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CITIZENSHIP AND COMMUNITY: EXPLORING THE RIGHT TO RECEIVE BASIC MUNICIPAL SERVICES IN *JOSEPH*

*David Bilchitz**

One of the key roles of a constitution is to specify the framework within which a society will be governed. This requires some understanding of the function and role of governance in relation to citizens. Yet, how are we to think of the relationship between a government and its citizens? The dominant model in political philosophy has conceived of there as being some form of social contract between government and its citizens. Hobbes, for instance, argues that individuals have good reason to renounce their unlimited natural rights to act in pursuit of their self-interest in return for a guarantee of security and safety by the sovereign.[1] Locke sees the state as necessary to establish clear laws, neutral judges and to have a monopoly on force. This is all done in the service of the natural rights of individuals to liberty and the preservation of their property.[2] In modern times, the state is usually far more extensive than simply performing security and adjudicative functions. It is also centrally involved in ensuring service provision for individuals in such areas as water, sanitation services, refuse removal and the provision of electricity. The terminology floating around the political realm in South Africa is of a 'developmental state'. Though the terminology lacks clarity, one central component of such a state is an active involvement in developmental processes and service delivery. In this more extensive state, how are we to capture the relationship between the government and citizens?

The Constitutional Court through its case law is often faced with this question although, in most cases, the cloak of legality helps

* Associate Professor, University of Johannesburg; Director, South African Institute for Advanced Constitutional, Public, Human Rights and International Law (SAIFAC). I would like to thank an anonymous referee for very helpful and thoughtful comments.

1 R Tuck (ed) T Hobbes *Leviathan* (1996) 117-121.

2 P Laslett (ed) J Locke *Two treatises of government* (1988) 350-353.

obscure the more philosophical questions that arise. At times, however, the Court is faced with a set of facts that requires it to make some pronouncements that bear on this important relationship. The case of *Joseph v City of Johannesburg*[3] provides an interesting departure point for consideration of the relationship between government and citizens. The first section of this paper commences by outlining the judgment and the key problem that arose therein and which is the subject of this paper. The section then goes on to provide a critical evaluation of the Constitutional Court's decision not to use fundamental rights as the rubric through which to decide the case.

The second section considers the Court's own basis for capturing the government-citizen relationship in a 'new' public law duty that government has towards its citizens to deliver basic services. This section investigates the clues the Court provides as to what could constitute its understanding of the deeper basis for such a duty. Three possible models for conceptualising the citizen-government relationship will be considered here: The first is 'citizen as customer'; the second is 'citizen as a party to a social contract'; the final is 'citizen as friend/community'. The paper will argue that the latter conception of the relationship between government and citizens best coheres with the Court's *dicta* on the matter. That conception is attractive yet, given the minimal details we are offered by the Court, could be the subject of potential pitfalls. Some of these are outlined and suggestions are made as to how they could be avoided. Suitably developed, it shall be argued, the Court's development of a 'new' right to basic services and the relational ethos underlying it can be seen as an exciting development that deepens the bonds between citizens and the government. The last section of this paper will consider the congruence of the decision in *Joseph* and the jurisprudential grounding alluded to therein with three other decisions of the Constitutional Court. In the process, it shall seek to highlight both the way in which the philosophical framework underpinning *Joseph* could help broaden our understanding of existing decisions and how an explicit articulation thereof could have supported different outcomes. It remains to be seen whether the Court builds on the new departure point it has articulated in *Joseph*. By drawing out the deeper jurisprudential basis for the decision, this article hopes to contribute towards making explicit the choices, possibilities and dangers that lie before judges in their thinking about the citizen-government relationship.

3 2010 4 SA 55 (CC).

1 Fundamental rights and public law duties

1.1 *Leon Joseph v City of Johannesburg*

The applicants in the *Joseph* decision were lessees of a building (Ennerdale Mansions) who had paid the amounts owing for their usage of electricity every month to their landlord. The landlord had a contract with City Power (a public entity formed by the City of Johannesburg for purposes of providing electricity to residents) and was responsible for making payments for the consumption of electricity on his property. The landlord accumulated substantial arrears in payments to City Power and as a result City Power disconnected the electricity supply to Ennerdale Mansions. This left the lessees without electricity despite having paid for their usage regularly and diligently. The case concerned whether City Power was entitled to disconnect the electricity of the building without notifying the lessees or providing them with a hearing. The Court stated that the 'crux of this case is therefore whether any legal relationship exists between the applicants and City Power outside the bounds of contractual privity that entitles the applicants to procedural fairness before their household electricity supply is terminated'.[4]

The legal issues rested upon whether the Promotion of Administrative Justice Act 3 of 2000 (PAJA) applied to this case and, if so, what procedural fairness required in the circumstances. In order for the provisions of the Act to apply, it is necessary that the actions of a governmental organ fall within the definition of 'administrative action'. Section 1 of PAJA defines administrative action to include any decision (or failure to take a decision) by an organ of state (or other party exercising public power) that 'adversely affects the rights of any person'. The municipality (respondents) argued that no rights of the applicants (lessees) had been affected as they had no contractual relationship with City Power. The applicants, however, argued that their right to have access to adequate housing (in section 26(1) of the Bill of Rights) had been affected adversely as well as their right to dignity. Alternatively, they claimed that the rights they held against the landlord had been affected in this way. Skweyiya J (writing for a unanimous court) avoided deciding the matter on either grounds advanced by the applicants and stated that '[t]he real issue is whether the broader constitutional relationship that exists between a public service provider and the members of the local community gives rise to rights that require the application of section 3 of PAJA'.[5]

4 *Joseph* (n 3 above) para 2.
5 *Joseph* (n 3 above) para 33.

The Court goes on to find that the local government has an obligation to 'meet the basic needs of all inhabitants of South Africa, irrespective of whether or not they have a contractual relationship with the relevant public service provider'.[6] Electricity services are part of the services that local government is expected to provide in fulfilling these needs. The Court finds that the duty of local government is sourced in the Constitution and legislation. In terms of the Constitution, it refers to provisions setting up the objects of local government in sections 152 and 153. The applicable legislation is the Local Government: Municipal Systems Act 32 of 2000 (Municipal Systems Act) as well as the Housing Act 107 of 1997 (Housing Act), which include a specific obligation on municipalities to provide basic municipal services which include electricity. In turn, these duties lead to a correlative right on the part of citizens (and, consequently, the applicants) to receive these services that is based in public law.[7]

The question then had to be considered whether such a right was sufficient to trigger the entitlement to procedural fairness in section 3 of PAJA. The Court held that this section should be interpreted in a purposive and expansive manner as it was founded in an understanding of both the dignity and worth of individuals who are entitled to participate in decisions that affect them as well as the quality and legitimacy of administrative decision making.[8] The Court referred to section 195 of the Constitution which requires public administration to perform its duties in a responsive, accountable, fair and transparent manner. These values, the Court held, were of particular importance in the manner public services were delivered by local government. Indeed, it found that municipalities were[9]

> at the forefront of government interaction with citizens. Compliance by local government with its procedural fairness obligations is crucial, therefore, not only for the protection of citizens' rights, but also to facilitate trust in the public administration and in our participatory democracy.

Taking these considerations into account, the Court concludes that the supply of electricity is a duty upon local government that citizens have a corresponding 'public law right to receive'.[10] Consequently, City Power had a duty to comply with the requirements of procedural fairness in PAJA before taking a decision to disconnect their electricity.

6 *Joseph* (n 3 above) para 34.
7 *Joseph* (n 3 above) para 40.
8 This point was made quoting C Hoexter *Administrative law* (2007) 326-327.
9 *Joseph* (n 3 above) para 46.
10 *Joseph* (n 3 above) para 47.

Skweyiya J turned to consider what procedural fairness required in the circumstances of the case. The Court found that City Power had a duty to afford notice to the applicants prior to disconnecting their electricity. Such a notice would have to include all relevant information, 'including the date and time of the proposed disconnection, the reason for the disconnection, and the place at which the affected parties can challenge the basis of the proposed disconnection'.[11] The Court held that at least 14 days' notice would be fair to provide the applicants with sufficient time to investigate the matter and gain legal advice. The applicants also claimed that procedural fairness meant that they ought to be able to make representations to City Power concerning the proposed disconnection. The Court found that City Power's 'administrative capacity would have been unduly strained if it were required in every case to process representations from tenants'.[12] Consequently, the Court held that there was no automatic obligation on the part of the public utility to have a hearing concerning each proposed disconnection. Nevertheless, the notice provided by City Power implied that the utility would in good faith be prepared to engage with the applicants were they to challenge the disconnection.

These findings of the Court led it to consider the constitutionality of one of the Electricity By-laws in Johannesburg.[13] By-law 14 allowed for disconnections without a pre-termination notice. Given the Court's findings, it held that this by-law was inconsistent with PAJA and therefore inconsistent with section 33(1) of the Constitution. The Court severed the words 'without notice' from the by-law. It also held that the termination of electricity to Ennerdale Mansions was unlawful and ordered the immediate re-connection of the electricity supply.

The *Joseph* decision places in sharp relief the question as to how we capture the relationship between ordinary citizens and a government entity (a public utility in this instance). It is helpful in analysing the decision to understand that, in these particular circumstances, three relationships were involved. The government had a direct contractual relationship with the landlord to provide electricity in return for payment. In turn the lessees had a direct contractual relationship with the landlord too: they had to pay rent (and their bills) in return for leasing the property (and benefiting from utility services). City Power, however, had no direct contractual relationship with the lessees. Interestingly, the default of payment by the landlord to City Power led to a disconnection of services, which

11 *Joseph* (n 3 above) para 61.
12 *Joseph* (n 3 above) para 63.
13 Greater Johannesburg Metropolitan Council 'Standardisation of electricity by-laws *Provincial Gazette* (Gauteng), GG 16 GN 1610 (17 March 1999).

of course made sense in the context of the contract between them. Yet, this had an impact on the lessees, who were third parties directly affected by these contractual arrangements. The government effectively claimed that the impact upon these third parties was not its problem and that, consequently, it did not even have a duty to notify the lessees of any disconnection that might occur. It conceptualised its responsibility to provide services as purely a contractual relationship akin to that which exists in the private sector. The Court's decision recognised that there was in fact a relationship between the lessees and the public utility that, at least, imposed a responsibility to notify the lessees of any disconnection. The key issue in this case — which will be the focus of this article — concerns the nature of the link in question, its justificatory base and its implications.

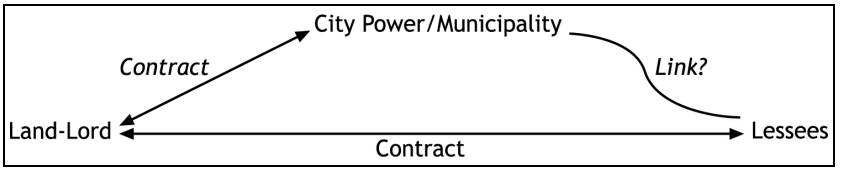

Fig 1: A visual representation of the problem in Joseph

1.2 Fundamental rights and service delivery

The decision not to decide a case in a particular way is sometimes as interesting and revealing as the basis that is given for a decision. In *Joseph*, a clear puzzle arises. The applicants submitted that the relationship between themselves and the utility was one governed by the fundamental rights in the Constitution. Though there is no explicit right to electricity in the Constitution, the applicants submitted that their right to have access to adequate housing had been negatively affected by the disconnection. Their argument involved the claim that the termination of electricity was a retrogressive measure which violated the negative obligation not to interfere with an individual's fundamental right to have access to housing.[14] The response by Skweyiya J to this argument is silence, simply stating that '[i]n the view I take of the matter it is not necessary to address this contention'.[15] Similarly, the Court states that 'it is not necessary to consider the right to human dignity as a self-standing right for purposes of section 3 of PAJA'.[16] Clearly, the Court decided not to

14 *Joseph* (n 3 above) para 32.
15 As above.
16 As above.

base its judgment on the adverse effects the disconnection had on the fundamental rights of the lessees, an argument that was made expressly before it.

The Court is, of course, not compelled to make a decision on any particular basis. Yet, its failure to engage the arguments put before it in relation to fundamental rights is disturbing, particularly given that it is the Court that is responsible for providing definitive interpretations of the Bill of Rights. These rights protect the most important interests that individuals have.[17] In a situation where there is a possible case that these rights have been abrogated, it seems reasonable to expect the Constitutional Court to engage with such an argument. Whether the content of the right to have access to adequate housing embraces a right to electricity (or at least a right not to be deprived of electricity where it is already provided) is a matter that does not arise often and is surely an important point for the court to clarify. *Joseph*, however, is not alone as being part of a disturbing trend in terms of which the Court prefers not to make decisions in relation to fundamental rights.

There is indeed a long history of criticism from the time of *Government of the Republic of South Africa v Grootboom*,[18] where the Court has sought to avoid dealing the content of socio-economic rights.[19] A recent and pertinent example is *Nokotyana v Ekurhuleni Metropolitan Municipality*.[20] This case concerned a claim by members of the Harry Gwala informal settlement for interim basic sanitation and high-mast lighting. The government had delayed making a decision concerning the upgrading of the settlement for over three years. These claims were also made in terms of the right to have access to adequate housing. The Court dismissed the case on the basis that the applicants had not provided a legal basis for their claims in either policy or legislation. Whilst those arguments of the Court may be challenged, the decision is notable for its failure to engage with the question whether the applicants were entitled to interim basic sanitation and high-mast lighting as part of their right to have access

17 D Bilchitz *Poverty and fundamental rights* (2007) 57-65.

18 2001 1 SA 46 (CC).

19 See, eg, Bilchitz (n 17 above); D Brand 'The proceduralisation of South African socio-economic rights jurisprudence or "What are socio-economic rights for?"' in H Botha *et al* (eds) *Rights and democracy in a transformative constitution* (2003) 33-56; S Liebenberg *Socio-economic rights: Adjudication under a transformative constitution* (2010) 177-179. The court has also been criticised for avoiding dealing with the content of rights more generally. See S Woolman 'The amazing vanishing bill of rights' (2007) 124 *South African Law Journal* 762.

20 2010 4 BCLR 312 (CC)

to adequate housing.[21] Again, the Court claims '[i]t is not necessary to make a finding on these submissions'.[22]

Both *Joseph* and *Nokotyana* raise the question as to why the Constitutional Court avoids engaging with the fundamental rights at issue in these cases. The first point that should be made is that this avoidance is simply an unacceptable abrogation of the role of the Constitutional Court. The Court is meant to be a defender of the fundamental rights of individuals — indeed, this is part of the core justification for the existence of judicial review. It may be argued that the minimalist approach of the Constitutional Court may be offered as a defence for failing to engage with the fundamental rights in this case.[23] Minimalism involves 'avoiding decisions that do not have to be made. And when decision making cannot be avoided, it entails making a decision that is as modest as possible in its scope and influence.'[24] However, minimalism does not provide a justification for avoiding matters that are squarely before the Court. Particularly, if fundamental rights are at issue, then the Court should not avoid dealing with these rights. Moreover, developing a 'new' right to receive basic municipal services in this case rather than relying on existing provisions in the Bill of Rights appears to be more activist than minimalist.

Being charitable to the Court, one could suggest that the Court did not see a fundamental right as being at issue. It is interesting to engage with possible arguments that could be made in this regard. The first is that basic sanitation and electricity are not fundamental human needs in the same way as housing, food, water and health care are. The problem here is that such an argument is in conflict with the Court's own statements in this regard. In *Nokotyana*, very little is said about the importance of sanitation, yet the Court recognises that the claim emanates from a community whose plight is 'desperate'.[25] In laying out its alternative basis for the claim to a right to electricity, the Court in *Joseph* states that '[e]lectricity is one of the most common and important basic municipal services and has become virtually indispensable, particularly in urban society'.[26] The Court

21 For a detailed critique of this decision, see D Bilchitz 'Is the Constitutional Court wasting away the rights of the poor? *Nokotyana v Ekurhuleni Metropolitan Municipality* (2010) 127 *South African Law Journal* 591-605.

22 *Nokotyana* (n 20 above) 24.

23 In South Africa, the foremost defence of minimalism is contained in I Currie 'Judicious avoidance' (1999) 15 *South African Journal on Human Rights* 138. Internationally, Sunstein has been one of the foremost theorists in this regard: See C Sunstein *One case at a time* (1996) and C Sunstein 'Foreword: Leaving things undecided' (1996) 110 *Harvard Law Review* 6.

24 Currie (n 23 above) 147.

25 *Nokotyana* (n 20 above) 3.

26 *Joseph* (n 3 above) para 34.

thus appears to recognise that these services are of fundamental importance to individuals in modern society.

As a matter of abstract principle, it is arguable whether electricity is 'fundamental' in the same sense as water or food is. The latter resources are essential for the very survival of individuals. Human beings do, and have, survived without electricity. Yet, rights cannot be considered in the abstract alone. The Constitutional Court emphasised this in the *Grootboom* case, when it recognised that the 'state's obligation to provide adequate housing depends on context' and that while 'some may need access to land and no more … some may need access to services such as water, sewage, electricity and roads'.[27] When we consider the South African context, it is clear that sources of energy and lighting, such as paraffin, often cause fires in poorer areas, leading to the loss of life.[28] Survival here is affected by the lack of electricity. There is also strong empirical evidence to show that dependence on polluting fuels, such as wood, coal and paraffin, also leads to a higher concentration of acute lower respiratory infections in children.[29] Exposure to indoor air pollution as the result of such unclean energy sources also leads to chronic lung disease in non-smoking women.[30] Women also suffer disproportionately from a lack of electricity, being required to walk long distances to fetch firewood and having to spend more time cooking.[31] The lack of electricity can thus impact on the very right to life, equality and health of individuals.

Moreover, socio-economic rights, whilst guaranteeing survival interests, are also concerned with enabling individuals to live decent lives. What constitutes a decent life cannot be considered in the abstract alone but must of necessity have regard to modern conditions of life. Smith famously made the point that, though some resources were not strictly speaking necessary for survival, they are required to live a life of dignity within one's community. His famous example was of a linen shirt and leather shoes which 'the poorest creditable person

27 *Grootboom* (n 18 above) para 37.

28 A particular problem in South Africa is the use of paraffin stoves that spill and cause fires. 'Shack fires blamed on unsafe stoves' 5 January 2011 http://www.iol.co.za/news/south-africa/western-cape/shack-fires-blamed-on-unsafe-stoves-1.1008252 (accessed 11 February 2011). See R Maota 'EMS encourages fire safety' 22 September 2010 http://www.joburg.org.za/index.php?option= com_content&view=article&id=5713&catid=119&Itemid=200 (accessed 11 February 2011).

29 J Wichmann & KVV Voyi 'Impact of cooking and heating fuel use on acute respiratory health of preschool children in South Africa' (2006) 21 *The Southern African Journal of Epidemiology and Infection* 48-54.

30 E Cecelski 'Enabling equitable access to rural electrification: Current thinking on energy, poverty and gender' (2003) *Energy, Poverty and Gender* 27.

31 J Dugard & N Mohlakoana 'More work for women: A rights-based analysis of women's access to basic services in South Africa' (2009) 25 *South African Journal on Human Rights* 546–548.

of either sex would be ashamed to appear in public without'.[32] Similarly, in our time, electricity can be seen to be of importance for a number of reasons. First, it helps to realise other basic rights, such as the right to food, through its importance in cooking and refrigeration. Secondly, it provides lighting which individuals require for intellectual activity, security, social engagements, educational activities and simply to function. Thirdly, it provides important sources of entertainment, such as television, which also perform educative functions and are regarded as signs of social status. In South Africa today, thus, electricity plays a crucial part in realising other rights as well as enabling individuals to attain a decent or adequate level of well-being.[33]

Perhaps then the Court, whilst recognising the important nature of electricity for individuals, did not wish significantly to broaden the entitlements contained within the Bill of Rights. The Bill of Rights contains a number of express guarantees which do not include sanitation and electricity directly. A plausible explanation for the Court's avoidance in these cases of questions relating to fundamental rights is its unwillingness to elevate rights not expressly contained in the Constitution to the level of fundamental rights. Yet, the reasoning above suggests that the caution of the Court is misplaced where there is a strong principled basis for interpreting the rights in the Constitution to include other goods such as sanitation and electricity. Indeed, if we recognise the vital importance of sanitation for health and housing (and indeed life itself), then there is no principled basis for refusing to recognise that it is implied by these rights. Similarly, if electricity today is indispensable (as the Court recognises) to the enjoyment of one's home and to one's health, then a right to electricity is a necessary component of the right to have access to adequate housing. The Court should indeed be reluctant to recognise a new right where it does not clearly flow from the interests underlying the rights in the Bill of Rights. Where there is an intimate connection between these interests, however, then there is no good

32 Quoted in A Sen *Poverty and famines: An essay in entitlement and deprivation* (1981) 18.

33 This is supported by the statistics the Court quotes from the Department of Mineral And Energy survey in n 27 of *Joseph*. It was found that electrification 'greatly improves the quality of life and welfare of households'. The key findings the Court summarises are that (i) 90% of households use electricity as their main source of lighting; (ii) lighting brings benefits such as increased study time for school children and greater security; (iii) electricity increases access to media which, in turn, increases awareness of several opportunities such as education; (iv) 63% of households use electricity as their main source of energy for cooking and refrigerator ownership is high at 65%; and (v) a number of enterprises were created as a result of electrification, and businesses were able to operate for more hours.

reason for the Court to refuse to develop the fundamental rights expressly recognised in the Constitution.[34]

It is quite clear that, in *Joseph*, the Court did not find the relationship between the government and its citizens to be based on fundamental rights. This section has criticised the failure by the Court to engage with these provisions. Clearly, the Court did not see any conflict between the fundamental rights provisions and the basis it articulates for its finding in *Joseph* which involves recognising a 'new' right to receive municipal services to meet one's basic needs. It is to an engagement with the express basis for the Court's decision that I now turn.

2 Exploring the basis for a right to receive basic municipal services

As has been mentioned, the Court in *Joseph* recognised that individuals have a right to receive basic municipal services. That right is rooted in the recognition that 'the provision of basic municipal services is a cardinal function, if not the most important function of every municipal government.'[35] The duty to provide services (including water and electricity) is described as a 'central mandate of local government',[36] as well as a 'matter of public duty'.[37] The duty in question is sourced in the constitutional requirements relating to the nature of local government as well as the duties of municipalities contained in the Municipal Systems Act and the Housing Act. Apart from any fundamental rights issues, local government has thus been tasked with the duty of providing basic services, a duty flowing from public law. This led directly to the finding of the Court that '[w]hen the applicants received electricity, they did so by virtue of their corresponding public law right to receive this basic municipal service'.[38] My concern in this article is to consider some of the possible philosophical origins of this duty. Whilst I shall not seek to question the legal authority the Court provides for it, the more interesting question concerns the jurisprudential foundation of this duty and the resultant conception of the relationship between

34 The Court has in fact recognised, eg, that the right of spouses to cohabit flows from the right to dignity in the Constitution, even though the former right is not explicitly recognised in the Constitution. See *Dawood v Minister of Home Affairs* 2000 3 SA 936 (CC) para 37.

35 *Joseph* (n 3 above) para 34.

36 As above.

37 *Mkontwana v Nelson Mandela Metropolitan Municipality*; *Bissett v Buffalo City Municipality*; *Transfer Rights Action Campaign v MEC, Local Government and Housing, Gauteng* 2005 1 SA 530 (CC) para 38, quoted in *Joseph* (n 4 above) para 34.

38 *Joseph* (n 3 above) para 47.

citizens and the government. The approach I shall adopt will seek to re-construct the best possible understanding of the Court's reasoning that both coheres with what it says and provides some independent justification for its finding.

In discussing whether the public law right to receive basic municipal services is sufficient to ground a duty to accord procedural fairness to the lessees, the Court provides some clues concerning its reasoning. The scope of administrative justice, the Court argues, must 'cover the field of public administration and bureaucratic practice in order properly to instrumentalise principles of good governance'.[39] The Court here suggests that its goal is to outline the responsibility of government overall to its citizenry in a way that extends across the whole field of governance. This could perhaps provide another explanation why the domain of fundamental rights was too limited to capture the Court's intentions in this case.

This reasoning is backed up by the following paragraph of the Court's reasoning:[40]

> Taken together, the values and principles described above require government to act in a manner that is responsive, respectful and fair when fulfilling its constitutional and statutory obligations. This is of particular importance in the delivery of public services at the level of local government. Municipalities are, after all, at the forefront of government interaction with citizens. Compliance by local government with its procedural fairness obligations is crucial therefore, not only for the protection of citizens' rights but also to facilitate trust in the public administration and in our participatory democracy.

The Court thus arguably wished to articulate principles that would apply to the whole domain of governance and its connection to individuals. That domain was not exhausted by fundamental rights provisions and so required articulation of a broader understanding of the notion of rights in this context. In an intriguing footnote to this paragraph, the Court states that this approach to the notion of 'rights' in the context of public service delivery is articulated in the national policy of Batho Pele. The policy provides that the terms 'citizen' and customer' are interchangeable in the context of service delivery, particularly, since citizens have little or no choice over the service provider or the services provided to them. The footnote concludes with the following statement:[41]

> It seems to me that Batho Pele gives practical expression to the constitutional value of *ubuntu* which embraces the relational nature of

39 *Joseph* (n 3 above) para 45.
40 *Joseph* (n 3 above) para 46.
41 *Joseph* (n 3 above) fn 39.

rights. Courts must move beyond the common law conception of rights as strict boundaries of individual entitlement.

This footnote is very rich and covers a broad range of concepts. It is a pity that some of these ideas were not elaborated upon in the text of the judgment. Much of the rest of this section will seek to expand upon and explore some of these terse but alluring ideas in search of a decent jurisprudential foundation for the public law duty upon government to provide basic services (and the consequent duty to give notice).

2.1 Citizens and customers

The Batho Pele Policy recognises the goal of a transformed public service as being to deliver services in such a way as to 'meet the basic needs of all South African citizens'.[42] Public services, the document recognises, are not a privilege but a legitimate expectation. The policy seeks to introduce a fresh approach to service delivery, one which 'puts pressure on systems, procedures, attitudes and behavior within the Public Service and reorients them in the customer's favour, an approach which puts people first'.[43] This requires creating 'a framework for the delivery of public services that treats citizens more like customers and enables the citizens to hold public servants to account for the service they receive'.[44]

The White Paper elaborates on the idea of treating citizens as customers. It recognises first that, in a competitive market, customers can take their business elsewhere if their needs and wishes are not met. Recognising that the customer comes first is an essential condition for business success. However, in the public sector, those who receive public services cannot choose to take their business elsewhere. Some public services are not paid for directly by individuals who receive them and departments that do not satisfy individuals do not go out of business. Some public services are also regulatory in nature and accepted as 'essential safeguards of a civilised society in which the vulnerable are protected and all citizens have equal opportunity for economic and social development'.[45]

Recognising these differences, the policy nevertheless contends that the notion of a 'customer' is important in the context of improving service delivery because it suggests certain principles that are 'as fundamental to public service delivery as they are to the

42 White Paper on Transforming Public Service Delivery GG 18340 (1 October 1997) ('Batho Pele' policy) *Batho pele* means people first.
43 Batho Pele Policy (n 42 above) para 1.2.12.
44 As above.
45 n 42 above, para 1.3.2.

provision of services for commercial gain'.[46] To treat citizens as customers implies listening to their views and taking account of them in making decisions about what services should be provided; treating them with consideration and respect; making sure that the promised level and quality of service is always of the highest standard; and responding swiftly and sympathetically when standards of service fall below the promised standard.[47] These ideas culminate in the eight principles of Batho Pele, which include consultation on the level and quality of services, equal access to services, being treated with courtesy, and so on.[48]

It is interesting to note that the policy suggests that the relationship between customers and businesses is in many ways more efficient at meeting needs than that between the government and citizens. It is suggested that the monopoly of the government over services and regulatory nature of those services render government at risk of being less efficient in meeting needs. The solution that is adopted is to render the government-citizen relationship more like that between businesses and their customers. This strategy, however, is flawed in failing adequately to examine the differences between private and public relationships. Those differences must be taken into account in conceptualising an adequate basis for the new 'right' to receive basic services.

The first important point to make is that this right is not purely contractual in nature. The *Joseph* case illustrates this well: Even where there is no private law contractual relationship with citizens, government owes duties to them.

The second point requires us to examine in a little more detail the roles of 'customer' and 'citizen'. First, it is important to recognise that companies operate for the purpose of making profits and meet customer's needs as an instrumental matter of self-interest, to try and advance their own ends. Similarly, customers buy goods as an instrumental matter of meeting their desires and needs. The relationship is governed by their own mutual self-interest and contract law is necessary to ensure that agreements are enforced on the terms that are agreed between the parties. There is also no point of connection other than the exchange of goods and services.

In relation to public services, the government's focus is not generally conceptualised as realising its own self-interest. Indeed, the government is usually understood as being at the service of citizens

46 n 42 above, para 1.3.3.
47 As above.
48 The eight principles of Batho Pele are consultation, service standards, access, courtesy, information, openness and transparency, redress and value for money.

and directed towards helping to realise and improve their lives. Its focus is thus not on achieving as much profit as possible; in fact, it would be required to reduce prices were the cost of providing a service to lessen. Individuals, in turn, see the government as instrumental to achieving their needs, but also as part of the goal of living together in a harmonious community. In a democracy, the government is also an expression of 'the people' rather than simply being a force operating independently of 'us'.

The relationship between citizens and the government is thus fundamentally different to that between customer and seller. It is not formed on the basis of a commercial relationship and is characterised by a significant asymmetry in that the goal of governmental action is the enabling of citizens' self-realisation. The Constitutional Court's emphasis in *Joseph* on the government's duty to provide also indicates that it conceptualises the meeting of citizen's basic needs as one of the fundamental tasks of governance.[49] Citizens have rights correlative to this duty. If we wish to explain this duty, then we need to recognise the unique features of the relationship between a government and its citizens. The duty also ultimately raises questions concerning the very purpose of governance. Given the very difference in purpose between businesses and governments, the analogy between citizens and simple private contracting parties cannot serve adequately to capture the special relationship between citizens and their government. We thus need a different idea to understand this relationship which requires us to go back to some of the theories underlying government.

2.2 Citizens as parties to a social contract

A different way to understand the Constitutional Court's position and that of the Batho Pele Policy is in terms of a social contract. The unique features of the citizen-government relationship can themselves be understood in terms of the fact that this is a relationship based on a *social* not a *private* contractual relationship. In turn, the similarities with the relationship of customers with a private service provider can also be explained by the common notion of a contract underlying both. Such an interpretation is supported by the Court's recognition that when City Power supplied electricity to Ennerdale Mansions,[50]

[49] See *Joseph* (n 3 above) para 34, where the Court states explicitly that 'the provision of basic municipal services is a cardinal function, if not the most important function of every municipal government'. Quoting *Mkontwana* (n 37 above), the Court recognises the obligations as being 'a matter of public duty'.

[50] *Joseph* (n 3 above) para 47.

> it did so in fulfilment of the constitutional and statutory duties of local government to provide basic municipal services to all persons living in its jurisdiction. When the applicants received electricity, they did so by virtue of their corresponding public law right to receive this basic municipal service.

Here we have the Court articulating a reciprocal relationship between the government and the people founded upon constitutional and statutory duties and 'public law' rights. The question that arises is what grounds these public law duties and rights. This question takes us back to the very foundations of governance.

The traditional theory that developed with the enlightenment and the advent of the notion of liberal democracy and fundamental rights was the idea of a social contract between citizens and the state. Hobbes recognised that the formation of the state involved individuals effectively transferring virtually all their natural rights to the sovereign. This was for purposes of attaining security against harm from others that may occur in the pre-political state of nature.[51] Hobbes conceived of the harms of the state of nature as involving physical violence as well as the constant threat of such violence erupting. Yet, in a more modern way we could extend his theory by conceiving of a state of nature as also involving an inherent insecurity where each is not guaranteed the basic goods necessary to survive and flourish. Individuals could also thus be seen to contract into society for purposes of avoiding the insecurity of a situation where each has to provide for themselves. The state on this view has been formed to help guarantee access to basic goods and services.

Locke in many ways can be seen expressly to advance this kind of reasoning. Though his view of human nature was less pessimistic than that of Hobbes, he nevertheless contended that the state of nature was one of uncertainty wherein 'the enjoyment of the property … is very unsafe, very unsecure'.[52] The goal of joining society involves 'a mind to unite for the mutual *Preservation* of their Lives, Liberties and Estates which I call by the general name, Property'.[53] Though the focus of Locke is on the lack of law, impartial judges and powers of enforcement in the state of nature, once again it is possible also to recognise that his reasoning supports the idea of the inherent uncertainty individuals may face in a state of nature when attempting to meet their basic needs. Moreover, with the complexity of service provision and large capital investment required to provide such services as water and electricity to individual households in the manner we are accustomed to in modern times, it does not seem

51 Hobbes (n 1 above) 117-121.
52 Locke (n 2 above) 350.
53 As above.

possible to imagine individuals organising this themselves. These are inherently collective services which require large capital infrastructure. It is not strange to imagine that a more modern Lockean could well reason that without a government in modern conditions, the provision of basic goods such as water, sanitation and electricity would be inherently uncertain and unlikely. Part of the very advantages of government involves the provision of these goods and this is one of the key modern reasons for entering into society.[54]

Clearly, the social contract tradition is a long one and cannot be analysed exhaustively here. The brief consideration of Hobbes and Locke, however, supports the idea that individuals may see one of the key reasons for accepting a sovereign as relating to the provision of basic services. A key task of the government is thus to fulfill the terms of this agreement by providing such services. One of the key aims of government is thus to be conceived of as rooted in the desire to be free from the insecurity of not receiving basic services. Its mandate and very goals involve the realisation of this task. This explains one of the key differences with the private sector outlined above and why the very ends of government involve the fulfillment of these individuals needs.

The social contract idea, though very influential in modern political thought, has been the subject of much criticism. The exact nature and status of the contract has always bedeviled this theory: history does not show many societies where an explicit social contract is undertaken. The notion of 'tacit consent' is often 'inferred too readily from conduct that the agent does not recognise as consenting … in which case the idea of consent adds little to the claim that we are simply obliged to obey the law of the land and that's that'.[55] On the other hand, the idea could have subversive implications in that it could imply that none of us have obligations to submit to political authority.[56] Recent theorists have suggested that the social contract is hypothetical; yet that is subject to the objection made by Dworkin that 'a hypothetical contract is not simply a pale form of an actual contract; it is no contract at all'.[57]

Whatever the exact merits of this idea, certain *dicta* of the Court plausibly suggest that this is not the best explanation of how it conceives of the relationship between citizens and the government.

54 Interestingly, R Nozick *Anarchy, state and utopia* (1974) does not adopt this line of reasoning, though his theory is often seen as a more modern Lockean understanding of property rights.

55 J Waldron 'Natural rights in the seventeenth and eighteenth centuries' in J Waldron (ed) *Nonsense upon stilts: Bentham, Burke and Marx on the rights of man* (1987) 19.

56 As above.

57 R Dworkin *Taking rights seriously* (1977) 151.

In particular, the contractual notion suggests a rather arms-length, formal relationship between members of the polity and the government. Though the contract has social objectives, it essentially involves citizens entering into a 'contract' with government that must provide certain goods. This suggests that the government is the party that must deliver services and that the citizens are entitled to claim delivery thereof. The social contract idea conceives of individuals as agents entering into association with one another and the government for their own individual benefit. Strong private law overtones thus remain in the very idea of the social contract.

The Constitutional Court seems concerned in *Joseph* to distance itself from these strong private law connotations in capturing the citizen-government relationship. As was mentioned above, in describing the policy of Batho Pele that governs service provision, the Court in an important footnote comments that it 'gives practical expression to the constitutional value of *ubuntu* which embraces the relational nature of rights'.[58] It goes on to state that '[c]ourts must move beyond the common law conception of rights as strict boundaries of individual entitlement'.[59] This statement is highly significant: it suggests that the Court is taking a particular position on how it perceives rights in this context. Unfortunately, the Court does not say anything more, though what seems evident is that the traditional understanding of rights underlying private law relationships is rejected by the Court. Basing the connection between citizens and the government on such a conception (which seems inherent in the social contract) thus does not adequately capture the jurisprudential foundation for the Court's new right. We thus are required to investigate further what the court could mean by its allusions to the 'relational nature of rights'.

2.3 Citizens and community

The Court does not give us very much about the alternative basis. It does, however, provide a reference to De Ville's book when it makes this statement.[60] In the relevant paragraph, De Ville argues for a wide potential understanding of the notion of rights for purposes of PAJA and being entitled to procedural fairness in administrative decision making. Moreover, he states, '[t]here is nothing "natural" about the concept of rights. Rights are not pre-political in nature, but "dialogical". In other words, what are termed "rights" in a legal system are shaped through legal discourse.'[61] Here De Ville rejects

58 *Joseph* (n 3 above) fn 39.
59 As above.
60 J de Ville *Judicial review of administrative action* (2005) 227.
61 As above

the idea of natural rights in the state of nature that is so closely connected to the social contract tradition. He does so in favour of a dialogical understanding of rights though the exact meaning of this is left underspecified.

Botha, who is referred to by De Ville, in two articles expands upon some of these ideas.[62] He contends that the way in which we conceive of law metaphorically has an impact on the kinds of laws we enact. Under apartheid, Botha argues that[63]

> the 'container metaphor' was central: it involved enforcing the idea of a 'strict separation between different race groups. Each of the race groups was viewed as a closed entity with well-defined boundaries; each individual was deemed to fall within one of the racial categories'.

Botha argues that the common law also used notions of property (for instance) as exclusive spaces demarcated by clear boundaries with property rights trumping other rights. The common law thus exemplified and helped to support an apartheid kind of logic. This logic allowed apartheid to continue unhindered by separating out the supposedly 'neutral' law from 'politics'.

The Constitution, argues Botha, requires us to move beyond the dichotomies of the apartheid order and to 'reconceive legal concepts and categories in *relational* terms'.[64] He argues too that identities are not natural or pre-political, but discursive, 'not cast in stone, but are subject to a continuous process of self-revision'.[65] Two metaphors are peculiarly important in the new constitutional order. First, there is the idea of rights[66]

> as a relationship. Rights, in this view, are not rooted in abstract individualism. They are, rather, an expression of connectedness among the self and others. On this understanding, the language of individual rights is fully compatible with the insight that the self is forged within a network of social relations, that the self is always situated within a concrete context.

Secondly, he defends the idea of rights as dialogue.[67]

> If rights are conceived not as fixed boundaries, but as relationship, their content and limits must be subject to debate. Rights, in this view, are

62 H Botha 'Metaphoric reasoning and transformative constitutionalism Part 1' (2002) 4 *Journal for South African Law* 612; H Botha 'Metaphoric reasoning and transformative constitutionalism Part 2' (2003) 1 *Journal for South African Law* 20.
63 Botha Part 1 (n 62 above) 624.
64 Botha Part 2 (n 62 above) 21.
65 As above.
66 Botha Part 2 (n 62 above) 23.
67 Botha Part 2 (n 62 above) 24.

> not pre-political, but are shaped through political and legal discourse. Rights are not inimical to the democratic process but provide us with the vocabulary to discuss matters of common concern.

This idea also involves a commitment to 'the idea of a public sphere that is characterised by openness, equality and plurality, and the transformation of institutions that do not fully embrace these values'.[68]

Botha's argument resonates with the language of the Court. It wishes to move beyond 'strict boundaries of individual entitlement' to embrace the 'relational nature of rights'.[69] This contrast is consistent with and further explicated by Botha's argument. His philosophical ideas thus can plausibly offer some insight into what the Court has in mind. Another important clue as to the thinking of the Court lies in its reference to the value of *ubuntu*. Though referred to in early judgments of the Court, this value has not played a major role in its recent jurisprudence. *Joseph* may signal a re-emergence thereof.

In *S v Makwanyane*,[70] Langa J referred to *ubuntu* in the context of the decision whether to declare the death penalty unconstitutional or not. The concept he claimed is[71]

> of some relevance to the values we need to uphold. It is a culture which places some emphasis on communality and on the interdependence of the members of a community. It recognises a person's status as a human being, entitled to unconditional respect, dignity, value and acceptance from the members of the community such person happens to be part of. It also entails the converse, however. The person has a corresponding duty to give the same respect, dignity, value and acceptance to each member of that community. More importantly, it regulates the exercise of rights by the emphasis it lays on sharing and co-responsibility and the mutual enjoyment of rights by all.

Langa J goes on to find that *ubuntu* provides support for respecting the life of others as being as valuable as one's own and respecting the dignity of other people.[72] Mokgoro J in *Makwanyane* also deals with *ubuntu*, claiming it can be understood metaphorically through the statement *umuntu ngumuntu ngabantu* (a person is a person because of other people).[73] 'Generally, *ubuntu* translates as humaneness. In

68 Botha Part 2 (n 2 above) 25.
69 *Joseph* (n 3 above) fn 39.
70 *S v Makwanyane* 1995 3 SA 391 (CC).
71 *Makwanyane* (n 70 above) para 224.
72 *Makwanyane* para 225.
73 *Makwanyane* para 308. In *Dawood* (n 34 above) para 30, O'Regan J refers in a footnote to this maxim in the context of explicating the value of marriage and personal relationships. The maxim is used to support the proposition that the significance of marriage goes beyond the personal significance to the couple

its most fundamental sense, it translates as personhood and morality'.[74] Finally, Mahomed J eloquently outlines the nature of *ubuntu* as expressing[75]

> the ethos of an instinctive capacity for and enjoyment of love towards our fellow men and women; the joy and the fulfilment involved in recognising their innate humanity; the reciprocity this generates in interaction within the collective community; the richness of the creative emotions which it engenders and the moral energies which it releases both in the givers and the society which they serve and are served by.

These statements are consonant with what has been said about *ubuntu* by thinkers and philosophers working in the field of African moral and political philosophy. Desmond Tutu, for instance, has said:[76]

> When we want to give high praise to someone we say, 'Yu, u nobuntu'; 'Hey, so-and-so has *ubuntu*.' Then you are generous, you are hospitable, you are friendly and caring and compassionate. You share what you have … Harmony, friendliness, community are great goods. Social harmony is for us the *summum bonum* — the greatest good. Anything that subverts or undermines this sought-after good is to be avoided like the plague. Anger, resentment, lust for revenge, even success through aggressive competitiveness, are corrosive of this good.

Similarly, in an essay on what facets of culture Africans widely share, Biko states that 'our action is usually joint community oriented action rather than the individualism which is the hallmark of the capitalist approach'.[77] Metz has sought to develop this into a fully-fledged moral theory with the following basic principle:[78]

> An act is right/just insofar as it is a way of living harmoniously or prizing communal relationships, ones in which people identify with each other and exhibit solidarity with one another; otherwise, an act is wrong.

In an effort to develop the rather vague exhortations to community and relationality, Metz attempts to elaborate on the notions of identification and solidarity. To identify with one another is 'largely for people to think of themselves as members of the same group — that is, to conceive of themselves as a "we," as well as for them to

concerned 'because human beings are social beings whose humanity is expressed through their relationships with others. Entering into marriage therefore is to enter into a relationship that has public significance as well.'

74 *Makwanyane* (n 70 above) para 308.
75 *Makwanyane* (n 70 above) para 263.
76 D Tutu *No future without forgiveness* (1999) 31, 35.
77 S Biko 'Some African cultural concepts' in S Biko *I write what I like* (2004) 46.
78 T Metz Human dignity, capital punishment and African moral theory: Towards a new philosophy of human rights (2010) 9 *Journal of Human Rights* 81 84.

engage in joint projects, co-ordinating their behaviour to realise shared ends.'[79] On the other hand,[80]

> to exhibit solidarity with one another is for people to engage in mutual aid, to act in ways that are expected to benefit each other (ideally, repeatedly over time). Solidarity is also a matter of people's attitudes such as emotions and motives being positively oriented toward others, say, by sympathising with them and helping them for their sake.

What has this all to do with our original question relating to the manner in which the relationship between citizens and the government is conceived? I have sought to examine the key concepts briefly mentioned by the Court and develop the philosophical underpinning that could plausibly explain them. That discussion suggests that the notion of the traditional social contract conceived of in strong individualistic terms and understood as an 'arms-length relation' does not adequately capture the way in which the Court conceives of the relationship between citizens and the government.[81] The concepts of *ubuntu* and 'relationality' suggest a 'warmer, friendlier' conception of the relationship between the government and the people. The government's relationship to citizens must be understood along the lines of a more communal, African ethic. That ethic prizes the creation of harmonious relationships between individuals and the government. The government-citizen relationship is thus an expression of a community founded upon the ethos of *ubuntu*. That ethos allows for parties to have differing rights and responsibilities: the government has the responsibility to provide services and people have a right to receive them. This can be seen as an expression of a system whereby the community jointly provides services for the benefit of every individual. The way in which services are delivered thus is not to be considered in a cold, formal, contractual manner, but rather in warm, friendly, and communal terms. The problem with the actions of the City of Johannesburg in *Joseph* can be explained against this background.

The City claimed it had no 'relationship' with the lessees. As the court puts it, '[t]he crux of the case is therefore whether any legal relationship exists between the applicants and City Power outside the bounds of contractual privity …'.[82] The actions of the city were particularly unfriendly and inhospitable: they cut off the electricity of

79 Metz (n 78 above) 84.
80 As above.
81 D Cornell 'A call for a nuanced constitutional jurisprudence: *Ubuntu*, dignity and reconciliation' (2004) 19 *South African Public Law* 667-671 also argues that the social contract is 'simply inadequate to the second and third generation rights guaranteed in the South Africa Constitution'. She also draws on the notion of *ubuntu* to give a different philosophical grounding for the more expansive commitments in the Constitution.
82 *Joseph* (n 3 above) para 2.

the lessees without any warning. The Court's reasoning is ultimately designed to restore the notion of a relationship between the lessees and the city: it does so through recognising the duty to provide services and a corresponding right to receive them. Moreover, the Court requires that notice, at the very least, be given to persons in such a position, informing them of any proposed disconnection. Whilst individuals do not have an automatic right to make representations, users may approach the city and where their grievance is valid, 'it must be presumed that City Power, *acting in good faith,* would not proceed to effect the proposed disconnection'.[83] Though not legally, or contractually, required to prevent a disconnection once a valid representation has been made, the Court recognises a notion of good faith that comes into the relationship between citizens and the government. The kind of connection between the two is thus not to be conceived of in strict legalistic terms, but rather as involving both decency and good faith. The ethical foundation of promoting friendly communal relationships could be seen to be a plausible foundation for this decision that is wholly consistent with the reasoning of the Court.

2.4 Objections

The article has thus far largely sought to explore the deeper philosophical underpinning of the decision in *Joseph* and, in particular, the right to receive basic services. If the reasoning thus far is correct and the Court is in future to build upon these foundations, it is necessary to consider certain possible objections to this approach. These objections in some ways flow from the lack of detail provided by the Constitutional Court in outlining the new right and its underlying ethos and they can hopefully identify pitfalls that can be avoided by the Court in its development.

Initially, it is perhaps important to consider an objection made very powerfully by Waldron to this line of reasoning.[84] Waldron argues that many individuals would want a society in which it were possible to decide matters on the basis of common interest and mutual understanding (what he refers to as 'affection'). The value of rights, however, he contends, often comes in precisely when such relationships break down. Rights are there precisely to guarantee a certain level of decent conduct and entitlements even where the harmony between individuals has broken down. If the foundation of rights lies in the notion of harmonious relationships, then it could be argued that they would lose their usefulness in cases of disharmony which is precisely where they are most important. Such disharmony is

83 *Joseph* (n 3 above) para 63 (my emphasis).
84 J Waldron 'When justice replaces affection: The need for rights' in J Waldron (ed) *Liberal Rights* (1993) 370-391.

of course likely to arise not only between individuals, but between citizens and the government as well.

However, we need not reach such a conclusion too quickly. Rights could be understood as aiming to restore harmony and relationships where conflict occurs or at least to minimise the disharmony that arises. The manner in which conflicts are resolved can also help restore social harmony and a sense of community in the future. Indeed, the very transition in South Africa is an example of how the law can attempt to sow community and reconciliation out of disharmony and separation. The ethos outlined by the Court is thus not seeking to pretend that we live in a utopian community in which conflict does not arise; rather, it can help guide the manner in which disputes are resolved in ways that help mend and repair social relationships.

A second objection involves a concern about breaking down the very individualism of rights. Part of the very benefit of rights-based thinking, it could be claimed, involves guaranteeing each individual certain basic freedoms, goods and services. Even where the communal interest is served by depriving an individual of such rights, in general rights claims trump the communal good.[85] A relational understanding of rights could serve to weaken this strong claim by individuals and allow the language and logic of harmony and community to require strong sacrifices for the greater whole. The problem here lies in the lack of clarity by the Court on exactly what is involved in a 'relational understanding of rights'. If this notion is understood as involving a strong version of communitarianism, then this objection is well-founded. The very quest to move beyond the atomistic conception of the individual poses the danger of abrogating their most fundamental interests. If we also fail to understand that individual interests are separable, it is possible to limit the very rights individuals have through vague notions of their 'relationship to others'.

It is not impossible to conceive of a response to this objection along the lines that an attractive African ethic requires drawing out in more detail the notion of harmonious and friendly relations. When we do so, it could be argued that a strong respect for the interests

85 R Dworkin 'Rights as trumps' in J Waldron (ed) *Theories of rights* (1984) 153. See also Dworkin (n 58 above) 192, who states that if a fundamental right exists, the government is not entitled to act 'on no more than a judgment that its act is likely to produce, overall, a benefit to the community. That admission would make his claim of a right pointless, and would show him to be using some sense of "right" other than the strong sense necessary to give his claim the political importance it is normally taken to have.'

protected by individual rights flows from such a conception.[86] The relational ethos may also not be understood as replacing a conception of individual rights; rather, it could involve a way to think about the interaction between the state and citizens in a society that already acknowledges the existence of individual, enforceable rights. [87] The problem remains, though, that the concept of relationality in relation to rights is rather underdeveloped and vague. If this objection is to be met, and its underlying concerns alleviated, the Constitutional Court will need to elaborate upon what it means by the relational nature of rights and moving bound the strict boundaries of individual entitlement. It will also need to demonstrate through its practice and judgments that the fears of a possible weakening of rights on this basis are unfounded.

The next concern relates to the relationship between the new right to receive basic services articulated by the Court in *Joseph* and the fundamental rights in the Bill of Rights. One possible way of understanding the judgment is that the Court preferred to make a decision in terms of the 'new' right as it allowed the court to express more fully its philosophy of relationality and *ubuntu* than fundamental rights would have. If this is so, it is necessary to understand the connection between the new ethos and fundamental rights. There is indeed a possibility that the fundamental rights in the Bill of Rights could be understood and justified as an expression of a relational ethos, something that is consistent with the comments quoted above from *Makwanyane*.[88] Some of the potential problems with such a relational understanding of fundamental rights are articulated in the first two objections. It could be that the reason the Court articulated this 'new' right and made some more contemplative comments was really to pronounce on the way in which it conceived of the relationship between government and its citizens. Rather than emanating from fundamental rights which flow from the very intrinsic nature of individuals, this 'new' right flows from relational properties between the government and individuals.[89] If this is so, it is an exciting development which requires us to think more deeply about how this relationship ought to be developed. A conception of a warmer, less distant state that is concerned to advance the welfare of all its citizens is certainly to be welcomed.

86 Metz (n 78 above) 96 has argued that such an African ethic can provide a plausible grounding for fundamental rights and is in the process of developing a more detailed theory in this regard.

87 I am indebted to an anonymous referee for this suggestion.

88 See also Metz (n 78 above) 96.

89 For the notion of relational properties and their importance in ethics, see T Metz 'For the sake of friendship: Relationality and relationship as grounds of beneficence' (2010) 57 *Theoria* 54-76.

The final concern relates to whether the relational understanding of the citizen-government relationship is really capable of grasping the full complexity of this interaction in a modern state. The government today performs a range of functions: It has a monopoly on the exercise of legitimate force by police and the army; it provides basic services; it provides welfare payments to citizens; it regulates the private sphere; it provides a framework in which close personal relationships can be legally recognised; and so on. The Court has really invited us to consider whether a relational understanding of this connection can adequately capture the full range of engagements between citizens and the state. The relational understanding is peculiarly apposite in relation to the provision of government services though it may be argued other 'metaphors' or philosophical frameworks could be necessary to explain other functions.[90] It does seem to me, however, that the relational approach is generally promising for articulating the *kind* of interactions between citizens and their government that is normatively desirable. A mode of engagement in a way that is productive of warm harmonious connections is potentially of enormous import, no matter the particular function the government is exercising.

3 Consistency, complexity and community

The last part of this article seeks to consider how the new 'right to receive basic services' and its foundation in an understanding of the citizen-government relationship as being akin to a warm, communal connection fits with other cases decided by the Constitutional Court. In particular, the focus will be on cases concerned with basic services and those where there was no direct relationship between the government and a particular party.

3.1 *Nokotyana*

The first case is *Nokotyana*, which has already been discussed in part 1, in relation to the Court's avoidance of fundamental rights as a basis for its decision making. However, the decision is even more difficult to understand when we consider the 'right to receive basic services' that the Court articulates in *Joseph*. In *Nokotyana*, the community claimed access to interim basic sanitation (and high-mast lighting). The Court effectively found that the claims of the community in the informal settlement were 'not properly conceived in law'.[91] It went through various technical bases upon which it generally dismisses the claims of the applicants (apart from ordering the government to make

90 I am indebted to an anonymous referee for pressing this point.
91 *Nokotyana* (n 20 above) para 61.

a decision whether to upgrade the settlement or not). Yet, *Joseph* provided a clear legal foundation for finding in favour of the applicants. The case, as we have seen, articulated a duty upon the municipality to provide basic municipal services and a corresponding right on the part of individuals to receive such services. Surely, sanitation is as important a service offered by the municipality as electricity provision. Why then did the Court not even consider this justification for providing the sanitation services to the informal settlement?

It is hard to explain why the Court avoids considering the right to receive basic services it had articulated only a month before. Perhaps again part of the reason lies in the different context of the decisions. *Joseph* concerned an administrative justice matter: finding a right to receive basic services only effectively imposed a duty upon the government to notify the lessees of the proposed disconnection. The government's actions demonstrated a particularly hostile, unfriendly mode of proceeding. The right to receive basic municipal services was only developed in the context of whether there was a duty to comply with the procedural fairness requirements of PAJA. This raises questions as to the ambit and scope of this 'new' right: Does it in fact provide an independent ground to claim the provision of basic services?

Interestingly enough, in *Nokotyana*, the government acted in a neglectful manner of its responsibilities to citizens by failing to make a decision concerning the upgrading of the informal settlement for three years. That demonstrated a disregard for the people's interests in the settlement that is not consistent with the concerned, attentive relationship between government and its citizens that an ethos of *ubuntu* and relationality would require. During the hearing of the matter, the Constitutional Court prompted the provincial government to apologise to the community in isiXhosa. The emphasis of the Court thus was upon apology and its capacity to restore relationships. It also ordered the government to take a decision within 14 months. The Ccourt here seems particularly concerned with the decision-making process. It does not go further and order fulfilment of the residents' rights actually to receive the sanitation services, which would have been more interventionist and required more resources from the government.

This raises some of the concerns with the new communal ethos that may underlie the decisions. The Court seems more willing to intervene where to do so does not involve directly ordering the government to provide a particular service but rather involves some procedural logjam. By focusing on the quality of relationship between government and citizens, it appears to become less concerned with the hard rights of citizens and their plight. This would bolster fears

that the communal ethos could well involve the weakening of individual entitlements. This situation is not in fact necessitated by the ethos, but some of the cases descriptively appear to bear out how the Court is employing it. A different direction could well be taken in understanding true communal relationships based on harmony, concern and friendliness to require actual service provision and meeting the needs of individuals. This would require courts, at times, to require the government to comply with its duties and realise citizens' corresponding rights.

Indeed, the constitutional and legislative provisions that the Court uses to justify the right to receive municipal services support recognising this right as being independent of the context of administrative justice. To claim that the right is limited to PAJA would be arbitrary. By choosing to reason in the way it does, the Constitutional Court must recognise the implications of its decision: the right to receive basic municipal services is a substantive right governing what citizens can expect of their government rather than simply being a catalyst for duties of procedural fairness. This will require the Court to pronounce on the ambit and scope of the right: in time, this could indeed provide a powerful entitlement for individuals.

3.2 Mkontwana

The second decision I wish to discuss is *Mkontwana v Nelson Mandela Metropolitan University* (Mkontwana).[92] The case concerned the constitutionality of section 118(1) of the Municipal Systems Act. The provision prevented the Registrar of Deeds from transferring immovable property without a certificate issued by the local municipality attesting to the fact that the charges for water and electricity had been paid for a period of two years prior to the date of issue of the certificate. The problem with the provision was that the occupiers of a property do not always own it. The provision essentially holds the owner of a property responsible for ensuring that occupiers pay their consumption charges for water and electricity. If this has not been done, the owner effectively is prevented from transferring the property. It was argued that this involved an arbitrary deprivation of property rights on the part of the owners.

The Constitutional Court found in this case that the provision was constitutional. The majority reasoned that there was a connection between the charges and the property. The owner effectively had a duty to take reasonable steps to ensure that charges were paid by occupiers of his property. The Court examined various types of legal

92 *Mkontwana* (n 37 above).

relationships that may exist, including lessee, usufructuary, fideicommissary and unlawful occupiers. In all the cases, the Court found that it is reasonable to hold the owner responsible for non-payment by the occupiers. The Court did affirm the responsibility of the municipality to collect its debts from the occupiers.[93] It also affirmed the municipality's responsibilities to keep proper accounts and to make them available to the owner on request.[94] However, those responsibilities did not lead the Court to conclude that it was unfair to place the risk of non-payment of consumer charges upon the owner of the property concerned.

Importantly, like *Joseph*, *Mkontwana* deals with a three-way relationship. We once again have the municipality, an owner of property and occupiers of that property. In this case, the municipality effectively provides a service to those occupiers and has a contractual relationship with them. Yet, it provides these services to a property owned by the owner. The occupiers default in their responsibility to pay though the municipality in this case continues to provide a service since the consumption charges increase. The case concerns whether the municipality can hold the owner responsible for the charges that are accumulated. The Court reasons that there is a direct connection between the charges and the property: these services make the property habitable and even increase its value.[95] The ownership of a property entails certain rights and responsibilities and this provides the vital link between the owner and the consumption charges that makes placing a burden on the property owner justifiable.

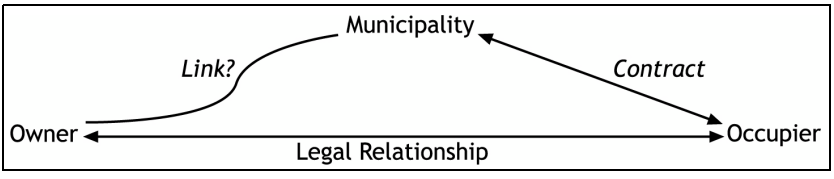

Fig 2: Visual representation of problem in Mkontwana

Mkontwana is a case that could involve a lengthy discussion in itself. There appears to be a significant degree of unfairness in holding an owner responsible for charges that should be recovered from another party. The reasoning of the Court appears to be largely utilitarian in nature in that it justifies the imposition of such a burden on the basis that this would be the best way to recover debts for the municipality. It could also discourage owners to abandon their properties to

93 *Mkontwana* (n 37 above) para 62.
94 *Mkontwana* (n 37 above) para 67.
95 *Mkontwana* (n 37 above) para 40.

occupiers who do not pay their bills. Why the municipality should be allowed to shift the burden of debt recovery from the party who incurred the debt is not adequately justified.

Mkontwana is in a way the converse of what happened in *Joseph*. In *Joseph*, the owner failed to pay the consumption charges and the lessees were affected negatively by having their electricity disconnected. They bore the burden for the failure of the owner and the municipality was required to deal directly with them. In *Mkontwana*, the owner is held responsible for the failure by the occupiers to pay their debts to the municipality. The municipality is allowed to hold the owner responsible (by depriving him or her of the right to transfer) instead of being required to deal directly with the occupiers. It thus seems that in enforcing their right to receive services, the municipality must engage directly with occupiers. However, when it comes to payment for those services, the same obligations do not fall on the municipality and a proxy, the owner, can be required to collect the debt or pay the bill. The connection of the property to the owner hardly seems like a sufficient justification for this disparity. As such, the deprivation of property in this case should have been found to be arbitrary under the wide understanding of this notion adopted by the Constitutional Court.[96]

The relational reasoning underpinning *Joseph* would tend to have supported a different result in *Mkontwana*. Importantly, the ethos of *ubuntu* and warm, communal relationships can only occur where there is reciprocity between citizens and the government in relation to the provision of services. It is made clear in *Joseph* that 'rights entail responsibilities. Citizens who can, must take responsibility for paying for services provided to them in fulfilment of government's statutory and constitutional obligations. Government is entitled to require this of citizens.'[97] If it is the case that the municipality has a duty to occupiers to provide services, they also have a duty to pay for those services (if they can afford to). If they have duties to pay, then it is quite unclear why the municipality should not be required to enforce these responsibilities as a matter of its relationship between itself and those who receive the services. Moreover, it is unclear why a third party — such as an owner — that does not directly benefit from those services and who, in certain circumstances, is not responsible for the usage (as in the case of unlawful occupiers) should merely by virtue of ownership be required to pay for those services (or collect

96 *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 4 SA 768 (CC).

97 *Joseph* (n 3 above) para 52. Some of the judges in *Makwanyane* (n 70 above) in their statements quoted above also recognise this as an implication of the value of *ubuntu*.

the monies owed). The reasoning and result in *Mkontwana* in the context of property seems to back up the 'common law conception of rights as strict boundaries of individual entitlement'[98] the Court attempts to move away from in *Joseph*.

3.2 *Walele*

The last case I wish to consider is *Walele v City of Cape Town*.[99] The case concerned whether the City of Cape Town had properly approved of plans to build a four-storey block of flats. The decision was challenged by a neighbour who claimed that the new apartments would devalue his property. According to the National Building Standards Act 103 of 1977, a municipality must refuse to approve plans if they would devalue neighbouring properties. The challenge in this case concerned the process of decision-making undertaken by the City of Cape Town and whether it complied with the provisions of PAJA and other applicable legislation.

Whilst I shall not consider all the details of the decision, what is of importance to note again was the fact that it involved a relationship between three parties. In this case, we were not concerned with the service provision function of the municipality, but the adjudicative function between two separate private parties. The one party had applied for approval of plans to build on their property; the other was claiming that the building plans in question affected the value of their property. The municipality is required to adjudicate between competing interests. The case deals with the fact that we live in relationship with one another and our activities can impact upon each other.

The majority, *per* Jaftha AJ, found that the neighbour does not have a right to be heard in terms of principles of administrative justice. However, the decision maker in a local authority must be satisfied personally that all the requirements for approving plans are met as laid out in the Building Standards Act. This includes the requirement that the proposed development does not devalue existing property. The reasoning of the majority is instructive: the interpretation contended for it claims:[100]

> [d]emonstrates that it is not only the landowner's right of ownership which must be taken into account, but also the rights of owners of neighbouring properties which may be adversely affected by the erection of a building authorised by the approval of the plans in circumstances where they were not afforded a hearing. The section, if

98 *Joseph* (n 3 above) fn 39.
99 *Walele v City of Cape Town* 2008 6 SA 129 (CC).
100 *Walele* (n 99 above) para 55.

> construed in this way, strikes the right balance between the landowner's entitlement to exercise his or her right of ownership over property and the right of owners of neighbouring properties. The interpretation promotes the property rights of the landowners and those of its neighbours.

This reasoning leads the majority to require a report from certain city officials to be placed before the final decision maker that outlines sufficient evidence upon which a decision could be taken. Since this had not been done, the majority found that the decision had to be sent back to the City. The minority, *per* O'Regan J, disagreed and found that no report was needed and that it would not necessarily play an important role in any resultant decision. It would also hamper decision-making on building approvals.[101]

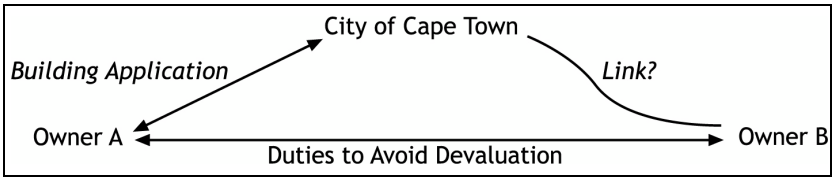

Fig 3: Visual representation of the problem in Walele

The case can be seen to involve consideration of how the government should go about its task of adjudicating the differing interests of individuals, particularly where one of the parties is not as of right entitled to have a hearing in this regard. Clearly, the government has a duty to take the third party's interests into account. The dispute between the majority and minority can be understood to concern the stringency of the measures the government must take to protect those interests. In the absence of a hearing, the third party is vulnerable and thus the majority requires the final decision maker to have firm evidence supporting any approval that entails no devaluation of the property will occur. Ultimately, the majority shows itself particularly concerned to establish that the government must give due consideration to the interests of all parties affected by its decisions.

Arguably, this diligence in considering the interests of all parties is entirely congruent with the finding in *Joseph*, where the government seemed to ignore the interests of the lessees. It also could be helpfully explained by understanding the government's relation to citizens as flowing from an attempt to build community and warm, harmonious relations with and between citizens. In

[101] *Walele* (n 99 above) paras 106-109.

Walele, the interests of individuals came into conflict, which will inevitably occur in social situations. Preserving harmony, according to the majority of the Court, entails ensuring every party understands that their interests have been considered in any decision-making process and that stringent procedures are in place to ensure this does take place. Such a procedure would give expression to an ethos that embodies a respect for every person, whilst recognising the interdependence of each, the very ethos underlying an attractive interpretation of the value of *ubuntu*. This decision thus illustrates how the relational ethos could be of importance, not only in the service provision function of government, but also in exercising its adjudicative powers.

4 Conclusion

This article has sought to explore the jurisprudential basis for the decision in *Joseph*. The goal has been in the process to consider what the decision says about the relationship between the government and citizens. The fundamental rights in the Bill of Rights could arguably provide the basis for the decision; yet, the Court avoids reaching its decision on this basis. The first part of the article explored this refusal and provided certain criticisms of the Court in this regard. I then turned to consider the 'new' right to receive basic municipal services that the Court articulates in this decision as explaining the link between the government and the lessees. I explored three possible explanations for its philosophical grounding: the first involved conceiving of citizens as customers and the second as participants in a social contract. The best explanation of the Court's decision, however, it was suggested, involves grounding the citizen-government relationship in notions of *ubuntu* and 'relationality'. I sought to explore what these ideas could mean, the possibilities they offer, and expressed some concerns that arise in this regard. The final part of this article sought to relate the 'new' right to receive basic services and some of the philosophical discussion to three other cases of the Constitutional Court that are either consistent with it or exemplify some of the concerns articulated in this article.

Ultimately, this 'new' right, articulated in *Joseph*, is an exciting development in South African jurisprudence. Too little thought is given to the relationships between citizens and the government. The crisis in service delivery also requires us to devote more detailed attention to this relationship. Basing that relationship on an ethos of respect, mutuality and harmony bodes well for the development of governance in South Africa and has the benefit of rooting it in an ethos that resonates with the values and dispositions of individuals in South African society. That ethos need not be seen as antithetical to fundamental rights discourse, but rather can complement and

reinforce it. The new right and its underlying ethos still require further development: the way in which they evolve in the jurisprudence of the Constitutional Court will be of great importance in developing both a theory of governance and citizenship in post-apartheid South Africa.