Can Fundamental Rights Bridge the Divide Between Ideal Justice and the South African Reality?

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1. The Gap Between Rights and Reality

In May 2016, South Africa will celebrate 20 years of its final constitution. The Constitution has received much praise internationally: for instance, Ruth Bader Ginsburg - an American Supreme Court judge - has lauded the Constitution as one of the finest in the world and a model for other countries to follow.1 In South Africa, the story is more complex: whilst a number of groupings have formed to defend the constitution and what it seeks to achieve, there has also been increasing criticism of it. One of the refrains that is constantly heard concerns the massive chasm between the aspirations of the constitution and the current reality faced by many if not most South Africans. The Constitution guarantees in section 27(1)(b) the right of everyone to have access to sufficient food: yet, a recent study found that ‘malnutrition, especially stunting is prevalent in hospitalized children’.2 The Constitution promises in section 29(1) a right to basic education yet South African children consistently perform very badly in tests measuring literacy and numeracy.3 The Constitution guarantees in section 12 (1)(c), the right to be free from all forms of violence from either public or private sources; yet the levels of murder, rape and robbery remain unacceptably high across the country.4 These patterns are in evidence in many societies across the world, particularly, those in developing world. In the face of these empirical realities, are we to conclude that the rights in a bill of rights simply have rhetorical value, are ‘empty promises’ which represent in the words of the philosopher Onora O’Neill, a ‘bitter mockery of the poor’?5

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Answering this question requires us to have an understanding of what rights in fact are and aim to achieve. The Interim Constitution of the Republic of South Africa self-consciously described itself as an

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

The metaphor of the bridge was famously applied by Etienne Mureinik to the South African bill of rights, in his attempt to provide an understanding of its key purpose. Mureinik offered a very particular view about what the bill of rights was designed to achieve: it sought, in his view, to move South African society away from a culture of authority - where respect was accorded to decisions simply as a result of the institutional or social position of the decision-maker – to a culture of justification, where the exercise of power would only be respected if it could be justified on the basis of compelling reasons. He claimed that ‘[t]he new order must be a community built on persuasion, not coercion.’

Rather than focus upon Mureinik’s particular view of the purpose of the bill of rights, in this paper, I want to engage with the idea that fundamental rights can be understood as a form of a ‘bridge’. This idea, I shall contend, is not one that is only of relevance to the particular historical context of South Africa though that will be the focus: in fact, it may help, I hope, shed light on the very nature of fundamental rights universally. In the first part of this paper, I will briefly examine the key contour of the notion of a ‘bridging concept’ which has been articulated in other academic disciplines. I will then attempt to examine the sense in which fundamental rights may constitute a bridging concept: the focus will be placed on the relationship such rights create between morality and law. I will argue that fundamental rights are best understood as moral ideals which create pressure for legal institutionalization. As such, the notion contains within it a pressing demand for the change of existing social conditions and an attendance to the institutional structures necessary to bring that about. These ideas, in turn, I contend have doctrinal implications and support a two-stage analytical structure through which rights should be adjudicated such that the focus is retained on both the moral and legal aspects of these norms. In the second part of the article, I will attempt to

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6 Section on National Unity and Reconciliation, S.AFR. (Interim) CONST.1993.
consider the implications of these insights for the manner in which such rights are interpreted and adjudicated in light of several concrete cases and puzzles that arise in relation to fundamental rights: I will consider the question of scarcity and lack of capacity in the field of socio-economic rights; norm conflicts in relation to freedom of religion and non-discrimination; and the realization of rights that are not yet properly institutionalized such as animal rights. I will argue that, first, the bridging conception requires the articulation of feasible ideals which may not be capable of full realization in the present; secondly, it involves decision-makers in thinking through clearly the structural obstacles that impact upon the full realization of these rights and trying to remove them. Thirdly, it requires developing doctrines with a view towards the future realization of these rights and not entrenching a status quo that undermines what these rights seek to achieve in the longer-term; fourthly, it requires drawing out the inherent logic of these rights so as to include previously excluded groups even if this is unpopular; and, finally, it involves legal institutions giving effect to a way of seeing rights bearers as deserving of respect which may, in turn, aid the future advancement of their rights in practice.

2. Fundamental Rights and Bridging Concepts

2.1. What are Bridging Concepts?

A bridge, as we know generally refers to a structure ‘carrying a road, path, railway etc across a river, road or other obstacle’.

For a bridge to be useful or necessary, there must usually be two points between which it is difficult to cross due to the existence of a gap or chasm. A bridge is built to facilitate the movement between these two points and to allow the crossing or passing over of a divide. These ideas have led to the development of a metaphorical sense of the notion: the Oxford English dictionary defines a bridge as being ‘something intended to reconcile or connect two seemingly incompatible things’. The latter definition captures the fact that a bridge may be regarded as a link but it does not really do justice the sense of movement in the idea. Thus, when the interim constitution describes itself as ‘bridge’, it does not simply imply a legal structure that helps neutrally span the divide between the two legal orders: rather, it includes the idea that there is some kind of progress or forward movement in

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9 Id.
that process from an inequitable system to one that is more just. Conceiving of the Constitution as a bridge is also meant to include the notion that it is in fact the instrument that can help us move towards a better future and provides the means of doing so.\textsuperscript{10}

This metaphorical idea of a ‘bridge’ has been drawn on in a number of disciplines to develop a particular sub-set of ideas which are referred to as ‘bridging concepts’. In the field of environmental sciences, the concept of sustainability has been described in this way which seeks to consider the impact of human activities on the environment and, in the process, balance environmental and economic factors. Robert Phaelke, for instance, writes that ‘[w]ithin academic discourse, one of the strongest appeals of sustainability is that it has some potential to reduce the gap – C.P. Snow’s (1964) unbridgeable gulf – between the humanities and the sciences’.\textsuperscript{11} Sustainability for Phaelke thus is a concept that has the potential to link differing domains of discourse, one of which focuses on prescriptions about our future and the other being concerned with charting the concrete empirical impacts of our activities on nature. The concept thus connects the ‘is’ and the ‘ought’ and ‘is centrally about how to change human societies and economies – how in effect to maximize the mileage gained from human impositions on nature’.\textsuperscript{12} In so doing, the concept – whilst theoretical in nature - also includes a significant practical dimension.

Similarly, a concept that has in recent years taken on significant importance in the field of planning and human geography is the notion of resilience. Engineering resilience has been defined as ‘the ability of a system to return to an equilibrium or steady-state after a disturbance which could be either a natural disaster, such as flooding or earthquakes, or a social upheaval, such as banking crises, wars or revolutions’\textsuperscript{13}. There have been significant changes in how this idea is understood but Davoudi characterises its role as having the ‘potential to become a bridging concept between the natural and the social sciences and stimulate interdisciplinary dialogues and collaborations’.\textsuperscript{14} It has also been described as being

\textsuperscript{10} The metaphor has been criticized for suggesting an end-point to the process of change, that one can be said to have crossed the bridge at some point instead of conceiving of social change as a continual process that never ends and develops as human understanding evolves: see DENNIS DAVIS & MICHELLE LE ROUX, PRECEDENT AND POSSIBILITY: THE (AB)USE OF LAW IN SOUTH AFRICA 9, 15 (2009). The criticism perhaps takes the metaphor too literally.
\textsuperscript{12} \textit{Id.} at 36.
\textsuperscript{13} Simin Davoudi, \textit{Resilience: a Bridging Concept or a Dead End?}, 13 PLANNING THEORY AND PRACTICE. 299, 300 (2012).
\textsuperscript{14} \textit{Id.} at 306.
part of a deliberate attempt to ‘bridge the science-policy’ divide.\textsuperscript{15} The concept, once again, can be seen to create a link between different academic disciplines and those that are more empirical with those that are more normative in nature. Moreover, in the context of resilience, it has also been argued that the idea has a radical dimension and should be seen not simply as a question of bouncing back after a shock but as a ‘dynamic process in which change and constant re-invention provide the grounds for social, economic, and/or environmental strength.’\textsuperscript{16} This dimension of change also highlights the way in which the concept connects the theoretical and the practical domains.

These two examples from differing disciplines provide the basis upon which to try and understand the contours of ‘bridging concepts’. From the above analysis, it can be said that such notions have the following characteristics:

(a) They would provide an important link between domains and intellectual disciplines that are often regarded as distinct; (the ‘connection’ dimension);

(b) In particular, they tend to connect disciplines and ideas which have an empirical base with fields that offer normative prescriptions; they thus include the idea that the real world with certain characteristics should change in the direction of realising particular ideals; (the ‘change’ dimension)

(c) In so doing, they would connect these theoretical domains in a manner that has practical consequences for the way in which the world around us is shaped and developed (the ‘theory-practice dimension’).\textsuperscript{17}

As we will see throughout this paper, these dimensions of bridging concepts are accompanied by other features that include a certain level of abstraction and a need to address internal value conflicts. Recognising that an idea is a ‘bridging concept’ does not provide a substitute for substantive reasoning concerning that idea. At the same time, I hope to show that this bridging dimension helps to capture certain aspects of the concept that can help address some of the conundrums and practical consequences that flow from it. In order to demonstrate


\textsuperscript{17} There may be other features of bridging concepts flowing from these ideas such as a certain level of vagueness or abstraction and the need to find a way to mediate internal clashes between the various disciplines that are linked.
these points, I now turn to consider in what sense fundamental rights may be said to be a ‘bridging concept’ and how this aids us in approaching certain theoretical controversies concerning these rights.

2.2. Fundamental Rights as Bridging Concepts

The notion of a fundamental right is a complex concept that involves several elements. The first is an idea which is essentially rooted in law, namely, that a right involves a claim against someone to some resource or a certain type of treatment. There are a range of rights created in legal systems which have differing origins: thus, for instance, rights may be created by contractual agreements between two parties. The focus of this paper is on fundamental rights which are unique and not dependent upon any ordinary agreement between persons: they are usually taken to be justified by virtue of some feature of individuals in which their worth or ‘inherent dignity’ resides. These rights are also ‘fundamental’ as they generally flow from and provide entitlements in relation to features of individuals which are particularly important for their ability to lead valuable lives. I shall now explore in more depth the sense in which fundamental rights are ‘bridging concepts’ and why that characterisation can help advance our theoretical understanding of them.

2.2.1. A bridge between the ‘is’ and the ‘ought’; morality and law

The first feature highlighted above concerns the term ‘right’ which seems to be a notion that is essentially rooted in law. The terminology of ‘rights’ has raised several confusions concerning exactly what fundamental rights are and whether they are essentially ‘legal’ or ‘moral’ in nature. In response to the French Declaration on the Rights of Man and Citizens,

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18 Joel Feinberg, The Nature and Value of Rights, 4.4 THE JOURNAL OF VALUE INQUIRY. 243, 257 (1970) states that ‘[t]o have a right is to have a claim against someone whose recognition as valid is called for by some set of governing rules or moral principles’.

19 I could have said, it is not dependent upon any agreement per se but I wish to allow for the possibility of some kind of social contract conception of fundamental rights which would be an agreement of a special type.


Jeremy Bentham famously wrote a polemical piece denouncing the idea of natural rights as ‘nonsense upon stilts’. He wrote (in the rhetorical style of the piece) that:

‘Right, the substantive right is a child of law: from real laws come real rights, but from imaginary laws, from laws of nature, fancied and invented by poets, rhetoricians, and dealers in moral and intellectual poisons come imaginary rights, a bastard brood of monsters, ‘gorgons and chimeras dire’. 22

Bentham argues here that real rights must have their origin in law: thus fundamental rights would need to be enacted into law in order to make true sense of the notion that individuals have such rights. Given that they are now included in most constitutions around the world and in several binding treaties of international law, this condition seems to be met and these rights can be said to have real legal effect. Bentham, however, contests the idea that individuals can have moral rights which are not in fact enacted in law. He argues that claims to such moral rights give rise to all kinds of pathologies, undermine the legal rights that exist and, in fact, lack any reality.

Amartya Sen has countered this argument by offering a different understanding of fundamental rights. He argues that ‘proclamations of human rights are to be seen as articulations of ethical demands. They are, in this respect, comparable with pronouncements in utilitarian ethics, even though their respective substantive concerns are, obviously very different’. 23 As such, they need not have any legal or institutional force to be valid: they are claims about how a society ought to treat individuals rather than how their actual laws are configured. We can thus say that the human rights of individuals in ISIS-controlled territory are being abrogated: in doing so, we are thus making a claim that there is a wrong being done to individuals in that territory in relation to their fundamental interests and that these rights ought to be respected even though we recognise there are no concrete laws in those territories giving concrete expression to these rights.

Sen, however, goes further in his argument, contending that fundamental rights are not simply the ‘child of law’ (or the result of law) but are also not necessarily the ‘parents of law’ in the sense that ‘they motivate and inspire specific legislations’. 24 He recognises, of course, that an important ‘use’ of moral rights has been empirically to serve as the basis of new

24 Id. at 327.
constitutional provisions or legislation. Yet, he contends that an understanding of fundamental rights as moral claims means that we should not tie them too closely to the making of new laws and recognise the possibility of other avenues through which they can be advanced such as social recognition, monitoring and activist support.  

Sen, in my view, here overstates his case and is mistaken in trying to define fundamental rights as simply ‘ethical demands’, and thus severing their intimate relationship with law. He is misled in my view by an analogy that is too simplistic between utilitarian ethical theory and a morality rooted in fundamental rights. Utilitarian ethical theory covers the whole domain of morality and provides ethical guidance on matters ranging from the comprehensive daily ethical decision-making of individuals to questions of what laws society should pass. A morality focused on fundamental rights, on the other hand, does not attempt to cover the full domain of human action but rather only addresses a sub-set of morality that relates to ensuring protection for the fundamental interests of individuals. It has very little or nothing to say as to whether I should respond positively to a request from a colleague for comments on her next article or whether a society should invest money in the building of opera houses.

This point was understood by John Stuart Mill who – whilst rooting rights in utility – recognizes that they have a particular moral character. Mill argued that rights emerge from a concern with security, ‘to everyone’s feeling the most vital of all interests’. They involve claims we have upon other creatures to make safe for us the ‘very groundwork of our existence’ and they thus assume the character of ‘absoluteness, that apparent infinity, and incommensurability with all other considerations’. Mill thus points out – whether we accept security as the central value or not – that rights relate to the most pressing concerns of our existence.

Indeed, we might say inherent in rights discourse is thus an idea of a ‘limit’: in other words, that beyond a certain threshold, beyond the realm of a certain domain, a claim no longer possesses the particular urgency necessary to convert it into a rights claim. This is another area in which Sen’s account of fundamental rights is lacking: fundamental rights are not just entities around which public reason converges. The idea itself rather guides public reason

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25 Id. at 328.
26 JOHN STUART MILL, Utilitarianism in ON LIBERTY AND OTHER ESSAYS, 190 (1998).
27 Id.
to certain essential features asking legislatures and courts what are the particularly foundational interests at stake in a particular matter. At what point is a threshold crossed whereby an entitlement becomes a fundamental rights claim rather than simply a political demand? The notion of a ‘threshold’ introduced importantly in the work of Martha Nussbaum and, on which I have built in my writing, is essentially connected to the notion of fundamental rights themselves.

Fundamental rights thus relate to a particular sub-set of moral claims which relate to interests that are so fundamental that individuals either cannot do without them or, if they do, their lives would be miserable. That renders the meeting of these interests as particularly significant for individuals and creates a pressure whereby they would want some form of guarantee and enforcement procedures that these interests be realised: enshrining these entities in law offers just such protections. Moreover, the failure to realise these rights affects the relationships and interactions that individuals have in that political community. In turn, individuals may lack reasons to show fidelity to a social order that fails to protect these fundamental interests: their recognition and realisation thus affect the very legitimacy of a social order.\textsuperscript{29} The foundational importance of fundamental rights for the legitimacy of a social order creates a strong pressure therefore that they be provided a central place within the political community. It is as a result no contingent accident that most countries in the world have recognised fundamental rights in their bill of rights and thus placed them at the centre of their legal systems. We thus see that fundamental rights by their nature create a pressure for legal institutionalisation which helps explain why they are recognised in most constitutions around the world. Fundamental rights, I thus argue, are best conceived of as a bridge between morality and law: they are moral entities whose inherent nature creates a push towards legal institutionalisation and social realisation.

\textit{2.2.2. Bridging concepts and the structure of rights analysis}

I have thus far explored the bridging dimension of fundamental rights through considering the important relationship they embody between morality – particularly in relation to ethics and political philosophy – and law. The push towards legal institutionalisation also means that these ideals are not simply utopian in nature, resting in some sort of unrealistic moral universe. Instead, fundamental rights are moral entities, one of whose central features is that

they are meant to be action-guiding. They are essentially notions which are about changing a status quo towards the fuller realization of these rights. This feature of rights places constraints on the kind of ideals that may be accepted under this heading: a right cannot be something that can never possibly be realized. I will explore this point further in the next section. At the same time, rights do not limit us to the status quo or ensure that we back up the current political realities. They are feasible ideals and require a concrete programme of action to be adopted that can bring them into reality. One of the crucial aspects of fundamental rights is thus an inherent requirement or link between an abstract broad right and concrete action-guiding consequences which often require addressing a range of norm-conflicts.

One of the key elements of fundamental rights discourse is also the fact that these entities each protect a particularly important facet of individual lives. Unlike utilitarianism which seeks to provide one measure of ‘pleasure’ or ‘preference’ that matters, rights recognise that these facets of flourishing lives are non-reducible to each other. Realising one of these important interests may clash with realising others. Moreover, in a social context, realising one of these important interests for some may clash with realising another of these important interests for others. The very structure and nature of fundamental rights thus means each right represents one facet of an individual’s life that is always in a relationship with other facets of her life.\(^\text{30}\) In a social setting, these differing facets interact in differing ways with the facets of the lives of others. Rights are thus also bridging concepts in the following sense: they inherently require a mediating mechanism to determine how the facets they protect interrelate in the lives of each individual and between them.

These features help explain and guide the approach to be taken to adjudicating rights in courts. In many parts of the world, including South Africa, a two-part structure has evolved of addressing cases concerning fundamental rights. The first part involves considering whether a particular right has been infringed; the second part determines whether such an infringement can be justified by a range of competing empirical and normative considerations.

This structure of rights-reasoning can be seen to give expression in legal doctrine to the bridge rights create between morality and law as well as the realm of the ideal and the real.

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The first stage of the enquiry involves understanding the fundamental interests that are at stake in a particular case that affect the foundational worth of an individual. That, in turn, requires determining whether protection is required for those interests to be realised. This again shows the limitations of Bentham’s view: the fact that abstract rights are instantiated in law does not end the matter as to how they are to be interpreted. They may have the ‘real’ imprimatur of legal enactment yet their exact meaning and implications are unclear without resorting to reasoning in political philosophy to develop their content (which draws upon their origins in foundational individual interests that a political community should protect). Such reasoning will also involve some empirical understanding of human nature and wants.

For instance, if we have a right to sufficient food, it is necessary to understand empirically what is required for human beings to be properly nourished. Disciplines such as psychology (which seeks to understand our minds) and certain elements of the natural sciences will be relevant here in this first stage of the enquiry. This part of the enquiry is crucial as it allows us to have a firm understanding in principle of what a just society ought to guarantee to every individual, taking into consideration specifically the importance of particular interests in their lives.

In an ideal world, all the rights at the first stage would be realised. Yet, every society operates under certain constraints that often render the full realisation of these rights impossible or undesirable. Empirical states of affairs such as natural resource scarcity and limited finances may render it impossible to meet all the foundational material interests of individuals. Rights at the first stage may also clash with one another and other normative considerations rendering it necessary to limit the extent to which each of them is realised.31 Disciplines such as sociology (which provides an understanding of societies in which these rights are to be rooted) and economics (which provides an understanding of economic mechanisms necessary for the provision of goods) would be of relevance here in understanding real-world constraints on the realisation of these rights.

Increasingly, across the world, the broad proportionality enquiry is being used at the second stage to determine the concrete real-world effects that rights have in particular circumstances.32 The enquiry is a structured process of reasoning that attempts to address the

31 I attempt to outline an account of such factors in DAVID BILCHITZ, POVERTY AND FUNDAMENTAL RIGHTS (2007).
problem of how to translate abstract right into concrete action-guiding consequences where there are competing empirical and normative considerations that must be taken into account. The enquiry requires a full understanding of the reasons for and nature of the fundamental interests at stake which should be performed at the first stage. It then involves determining the purpose of any measure that restricts a right. If there is a valid purpose, three further tests are engaged in: first, the measure must be suitable for achieving the purpose; secondly, the measure must be necessary to achieve the purpose (there must not be an alternative that can achieve the purpose but have a lesser impact on the right)\(^{33}\); finally, the benefits of the limitation must be proportional to the harm caused to the right.\(^{34}\)

The understanding of rights as bridging concepts provides an explanation of the importance of the two-stage structure adopted in many jurisdictions and the manner in which judges should reason in this regard. The first part of the enquiry gives expression to what ideally each individual should be entitled to claim. This is the moral principle which, as we have seen above, is institutionalised in a bill of rights. Without an understanding of the interests of individuals that ideally should be realised, fundamental rights cannot guide the status quo. This is why some academics, including myself, have criticised courts tasked with making authoritative pronouncements on fundamental rights when they shy away from providing normative content to rights.\(^{35}\) That must be the starting point for any analysis. It is also crucial when the second stage of the enquiry is addressed: without an adequate capturing of the interests that ought to be realised at the first stage, there is no normative ideal against which to balance competing considerations. Moreover, often it is possible to realise a right partially but not fully: a conception of the normative ideal content of rights is required in order to determine what aspects cannot be fulfilled in the present circumstances.

Significantly, the first stage is also important even in circumstances where it cannot be realised at all. Without an engagement with the ideal content of rights, it could be considered in such situations as if individuals lack particular entitlements. Yet, the fact that something


\(^{34}\) The form of the proportionality test has been utilized in Canada, South Africa, and Germany. ROBERT ALEXY, *A THEORY OF CONSTITUTIONAL RIGHTS*, 50-54 (2002) has famously sought to provide an understanding of how this structure emerges from a particular understanding of rights as principles (understood as optimization requirements).

\(^{35}\) I have, for instance, made this criticism of the Constitutional Court of South Africa in its approach to socio-economic rights.
cannot be realised in practice now does not mean that the normative ideal disappears. The bridge into practice may not be capable of being constructed at present: continual thought needs to be given though about how to create the circumstances in which such realisation can take place. This is precisely why we should not allow contingent circumstances to determine the fundamental rights we ought to have. Insisting on the first stage and a strong justification for any significant limitation allows us to retain an understanding of the ideal and creates an understanding of why it cannot be realised now. Robert Alexy has utilised the language of principles to make a similar point: the fact that a principle is outweighed by another principle in a particular circumstance does not invalidate the principle or render it inoperable in other circumstances.  

The discussion above has highlighted the two-stage structure and how it can be seen to give expression to the idea that rights are bridging concepts. Yet, it may be objected that prominent constitutional democracies such as the United States have not adopted this form of reasoning and utilise a one-stage approach where the scope of a right is determined immediately together with the empirical and normative considerations that count against its realisation. Thus, instead of constructing an ideal right to privacy and then investigating the justification for its limitation, courts in the United States build in constraints on the realisation of rights in the very construction of their content: rights in this sense are always action-guiding as we have no right that goes beyond what can currently be realised.

It should be evident from the above discussion why such a one-stage approach is not desirable: it leads inevitably to a conflation of differing normative considerations into one enquiry. It also fails to capture the extent to which rights may go beyond what is presently capable of being fulfilled and maintaining a focus on how to remove the obstacles from the realisation of these ideals. I would also contend that the absence of a formal two-stage enquiry does not mean that the courts cannot utilise an analogue of this process within a one-stage doctrine. In other words, constructing the content of a right can be broken down into two phases: the first capturing the fundamental interests at stake and the second considering constraints on the possible realisation of these interests. Without doing so, contingent constraints may well land up restricting the very conception of rights in a polity and thus there will be a failure to realise the promise these moral ideals hold for the law.

36 See ALEXY, supra note 34, Chapter 3.
I have thus far examined the manner in which fundamental rights can be conceived as bridging concepts between morality and law, theory and practice. That idea was seen to have some important consequences for the structure in which courts reason about rights. In the next section, I wish to explore further implications of this idea and the guidance it provides us with in addressing a number of conundrums that arise in giving effect to rights in practice.

3. The Bridging Conception and its Implications

3.1. The Bridging Conception and rendering rights ‘Feasible’

The inclusion of socio-economic rights in many modern constitutions and, particularly, in countries with high levels of poverty has raised questions about the meaningfulness of constitutionalizing such rights in circumstances where they seem difficult if not impossible to realise fully. The first case confronting the South African Constitutional Court on socio-economic rights - *Soobramoney v Minister of Health (Kwazulu Natal)* 37 - raised this issue in a stark manner. The case concerned a claim by Mr Soobramoney, an individual suffering from chronic renal failure, that he was entitled to the continued provision of renal dialysis by the state given that he could not afford this treatment himself. He argued that this concrete entitlement flowed from his right to emergency medical treatment (enshrined in section 27(3) of the Constitution) and the right to life (section 11 of the Constitution). Given the limited number of dialysis machines, the state had adopted a rationing policy only to provide dialysis to those who had acute renal failure which could be treated and remedied or those eligible for a kidney transplant. The majority of the court dismissed Mr Soobramoney’s argument in terms of these rights and instead sought to determine whether Mr Soobramoney could claim a right to kidney dialysis in terms of the right of everyone to have access to health-care services (enshrined in section 27(1)(a) of the Constitution). Judge-President Chaskalson found that the court needed to respect rational decisions taken in good faith by other branches of government in relation to the rationing of scarce health-care resources. For the purposes of this article, what is key is the following statement made expressing the dominant approach of the court to interpreting this right:

‘What is apparent from these provisions is that the obligations imposed on the State by ss 26 and 27 in regard to access to housing, health-care, food, water and social

37 1998 (1) SA 765 (CC).
security are dependent upon the resources available for such purposes, and that the corresponding rights themselves are limited by reason of the lack of resources’.

There is an ambiguity in this statement which requires some thought and engagement and affects the way in which rights are to be adjudicated and given effect to. Do we define the very rights we have in relation to the resources that are available or do we define our entitlements independently of the resource constraints that may exist? In the latter case, the rights exist independently though resource constraints may mean that they cannot be realized at present.

Conceiving of rights as bridging concepts can help provide an approach to answering this question. As we saw, rights provide a bridge between moral ideals and the law, between theory and practice. That in turn means that it is desirable to separate out an enquiry into the normative ideals that we have and the constraints – empirical or normative – on their realization. The bridging conception points to the idea that rights are ideals that are feasible to realize: as such, it is clear that there is no sense in articulating a claim which would be utterly impossible to realise. Thus, if a human individual claimed that she possessed a right to fly unaided, we would have to reject such a notion given that there are no conditions under which such a claim could be physically realized. Such a rejection would though be unremarkable as it would simply be an expression of the more generally applicable principle that ‘ought implies can’.

However, understanding the application and scope of this principle in relation to fundamental rights raises difficulties. Amartya Sen, for instance, challenges the assumption that a necessary condition for the existence of a right is its complete achievability. Rights, often, he claims suggest ‘the need to work towards changing the prevailing circumstances to make the unrealized rights realizable and ultimately realized’. He points out too that a strong condition of complete attainability would also rule out many civil and political rights from being recognized as fundamental rights as it is becoming more difficult in our current world to ensure the complete protection of liberty. Sen suggests that it is a misapplication of the ‘ought implies can’ principle ‘to suggest that claims that are not yet fully realizable cannot be taken to be rights at all. To see the ethical force of some claims is also a demand to consider

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38 *Id.* at para.11.
what one should do to make them realizable, for example through working for the development of new institutions’. 40

Understanding fundamental rights as bridging concepts requires us to build on Sen’s approach and consider in more detail the relationship between the claim that a fundamental rights ‘ought’ to be realized and the idea that it ‘can’ practically be achieved. As we have seen, there is in fact a limit on the coherence of claims which may be logically or physically impossible to achieve. The burden of Sen’s argument is that rights can exist in circumstances where they are not ‘fully realisable’ at present: as long as it is possible to realise them partially or to take active steps to bring about their realization, a rights claim can be valid. It is important to recognize here that rights retain an action-guiding element: a statement of an ideal without any action-guiding consequences cannot qualify as a right.

Let us consider that idea in relation to the scarcity of resources. The first scenario I wish to consider relates to what may be termed ‘absolute resource unavailability’ which arises where a particular resource no longer exists: let us imagine a world where all the oil reserves have been utilized and none exists anymore. 41 Such a world, however, arises without alternative sources of energy to enable aeroplanes and motor-vehicles to operate. As a result, people are severely restricted in their ability to move around. Let us imagine that a person claims that their right to freedom of movement entitles them to a specific right to oil-based sources of energy (that would enable them once again to utilize motor-vehicles). Such a specific right would lack coherence in such circumstances and would need to be rejected for this reason alone as it could never be realized again (there may be other reasons to do so). The broader right to freedom of movement may, however, place obligations on the government (and other actors) to fund research into alternative energy sources that would enable people once more to move around freely. Thus, even in the face of significant natural constraints, there may well be obligations that arise to find a method to address significant human interests within those constraints.

A second scenario exists where there is absolute natural scarcity: the total amount of a resource such as land or oil is fixed and cannot be increased by our actions. In these circumstances, the resource exists but is of a finite quantity. The questions that arise relate to our usage of these resources and the distribution between us. If the scarcity is such that not all

40 Id. at fn 55.
41 We can add a further assumption that we do not develop new techniques to develop oil from other sources.
individuals may have even a small quantity of such resources, then the notion of an individual right to such resources once again becomes difficult to sustain. At the same time, this is usually not the situation and the significant questions that arise relate to the distribution of such finite resources between individuals.

Finally, there is a class of scarcity that can be seen to result from societal limitations. A good may be particularly expensive because of the structure of the modern market-place and the monopolistic position of certain companies within these structures. Consider the fact that life-saving drugs and technologies often fall within this domain as pharmaceutical companies are granted exclusive patents to exploit the drugs they develop for a particular amount of time. Whilst these patents are granted to compensate for research and development expenditure, the price of the drugs and technologies often far exceeds the cost of their production (or the research costs involved in their development). A country may not have the resources to supply these drugs or technologies in its public health system because of the pricing arising from the monopolistic structures of the market and not because of any inherent scarcity. Countries may also lack resources to acquire such medications due to their being comparatively badly off economically, having a limited tax base and lacking access to credit on financial markets.

Distinguishing these sources of scarcity is significant for understanding whether we can legitimately claim rights in a particular matter and the consequent obligations that may flow from particular rights claims. Situations of absolute resource scarcity are limited; most often, those who engage with rights will be faced with humanly-created constraints upon the realization of rights. In the latter circumstances, rights claims may legitimately be asserted as scarcity is not absolute and it is possible to enable greater rights realization through removing these constraints. Importantly, though, when giving effect to rights, it will be necessary for courts (and other bodies) tasked with giving effect to rights to consider the social structures that inhibit their realization. Rights adjudication (and advocacy) thus inevitably requires a consideration not just of what must be done to realise the interest in question but of the obligations necessary to clear the obstacles to their realization.

In light of this discussion, let us return to the more concrete question of the decision in \textit{Soobramoney}. The tenor of the argument thus far suggests that the reasoning underlying the

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42 Here I draw and develop the analysis of scarcity I provided in \textit{POVERTY AND FUNDAMENTAL RIGHTS}, \textit{supra} note 21, at 84-86.
decision was mistaken. The right to health-care services of Mr Soobramoney could plausibly be taken to include a right to kidney dialysis which was necessary for his survival. Such a rights-claim is not incoherent as it is neither physically impossible to provide nor is absolute natural scarcity at stake. The court should thus have found that Mr Soobramoney had a significant interest that was abrogated and, consequently, that at a prima facie level his right of access to health-care services was infringed. The court’s reasoning essentially involves the application of a one-stage approach to rights adjudication which fails to separate the content of the right from the constraints on its realization.43

The court could still, of course, have found that the state’s rationing policy was a reasonable limitation on Mr Soobramoney’s right. Such an enquiry, however, requires understanding the reasons for the paucity of kidney dialysis machines which relate to a number of societal decisions and constructs. Their expense may well relate to the structure of the health-care market for these machines; and the budgeting decisions of the government may legitimately be affected by competing needs which may have a comparable level of priority. The general poor state of public health-care in South Africa and the failure often even to offer low-cost interventions may well have made it justifiable to refuse such an expensive medical treatment. A finding that the government’s rationing decisions ought to be respected, however, need not have been the end of the matter.

If rights are a bridge between the ideal and the real, we must recognize firstly (as the judges did) that there is something terrible about allowing a person to die where we have the means to keep him alive. As such, the ideal must clearly be that dialysis ought to be a matter of right for those unable to afford it and that South African society should move towards providing dialysis for those who need it. The court’s conflation of the first and second stage of the rights analysis meant that there is no need to construct a bridge to providing dialysis for all: we have simply defined away the expectations that it should be provided, at great cost to those who are poorest and remain living with an unacceptable status quo. The court could have recognized that the government’s decision in relation to Soobramoney was reasonable under present circumstances yet, at the same time, held that it had a duty progressively to ensure that dialysis over time was available to an increasing number of people (with the ideal being it would be available to all who needed it and were unable to afford it themselves). The

43 SANDRA LIEBENBERG, SOCIO-ECONOMIC RIGHTS ADJUDICATION UNDER A TRANSFORMATIVE CONSTITUTION, 173-178 (2010) also advocates for a clearer two-stage analysis in the jurisprudence of the constitutional court on socio-economic rights.
court could have required the government to create measurable goals and targets that would over a period of time lead to the expansion and the improvement of its health programmes including the provision of dialysis on an extended basis. If rights are bridges, then we cannot simply be comfortable with a particular balancing decision in the here and now; decision-making bodies must be concerned with ensuring that the structures for the future improvement in the realization of rights be put in place.

These points are of importance as well in relation to a further problem of feasibility that arises particularly in the case of developing countries: in many instances, there is a lack of human capacity and expertise to develop programmes to fulfill rights. Rights often are not fulfilled due to a lack of skills as well as a shortage of administrative and managerial acumen to ensure that they are realized. For effective rights realization, adjudicatory bodies such as courts will have to adopt a wider holistic approach that considers this lack of capacity and methods to address the problem. Where there are clear deficits in the decision-making of government bureaucracies, it may not be sufficient for courts simply to declare rights have been violated and to order their realization. Courts may need to understand the causes of governmental failure and to require a range of measures be adopted that render the realization of rights more effective. In India, for instance, recognition of managerial and bureaucratic problems has, on occasion, led courts to appoint special functionaries to supervise the implementation of programmes to advance rights (most notably in the case concerning the right to food). Greater attention to institutional and systemic factors are thus necessary in rights adjudication.

An illustration of the inadequacy of existing judicial approaches and the potential of the revised approach advocated for in this paper can be seen in the Nokotyana case that arose in South Africa. The case dealt with a claim by the residents of an informal settlement for the provision of temporary sanitation facilities and high mast lighting. The provincial government had delayed for three years in making a decision whether to upgrade the informal settlement in question to a formal settlement where the conditions would have been much improved and the facilities claimed by the residents would have been provided. The court found that the underlying cause of the complaint in this case lay in the failure to make a decision on the upgrading. It found that people lacked a claim to the provision of the facilities

44 PUCL v Union of India (Writ Petition no 196 of 2001). Details of the orders can be found at http://www.righttofoodindia.org/orders/interimorders.html
45 Nokotyana and Others v Ekurhuleni Metropolitan Municipality and Others 2010 (4) BCLR 312 (CC).
they wanted in the interim; nevertheless, it ordered the provincial government in question to make a decision within 14 months. 46

On an initial reading, it would seem that the approach adopted by the judges might follow the arguments made thus far in this section. Nevertheless, two aspects of this decision count against such a conclusion. First, no provision was made by the judges for addressing the temporary plight of the people in the informal settlement who lacked adequate sanitation facilities. Understanding fundamental rights as ‘bridging concepts’ means that we cannot simply ignore the serious invasion of people’s fundamental interests in the short-term, for longer-term gains and benefits. The Constitutional Court recognized this point in the Grootboom case47, where it found that the government housing programme was unconstitutional precisely because it promised individuals a home in the longer term without any provision for the shorter term. Understanding rights as bridging concepts explains why this is important: if a person’s fundamental rights are so severely violated in the shorter term now that they either do not survive or are seriously harmed, rights will simply fail to function as a bridge to a better state of affairs for those people. Given that rights attach to specific individuals, we cannot simply sacrifice a few individuals for the benefits to many others in the future. This is precisely what distinguishes rights-based thinking from crude utilitarian trade-offs: every individual must be considered and must have the potential to cross the bridge into a brighter future. That requires ensuring at least survival and a minimum level of provision in the shorter term.48

The court order in Nokotyana was also deficient, secondly, in that it did not engage at all with the causes or reasons for the failure of decision-making by the government. Simply to order the government to make a decision may not help if there are deep, underlying problems that led to this malaise. The court could, for instance, in that case have asked for clear reasons for the delay thus placing a burden of justification upon the government department or minister in question. Where there was a failure to provide adequate reasons, the court could order an investigation to be undertaken by independent assessors and, in light thereof, to provide a series of orders that seek to address the underlying problems that led to such poor decision-making. This wider lens would enable the court to craft effective orders but also, in many

46 I have provided a detailed evaluation of this decision in David Bilchitz, Is the Constitutional Court Wasting Away the Rights of the Poor? Nokotyana v Ekurhuleni Metropolitan Municipality, 127 SALJ. 591-603 (2010).
47 2001 (1) SA 46 (CC).
48 This paragraph highlights the relationship between the bridging conception and the minimum core approach to the interpretation of socio-economic rights: See BILCHITZ, supra note 21, at 178-235.
ways, to address problems of governance that affect rights realization more generally. Such an approach would help recognize and address real, structural obstacles to rights realization and thus create a more solid bridge to effective realization in the political community.

3.2. Bridging conflicts and remedies

The bridging conception of rights is not only of importance in the sphere of rights that relate to the distribution of resources but also in relation to rights that seek to accord and enforce a certain type of recognition upon individuals. I will focus on the difficult issue that is now frequently arising in courts around the world concerning religious doctrines and behaviours that discriminate against persons on grounds of gender and/or sexual orientation. These cases involve a potential clash of two sets norms: one that prohibits discrimination against individuals or a particular group and the other which recognises the importance of protecting the right to freedom of religion and association. They also deal with the important question of the extent to which private domains can be structured and function according to different norms to the public domains.

These issues arose in South Africa in the Strydom case which dealt with a music teacher who worked in a church for twenty years. After discovering that Mr Strydom was gay, the church dismissed him from his post. Mr Strydom lodged a case before the High Court, arguing that he had been unfairly discriminated against and claiming damages. The church claimed that it was entitled to decide only to employ teachers that lived according to its doctrines. The High Court found in favour of Mr Strydom and awarded him damages for the dismissal. Its reasoning involved balancing the harm to Mr Strydom against the harm to the religious grouping: it found that the discriminatory behaviour had severe financial and psychological effects upon Mr Strydom; the church on the other hand only suffered a limited invasion of its rights given that he was employed as a music teacher and not a religious leader. A case which deals with similar issues is currently before the South African Constitutional Court, dealing with whether a church is entitled to dismiss a Minister who formed a same-sex marriage in violation of the rules of the church.

49 I use here Nancy Fraser’s notion of rights that relate to ‘redistribution’ and those that relate to ‘recognition’: See Nancy Fraser, Rethinking Recognition, 3 NEW LEFT REVIEW. 107, 116 (2000).
50 Strydom v Nederduitse Gereformeerde Gemeente Moreleta Park 2009 (4) SA 510 (T).
The South African constitution establishes a strong norm of equality and the prohibition on discrimination extends not only into the public sphere but also into the private sphere. The reason for such an extensive approach lay in the fact that all aspects of the society had been suffused with discriminatory practices and attitudes; in order to move into a future based on seeing every person as worthy of respect, norms of non-discrimination would have to penetrate all spheres of society. The approach, however, impacts upon the freedom of individuals to act in particular ways that discriminate where that emanates from an important part of their religious (or other) world-view. How to strike an adequate balance between these competing values and rights has given rise to an intense debate in the literature around the world with some placing more emphasis on equality and others on freedom of religion.  

Understanding the purpose of the non-discrimination provisions in South Africa as being to change the way in which previously disadvantaged groups are treated and perceived means that the approach adopted by judges must not simply bolster an unacceptable status quo. Doing so, rules out certain doctrinal approaches and counts in favour of others. Consider, an approach to deciding such a matter that finds there is no unfair discrimination in instances where the unequal treatment emanates from a sincere religious belief of individuals or groups. Such an approach would essentially interpret away the norm conflict by limiting the scope of the prohibition on unfair discrimination only to the public sphere (or perhaps private groupings where religion is not at issue). Unfortunately, through doing so, it would undermine much of the importance of the prohibition on unfair discrimination by allowing it to be subject to the discriminatory beliefs of others and place not pressure for change on the groups holding these beliefs. The laws relating to unfair discrimination are meant to remove social obstacles that inhibit the ability of individuals to realise their purposes and to flourish; as such, they inherently must challenge beliefs and behaviour that inhibit this purpose. If current prejudicial beliefs are sufficient to defend discriminatory behaviour, there is no impetus for change. The religious beliefs and behaviour in question also do not remain

51 In South Africa, there has been a lively debate on these questions which include the following articles: Patrick Lenta, Taking Diversity Seriously: Religious Associations and Work-Related Discrimination, 126 SALJ 827-860 (2009); Stu Woolman, On the fragility of associational life: a constitutive liberal’s response to Patrick Lenta, 25 SAJHR 280-305 (2009); David Bilchitz, Should Religious Associations be Allowed to Discriminate?, 27 SAJHR 219-248 (2011); Shaun de Freitas, Freedom of association as a foundational right: religious associations and Strydom v Nederduitse Gereformeerde Gemeente, Moreleta Park, 28 SAJHR 258-272 (2012); Stu Woolman, Seek justice elsewhere: an egalitarian pluralist’s reply to David Bilchitz on the distinction between differentiation and domination, 28 SAJHR 273-295 (2012); David Bilchitz, Why courts should not sanction unfair discrimination in the private sphere: a reply, 28 SAJHR 296-315 (2012).

neatly confined to the private sphere: as such, if left unchallenged, they could also undermine the very way in which the anti-discrimination provisions were meant to guarantee the equal citizenship and respect for all individuals in the society. All the defects of a one-stage approach to rights-analysis are evident in this first approach where the moral impetus for change is lost through a reduction in the very scope of the right itself.

An alternative approach would be to recognise that unfair discrimination does exist in such circumstances but that the religious behaviour constitutes a reasonable and justifiable limitation on this right. Whilst it is better than the first approach in recognising a prima facie case of unfair discrimination, it, in some sense, legitimates the discrimination by finding it justifiable on the grounds of religious belief. In this instance, the approach though seems unacceptable as it largely undermines the very purpose of the non-discrimination norm. The prohibition on non-discrimination was meant to proscribe beliefs and behaviour which undermine the worth of individuals; yet, the message provided by this approach is that, as long as the beliefs and behaviour flow from a particular source or fall within a particular sphere, then they are justifiable no matter how repugnant. The approach is also at odds with the bridging conception of rights in that it provides no reason or catalyst to shift the discriminatory beliefs and behaviours of these religious spheres and thus places no pressure on them to transform.

A third approach fares better: it would involve courts declaring that unfair discrimination — whether it is grounded in religious belief, practice or anything else — is illegal and unconstitutional in South African society and cannot be justified. This approach sends a clear message to religious (and other private sector) bodies that prejudicial beliefs and actions are at odds with the central values underpinning the public constitutional order and it creates a pressure on these bodies to re-consider and revise their beliefs. A declaration that unfair discrimination has occurred would still leave it open to courts to decide upon what remedies to impose in such instances. I would be against remedies that coerce individuals to change their beliefs or force them to participate in ceremonies (such as same-sex marriages) which they virulently oppose: such an approach would fail to accord any respect to the freedom of religion individuals have. At the same time, individuals should bear the burdens of their discriminatory beliefs: in some instances, they will simply not be allowed to act in a

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53 Woolman, supra note 51, at 290.
discriminatory manner where offering public services\textsuperscript{54} and in their employment practices that have wider public effects. In others, they will need to compensate others for the harms they impose upon them – the damages awarded to Mr Strydom is an example of this. Courts can thus use remedies in a nuanced way to recognise the unacceptability of the status quo, to compensate others for harms caused by prejudicial beliefs and to nudge those with these religious beliefs in the direction of fairer and better treatment. Conceiving of rights as bridging concepts, thus requires us to recognise the responsibility of adjudicatory bodies not simply to accept the status quo but to understand the kind of society a particular right seeks to achieve and to mould it sensitively in a way that can help create the reality of such a different future.

The third method of resolution also shows the manner in which there is no complete overriding of one set of concerns by the other in cases of norm conflict. Instead, a balance has to be achieved in each circumstance which does not undermine the applicability of the weaker norm in other circumstances. It is also evident that the normatively weaker set of concerns – in this instance, I have assumed this applies to freedom of religion and association - will have some effect on how the clash is resolved even if that is not overriding. This means in the context of the current example that freedom of religion retains its importance in our society for protecting a vital element of individual autonomy even if the prohibition against unfair discrimination requires a restriction of that autonomy. In the approach I have advocated for, in fact, the importance of that freedom is still given some weight in the determination of the appropriate remedy even though it is not sufficient to inhibit a finding of unfair discrimination. The bridging dimension of fundamental rights thus highlights the fact that the normative concerns which are engaged – if they constitute a right at all – remain of importance and modify the eventual result even where one principle is stronger than another. Rights thus are structured as a series of discrete protections for fundamental interests, each of which is in relationship with each other and requires a set of mediating mechanisms and norms to determine action that gives effect to the transformative ideals underlying them.

3.3. Bridging Ideals into Reality

The last issue I want to consider concerns the question of claims of right which are normatively justifiable yet are not yet fully recognized by the law or society. In what sense is it possible to create a bridge between current rights practice and the ideal of what is normatively desirable? To illustrate the points here, I will take as my practical case study the question of the rights of non-human animals. There is no explicit recognition of such rights in the South African constitution; at the same time, I have argued in the past, that there are some good reasons why the constitution should normatively be interpreted in the future to recognize such rights.\(^5^5\) How does the fact that rights are bridging concepts help us to shift legal recognition beyond current understandings?

The question of whether animals have rights raises the important issue of who falls within the domain of our moral concern. When we examine the history of fundamental rights, we see that part of the reason for their importance is precisely because they press for the inclusion of those who were previously excluded within the domain of our moral concern. This was achieved precisely by seeing the similarity of the fundamental interests at stake in different rights claims. Slavery could not be justified because the moment that people stood back from blinding chimera of economic profit, it was clear that slaves shared the very basic interests of their slave-masters: if slave-masters wanted rights, they had to confer them on their slaves too. Similarly, skin colour in South Africa could never be justified as a basis for excluding black people from the domain of rights-bearers. The very logic through which whites claimed entitlements to have their fundamental interests protected require that these same entitlements be extended to black people. Those of us who defend animal rights contend that a similar sort of logic is at play in this domain: that, animals share many of the fundamental interests of human beings, and the fact that one is a member of a species other than homo sapiens provides no basis upon which to exclude other beings from basic protections for their fundamental interests.\(^5^6\)

The bridging nature of fundamental rights can be seen here through the following logic: the argument begins with a claim that a particular individual has a set of rights. When we examine the basis for such a claim, however, we find that it is rooted in fundamental interests that are also shared by other individuals. If the one individual or group is entitled to these

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\(^5^5\) David Bilchitz, Does Transformative Constitutionalism Require the Recognition of Animal Rights?, 125 SOUTH AFRICAN PUBLIC LAW. 267-300 (2010).

\(^5^6\) This form of argument was made in recent times most famously in PETER SINGER, ANIMAL LIBERATION (1995).
rights, then the other individual or group must be too. The foundational normative underpinnings of rights create a pressure to extend their protections to all who share these fundamental interests, irrespective of whether such a recognition is popular. Rights thus help bridge the divide between our own self-interest in excluding certain groups and the moral requirement to protect all those similarly situated. Some of these points may of course be true of other moral concepts too: however, the fact that rights relate to aspects of individuals with foundational importance, as we saw, creates a bridge between political philosophy and a demand for legal institutionalisation. As such, rights are more powerful in that they do not simply remain as interesting ideals to debate: they place pressure on institutions which are already working with these concepts, continually, to advance their protection by realising in practice the entitlements they contain and extending the domain of rights-bearers. The recent United States Supreme Court decision Obergefell v Hodges is an example of how an inescapable internal logic that required the fundamental interests of all people to be treated equally eventually yielded an extension of marriage to a previously excluded group (same-sex couples). That same underlying logic is what holds out hope for the practical realisation and instantiation in law of ideals such as animal rights, which currently lack full legal recognition.

It is no doubt a difficult task where courts are faced with a logic underpinning fundamental rights which requires an extension of existing protections yet most of society remains indifferent (or, in many cases, opposed) to such a development. A full realisation of the recognition of animal rights seems impossible at this point in history: a legal system, it seems, could not sustain a ruling that banned meat-eating where the vast majority partake in this practice, however, unjustifiable in moral terms. Yet, once again, we are faced with recognising that the failure fully to realise rights now does not provide a justification for not intervening to realise them partially. A minimum level of protection may well be feasible even if this does not deliver everything that is desired: banning cruel practices in the production of meat and eggs such as sow stalls and battery cages are feasible and will, at least, prevent these very serious violation of the bodily integrity of pigs and chickens respectively.

Moreover, beginning the process of rights recognition can, importantly, shift the manner in which individuals are seen which, in turn, creates the possibility of further changes.

Recognising an individual as a rights-bearer involves a particular way of seeing them: that they have a certain worth which entitles them to respect and to claim (and be owed) duties from us. By recognising previously excluded individuals and groups as rights-bearers, courts not only recognise important concrete entitlements: they also confer a certain status upon them. That status, in time, might well lead to a shift in the way this group is perceived which, in turn, enables a fuller realisation of their entitlements. It is such a shift which has occurred in relation to many excluded groups and which, it is possible, could be achieved for non-human animals too.

4. Conclusion

I have defended a view in this paper that fundamental rights should be understood as bridging concepts: they essentially connect the domains of morality and law and create a demand to move from abstract conceptualisation to practical concretisation. I argued too that this understanding of rights requires a particular two-stage approach to their analysis which begins with a prima facie understanding of the protections individuals are entitled to which is followed by an investigation in a structured way of the empirical and normative constraints on their realisation. We also saw how these ideas around fundamental rights provided some guidance in relation to difficult practical issues that have arisen in rights adjudication. First, the ideals must be feasible but that does not mean that they must be capable of full realisation immediately. Secondly, courts have a duty to investigate structural factors that inhibit their ability to be realised and to address these when adjudicating upon concrete cases. Thirdly, the manner in which these rights are adjudicated and given content must not entrench a status quo that is at odds with the protection of these rights: courts must always consider what doctrines and measures can lead to a greater realisation of the interests protected by these rights over time. Finally, it was recognised that an insistence on drawing out the internal foundations and logic of rights and conferring a rights-bearing status on those previously excluded can be central in bringing ideals which lack full social recognition now into further concrete realisation in future.

With all this in mind, let us then return to the question raised at the beginning of this article concerning the disappointment of many with the ‘rights revolution’ that has taken place in

58 Feinberg, supra note 18.
South Africa (and elsewhere). In the face of high crime rates, alarming levels of economic deprivation and risks to our freedom, are we to say that the rights project has failed? I hope to have shown in this piece that, in answering this question, it is essential to understand the nature of rights as bridging concepts which does not allow us to wallow in any of such self-defeating, paralyzing pessimism. Fundamental rights are precisely of significance because there is a struggle to move them from the domain of morality into law, from theory to practice. The bridging conception challenges legislators, judges and academics to improve on the mechanisms that enable the transition from the ideal into the real, understanding the clear constraints that exist within our society. Rights, on this idea, involve a sense of movement and change, an optimistic idea that pushes us and challenges us continually in the face of an imperfect reality. At 20 years of the final South African constitution in 2016, the gap between the bill of rights and the reality for many South Africans must not leave us defeated: it is rather a call to action to all segments of our society, all branches of government to leave no stone unturned to bring this vision into reality. It is not time to give up upon the noble ideals and principles which animate the constitution but rather, with renewed vigour to assess how to remove the current obstacles to their realisation. Rights in a sense contain an internal tension between a moral ideal and the imperfections of human institutions: It is in harnessing the creativity contained in that tension that the progress of a country such as South Africa and, indeed, perhaps the entire world, lies.