line of cases, but does not see it as terminal to its interpretation of the application of rights.⁵⁷ This reticence invites questions over why, exactly, South African courts continues to want to view rights as inherently caught up with the rapport between the state and private persons. A charitable interpretation of the phrase ‘meant to protect warm-bodied human beings, primarily against the state’ may provide some traction. Perhaps the Court means to say no more than that rights inherently provide aegis to private individuals, and that both the most prescient threat to their rights, and the most capable source of their vindication, is the state. This severs the conceptual tie between private persons and the state in defining rights, and erects in its place a looser association sourced in the essential role the state plays in a constitutional democracy.

The reasoning in *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties (Blue Moonlight)* is an instructive example here.⁵⁸ In that case, a private company, Blue Moonlight, sort to evict a number of unlawful occupiers from a building it owned. The Occupiers objected to the eviction order. After noting that the Occupiers grounded their claim in the rights to housing and equality, the Court immediately shifted to determining the state’s responsibility in alleviating the detrimental consequences of the proposed eviction.⁵⁹ This approach seems to have been prompted by Blue Moonlight’s protestation that the Occupiers continued stay violated the company’s right to property.

⁵² *Khumalo v Holomisa* 2002 (5) SA 401 (CC); 2002 (8) BCLR 771 (CC) (*Khumalo I*) at paras 29-34.

⁵³ *Governing Body of the Juma Masjid Primary School v Essay N.O* 2011 (8) BCLR 761 (CC) at para 58.

⁵⁴ *Daniels v Scribante* 2017 (4) SA 341 (CC); 2017 (8) BCLR 949 (CC) at para 49. See also *Barkhuizen v Napier* 2007 (5) SA 323 (CC); 2007 (7) BCLR 691 (CC) at para 57.

⁵⁵ S Woolman ‘Application’ in M Chaskalson, J Kentridge, J Klaaren, G Marcus, D Spitz & S Woolman (eds) *Constitutional Law of South Africa* (2004) 31.

⁵⁶ *Ibid* at 31-46.

⁵⁷ *Ibid* at n1 above at fn 18.

⁵⁸ *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties* 39 2012 (2) BCLR 150 (CC); 2012 (2) SA 104 (CC).

⁵⁹ *Ibid* at paras 19-20.

The case thus pitted two compelling, and opposing, rights claims against each other. What's more, two opposing rights claims with considerable political heft. In this context, it is understandable why apportioning responsibility to the state looms as a compelling *via media*. By finding that the state had to provide adequate alternative accommodation to the occupiers (on the basis of its own existing laws and policy), the Court was able to shift the rights obligation of housing the applicants from the owner of the building to the state. At the same time, by sanctioning the eviction on condition that the state make alternative accommodation available, the Court similarly shifted the rights obligation of avoiding arbitrary deprivation of property from the occupiers to the state.

The implicit reasoning adopted by the Court is that the threat to the housing rights of the Occupiers, and the property rights of the owners, was a result of the state's failure to provide adequate alternative accommodation. The Court conspicuously declines to declare that either the occupiers or the owners infringed rights: it is only the state's housing policy that is found unconstitutional. But does this mean that by bringing the evicting application *Blue Moonlight* was not violating the occupiers rights? And by illegally settling the building, the Occupiers were not violating those of *Blue Moonlight*?

Through finding, in this and other cases, that the state must always be joined in eviction applications, the Constitutional Court has ensured that we will never know the answer to these questions. Instead, the state remains the only visible duty bearer: in order to avoid the prickly issue of resolving genuinely competing right claims between private persons, Courts have made recourse to the state. State apparatuses becomes a collectively agreed upon, and institutionally supported, mechanisms for resolving social ills.

The take-home message is that in cases like *Blue Moonlight*, there are reasons why private disagreements may be better resolved by putting the obligations that come of being bound by rights on organs of state. Doing so enables courts to acknowledge the political and social character of rights disputes, and provides a solution that avoids putting responsibilities on either of the private parties.

In many respects, this is a positive feature of our constitutional order. The state is given the obligation to protect and promote rights, even where the claim jeopardising a person's interests are seemingly private in nature. At the risk of over simplification, the state collects taxes, and holds the power of coercion, exactly so as to bring about the social goods set out by law-makers and the Constitution.⁶⁰ The holding of this obligation helps ensure that disagreements and social tensions are diverted through legal channels, rather than being settled outside of them.⁶¹ There are therefore good reasons for having the state at the centre of the realisation of rights.

But none of this means that organs of state should be barred from relying on rights themselves. Indeed, the reverse seems to be true: if the state bears the burden of ensuring the

⁶⁰ See further N W Barber *The Constitutional State* Oxford University Press Oxford (2010).

⁶¹ See further Tom Ginsburg and Aziz Huq *Introduction Assessing Constitutional Performance* Ginsburg and Huq (eds) Cambridge University Press Cambridge (2016).

protection of rights, it should be able to apply them directly when doing so is advantageous for ‘human beings’. This is exactly what occurred in *Gijima*. SITA’s review was grounded in its belief that the contract signed between itself and Gijima did not comply with section 217 of the Constitution, and was therefore unlawful. One of the key normative principles at the heart of section 33 is that unlawful administrative actions should be set aside. The setting aside of unlawful decisions is valuable because it protects private persons from capricious state action. The benefit derived from this standard surely does not change when it is the state that seeks to enforce the law.

The converse view, which sees administrative review as the preserve of private persons, suggests that what matters is not so much the content of the right, as the *fact* of a private person enforcing it. This position has distinctly political undertones. Rights are here construed as the pitchforks of a disgruntled citizenry, spurred on by a Patrick Henry-style republicanism where the state is a monolithic iniquity, which private persons must hold to account.

Aside from the obvious problems with this fanciful depiction of the work done by a modern state, such a reading also implies that organs of state cannot play the role of holding themselves to account. This interpretation is echoed by the *Gijima* Court’s finding that it would not make conceptual sense for an organ of state to review its own decisions. In the next section, I therefore consider how the state should be conceptualised for the purposes of determining the application of the Bill of Rights.

V Can the state claim rights against itself?

A natural starting point in answering this question is section 8(4) of the Constitution. It provides that juristic persons are 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’. What gamut this spectrum runs has never received attention by the Constitutional Court. In fact, section 8(4) has largely been ignored by South African courts.⁶² Nor does the Constitution itself provide much further guidance. Unlike in the case of determining who is bound by the Bill of Rights, there is no helpful coda – played in the former instance by section 8(3) – which explains how the provision should be applied.

What is notable is the slight difference in wording between sections 8(2) and 8(4). Where the former states that juristic persons are bound by the Bill of Rights to the extent required ‘by the nature of the right and the nature of the duty imposed by the right’, the latter provides that juristic persons are 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’. The difference is that, in the case of section 8(2), emphasis is put on the *duty* imposed by the right, while in the case of section 8(4), emphasis is put on the *nature* of the juristic person.

⁶² This likely because the broad standing allowed by section 38 of the Constitution has allowed courts to hear rights cases even where the exact application of the right is unclear.

This may intimate a general reluctance to extend the application of the Bill of Rights beyond the relationship between juristic persons who exhibit certain (at present unclear) features and those persons covered by sections 8(1) and 8(2) of the Constitution. But the shift away from the vertical view of rights discussed in the section above remains: anyone can now be both the holder of rights, and the bearer of corresponding duties, if the reasons are good. As the Constitutional Court puts it in *Association of Mineworkers and Construction Union v Chamber of Mines of South Africa*, the Constitution ‘casts up no impenetrable wall between the public and the private’.⁶³ Our legal order rebuffs a doctrinal approach to the application of the Bill of Rights.

Assuming (I think correctly) that organs of state are juristic persons, what, then, is the ‘nature’ of the state for the purposes of section 8(4)? Specifically, what is the nature of the state at the point it seeks to rely on a right against itself? The Constitution’s definition of organ of state is helpful in this regard. It defines an organ of state as either, ‘any department of state or administration in the national, provincial or local sphere of government’, or any ‘functionary or institution... exercising a power or performing a function in terms of the Constitution or a provincial constitution or exercising a public power or performing a public function in terms of any legislation’.⁶⁴

The Constitution therefore defines the state *either* by its institutional position *or* by its function. This raises the intriguing proposition that an organ of state in the first sense may perform acts that are not public in nature.⁶⁵ If this is the case, then why shouldn’t an organ of state invoke the right to just administrative action in a costume different to that it wore in making the original decision it now seeks to review? In language more faithful to section 8, why shouldn’t the nature of an organ of state be different at the point it makes a decision and at the point it reviews it? This is even more credible in the case of a facially private party who previously exercised a public power, and now seeks to review its own decision in a private capacity.

The point is that when determining the ‘nature’ of an organ of state for the purposes of section 8(4), the emphasis should be on the function of the decision, rather than the functionary itself. This suggests we may also need to move our imagining of the state away from it being a collection of definable institutions and entities. In my view, rather than seeing the state as an homogenous whole – a definable thing – section 8(4) challenges us to approach it as an assortment of *processes*. Without mounting a full exegesis within the confines of a short note, this would imply that the state is the instantiation of a variety of different social practices. As Nicos Poulantzas explains, the manifestations of the state are the *effect* of various social productions and contestations, rather than things in themselves.⁶⁶

⁶³ *Association of Mineworkers and Construction Union v Chamber of Mines of South Africa* ((2017) 38 ILJ 831 (CC); 2017 (3) SA 242 (CC); 2017 (6) BCLR 700 (CC) at para 68.

⁶⁴ Section 239 of the Constitution.

⁶⁵ *Cape Metropolitan Council v Metro Inspection Services (Western Cape)* CC [2001] ZASCA 56; 2001 (3) SA 1013 (SCA); *Amcu* para 69.

⁶⁶ Nicos Poulantzas *State, Power, Socialism* Verso London (2000)

Gaston Bachelard provides a helpful metaphor for this reading. He explains that “the idea of the state” is analogous to the pre-scientific idea of fire: flames appear to be an object or a thing – they have “palpable confirmations” – giving rise to substantialist ideas of fire as some essential quality.⁶⁷ In reality, however, fire is no more than the outcome of physical processes. An account of fire must therefore be in terms that invoke these processes rather than the effects that follow.

Similarly, the state is not an entity in itself, but instead an assortment of varying processes that bring about decisions and visible applications. Determining whether or not an organ of state should be entitled to rely on a right should consequently focus on the underlying processes that manifest themselves in the organ seeking to rely on the substantive entitlements of the ‘right’. This analysis can have fluctuating outcomes – it is a sociological and factual determination rather than a strict rule. Understood in this way, it is perfectly coherent for the state-as-process to rely on rights against the state-as-process: this interaction does no more than form part of the set of mechanisms by which the state proceeds.

Such an interpretation is in contrast to the *Gijima* Court’s view of the state as *itself* the source of social harms, and therefore the target of the historical changes in the character of administrative law aimed at preventing the abuse of state power.⁶⁸ The ‘flames and heat’ of the Apartheid regime’s performance of administration results in the court misconstruing the ‘wood’ of a dominant (and nefarious) ideological process for the ‘trees’ of the state. Instead of seeing administrative justice as a mechanism to prevent the abuse of public power, the court sees it as a tool to prevent the abuse of private citizens by the state.

This leaves the Court’s argument that it is ‘inconsonant that the State can be both the beneficiary of the rights and the bearer of the corresponding obligation that is intended to give effect to the rights.’⁶⁹ Again, the problem only arises if the state is construed as a monolithic entity. As soon as SITA’s decision to review its own decision, and the making of the decision itself, are seen as two separate processes, the difficulty falls away. While the decision-maker may be both the bearer of the right and of its corresponding duty, the processes that lead up to each decision are distinct. SITA as bearer-of-rights is not a mimetic representation of SITA as bearer-of duties.

This is not to say that organs of state should always be entitled to rely on rights. Instead, the limitation of the ambit of the application of rights to state entities should be a dependent fundamentally on the nature of the process (together with the nature of the right), rather than merely on the basis of the state being the state. Judgments like *Gijima* emerge from a dogmatic application of the reasoned law illustrated by *Blue Moonlight*. Who should be held to account, and by whom, is a processive inquiry. As the facts of cases like *Kirland*, *Tasima* and *Aurecon* show, the state is made up of competing interests, often inhabiting the same institutional position at different times. The emphasis should always be on how best to uphold the substantive obligations that right protects. Taking this approach allows rights to

⁶⁷ Gaston Bachelard *The Poetics of Space* Penguin Books London (2014).

⁶⁸ Ibid at n 1 above at para 26.

⁶⁹ Ibid.

function as normative guidelines, and liberates state entities from the strictures of too vertical a vision of law and society.

VI Conclusion