Fundamental procedural rights of civil litigants in Australia and South Africa: is there cause for concern? (part 1)

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1 *Introduction*

Forty years ago, in the context of a world survey on access to justice, Cappelletti and Garth sounded the following warning: "The greatest danger ... is the risk that streamlined, efficient procedures will abandon the fundamental guarantees of civil procedure – essentially, those of an impartial adjudicator and of the parties' right to be heard."[1]

In the authors' view, this warning has special relevance in modern-day common-law systems with the ever-increasing demand for cheaper, more efficient and speedier procedures for the resolution of civil disputes.

The last three decades have indeed seen dramatic changes to the civil justice systems in different common law countries. An important stimulus for the transformation of the traditional common law adjudication process in these countries was Lord Woolf's report entitled *Access to Justice: Final Report to the Lord Chancellor on the Civil Justice System in England and Wales* (1996) and its implementation in the Civil Procedure Rules of 1999.[2] The Woolf reforms introduced new goals for civil procedure in England and Wales to address the perceived ills of cost, delay and complexity. Essentially, these goals included the achievement of justice through efficiency, speediness, cost-saving and proportionality.[3] The main mechanisms introduced by the Woolf reforms to further the new goals were judicial case management and alternative dispute resolution, especially mediation, aimed at settlement of cases.[4]

A strict exercise of case management powers by judges and an embrace of alternative dispute resolution at the cost of trial adjudication may have an adverse impact on two fundamental rights or guarantees of the parties. First, if a judge in the exercise of case management powers refuses leave (permission) to a party to amend his or her pleading or to call a witness due to procedural failure it would clearly

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1 Cappelletti and Garth (eds) I *Access to Justice: A World Survey* (1978) 123.

2 The literature on the Woolf reforms is vast. Suffice it to mention the following sources: Andrews *English Civil Procedure: Fundamentals of the New Civil Justice System* (2003) 30; Andrews *The Modern Civil Process* (2008) 22; Sorabji *English Civil Justice after the Woolf and Jackson Reforms* (2014) 1-5; Bamford and Rankin *Principles of Civil Litigation* (2017) 8-9; Colbran, Spender, Jackson and Douglas *Civil Procedure: Commentary and Materials* (2012) 50-51.

3 Andrews (n 2 (2003)) 31 and 38.

4 Andrews (n 2 (2003)) 36-37; Andrews (n 2 (2008)) 7; see De Vos and Broodryk "Managerial judging and alternative dispute resolution in Australia: an example for South Africa to emulate?" (part 1) 2017 *TSAR* 683 684 with regard to the position in Australia.

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infringe the party's right to present its case properly, *ie* to be heard.[5] Secondly, if a judge in the exercise of case management powers strongly advises the parties to pursue mediation and stays the proceedings pending the outcome of this process[6] or directs the parties to proceed to mediation, the *practical* effect of such intervention by the judge would be to deny the parties their right of access to a court to obtain a judicial determination on the merits of the case.[7]

The aim of this article is to examine the ways in which the fundamental procedural rights of civil litigants receive recognition in Australia and South Africa and to assess to what extent modern reforms to civil procedure, including the phenomena of case management and the drive from trial adjudication to mediation, affect these rights. In other words, the key question is whether the two systems are on a good path regarding the protection of the fundamental rights of the parties or whether there is cause for concern.

Before discussing the main theme of this paper it would be appropriate to present a short *excursus* on the recognition of the fundamental procedural rights of civil litigants generally and on procedural reform in England over approximately the past 150 years, culminating in the Woolf reforms of the 1990s. This will provide the necessary background for the main theme.

2 *Short* excursus *on the recognition of the fundamental procedural rights of civil litigants and on civil procedural reform in England over the past 150 years*

2.1 The recognition of the fundamental rights of civil litigants – a brief comparative perspective

The recognition of the fundamental rights of civil litigants in different legal systems was a relevant topic in two previous studies conducted by one of the authors.[8] In the present context the topic forms part of the relevant background for the development of the main theme. It is therefore necessary to include a brief updated commentary on the subject matter under this *excursus*.

Developed legal systems worldwide accord certain fundamental procedural rights or guarantees to the parties in civil litigation. This entails certain basic requirements that must be complied with to ensure that procedural justice is achieved.[9] These requirements, which include the age-old and well-known *audi alteram partem* (hear the other side) principle, form the *raison d'être* of all the specific rules regulating the litigation process.[10] The fundamental rights or guarantees accorded to the parties thus constitute the principles, *ie* the theoretical foundation, upon which most of the specific rules regulating civil litigation are based. Andrews succinctly explains the role of these principles: "The most important point is that principles are general in their scope. They help to identify the connections between legal rules. If rules can

5 See De Vos and Broodryk "Managerial judging and alternative dispute resolution in Australia: an example for South Africa to emulate?" (part 2) 2018 *TSAR* 18 20-22.

6 See Andrews (n 2 (2008) 212.

7 See De Vos and Broodryk (n 5) 22; Bamford and Rankin (n 2) 227.

8 See De Vos *Grondslae van die Siviele Prosesreg* (1988 thesis RAU) ch 2; De Vos "Die grondwetlike beskerming van siviele prosesregtelike waarborge in Suid-Afrika" 1991 *TSAR* 353.

9 See Habscheid (ed) *Effectiveness of Judicial Protection and Constitutional Order* (1983) 15 *et seq.*

10 De Vos (n 8 (1991 *TSAR*)) 355.

be likened to bricks, principles are the foundations and girders which support the great legal edifice."[11]

Different legal systems follow different approaches in giving recognition to fundamental civil procedural rights or guarantees. In a broad sense three typical approaches can be identified: (i) the rights are not expressly recognised but can be implied from specific rules; (ii) the rights are expressly stated in legislation or a code but enjoy no higher status than other ordinary legislation; (iii) the rights are proclaimed in a constitution which enjoys a supreme status above ordinary legislation and requires all legislation to be consistent with such rights.

2.1.1 Rights are not expressly recognised but can be implied from specific rules

According to the first approach the fundamental procedural rights are not expressly proclaimed in a constitution or ordinary legislation. They can be identified only by way of inferences from specific procedural rules. Court decisions are also more inclined to deal with detailed rules than with broad principles.

The traditional position in England, prior to the adoption of the Human Rights Act 1998, serves as a good example of this approach. The right to be heard (*audi alteram partem*) and other civil procedural principles were not expressly mentioned in legislation, such as the Supreme Court Act 1981, and court decisions on procedure dealt rather with detail than with any principles. Jolowicz was to the point when he observed that "English law tends rather to take [these guarantees] for granted than to enshrine [them] in a legislative text".[12] This does not mean of course that such principles had no place in the traditional system. It simply means that they had to be implied from specific rules or case law dealing with statutory provisions or court rules. Quoting Jolowicz again:

> "[T]he English tradition places little faith in broad statements of sweeping general principle. Being, both in its legislation and in its case-law, pragmatic and not theoretical in style, the fundamental principles of English law can be discovered only by a process of extrapolation or generalisation from a host of individual instances."[13]

Needless to say, these principles did not enjoy any special protection. The British parliament could at any stage adopt legislation infringing the fundamental rights of the parties, even though this is unlikely since procedural justice is embedded in the common-law system.[14] The traditional English approach also found its way into the former British colonies in Australia and still holds sway in the states and territories that have not adopted human rights acts.[15] That was also the position in South Africa before the adoption of a supreme constitution with a bill of rights entrenching not only substantive human rights but also fundamental procedural rights in both criminal and civil proceedings.[16]

[11] *Principles of Civil Procedure* (1994) 13. Also see Andrews (n 2 (2003)) 52-54; Andrews "Fundamental principles of civil procedure: order out of chaos" in Kramer and Van Rhee (eds) *Civil Litigation in a Globalising World* (2012) 19 20.

[12] Cappelletti and Tallon (eds) *Fundamental Guarantees of the Parties in Civil Litigation* (1973) 664.

[13] Cappelletti and Tallon (eds) (n 12) 172.

[14] Cappelletti and Tallon (eds) (n 12) 670; De Vos (n 8 (1991 *TSAR*)) 357.

[15] See par 3 below.

[16] See par 4 below.

2.1.2 Rights are expressly stated in legislation or a code but enjoy no higher status than other ordinary legislation

In accordance with the second approach a state may adopt an act on human rights which includes certain fundamental civil procedural rights or, if it is a codified legal system, a state may include such rights in the civil procedure code. In both instances the instrument containing the relevant rights is accorded an important status and must be heeded by the courts in the interpretation of other statutory provisions. However, such an instrument enjoys no higher status than ordinary legislation or law and courts cannot declare an act which is inconsistent with the human rights instrument invalid. The following systems are illustrative of this approach.

The French *Code de Procedure Civile* contains a chapter setting out the guiding principles which form the foundation of all the rules regulating the civil process.[17] These principles include especially the different aspects of the adversary principle (*principe du contradictoire*), such as the right to be heard, the right to be apprised of the opponent's case and the duty of the judge to respect the adversary principle.[18] The guiding principles are an important cornerstone of French civil procedure but they enjoy no higher status than the ordinary law of the land. Changes could therefore be made to these principles in the same way as in the case of other ordinary legislative provisions and courts have no power to review legislation that has been promulgated.[19] However, the position must be qualified by taking into account the application of article 6(1) of the *European Convention for the Protection of Human Rights and Fundamental Freedoms* of 1950 (European Convention) by the French courts. Ferrand explains:

> "[T]he principles of effective access to justice, due process of law, right to a judge provided by law, the adversarial nature of the proceedings in the presence of the parties involved (*principe contradictoire, ...*), reasonable time to reach a decision or the right to enforcement of court decisions are usually interpreted and applied in accordance with this international legal instrument."[20]

Although the principles contained in the French code could be changed by the ordinary legislative process in France the authors submit that the European Convention acts as a supra-national protective measure to ensure that procedural justice will be maintained in French courts.

Examples in the common law world of the second approach to the recognition of fundamental procedural rights of civil litigants include the United Kingdom and the two Australian jurisdictions that adopted human rights acts, namely Victoria and the Australian Capital Territory.

[17] See Cadiet "The new French code of civil procedure (1975)" in Van Rhee (ed) *European Traditions in Civil Procedure* (2005) 49 56. The *Nouveau Code de Procedure Civile* of 1975, which replaced the *Code de Procedure Civile* of 1806, underwent some modifications and was renamed *Code de Procedure Civile* in 2007. This was done by means of s 26 of *loi* 2007 - 1787, 20-12-2007 – see https://fr.wikipedia.org/wiki/Code_de_procedure_civile (France) (30-12-2018).

[18] s 14-17 of the *Code de Procedure Civile* – see sources quoted above (n 17); also see Dadomo and Farran *The French Legal System* (1993) 152.

[19] De Vos (n 8 (1991 *TSAR*)) 357-358; Dadomo and Farran (n 18) 108-109. The *Conseil Constitutionnel* can review and invalidate legislation that has been passed by parliament but not yet promulgated if it is not in conformity with the constitution. This can be done on request of the president of the Republic, the president of the national assembly, the president of the senate or 60 members of the national assembly or 60 senators – a 61 and 62 of the French Constitution of 4-10-1958, as amended up to 23-7-2008 – see https//wipolex.wipo.int/en/text/179092 (2-1-2019).

[20] "The French approach to the globalisation and harmonisation of civil procedure" in Kramer and Van Rhee (n 11) 335 337.

The United Kingdom adopted the Human Rights Act 1998 incorporating most of the European Convention's provisions into its domestic law.[21] From a civil procedural perspective the most important provision is article 6(1) of the European Convention, which proclaims the right to "a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law".[22] Although the right of access to justice is not expressly mentioned the European court of human rights held that it must be implied and this reasoning has been adopted by the British courts.[23] An analysis of the meaning ascribed to each right by the European court of human rights, the British courts and commentators falls outside the scope of this article. Andrews remarks aptly that the "[e]nactment of the Human Rights Act 1998 has produced a cascade of literature".[24] To this must be added all the literature on the European Convention and the case law of the European court of human rights, as well as British case law on the Human Rights Act. It is indeed an enormous body of literature and case law. Suffice it therefore to summarise the essence of this provision. It provides *inter alia* for the following rights:

(a) access to justice, including access to a lawyer and legal aid (implied right);
(b) a public hearing;
(c) a hearing within a reasonable time;
(d) a hearing before an independent and impartial tribunal established by law;
(e) effective enforcement of a judgment (implied right); and
(f) a fair hearing. This is a wide concept embracing several subsidiary rights (implied), including:
    (i) the right to notice of the proceedings and the nature of the opponent's case;
    (ii) the right to equality of arms, *ie* the parties must be treated equally;
    (iii) the right to be present at an adversarial hearing, to present evidence and to challenge (cross-examine) the opponent's witnesses; and
    (iv) the right to a reasoned judgment.[25]

Case law of the European court of human rights and the British courts indicates that, "[s]ubject to a limited number of absolute guarantees",[26] the fundamental rights of individuals are not absolute and limitations may therefore be imposed in legitimate cases.[27] In the authors' opinion absolute guarantees certainly include the right to a hearing presided over by an independent and impartial judicial officer. It is submitted that these qualities of the bench cannot be limited without compromising the entire proceedings.[28]

[21] The act came into operation on 2-10-2000 – Andrews (n 2 (2003)) 149.
[22] Sch 1 of the Human Rights Act 1998 – see Wadham and Mountfield *Human Rights Act 1998* (2000) 178.
[23] Andrews (n 2 (2003)) 156, citing the European court of human rights' decision in *Golder v UK* 1975 1 EHRR 524 536, and 172-186 where the author discusses UK case law on the access to justice principle.
[24] (n 2 (2003)) 149 n 4.
[25] See Andrews (n 2 (2003)) 149-186; Wadham and Mountfield (n 22) 87-92; Uzelac and Van Rhee (eds) *Access to Justice: Towards New European Standards of Affordability, Quality and Efficiency in Civil Adjudication* (2009) 1-2.
[26] *Brown v Stott* 2001 2 WLR 817 (PC) 839-840; Andrews (n 2 (2003)) 151.
[27] See *eg Ashingdane v UK* 1985 7 EHRR 528 upholding a restriction preventing a mental patient from suing a mental hospital except if the latter had been guilty of negligence or bad faith; Andrews (n 2 (2003)) 157-159.
[28] See Cappelletti and Tallon (eds) (n 12) where Jolowicz remarked: "Without a judiciary which can and will administer the law fairly and fearlessly ..., no other guarantee given to the parties is likely to be of value."

The Human Rights Act broke with the past by importing a supra-national standard into domestic law and by obliging courts to decide cases compatibly with the rights and freedoms contained in the European Convention and some of its protocols (referred to as "Convention rights" in the Human Rights Act).[29] The courts are also required to interpret legislation in conformity with such rights wherever possible.[30] Although the Human Rights Act imported a standard to which legislation should, as a rule, conform it still remains part of ordinary legislation and courts have no authority to invalidate legislation which they find to be incompatible with a convention right.[31] However, a court can *declare* a legislative provision to be incompatible with a convention right, whereafter the matter will be referred to the government to consider taking remedial action in collaboration with parliament.[32] This approach, which has been called the dialogue model,[33] ensures in the authors' view that parliamentary sovereignty is maintained. Although the incorporation of the European Convention's provisions into the United Kingdom's domestic law did not create an instrument with a higher status than other legislation, as is the case with a supreme constitution, it was nevertheless a watershed in the United Kingdom's history. The convention rights established a yardstick against which legislation had to, and still has to, be measured to assess its compatibility. In the authors' view these rights laid the foundation for the development of a human rights culture in the British legal system. The impact of the European Convention on this legal system was eloquently worded by an eminent British judge: "The European Convention, by virtue of the Human Rights Act 1998, now permeates, actually or potentially, every aspect of our law. Nothing can now be properly conceptualized without the added human rights dimension ..."[34]

The European Union Charter of Fundamental Rights, 2000, which offers wider protection of human rights than the Human Rights Act, is also still applicable in the United Kingdom, but all indications are that it will cease to apply after Brexit.[35] This instrument falls outside the ambit of this paper.

The position in the two Australian jurisdictions is discussed below.[36]

2.1.3 Rights are proclaimed in a constitution which enjoys a supreme status above ordinary legislation

According to the third approach the fundamental rights of civil litigants, together with other fundamental human rights and freedoms, are usually entrenched in a bill or charter of rights included in a supreme constitution to which all legislation must

[29] s 1 of the Human Rights Act 1998. The articles of the European Convention in which the rights and freedoms are proclaimed are set out in sch 1 of the Human Rights Act 1998 – see Wadham and Mountfield (n 22) 5 and 177.

[30] Wadham and Mountfield (n 22) 5.

[31] The government is required when launching a bill through parliament to state whether its provisions are compatible with the convention rights, but if they are not the government could still proceed – s 19 of the Human Rights Act 1998; Wadham and Mountfield (n 22) 173.

[32] s 10 of the Human Rights Act 1998; only the superior courts have the power to make such a declaration – s 4 of the Human Rights Act 1998; Wadham and Mountfield (n 22) 169 and 165.

[33] Colbran *et al* (n 2) 28.

[34] Sedley "One year later" 2001 *Judicial Studies Board Journal* 7 cited by Andrews (n 2 (2003)) 172.

[35] In 2018 both houses of parliament voted against retaining the EU Charter after Brexit and its fate therefore seems to be sealed. See Cooper "The fate of the Charter of Fundamental Rights in UK law after Brexit is sealed" (20-06-2018) - ohrh.law.ox.ac.uk/the-fate-of-the-charter-of-fundamental-rights-in-english-law-after-brexit-is-sealed/ (3-01-2019).

[36] See par 3 below.

conform. A concomitant feature of this approach is the power of judicial review entrusted to the courts to ensure compliance of legislation (and other state action) with the constitution. The American, Canadian, German and South African systems are typical examples of this approach. The German system falls outside the ambit of this paper, while the South African system is discussed below.[37] A brief exposition of the position in the United States of America (USA) and Canada follows. The focus falls on the federal level.

The Constitution of the United States of America of 1787 is the "supreme Law of the Land,"[38] meaning all the federal and state laws of the United States of America must conform to its provisions, and the courts are empowered to invalidate legislation found to be unconstitutional.[39] An interesting aspect of the constitution is that it does not expressly provide for judicial review of legislation. However, in *Marbury v Madison*, decided in 1803, the supreme court of the United States of America, in an opinion written by Marshall CJ, established the principle of judicial review of legislation, which has endured ever since.[40] This judicial power, as it evolved, is not confined to the supreme court, as Cappelletti explains:

> "Although there is neither a special, differentiated proceeding to attack unconstitutional statutes before the courts, nor any court specially created for that purpose, unconstitutional statutes relevant to the decision of any civil or criminal case must be set aside by any court as an incidental issue to the decision of the concrete case. *Stare decisis*, then does the rest: once the constitutional issue has been decided by the highest court through the normal means of attack, the unconstitutional statute, although still 'on the books', has become 'a dead law' for all practical effects."[41]

The 27 amendments which have been added to the constitution over the course of just over 200 years contain a number of fundamental human rights, not only those that are relevant in criminal cases but also those that have a bearing on civil proceedings.[42] The most important fundamental rights accorded to civil litigants are undoubtedly the famous "due process of law" and "equal protection of the laws" guarantees contained in the Fourteenth Amendment adopted in 1868. The relevant part of the amendment reads as follows:

> "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without the due process of law; nor deny to any person within its jurisdiction the equal protection of the laws".[43]

[37] The German Basic Law (*Grundgesetz)*, adopted in 1949 and retained with modifications after unification of Germany in 1990, provides for the protection of fundamental human rights and freedoms, as well as basic procedural rights, and a federal constitutional court (*Bundesverfassungsgericht*) empowered to invalidate legislation found to be inconsistent with the basic law. See De Vos (n 8 (1991 *TSAR*)) 360; Church, Schulze and Strydom *Human Rights from a Comparative and International Perspective* (2007) 99; https://www.brittanica.com/topic/Federal-Constitutional-Court (5-1-2019). The position in South Africa is discussed in par 4 below.

[38] a 6 of the constitution – https://www.law.cornell.edu/constitution/articlevi (5-1-2019).

[39] De Vos (n 8 (1991 *TSAR*)) 359-360; Church *et al* (n 37) ch 8 generally.

[40] 5 US 1 Cranch 137 (1803); De Vos (n 8 (1991 *TSAR*)) 360; Campbell and Hepperle *The US Legal System* (1983) 172-173; Abraham *The Judicial Process* (1993) 270-288 citing numerous cases in which this power was exercised; https://supreme.justia.com/cases/federal/us/5/137/ (5-01-2019).

[41] Cappelletti and Tallon (eds) (n 12) 674-677.

[42] The first 10 amendments, which are contained in the form of the bill of rights, were all passed in 1791 while the remaining 17 amendments were adopted over the next two centuries, the 27th Amendment being added in 1992. See Church *et al* (n 37) 132-133; https://www.archives.gov/founding-docs/constitution-transcript (5-1-2019).

[43] s 1 of the 14th Amendment. See https://www.u-s-history.com/pages/h926.html (5-01-2019); Church *et al* (n 37) 134.

The due process requirement is especially important because the courts decided in numerous cases since its adoption that most of the rights falling under the first ten amendments, *ie* the bill of rights, must be incorporated under the due process provisions. In other words, due process is also applicable when those rights are exercised and it embraces fair procedures, such as due notice of the proceedings and the right to be heard, not only in criminal cases but also in civil proceedings generally.[44]

The Canadian Constitution Act, 1982, proclaims itself as the "supreme law of Canada", adding that "any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force and effect".[45] A cornerstone of the Constitution Act is the Charter of Rights and Freedoms contained in part I of the act.[46] The charter entrenches a number of fundamental rights, including procedural guarantees, especially applicable in criminal cases, but it also has a provision relevant to civil proceedings, *viz* section 15. It provides as follows: "Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination ...."[47] The equality principle embodied in this provision seems to be predominantly aimed at protection against all forms of discrimination.[48] However, it is submitted that the wording of the provision is wide enough to embrace fundamental procedural guarantees, such as equal treatment of parties in civil litigation and other related procedural rights.

Before elaborating on the fundamental rights of civil litigants it is important to note that the Constitution Act clearly gives recognition to judicial review of legislation that violates the constitution. Section 24(1) of the charter provides as follows: "Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances."[49]

The jurisdiction of the court to entertain such an application clearly includes the power to invalidate legislation that breaches the provisions of the charter.[50] As is the case in the United States of America, any court seized of a matter in which the compatibility of a statute with the charter is raised, be it a criminal or civil court, may decide the issue. Whether the court is "a court of competent jurisdiction" is therefore determined by jurisdictional rules "external to the Charter itself".[51]

Except for the equality provision and a section dealing with the protection of a witness who gave self-incriminating evidence at any proceeding,[52] the charter does not contain any rights with a direct bearing on civil litigation. However, the Canadian Bill of Rights, 1960, which has not been repealed with the adoption of the Charter of Rights and Freedoms, embodies a core provision which lies at the heart of procedural justice in Canada, *viz* section 2. It reads as follows:

44 De Vos (n 8 (1991 *TSAR*)) 359; Church *et al* (n 37) 142 and 144.
45 Church *et al* (n 37) 86; https://laws-lois.justice.gc.ca/eng/Const/ (5-01-2019).
46 Church *et al* (n 37) 86.
47 See https://laws-lois.justice.gc.ca/eng/const/page-15.html (4-01-2019).
48 Church *et al* (n 37) 86-87.
49 Church *et al* (n 37) 92; https://www.canlii.org/en/ca/laws/stat/schedule-b-to-the-canada-act-1982-c-11/latest/schedule-b (6-01-2019).
50 Church *et al* (n 37) 86.
51 *Singh v Canada (Minister of Employment and Immigration)* 1985 1 SCR 177 222; Church *et al* (n 37) 94.
52 s 15 and 13 of the charter respectively.

"[N]o law of Canada shall be construed or applied so as to ...
(e) deprive a person of the right to a fair hearing in accordance with the principles of fundamental justice for the determination of his rights and obligations."[53]

The shortcoming of the bill of rights has been that it is only a statute and not a constitutional instrument with a status above ordinary legislation. It further only applies to the federal level and not the provinces, unlike the charter which applies to both. Its main purpose was to serve as an instrument in aid of the interpretation of other statutes.[54] Despite the limited status of the bill of rights as an instrument of construction the courts have managed somehow to ascribe a somewhat higher status to the bill than ordinary federal legislation. This is illustrated by the following *dictum* of Laskin J in *Hogan v The Queen*: "The Canadian Bill of Rights is a half-way house between a purely common law regime and a constitutional one; it may aptly be described as a quasi-constitutional instrument."[55]

It appears therefore that a distinction needs to be drawn between the status of the equality clause of the charter and the fair hearing provision of the bill of rights. The equality section enjoys supreme status as part of the supreme constitution, whereas the fair trial principle embodied in the bill of rights has the status of an ordinary statute. However, as mentioned, the latter attained a somewhat higher status through case law.

2.2 Civil procedural reform in England over the past 150 years

In order to assess the position regarding the fundamental rights of civil litigants in Australia and South Africa at present it is necessary to take a brief look at the main features of reforms to the civil justice system in England over the past 150 years. They provided the stimulus for developments in the former British territories. This brief exposition is mainly sourced from Sorabji,[56] which may be summarised under the following headings:

2.2.1 The position prior to 1873

Prior to the fundamental reforms of 1873-1875 the common law was applied in the common law courts while equity was administered in a single superior court, the court of Chancery presided over by the Lord Chancellor.[57] The respective approaches of the two court structures in dispensing substantive justice differed fundamentally.

The proceedings in the common law courts were characterised by absolute formalism. There was no clear separation between substantive and procedural law. The party seeking a remedy from the court had to select the right form of action and then comply strictly with the distinct procedure applicable to that specific type of action. Selection of the wrong form of action or, if the right form of action was selected, any deviation from the applicable procedure resulted in dismissal of the action. Justice could be dispensed only when there was absolute compliance in both respects.[58] Thus, procedure was not a means to an end but an end in itself. In other

[53] https://laws-lois.justice.gc.ca/eng/acts/C-12.3/page-1.html (4-01-2019).
[54] Church *et al* (n 37) 84.
[55] 1975 2 SCR 574 579; Church *et al* (n 37) 84.
[56] (n 2) ch 2 and 4-7; also see Van Rhee (ed) (n 17) 129-159.
[57] Several courts were charged with the duty to apply the common law, particularly the court of common pleas, King's or Queen's bench and court of exchequer. See Sorabji (n 2) 14 and 38.
[58] Sorabji (n 2) 34-36.

words, procedure was the master and not the servant of justice.[59] This regime was aptly coined as "procedural despotism".[60]

In the court of Chancery there was a clear distinction drawn between equity and procedure, and the same procedure applied irrespective of the nature of the claim.[61] Equity's policy was to achieve complete justice between the parties and procedural error was not allowed to jeopardise this outcome. Procedure was therefore a means to an end and not an end in itself.[62] In due course the court of Chancery also adopted a body of technical and complex procedural rules and required strict compliance therewith. However, the policy of finding the truth and dispensing complete justice remained in place. In other words, the court was committed to deciding every case on its merits, thus securing substantive justice, and would not dismiss a claim on the basis of procedural failure.[63] The pursuit of complete justice was regarded as all-important, with the result that the time and cost involved in this quest were not seen as issues. This policy coupled with a system of complex rules gave rise to a practice of raising procedural points whenever possible.[64] The result in the end was intolerable delays. A leading commentator at the time remarked that "[n]o man ... can enter into a Chancery suit with a reasonable hope of being alive at its determination, if he has a determined adversary".[65]

2.2.2 Reforms of 1873-1875 and adoption of the Rules of the Supreme Court (Rules) 1875

The reforms introduced by the Judicature Act of 1873, as amended by the Judicature Act of 1875, and the Rules of 1875 created a totally different litigation landscape regarding structure, procedure and theory of justice. A new court structure, the supreme court of judicature, consisting of the high court and the court of appeal was created in which both common law and equity would henceforth be administered. In other words, common law and equity were merged and the new procedure laid down in the Rules would apply, irrespective of the nature of the claim.[66] The common-law forms of action were abolished and a less complex, simpler procedure was adopted, which was illustrated *inter alia* by the introduction of fact pleading.[67] Furthermore, the jury, which featured only in common law trials and played no part in equity proceedings, was relegated to "the exception rather than the rule".[68] The structural and procedural changes were accompanied by the adoption of equity's theory of complete justice. In other words, the courts were henceforth tasked with the duty of deciding cases on their merits and not allowing procedural error to frustrate a claim, thus securing substantive justice between the parties.[69] A court would therefore always correct procedural mistakes to allow the case to be decided on its merits, unless

[59] Sorabji (n 2) 37.
[60] Sorabji (n 2) 36 citing Sutherland "Joinder of actions" 1919-1920 *Michigan Law Review* 571 573.
[61] Sorabji (n 2) 39.
[62] Sorabji (n 2) 39.
[63] Sorabji (n 2) 45.
[64] Sorabji (n 2) 43.
[65] Cited in Sorabji (n 2) 33 with reference to O'Main "Traditional equity and contemporary procedure" 2003 *Washington Law Review* 429 448 and generally Spence *The Equitable Jurisdiction of the Court of Chancery* (1846).
[66] See Sorabji (n 2) 56 *et seq*. Sorabji also shows that the reforms of 1873-1875 were a culmination of a reform process that started in earnest in the 1850s, (46 - 56); also see Van Rhee (ed) (n 17) 147-149.
[67] Sorabji (n 2) 59; Van Rhee (ed) (n 17) 151.
[68] Sorabji (n 2) 58.
[69] Sorabji (n 2) 56-58.

prejudice to the other side could not be addressed by way of a costs order or other appropriate relief.[70] Sorabji states that this outcome "is often, and correctly, presented as the triumph of equity over the common law".[71] The adoption of equity's approach to achieving substantive justice took some twenty years to be fully embraced by the courts, but once the rejuvenated theory of justice was established it remained in place until the implementation of the Woolf reforms in the 1990s.[72]

2.2.3 The Woolf reforms of the 1990s

The new civil procedural code[73] embodied in the Civil Procedure Rules, 1999, which flowed from Lord Woolf's access to justice reports,[74] set out, like the judicature acts and Rules of the 1870s had done, to introduce a totally new litigation landscape. This was achieved mainly by adopting a transformed procedural system and a new theory of justice. The reasons advanced for the need radically to transform the civil justice system were, as mentioned, the perceived ills of "high cost of litigation, delay and complexity" which plagued the previous regime.[75] The view has been formed that the emphasis on achieving substantive justice and the relaxed approach regarding compliance with procedural rules had resulted in excessive delays and costs.[76]

As mentioned, the keystone of the Woolf reforms, introduced to address the stated evils, thus rendering justice more accessible, simplifying and expediting proceedings and saving costs, was judicial case management.[77] In the words of Lord Woolf, there had to be "a fundamental transfer of responsibility for the management of civil litigation from litigants and their legal advisors to the courts".[78] As managers of the proceedings, especially during the pre-trial phase, judges acquired the power and the duty to see to it that the parties comply with the prescribed procedural rules.[79] This was undoubtedly a radical departure from the past, which was dominated by party control.[80] As alluded to, another important mechanism in the overall strategy, which goes hand in hand with case management, is the promotion of alternative dispute resolution, such as mediation, aimed at settling the dispute.[81] Ardent supporters of this drive away from trial adjudication to mediation see this form of dispute resolution as the panacea that will cure the civil justice system of its ills. It is therefore regarded as the preferred way of resolving a dispute, while trial adjudication is seen as a failure.[82]

The transformation of procedure was accompanied by the adoption of a new theory of justice, which replaced the previous regime's theory of achieving substantive

[70] *Tildesley v Harper* 10 ChD 393 (1876) cited by Sorabji (n 2) 62.
[71] (n 2) 56.
[72] See Sorabji (n 2) 68.
[73] Civil Procedure Rules 1.1(1) describes the Civil Procedure Rules as a "new procedural code".
[74] *Access to Justice: Interim Report* (1995) and *Access to Justice: Final Report* (1996); Kramer and Van Rhee (eds) (n 11) 28.
[75] See Andrews (n 2 (2003)) 31; par 1 above.
[76] See Sorabji (n 2) 73.
[77] Andrews (n 2 (2003)) 37 and 337; par 1 above.
[78] *Interim Report* ch 4 par 2 cited by Andrews (n 2 (2003)) 37.
[79] See generally Andrews (n 2 (2003)) ch 13 and 14.
[80] Andrews (n 2 (2003)) 334.
[81] See Andrews (n 2 (2003)) 39, 131 and 539; par 1 above.
[82] See Genn, who is an eloquent critic of the drive away from trial to mediation, "What is justice for – reform, alternative dispute resolution, and access to justice" 2012 *Yale Journal of Law & Humanities* 397 409. According to her, judicial determination is rather the "heart and essential purpose" of the civil justice system.

justice at the cost of procedural compliance. Sorabji, who is clearly an ardent supporter of the Woolf reforms to their full extent, coined the new theory as one of "proportionate justice".[83] In a nutshell this means that dispensing substantive justice between the parties is not the primary and only goal of the civil justice system. The new theory, as reflected in the Civil Procedure Rules' "overriding objective of dealing with cases justly"[84] has a much wider ambit in that consideration is given not only to the interests of the parties but also, and especially, to the position of other litigants waiting to be heard and the effective use of the court's resources. The aim is therefore to secure "an equitable distribution of the court's resources among all litigants".[85] This may have the result that individual justice is not attained in a given case if, in the court's view, its achievement would undermine the efficient functioning of the court's processes and the ability of other litigants to access the justice system. According to Sorabji such an outcome is justified on the basis of proportionate justice for all which is supported by the wider public interest.[86] Proportionate justice further means that judges must ensure strict procedural compliance and impose sanctions in the case of failure to comply; otherwise the effective functioning of the court and its ability to provide equitable access to all might be impaired.[87] Finally, the concept of proportionate justice also entails that resources and time must be allocated to cases on a proportionate basis, taking into account *inter alia* the value of the claim, the complexity of the issues and the importance of the case.[88] In the authors' view such proportionate treatment of cases inevitably means that all cases cannot aspire to receive the same form of justice. Cases involving complex issues and huge claims receive preference in terms of time and resources and therefore the best form of justice, while less complex cases and cases involving smaller claims must be satisfied with less time and resources and thus a more limited form of justice. The question may be asked if this is truly justice.

According to Sorabji it became apparent ten years after the Woolf reforms that they had failed to cure the justice system of its ills, especially the high cost of litigation.[89] He identifies case management as the crucial area where the new theory of justice failed. According to Sorabji the crux of the matter was "that courts had failed to eradicate the previous lax approach to rule compliance and the liberal approach to procedural default that had characterised the RSC".[90] The reason for this has been the courts' inclination still to strive to achieve substantive justice in individual cases.[91] He laments this attitude by judges whom he calls "traditionalists" and suggests that they "will need to be educated and the rejectionist approach laid to rest".[92]

The Woolf reforms were followed by the Jackson review of litigation costs of 2009, which recommended certain changes to *inter alia* the "litigation funding regime".[93]

[83] (n 2) 136.
[84] Civil Procedure Rules 1.1; Andrews (n 2 (2003)) 38.
[85] Sorabji (n 2) 136.
[86] (n 2) 180 and 217.
[87] Sorabji (n 2) 209; Andrews (n 2 (2003)) 364.
[88] This was done by the creation of different procedural case tracks for different cases. See Sorabji (n 2) 183 and 188; Andrews (n 2 (2003)) 38-41.
[89] (n 2) 201 where he states: "Litigation was as expensive as ever, if not more so."
[90] (n 2) 203.
[91] (n 2) 203.
[92] Sorabji (n 2) 211.
[93] Sorabji (n 2) 202, citing Jackson *The Review of Civil Litigation Costs in England and Wales* (2009).

These recommendations were implemented in 2013.[94] It appears that no fundamental procedural changes flowed from the Jackson reforms but an important amendment of the overriding objective stated in Civil Procedure Rules 1 was implemented on 1 April 2013.[95] The overriding objective of dealing with cases "justly" was amplified by adding the phrase "and at proportionate cost".[96] And the subsection which sets out measures included under dealing with cases justly now contains a new item which expressly tasks the courts with the duty of "enforcing compliance with rules, practice directions and orders".[97] It appears that the addition of these "explicit references to proportionate costs and rule-compliance" was a strategy aimed at ensuring that courts fully embrace the new theory of proportionate justice.[98] Time will tell how the courts will react to this.

The proponents of alternative dispute resolution continue with their quest to promote alternative dispute resolution methods, especially mediation, as the preferred method of dispute resolution above trial adjudication, but for now the position in the United Kingdom remains a voluntary regime, subject to strong persuasion from the bench and the legal profession. In its recent report on alternative dispute resolution and civil justice the civil justice council stopped short of recommending compulsory alternative dispute resolution as a condition for instituting proceedings. However, it made several recommendations aimed at making the parties aware and persuading them of the benefits of alternative dispute resolution methods, such as mediation.[99] In the authors' view the council obviously had to be conscious of the access to justice guarantee, which is one of the implied convention rights incorporated in the Human Rights Act, 1998.[100]

2.2.4 Questions for consideration in the context of the Australian and South African systems

(a) In view of the ever-expanding role of the case management regime in common law systems requiring strict rule-compliance, could this be seen as a return to formalism? It is clearly not the kind of formalism that held sway in England prior to the reforms of 1873-1875. But is it not formalism nevertheless, in the sense that procedural error may result in the imposition of a judicial sanction causing an arguable claim to fail, which in turn means that substantive justice is not being achieved? What about a party's right to present his or her case fully and obtain a judicial determination on the merits? Has rule-compliance not become an end in itself, instead of a means to an end, *viz* to achieve justice? Finally, in the context of promoting the theory of proportionate justice frequent references are made to other litigants waiting to be heard and the court's limited resources that must be

[94] Sorabji (n 2) 205.
[95] Sorabji (n 2) 214.
[96] Civil Procedure Rules 1.1(1).
[97] Civil Procedure Rules 1.1(2)(*f*); Sorabji (n 2) 214.
[98] See Sorabji (n 2) 215.
[99] See *Alternative Dispute Resolution and Civil Justice* CJC alternative dispute resolution Working Group Final Report (Nov 2018) s 9: recommendations.
[100] This was in line with the submission of the law society to the council (n 99) summary; par 2.1.2 above; see also *Halsey v Milton Keynes General NHS Trust; Steel v Joy and Halliday* 2004 4 All ER 920 par 4-11, 9 and 50-54 in which the court of appeal declined to make an adverse costs order against the defendant trust because of its refusal to take part in mediation. The court endorsed the judicial encouragement of the parties to mediate but cautioned that, having regard to art 6 of the European Convention, "to oblige truly unwilling parties to refer their disputes to mediation would be to impose an unacceptable obstruction on their right of access to the court" (par 9).

distributed equitably among all litigants.[101] Are these not mythical concepts? What empirical research is there to back this up? How many litigants are waiting to be heard and how limited are the court's resources?[102]

(b) Given the relentless drive from trial adjudication to alternative dispute resolution, especially mediation, are the courts not diminishing their crucial constitutional role in the context of the adjudication of civil disputes, thus also impoverishing the development of the law through decided cases? And does this strategy not have an adverse effect on the parties' right of access to a court for a judicial determination, *ie* the parties' right to their day in court? Has this right not become a hollow guarantee?[103]

3 *Position regarding fundamental civil procedural rights in Australia*

3.1 Historical perspective

The influence of English law in the former British colonies in Australia, which became federal states in the Commonwealth of Australia in 1901, ensured that all the different jurisdictions adopted the adversarial system of civil litigation and the traditional English approach regarding the recognition of the fundamental rights of litigants.[104] Accordingly, the principle of party control was embraced and in typical common law style legislation, court rules and cases generally dealt with detailed procedural requirements and shied away from broad principled statements proclaiming the fundamental rights of litigants.[105] In other words, as was the case under the traditional regime in England, the existence of the fundamental procedural rights or guarantees of the parties could be identified only by way of inferences from specific legislative provisions and case law dealing with procedural rules.[106]

3.2 Ratification of the International Covenant on Civil and Political Rights (International Covenant) by Australia

In 1980 Australia ratified the International Covenant, which had entered into force in 1976.[107] Article 14 of the International Covenant has an important bearing on both criminal and civil proceedings. The part which is relevant for civil proceedings reads as follows: "All persons shall be equal before the courts and tribunals. In the determination of ... his rights and obligations in a suit at law, everyone shall

[101] See Sorabji (n 2) 225 and 136.

[102] See Genn *Judging Civil Justice* (2009) 52 and 62-64 pointing out the lack of empirical research to serve as a basis for reform.

[103] The role of case management and alternative dispute resolution in the context of civil litigation in Australia and South Africa were discussed by the authors previously – see De Vos and Broodryk (n 4 and 5). In the present context the emphasis falls on the impact of these phenomena and other reforms on the fundamental rights of the parties in civil litigation. See also Andrews (n 2 (2003)) 212-214, where the author defends the current trend of quite significantly restricting the parties' right to their day in court.

[104] See De Vos and Broodryk (n 4) 683; Carney *The Constitutional Systems of the Australian States and Territories* (2006) 1.

[105] See generally De Vos and Broodryk (n 4) 683 and the sources cited there.

[106] See Kendall and Curthoys *Civil Procedure Western Australia* (loose leaf) par 1.0.8B stating that "there are no positive words in a statute" proclaiming a party's right to be heard but that it is nevertheless "a deep-rooted principle of the common law".

[107] Colbran *et al* (n 2) 27; www.austlii.edu.au/au/other/dfat/treaties/1980/23.html (16-01-2019).

be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law."[108]

In the authors' view the ratification of this covenant was clearly a significant symbolic act in the sphere of international relations. But domestically it has no legal effect at either federal or state level.[109] The provisions of such an international treaty attain legal effect only when they are incorporated into the domestic law of a given country by means of legislation.[110] Although Australia's ratification of the International Covenant occurred close to forty years ago, not much has been achieved on local soil to honour this agreement. Numerous statutes bearing on certain human rights, such as anti-discrimination laws, have been passed at both federal and state level,[111] but little progress has been made overall to adopt comprehensive human rights acts incorporating the provisions of the International Covenant. At federal level there is as yet no such statute but at least at state level Victoria and the Australian Capital Territory took the lead by adopting human rights acts just over a decade ago and Queensland is presently in the process of following suit.[112]

3.3 Adoption of human rights acts at state level in Australia

As mentioned, there are two acts to be considered in this context.

3.3.1 The Human Rights Act 2004 (Australian Capital Territory)[113]

The majority of human rights proclaimed in part 3 of this act are based on the provisions of the International Covenant.[114] The most important provision in the context of civil proceedings is section 21 of the act, which enshrines the right to a fair trial. Under the heading "Fair trial" the relevant part of the section reads as follows: "Everyone has the right to have ... rights and obligations recognised by law, decided by a competent, independent and impartial court or tribunal after a fair and public hearing."[115]

There is clearly a close resemblance between section 21 and article 14 of the International Covenant, except that the section does not incorporate the right to equality before the law. The latter right is contained elsewhere in the act.[116]

The salient features of the Human Rights Act can be summarised as follows.[117] It is an ordinary act of the Australian Capital Territory's legislative assembly, which is a unicameral legislative body. This means that the act has no higher status than other statutes of the Australian Capital Territory. It follows that the act adopted the

[108] Colbran *et al* (n 2) 27.
[109] See Hemming and Penovic *Civil Procedure in Australia* (2015) 38.
[110] Hemming and Penovic (n 109) 38.
[111] See *eg* the Racial Discrimination Act 1975, Sex Discrimination Act 1984 and Fair Work Act 2009 at federal level and the Equal Opportunity Act 1984 (WA) and Equal Opportunity Act 2010 (Vic) at state level.
[112] See Colbran *et al* (n 2) 27-28; Human Rights Law Centre *Annual Report 2018* 3 – https://www.hrlc.org.au/news/2018/12/20/our-2018-annual-report (15-01-2019). The report mentions that the centre is currently engaged in a nationwide campaign for the adoption of an Australian charter of human rights. It also indicates that a human rights act will be passed in Queensland in early 2019.
[113] The summary of the salient aspects of this act is mainly based on UNSW Gilbert and Tobin Centre of Public Law *The Australian Capital Territory Human Rights Act* – see www.gtcentre.unsw.edu.au/node/3074 (17-01-2019); also see www.austlii.edu.au/legis/act/consol_act/hra2004148/ (17-01-2019).
[114] Gilbert and Tobin Centre (n 113).
[115] s 21 of the Human Rights Act 2004 (Australian Capital Territory).
[116] s 8 of the Human Rights Act (n 115).
[117] See UNSW Gilbert and Tobin Centre (n 113).

second approach regarding the recognition of fundamental rights discussed above.[118] The act provides that reasonable limits may be placed on human rights by laws that "can be demonstrably justified in a free and democratic society".[119] The act further requires the attorney-general to present a compatibility statement to the legislative assembly when a new bill is introduced indicating whether the bill is consistent with human rights and, if it is not, how it is inconsistent with such rights.[120] The Australian Capital Territory legislative assembly followed the British example by adopting the dialogue model, which regulates the interaction between the courts and the legislature in cases where the compatibility of legislation with human rights is in issue.[121] First, courts are enjoined to interpret legislation, as far as possible, in a way that is compatible with human rights[122] and they may use "international human rights jurisprudence" to assist in the task.[123] If the Australian Capital Territory supreme court finds that a legislative provision is inconsistent with any human right the court may issue a declaration of incompatibility, setting out such inconsistency, and notify the attorney-general, who must in turn notify the legislative assembly. The latter may then decide what action, if any, to take.[124] Such a declaration of incompatibility does not affect the validity of the legislation in question.[125]

Since a court cannot invalidate a statutory provision which is inconsistent with any human right, its power of review is very limited. Nevertheless, it is submitted that the rights enshrined in the Human Rights Act provide an important yardstick enabling the courts to test the compatibility of legislation with human rights and if appropriate to make a declaration of incompatibility. In the authors' view the existence of the act provides a strong stimulus for the development of a human rights culture among the Australian Capital Territory's judiciary and legal profession.[126]

3.3.2 The Charter of Human Rights and Responsibilities Act 2006 (Vic)[127]

The provisions of this charter correspond in all material respects to the Australian Capital Territory's Human Rights Act.[128] The rights proclaimed in the charter are also derived from the International Covenant and they likewise include the right to a fair trial. Under the heading "Fair hearing" the relevant part of section 24 provides as follows: "[A] party to a civil proceeding has the right to have the ... proceeding decided by a competent, independent and impartial court or tribunal after a fair and public hearing."[129]

The charter is also an ordinary act of the Victorian parliament and enjoys no higher status than other Victorian statutes. It follows that Victoria also aligned itself with the second approach regarding the protection of fundamental rights

[118] par 2.1.2 above.
[119] s 28 of the Human Rights Act (n 115).
[120] s 37 of the Human Rights Act (n 115).
[121] See par 2.1.2 above; Colbran *et al* (n 2) 28.
[122] s 30 of the Human Rights Act (n 115).
[123] s 31 of the Human Rights Act (n 115); UNSW Gilbert and Tobin Centre (n 113) 3.
[124] s 32(2) and 33 of the Human Rights Act (n 115); UNSW Gilbert and Tobin Centre (n 113) 4.
[125] s 32(3) of the Human Rights Act (n 115).
[126] See par 3.5 below where Australian Capital Territory case law is discussed.
[127] See *The Law Handbook 2018 – Your Practical Guide to the Law in Victoria* - https://www.lawhandbook.org.au/2018_11_01_07_charter_of_human_rights_and_responsibilities/ (17-1-2019); www5.austlii.edu.au/au/legis/vic/consol_act/cohrara2006433/ (17-01-2019).
[128] See Hemming and Penovic (n 109) 32.
[129] s 24 of the Charter of Human Rights and Responsibilities Act 2006 (Vic).

discussed above.[130] The charter further provides for the limitation of human rights under similar circumstances as in the Australian Capital Territory.[131] A statement of compatibility must also be presented to the Victorian parliament, but in this case it must be done by the member of parliament introducing the bill.[132] Victoria also adopted the dialogue model in so far as the compatibility of legislation with human rights is concerned. The courts must also interpret legislation as far as possible compatibly with human rights.[133] If that is not possible the Victorian supreme court may declare a legislative provision incompatible with a human right[134] and notify the attorney-general, who must in turn inform the responsible minister.[135] The minister must then make a presentation to parliament to reconsider the statutory provision.[136] As in the case of the Australian Capital Territory, a declaration of incompatibility does not affect the validity of the legislation in question.[137]

The authors' comments regarding the influence of the Australian Capital Territory's human rights act apply equally to the Victorian charter. The numerous references to the charter's provisions in Victorian case law bear testimony to its impact on the civil justice system in that state.[138]

3.3.3 Other jurisdictions

It follows from the discussion above that the other jurisdictions in Australia, which have not adopted human rights acts to incorporate the provisions of the International Covenant, maintain the traditional English common law approach regarding the recognition of fundamental rights of civil litigants.[139]

3.4 The new litigation landscape in Australia, especially judicial case management and alternative dispute resolution

Judicial case management and alternative dispute resolution was the subject matter of a previous study by the authors.[140] The idea with this article is therefore not to traverse the same terrain again. However, since the exercise of judicial case management powers, in conjunction with the use of alternative dispute resolution such as mediation, has the potential to limit or even deny parties their right to present their cases to a court for a judicial determination, it is necessary to recapitulate the essence of the subject matter.

The different jurisdictions in Australia have adopted the new philosophy regarding civil justice which emanated from the Woolf reforms with great enthusiasm and vigour. This was achieved by either adopting new civil procedure acts and court rules or by amending existing legislation and court rules.[141] In the authors' opinion

[130] par 2.1.2 above.
[131] s 7 of the Charter of Human Rights (n 129).
[132] s 28 of the Charter of Human Rights (n 129).
[133] s 32 of the Charter of Human Rights (n 129).
[134] s 36(2) of the Charter of Human Rights (n 129).
[135] s 37 of the Charter of Human Rights (n 129).
[136] s 37 of the Charter of Human Rights (n 129); Hemming and Penovic (n 109) 32.
[137] s 36(5) of the Charter of Human Rights (n 129).
[138] See par 5 below.
[139] They are New South Wales, South Australia, Western Australia, Tasmania and the Northern Territory. Queensland is expected soon to join Australian Capital Territory and Victoria by passing a human rights act – see n 112 and par 2.1.1 above.
[140] De Vos and Broodryk (n 4 and 5).
[141] See De Vos and Broodryk (n 4) 687.

the Australian jurisdictions effected this transformation of their litigation landscapes with even greater vigour than has been the case in England.

The salient features of the new litigation landscape can be summarised as follows.[142]

3.4.1 Overarching provisions

All jurisdictions in Australia at both federal and state/territory level have incorporated provisions in their statutory frameworks governing civil litigation in which the overarching or overriding objects of their civil procedural rules are proclaimed. The wording of the different statutory instruments differs, but in essence the goals are the same, *viz* to promote the just, efficient, timely and cost-effective resolution of disputes.[143] Some jurisdictions also imposed overarching obligations on the parties and their lawyers to assist the court in achieving the proclaimed goals.[144] In the authors' view these overarching objectives, as expounded by case law, constitute the new theory of justice in Australia.

3.4.2 Judicial case management powers

The different jurisdictions in Australia at both federal and state/territory level have embraced the idea of judicial case management with great enthusiasm by adopting elaborate rules setting out the wide powers of judges to control litigation, especially during the pre-trial phase but even during the trial. Again, the wording of the different legislative measures differs, but broadly the powers of the various courts correspond.[145] In essence the authority conferred upon judges comprises the power to give procedural directions covering a wide range of matters, all aimed at furthering the overarching objectives of the civil procedural rules.

Judges acting as case managers may, for example, give directions relating to compliance with timetables for different procedural steps and to any pre-trial procedure, such as the amendment of pleadings, discovery of documents, inspection of objects or premises and exchange of witness statements.[146] They may even give directions that interfere with the presentation of the parties' respective cases at the trial, for example by limiting the number of witnesses to be called, limiting the time for examination and cross-examination of witnesses, limiting the time for oral arguments and ordering experts on opposing sides to confer.[147] A recent amendment of the rules of the supreme court in Western Australia brought about a drastic change regarding a party's right to present expert evidence. Order 36A provides as follows:

> "A party may not adduce expert evidence at a trial ... unless –
> (a) the case manager for the case has directed that the party may do so; and
> (b) the party has complied with all directions given in relation to that expert evidence."[148]

[142] This summary is based on De Vos and Broodryk (n 4) 686-700 and (n 5) 20-24.

[143] De Vos and Broodryk (n 4) 686-689 referring to the Civil Procedure Act 2010 (Vic); Supreme Court Rules 2005 (Vic) and Rules of the Supreme Court 1971 (WA); see also Bamford and Rankin (n 2) 79.

[144] An example in this regard is Victoria – s 16-25 of the Civil Procedure Act (n 143); De Vos and Broodryk (n 4) 687.

[145] See Bamford and Rankin (n 2) 79; Hemming and Penovic (n 109) 48-64.

[146] De Vos and Broodryk (n 4) referring to the rules in Victoria and Western Australia; Hemming and Penovic (n 109) 48-64.

[147] See *eg* order 34.5A of the Rules of the Supreme Court (WA) (n 143); De Vos and Broodryk (n 4) 689-690; Hemming and Penovic (n 109) 58-64; Cairns *Australian Civil Procedure* (2016) 112-116 and 125-129.

[148] Rules of the Supreme Court (WA) (n 143).

In the authors' view the presentation of evidence, including expert evidence, is an essential element of a party's right to be heard (*audi alteram partem*). To limit the number of experts a party wishes to call or to direct the experts on opposing sides to confer in order to narrow the issues may be justifiable in appropriate circumstances. But to abolish a party's right to call an expert witness and make the presentation of such evidence dependent on the case manager's discretion appears to be a radical departure from one of the core components of the right to a fair trial.[149]

The compilation of practice directions or notes, amplifying court rules, in the different supreme courts in Australia is a growing phenomenon which has added to the procedural complexity of civil litigation, especially during the pre-trial phase. The Supreme Court of Western Australia Consolidated Practice Directions, running to 459 pages, is illustrative of the present-day tendency to regulate litigation in the finest detail.[150] Needless to say, case managers and registrars are also tasked with the duty to see to it that the parties comply with relevant practice directions. The Western Australian supreme court's direction on entry for trial bears testimony to the policy of detailed regulation and strict compliance with rules.[151] The direction sets out in great detail all the pre-trial steps that have to be completed and an attached "full case evaluation checklist" requires the parties to answer numerous detailed questions aimed at establishing if the case is ready for trial.[152] Only if the case manager is satisfied that all procedural requirements have been fully complied with will the case be entered for trial.[153] In the authors' view the entry for trial procedure is a hurdle of note that the parties have to clear to gain access to the court. It is also illustrative of the importance the courts attach to strict rule compliance by the parties in present-day litigation.

3.4.3 Compulsory mediation

The law makers in Australia have taken the idea of alternative dispute resolution, especially mediation, as the preferred method of dispute resolution to another level by making it compulsory. They have therefore deviated from the voluntary regime which is still in place in the United Kingdom.[154] All jurisdictions in Australia have empowered their courts under their respective case management regimes to refer the parties to mediation without their consent and the courts have embraced this idea enthusiastically. As a rule, a case will not be listed for trial if the mediation (or related alternative dispute resolution) process has not been exhausted.[155] Although the parties have the option to go to trial if mediation fails to result in a settlement of the dispute, mandatory mediation may *effectively*, due to cost considerations, deny a party his or her day in court.[156]

3.4.4 Court charges

To complete the features of the new civil justice system in Australia brief mention should be made of court charges for the issuing of various court processes, such as

[149] See par 3.6 below for further comments on this issue.
[150] See https://www.supremecourt.wa.gov.au/C/consolidated_practice_directions.aspx (19-01-2019).
[151] practice direction 4.4 (n 150).
[152] n 150.
[153] See practice direction 4.4.1.10 and 4.4.1.12 (n 150).
[154] See par 2.2.3 above.
[155] See *eg* Supreme Court of Western Australia Consolidated Practice Direction 4.2.1(8); De Vos and Broodryk (n 4) 698-700; Bamford and Rankin (n 2) 224.
[156] See Bamford and Rankin (n 2) 227; see par 3.6 below for further comments.

the originating process. Traditionally these charges were modest and did not impede access to the courts. However, there has been a dramatic increase in such costs, especially in the case of corporations, but the charges for private litigants have also risen significantly.[157] The current charges in the supreme court of Western Australia provide a good example in this regard. The filing fee for an originating process for a private litigant and a small business is $1 318 and for a corporation it is $2 568. The same charges are payable when a case is entered for trial.[158] In the authors' opinion these charges cannot be described as modest. They rather appear to be exorbitant, posing a formidable barrier to effective access to the courts for many potential litigants.[159]

3.5 Synopsis of selected cases

The ambit of this article does not allow a discussion of all the Australian cases dealing with the different features of the new litigation landscape. The article focuses instead on a few selected cases which are illustrative of the new approach to civil litigation. Attention is specifically given to cases expounding the new theory of justice and those that have a bearing on the fundamental rights of the parties.[160]

3.5.1 The new theory of justice

The decision of the high court of Australia in *Aon Risk Services Australia Ltd v Australian National University*[161] in 2009 has since then been the ultimate authority on the new theory of justice and the role of case management in attaining the overriding objectives of civil procedure. In the *Aon Risk* case, which dealt with the amendment to a statement of claim, the high court departed from its previous decision in *Queensland v JL Holdings Pty Ltd*[162] in which the majority had said:

> "Case management is not an end in itself. It is an important and useful aid for ensuring the prompt and efficient disposal of litigation. But it ought always to be borne in mind, even in changing times, that the ultimate aim of a court is the attainment of justice and no principle of case management can be allowed to supplant that aim."[163]

Kirby J, who delivered a separate but concurring judgment in the *JL Holdings* case, warned that "a judge who applies case management rules too rigidly may ignore the fallible world in which legal disputes arise and in which they must be solved".[164] In the authors' opinion the realism demonstrated by Kirby J's *dictum* is a valid consideration in assessing the role of case management in present-day litigation.

The new theory of justice embraced by the high court in the *Aon Risk* case may be summarised as follows.[165] Statements in the *JL Holdings* case suggesting that case management considerations should be given limited weight in deciding an

[157] See Bamford and Rankin (n 2) 297 referring to the court charges in Queensland.
[158] See https://www.supremecourt.wa.gov.au/F/forms_and_fees.aspx (19-1-2019).
[159] Bamford and Rankin (n 2) 298 share this opinion saying that "[i]t would be hard to describe the current court costs regimes as 'modest' and they have become a barrier to reasonable access to courts".
[160] Some of the cases are extracted from De Vos and Broodryk (n 4 and 5).
[161] 2009 HCA 27; 2009 CLR 175.
[162] 1997 CLR 146.
[163] (n 162) 154.
[164] (n 162) 172.
[165] See De Vos and Broodryk (n 4) 691-693. There was a majority judgment and separate judgments by French CJ and Heydon J, but in essence the judges were unanimous in denouncing the authority of the *JL Holdings* case.

interlocutory dispute are no longer authoritative.[166] In essence, according to the new philosophy, a court seized of an interlocutory process is concerned not only with the task of dispensing justice between the parties but also, and especially, with the effect of any delay in the proceedings upon other litigants waiting to be heard, the proper functioning of the court's processes and the efficient use of the court's resources, which are publicly funded.[167] The court noted for good measure that the days when the preparation for trial was largely in the hand of the parties "are long gone" and added that "the resolution of disputes serves the public as a whole, not merely the parties to the proceedings".[168] Bamford and Rankin remark aptly that the court has not only expanded the concept of justice, in the sense that it now also incorporates the interests of other litigants, but also narrowed the concept for the parties, in that justice does not require that they be afforded an unfettered right to present their cases.[169] In the authors' view the new philosophy of justice in Australia is clearly closely aligned to the theory of proportionate justice in England discussed above.[170]

The impact of the new theory of justice and the role of case management, as espoused in the *Aon Risk* case, has been huge. The reasoning of the court has been embraced and applied with "great vigour in ... hundreds of cases" across Australia.[171] Fortunately there are some cases in which the courts cautioned that the *Aon Risk* case is not to be applied blindly, without due regard to the facts of each case and doing justice between the parties. The case of *Cement Australia Pty Ltd v Australian Competition and Consumer Commission (ACCC)*,[172] which also involved the amendment of a statement of claim, is to the point. The full federal court stated that "*Aon Risk* is not a one size fits all case" and added that "statements made in cases concerning amendment of pleadings are best understood by reference to the circumstances of those cases ...".[173] In similar vein the Victorian supreme court, in *Namberry Craft Pty Ltd v Watson*,[174] which also dealt with the amendment of a statement of claim, first endorsed the authority of the *Aon Risk* case but then added:

> "This is not to say that the object of doing justice between the parties is to be ignored. In fact, it is quite the contrary – a just resolution of proceedings between the parties remains a critically important consideration, which will necessarily include as part of that process, a proper opportunity being given to the parties to plead and re-plead their respective cases, should that need arise and the circumstances are present to warrant the discretion being exercised in favour of the grant of the amendment. The principle that a civil trial should be conducted fairly to the parties is beyond controversy. It is a human right enshrined in s 24(1) of the Charter of Human Rights and Responsibilities Act 2006."[175]

Despite these laudable judicial comments, the overall state of affairs in Australia appears to lean in favour of a faithful adherence to the new theory of justice and a strict application of case management rules. The result is that the notion of deciding a

[166] (n 161) par 6 and par 111.
[167] (n 161) par 4-5; 93, 95 and 11-112.
[168] (n 161) par 113.
[169] (n 2) 96.
[170] par 2.2.3 above.
[171] Bamford and Rankin (n 2) 97.
[172] 2010 FCAFC 101; see De Vos and Broodryk (n 4) 695-697.
[173] (n 172) par 51.
[174] 2011 VSC 136.
[175] (n 174) par 37. In another Victorian case also involving an amendment to a statement of claim the court endorsed this *dictum* and followed a similar approach in deciding the issue – see *Virginia Surety Company Inc v Dumbrell* 2011 VSC 602.

case on its merits and thus doing justice between the parties has, generally speaking, been relegated to a subsidiary position in the civil justice system.[176]

3.5.2 The fundamental rights of the parties.

Most of the cases in Australia involving the fundamental procedural rights of the parties have been decided under the human rights regimes of the Australian Capital Territory and Victoria. A notable case that sets a balanced standard between conflicting notions of case management and a fair hearing is *Hodgson v Amcor Ltd; Amcor Ltd v Barnes (No 3)*.[177] The case is also illustrative of the approach of the courts in these two jurisdictions in interpreting statutory provisions regulating civil litigation. It is clear that these courts have become mindful of the need to balance legislative provisions against the rights enshrined in their human rights instruments.

In the *Hodgson* case, which dealt with the late delivery of a witness statement, Vickery J commenced by sounding a cautionary note regarding the role of case management directions:

> "[C]ase management orders designed to serve the interests of justice in the course of a trial, particularly a long and complex matter such as the present case are not immutable. The procedures set in place for the management of the trial must be capable of reasonable adaptation to ensure that the trial is in fact conducted in accordance with the interests of justice as the case proceeds to judgment."[178]

The judge proceeded by adding that "it is axiomatic that a just determination of a proceeding is the product of a trial, which must be conducted fairly and in accordance with the principles of natural justice and procedural fairness".[179] Vickery J further argued that these principles are supported by the Civil Procedure Act,[180] which has the overarching purpose *inter alia* "to facilitate *the just*"[181] resolution of the issues.[182] The judge then emphasised that the act specifically states that nothing in it is intended to override the charter of human rights, which provides for a fair hearing.[183] Procedural fairness, according to Vickery J, "includes the right of a party to present relevant evidence in support of its case ...".[184] The judge then summarised the legal position by saying that the act calls "for a balance to be applied between the case management requirements of achieving an efficient, timely and cost effective resolution of the real issues in dispute, and the requirements for a fair hearing to achieve a just outcome ...."[185]

In the authors' view Vickery J must be commended for the balanced approach he adopted in this case. This judgment illustrates the important role that a statutory provision proclaiming the right to a fair trial can play in curbing excessive judicial case management.

There are several other cases decided in the Australian Capital Territory and Victoria in which references were made to the fair trial provisions in the respective

[176] See in general Bamford and Rankin (n 2) 92-100.
[177] 2011 VSC 272; summary extracted from De Vos and Broodryk (n 5) 20-21.
[178] (n 177) par 27.
[179] (n 177) par 28.
[180] (n 143).
[181] emphasis in the original.
[182] (n 177) par 28.
[183] (n 127) where charter is cited.
[184] (n 177) par 31.
[185] (n 177) par 32. *In casu* the court allowed the witness's testimony to be presented despite the non-compliance with a case management direction to deliver his statement by a certain date. In Vickery J's view the opposing side had sufficient notice of the proposed evidence – see par 33-35.

human rights acts, all illustrating the important role accorded to this fundamental procedural right in interpreting and applying civil procedural rules.[186] In essence, as Colbran *et al* remark aptly, "the right to a fair hearing may operate as a counterbalance to traditional or evolving civil procedures, particularly where judicial discretion is involved".[187]

The jurisdictions in Australia without human rights legislation, such as Western Australia, stand in contrast to the human rights regimes of the Australian Capital Territory and Victoria. In general, courts tend to focus on specific procedural rules and case law on the subject matter, at the same time giving due consideration to the new theory of justice and the dictates of case management. Although the common law recognises certain basic principles, like the right to be heard, equality and procedural fairness, these fundamental rights are generally not uppermost in the minds of judges. The case of *Attorney General of Botswana v Aussie Diamond Products Pty Ltd (No 2)*[188] provides a good example in this regard. On appeal one of the questions was whether the trial judge's ruling, which prevented the Attorney General of Botswana (AG Botswana) from presenting the evidence of a certain witness because the witness statement was delivered late, was correct. *In casu* the witness statement was delivered about four months late but still six weeks before the trial and a plausible reason was given for the late delivery. Nevertheless, the trial judge rejected AG Botswana's application to present the evidence, citing the objectives embodied in the rules of the supreme court and the importance of case management principles acknowledged in the *Aon Risk* case for concluding that the interests of justice did not favour granting the relief sought. This ruling was confirmed on appeal.[189]

It is notable that no reference was made in this case to AG Botswana's right to a fair trial, including the right to present the party's case by calling witnesses supporting its cause. It is submitted that if Western Australia had a statutory fair trial provision like the Australian Capital Territory and Victoria the outcome could have been different.[190]

3.6 Assessment

In the authors' view there is indeed cause for concern about the current state of civil litigation in Australia. The following features of the system call for critical attention.

[186] See *eg Capital Property Projects (Australian Capital Territory) Pty Limited v Australian Capital Territory Planning & Land Authority* 2008 Australian Capital TerritoryCA 9 par 29 and 38-39; *West & Anor v State of New South Wales* 2007 Australian Capital TerritorySC 43 par 19-20 (this case was decided before the *Aon Risk* case); *PQR v Secretary, Department of Justice and Regulation (No 1)* 2017 VSC 513 par 37; *Vella v Waybecca Pty Ltd (No 2)* 2015 VSC 678 par 152-163; *Pham v Ex Parte, Drakopoulos* 2013 VSCA 43 par 49, 55 and 68-70; *Secretary to the Department of Human Services v Sanding* 2011 VSC 42 par 168-206 (this is not an exhaustive list of cases on the topic).

[187] (n 2) 28.

[188] 2012 WASCA 73; essence of the summary is extracted from De Vos and Broodryk (n 5) 21-22.

[189] (n 188) par 128-137. See also *Moore v Lansdale Pty Ltd* 2012 WASC 452 in which the *Attorney General of Botswana* case was cited with approval (par 57) and a similar approach was followed, emphasising the importance of case management principles and declining the relief sought – par 51-67. *In casu* the plaintiff sought leave to present evidence of five expert witnesses whose reports were delivered out of time and the court refused leave in respect of four of them. The evidence of the fifth expert was allowed because the court viewed her report as merely responsive to the defendant's expert evidence – par 66.

[190] De Vos and Broodryk (n 5) 22.

3.6.1 Procedure clearly dominates the scene. The current trend to regulate litigation in minute detail has led to a myriad of procedural requirements that must be complied with to get a case ready for trial. The case manager's task is to see to it that the parties comply with these requirements. Procedural error or non-compliance with a case management direction may result in an arguable cause failing. Therefore, a party has no right to present an arguable case for a judicial determination. The party is afforded an *opportunity* to do so but whether that will in fact materialise will depend on whether he or she complies strictly with all procedural requirements and directions.[191] This outcome is of course mostly dependent on judicial discretion. Needless to say, the result of the new theory of justice, coupled with a policy of strict procedural compliance under case management, is that the idea of dispensing substantive justice between the parties has become of secondary importance.

3.6.2 Case management has become an all-important feature of litigation and the powers of case managers are constantly expanding. It is not a mere tool aimed at ensuring the efficient resolution of civil disputes anymore. It is more like an end in itself. The wide powers of case managers and even trial judges to make procedural rulings may have an adverse effect on the way a party wishes to plead and present its case. The drastic impact of case management powers on the fundamental rights of the parties is well illustrated by a recent amendment to the Western Australian supreme court rules, which means that a party requires the case manager's consent to call an expert witness.[192] In the authors' opinion this is an unjustified curtailment of a party's right to be heard.

3.6.3 The relentless drive away from trial adjudication to mediation aimed at settling cases, which is evident across all Australian jurisdictions, will eventually take its toll. It will not only diminish the important constitutional role of the courts in the resolution of civil disputes and development of the law but also make a mockery of a party's right to his or her day in court.[193]

3.6.4 In general, court charges or fees, as illustrated by those in Western Australia, have become prohibitively high.[194] It is submitted that these charges constitute a significant limitation on potential litigants' right of access to a court. The authors fail to see on what basis this limitation could be justified.

3.6.5 A worrying factor in the context of the transformation of the civil litigation landscape is that little or no empirical research appears to precede reform measures. Bamford and Rankin remark that "reform is largely a judge driven process and rule changes are often made without great research ...".[195] They add, with reference to the continuous evolvement of judicial case management: "These changes will undoubtedly be controversial and they need to be accompanied by rational debate based upon sound research. However, the history of the introduction of pre-trial case management does not provide grounds for great optimism that this will occur."[196]

3.6.6 However, everything is not gloomy. There is at least also reason for some optimism. A notable positive development in the field of civil litigation is the

[191] See *Aon Risk* case (n 161) 2009 HCA 27 par 112.
[192] order 36A – see n 143 and 148.
[193] See De Vos and Broodryk (n 4) 700-703 and (n 5) 20 and 22-23.
[194] See par 2.4.4 above and Bamford and Rankin (n 2) 297-298.
[195] (n 2) 13.
[196] (n 2) 99-100.

approach adopted by the courts in the human rights regimes of the Australian Capital Territory and Victoria. It seems clear that the courts in these jurisdictions have become imbued with a human rights culture and that they have embraced the notion of applying the fair trial provision in the interpretation and application of civil procedural rules. All indications are that Queensland will soon join their ranks and hopefully other jurisdictions will follow in due course.[197] Only time will tell whether these developments will in the future lead to a turning point in Australia.

[to be concluded]

TAXIBESTUURDER JAAG IN DURBAN DEUR ROOI VERKEERSLIG EN RY DRIE JONG DOGTERS MORSDOOD – SLEGS 'N VERKEERSOORTREDING EN MOONTLIK STRAFBARE MANSLAG WORD ONDERSOEK – WAT VAN *DOLUS EVENTUALIS* EN MOORD?

Op 6 Maart 2019 sterf drie jong dogters op weg na hul skool vir gehoorgestremdes in Durban as 'n taxibestuurder op volle vaart deur 'n rooi verkeerslig jaag en tussen die kinders op die sypaadjie deurploeg. Na berig word, het die bestuurder weggehardloop van die toneel van die ongeluk, maar is later aangekeer. Teen die taxibestuurder word na bewering ongespesifiseerde verkeersoortredings ondersoek - wat mag insluit 'n snelheidsoortreding, die verontagsaming van 'n rooi verkeerslig, roekelose bestuur, of nalate om hulp op 'n ongelukstoneel aan slagoffers te verleen - én moontlik strafbare manslag (Bhengu "Bail for taxi driver who ploughed into teens, killing three" *TimesLive in Sunday Times* (13-03-2019) 1).

Hoekom nie moord nie?

Geld vir taxibestuurders in Suid-Afrika, anders as byvoorbeeld in Duitsland (sien 618 hieronder), buitengewone en uitsonderlike verkeersreëls wat insluit straffelose verontagsaming van snelheidsperke, verkeersligte of stoptekens, die arrogante ry oor geelstroke soos ook op voetgangers se sypaadjies, die jaag téén aankomende verkeer en op die teenoorgestelde rybaan? Nog is geen gerapporteerde beslissing aantoonbaar waar 'n Suid-Afrikaanse hof 'n oortreder weens gedrag waaruit afgelei moet word dat die dader met die erns van sy wandade rekening gehou het en hom daarmee versoen het dat dít die dood van onskuldige ander verkeersdeelnemers kan veroorsaak, skuldig bevind het aan moord én dienooreenkomstig lewenslange gevangenisstraf opgelê het nie.

[197] See n 112.