

LEGAL SUBSIDIARITY &  
CONSTITUTIONAL RIGHTS: A REPLY TO  
AJ VAN DER WALT

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## 1 Introduction

The Constitutional Court of South Africa is one of the most respected legal institutions in the world. Its work excites interest among lawyers and others far beyond South Africa's borders who are inspired by the Constitution's democratic and egalitarian aspirations. The Constitution<sup>1</sup> and the Court<sup>2</sup> are precious accomplishments in the human striving to discover and realise the institutional foundations of freedom and self-determination. South Africans are guardians of these achievements for all of the world's people.

It was therefore unnerving when inane and thuggish attacks were lobbed at the judiciary in the run-up to Nicholson J's judgment in *Zuma's Case*.<sup>3</sup> Prominent public figures branded the judiciary 'counter-revolutionaries'. Adolescent *poseurs* threatened to 'kill' for their heroes and 'eliminate' their enemies. The objects of these attacks included the Court's great jurists such as Pius Langa CJ, who has devoted his lifetime to the cause of social justice under law, and Dikgang Moseneke DCJ, who at age 15 was the youngest political prisoner sent to Robben Island.

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<sup>1</sup> 'Constitution' or 'FC' refers to the Constitution of the Republic of South Africa, 1996. (In the context of discussing US law, 'Constitution' is used in reference to the US Constitution.)

<sup>2</sup> The 'Court' (with an upper case 'C') or 'the CC' refers to the Constitutional Court. In the context of the concluding discussion of US law, 'the Court' refers, as is customary, to the United States Supreme Court. References to all other courts use a lower case 'c'.

<sup>3</sup> *Zuma v National Director of Public Prosecutions* [2009] 1 All SA 54 (N) (setting aside decision to prosecute, reversed on appeal in *National Director of Public Prosecutions v Zuma* 2009 2 SA 277 (SCA)).

In this fraught context, friends of the CC must avoid the temptation to rally around the Court by showering it with congratulatory platitudes. We best respect the Court by continuing as before to study its work meticulously and to provide the most rigorous and critical analysis of which we are capable. In that spirit, I have the honour, as a non-South African, to contribute this reply to Professor van der Walt.

Professor van der Walt gifts us with a densely layered essay in which he tries to invent a new grammar for legal analysis.<sup>4</sup> He argues that we must become comfortable with gaps rather than seeking refuge in supposedly stable and all-inclusive rules because, first, this brings us closer to understanding what actually goes on in legal reasoning, and, second, because gaps open space for conversation, diversity, dissent, contestation, and judgment. That is, legal gaps open space for politics and the emergence of moral communities. Van der Walt believes, and I agree, that a legal discourse that embraces uncertainty and conflict fits better with a transformative constitution than arid syllogisms. Surely he is correct that South African jurists must work out new methods for addressing legal problems consonant with the Constitution's transformative project. It is highly implausible that legal reasoning methods developed in earlier times, including apartheid times, are adequate for this task.

It is important when reading van der Walt to appreciate that 'politics' carries a positive valence. In the mainstream view, something has gone badly wrong when 'politics' enters legal decision making. By contrast, Van der Walt does not regard politics as an enemy of the rule of law. A reception of politics into legal discourse can be a welcome contribution to democracy,<sup>5</sup> provided that (1) adjudicators acknowledge the discretion that permits and compels them to make value-laden ('ideological') choices in the routine course of their work, (2) they become deeply self-conscious, self-critical, and candid about the 'inarticulate premises, culturally and historically ingrained'<sup>6</sup> that inform their thinking and choices, and (3)

<sup>4</sup> AJ van der Walt 'Normative pluralism and anarchy: Reflections on the 2007 term' (2008) 1 *Constitutional Court Review* 77.

<sup>5</sup> From this perspective, the problem with the recent attacks on the judiciary is not that they were political. The problem is that they were uninformed, fatuous, and threatening, and they were aimed to achieve power for a particular political leader then facing serious criminal charges. In short, their purpose and their effect were to close down, rather than to open up, space for discussion and dissent.

<sup>6</sup> *Du Plessis v De Klerk* 1996 3 SA 850 (CC), 1996 5 BCLR 658 (CC) para 119 (Kriegler J).

we understand law making processes as a conversation between adjudicators, the other branches, and the public.<sup>7</sup>

Van der Walt focuses on the proper relationship between three bodies or sources of law – the Constitution, legislation (pre- and post-1994), and the common law. He is concerned about the ‘preservative pull of the common law tradition’ in light of the common law’s ‘undemocratic origin and history’.<sup>8</sup> He fears that the continued validity and prestige of the common law threaten to short-circuit the transformative project, and he wants to minimise that risk:

An important premise of my argument is that the Constitution’s commitment to [political and ethical, as well as social] diversity as a positive value is premised upon the reduced authority of the common law.<sup>9</sup>

He warns that uncritical obeisance to common law thinking will immobilise the transformative project, and I could not agree more.<sup>10</sup>

## 2 From normative pluralism to legal subsidiarity

In quick succession, van der Walt courses through a philosophical problem, a jurisprudential problem, and a question of constitutional interpretation. Subsidiarity comes in later as an instantiation of the approach van der Walt crafts to address more abstract considerations. The background philosophical problem is that modernism and post-modernism have undermined the foundations of epistemological fundamentalism: there is no knowledge-platform from which to identify trans-historical and trans-cultural (‘universal’) norms. The jurisprudential problem is that Legal Realism and Critical Legal Studies ‘destroyed the theoretical credibility of fundamentalism’ by demonstrating ‘the indeterminacy and contingency’ of legal norms.<sup>11</sup> Superficially this would appear to leave lawyers with a choice between retreating to empty formalism, on the one hand; or, on the

<sup>7</sup> In this regard, see the comment of Sachs J in *S v Mhlungu* 1995 3 SA 897 (CC), 1995 7 BCLR 793 (CC) para 129: ‘[T]he question of interpretation [is] one to which there can never be an absolute and definitive answer and ... in particular, the search of where to locate ourselves on the literal/purposive continuum or how to balance out competing provisions, will always take the form of a principled judicial dialogue, in the first place between members of this court, then between our court and other courts, the legal profession, law schools, Parliament, and, indirectly, with the public at large’.

<sup>8</sup> Van der Walt (n 4 above) 127.

<sup>9</sup> Van der Walt (n 4 above) 84 (footnote omitted).

<sup>10</sup> On this theme, see generally D Davis & K Klare, ‘Transformative constitutionalism and common and customary Law’ (forthcoming).

<sup>11</sup> Van der Walt (n 4 above) 79.

other, sliding into normative anarchy (the idea that ‘anything goes’).<sup>12</sup>

Van der Walt refuses this binary, insisting that we can ‘recognis[e] that values are contingent and that everything is open for dissent and discussion, without implying that everything goes’.<sup>13</sup> He holds out for ‘normative pluralism’ in the belief that rational discussion about values is possible and meaningful even in our post-modern condition. We must conceive legal practices and discourses as an opening to endless political debate and dissent.<sup>14</sup> This means that every legal decision involves a matter of judgment with a decisionist element.<sup>15</sup> One value-set is chosen over and at the expense of others, but only ‘for the time being’. All legal decisions are ‘provisional’ and may be qualified or superseded in the next case or next generation. Van der Walt craves ‘fundamentality without fundamentalism’, to use Morton Horwitz’s phrase.<sup>16</sup>

The constitutional problem is the built-in ‘tension between the push for constitutional reform and the pull of traditional stability’.<sup>17</sup> Van der Walt’s ‘central premise’<sup>18</sup> is that this tension reflects ‘a larger conflict between two opposing normative values or ideologies’:

Those who think that the existing distribution of wealth, privilege and power and the law that helped create and uphold it are politically neutral and therefore not in need of political reconsideration favour a regime of rights in which the direct effect of the Constitution is preservation of the status quo; those who think that the existing regime and its laws are inherently politically constructed and hence in need of political reconsideration favour the view that neither law nor rights are immune from constitutional effect or democratic redefinition ...<sup>19</sup>

How are jurists to negotiate the push and pull of these competing values without rejecting either in favour of the other – that is,

<sup>12</sup> Van der Walt (n 4 above) 103.

<sup>13</sup> Van der Walt (n 4 above) 84.

<sup>14</sup> Van der Walt joins a growing number of commentators who think the time has come to replace the evocative and influential metaphor of the Constitution as a ‘bridge’. See Interim Constitution, Postamble, ‘National unity and reconciliation’ para 1 (‘[t]his Constitution provides a historic bridge ...’); see also E Mureinik’s memorable ‘A bridge to where? Introducing the interim Bill of Rights’ 1994 (10) *South African Journal on Human Rights* 31. A new metaphor is needed for the deliberative process launched by the Constitution, perhaps seeing it as an ‘endless highway’.

<sup>15</sup> ‘Decisionist’ refers to Van der Walt’s insistence upon ‘the sacrificial nature’ of legal decisions and their inability ever ‘to resolve social conflict with reference to a common will or purpose’ (Van der Walt (n 4 above) 6).

<sup>16</sup> M Horwitz ‘The Supreme Court 1992 term – Foreword – The constitution of change: Legal fundamentality without fundamentalism’ (1993) 107 *Harvard Law Review* 32.

<sup>17</sup> Van der Walt (n 4 above) 88.

<sup>18</sup> As above.

<sup>19</sup> Van der Walt (n 4 above) 89.

without retreating to a conservative formalism that sweeps the question under the rug, or to a moral anarchy that simply disregards it? The answer is to find an idiom of Constitutional adjudication that ‘uphold[s] the tension’<sup>20</sup> thereby ‘giving politics a chance’.<sup>21</sup> While no particular *decision* can be justified by reference to foundational principles, *making decisions* can be justified, provided that we are able to extract a *direction-giving purpose* from the Constitution.<sup>22</sup> A direction-giving purpose is *not* a ‘foundational principle’. It is a rudder to steer us between the Scylla of formalism and the Charybdis of anarchy.

Borrowing in part from Frank Michelman,<sup>23</sup> van der Walt makes the crucial, albeit contestable, assumption that the Constitution does indeed provide a direction-giving purpose, viz, to ‘favour transformation’ – to renounce everything that the apartheid legal order stood for and to embrace the central transformative values of human dignity, equality, freedom, social justice, democracy, and an open society, values which are the reverse of everything apartheid was. Constitutional analysis must ‘yield to the Constitution’s direction-giving (transformative) purpose’ while ‘holding open’ the tension between stability and transformation, between the law as it is and the law as it should be in the free society toward which South Africans are transitioning.<sup>24</sup>

At this point Van der Walt proposes subsidiarity theory as a transformation-oriented and closure-refusing approach to sorting out

<sup>20</sup> Van der Walt (n 4 above) 91.

<sup>21</sup> Van der Walt (n 4 above) 127. See also 105: ‘[L]aw ... in so far as it is inevitable, will only be justified to the extent that it promotes normative pluralism but does not descend into either anarchy or reactionary formalism. In allowing room for normative pluralism but simultaneously avoiding anarchy, it must give politics a chance by allowing for real social contention and dissent’.

<sup>22</sup> Van der Walt (n 4 above) 87.

<sup>23</sup> Michelman argues that constitutional supremacy means that all sites of legal practice and norm-creation must pull in the same direction, and that the principle of constitutional supremacy is a *value* within the meaning of sec 1 of the Constitution (not just a trumping rule) when that direction is toward transformation of South African society in light of the ‘vision’ (such as it is) contained in the founding values (s 1) and elsewhere instinct in the Constitution. See ‘The rule of law, legality and the supremacy of the Constitution’ in S Woolman *et al* (eds) *Constitutional law of South Africa* (2nd Edition, OS, 2005) 11 - 36 - 11 - 38.

<sup>24</sup> Van der Walt (n 4 above) 82 - 90. I agree that, on its best reading, the Constitution contains the direction-giving purpose to ‘favour transformation’. But more work is needed on the content and historical provenance of the direction-giving purpose. As formulated by Van der Walt, the direction-giving purpose has greatest analytical power with respect to unravelling apartheid and abolishing its legal incidents. ‘Favour transformation’ provides less guidance with respect to the construction of the new society of democracy, freedom, and social justice. For example, what forms and degree of redistribution of social and political power and wealth does this ‘direction’ imply? Could a critic accept Van der Walt’s ‘direction’ for purposes of discussion and yet plausibly claim that it is silent on such questions?

the relationships between common law, legislation, and a transformative Constitution. Van der Walt's subsidiarity refers to the hierarchy of sources of law – not, as in European law, to the hierarchy of decision making levels.<sup>25</sup> The core tenet is that courts should 'avoid[ ] a constitutional decision if the matter can be decided on a nonconstitutional basis'.<sup>26</sup> Van der Walt assumes that legislation embodies a forward-looking, transformative 'pull', whereas the common law tugs in a preservative direction.<sup>27</sup> Accordingly he seeks to prioritise legislation over the common law and to shield Parliament's work from judicial encroachment. In this respect, subsidiarity restates a familiar norm of almost all modern, democratic legal systems that courts should defer to the legislature (except perhaps in special situations, for example, when the constitutional rights of politically excluded and subordinated groups are at stake). A second goal is to encourage courts to avoid any tendency to proliferate separate tracks or sub-systems of law such as, for example, parallel systems of remedies respectively grounded on the Constitution itself and on legislation or the common law.

Van der Walt finds traces of subsidiarity thinking in the Court's recent work, which appropriately balances stability and transformation. He 'embroider[s] upon the logic of the subsidiarity principles that [he has] identified in [these] decisions'.<sup>28</sup> The provisional verdict is that the Court's emerging subsidiarity perspective will permit normative pluralism to flourish by avoiding premature resolution of the stability/transformation tension. In van der Walt's argot, the Court's cases embrace *aporia* so as to give politics a chance on a continuing basis.

<sup>25</sup> In EU law, 'subsidiarity' denotes a mandate for downward devolution of decision making to the lowest level at which a particular decision may appropriately be taken. The idea is to harvest local knowledge, facilitate public participation and empowerment, and respect local concerns. The principle was formally introduced into EU law by the Treaty of Maastricht (entered into force 1 November 1993). The present formulation is found in Article 5 of the Treaty Establishing the European Community (consolidated version following the Treaty of Nice (entered into force 1 February 2003)), which provides in relevant part: 'In areas which do not fall within its exclusive competence, the Community shall take action, in accordance with the principle of subsidiarity, only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale or effects of the proposed action, be better achieved by the Community'. Strictly speaking, this type of subsidiarity is not Van der Walt's concern. At one point he mentions a precept that courts should refrain from taking a decision that can be taken by a lower court, but very little discussion is devoted to the hierarchy of courts.

<sup>26</sup> Van der Walt (n 4 above) 99 (footnote omitted). See also (95, 99, and 119 - 120) discussing *S v Mhlungu* 1995 3 SA 867 (CC), 7 BCLR 793 (CC) para 59 (giving rise to the principle, as somewhat reformulated by Van der Walt, that 'a court should not protect a constitutional right by way of a direct validity attack or by way of a direct constitutional remedy before considering whether the legislation or common law in question could be interpreted in a constitution-conforming and -confirming way') (n 4 above) 119.

<sup>27</sup> Van der Walt (n 4 above) 104 - 106.

<sup>28</sup> Van der Walt (n 4 above) 105.

The orchestration might differ, but my thinking is largely in tune with van der Walt's philosophy and jurisprudence. My misgivings concern his concluding discussion of subsidiarity. I am not persuaded that subsidiarity theory can perform the functions van der Walt asks of it or that it is a reliable starting point for developing the transformative constitutional methodology he seeks.

### 3 Subsidiarity through a critical lens

#### 3.1 Introduction

The *raison d'être* of subsidiarity principles is to strike an authoritative balance between the conflicting values of judicial deference and constitutional supremacy, so that courts are not at large weighing the conflict on an *ad hoc*, case-by-case basis. The central weakness of the theory is that, when called upon to resolve difficult cases, subsidiarity does little more than instruct courts to reopen the question and conduct the *ad hoc* balancing exercise it counselled them to avoid. Moreover, at least as presently formulated, subsidiarity imports conventional separation-of-powers discourse without rigorous critical examination; it relies upon the deceptively simple but under-examined and ambiguous notion of a statute 'giving effect' to a constitutional right; and, as a result, it tends to skew analysis in the direction of stability rather than transformation.

#### 3.2 Imports

The subsidiarity approach is not a critical theory. Like most conventional discourse of separation-of-powers, subsidiarity rests on timeworn and reified conceptions of the various branches and organs of government and their inter-relationships. This imagery relies as much on wishful thinking as on evidence or analysis. Van der Walt knows this of course, but when he recruits subsidiarity to the cause of transformation, he cannot shed all of its baggage. Because this is a general problem in legal theory, I simply register my objection *pro forma* and leave detailed examination of these issues to another day.

The trite assumption is that the legislature is the democratic and representative branch, to which non-elected judges owe deference. We twist ourselves into knots trying to explain why and under what circumstances counter-majoritarian judicial review might be legitimate in a democratic society. Jurists spin out a catechism of legal fictions and maxims from the simplistic notion of legislative

primacy, which on occasion van der Walt incongruously deploys.<sup>29</sup> Van der Walt no doubt takes a critical view of all this, but the discourse is implicit in the subsidiarity theory he imports. He even goes a step farther, consistently portraying the legislature as the forward-looking, progressive branch and a repository of transformative intentions and energy, whereas he treats the courts as necessarily backward-looking, reactionary, and obstructionist.

These assumptions fall to be interrogated in the perspective of transformative constitutionalism. They make a fine starting point for discussion but ought not substitute for investigation and analysis. We must move outside the standard frame of the ‘counter majoritarian’ dilemma,<sup>30</sup> for at least two reasons.

First, political institutions (parliaments, courts, agencies) do not have an intrinsic nature or an inherent leaning toward or against transformation. Whether, for example, the legislature is representative and/or plays a democratic, let alone a progressive, role are matters of contextual judgment on the historical record. ‘Process failures’ happen.<sup>31</sup> Legislatures have been known to ally with reaction, to be captured by wealthy interests, and/or to be so dominated by an entrenched oligarchy as to lose touch with the grass roots. I do not say any such thing has occurred in South Africa since 1994, although Parliament’s lock-step ratification of the arms deal provides food for thought.<sup>32</sup> The point is simply that any separation-of-powers theory worth having in the 21st century cannot assume that, but must inquire *whether*, legislatures as we find them actually function in service to the popular will.

Second, it is much too late in the day to assume that judicial review of legislation under a supreme and rights-rich constitution is inherently anti-democratic. Yes, judicial review may derogate from majority rule. But at the same time, judicial enforcement of rights and other constitutional provisions can deepen and enhance

<sup>29</sup> For example, he cites the fiction that the legislature approves that portion of the common law which it has not amended by statute (Van der Walt (n 4 above) 115).

<sup>30</sup> It is worth noting that Van der Walt makes this precise point in an illuminating, earlier essay. See AJ van der Walt ‘Transformative constitutionalism and the development of South African property law’ (part 1) 2005 (4) *Tydskrif vir die Suid-Afrikaanse Reg* 655 (contrasting the ‘counter majoritarian dilemma’ – the familiar problem of the legitimacy of judicial review of legislation – with a new, ‘transformative dilemma’). The Constitution ‘created a new adjudicative dilemma of simultaneously upholding the supremacy of the new constitution and the integrity of a well-developed and established system of private law’ (657 (footnote omitted)).

<sup>31</sup> By analogy to the terms ‘market failure’ and ‘regulatory failure’, I use ‘process failure’ to refer to a systemic breakdown in the idealised relationships between branches of government.

<sup>32</sup> See P Govender *Love and Courage: A Story of Insubordination* (2007) 197 - 205 (former ANC parliamentarian’s account of process of voting on arms deal).

democracy by making legislative bodies more responsive, legislative processes more transparent, or elections more competitive, or by opening communication channels between the populace and government officials. The net result in context might be that the democracy-enlarging consequences of the court's decision outweigh its counter-majoritarian form. *Treatment Action Campaign*<sup>33</sup> comes to mind as an example.

Moreover, South Africa's Constitution embodies a conception of democracy that goes well beyond representation, elections, and majority rule. South African constitutional democracy contemplates not only robust political rights, but also that the resources and social circumstances necessary for meaningful political participation and authentic experiences of self-determination will gradually be extended to all South Africans. As Theunis Roux meticulously demonstrates:

The principle of democracy in South African constitutional law is not that collective decisions shall be taken by majority vote, but something far deeper than this, including, at the very least, the notion that the people's will may be trumped by individual rights where this serves the democratic values of 'human dignity, equality and freedom'.<sup>34</sup>

Depending on what they do with their power, a more assertive role for courts than is contemplated by the conventional wisdom may be consistent with or possibly even required by democracy as envisioned by this Constitution. Recognising that judicial enforcement of the Bill of Rights can be democracy-enhancing disrupts traditional separation-of-powers assumptions and calls for a re-examination of the old shibboleths.<sup>35</sup>

<sup>33</sup> *Minister of Health v Treatment Action Campaign* (No 2) 2002 5 SA 721 (CC), 2002 10 BCLR 1033 (CC).

<sup>34</sup> T Roux 'Democracy' in S Woolman *et al* eds (n 23 above) 10 - 66 (quoting FC sec 7(1)).

<sup>35</sup> At one point, Van der Walt discards the conventional discursive framework and reverts to his accustomed, critical self. His insight is so powerful that it deserves separate mention. The CC and other courts, he says, conflate the common law insistence that courts restrict themselves to incremental development of the law with the separation-of-powers imperative that courts defer to the legislature. He convincingly argues that courts are perfectly capable of respecting the superior authority of the legislature while at the same time taking bold steps as necessary and appropriate: 'Respect for democratic processes should not prevent the courts from rooting out remnants of tradition such as discrimination or inequality in conflict with the new constitutional dispensation ... hence the courts need not shy away from larger development of the common law out of respect for the legislature' (Van der Walt (n 4 above) 120). In fact, Van der Walt hopes that subsidiarity will provide courts with a decisional framework authorising and encouraging them to take big (transformative) steps when Parliament is silent and to challenge Parliament when its efforts to give effect to the Bill of Rights are too grudging.

### 3.3 Problems of application

Subsidiarity performs a ‘gate-keeping function’. It instructs courts to answer certain threshold questions before entertaining suits seeking to vindicate a constitutional right or to obtain constitutional damages or other special relief on the Constitution itself (‘Constitution-based remedies’). In principle, subsidiarity analysis tells a court whether to proceed with an action styled as a claim on the Constitution itself (or for Constitution-based remedies); or whether, in the alternative, to limit the claimant to such rights and entitlements as are available within the compass of a pertinent statute giving effect to the constitutional right, if any, or the common law, if not. At stake in this inquiry is whether a court may heed its own judgment on how to give effect to the constitutional right or whether it must leave that task, and the prudential and fiscal choices involved, to the legislature. Van der Walt explains well enough *why* in a given type of case courts should take the approach prescribed by subsidiarity. Unfortunately, subsidiarity often cannot tell us *which* cases have the specified characteristics, notwithstanding van der Walt’s assiduous efforts to ‘embroider’ the theory. As a practical matter, courts can only answer the threshold, gate-keeping questions by examining and balancing the pertinent constitutional values and principles. Courts cannot apply subsidiarity theory without addressing precisely the questions, and making precisely the value judgments, that the theory means them to avoid.

Under *SANDU*, for example, if Parliament enacts legislation to give effect to a constitutional right (‘effect-giving statute’), a claimant seeking to protect or enforce that right must rely on the legislation and is precluded from bringing a claim directly on the Constitution. However *SANDU* preclusion does *not* apply when a claimant challenges the constitutionality of the statute.<sup>36</sup> Therefore, in order to apply *SANDU*, a court must be able to distinguish rights-enforcement claims from constitutional challenges.<sup>37</sup> Drawing that distinction will be easy in many cases, but not in others. Important cases fall into middle-ground, creating difficulties for the theory that limit its usefulness.

A claimant eligible under an effect-giving statute for the relief sought will sue on the statute. She will sue on the Constitution or for Constitution-based remedies only if she cannot obtain what she wants on the statute. It is reasonable to assume, therefore, that after

<sup>36</sup> See Van der Walt (n 4 above) 100 - 103, discussing *South African National Defence Union v Minister of Defence (SANDU)* 2007 5 SA 400 (CC), 2007 8 BCLR 863 (CC) paras 51 - 52.

<sup>37</sup> Obviously the claimant’s own description of her claim cannot be determinative. If it were, the *SANDU* principle could be nullified by strategic pleading.

*SANDU*, whenever a claimant is ineligible for relief on an effect-giving statute, she will pursue her claim by alleging that the enforcement provisions of the statutory scheme are constitutionally inadequate. If the statute *is* constitutionally adequate as applied, and the claimant is remitted to her statutory remedies, she is out of luck. If the statute *is not* constitutionally adequate, the claimant may proceed on the Constitution, and the court must hear her case. Thus, every non-frivolous case in which the effect-giving statute denies relief, that is, virtually every serious case likely to arise post-*SANDU*, raises a preclusion-avoiding, constitutional question. In all cases seeking constitutional relief beyond that provided in an effect-giving statute, the courts must make a *pre-threshold determination* as to whether the plaintiff has a legitimate claim of constitutional inadequacy *before* it can make the supposedly threshold, subsidiarity-prescribed determination whether the case should be decided on the statute alone.

This renders the *SANDU* principle a nullity, unless courts are able to make the pre-threshold determination *on the face* of the pleadings. But how is a court to know whether it is in the presence of a *bona fide* constitutional question, short of airing and taking a view on the matter? Inevitably, the court must consider the full panoply of relevant constitutional values, including separation-of-powers values. In addition to substantive constitutional concerns, the court must inquire whether the question of remedies is one peculiarly within the competence of the legislature, or whether the principle of constitutional supremacy authorises or obliges the court to consult its own views of the matter. By itself, the *SANDU* principle provides little guidance in determining whether a valid claim on the Constitution has been pleaded; that determination must be made before *SANDU* kicks in.

In sum, unless a claim is patently frivolous, a court cannot answer the pre-threshold question – whether the remedies provided by an effect-giving statute are constitutionally adequate – without fully considering and reaching at least a tentative conclusion on that point. But the purpose of subsidiarity was to prevent claimants from precipitating full-dress adjudication of constitutional issues when the legislature has given effect to a constitutional right. The process of *applying* subsidiarity principles reinstates the problem it is intended to solve.

This dilemma, if it is one, derives ultimately from an ambiguity in the constitutional provisions that authorise or enjoin Parliament to

‘give effect’ to an enumerated constitutional right.<sup>38</sup> The bare words of the text can bear at least two polar meanings and perhaps a range of others in between. To ‘give effect’ to a constitutional right might mean that the right is free-standing, with a content of its own, but that Parliament is invited or mandated to implement and give concrete, practical significance to the right. In this interpretation, the content of the right is not exhausted by the effect-giving statute. Alternatively, and in contrast to textual references to the ‘progressive realisation’ of constitutional rights through legislation,<sup>39</sup> the phrase ‘give effect’ might mean that the right has the meaning and effects that Parliament gives it. The case for the former interpretation seems overwhelming to me, but, followed to its logical end-point (a course which van der Walt does not advocate), subsidiarity pushes the law toward the latter approach.

I should pause to say that, in my view, constitutional rights are in part constituted by the extent and scope of relief awarded for their violation. Generations ago, the Legal Realists argued that remedies define legal rights and entitlements, rather than the other way around. On the traditional view, courts fashion remedies based on their understanding of the nature of the legally protected interests infringed and the character of the wrong to those interests. According to the Legal Realists, we learn the identity of the legally protected interests and the nature of wrongs by examining the remedies courts dispense. A wrongful injury to a legally protected interest is that for which and to the extent that the courts provide a remedy.<sup>40</sup> One need not press the point to an extreme to accept that to some significant extent, enforcement and remedies determine what a right means in practical effect in the lives of the parties. When Parliament ‘gives effect’ to a constitutional right, it may task itself with giving the right an enforceable floor of protections and implementations. In practice, it may also erect a ceiling and walls around the right. At a certain point, ‘giving effect’ to a constitutional right slides into *defining* the right by setting out its metes and bounds. The question we deal with here is whether and to what extent the courts are confined within the houses that Parliament builds.

The constitutional adequacy of the relief afforded by an effect-giving statute is not, strictly speaking, a question subsidiarity theory addresses – it is a substantive problem of constitutional law that must be decided by courts. However, the issue of constitutional adequacy

<sup>38</sup> See, eg, FC sec 33(3) (just administrative action) (‘[n]ational legislation must be enacted to give effect to these rights’).

<sup>39</sup> See, eg, FC secs 26(2) (housing) and 27 (health care, food, water & social security).

<sup>40</sup> See, eg, WH Hamilton & I Till *Property* (1933) 12 *Encyclopedia of Social Science* 528-536 (‘[i]t is incorrect to say that the judiciary protect[s] property; rather they call[ ] property that to which they accord[ ] protection’).

does implicate core subsidiarity concerns in the sense that how one approaches it may be strongly influenced by one's attitude regarding the appropriate roles of courts and legislatures. Too eager a judicial willingness to find constitutional fault with effect-giving statutes might deprive the legislature of the discretion to which it is properly entitled in a democratic society. But an overly cautious attitude, comfortable with directing most claimants to their statutory remedies, might abdicate the courts' obligation to protect and promote the Bill of Rights.

Particularly in the field of socio-economic rights, when Parliament enacts an effect-giving statute providing a range of benefits, rights, and entitlements to qualified applicants and imposing corresponding obligations and prohibitions on the government, it will trade off limitations on the coverage, administration, and enforcement of the right in return for greater generosity of benefits and ease of access to them. Such tradeoffs are entirely legitimate means to make economical use of scarce resources needed to fulfil other constitutional rights and to provide for orderly conduct of executive and judicial business. Legislatures are supposed to make such tradeoffs, and the Constitution requires South African courts to respect the considered judgment of Parliament.<sup>41</sup> But must courts give it dispositive weight on practical questions of enforcement and remedies? Leave aside crudely under-protective and otherwise patently inadequate remedial schemes. Assume the legislature's scheme falls within a range of reasonable decision making. In a democracy, are there any circumstances under which a court may properly substitute its own thinking for that of the legislature? What if a court concludes that a different choice of remedies would do a significantly better job of protecting the constitutional right in question, with a net gain to democracy? Is it nevertheless precluded by the legislative judgment (except in extreme cases)?

Assume that in a statute giving effect to a constitutional right, Parliament provides relief for denial or infringement of the right by lawsuit, and that the statute specifies a four-year time-limitation period for instituting such proceedings. X sues on the statute against an appropriate defendant. Her claim is meritorious in all respects save that she waited five years to bring the claim. She was tardy for a combination of reasons: she was not well-schooled in her rights, she faced practical and financial difficulties in obtaining representation, and she pursued the claim with insufficient vigour and attention. X pleads her cause both on the statute and on the Constitution itself. She argues that the four-year cut-off is unconstitutional, and that the court should either grant Constitution-based remedies or, alter-

<sup>41</sup> See FC sec 41(1)(e).

natively, read a longer limitations-period into the statute and then grant relief on the statute so revised.

If Parliament had specified a 24-hour limitations period, most everyone would agree that the statute is unconstitutional to that extent—both for failing to give meaningful effect to the substantive right and in terms of the section 34 right of access to courts.<sup>42</sup> Assume for purposes of discussion, however, that the Constitutional Court had previously ruled that Parliament does not offend the Constitution merely by imposing *some* reasonable limitations-periods in effect-giving statutes, the constitutionally acceptable minimum length to be determined in light of the nature of the right, the nature of potential violations, and any other relevant considerations. If the court in X's case were to conclude that a four-year prescription period plainly, unjustifiably, and unreasonably limits enjoyment of the constitutional right, presumably it would be common cause that the court may properly, indeed must, hold the statute invalid to that extent. Suppose instead that the court concludes (1) a four-year time-frame is within the range that could reasonably be regarded as appropriate and constitutional, but nevertheless (2) a seven-year period would *better safeguard* the right in question. The court arrives at this conclusion because it deems the substantive right to be very fundamental and in need of generous protection; because of its concern about the practical barriers to rights-enforcement faced by millions of poor South Africans; and because it feels the more forgiving limitations period better comports with 'the values that underlie an open and democratic society based on human dignity, equality, and freedom'.<sup>43</sup> May the court impose its preference for seven years, thereby trumping Parliament's choice among a range of reasonably acceptable approaches to time-limitation? Are courts, or at least the Constitutional Court, charged with the authority to *optimise* protection of fundamental rights? Or would such a decision violate a proper understanding of separation-of-powers?

<sup>42</sup> In *Moise v Transitional Local Council of Greater Germiston* 2001 4 SA 491 (CC), 2001 8 BCLR 765 (CC), the CC confirmed an order of the Witwatersrand High Court finding unconstitutional and invalid sec 2(1)(a) of the Limitation of Legal Proceedings (Provincial and Local Authorities) Act 94 of 1970, which barred suits against local authorities unless the claimant gave written notice of a claim within 90 days of the date on which it arose. (Plaintiffs had 24 months within which to file suit.) The short notice period was held to impair the FC sec 34 right of access to courts in a manner that was not reasonably justifiable within FC sec 36(1). In *Engelbrecht v Road Accident Fund* 2007 6 SA 96 (CC), 2007 5 BCLR 457 (CC), the Court held unconstitutional regulation 2(1)(c), GN 17939, 25 April 1997, promulgated in terms of the Road Accident Fund 56 of 1996. With some qualifications, the regulation barred compensation to a victim of a hit-and-run accident unless the claimant filed a police affidavit within 14 days of the accident.

<sup>43</sup> FC sec 39(1)(a) (concerning interpretation of the Bill of Rights).

Subsidiarity demands that the court dismiss X's case even though it is in part styled as a constitutional challenge. If we rule out ultra-short and patently unfair limitations periods, setting the precise time-limit on claims is quintessentially a question of 'policy' as to which courts should refrain from substituting their own judgment for Parliament's. This is so even if the legislature, in reaching its decision, predictably and properly took into account such non-constitutional factors as the government's need for efficient and frugal management of its legal and material resources, its desire to remove impediments to economic development, and/or its unadorned interest in avoiding litigation. It is surely defensible to argue that courts have no business critically scrutinising, let alone second-guessing, Parliament. It is worth noting that there is nothing particularly 'transformative' about this position. Most jurists who administer democratic constitutions providing for judicial review would probably counsel deference in this situation. Is that the best approach for South Africa or one that the Constitution obliges South African courts to take?

It is not obvious, at least to me, that the familiar separation-of-powers considerations supporting judicial deference are equally compelling when invoked in a case the outcome of which will define the operative bounds of a constitutional right. The legislature may have superior institutional competence to make what are conventionally called 'policy decisions', but it is not necessarily better situated than the Constitutional Court to strike the appropriate balance between majoritarian interest and constitutional principle. Is it not paradoxical to entrench judicially enforceable rights in a supreme constitution – a constitution meant to constrain the legislature – and then leave it to the legislature effectively to determine how those rights are to be protected and enforced, subject only to highly deferential judicial review? Given the paramount importance of constitutional supremacy in South Africa's evolving constitutional understanding, the courts might legitimately be entitled to greater latitude in cases involving the effective definition and enforcement of constitutional rights than they may rightly claim in reviewing social and economic legislation that does not derogate from important rights and freedoms. In a transformative context, a bit more active role for the courts (or at least the Constitutional Court) and a bit more back-and-forth between the branches might be in order.<sup>44</sup>

<sup>44</sup> Courts – particularly the peak level courts (CC and SCA) – could evolve practices designed to reduce the institutional tension between the branches and establish a more 'dialogic' relationship between them. A reviewing court could, for example, announce its conclusions but withhold judgment, pending further representations from the government or Parliament itself. A court could declare the four-year time limitation constitutionally deficient, but suspend the effective date of its order to give the legislature time to reconsider and, perhaps, devise an

If the reader will grant that these questions are at least worthy of debate, subsidiarity provides us no new tools with which to approach them. The theory instructs courts to leave to legislation (or to the common law, developing under the mandate of section 39(2)<sup>45</sup>) cases in which it is appropriate in light of separation-of-powers theory to do so, but not in cases where that course is inappropriate. But the theory lacks the analytical traction necessary to perform any real work in assigning actual claims to their appropriate category. Any application of subsidiarity in a borderline case pushes the decision maker back to the general debate about separation-of-powers. Subsidiarity recites some of the countervailing considerations of which account ought to be taken, but it adds no new insight as to how they should be balanced.

Likely van der Walt would say that this is exactly his point – there are no easy answers to such questions. Precisely what he wants is a general acknowledgment that resolving such conundrums calls for ‘politics’ – discussion, debate, dissent, and the taking of judgments about how best to serve competing imperatives (‘for the time being’). Discuss, debate, and balance; decide provisionally; hold tensions open – I could not agree more. But van der Walt told us that *before* he brought subsidiarity into the picture. Subsidiarity cannot help us in pursuing the discussion.

The reader may doubt that anything of constitutional substance can turn on the length of a limitations period. If so, she will find sobering a US case in which the Supreme Court sanctioned a man’s execution without affording a hearing on his constitutional claims because his lawyer was three days late in filing a notice of appeal in a lower court.<sup>46</sup> Nevertheless, I turn to examples in which the substantive constitutional stakes are more apparent.

intermediate solution or approach the problem from a different angle. A court could invite, ask, or order Parliament to reconsider, standing ready to defer to the legislature or review its work with less exacting scrutiny if, upon reconsideration, it reaffirms the choice of a four-year limitations period. It could invite, ask, or order Parliament to propose a new solution within stipulated guidelines. The invention of intermediate review practices between the extremes of deference and trumping is one of the great challenges to constitutional law in our time.

<sup>45</sup> FC 39(2) (development of the common law and customary law ‘must promote the spirit, purport and objects of the Bill of Rights’).

<sup>46</sup> *Coleman v Thompson* 501 US 722 (1991) (O’Connor J). Coleman was convicted of crimes and sentenced to death. He contended that his trial was infected by violations of his constitutional rights. The Court held that the attorney’s late-filing was a procedural default rendering Coleman’s conviction final under of the state law of Virginia, and therefore unreviewable in the US Supreme Court. Coleman was condemned by the equivalent of a ‘subsidiarity rule’ in the federalism context. The rule was based on two legal foundations – limitations on federal jurisdiction imposed by Article III of the US Constitution, and principles of federal/state comity. (The ‘procedural default’ doctrine has exceptions, but the Court did not find them applicable in Coleman’s case.)

Imagine that in response to *Carmichele*<sup>47</sup> and its progeny, Parliament enacted a comprehensive programme (the ‘domestic violence programme’ or DVP) intended to give effect to women’s equality rights (FC section 9), children’s rights (FC section 28), the right to security of the person (FC section 12), and the obligation of government to protect against violence (FC section 12(1)(c) read with FC section 7(2)) in the context of violence against women and other domestic violence. DVP commits the national government to massive expenditures for increased policing, a well-designed scheme of initiatives for police and other officials to receive training on violence against women and children, a victim advocate programme in the courts and in the community, and secure shelters and temporary financial assistance to victims and potential victims. DVP also provides scheduled compensation, obtainable through simple and prompt administrative procedures, for injuries caused by negligent acts or omissions of the police, court authorities, and other public officials. In response to concerns about costs, the statute declares the specified administrative compensation to be the exclusive remedy in such cases, and moreover it grants the government and police absolute immunity from suit for negligence in any case involving violence against women or children. Assume that all interested groups in civil society and leading experts from numerous disciplines were consulted and had substantial input into the design of DVP. Many objections were raised in the consultation process, but in the end a wide consensus emerged that DVP is a state-of-the-art programme promising great benefits to vulnerable or victimised persons and to the community at large. The vote in Parliament in favour of DVP was unanimous.

H attacks and shoots his wife W with an illegally possessed firearm, so seriously injuring and disabling her that she will need care-taking assistance, social work, and other services for life. Her young children witnessed the attack and suffered deep emotional trauma; they will require specialised services for the foreseeable future. H’s attack occurs under circumstances reminiscent of *Carmichele* and related cases – H had a history of violence known to local authorities; the police failed, for no legitimate reason, to impound H’s guns; and no warning or protection was given to W after police officers observed H intoxicated and threatening to kill her. H is arrested shortly after the attack and is eventually sentenced to a long prison term.

W claims administrative compensation under DVP, to which she is unquestionably entitled. However, the DVP benefits do not provide redress for the emotional injury to her or the children, and they do

<sup>47</sup> *Carmichele v Minister of Safety and Security (Centre for Applied Legal Studies Intervening)* 2001 4 SA 938 (CC), 2001 10 BCLR 995 (CC).

not come close to the estimated life-time cost of her and the children's caring needs. W therefore sues the local police and the Minister of Safety and Security for unlawful omission to protect her. W brings the claim in delict, urging that, if necessary, the common law be developed so as to promote the spirit and objects of the Bill of Rights. Alternatively, she sues on the Constitution itself seeking Constitution-based damages. The defence concedes that the police were guilty of wrongful omissions, that these omissions proximately caused W's injuries, and that the police's omissions violated common law and constitutional duties owed to W. Nevertheless the police and Minister seek dismissal of both branches of W's claim based on the DVP immunity provision. W in turn concedes that the defendants are immune in terms of DVP, but she argues that in application the statutory scheme is unconstitutional to that extent.

May or must a court hear either her delictual and/or her constitutional claim? Should the court remit her to her remedies under DVP (with the result that a large portion of her injuries will go uncompensated and her constitutional challenge will go unheard)? At first glance, the *Bato Star* principle<sup>48</sup> suggests that W's common law claim is precluded, but she escapes that tenet because she has challenged the constitutionality of DVP. If bypass is so easy, can subsidiarity effectively constrain courts from second-guessing the legislature and from undermining its carefully engineered policy compromises? If the court hears W's claim on the Constitution, must it defer to the legislature's policy judgment, and if so, how much deference must it show? On the other hand, if the court may not independently examine the constitutionality of the immunity provision – if, for example, subsidiarity directs the court to abstain from hearing W's claim on the Constitution – have we not vested the legislature with effective power to define and limit the constitutional rights at stake, in violation of the fundamental principle of constitutional supremacy?

I do not mean to suggest that there are easy or clear answers to these questions. My point is simply that subsidiarity brings us to their threshold, and then its analytic power runs out. It leaves us without moorings in attempting to figure out the appropriate roles and inter-relationships of legislation and judge-made law.

<sup>48</sup> See Van der Walt (n 4 above) 103 - 105 discussing *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs* 2004 4 SA 490 (CC), 2004 7 BCLR 687 (CC) para 25 and *Chirwa v Transnet Ltd* 2008 2 SA 24 (CC), 2008 3 BCLR 251 (CC) para 23. According to Van der Walt (103), these cases state the principle that 'once legislation has been enacted to give effect to a right in the Constitution, and in so far as the legislation was intended to codify the common law, litigants may not rely directly on the common law *when seeking to protect that right against infringement*' (italics in original).

### 3.4 A cautionary tale – of *Schweiker v Chilicky*<sup>49</sup>

In this case, the US Supreme Court denied claimants the right to pursue constitutional claims because Congress had enacted an administrative scheme to redress their grievances. At first glance, *Chilicky* is *SANDU* with an American accent. But subsidiarity thinking runs wild in the Court's opinion, which would make Kafka proud. To be clear, I do not believe that subsidiarity theory entails the *Chilicky* result, and I am confident that van der Walt would regard the case as wrongly decided. I offer it as a cautionary tale for South Africans – to show how much damage can be done when jurists who do not possess van der Walt's sophistication and intellectual integrity use subsidiarity-talk to resolve a case.

Comparative discussion of constitutional torts requires caution because the US system is shaped by several factors that do not play a role South Africa. The US states are conceived as semi-autonomous sovereigns with a much more significant and independent legal identity than is associated with South African provinces. US federal courts are courts of constitutionally limited, not general, jurisdiction. US law seems to be more fastidious in distinguishing between *rights*, *sources of law*, and *causes-of-action* for redress of violations. Notably, the US Constitution does not contain a general 'standing' provision such as found in FC section 38,<sup>50</sup> and the case-law is generally more restrictive than what FC section 38 permits.<sup>51</sup> The key point for present purposes is that the US Constitution does not expressly create any causes-of-action under which individuals may seek redress for constitutional violations. Congress long ago enacted statutes expressly creating causes-of-action against persons acting under the colour of *state* law who deprive individuals of federal constitutional rights.<sup>52</sup> There is no comparably generic cause-of-action for violation of constitutional rights by the *federal* government or others acting under the colour of *federal* law. As a historical matter, it was generally assumed, but not entirely certain, that an individual could sue a federal actor for redress of constitutional rights

<sup>49</sup> *Schweiker v Chilicky* 487 US 412 (1988) ('*Chilicky*') (O'Connor J). Brennan J, joined by Marshall and Blackmun JJ, dissented.

<sup>50</sup> FC sec 38 (enforcement of rights) both lists the parties who *may* approach a court when a right in the Bill of Rights 'has been infringed or threatened' and gives them a constitutional *right* to do so.

<sup>51</sup> The picture is further complicated because South African constitutional law has numerous distinctive features missing or largely absent in the US. These include affirmative governmental duties, social and economic rights, and direct horizontal application. The latter exists in the US – eg, the Thirteenth Amendment prohibition of slavery has direct horizontal application – but US constitutional jurisprudence is dominated by a powerful public/private distinction.

<sup>52</sup> The most salient of these is the provision of the Civil Rights Act of 1871 now codified at 42 USC § 1983.

violations. In the modern *Bivens* case,<sup>53</sup> the Court held that the Constitution impliedly gives rise of its own force to a cause-of-action in favour of an individual deprived of federal constitutional rights by a person acting under colour of federal law.

*Bivens* remains good law, but the Court has narrowed its scope in recent years. In my view, the Court moved in this direction partly because of hostility to the Bill of Rights and an unarticulated antipathy to some of the kinds of people (eg, poor people) that attempt to bring *Bivens* claims. The Court's stated reasons are based on subsidiarity principles. Specifically, the Court has held that a claimant may not pursue a *Bivens* tort where Congress has enacted an enforcement scheme providing meaningful remedies for unconstitutional action. In a leading case, *Bush v Lucas*,<sup>54</sup> a federal government employee claimed that his employer had violated his constitutional right of freedom of speech.<sup>55</sup> He was precluded from bringing a *Bivens* action and was instead confined to the administrative relief available under statutes governing the employment of federal civil servants, even though he alleged that these remedies were inadequate to deter unconstitutional wrongdoing and did not allow compensation for certain of his injuries (eg, emotional harms).<sup>56</sup>

The *Bush* Court assumed that the civil service procedure was constitutionally adequate.<sup>57</sup> One might think that, had the Court treated *Bush's* claim as a direct challenge to the constitutional sufficiency of the administrative remedies,<sup>58</sup> it would have permitted his *Bivens* claim to go forward. This would bring the US approach into

<sup>53</sup> *Bivens v Six Unknown Named Agents of Federal Bureau of Narcotics* 403 US 388 (1971). Actions pursuant to the rule of this case are called '*Bivens* torts'.

<sup>54</sup> 462 US 367 (1983).

<sup>55</sup> See US Constitution, 1st amend.

<sup>56</sup> Mr *Bush* is not related to either of the former Presidents *Bush*. The Supreme Court affirmed that federal courts have the power to establish remedies needed and appropriate to vindicate constitutional rights, even if not expressly authorised by Congress (*Bush* (n 54 above) 374). However, it declined to exercise that power in *Bush's* case because, after careful consideration, Congress had struck a balance between 'the conflicting interests involved in providing job security, protecting the right to speak freely, and maintaining discipline and efficiency in the federal work force' (385). Congress had developed 'an elaborate, comprehensive scheme ... by which improper [personnel] action may be redressed', (385), and which 'provides meaningful remedies for employees who may have been unfairly disciplined for making critical comments about their agencies' (386) (footnote omitted). The Court saw as the central question in the case whether the remedial system established by Congress 'should be augmented by the creation of a new judicial remedy for the constitutional violation at issue' (388). That question requires a 'policy judgment', including a cost-benefit analysis of the value of additional remedies and their possible impact on the efficiency of the civil service, a policy judgment that Congress is in a far better position than the Court to make (388 - 389).

<sup>57</sup> *Bush* (n 54 above) 378 n 14.

<sup>58</sup> *Bush's* pleadings were unclear on this point, although on a generous reading his suit did advance a constitutional challenge to the administrative scheme.

conformity with *SANDU*. If one thought that, one would be mistaken. *Chilicky*, to which I now turn, disallows a *Bivens* tort even where the claimant raises an explicit constitutional challenge to the statute (as applied), and even though the alternative, statutory scheme to which she is remitted *excludes* recovery for unconstitutional conduct.

The Federal Government (in cooperation with the states) operates several programs dispensing monetary benefits to persons who suffer specified forms of income interruption (due, for example, to unemployment, retirement, spouse's death). *Chilicky* concerned a benefits programme for certain categories of people unable to perform paid work due to disability. Many recipients rely entirely on these benefits for their livelihood and that of their families. At the time, eligibility for disability (or other welfare) benefits was in many cases a requirement of access to Medicaid, the programme of health-care coverage for poor people.

Former President Ronald Reagan's Administration was hostile to all forms of welfare and in the early 1980s imposed directives and informal pressures on programme managers designed to get them drastically to reduce the number of social welfare recipients. As a result, the disability-benefit programme alone terminated hundreds of thousands of benefit-recipients over a period of years using questionable, and often sleazy, methods. The *Chilicky* claimants argued that the procedures the Government used to clear the welfare rolls violated the right to Due Process guaranteed by the Bill of Rights.<sup>59</sup> Congress eventually brought a halt to the wholesale terminations and introduced procedural safeguards. By then, approximately 200,000 recipients had been *wrongfully* terminated, by the Government's own reckoning. Many were eventually reinstated, but the episode caused heart-breaking and traumatic suffering. Many thousands of recipients and their families lost their livelihood, became homeless, and/or scraped by on the kindness of friends and relatives for long periods. Regrettably, South Africa is also familiar with large-scale delivery-failures in social welfare programmes.

The disability-benefits programme was enacted under the Social Security Act,<sup>60</sup> which incorporates an administrative appeals procedure for correcting errors. Terminated recipients who were in fact eligible invoked these procedures. They were entitled to, and most eventually received, reinstatement for future benefits and

<sup>59</sup> See US Constitution, 5th amend. ('No person shall ... be deprived of life, liberty, or property [by the Federal Government], without due process of law'). The Fourteenth Amendment guarantees Due Process in deprivations undertaken by *state* governments.

<sup>60</sup> Social Security Act, Title II (1935), principally codified at 42 USC §§ 420 - 425.

retroactive payment of past benefits wrongfully withheld. The problem was that these were the *only* remedies available under the administrative system. In other words, a fully successful claimant received at the end of the administrative process only what she was entitled to in the first place. The procedure made no provision for mandatory or injunctive relief, it afforded no compensation for the turmoil and dislocation caused by wrongful termination, and it did not entertain, let alone remedy, constitutional claims.

The claimants in *Chilicky* were eligible but wrongfully terminated benefits-recipients who sought monetary damages for ‘emotional distress and for loss of food, shelter and other necessities proximately caused by [the Government’s] denial of benefits without due process’.<sup>61</sup> Consequential damages and the other remedies requested were not available through the administrative appeals system. Lacking any other vehicle, plaintiffs lodged their claim as a *Bivens* tort.

*Chilicky* differs from the cases van der Walt discusses in that the Social Security Act was not enacted in order to ‘give effect’ to a constitutional right. The US Constitution contains no guarantee of social security such as appears in FC section 27(1)(c). This should not greatly alter the analysis of *Chilicky*, however, because the claim was grounded on a constitutional right, the right to Due Process. Indisputably, the remedial scheme attached to the disability benefits programme must provide constitutional Due Process – in that sense, it is a statute designed in relevant part to ‘give effect’ to a constitutional right.

In a 1970s case called *Arnett*, Justice Rehnquist floated a theory that recipients of government largesse or public employment must ‘take the bitter with the sweet’.<sup>62</sup> By this he meant that any non-constitutional benefit created or extended by law is qualified and limited by the procedures specified in the legislation for removal or discontinuance of the benefit, even if such procedures do not measure up to the minimum requirements of constitutional Due Process. Rehnquist J reasoned that no deprivation of property occurs if a benefit is terminated or removed according to the procedures for removal specified in the law creating the benefit. In these circumstances, the claimant is deprived of nothing to which she has a

<sup>61</sup> *Chilicky v Schweiker* 796 F 2d 1131 1134 (9th Cir. 1986) (quoting plaintiffs’ complaint), reversed by *Schweiker v Chilicky* 487 US 412 (1988). Other remedies were sought, notably an interdict against the benefit cut-offs. The additional remedial requests dropped out of the case partly because it meandered through the courts for about six years, by which time Congress had halted the Reagan campaign to slash the rolls and had provided enhanced procedural safeguards.

<sup>62</sup> See *Arnett v Kennedy* 416 US 134 151 - 54 (Rehnquist J for the plurality), rehearing denied 417 US 977 (1974).

legal claim of entitlement. Therefore, Rehnquist J argued, the strictures of Due Process are inapplicable.<sup>63</sup>

A majority of the Court emphatically rejected Justice Rehnquist's thesis, both in the *Arnett* decision itself and on subsequent occasions.<sup>64</sup> Under settled doctrine, even though the government is not constitutionally obliged to confer a certain benefit, once it elects to do so, it may not remove or terminate the benefit except by procedures consistent with *constitutional* Due Process. The Constitution, not the statute, sets the procedural floor.

Evidently the Court forgot this when it decided *Chilicky*, which shows legislatures how to immunise their work from constitutional review. Therein lies a warning for South Africans. The *Chilicky* Court held that '[w]hen the design of a Government program suggests that Congress has provided what it considers adequate remedial mechanisms for constitutional violations that may occur in the course of its administration, we have not created additional *Bivens* remedies'.<sup>65</sup> In the result, the Court precluded the plaintiffs from proceeding with an action on the Constitution. Under the banner of subsidiarity, they were remitted to statutory remedies which, it was common cause, did not even consider, let alone remedy, claims of constitutional injury. Under American-style subsidiarity, constitutional claimants were channelled to and compelled exclusively to utilise a forum *that did not entertain constitutional claims*. This meant that the claimants could not obtain a hearing for their constitutional claims in *any* forum. In practical effect, the legislation simply *erased* their constitutional right to Due Process.

One might have thought that a self-respecting court would be embarrassed to decree something so absurd. But no, the US Supreme Court made its conclusion official: 'the relief sought by the [claimaints] is unavailable as a matter of law ...'.<sup>66</sup> In sum, when enacting a benefits programme, the legislature may render the Bill of Rights inoperative by attaching remedial procedures that claimants are exclusively constrained to utilise when challenging the

<sup>63</sup> See *Arnett* (n 62 above) (under constitutional text, a 'deprivation' is required to trigger Due Process guarantees).

<sup>64</sup> See, eg, *Cleveland Board of Education v Loudermill* 470 US 532 (1985).

<sup>65</sup> *Chilicky* (n 49 above) 423. The Court could find no legal distinction between *Chilicky* and *Bush*: '[W]e declined in *Bush* to create a new substantive legal liability [on the Constitution] ... because we [were] convinced that Congress is in a better position [than the judiciary] to decide whether or not the public interest would be served by creating it. That reasoning applies as much, or more, in this case ... In neither case ... does the presence of alleged unconstitutional conduct that is not *separately* remedied under the statutory scheme imply that the statute has provided 'no remedy' for the constitutional wrong at issue (426 - 428) (citations and internal quotation marks omitted; italics in original).

<sup>66</sup> *Chilicky* (n 49 above) 429.

constitutionality of the programme's administration, even though those procedures expressly disallow constitutional challenges of any kind. *Chilicky* allows Congress to stamp 'void' on the Bill of Rights.<sup>67</sup>

The Court's deference to the statutory remedies fully accords with subsidiarity thinking. True, the Court's articulated rationale invoked the theory of institutional competence (the legislature is better situated than the courts to study complicated policy matters and to engineer comprehensive solutions) rather than classical separation-of-powers doctrine (the legislature is representative and acts democratically). The distinction might be highly significant in some contexts, but here the two theories seem closely intertwined. Subsidiarity draws on both. Substitute 'Parliament' for 'Congress', and 'government agencies' for 'state agencies', and one can easily imagine a South African court committed to the *SANDU* principle denying an action on the Constitution with words similar to the following:

Congress ... has addressed the problems created by state agencies' wrongful termination of disability benefits. Whether or not we believe that its response was the best response, Congress is the body charged with making the inevitable compromises required by the design of a massive and complex welfare benefits program ... Congress has discharged that responsibility to the extent that it affects the case before us, and we see no legal basis that would allow us to revise its decision.<sup>68</sup>

I am confident that van der Walt would say that *Chilicky* goes too far. His version of subsidiarity is more flexible than its US counterpart and does not rule out constitutional challenges to effect-giving statutes. But these subtleties can easily be lost in less able hands than his.

<sup>67</sup> *Chilicky* is in a line of disastrous Nixon-Reagan era decisions that eviscerated the Due Process clauses. In *Bishop v Wood* 426 US 341 (1976), the Court held that a public employer may discharge an employee for cause without providing a hearing, an opportunity to respond to the charges against him, or any other minimum component of constitutional Due Process, if the government structures its relationship with its employees on an at-will basis. In *Paul v Davis* 424 US 693 (1976), a local police department distributed circulars to merchants containing the names and photographs of individuals identified by the police as known to be actively engaged in shoplifting. The names were selected *ex parte*, without notice to the individuals involved, hearing, or any other opportunity for the accused to respond. The Supreme Court found no constitutional deficiency in this procedure, holding that those who were 'merely' publicly branded as criminals without trial suffered no impairment of any interest protected by the Due Process clauses. Justice Brennan remarked in dissent that '[t]he potential of today's decision is frightening for a free people' (721).

<sup>68</sup> *Chilicky* (n 49 above) 429 (citations omitted). The legal basis the Court had difficulty seeing is, of course, the Constitution's Fifth Amendment and the Court's own case-law.

## 5 Conclusion

I conclude with a hypothetical problem aimed to identify interpretive questions that await South Africa's courts. My purpose is to show the limitations of subsidiarity analysis, but also to offer a platform for discussion of issues that may well arise as the jurisprudence of *SANDU* and *Bato Star* evolves. In fact, the hypothetical bears more than a passing resemblance to matters that have already concerned South African courts.<sup>69</sup>

Imagine that Parliament enacts legislation to give effect to the right to social security guaranteed by FC section 27(1)(c). In addition to setting forth the substantive content of the programme, the legislation contains a remedial scheme intended to address and remedy all wrongs committed by the government in connection with the benefits programme, including any constitutional violations that may occur. Successful claimants are entitled to retroactive payment of benefits wrongfully withheld, access to the programme if it was wrongfully denied, and restoration to the programme in the event of wrongful termination. In addition, a claimant may receive monetary compensation for consequential damages, including damages proximately caused by a constitutional violation, up to a maximum of R100. The statutory procedure makes no provision for mandatory relief and does not allow class actions. These restrictions were included after careful study, consultation with experts and affected stakeholders, and plenary discussion in Parliament. The drafters are in good faith convinced that it is necessary to limit litigation and remedies in connection with delivery problems in order to preserve scarce resources for the beneficial purposes of the programme. Parliament declares the statutory remedial procedure to be the exclusive avenue of redress for any grievance in connection with the programme. Neither the Promotion of Administrative Justice Act (PAJA)<sup>70</sup> nor any other statute applies, and any claim that might arise under the common law is expressly pre-empted.

<sup>69</sup> See, eg, *Permanent Secretary, Department of Welfare v Nguzu* 2001 4 SA 1184 (SCA), 2001 10 BCLR 1039 (SCA); *MEC, Department of Welfare v Nontemiso Norah Kate* 2006 2 All SA 455 (SCA). In *Kate*, the SCA sustained an award of constitutional damages in a case of excessive delay in the processing of a social grant application, as against the view that the claimant should be restricted to statutory or delictual remedies. See (para 27) stating that the relief permitted by FC sec 38 (enforcement of Bill of Rights): 'is not a remedy of last resort, to be looked to only where there is no alternative – and indirect – means of asserting and vindicating constitutional rights. While that possibility is a consideration to be borne in mind in determining whether to grant or to withhold a direct section 38 remedy, it is by no means decisive, for there will be cases in which the direct assertion and vindication of constitutional rights is required ... [T]he endemic breach of the rights that are now in issue justifies – indeed, it calls out for – the clear assertion of their independent existence'.

<sup>70</sup> Act 3 of 2000.

An eligible recipient of welfare benefits is arbitrarily terminated from the program for no good reason and without notice or an opportunity to be heard. She suffers consequential damages in an amount greater than R100 and asserts that the cap on remedies renders the statutory remedial procedure constitutionally inadequate, citing FC section 27(1)(c) itself and perhaps FC section 33 (just administrative action), FC section 34 (access to courts), and other provisions of the Bill of Rights. May she prosecute a claim on the Constitution for the full amount of her damages? Suppose an additional 100,000 eligible recipients experience similar problems due to the incompetence or malfeasance of the authorities. May they sue on the Constitution as a class to remedy their own injuries and interdict the authorities from future, administrative misbehaviour?

If we conclude that these claimants may not proceed on the Constitution and are limited to working within the statutory procedure, we vindicate the pro-legislature, pro-representation spirit of subsidiarity at the expense of constitutional supremacy and substantive constitutional rights. We put the legislature in a position effectively to define rights entrenched by a Constitution intended to constrain it. And because an interdict is precluded by the statute, we effectively prevent the courts from granting a timeous remedy that might induce the authorities to straighten out the mess. But suppose we conclude that these suits may go forward. Would we not be saying, in practical effect, that we will observe the tenets of subsidiarity except in cases where we prefer not to? And if this is what it comes down to, what has subsidiarity taught us?