Reconceiving Commissions of Inquiry as Plural and Participatory Institutions: A Critical Reflection on *Magidiwana*

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I Introduction

Legal Aid South Africa v Magidiwana & Others[1] is a highly distinctive and potentially influential authority on the status and function of commissions of inquiry. These attributes were almost certainly unintended by the Constitutional Court. On its surface, the case presents itself as a straightforward decision on mootness, one in which a majority of the Court declined to revisit issues that had been rendered irrelevant by a private settlement spurred by a High Court judgment. The necessary effect of the Court's decision, however, is to preserve the authority of that judgment, the scope and significance of which is contested, but potentially sweeping.

On the view taken by a majority of the Constitutional Court, the principles from *Magidiwana* are narrow and limited, unlikely to engage future consequences for Legal Aid South Africa (LASA) – the chief respondent in the case – or for the future conduct of commissions of inquiry. But an alternate interpretation of the judgment suggests that it creates a contextual right for participants at commissions of inquiry to demand public financing for their legal representation, an obligation that LASA is required to fulfil. The significance of this interpretation extends beyond the issue of participant funding: it reflects a specific vision of inquiries as civic institutions, embracing a purposive and procedural affinity between them and more conventional judicial processes, with the potential to challenge many familiar tenets of inquiry practice.

This paper has two aims. The first is to discern the significance of *Magidiwana*, considering both the Constitutional Court decision and the High Court ruling that it operates to preserve. I argue that while the principles which emerge from *Magidiwana* are ambiguous, read even in narrow terms they depart significantly from an orthodox treatment of commissions of inquiry. Given the relative dearth

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[1] [2015] ZACC 28, 2015 (6) SA 494 (CC), 2015 (11) BCLR 1346 (CC)('*Magidiwana*').

of authorities on commissions of inquiry from the apex courts of commonwealth countries, *Magidiwana* emerges as an important decision, one that pushes against the grain in its characterisation of inquiries and in the participatory implications which it derives from that characterisation.

The second aim of the paper is to use *Magidiwana* as a starting-point for reflection on the institutional nature of commissions of inquiry. *Magidiwana* underscores the fact that inquiries are sites for multiple competing normative claims, expressed as ideas about what inquiries are meant to achieve (their ends) and how they should best achieve them (their means). Different starting points about inquiries ends and means foster different analytics for appraising their conduct – for example, an analytic that stresses efficacy in truth-seeking as opposed to one that stresses adversarial equality for participants. The starting points are not mutually exclusive, but often present competing tensions within a single inquiry. Conventional legal treatments of inquiries prioritise these claims in familiar ways, suggesting for example that the inquisitorial mandate of inquiries justifies displacing court-like participatory rights in order to preserve the central authority and efficacy of the commission. I advance a theory of inquiries that adopts a less hierarchical view of the normative claims placed on them, instead suggesting that the confluence of those claims within a single institution is expressive of inquiries' institutional distinctness and potential. If inquiries are conceived as normatively plural and participatory institutions, as opposed to prefabricated means to achieving specific ends, then a host of new possibilities arises for enhancing their conduct and their socially constructive impacts.

II Discerning the Significance of *Magidiwana*

In this Part, I provide a detailed overview of the *Magidiwana* case and attempt to distil its significance for future inquiry conduct. After briefly introducing the factual background to the Marikana Commission (the inquiry that gave rise to the litigation) I offer a comparative perspective of Canadian and Australian legal standards related to the controversies in *Magidiwana*. This comparison helps to situate both the international relevance of *Magidiwana*, and the degree to which it departs from an orthodox treatment of inquiries. I then review both the High Court and Constitutional Court decisions, emphasising those aspects of the decisions that remain ambiguous, but noting that despite this ambiguity, the case is likely to have a significant impact on how future inquiries are conducted in South Africa.

A Background to *Magidiwana*

Magidiwana arose from the proceedings of the Marikana Commission of Inquiry (hereinafter the 'Marikana Commission'), appointed by President Zuma in 2012 following the killing of 34 miners by the South African Police Service (SAPS) on 16 August 2012, and the separate deaths of ten people – including mine workers, security officers and police – which occurred during wage strikes at the Marikina Mine near Rustenburg, North West Province, between 11 and 16 August 2016. The strikes involved civil unrest and violent confrontation between mineworkers,

security and other staff of the Lonmin Mine Plc Company (Lonmin), union officials, and SAPS, culminating in a mass shooting perpetrated by the police. Graphic footage of this event captured headlines around the world, and political associations between the National Union of Mineworkers and the ANC, together with Cyril Ramaphosa's then status as a director and shareholder of Lonmin, implicated the country's political establishment in the ensuing controversy.[2]

The Commission was tasked with the responsibility to 'inquire into and make findings and recommendations on, amongst others: (a) the conduct of Lonmin, SAPS, AMCU [the Association of Mineworkers and Construction Union] and the National Union of Mineworkers (NUM); (b) the role of the Department of Mineral Resources and any other government departments or agencies; and (c) the conduct of individuals and loose groupings in promoting a situation of conflict and confrontation which may have given rise to the tragic incident'.[3] Ian Farlam, a retired judge of the Supreme Court of Appeal, was appointed Chairperson of the Commission.

The Commission was established by presidential proclamation[4] and vested with authority under the Commissions Act (the Act).[5] Section 84(2)(f) of the Constitution grants the President the authority to appoint commissions of inquiry concerning any subject. For a commission to exercise coercive investigative authority, however, it must be vested with the powers of the Act. This parallels the situation in Canada and Australia, where appointment of a commission of inquiry remains a matter of Crown prerogative, but the conferral of coercive powers requires recourse to statutory authority.[6]

The Commissions Act itself is similar to the equivalent federal statutes in those countries.[7] It is a skeletal document, conferring robust authority on inquiries to compel witnesses and to hear testimony under oath,[8] as well as to require the production of evidence,[9] but not speaking in detail to the manner in which inquiries should be procedurally structured. Nor does the statute deal in any detail with the rights of inquiry witnesses.[10] The statute does specify that compelled

[2] See, generally, R Munusamy 'The Marikana Massacre is a Tale of Utter Shame for South Africa' *The Guardian* (26 June 2015) available at https://www.theguardian.com/world/2015/jun/26/marikana-massacre-ramaphosa-lonmin; and 'South Africa Police Accused over Marikana Mine Deaths' *BBC* (25 June 2015), available at https://www.bbc.com/news/world-africa-33278083.

[3] As summarised by the Constitutional Court in *Magidiwana* (note 1 above) at para 5.

[4] See *Government Gazette* 35680 (12 September 2012).

[5] Act 8 of 1947.

[6] On the Canadian position, see E Ratushny *The Conduct of Public Inquiries: Law, Policy, and Practice* (2009) 24 and R Mcdonald 'The Commission of Inquiry in the Perspective of Administrative Law' (1980) 18 *Alberta Law Review* 366, 368. For an excellent discussion of the source of legal authority to appoint commissions of inquiry in Australia, including the need for statutory authorisation of coercive powers, see N Aroney 'The Constitutional First Principles of Royal Commissions' in S Prasser & H Tracey (ed) *Royal Commissions and Public Inquiries: Practice and Potential* (2014) 23 at 25–27.

[7] See Canada's Inquiries Act of 1985 and Australia's Royal Commissions Act of 1902.

[8] Canada's Inquiries Act s 3.

[9] Ibid.

[10] Among the South African, Australia, and Canadian statutes, only Canada's Inquiries Act (note 7 above) specifies that inquiry witnesses are entitled to representation by counsel and to the basic elements of natural justice: see ss 12 and 13, respectively. Entitlement to counsel will be considered in further detail below.

witnesses at an inquiry may exercise the same evidentiary privileges as those available in a court.[11] This position differs from that in Canada and Australia, where the privilege against self-incrimination is abrogated at commissions of inquiry, subject to a broad restriction against the admission of compelled evidence in subsequent civil or criminal proceedings.[12]

One outcome of the relative lack of procedural guidance in the statutes of all three jurisdictions is that significant discretion is ordinarily deferred to inquiry commissioners in crafting inquiry procedure.[13] Despite this flexibility, most commissions of inquiry follow a familiar procedural template by which evidence is led through the examination and cross-examination of witnesses, conducted by legal counsel representing the inquiry (the 'evidence leaders' or 'commission counsel') and by counsel representing individuals and groups that have been granted formal standing. As in the case of the Marikana Commission, often the commissioner presiding over an inquiry is a current or former judge.[14]

These characteristics point to a paradoxical feature of inquiries: while they appear to borrow heavily from the procedures of a courtroom, with public hearings conducted by lawyers and frequently overseen by judges, they are not formally judicial processes responsible for interpreting and applying law or for determining the legal rights of participants.[15] Rather, they are fact-finding bodies whose work culminates in findings and recommendations which engage no legal consequences in their own right, although they may tarnish reputations, spur civil and criminal proceedings, and inform consequential legislative action. This distinction between inquiries and courts is one of the most analytically significant themes in inquiry jurisprudence. For example, in a seminal decision, Canada's Supreme Court observed that:

[11] Canada's Inquiries Act s 3(4).

[12] Canada's Inquiries Act doesn't speak to the issue of evidentiary privileges, although the abrogation of the privilege against self-incrimination (subject to subsequent-use protections) was affirmed in the influential concurring reasons of Cory J in *Phillips v Nova Scotia (Westray Mine Inquiry)* (1995) 2 SCR 97. Some provincial statutes specify that witnesses will be taken to have objected to giving testimony that tends to incriminate them (see s 16(b) of Ontario's Public Inquiries Act of 2009) thus activating the blanket protection of s 5 of the Canada Evidence Act of 1985. Canada's Charter of Rights and Freedoms, Part 1 of the Constitution Act of 1982, being Schedule B to the Canada Act of 1982, also prohibits the use of testimony given in one proceeding to incriminate the same witness in another, other than in cases of perjury (see s 13). Australia's Royal Commissions Act of 1902 specifies that the privilege against self-incrimination may only be asserted at an inquiry when other proceedings have already been commenced against a witness (s 6A (1)–(4)); otherwise the witness benefits only from the inadmissibility of compelled testimony in subsequent proceedings (s 6DD).

[13] Uniquely among the South African, Canadian and Australian statutes, the Commissions Act confers authority on the President to set procedural guidelines for an inquiry (see note 5 above at s 1(1)(b)(ii)). In practice, however, such guidelines are typically drafted by commissioners themselves and issued by the executive on request. See M Bishop 'An Accidental Good: The Role of Commissions of Inquiry in South African Democracy', conference paper presented to the New York Law School Symposium, *Twenty Years of South African Constitutionalism: Constitutional Rights, Judicial Independence, and the Transition to Democracy* (16 November 2014) 5, available at http://www.nylslawreview.com/wp-content/uploads/sites/16/2014/11/Bishop.pdf.

[14] Ibid.

[15] For an extended and critical treatment of this paradox, see G Hoole *Judicial Inquiries and the Rule of Law* (PhD Thesis, University of Ottawa, 2015), available at https://www.ruor.uottawa.ca/handle/10393/32355.

> A commission of inquiry is neither a criminal trial nor a civil action for the determination of liability. It cannot establish either criminal culpability or civil responsibility for damages. Rather, an inquiry is an investigation into an issue, event or series of events. The findings of a commissioner are simply findings of fact and statements of opinion reached by the commissioner at the end of the inquiry. They are based upon and flow from a procedure which is not bound by the evidentiary and procedural rules of a courtroom. There are no legal consequences attached to the determinations of a commissioner. They are not enforceable and do not bind courts considering the same subject-matter.[16]

The effect of the distinction between inquiries and courts in this case was to validate the commission's power to issue highly critical findings against individuals and corporations, despite observing standards of fairness and impartiality that were less robust than those of a court.[17]

The notion that inquiries may observe relaxed evidentiary and procedural standards when compared with court proceedings is unlikely to attract controversy. In the Marikana Commission itself, Justice Farlam interpreted his mandate to require the referral of suspected criminal misconduct to prosecutorial authorities on a mere prima facie basis – that is, on an evidentiary standard less than the balance of probabilities, let alone proof beyond a reasonable doubt.[18] In outlining the 'Principles Applied by the Commission in Conducting its Proceedings', the Commissioner quoted approvingly from an article by W Bray observing 'the functions of a commission of inquiry are generally not truly judicial because there are no facts in issue to be decided judicially, therefore rules of evidence may be relaxed'.[19] He also noted that participants in the inquiry bore no onus to prove or disprove facts, as they might in a court, but rather a general duty to furnish the inquiry with accurate and complete evidence.[20]

There are nevertheless important distinctions in the types of adverse findings that commissions of inquiry can reach in different jurisdictions, accounting for their distinctness from courts and their reliance on more relaxed evidence and procedure. Under Canadian law, the fact that inquiries are not formally empowered to make findings of criminal or civil wrong has been interpreted as restricting

[16] *Canada (AG) v Canada (Commission of Inquiry on the Blood System)* [1997] 3 SCR 440 ('*Blood System*'). See also the general discussion in S Ruel *The Law of Public Inquiries in Canada* (2010) 13ff. For a similar position in South African jurisprudence, see *S v Sparks & Others* 1980 (3) SA 952 (T) 961B–C.

[17] Specifically, the Commission was not restricted from issuing adverse findings following private deliberations between the Commissioner and commission counsel (the evidence leaders), despite counsel having been privy to evidence and allegations that were never tested before the Commissioner. The Court held that findings based specifically on such evidence or allegations would be improper, but that the involvement of commission counsel in deliberating on adverse findings generally did not taint the impartiality of the commission (see ibid at paras 72ff). In giving confidential advance notice of possible adverse findings to individuals (so as to facilitate their reply) the commission was also afforded latitude to include allegations that, if included in a final report, would be ultra vires the inquiry (see ibid at paras 58–63).

[18] South Africa, Marikana Commission of Inquiry *Report on Matters of Public, National and International Concern Arising Out of the Tragic Incidents at the Lonmin Mine in Marikana, in the North West Province* (31 March 2015) 19, available at: https://www.sahrc.org.za/home/21/files/marikana-report-1.pdf.

[19] Ibid at 22 quoting from W Bray 'n Paar Gedagte raadkendte die Getui v 'n Kommissie van Ondersoek' (1982) 45 *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 390, 393.

[20] Ibid at 31.

them from stating *factual* findings in criminal or civil terms.[21] This restriction is often reiterated in the terms of reference commissioning individual inquiries.[22] The exact boundaries of the restriction are unclear: it has been found, for example, that an inquiry cannot opine that suspicious deaths were caused by the deliberate actions of a named person – a finding that would be tantamount to a criminal finding of murder.[23] Nevertheless, Canadian inquiries routinely report factual findings in language deliberately separate from the civil and criminal standards – describing conduct as 'wrong', 'improper' or 'inappropriate' – but from which strong inferences of criminality and civil culpability can be made. The precise legal basis for this restriction is similarly unclear, although it likely serves both to protect individuals – ensuring that the subjects of criminal findings benefit from the trial rights prescribed by s 11 of Canada's Charter of Rights and Freedoms and from security of the person protected by section 7 – and to protect courts against executive encroachment on their jurisdiction.[24] Intriguingly, Australia – which observes a much stricter constitutional separation of powers than Canada – does not encumber commissions of inquiry in this manner: Australian commissions may be expressly mandated to investigate criminal activity,[25] and the Royal Commissions Act empowers them to refer evidence of criminality to prosecutorial authorities.[26]

South Africa falls closer to the Australian position than to the Canadian one: the Marikana Commission was tasked to opine on whether individual parties' 'acts or omissions' had caused any of the deaths,[27] and the High Court in *Magidiwana* dealt expressly with the possibility that the Commission might report findings of criminal misconduct against individuals.[28] Notably, in Justice Farlam's final report, he declined to issue such specific findings against individuals, given his ability to refer suspected criminal activities to other authorities.[29] A clear implication in the Commissioner's approach is that he felt the judicial forum to be more appropriate in adjudicating such grave and personalised allegations.

The importance of legal representation at commissions of inquiry – the central issue considered in *Magidiwana* – can now be brought into sharper focus. If commissions of inquiry typically adhere to a highly legalistic framework in which evidence is led and examined by lawyers, subject to relaxed evidentiary and procedural safeguards but still engaging real risks of prejudice to witnesses, then access to legal representation will be a critical function of participants' ability to present and test evidence, safeguard their interests, and be heard. Access to funding for counsel will, in turn, be crucial to making a nominal right to legal representation meaningful when witnesses or participants lack their own financial resources.

[21] See *Blood System* (note 16 above) at paras 52–54 and 57. See also the discussion in Ratushny (note 6 above) at 371–77.

[22] See Ratushny (note 6 above) at 371–72.

[23] See *Nelles v Grange* (1984) 46 (CA) 217, and its affirmative treatment by the Supreme Court of Canada in *Starr v Houlden* (1990) 1 SCR 1366.

[24] See D Mullan *Administrative Law* (2001) 392.

[25] See S Donaghue *Royal Commissions and Permanent Commissions of Inquiry* (2001) 23–27.

[26] Royal Commissions Act s 6P.

[27] See the Commission's Terms of Reference in its constituting Proclamation (note 4 above).

[28] See § 1(b)(ii) below.

[29] Marikana Commission Report (note 18 above) at 29.

In a 1994 decision, Australia's High Court considered the rights of indigent persons compelled to testify at a commission investigating a potential instance of wrongful conviction.[30] Overturning a decision of the Court of Appeal for New South Wales,[31] the High Court held that the denial of legal representation to the witnesses occasioned no injury to natural justice, despite the fact that the inquiry could issue factual findings implicating the witnesses in a murder.[32] The Court's reasoning relied on the formal distinction between inquiries and trials: whereas the common law provides a right to legal representation in a prosecutorial forum, it does not in the inquisitorial setting of an inquiry where the only prejudice to individuals is 'reputational'.[33] Stephen Donaghue, the author of Australia's leading legal text on commissions of inquiry, has interpreted this authority to confirm that 'procedural fairness does not require the provision of public funding for legal representation before commissions, even if a witness has a statutory right to representation'.[34] Australia has no federal bill of rights that would provide an additional anchor for those seeking a right to publicly-funded counsel at an inquiry.

In Canada the right to legal representation at commissions of inquiry is comparatively well-established,[35] although whether it embraces a further right to funding when a witness lacks financial means has never been tested in law. It is very likely that a witness facing equivalent prejudice to those in *Canellis*, but denied legal counsel on account of poverty, would succeed in having his or her examination declared ultra vires the inquiry on the ground of unfairness.[36] It is less clear that such witnesses would have a constitutional right to actually avail themselves of counsel at state expense. Canada's Charter of Rights and Freedoms[37] recognises a right to security of the person under s 7, which may be engaged in an administrative setting by 'serious psychological incursions resulting from state interference with an individual interest of fundamental importance'.[38] It is arguable that compulsory participation as a witness in an inquiry, in the face of serious personal stigma, could trigger a s 7 claim to funding for legal representation. The right to such funding has nevertheless been drawn narrowly outside the sphere of

[30] *New South Wales v Canellis* [1994] 181 CLR 309 (HC).

[31] *Canellis v Slattery* [1994] 33 NSWLR 104 (CA).

[32] *Canellis* (note 30 above) at paras 35–40.

[33] Ibid.

[34] Donaghue (note 25 aboave) at 192.

[35] Virtually every Canadian inquiry statute provides for the right to counsel. See also A Mackay & M McQueen 'Public Inquiries and the Legality of Blaming' in A Manson & D Mullan (eds) *Commissions of Inquiry: Praise or Reappraise?* (2003) 249, 268 ('Any denial of counsel would be subject to judicial review and would likely be overturned in the interests of procedural fairness').

[36] I differ in this respect from Mackay and McQueen who observe that: 'The choice to grant (or not grant) such funding is entirely discretionary on the part of government and would be difficult to challenge legally absent evidence of discrimination in terms of the Charter or a Human Rights Code.' Ibid at 269. Given that the requirements of procedural fairness are contextual, and that their breach will invalidate an exercise of administrative power, I find it implausible that a Canadian court would not feel impelled to provide a remedy to witnesses facing equivalent prejudice to those in *Canellis*. An outcome reminiscent of that reached by the New South Wales Court of Appeal (note 31 above) would be likely. It might also be possible for such witnesses to advance a claim under s 7 of the Canadian Charter of Rights and Freedoms, as discussed further below.

[37] Ibid.

[38] *British Columbia (Human Rights Commission v Blencoe)* [2007] 1 SCR 350 at para 82.

criminal prosecutions, even in highly consequential settings such as child custody disputes.[39] It is thus very likely that absent a strong claim to personal prejudice, the courts would not recognise a s 7 right to funded counsel at a commission of inquiry. Certainly, such a right would not lie for those whose participation in an inquiry is voluntary. Thus, the government of British Columbia denied legal financing to a range of community groups granted standing at the 2012 Missing Women Commission of Inquiry.[40] The groups broadly represented survival sex workers and community service-providers based in Vancouver's impoverished downtown eastside, a community that had been serially victimised by the worst mass murderer in Canadian history. The denial of funding precipitated a mass withdrawal by the groups in protest, and seriously undermined public confidence in the inquiry process itself.[41] It did not, however, occasion legal challenges alleging that the participants were owed funding for legal counsel as of right.

A strong parallel lies between these facts and the controversies that led to the *Magidiwana* litigation. In addition to those killed in the Marikana massacre, more than 70 miners were injured and approximately 250 were arrested. These miners were granted collective standing as a group participant in the Marikana Commission, alongside a group representing the surviving family members of the miners killed, representatives of Lonmin, AMCU, NUM, SAPS, and the Department of Mineral Resources. Counsel representing each of the state participants in the inquiry were financed at public expense. The families of the deceased miners successfully applied to receive financing for their legal representation from LASA. The injured and arrested miners too sought public financing to support their legal representation, making such requests of the President, the Minister of Justice and Constitutional Development, and LASA. The President and Minister both declined the miners' request on the basis that only LASA could provide for the public financing of legal participation in civil proceedings.[42] LASA declined to provide funding, citing resource constraints and the fact that support for the miners would divert funding from other indigent persons involved in civil and criminal court proceedings.[43] LASA also concluded that commissions of inquiry did not fall within the types of proceeding for which it was mandated to provide funding.[44]

While the injured and arrested miners were able to secure private financial support for legal representation during the first stages of the inquiry, this support could not be secured for the entire duration. Ultimately the miners would file an

[39] See E Heinrich 'Canadian Jurisprudence Regarding the Right to Legal Aid' Lawyers' Rights Watch Canada, 3 September 2013, discussing *New Brunswick (Minister of Health and Community Services) v G(J)* [1999] 3 SCR 46 and related jurisprudence at 4–5.

[40] British Columbia Missing Women Commission of Inquiry *Forsaken: The Report of the Missing Women Commission of Inquiry* (2012).

[41] See the discussion of these events in G Hoole 'The Forms and Limits of Judicial Inquiry: Judges as Inquiry Commissioners in Canada and Australia' (2014) 37 *Dalhousie Law Journal* 431, 449–53.

[42] See *Magidiwana & Others v President of the Republic of South African & Others (No 1)* [2013] ZAGPPHC 220, [2014] 1 All SA 61 (GNP)('*Magidiwana I (HC)*') and *Magidiwana and other injured and arrested persons v President of the Republic of South Africa & Others (No 2)* [2013] ZAGPPHC 292, [2014] 1 All SA 76 (GNP) ('*Magidiwana II (HC)*').

[43] See *Magidiwana* (note 1 above) at paras 6–7.

[44] Ibid.

application in the High Court claiming that the denial of funding constituted a violation of their rights to equality under s 9 of the Constitution and to a fair hearing under s 34.[45] They were supported in their application by the surviving family members of miners killed in the massacre. The second of the miners' claims was arguably most significant from a constitutional perspective, as it suggested a novel extension of s 34, which reads: 'Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum.'[46] Clearly the implied characterisation of a commission of inquiry as a forum responsible for the resolution of disputes through the application of law is at odds with the orthodox legal treatment of inquiries outlined above.

B The High Court and Constitutional Court Decisions

The *Magidiwana* litigation branched into two separate proceedings, the first concerning a claim for interim relief while the main constitutional issues awaited adjudication, and the second concerning the ultimate disposition of those issues. Each proceeding involved decisions by both the High Court and Constitutional Court. In order to place the Constitutional Court's final decision in context, it is important to review the prior proceedings. This is especially true of the High Court's determination of the constitutional claims, which will be addressed here in some detail so as to consider the significance of the Constitutional Court's decision not to disrupt that ruling.

1 *The Decisions Regarding Interim Relief*

The termination of private financing for the miners' legal team effectively meant that the miners could not participate in the evidentiary hearings of the Commission. As the High Court would later acknowledge, the proceedings were complex,[47] relying upon the examination and cross-examination of witnesses and engaging diametrically opposed factual positions. Indeed, when it became apparent that public funds would not be forthcoming to support the miners' participation, they withdrew from the Commission in protest and were joined by the surviving family members expressing solidarity with their cause. The miners accordingly sought urgent, interim relief from the High Court – in the form of an order requiring that legal funding be provided at state expense – while they awaited the adjudication of their constitutional claims. The Commission itself temporarily suspended hearings while this urgent application was heard.

The High Court rejected the application, holding that the applicants had failed to establish a prima facie case of unlawfulness, fraud or corruption that would warrant an urgent order directing the expenditure of public funds.[48] Importantly, while the court stressed that its decision was not determinative of

[45] Constitution of the Republic of South Africa, 1996.
[46] Ibid at s 34.
[47] *Magidiwana I (HC)* (note 42 above) at para 13.
[48] Ibid.

the constitutional claims in dispute,[49] it did engage with those claims in a limited manner for the purpose of evaluating whether they established a prima facie case of government unlawfulness.

On this limited basis, the court found that s 34 was not engaged by the Commission, since unlike a judicial or tribunal hearing, the Commission would culminate only in non-binding findings and recommendations; it was not responsible for resolving disputes according to law.[50] In this sense, the decision aligned perfectly with an orthodox legal characterisation of inquiries. Nor was a prima facie case established for the violation of s 9. While the applicants highlighted the unfairness of their being denied equality of arms against adverse participants in the inquiry, the court considered the relevant comparators for constitutional equality analysis to be the categories of person who received legal aid under the regime more broadly.[51] By its nature, legal aid financing involved decisions about resource-allocation amongst the impoverished and vulnerable. LASA had exercised lawful discretion to prioritise the funding of those involved in civil and criminal proceedings, facing the threat of immediate legal consequences, as opposed to those who (like the applicants) faced only the threat of indirect consequences flowing from a non-binding proceeding.[52] Again, the familiar formal distinction between inquiries and courts was reinforced.

The Constitutional Court denied the applicants leave to appeal this decision.[53] Recognising the public importance of the Marikana Commission, however, it also took the unusual step of hearing arguments on the 'narrow issue' of whether there was a basis to interfere with the decision.[54] After summarising the High Court's reasons approvingly and finding no basis to overturn them, the Court offered the following obiter comments about the Marikana Commission and its relationship with s 34:

> Section 34 deals with disputes 'that can be resolved by the application of law.' The Commission's findings are not necessarily to be equated to a resolution of legal disputes by a court of law.
>
> It may be that it would be commendable and fairer to the applicants that they be afforded legal representation at state expense in circumstances where state organs are given these privileges and where mining corporations are able to afford the huge legal fees involved. The power to appoint a commission of inquiry is mandated by the Constitution. It is afforded to the President as part of his executive powers. It is open to the President to search for the truth through a commission. The truth so established could inform corrective measures, if any are recommended, influence future policy, executive action or even the initiation of legislation. A commission's search for truth also serves indispensable accountability and transparency purposes. Not only do the victims of the events investigated and those closely affected need to know the truth: the country at large

[49] Ibid at para 53.
[50] Ibid at para 37, 48.
[51] Ibid at para 47.
[52] Ibid at paras 47–49.
[53] *Magidiwana v Legal Aid South Africa* [2013] ZACC 27 2013, (11) BCLR 1251 (CC)(*'Magidiwana I (CC)'*).
[54] Ibid at para 11 outlining the Court's position that this limited engagement with the High Court decision was in the public interest.

> does, too. So ordinarily, a functionary setting up a commission has to ensure an adequate opportunity to all who should be heard by it. Absent a fair opportunity, the search for truth and the purpose of the Commission may be compromised.
>
> This means that unfairness may arise when adequate legal representation is not afforded. But this does not mean that courts have the power to order the executive branch of government on how to deploy state resources. And whether the desirable objective of 'equality of arms' before a commission translates into a right to legal representation that must be provided at state expense is a contestable issue.[55]

Several aspects of these comments are noteworthy. First, while preserving the High Court's treatment of inquiries as investigative and recommendatory bodies, the Court left open the possibility of an 'equivalency' between commissions and the traditional subjects of s 34. Similarly, while affirming the formal status of inquiries as truth-seeking instruments constituted by the President, the Court suggested that an inquiry's purpose goes beyond its utility to an executive master and includes the justice and truth-seeking interests of other participants and of society at large. Acknowledging that it may be unfair to deny funding for legal representation in some instances, the Court used prescriptive language in opining that 'ordinarily a functionary has to ensure' an opportunity for all relevant parties to be heard by a commission. The Court was nevertheless cautious to stop short of suggesting that judges should liberally interfere with executive decisions regarding resource allocation. Finally, the Court linked considerations of fairness to considerations of efficacy, implying that the denial of equal participation in an inquiry, while unfair in its own right, also diminished its capacity to probe for the truth.

These obiter comments would prove to be prescient in light of the High Court's subsequent determination of the constitutional issues in dispute.

2 *The High Court Decision*

Fifteen months after its interim ruling, the High Court issued a full decision on the constitutional claims in *Magidiwana*.[56] It accepted the miners' claim that the denial of funding for their legal representation violated ss 34 and 9 of the Constitution, and ordered LASA to provide the funds. Its reasoning upended several of the latent assumptions about commissions of inquiry reflected in the interim ruling.

aa Applicability of s 34 to the Commission

The court began its analysis by observing that the Constitutional Court had 'lit the path' with its obiter reasons in *Magidiwana I*.[57] It cited, first, case law demonstrating the applicability of s 34 to tribunals that duplicate the procedural features of courts, notably through the examination and cross-examination of witnesses, despite their departure from court-like standards of evidence or

[55] Ibid at paras 14–16.
[56] *Magidiwana II (HC)* (note 42 above).
[57] Ibid at para 24.

flexibility in the precise features of procedural fairness.[58] Second, it rejected a categorical treatment of s 34 that would exclude its application to commissions on the mere basis that they do not adjudicate contested questions of law or determine legal rights. The court held:

> [C]ommission [sic] like the Marikana commission, have the power to make far-reaching findings and recommendations, which carry potential prejudice to rights of individuals and corporations, the bearers of which are entitled to protect [sic], even at that investigative stage.
>
> In the context of the present application, it is of no consequence that the commission is not of a judicial or quasi-judicial nature. That does not, in my view, place the Commission outside the scope of s 34 of the Constitution. At [a] conceptual level, the general proposition that the proceedings of commissions of inquiry fall outside the scope of s 34 at the outset, is, to my mind, an over-simplification of a complex situation involving constitutional rights and a distinct possibility of those rights being adversely affected by the outcome of the commission. A preferable view is that the right to legal representation at commissions is not an absolute one, but depends on the context.[59]

It should be noted that this statement focuses on the legal representation of participants at an inquiry, not the public funding of that representation per se. As discussed again below, the extent to which legal funding and legal representation may be amalgamated as a single issue to be governed by the same principles is a subject of some confusion. The statement is nevertheless striking for the departure it signals from the position adopted by the High Court in its interim ruling, which largely affirmed a categorical treatment of commissions as beyond the scope of s 34 on the basis that they do not produce finite legal consequences.

The court accepted that considerations related to the 'nature and type of inquiry', the 'interests of justice and the rule of law', and 'whether the constitutional rights or parties or witnesses … are implicated', formed a 'general framework' within which to evaluate the applicability of s 34.[60] It then considered the relevance of six contextual factors:

1. *The substantial and direct interest of the applicants in the outcome of the Commission:*[61] The court referred to an interlocutory ruling of the Commission to the effect that it would consider the possible culpability of protesting miners for the violence, and report on whether any should bear criminal responsibility for the deaths.[62] It considered the miners to be diametrically opposed in interest to the state participants at the inquiry.[63] Consequently, they had substantial interests both to insulate themselves against criminal liability, and to protect and advance cases of civil liability against the police.[64] The court noted that criminal charges had already been preferred against some of the miners.[65] It also observed that: 'All of the other parties specifically named in the

[58] Ibid at paras 31–32.
[59] Ibid at paras 36–37.
[60] Ibid at para 37.
[61] Ibid at paras 38, 40ff.
[62] Ibid at para 40.
[63] Ibid at para 42.
[64] Ibid at para 41.
[65] Ibid.

commission's terms of reference are participating in the commission proceedings to avert adverse factual findings against them.'[66]

2. *The vulnerability of the applicants:*[67] As impoverished persons facing potential criminal liability, but placed on an unequal footing with other participants in the inquiry, the applicants were its 'most vulnerable' participants.[68]
3. *The complexity of the proceedings:*[69] The court considered there to be 'no doubt' that the proceedings were 'beyond the scope of the applicants' absent legal representation.[70]
4. *The procedures adopted by the Commission:*[71] Both procedurally and substantively, the Commission was structured as a contest between the competing claims of participants. The court opined:

> Whether one refers to 'parties' or 'participants' [as in a formal judicial hearing] is immaterial, and does not alter the nature of the commission. It should follow from the events giving rise to the commission, and its terms of reference (where specific parties are specifically cited for investigation) that there would be partisan contestation between some of those parties identified for investigation. … I therefore agree with the contention of the applicants and the supporting respondents that the commission bears the hallmarks of an adversarial inquiry.[72]

5. *Equality of arms:*[73] The court observed: 'Our society is premised on the constitutional values and principles of social justice, fairness, equality and justice. A process which enables only the police, other State organs and a multinational corporation to be legally represented to the exclusion of survivors of the police shooting is "entirely inconsistent with the principles and values that underlie our Constitution".'[74]
6. *Consequences of the Commission's findings and recommendations:*[75] The court stressed that the recommendatory, non-binding character of the Commission did not obviate its potential to seriously impact the applicants' rights, especially those subject to criminal suspicion. Its reasoning warrants quotation at length:

> There will be reputational, moral, criminal and civil repercussions on those in respect of whom adverse findings are made by the Commission. It is true that the President is not obliged to act on the recommendations (if any) of the commission. … However, that does not mean that there will be no consequences. It is to be borne in mind that some in the class of applicants have already been charged criminally. … Once criminal proceedings resume, the applicants face a distinct possibility of imprisonment, including life or long-term imprisonment. It is cold comfort for the applicants that they will be entitled to state-funded legal representation for their criminal trials when that happens. They are entitled, like all other parties before the commission, to present (and

[66] Ibid at para 43.
[67] Ibid at paras 38, 44.
[68] Ibid at para 44.
[69] Ibid at paras 38, 45.
[70] Ibid at para 45.
[71] Ibid at paras 38, 46–47.
[72] Ibid at paras 46–47.
[73] Ibid at paras 38, 48–49.
[74] Ibid at para 49.
[75] Ibid at paras 38, 50–54.

> rebut) evidence … to prevent even the possibility of criminal proceedings against them being proceeded with or resumed. … Although the evidence of the commission would not necessarily be admissible in subsequent civil proceedings, a finding in this regard is likely to influence the course of action adopted by either the applicants or the state, and is most likely to encourage settlement of civil claims in the event that it is found the police did not act in self-defence.[76]

These reasons completely upend the categorical treatment offered by the interim ruling, in which inquiries were distinguished from the traditional subjects of s 34 by their investigative and recommendatory character. Instead, the court dealt candidly with the fact that the inquiry was constituted as a dispute between participants – in its words, an 'adversarial inquiry'. Rather than treating the legal interests of the participants as incidental or subordinate to the President's investigative purpose, those interests were legitimated as necessary functions of the inquiry's mandate. The court explicitly recognised that in addition to serving an investigative function, the inquiry served as a staging ground for the legal aims and interests of participants; indeed, it referred to those interests in the language of 'entitlement'.

The court also repeatedly emphasised that actual, grave consequences could flow to the applicants from the inquiry, including findings of criminality, as well as the risk that subsequent criminal proceedings could be spurred or influenced by the inquiry. In light of these risks, the court considered it insufficient that s 34 serve simply to ensure procedural safeguards for the miners within subsequent criminal proceedings themselves. It even acknowledged the legitimate reputational and civil interests of the applicants, not only to insulate themselves against future liability, but to advance the foundations for their own potential civil claims.

The court did not limit itself to the miners' interests in evaluating the applicability of s 34. It also considered those of the supporting applicants (the family members of the deceased miners) for whom the inquiry presented an opportunity for truth-seeking, vindication, healing and reconciliation: '[N]one of [these] goals can be achieved without the full and effective participation of the applicants, who are the eye witnesses of the shooting incident that resulted in the death of their loved ones.'[77] The court underscored the importance of procedural inclusiveness to the pursuit of truth and to restoring the 'civil dignity' of victims.[78] It opined that extension of s 34 to the Commission was consistent with a purposive, expansive treatment of South Africa's 'never again Constitution', a document that took equality and social justice as foundational tenets.[79]

The court thus found that s 34 was applicable to the Commission, constitutionally entitling the applicants to legal *representation*.[80] It went on to give brief additional reasons to the effect that s 34 also occasioned a right to state *funding* for that representation:

[76] Ibid at paras 50–54.

[77] Ibid at para 57, citing *Albutt v Centre for the Study of Violence and Reconciliation* [2010] ZACC 4, 2010 (3) SA 293 (CC) together with an extract from the Report of the Truth and Reconciliation Commission.

[78] Ibid at para 59, quoting from the Report of the Truth and Reconciliation Commission.

[79] Ibid at para 66.

[80] Ibid at para 67.

> I am of the view, taking into account the considerations referred to above, and the fact that the rights of indigent and vulnerable persons are implicated, that the State is, in the circumstances, constitutionally obliged to provide legal assistance to the applicants. I agree with the applicants' and the supporting respondents' contention that the interests of justice and the rule of law would be undermined by a failure to uphold the applicants' right, especially in light of my conclusion that the constitutional rights of the applicants are not only implicated in the proceedings of the commission, but may possibly be threatened by its findings.[81]

The brevity of these reasons, and their substantive reiteration of the factors that led to the principal finding under s 34, suggests that the court gave only nominal consideration to the analytic distinction between a right to counsel and a right to state funded counsel. The significance of this issue will be considered again in analysing the extent to which *Magidiwana* establishes an authoritative precedent for the conduct of future inquiries.

bb Whether the Applicants' Rights under s 34 were Violated

Having found that the applicants were entitled to state-funded legal counsel by virtue of s 34, the court gave separate consideration to whether the denial of that funding signalled a constitutional violation by either the state (meaning, in essence, the President or Minister of Justice and Constitutional Development) or LASA.

Focusing first on the state, the court declined to consider whether the President's decision to establish the Commission without funding for all necessary participants was an irrational, and thus invalid, use of his constitutional power.[82] Rather, it considered the Minister's response to the applicants' request for funding – in which the Minister expressed that only LASA was empowered to provide public funds for legal representation – to be the focal point for constitutional scrutiny. It accepted the Minister's defence that this outcome was commanded by the principle of legality:

> If anything, [the Minister's] decision was a sound one. Its correctness lies in the rule of law, and its offspring, the doctrine of legality, because constitutionally, the only framework within which legal aid for indigent people is provided, is in terms of the Legal Aid Act. Thus, the only channel through which such funding can be accessed is Legal Aid SA, which is a separate juristic person with its own legislative mandate[.] … Simply put, the only State agency charged with the responsibility to provide legal aid to the indigent, is Legal Aid SA. That should have been the applicants' first port of call, and not the President or the minister.[83]

The cogency of these reasons rests on whether the legislation creating LASA should be construed as an exhaustive attempt to confer responsibility for publicly-funded legal assistance on that body, even where the need for such assistance arises in ad hoc processes created at the executive's discretion. There is no obvious textual source in South Africa's Constitution for the proposition that

[81] Ibid at para 68.

[82] This argument was raised after the close of written submissions by one participant to the litigation. The court held that its consideration would be unfair to the state respondents.

[83] *Magidiwana II (HC)* (note 42 above) at para 74.

the right to publicly-funded legal counsel, once recognised, can only be provided by one agency. The Legal Aid South Africa Act[84] acknowledges a legislative intent to fulfil the constitutional right of indigent persons to state-funded counsel,[85] but does not specify that LASA is to bear this burden exclusively in all forums. Funding for commissions of inquiry flows from the executive as an incident of its power of appointment. Just as the President could prescribe funding for the Commission's own staff and other expenses, there is no obvious reason why he could not have augmented the Commission's budget to provide funding for participants, barring express legislative restriction to the contrary.[86] The High Court's decision appears to read such a restrictive intention into the very existence of LASA; rather than properly confining executive expenditures to those authorised by law, this risks unduly narrowing the scope of executive liability for a well-founded constitutional right.

The court nevertheless did find that LASA had violated the applicants' rights under s 34. Its reasoning was based LASA's correspondence with the applicants, in which LASA had advised: 'We are not able to determine from your funding request that there will be a substantial and direct benefit to your … being separately represented at the Commission, especially as the interests of the miners will be protected … by their respective unions … who are legally represented.'[87] It should be noted that this reason for declining funding to the applicants was one of several stated in the correspondence, as the subsequent Constitutional Court decision would make clear. It was nevertheless found sufficient for the High Court to conclude that LASA's decision was erroneous – indeed, that there was 'no plausible reason' that the miners should be distinguished from the surviving family members who received LASA funding.[88] This conclusion rested on the court's prior appraisal of the applicants' significant and distinct interest in the Commission, for which neither the unions nor the family groups could stand in proxy. Importantly, the court also rejected the view that the inquiry's evidence leaders could stand-in for the applicants' interests. Despite the neutrality demanded of these officials, they could not be expected to 'present the partisan needs' of those falling under the Commission's investigative scrutiny.[89]

After denying that LASA had a valid basis on which to decline funding to the applicants, the court moved immediately to consider the applicant's equality claim under s 9. It did not offer an express statement clarifying the effect of its finding under s 34 in its own right. It is accordingly unclear whether the remedial outcome of the decision – the court's order for LASA to fund the applicants – could flow exclusively from its finding under s 34, or was dependent upon its further analysis under s 9 that the denial of funding unfairly discriminated between the applicants and other inquiry participants. This distinction is significant in evaluating the precedential effect of the decision, as will be discussed more fully below.

[84] Act 39 of 2014 ('LASA Act').
[85] LASA Act s 3.
[86] See Bishop (note 13 above) at 36.
[87] Reproduced in *Magidiwana II (HC)* (note 42 above) at para 79.
[88] Ibid at para 86.
[89] Ibid at paras 83–84.

cc Whether the Applicants' Rights under s 9 were Violated

The court identified a violation of s 9 for reasons foreshadowed by its treatment of s 34: in declining to fund the miners, LASA made an arbitrary and thus discriminatory and irrational[90] distinction between them and the surviving family members who did receive funding. In the court's view:

> They [the miners] are visited with disadvantages, solely because they have survived a police shooting. … It seems to me that the differentiation between the families of the deceased and the injured miners is based on the assumption that the deceased miners have left behind destitute widows and orphans, while the injured miners are still able to work and provide for their families. This is a simplistic and fallacious generalisation, which, without empirical evidence, cannot logically be made.[91]

This again represents a significant point of departure from the court's analysis in the interim ruling. There, the relevant comparator group for s 9 analysis was thought to be the recipients of legal aid funding at large – that is, those indigent persons facing criminal or civil proceedings who required legal representation to fulfil their constitutional rights. Here, the relevant comparator group was identified as the recipient group that benefited from LASA support within the context of the Marikana Commission. In finding that no rational basis could be established for differentiating between those recipients and the applicants, the court located a source of unlawful discrimination against them.

The court accordingly ordered that LASA 'forthwith take steps to provide legal funding to the applicants for their participation in [the Commission]'.[92]

dd Summary and Analysis

It will be helpful to briefly recapitulate what emerge as the principles from the High Court's ruling on the constitutional issues in *Magidiwana*, together with those aspects of the ruling that remain ambiguous, before moving on to consider the Constitutional Court's decision on appeal.

First, the decision clearly stands for the proposition that s 34 can be applicable to inquiries. This does not flow intuitively from a plain reading of s 34, which implies that its application is confined to forums that resolve disputes through the adjudication of law. Extending the provision to a commission of inquiry, even if confined to specific factual circumstances, still signifies a significant departure from both the plain meaning of the text and from a conventional treatment of inquiries as non-adjudicative fact-finding and recommendatory bodies constituted deliberately outside the traditional judicial sphere.

Second, the decision offers a non-exhaustive range of contextual factors that may trigger the application of s 34 to an inquiry. Perhaps the most crucial of these is the potential impact of the inquiry upon an individual or group of individuals.

[90] See especially ibid at para 97 (the court supplements its principal finding under s 9 with reference to s 1 of the Constitution, holding that the denial of funding to the applicants was irrational and thus contrary to the latter provision).

[91] Ibid at 93–94.

[92] Ibid at para 103.

The danger that an inquiry may lead to a factual finding of criminal behaviour, or that it may spur subsequent prosecution or otherwise affect a person's trial, are the most obvious factors that could bring an inquiry within the scope of s 34. The case is strengthened when the vulnerability of individual participants is combined with the procedural complexity of an inquiry, and its engagement with adversarial positions on contested facts. It would also seem to be strengthened when the legal representation of participants sustains other important interests, such as the truth-seeking concerns of victims or the interests of participants in protecting and advancing civil claims.

An important third principle can be distilled from the above. Were the extension of s 34 to be confined to instances in which an inquiry engages risks of a quasi-criminal variety (adverse findings related to criminality, or effects on subsequent proceedings) it would not have been necessary for the court to highlight the relevance of further interests in civil liability, truth-seeking and restorative justice. Thus, while the boundaries of s 34's extension are imprecise, it seems clear that that extension is not narrowly limited to persons facing criminal prejudice. Nor does it appear to be limited to *individuals* per se, or to those whose participation in an inquiry is coerced. While the applicants included some individuals summoned as witnesses at the inquiry, the s 34 right was recognised in all of the applicants as a class, and without reference to the inquiry exercising investigative powers of compulsion against any of them specifically. The court even alluded to the possibility of corporations benefiting from the extension of s 34 at an inquiry.[93] So the s 34 right may be available at an inquiry collectively, based on interests beyond mere protection against criminal stigma or sanction, and exercisable even by corporations.

The decision is vague as to whether the right to state-funded counsel flows necessarily from the right to legal representation, although its lack of analytic differentiation between the two implies that this will be the case when a claimant is genuinely indigent. It will be recalled that the decision did not give precise remedial treatment to its finding under s 34, as distinguished from its finding under s 9. This is significant, because more than one remedial outcome could conceivably result from a finding that a claimant's constitutional rights have been violated by the denial of publicly-funded legal counsel. One outcome could be to order the provision of such counsel, as the High Court did, but another could be to invalidate the proceeding itself as being ultra vires the Constitution. Recourse to s 9 provided the court with a firm analytic foundation for a prescriptive funding order, based on LASA's failure to afford the applicants equal treatment with an analogous group. By contrast, the court's finding on s 34 did not rely on any inequality lying between the applicants and the surviving family members. It is thus unclear whether a future case, satisfying the same conditions as *Magidiwana* on s 34 but not engaging s 9, could result in a prescriptive funding order or would instead occasion some form of declarative relief (for example, a declaration injuncting or invalidating the inquiry).

[93] Ibid at paras 36–37.

With these aspects of the High Court's ruling in mind, we may now turn attention to the Constitutional Court's decision.

3 *The Constitutional Court's Decision on Appeal*

LASA appealed the High Court's decision to the Supreme Court of Appeal. In the intervening period, however, it also agreed to provide funding for the miners' legal representation at the Marikana Commission. The Supreme Court of Appeal accordingly declined to hear the matter, considering it moot.[94] LASA appealed further to the Constitutional Court.

Before the Constitutional Court, LASA contended that it would be responsible under the High Court's decision to finance the legal representation of indigent participants at future commissions of inquiry. It thus sought correction of what it considered to be an erroneous application of s 34. The miners' response was twofold. They pointed out, first, that LASA's funding Guidelines had been amended following the High Court ruling to imply that future responsibility for the financing of participants at commissions of inquiry belonged to the constituting authority (that is, to the President or other executive official responsible for commissioning the inquiry) and not to LASA. LASA's claim to future liability was thus erroneous and irrelevant as a matter of law. Second, the miners' reasserted the bases of their original claim, taking the position that the High Court's determination was correct.

The Court held by a 10–1 majority that the matter was moot as between the parties, and that the High Court decision did not engage matters of sufficient public interest to justify reconsideration of the legal issues in dispute. This outcome relied on the Court's appraisal that the future impact of the decision, if any, was exceedingly narrow. As Acting Justice Theron (as she then was) wrote for the majority:

> The argument that the High Court judgment lays down principles applicable not only to the Marikana Commission but also to other inquiries and investigative tribunals is unpersuasive. The High Court was careful to circumscribe the application of the judgment to the singular circumstances surrounding the Marikana Commission. Thus the extent to which the findings could bind Legal Aid in future cases would be very narrow and indeed so rare as to be negligible.[95]

In reaching this conclusion, the Court drew a distinction between the High Court's decision that s 34 was applicable to the Marikana Commission and its further decision that the miners were entitled to funding. The first decision, in itself, was informed by contextual factors that the Constitutional Court considered 'exceptional and rare.'[96] The second decision hinged on the High Court's finding that the denial of *funding*, not just representation, was irrational and invalid under s 9: 'The High Court made a decision based on the unique circumstances of the Marikana Commission, in the context of the reasons advanced by Legal Aid not

[94] *Legal Aid South Africa v Magidiwana & Others* [2014] ZASCA 141, 2015 (2) SA 568 (SCA).
[95] *Magidiwana* (note 1 above) at para 21.
[96] Ibid at para 22.

to fund the miners, on the one hand, and to fund the families, on the other.'[97] As such,

> the construction the High Court assigned to section 34 to the effect that the section applies to commissions like the Marikana Commission, imposes no obligation on Legal Aid to fund legal representation. The decision and the discretion remain with Legal Aid. The decision … will have no practical effect … on Legal Aid and its future decisions in respect of funding. If in future parties that appear before a similar commission require legal representation at state expense, they will have to apply to Legal Aid which will consider the application in terms of the relevant law and regulations. If the application does not meet the requirements for funding, Legal Aid will be free to decline it, regardless of the fact that section 34 applies to the matter before the commission. This is so because even in criminal cases, the Constitution does not guarantee legal representation at state expense in all matters. The right to claim legal representation at state expense is limited to cases where substantial injustice would occur.[98]

It will be recalled that the High Court decision did not specify whether its remedial outcome – the award of funding to the miners – was dependent on the applicants' s 34 claim being supplemented by their claim under s 9. The Constitutional Court's interpretation implies that the outcome *was* dependent on recourse to s 9, to the effect that an indigent claimant will only succeed in demanding funding from LASA when the latter has already provided such funding to other inquiry participants against whom the claimant is entitled to equal treatment. Otherwise, LASA may still decline funding, even in the face of a s 34 violation, according to legal principles limiting funding to instances where 'substantial injustice' would otherwise result.

This treatment of the High Court decision is not altogether persuasive. The High Court could have devoted substantial analytic attention to the threshold for establishing a right to legal *funding*, but it did not. Instead, it treated the right to funding as something that flowed logically from the combination of a proven right to representation under s 34 and the claimant's genuine poverty. The court did not narrow the availability of funding to instances of 'substantial injustice', nor consider the related case law cited by the Constitutional Court. It is thus perfectly intelligible to treat the High Court's decision as entitling the miners to counsel *and* funding, on account of the injustice that would result from their exclusion from the inquiry, and quite apart from concerns about their equality vis-à-vis the participants who did receive LASA funding. To the extent that a contrary interpretation of the High Court decision is required to narrow its future impact on the LASA, the majority position in the Constitutional Court rests on uncertain ground.

The Constitutional Court's view that the contextual factors informing the High Court's principal finding under s 34 are 'so rare as to be negligible' is also questionable. For one thing, the boundaries established by those factors are fluid: they clearly do not limit s 34 rights to coerced inquiry participants facing possible criminal prejudice, and may extend to participants pursuing civil interests, truth and restorative justice through a commission of inquiry. They may be asserted

[97] Ibid at para 25.
[98] Ibid at para 26.

not just by individuals but also by groups and possibly by corporations. The confluence of factors identified by the High Court – factual disputes that raise adversarial positions among participants; the use of conventional legal procedure such as examination and cross-examination; the possibility of stigma, criminal prosecution, or civil liability flowing to inquiry participants; participant interest in truth-seeking, vindication and healing; and the poverty and vulnerability of participants – are hardly unique to the Marikana Commission. They are in many ways characteristic of commissions of inquiry: lapses in public confidence in government – typically the impetus for a commission of inquiry – very often stem from systemic victimisation of society's most vulnerable members, and thus involve participation by marginalised groups for whom procedural equality is a paramount value. The common use of judges and lawyers to conduct inquiries, together with the fact that inquiry subject-matter almost invariably raises legal risks and interests for those affected, renders reliance on court-like procedures of examination and cross-examination the norm. Any number of inquiries thus combine elements of criminal and civil liability, truth-seeking, restorative justice, adversarialism, and indigence in a manner similar to the Marikana Commission.

If the High Court's decision in *Magidiwana* extends a right to state-funded legal representation based on s 34 alone, independent of recourse to s 9, then the decision is very likely to occasion future liability on the part of LASA. While the Constitutional Court did not consider how LASA's amended Guidelines would impact this liability, it is not clear that they alter the outcome. The Court's apparent reading of the new Guidelines is that they confer responsibility on an inquiry's constituting authority to provide for the legal financing of participants.[99] That may be accurate as a statement of LASA's administrative position toward the funding of participants at an inquiry, but it receives no obvious legislative corroboration imposing an *obligation* on such constituting authorities. The Commissions Act certainly imposes no such duty on the President. Combined with the High Court's debatable conclusion that the doctrine of legality requires recourse to LASA as the sole authority empowered to ensure the legal funding of indigent persons in any forum – a conclusion left undisturbed by the Constitutional Court – a mere administrative guideline adopted by LASA would not save it from liability.

In any case, even if a funding obligation against LASA were only engaged by the nexus of s 34 and s 9 claims, this would not exhaust the precedential effect of *Magidiwana*. The High Court clearly found that s 34 demanded both legal representation for the miners and state funding for such representation. Recourse to s 9 may have been necessary for the specific remedy of a prescriptive order against LASA. But a general finding that the conduct of the inquiry violated the participants' rights could have eventuated other relief, such as an order against the President or a declaration invalidating the inquiry for unconstitutionality. Either way, the potential impact of principles flowing from *Magidiwana* is substantial.

This view of the High Court decision is reflected in the dissenting reasons of Nkabinde J, who agreed with the majority's decision on mootness but nevertheless felt that sufficient public interest concerns surrounded *Magidiwana* to warrant

[99] Ibid at paras 17–18.

review. In her characterisation, the case fundamentally concerned 'what the right to a fair hearing means; what demands can be placed on the resources of the State; and how best to balance the competing claims of a range of seemingly worthy recipients of the State's assistance.'[100] She concluded that *Magidiwana* established sweeping new principles extending the application of s 34 to commissions of inquiry, fettering LASA's future discretion and impacting adversely on its ability to fulfil its important mandate. She also determined that the legal bases on which the High Court established these principles were erroneous.

Against the majority's view that *Magidiwana* was factually specific and discrete, Nkabinde J identified five principles flowing from the decision, each of which represented an unprecedented extension of s 34. These were: (1) the applicability of s 34 to proceedings that are not 'quasi-judicial';[101] (2) the applicability of s 34 to forums that do not determine legal rights;[102] (3) the identification of contextual factors that guide the application of s 34 to a commission of inquiry;[103] (4) the finding that s 34 can create a right to counsel at an inquiry;[104] and (5) the finding that the section can create a right to *publicly funded* counsel at an inquiry.[105] Concerning the factual matrix which activated these principles, Nkabinde J opined: '[T]here is no reason to speculate that those circumstances are indeed so unique as to have no relevance to future cases. We need only consider commissions of the past to see that this is not so.'[106]

Moreover, Nkabinde J noted that the consequences for LASA were severe. Accepting the view that LASA was the state organ responsible for providing legal financing when it is required under s 34, the majority's characterisation of LASA's continuing discretion could not be sustained:

> The High Court held that s 34 obliged Legal Aid to fund the miners, that is to say, Legal Aid has no discretion to exercise. Indeed, this is precisely what is problematic for Legal Aid: the High Court judgment stands for the proposition that, where s 34 applies to commissions of inquiry and provides the right to state-funded legal representation, it has no discretion to exercise.[107]

This interpretation of the High Court's decision departs significantly from the Constitutional Court majority by treating the finding under s 34 as creating a positive obligation against LASA, irrespective of the subsequent s 9 claim. As noted above, the ambiguity of the High Court decision supports either interpretation. In either case, significant and potential harmful outcomes result. Preferring the view that s 34 and s 9 claims must coincide to occasion liability, LASA is incentivised to never finance the participation of any group in an inquiry again, lest it be forced to expand such funding on the basis of equality. The Constitutional Court's reading of the High Court's decision could thus have an unintended chilling effect on the

[100] Ibid at para 99.
[101] Ibid at para 70.
[102] Ibid at para 71.
[103] Ibid at para 72.
[104] Ibid at para 73.
[105] Ibid at para 74.
[106] Ibid at para 81.
[107] Ibid at para 88.

future dispersal of LASA funds. Preferring Nkabinde J's view, LASA's discretion would presumably be fettered by the recurrence of circumstances similar to those of the Marikana Commission: it would be forced to provide legal aid funding under these conditions. This would not only impact LASA, but those reliant on access to its scarce resources in settings where rights are imminently endangered: '[I]n this case, in which Legal Aid projected that it would be required to re-direct R19 530 800 to fund legal representation before the Commission, approximately 3 800 applicants involved in civil and criminal proceedings would be denied state-funded legal representation as a direct result of the High Court judgment.'[108]

For her part, Nkabinde J found that neither s 34 nor s 9 created a right to state-funded counsel at the Commission. Past jurisprudence implied that a right to funded counsel is limited to hearings where rights may be finally determined, and where substantial injustice would result from an indigent person going unrepresented.[109] The Marikana Commission did not fit within this mould. The High Court's equality analysis was flawed for treating the miners' survival of the police shooting as an analogous ground activating a claim to discriminatory treatment under s 9(3). The comparator group properly invited by this analogy was not the surviving family members but the deceased miners themselves, who could hardly be said to hold a benefit denied those who survived, nor could survival of a shooting be considered a characteristic with the potential to impair human dignity as envisaged by s 9(3).[110] The High Court's conclusion that it was irrational for LASA to have funded the surviving families but not the miners was defective in that it relied exclusively on LASA's supplementary reasons for denying funding, not on the primary one: the fact that LASA had finite resources and did not wish to deprive those in greater need.[111]

Ultimately, Nkabinde J's dissenting analysis is more satisfying and persuasive than that of the majority. The dissent deals directly with the fact that the matrix of factors animating the Marikana Commission are hardly unique to that inquiry. It underscores that there is no express reason why the High Court's ruling on s 34 cannot be interpreted to impose a funding obligation on LASA in its own right, and it highlights a certain narrowness and illogic to the High Court's s 9 analysis. It also signals a potential alternate route to a just outcome in *Magidiwana*, but one that wasn't pursued by the High Court. Nkabinde J queries whether a claim against the President under s 1(c) of the Constitution, alleging that he violated norms of legality by commissioning an inquiry that irrationally excluded groups needed to fulfil its mandate, would have been more fruitful.[112] I would add that if participation in the inquiry can be conceived as a benefit to which those with a pressing and substantial interest are *entitled*, or if the inquiry is conceived as an expression of official power to which some persons were involuntarily *subjected*, a

[108] Ibid at para 62. See also para 108 ('It deprives not only Legal Aid of the ability to engage in the 'polycentric budget-allocation' that is inherent to the task of allocating finite resources amongst many indigent and vulnerable claimants … but it deprives other claimants of the assistance to which they would otherwise be entitled.')

[109] Ibid at paras 111–12.

[110] Ibid at para 116.

[111] Ibid at para 120.

[112] Ibid at para 114.

claim against the President may also emerge under s 9. Here it could be alleged that the President violated the right to equality by constituting an inquiry that was fundamentally skewed to the interests of the state respondents, at the expense of non-state participants whose interests in the inquiry were equally valid but who were denied procedural equality on the arbitrary ground of their poverty.

In any case, the dissenting judgment highlights *Magidiwana*'s controversy and its ambiguous authority. That ambiguity is not just about the application of constitutional provisions to the inquiry context, but about the underlying status and functions of inquiries themselves. It should now be evident that the view taken of inquiries by the High Court in *Magidiwana* differs from the norm in the extent to which it readily analogises inquiries to court proceedings. While stopping short of characterising inquiries as institutions that determine legal rights, it nevertheless treats them as forums which engage equivalent concerns of justice for those affected. It also gives clear-eyed recognition to inquiries' adversarial character, the fact that they engage real, significant prejudice, and the fact that participants may approach them with legal self-interest in mind, seeking to insulate their own liability and to advance the foundations for claims against others. Perhaps most importantly, it implicitly *legitimates* those features of inquiries, treating them as part and parcel of the institution rather than as incidental (and undesirable) features of a formal investigative mandate. Fulfilment of equality of arms at an inquiry, and the adversarial contest it facilitates, is framed as conducive to reliable fact finding and to restorative justice, not inimical to them.

III Exploring the Plural and Participatory Character of Inquiries

There is room for reasonable disagreement about whether the outcome reached by the High Court and left undisturbed by the Constitutional Court in *Magidiwana* is desirable as a matter of public policy or correct as a matter of law. What should nevertheless be clear is that it reveals a different way of conceptualising inquiries that breaks from past orthodoxies and raises significant procedural and policy implications as a result.

What I have identified previously as an 'orthodox' treatment of inquiries might be framed summarily as follows: inquiries are investigative institutions falling within the executive branch of government, tasked to identify facts and report findings and related recommendations to government; although they may affect reputations, they do not determine legal rights or impose legal consequences, and consequently they are not beholden to the evidentiary and procedural standards of court proceedings. *Magidiwana* suggests an alternate rendition, framed along these lines: while inquiries are not court proceedings, they engage significant rights and interests on the part of participants, which include interests in justice-seeking, safeguarding against personal liability or criminal culpability, and advancing civil interests; the legitimacy and importance of these interests warrants observance of adjudicative procedures in deciding contested matters of fact, including ensuring that participants have equality of arms.[113] These characterisations of inquiries

[113] See Hoole (note 41 above)(arguing that some inquiries demand fidelity to adjudicative procedure).

are not mutually exclusive – both are capable of accommodating the fact that inquiries have formal fact finding and advisory mandates, and that they owe witnesses procedural fairness. The first characterisation nevertheless draws an inquiry's chief procedural implications from its formal status as a fact-finding and advisory body, while the second develops those implications by focusing on the interests and concerns of inquiry participants. They differ in the normative considerations to which they assign primary, organising authority.

The point in highlighting these different perspectives is to demonstrate that individual inquiries can be sites for competing normative claims or expectations, expressed as ideas about what an inquiry should do and how it should do it. The perspectives need not be limited to those stressing an inquiry's investigative purpose or adversarial elements: the Marikana Commission itself illustrates that inquiries may also serve as sites for restorative justice, political advocacy, and public education, among other civic goals. There may be subtle or very significant differences in the expectations brought to inquiries by their various stakeholders and participants, including their commissioning governments, the judges or lawyers responsible for conducting them, and the various individuals and groups implicated in the process. Inquiries inevitably confront and resolve these expectations at the level of procedure. Indeed, even reliance on the familiar precedents of past commissions reflects a *choice* of a specific procedural template at the expense of other possibilities, advancing the values with which that template is most associated. So too does the decision to constitute the inquiry as a legalistic, quasi-adversarial process ensuring equality of arms for participants.

Lon Fuller famously observed that quite apart from the instrumental goals sought from different types of legal institution, the procedural forms of the institutions themselves foster inherent values.[114] The choice of a given inquiry procedure thus involves elevating values – both instrumental (or goal-oriented) and intrinsic – that are associated with that procedural form, regardless of whether that outcome is deliberate or incidental. *Magidiwana* is an important case because it brings this latent decision-making to the fore: by showing that different procedural arrangements are possible in response to the different demands placed on an inquiry, the decision challenges presumptive reliance on a given institutional form. In this sense, the decision helps reveal something unique – and possibly laudable – about inquiries, flowing from their ad hoc nature: each inquiry presents a new opportunity for procedural innovation and adaptation to unique contextual demands.

The possibilities for such innovation extend beyond the choice between formally inquisitorial or adjudicative procedures: they may include new procedural hybrids; new means of facilitating the testimony and participation of vulnerable witnesses; new means of balancing the transparency and awareness-raising

[114] See especially L Fuller 'Means and Ends' in KI Winston (ed) *The Principles of Social Order: Selected Essays of Lon L Fuller* (2001) 61 (Fuller's paradigmatic illustration of the inherent values signalled by different institutional forms, and the relevance of those values to appraising institutional forms and limits, was his essay 'The Forms and Limits of Adjudication' (1978) 92 *Harvard Law Review* 353.) See also the discussion in Winston ibid at 40–47 and K Rundle *Forms Liberate: Reclaiming the Jurisprudence of Lon L Fuller* (2013) 32–45.

qualities of an inquiry against legitimate concerns for privacy or for safeguarding the integrity of parallel proceedings; and new means of allowing broader systemic and structural injustices surrounding an inquiry to come to the fore, to give just a few examples. It should be kept in mind that the statutory frameworks governing inquiries are skeletal and inquiry terms of reference normally allow commissioners broad interpretive latitude in devising procedures. The fact that those terms inevitably pose investigative questions, directing commissioners to find facts and make recommendations, should not foreclose the types of procedure inquiries may adopt in pursuing those questions, or the possibility that different socially constructive and complementary values can be fostered in their pursuit. In the Marikana Commission those values may have been the procedural equality of participants to press competing claims, given the grave subject-matter of the inquiry, the fact that it was relatively factually confined, and the fact that it quite directly implicated associated legal interests. For other commissions, circumstances may militate in favour of the promotion of different values and the choice of different associated procedures.

This would suggest that the institutional potential of inquiries may lie in embracing their ad hoc character, treating their formal mandates as starting points for an interpretive exercise in which procedures are developed to foster context-driven values and objectives. Were individual inquiries to adopt this approach, it would mark a significant departure from conventional inquiry practice by counselling against instinctive reliance on institutional precedents. It would involve actively associating the value of inquiries with the normative tensions that characterise them – and with the opportunity to reconcile them through constructive procedures – as opposed to a formal preconception of standard inquiry means and ends.[115]

I elaborate the significance of this claim below, turning first to two useful metaphors that help to locate the potential of inquiries in their normatively plural, participatory character. I then turn to offer three concrete recommendations for enhancing commissions of inquiry in light of these observations.

A On Exploder Diagrams and Participatory Bubbles: Two Inquiry Metaphors

Canadian scholar Liora Salter has offered some of the most theoretically rich commentary on commissions of inquiry, first in her ground-breaking text *Public Inquiries in Canada*,[116] co-authored with Debra Slaco in 1981, and subsequently in a small body of publications that build from the themes established in that study.[117] Salter's focus has largely been on the development and evaluation of science within commissions of inquiry, and on the nexus between inquiries,

[115] For an excellent account of commissions of inquiry that departs from orthodox institutional preconceptions, see R Macdonald 'Interrogating Inquiries' in Manson & Mullan (note 35 above) at 473.

[116] See generally L Salter & D Slaco *Public Inquiries in Canada* (1981).

[117] See especially L Salter 'Two Contradictions in Public Inquiries' in A Pross et al (eds) *Commissions of Inquiry* (1990) 173; and L Salter 'The Complex Relationship Between Inquiries and Public Controversy' in Manson & Mullan (note 35 above) at 185 (Salter 'Public Controversy').

policy-formation, and public controversy. A central contribution of her work has been to underscore how scientific questions can be attributed a false determinacy as they are translated to meet the pragmatic demands of an inquiry and the arbitral interests of participants. For present purposes, her work is useful for the emphasis it places on the competing tensions within commissions of inquiry, and for the analytic priority she assigns to recognising those tensions as constitutive of the inquiry institution itself.

In her essay 'The Complex Relationship Between Inquiries and Public Controversy',[118] Salter approaches inquiries through the architectural metaphor of an exploder diagram:

> [A] diagram where the walls and roof have been pulled back in order to facilitate a better view of each floor. No one would think that a house was complete without walls and roof, but the resulting picture permits the analyst to focus on all the separate elements that comprise the building as if they could be studied separately.[119]

Salter employs this metaphor to consider how four different elements interact within commissions of inquiry. These are: (1) truth-seeking, meaning the pursuit of accurate or viable scientific conclusions;[120] (2) justice-seeking, which means 'identifying potential wrongdoing, dispute resolution, and dealing with interest group conflicts';[121] (3) value debates, meaning debates about underlying principles that should frame or inform the contested subject-matter of an inquiry;[122] and (4) policy-seeking, meaning the necessary engagement of inquiries with matters of public policy, and in particular the pragmatic imperative of developing policy recommendations.[123] Each of these elements places a pressure on inquiries to accommodate distinct normative and disciplinary commitments within a common procedure. Salter considers this unique constellation of tensions to be definitive of the inquiry institution itself:

> What makes an inquiry unique is that it combines all four elements, and that none is more important than the others. That is, while, for example, legal deliberations often combine science and law, efforts are made to restrict value debates (not always successfully) and rarely are policy recommendations included in legal judgments. This would be enough to distinguish inquiries from courts, but there is more. In the courts, it is clear to all which element (justice-seeking) should prevail in the final judgment. It is never so clear in the case of inquiries, which are simultaneously legal proceedings, quasi-scientific enterprises, value and political debates, and instruments for creating public policy.[124]

It should be stressed that the elements identified by Salter reflect her particular focus on inquiries concerned with examining questions of science and its relation to public policy. Her observations are valuable here less for the specific elements she identifies than for her analytic approach, which forces us to conceive of

[118] Salter 'Public Controversy' (note 117 above).
[119] Ibid at 190.
[120] Ibid at 190–94.
[121] Ibid at 194, 195–97.
[122] Ibid at 196–97.
[123] Ibid at 197–98.
[124] Ibid at 198.

inquiries through their composite tensions rather than through a prefabricated idea of what the institution itself should look like. This means challenging the assumption that one normative value commands prima facie priority in dictating inquiry procedure; rather, each inquiry presents an opportunity to strike a new procedural balance responding to the distinct values that arise from context.

To clarify and press Salter's metaphor further: a vision of a completed house is inevitably accompanied with instrumental assumptions about what a house is for, what it can do, and what it cannot do.[125] Focusing instead on the elements that make-up the idea of a house – shelter, family life, privacy, security, and personal property, to name a few – we might consider different manners of integration and balancing that alter the 'architecture' in modest or fundamental ways. Recognising that no one element commands prima facie priority separated from context, we can approach each institutional site anew to conceive of different configurations responsive to different contextual demands.

Michael Bishop pursues a related point in his essay 'An Accidental Good: the Role of Commissions of Inquiry in South African Democracy'.[126] Bishop notes that inquiries are subject to a range of limitations, including the limited scope of their terms of reference, procedural inefficiencies, obstructiveness and delay by participants, failure for their recommendations to ever be adopted, and outright political capture. He nevertheless considers them to serve an accidental good: by virtue of their unique publicity and broad public engagement, inquiries can advance values of accountability and participatory democracy even when procedural defects themselves expose partisan abuses and corruption.[127] Bishop adopts the metaphor of a 'participatory bubble'[128] – a 'small-scale [moment] that allow[s] participation and contestation over the meaning of constitutional norms' – to help distil the special value of a commission of inquiry. Bubbles arise from social 'boiling points', enclose a specific space and specific actors, and eventually burst with time.[129] Yet, 'while bubbles burst, the value of the bubble lies in what is learnt from it – not how it directly changes policy (although that would be nice) – but whether it was a successful experiment that "alter[ed] our understanding of the norms that frame them"'.[130] Like Salter, Bishop recognises that inquiries have important instrumental value, including impacting public policy, but can also generate intrinsically laudable effects, such as channelling and reshaping social norms.

While Bishop perceives the good of inquiries as being incidental and even inherent to their public and participatory character, there may nevertheless be means of enhancing that character and thus maximising the potential of inquiries

[125] See generally R Macdonald 'The Swiss Army Knife of Governance' in P Eliadis et al (eds) *Designing Government: From Institutions to Governance* (2005) 203. Macdonald gives preliminary treatment to commissions of inquiry through his own distinct blend of legal pluralism and legal process theory in 'Interrogating Inquiries' (note 116 above).

[126] Bishop (note 13 above).

[127] Ibid at 38–39.

[128] See S Woolman *The Selfless Constitution: Experimentalism and Flourishing as Foundations of South Africa's Basic Law* (2013) cited in Bishop (note 13 above) at 40–41.

[129] Ibid.

[130] Ibid.

to reshape norms and foster positive change irrespective of their immediate findings or recommendations. Bridging Bishop's metaphor with Salter's, this could mean exploring ways to actively embrace inquiries' status as the sites of competing normative tensions, on the premise that the public, deliberate reconciliation of those tensions might itself encourage the transformative potential that Bishop identifies. In other words, perhaps bringing the inquiry's role in reconciling normative tensions into the open – making it an express, deliberative feature of the institution – would corroborate and expand the impact of an inquiry after its formal proceedings have ceased. Even if this more express, deliberate and transparent exercise led to some commissions continuing to employ orthodox procedural approaches, they would then do so with greater assurance that these approaches are actually suited to context, and without foreclosing potential alternatives.

B Advancing the Plural and Participatory Character of Inquiries: Three Recommendations

I offer three recommendations to advance this aim. The first stems directly from the negative example of the Marikana Commission, and its Canadian counterpart the Missing Women Commission of Inquiry, where the denial of necessary funding for participants diminished confidence in the inquiry process as a whole. It would be trite to suggest that appointing governments should learn from these experiences and ensure adequate financing for participants at future inquiries; one can hope that the political consequences of failure to do so will be a corrective for future behaviour, but ideally equality of participation at an inquiry shouldn't depend on the wisdom or benevolence of an appointing government. There is an alternative that provides a stronger safeguard for adequate funding at future inquiries, and it lies in the negotiating power of future commissioners. While the authorities that appoint inquiries enjoy wide discretion to stipulate terms of reference, and even to intervene in inquiries with modifications to those terms (or in the South African case, through the imposition of procedural guidelines), they cannot force a prospective commissioner to accept an inquiry appointment. The pre-acceptance phase of an inquiry appointment thus presents a crucial moment in which a prospective commissioner can model the integrity and independence that will be essential to successful performance of his or her role.

The prospective commissioner can do so by requiring, as a condition of acceptance, that the inquiry's terms of reference enshrine the commissioner's decisional independence over the conferral of standing to inquiry participants and the granting of requests for funding. In Canadian inquiry practice, funding of inquiry participants is ordinarily at the discretion of the commissioner, drawing from an inquiry budget that has been established with this need in mind.[131] This

[131] An illustration of this approach is provided by Canada's 2012 Cohen Commission of Inquiry into the Decline of Sockeye Salmon in the Fraser River. The commission's archived website contains correspondence between the Commissioner and the Clerk of the Privy Council concerning supplements to a Contribution Program designated under the inquiry's budget to finance the legal representation of certain participants. See 'Rulings' available at http://epe.lac-bac.gc.ca/100/206/301/pco-bcp/commissions/cohen/cohen_commission/LOCALHOS/EN/RULINGS.HTM. The inquiry's

recommendation would corroborate that practice, but build-in a legal obligation for the appointing authority to meet the funding requests of a commissioner, reinforcing that official's independence to conduct the inquiry as he or she sees fit. Escaping the obligation would require the appointing authority to amend the terms of appointment, and thus presumably escalate the political cost. The following language, for incorporation in the legal instrument constituting the inquiry, would be appropriate for achieving this objective:

> The Commissioner may allow for participation in the inquiry by any individual, organisation or group, according to any means that she considers appropriate to fulfilment of these terms of reference.
>
> The Commissioner may request, and the appointing authority will grant, funding to enable the legal representation of any individual, organisation, or group granted standing at the inquiry, should the Commissioner deem such funding necessary to ensure appropriate participation by that individual, organisation, or group. Funding shall be appropriate to the scope of each participant's interest in the inquiry, as determined by the Commissioner, and consistent with applicable laws, regulations and guidelines as specified in these terms of reference.

To be clear, the aim of this proposal is not necessarily to secure equality of arms in the adversarial sense that the High Court deemed appropriate to the Marikana Commission. This would contradict the potential for inquiries to innovate procedurally in context, which may involve the adoption of procedures that are deliberately non-adversarial. Rather, the point is to secure equality in a more basic sense of equal opportunity to contribute to the procedural and substantive direction of the inquiry, whatever form those may take.

This, in turn, leads to my second recommendation: that commissioners elevate the role of stakeholders and participants in interpreting an inquiry's terms of reference, both through early community consultation and by formalising an opportunity for participants with standing to offer their interpretations of the terms. Inquiries are often appointed with a sense of political urgency in order to convey the impression that action is being taken in response to a pressing community problem. This urgency can be to the detriment of inquiries that are established with terms of reference which, for lack of consultation and genuine community engagement, fail to reflect the true concerns of the persons whose confidence the inquiries are intended to restore. Fortunately, most terms of reference provide interpretive latitude to inquiry commissioners themselves. The commissioners may thus compensate for the defects of a hastily-appointed inquiry by consulting broadly on how their terms should be interpreted, and make best efforts to accommodate community concerns within a reasonable framework of

final report also contains a helpful account of how budgetary allocations for participants' legal representation were administered, clarifying the respective roles of the commission and government. See *Commission of Inquiry into the Decline of Sockeye Salmon in the Fraser River Final Report* (2012) Vol 3 at 132–33. These sources demonstrate that the inquiry was obliged to operate within Treasury Board funding requirements, but that it was nevertheless treated with independence and respect by government officials responsible for approving extensions or supplements to the inquiry's expenses.

adherence to the terms. They may also publicly request revision to their terms where the latter are found inadequate to meet legitimate community demands.

Australia provides a recent example of the merit of this approach. In July of 2016, a joint Federal and Northern Territory Royal Commission was appointed to investigate youth protection and detention practices in the Territory,[132] following media revelations that youth had been subjected to degrading and inhumane treatment at a specific detention facility.[133] The inquiry was announced hastily following an investigative news report that featured graphic footage of the youths' abusive treatment at the hands of prison staff. It was immediately criticised both for terms of reference that were too narrow, focusing on the policies and practices of youth detention centres but not on deep-seated societal problems that foster the over-incarceration of Indigenous youth, and for its selection of a commissioner implicated in the Territory's youth justice system through his past judicial service.[134] Following the early resignation of this commissioner, two new appointees were selected – one a judge from outside the Territory's justice system, and the other a respected Indigenous advocate and Aboriginal and Torres Strait Islander Social Justice Commissioner.[135] These Commissioners subsequently deferred commencement of formal evidentiary hearings so that they could consult with the persons and communities most directly impacted by the inquiry. This included, notably, visiting youth within the Territory's detention centres and considering means to enable their participation in the inquiry hearings that recognised their evidentiary insight but also accommodated their vulnerability.[136]

This original ethic of consultation yielded an innovative and inclusive inquiry approach. Vulnerable witnesses were accommodated by a range of participatory options, which simultaneously protected their privacy but allowed for the testing of any evidence that could substantiate formal findings.[137] Community Engagement Officers were appointed to raise awareness of the inquiry and to broker community input and participation throughout remote regions of

[132] See the archived website of the Royal Commission into the Protection and Detention of Children in the Northern Territory, available at http://childdetentionnt.royalcommission.gov.au.

[133] See M Levy 'Royal Commission into Youth Detention in the NT: What You Need to Know' *The Sydney Morning Herald* (26 July 2016) available at http://www.smh.com.au/national/royal-commission-into-youth-detention-in-the-nt-what-you-need-to-know-20160726-gqdqkd.html.

[134] See 'Black Fury: Royal Commission Compromised from the Start, Say Peak NT Aboriginal Bodies' *New Matilda* (29 July 2016) available at https://newmatilda.com/2016/07/29/black-fury-royal-commission-is-compromised-from-the-start-say-peak-nt-aboriginal-bodies/; and S McKeith 'Labor Ramps Up Pressure on Turnbull Over NT Abuse Royal Commission' *The Huffington Post* (30 July 2016) available at http://www.huffingtonpost.com.au/2016/07/29/turnbull-must-do-nt-abuse-royal-commission-properly-shorten/.

[135] See A Henderson 'Mick Gooda, Margaret White Named New Royal Commission Heads after Brian Martin Steps Down' *ABC News* (1 August 2016) available at http://www.abc.net.au/news/2016-08-01/brian-martin-stands-down-from-royal-commission/7677400.

[136] The Commissioners addressed the unique process developed at the inquiry to accommodate vulnerable youth witnesses in their *Interim Report* at 21–22, available at https://childdetentionnt.royalcommission.gov.au/about-us/Documents/RCNT-Interim-report.pdf.

[137] Ibid.

Australia's Northern Territory.[138] These efforts were augmented by the inquiry's use of social media to provide regular, accessible information about its work, and by 13 community meetings conducted to gather information, perspectives and knowledge from those impacted most directly by youth protection and detention practices.[139] The final report of the inquiry included significant findings of organisational and individual misconduct, but also a richly contextual account of community interactions with the Northern Territory youth protection and justice systems. A chapter was devoted to 'Personal Stories', in which the anonymised voices of incarcerated youth, their families and community members were allowed to speak for themselves.[140] The Commission made audio recordings of several of these statements available on its website.[141] Finally, the Commission took the highly innovative step of publishing a non-technical overview of its report and releasing online audio versions of the overview in 17 different Indigenous languages.[142] These measures to enhance community stakeholdership, participation, and understanding appear to have complemented the overall efficacy of the inquiry: the Commission completed its work in 15 months, stayed within budget, delivered a probing and persuasive audit of systemic deficiencies, and formulated 227 policy recommendations that have been broadly endorsed by both the Commonwealth and Territorial governments.[143]

While the Northern Territory Royal Commission demonstrates that procedural innovativeness can result from consultation with the communities affected by an inquiry's mandate, more can still be done to cement the status of inquiries as truly independent and public investigative institutions. All terms of reference demand interpretation in context. The commissioners who preside over inquiries bear ultimate responsibility for this interpretive task, but there is no reason why they shouldn't be aided in doing so by participants whose standing in an inquiry reflects the immediacy of their knowledge and interest in the subject-matter

[138] *Northern Territory Report* (note 132 above) at 66–67.

[139] Ibid.

[140] Ibid at Chapter 2 titled 'Personal Stories'.

[141] See the Northern Territory Royal Commission's archived website (note 132 above). The Commission also made valuable use of oral transcripts and recordings in its 'Voices of the Commission' series, available at https://childdetentionnt.royalcommission.gov.au/community-engagement/Pages/Voices-of-the-Commission.aspx.

[142] Australia/Northern Territory, Royal Commission into the Protection and Detention of Children in the Northern Territory *Report Overview* (2017), available at https://childdetentionnt.royalcommission.gov.au/Pages/Report.aspx#_Report.

[143] Both the Commonwealth and Territorial government have given either specific or 'in principle' support to all of the report's recommendations; the future scope of their implementation remains to be seen. See H Davidson 'NT Resists Cash Guarantee on Child Detention Blueprint from Royal Commission' *The Guardian* (1 March 2018), available at https://www.theguardian.com/australia-news/2018/mar/01/nt-supports-all-but-10-royal-commission-recommendations; N Vanovac 'NT Royal Commission: Government Promises Overhaul of "Broken" Child Protection and Youth Justice' *ABC News*, (1 March 2018), available at http://www.abc.net.au/news/2018-03-01/nt-royal-commission-government-promises-overhaul-broken-systems/9491930; Office of the Prime Minister of Australia 'Commonwealth Government Response to the Royal Commission into the Protection and Detention of Children in the Northern Territory' Media Release (8 February 2018); Northern Territory Government 'Safer Communities: Response to the 227 Recommendations of the Royal Commission into the Protection and Detention of Children in the Northern Territory' Media Release (1 March 2018) available at http://newsroom.nt.gov.au/mediaRelease/24289.

under investigation. While commissioners often consult informally with inquiry participants on the interpretation of their terms of reference, and on procedural implications that should flow from those interpretations, I suggest that this process be formalised by means of a preliminary interpretive hearing. This is perhaps the most controversial recommendation advanced here, and the one that would go furthest in bringing the normative tensions latent in an inquiry into the open. I recommend that shortly after the conferral of standing on inquiry participants, commissioners should convene formal hearings inviting written and oral submissions on the interpretation of an inquiry's terms of reference. Participants with equal standing should receive an equal opportunity to direct the commissioner to the substantive issues they consider most important under the terms of reference (the inquiry's ends) and on appropriate procedural steps to address those issues (the inquiry's means). The commissioner might then issue a 'ruling' in the form of a procedural template that demonstrably accounts for the participants' claims.[144]

The template adopted by the commissioner need not accommodate the demands of every participant, but by acknowledging and addressing those demands, it would render explicit the balancing of normative expectations that is characteristic to the inquiry institution. The very fact of transforming this balancing into a public, deliberative exercise is likely to elevate the potential for inquiries to be procedurally innovative. It would also reinforce the independence of inquiries. Rather than treating the commissioner as a presidential or executive delegate, a preliminary hearing on the terms of reference positions him or her as the facilitator and leader of a publicly-driven, publicly accountable exercise. It in turn treats inquiry participants non-instrumentally, recognising them not just as sources of evidence but as stakeholders with legitimate interests and perspectives to lend the commission. Importantly, this approach still respects the authority of an inquiry's terms of reference: appointing governments wishing to ensure adherence to a highly specific procedural archetype will be able (and will be incentivised) to draft terms of reference with corresponding specificity. But the significance of this approach is that it broadens the commissioner's accountability in interpreting the terms: it treats the terms as starting points in an interpretive exercise to which inquiry participants are entitled to contribute, even while the commissioner retains the final say on the interpretation and the matching inquiry approach ultimately adopted.

It should be emphasised that a preliminary template on inquiry conduct need not be inflexible or preclude revision as an inquiry unfolds, especially in light of new investigative avenues or discoveries. The point is to initially ground the inquiry in an ethic of equality, inclusiveness, and deliberation, and to seize the opportunity for procedural innovation from an early stage. Certainly this process places an added administrative onus on commissioners who already face daunting responsibilities under tight timeframes. But this should be weighed

[144] Many inquiries already observe a variation on this practice by seeking the formal input of participants on draft rules of inquiry procedure. My proposal nevertheless advocates a considerably more developed opportunity for participant engagement on interpretive issues that will direct the inquiry.

against the reality that inquiries are frequently disrupted by interlocutory disputes raising exactly the types of concerns a preliminary hearing might address more constructively at an early stage. At the very least, it would be more difficult for participants to challenge the jurisdiction and fairness of an inquiry in which they received an early, express opportunity to be heard on the procedural and substantive issues of greatest concern to them, especially when the preliminary hearing itself was manifestly fair. This would especially be the case were the courts to exhibit deference in any early judicial challenges to inquiries adopting this approach.

A final recommendation focuses on the political actors who receive inquiry reports. At a 2014 conference on commissions of inquiry in the national security context, former Supreme Court of Canada Justice Frank Iacobucci recommended that Canada's inquiry legislation be amended to require that an independent reviewer be appointed to monitor and report on whether past inquiry recommendations have been implemented by government.[145] This is an eminently sensible recommendation, which could be buttressed by requiring that a standing parliamentary committee also regularly review and report on government responses to inquiry reports. Rather than fettering governments with a duty to adopt inquiry recommendations, this would ensure that engagement with them is ongoing and transparent, requiring political actors to articulate reasons for departure from the findings they invested significant public resources to reach. This might modestly extend the life of the participatory bubble identified by Bishop. At the very least, it would further values of accountability, debate and deliberation beyond the limited lifespan of an inquiry.

IV Conclusion

Magidiwana signifies an exceptional departure from the orthodox jurisprudential treatment of commissions of inquiry. Quite apart from its impact on the conduct of future inquiries, or on LASA's responsibility to finance the legal representation of indigent persons in consequential proceedings, the decision raises important questions about how inquiries are conceived as institutions of public law. These include questions about the significance that should be attributed to the fact that inquiries do not produce immediately enforceable legal findings: to what extent does this institutional characteristic justify procedural and substantive departure from traditional judicial proceedings, especially when participants have significant justice-seeking interests in the outcome of an inquiry or face a high risk of indirect legal prejudice? Pressing beneath these questions, *Magidiwana* invites us to reflect on the range of normative expectations that converge on the inquiry institution – expectations about truth-seeking, fairness, accountability, legal liability and restorative justice, to name a few. By subverting an assumption about the primacy of one normative expectation – the standard procedural suppositions flowing from the formal character of inquiries as inquisitorial instruments – *Magidiwana*

[145] See conference report for *Arar + 10: National Security and Human Rights a Decade Later* (24 October 2014) 13, available at https://cdp-hrc.uottawa.ca/sites/cdp-hrc.uottawa.ca/files/report_arar10_29-10-2015_en.pdf.

presents a starting point for rethinking inquiries in a manner that doesn't take a presumptive archetype for granted.

I have attempted in this paper to offer a preliminary view of what it would mean to approach inquiries as plural and participatory institutions responsible for mediating the competing normative expectations of participants. While all inquiries do this innately, I have suggested that the institutional potential of inquiries might be enhanced by them doing so expressly, taking concrete measures to ensure the structural equality of participants, accord them a formal opportunity to speak to desirable ends and means flowing from their interpretation of the inquiry's terms of reference, and legislating measures to ensure ongoing parliamentary dialogue and engagement with an inquiry's findings. The intended result is to affirm the status of inquiries as truly public enterprises, modelling qualities of deliberation and facilitation just as they do adjudication and investigation.