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SPECIAL ISSUE:

The South African Constitution in Transition

Issue Editors: Richard W. Bauman and David Schneiderman

Introduction: The South African Constitution in Transition
Richard W. Bauman and David Schneiderman

Participating in the Design: Constitution-Making in South Africa
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INTRODUCTION: THE SOUTH AFRICAN CONSTITUTION IN TRANSITION[1]

Richard W. Bauman* and David Schneiderman**

Constitutionalism has emerged, particularly since the collapse of state socialism, as the primary vehicle for both mediating conflict in divided societies and promoting economic development. This phenomenon has transnational significance, felt specifically in the new republic of South Africa. The transition from the extremes of a regime of racial segregation and disenfranchisement to a pluralistic democratic one has been both breathtaking in pace and dramatic in form.

As Canadian legal scholars, we have taken a special interest in the political significance of constitutional democracy for South Africa and the implications of that constitutional design for South Africa's democratic future. Confident that this is an interest shared by many, we have gathered together these papers in a special edition of the Review of Constitutional Studies. The papers, all written by South Africans, enable us to understand better the process leading to the new constitutional regime as well as some of the interesting and important features and consequences of the interim and new constitutions (the latter pending certification before the Constitutional Court).

In Part I of this introduction, we want to provide readers with a brief tour of the political events leading up to the present day. In Part II, we offer some observations about constitutional design by drawing comparisons between the texts representing the South African constitutional transition and the 1982 *Canadian Charter of Rights and Freedoms*.

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[1] We are grateful to Hugh Corder and Dennis Davis for their helpful comments. Any errors remain our own.

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I

The path to constitutional, non-racial democracy in South Africa has been tortuous and difficult. In less than a decade, the country has attempted to undo a long history of injustice epitomized in its apartheid laws. After the National Party was elected in 1948 under the slogan of apartheid (or separateness), the government enacted a series of laws designed to disenfranchise the non-white majority of South Africans, dispossess many of them of their property, deny them opportunities and basic amenities, and control their movement within the country.[1] The ensuing opposition to the white-dominated regime took several forms. During the 1950s, leading opponents to apartheid engaged initially in passive resistance.[2] Then, especially after the 1960 Sharpeville massacre in which 69 non-violent demonstrators including children were shot, government intransigence was met with armed struggle and guerrilla tactics.[3] In addition, various forms of sanctions, including international economic restrictions and domestic boycotts, were brought to bear.[4] Through an extraordinary process of political negotiations and mass action, accompanied by pulses of violence, South Africans have arrived in the 1990s at a constitutional framework designed to allocate governmental power and protect fundamental human rights. The events leading up to the adoption of a "final" constitution include the following milestones.

In the late 1980s, ministers in the government of the National Party began clandestine discussions with the African National Congress (ANC) leadership, in particular Nelson Mandela, who was at that time serving a life sentence in Pollsmoor prison (he had been transferred there after eighteen years'

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1 See Leonard Thompson, *A History of South Africa* (New Haven: Yale University Press, 1990) at 187-220.

2 See Albert Luthuli, *Let My People Go* (London: Collins, 1962) and Heidi Holland, *The Struggle: A History of the African National Congress* (New York: George Braziller, 1990).

3 See the articles in N. Chabani Manganyi and André Du Toit, eds., *Political Violence and the Struggle in South Africa* (New York: St. Martin's Press, 1990).

4 On the imposition and effect of sanctions, see Commonwealth Committee of Foreign Ministers on South Africa, *South Africa: The Sanctions Report* (Harmondsworth: Penguin, 1989); Robert Edgar, ed., *Sanctioning Apartheid* (Trenton, N.J.: Africa World Press, 1990); and Joseph Hanlon, ed., *The Sanctions Report* (London: Heinemann, 1990).

confinement on Robben Island).[5] On several occasions previously, dating back to the period before his conviction at the Rivonia trial in 1964, Mandela had written to ruling politicians, calling for a new democratic constitution which would guarantee equal rights for all South Africans.[6] On its part, the ANC published in 1988 its own Constitutional Guidelines, expressly modelled after the Freedom Charter of 1955.[7] Those Guidelines prefigured an end to legislated oppression and discrimination based on race.[8] After the reelection of the National Party in September, 1989, State President F. W. de Klerk (who had succeeded P. W. Botha the month before) continued the process of *rapprochement* with the ANC, culminating in de Klerk's landmark speech of February 1990, in which he announced the legalization of such political organizations as the ANC, the Communist Party, and the Pan Africanist Congress, the unconditional release of Mandela and other political prisoners, and the end of "banning" orders on various anti-apartheid activists.[9]

To further the goal of peaceful transition to a new constitutional dispensation, the ANC agreed in the Pretoria Minute of May 1990 to suspend the armed struggle through its military wing, Umkhonto weSizwe.[10] In September, 1991, nearly all the major political parties in South Africa (including the National Party, ANC, and Inkatha Freedom Party [IFP]) entered into a National Peace Accord which was supposed to stem the rising spiral of violence.[11]

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5 The Minister of Justice, Kobie Coetsee, paid an unannounced and unpublicized visit to Mandela's hospital room while the latter was recovering from surgery. See Nelson Mandela, *Long Walk to Freedom* (Boston: Little, Brown, 1994) at 456-57.

6 See *ibid.* at 224 for the substance of a letter sent to Prime Minster Verwoerd in June, 1961.

7 See African National Congress, *Constitutional Guidelines for a Democratic South Africa* (1988).

8 Subsequent discussions within the ANC emphasized that the *Guidelines* should be fortified to provide protection against sexism, as well as racism: see Albie Sachs, *Protecting Human Rights in a New South Africa* (Cape Town: Oxford University Press, 1990) at 197-201 and Catherine Albertyn, "Women and the transition to democracy in South Africa" in Christina Murray, ed., *Gender and the New South African Legal Order* (Kenwyn: Juta & Co., 1994) 39 at 46-47.

9 For a journalistic account of the critical manoeuvres within both the National Party and the ANC leading up to de Klerk's announcement, see Allister Sparks, *Tomorrow is Another Country* (London: Heinemann, 1995) at 91-119.

10 Martin J. Murray, *The Revolution Deferred: The Painful Birth of Post-Apartheid South Africa* (London: Verso, 1994) at 180.

11 *Ibid.* at 110-11.

Notwithstanding these formal agreements, levels of both political and ordinary violence increased and de Klerk appointed a special Commission of Inquiry into Public Violence, chaired by Justice Richard Goldstone, to investigate and report on the causes of armed clashes between militant factions.[12]

Multi-party, formal negotiations on a non-racial, non-sexist constitution began in December 1991 with the first plenary session of the Convention for a Democratic South Africa (CODESA).[13] This meeting provided a forum for representatives from nineteen different political groups, including the ruling government, parties represented in the tricameral Parliament, delegations from both non-independent homelands, as well as the so-called independent TBVC states (Transkei, Bophuthatswana, Venda, and Ciskei), the ANC, and other political parties. CODESA enabled each group to declare its goals and try to arrive at a common commitment to bring about a united South Africa that would be marked by a climate conducive to peaceful constitutional change.

In CODESA's preliminary discussions, and through five different working groups established to deal with particular issues, the National Party and the ANC (as the most significant participants) were able to agree on a number of key transitional issues: the value of implementing the National Peace Accord, the need for controlling the security forces, the use of a Transitional Executive Council to help achieve eventual free and fair elections, and the reincorporation into South Africa of the TBVC states.[14] However, the major parties continued to disagree about constitutional principles, including especially the percentage of the majority necessary in an elected constitution-making assembly for the adoption of a new constitution.

When CODESA II began its work in early 1992, it became apparent that sufficient agreement was lacking on broad, substantive principles underlying a proposed constitution. Consequently, the process of formal, multilateral talks collapsed in May, 1992. The NP government had increasingly hardened its position, in part because of its victory in the whites-only referendum of March 1992, where de Klerk received a fresh endorsement of his mandate to negotiate

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12 *Ibid.* at 85-86.

13 For an overview of the mandate of CODESA, summarizing its achievements and its eventual breakdown, see Hugh Corder, "Towards a South African Constitution" (1994) 57 Mod. L. Rev. 491 at 496-500.

14 See Murray, *supra* note 10 at 182-84.

constitutional reform.[15] By the end of CODESA II, however, the parties effectively had agreed to the constitutional principles which would form the basis for future constitutional negotiations.[16]

The end of CODESA II was followed by a series of events that threatened to derail entirely the process of negotiated constitutional change. On June 17, 1992, the massacre of 40 people at Boipatong, an ANC community near Johannesburg, heightened the tension between supporters of the ANC and those of the IFP.[17] In August 1992, the ANC sponsored a fresh "mass action" programme involving popular protests and strikes, including a two-day general strike of more than four million South African workers. This was followed in the same month by the march of 100,000 ANC supporters on the Union Buildings in Pretoria.

In September, 1992, covert bilateral discussions between de Klerk and Mandela resulted in a Record of Understanding which provided, in part, for the fencing of workers' hostels and the prohibition of traditional "cultural" weapons.[18] Further talks between Mandela and de Klerk into early 1993 led to an agreement on the formation of a government of national unity. This called for a coalition arrangement that would exercise power until a democratically elected, non-racial government could be set up under a new constitution.[19]

In March 1993 multiparty talks finally resumed at the World Trade Centre in Kempton Park, outside Johannesburg. Events which commanded media attention around the world, such as the assassination of Chris Hani (leader of the South Africa Communist Party) in April 1993 or the assault on the World Trade Centre itself by right-wing extremists, distracted but ultimately did not succeed in thwarting the negotiations. By September 1993, the 21 participating groups reached agreement on the establishment of a Transitional Executive Council (TEC) that was empowered to veto National Party cabinet decisions.[20] The TEC was designed to ensure each of the parties a voice in the governance of the country and to enable the parties both to monitor government security forces and

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15 Willem de Klerk, "The Process of Political Negotiation: 1990-1993" in Bertus de Villiers, ed.., *Birth of a Constitution* (Kenwyn: Juta & Co., 1994) 1 at 7.

16 See Corder, *supra* note 13 at 497-98.

17 See Sparks, *supra* note 9 at 140-47.

18 Murray, *supra* note 10 at 183.

19 Corder, *supra* note 13 at 500.

20 See Jan Heunis, "The Transitional Executive Council" in de Villiers, ed., *supra* note 15, 20.

to create a separate "national peace-keeping force."[21] These measures were envisioned as paving the way to free and fair elections for a 400-member transitional parliament that itself would act as a constituent assembly and draft a permanent constitution to replace the transitional one.

In November, 1993, the negotiators at the World Trade Centre adopted an interim constitution containing a Bill of Rights and providing for a Transitional Government of National Unity (TGNU) to arise out of national elections in late April 1994.[22] That government was authorized to govern for five years, unless in the meantime it lost a vote of confidence in parliament.[23] Among the tasks of the TGNU was the preparation and adoption of a permanent constitution. When acting in this role as a constituent assembly, decisions by parliament would require a two-thirds majority and would be constrained by principles set out in the interim constitution.[24] There was no provision for special majorities or minority vetoes except for the selection of quasi-judicial appointees such as the Public Protector and members of the Human Rights Commission. Leading the TGNU would be the president, chosen by parliament, with at least two deputy presidents[25] (the National Party having failed to obtain the rotating presidency upon which it had insisted during negotiations). When acting as an ordinary legislature, the TGNU required only a simple majority to make decisions. Seats in the cabinet, consisting of 27 members, would be distributed proportionately, and would include ministers from all parties winning more than 5 per cent of the total popular vote.

Under the interim constitution, the parliament was chosen on the basis of proportional representation from prepared party lists (half the 400 seats to be filled from national lists of the parties, and the other half from regional lists).[26] In addition, a senate was created, with ten members from each of the nine provinces to be elected proportionally by parties represented in the provincial legislatures.[27] Each of the provinces would have significant powers in relation

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21 *Ibid.* at 25. Training of members in the National Peacekeeping Force began in January, 1994: see Corder, *supra* note 13 at 507, n.76.

22 Constitution of the Republic of South Africa, Act 200 of 1993.

23 *Ibid.*, Ch. 4, s. 38 and Ch. 6, s. 93.

24 *Ibid.*, Ch. 5, ss. 68, 71.

25 *Ibid.*, Ch. 6, ss. 75-85.

26 *Ibid.*, Schedule 2.

27 *Ibid.*, Ch. 4, ss. 48-54.

to education, health, welfare, and policing.[28] The provinces would be left to adopt their own constitutions, provided they conformed to the principles contained in the national constitution.[29] The Constitutional Court created under the interim constitution was empowered to determine this issue of consistency as well as other matters relating to federalism disputes. The Constitutional Court, composed of 11 judges (including a President) mostly appointed from a list provided by the non-partisan Judicial Service Commission was also assigned the task of interpreting and enforcing those fundamental rights enshrined in the interim constitution.[30]

South Africa's first non-racial, general elections were held between April 26 and 28, 1994. Despite efforts to disrupt the elections — car bombs, for example, exploded near polling stations and outside the Johannesburg office of the ANC on the eve of the elections — vast numbers of eligible voters (three-quarters of them enfranchised for the first time) turned out to choose among predetermined slates of candidates from each of the 19 parties listed on the ballot.[31] The final outcome, endorsed by the Independent Electoral Commission, gave approximately 63 per cent of the nearly 20 million votes cast to the ANC.[32] It therefore commanded 252 seats in the National Assembly. The National Party gained a little over 20 per cent of the vote and thus earned 82 seats. F. W. De Klerk became the second Deputy President behind the ANC's Thabo Mbeki, a position from which de Klerk resigned in May 1996. The only other party exceeding the 5 per cent threshold was the IFP, which was supported by 10.5 per cent of the voters and thus held 43 seats. In the provincial elections, the ANC was victorious in seven of the nine provinces. The National Party led all parties in the Western Cape, while the IFP won control in KwaZulu/Natal.[33]

From the 1994 elections until May 1996, the process of constitution-making

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28 *Ibid.*, Ch. 9, s. 126 and Schedule 6 (as am. by s. 14 of Act 2 of 1994). See discussion in Karthy Govender, "Federal Features of the Interim Constitution" (1996) 3 Review of Constitutional Studies 76.

29 *Ibid.* Ch. 9, s. 160 (as am. by s. 8(a) of Act 2 of 1994 and s. 1 of Act 3 of 1994).

30 For the procedures surrounding the appointment of members to the Constitutional Court, see *ibid.*, Ch. 7, ss. 97 and 99. The jurisdiction of the Constitutional Court is delimited in *ibid.*, Ch. 7, s. 98. See discussion in Patric Mtshaulana and Melanie Thomas, "The Constitutional Court of South Africa: An Introduction" (1996) 3 Review of Constitutional Studies 98.

31 See Murray, *supra* note 10 at 208-209.

32 *Ibid.* at 210.

33 *Ibid.* at 211.

continued. While members of the public forwarded a vast number of submissions, negotiations also took place among elites of the various political parties. Agreement within Parliament's Constitutional Committee was finally reached on several remaining contentious issues as a result of dramatic, marathon sessions in early May. The parties resolved an impasse created by the National Party's steadfast support for constitutional provisions in relation to employers' lock-outs, property rights, education, and continued executive power-sharing. The approval of the new 1996 Constitution by more than a two-thirds' majority in Parliament has paved the way for the next step in the process of constitutional adoption, which is the requirement of certification by the Constitutional Court. The Court has to determine whether the new text is compatible with the 34 principles set out in the interim Constitution.[34] Hearings on the issue of certification began in the Constitutional Court in early July 1996. If the new Constitution fails to comply with the principles, the Constitutional Court must refer the document back to Parliament for amendment.

II

While one should undertake exercises in comparative constitutional law with some caution, we believe it would be worthwhile to outline some of the interesting features of the Bill of Rights in both the interim and new South African Constitutions with the Canadian model in mind.[35]

One of the elementary debates around the Canadian *Charter* concerns the extent to which its rights and freedoms have application in disputes between non-governmental actors. Most readers will be familiar with the Canadian Supreme Court's holding on this issue in *Dolphin Delivery*.[36] According to the Court, the *Charter* applies only to litigation where government or its agents are parties, or where some governmental connection exists. The *Charter* does not apply, however, to disputes between two private parties, even where the parties seek to invoke the authority of the courts to adjudicate their disputes. For the purposes of the *Charter*, then, courts are not "government".

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34 See *supra* note 22, Schedule 4, as am. by s. 13 of Act 2 of 1994 and s. 2 of Act 3 of 1994.

35 We regret that we will not undertake a discussion of the federalism aspects of the South African and Canadian constitutions here. We are confident, however, that such an exercise would be a worthy undertaking at some future time.

36 *Retail, Wholesale and Department Store Union, Local 580* v. *Dolphin Delivery Ltd*, [1986] 2 S.C.R. 573.

What constitutes government "action" triggering *Charter* application has been the subject of ongoing *Charter* doctrine. The Court seems to have settled on the necessity for some degree of government "control,"[37] although at least one former justice of the Court has characterized the Court's record in this front as incoherent.[38] Having to reconcile its *Charter* application doctrine with the plain fact that the *Charter* is the supreme law of the land, the Court did concede in *Dolphin* that *Charter* "values" have a role to play in judicial development of the common law. In a recent series of decisions, the Court has made plain that *Charter* values will have strict application to those judicial orders based in the common law that issue from criminal proceedings[39] but that, more generally, the common law will be tested loosely against *Charter* values.[40]

The debate about the application of fundamental rights raises two distinct questions: what actors are bound by constitutional rights and to what "law" do those rights apply? The interim Constitution may not have clearly resolved either question. Section 7(1) declares that the rights set out in Chapter 3 "bind all legislative and executive organs of state at all levels."[41] Chapter 3 would seem, on its face, to apply only to legislative and executive actions and not to the actions of non-governmental actors. In the parlance of the South African debate, constitutional rights apply "vertically" and not "horizontally." The judiciary, however, are not exempted from the constitutional obligation of enforcing Chapter 3 rights in the context of private disputes. The supremacy clause declares that the constitution "shall bind all legislative, executive, and judicial organs of the state"[42] while the limitations clause provides that, subject to those reasonable and justifiable limitations authorized under subsection (1), "no law, whether a rule of the common law, customary law or legislation, shall limit any right entrenched in this Chapter."[43] Taken together, the supremacy and limitations clauses seem to suggest the beginnings of an application doctrine similar to Canada's, where constitutional rights have at least indirect application to private disputes in judicial development of the common law.

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37 *McKinney* v. *University of Guelph*, [1990] 3 S.C.R. 229.

38 See Wilson J. in *Lavigne* v. *Ontario Public Service Employees Union*, [1991] 2 S.C.R. 211.

39 *Canadian Broadcasting Corp.* v. *Dagenais*, [1994] 3 S.C.R. 835.

40 *Hill* v. *Church of Scientology of Toronto*, [1995] 2 S.C.R. 1130.

41 An organ of the state is defined as including "any statutory body or functionary" in s.233(1)(ix) of the Constitution of the Republic of South Africa, Act 200 of 1993.

42 *Ibid.*, s. 4.

43 *Ibid.*, s. 33(2).

The Constitutional Court of South Africa recently affirmed this interpretation in *Du Plessis* v. *De Klerk*,[44] holding that a literal interpretation of the interim constitution revealed that court orders did not trigger Chapter 3 rights but that, following *Dolphin Delivery*,[45] the common law would have to be developed by Courts in light of those rights.[46] This ruling, however, leads to significantly different consequences than does the Canadian ruling. The Constitutional Court, by virtue of its limited jurisdiction to the "interpretation, protection and enforcement" of the Constitution, has no jurisdiction to participate in the development of the common law.[47] This is left to provincial Supreme Courts and its Appellate Division. Unlike the Canadian situation where the Supreme Court reserved to itself jurisdiction to develop the common law in accordance with *Charter* values, the Constitutional Court divested itself of any role in assessing the common law's conformity with Chapter 3, save for those instances where government has legislated in the area or is otherwise a party.[48]

The new Constitution of the Republic of South Africa may have the effect of further colonising the common law under a regime of rights. The application clause,[49] now makes explicit reference to the "judiciary," in addition to the legislature and the executive, together with "all organs of the state" (now defined to include institutions exercising a "public power or preforming a public function in terms of legislation").[50] The clause also mandates that the common law be developed in accordance with Chapter 3 rights and permits the development of common law rules that limit rights provided that limitations satisfy the requirements of section 36(1), the limitations clause. The new Constitution mandates, then, more strict scrutiny of common law rules that limit fundamental rights than will usually be the case in Canada. Further, as the application of Chapter 3 to the common law is now underscored, the jurisdiction of the Constitutional Court in the development of those common law rules is again unsettled. The new jurisdiction of the Court extends to "issues connected with decisions on constitutional matters"[51] and "makes the final decision whether a matter is a constitutional matter or whether an issue is connected with

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44 *Du Plessis* v. *De Klerk* CCT/8/95.

45 *Supra* note 36.

46 *Supra* note 44 at paras. 56-58, per Kentridge A.J.

47 Constitution of the Republic of South Africa, Act 200 of 1993, s. 98.

48 See the ruling of Sachs J. in *Du Plessis*, *supra* note 44.

49 Constitution of the Republic of South Africa Bill, (6 May 1996) s. 8.

50 *Ibid.*, s. 239.

51 *Ibid.*, s.167(3)(b).

a decision on a constitutional matter."[52] Section 173 also empowers the Constitutional Court, *inter alia*, "to develop the common law, taking into account the interest of justice." Not only does the Constitution have a more horizontal reach, but the jurisdiction of the Court to both supervise and adjudicate such questions now seems confirmed.

The limitations clause also suggests interesting parallels between the Canadian experience under the *Charter* and the constitutional transition in South Africa. The Canadian *Charter*'s "reasonable limits" clause (section 1) both guarantees rights and freedoms and subjects them to such reasonable limitations as are demonstrably justifiable in a free and democratic society. The *Oakes* case articulated a four-fold analysis (in typical Dicksonian architecture, the analysis has two stages, with the second stage having three steps).[53] Much of the controversy concerning the limitations clause concerns the third inquiry in the analysis — the "least restrictive means" requirement. The inquiry has evolved into a sliding-scale, contextually-driven approach such that the means used are required to meet a strict standard when a limitation concerns the state as "singular antagonist" or amounts to a complete prohibition on a right or freedom, and a less strict standard, showing some deference to legislative means, when a limitation concerns choices between competing social groups or socio-economic questions, such as the provision of state benefits.[54]

As Corder and Davis suggest in their paper,[55] the drafters of the interim Constitution clearly had the Canadian experience in mind when they formulated the test in section 33(1). Limitations on the rights in Chapter 3 are only permissible to the extent that they are "reasonable and justifiable in an open and democratic society based on freedom and equality." The structure of analysis requires an assessment of both the reasonableness of the limitation and satisfactory justification by government, parallelling to some extent the structure of analysis in the Canadian regime. David Beatty suggests, for example, that section 1 of the *Charter* requires demonstration of both the proportionality (a

52 *Ibid.*

53 *R.* v. *Oakes*, [1986] 1 S.C.R. 103.

54 *Attorney-General of Quebec* v. *Irwin Toy*, [1989] 1 S.C.R. 927 and *RJR-MacDonald* v. *Canada (Attorney-General)* (1995), 127 D.L.R. (4th) 1.

55 "A Ringing and Decisive Break With the Past" (1996) 3 Review of Constitutional Studies 141.

cost-benefit analysis) and rationality (an ends-means analysis) of limitations.[56] The reasonableness and justification requirements in the interim Constitution seem to resemble this two-step analysis. According to Justice O'Regan:[57]

> [The enquiry into reasonableness and justifiability] concerns proportionality: to measure the purpose, effects and importance of the infringing legislation against the infringement caused. In addition, it will need to be shown that the ends sought by the legislation cannot be achieved sufficiently and realistically by other means which would be less destructive of entrenched rights.

The Constitutional Court has, however, rejected the incorporation of the *Oakes* criteria into its analyses of limitations. According to Acting Justice Kentridge, section 33(1) "itself sets out the criteria which we are to apply, and I see no reason, in this case at least, to attempt to fit our analysis into the Canadian pattern."[58] An additional point of comparison concerns section 33(1)(b) which requires that no limitation "negate the essential content of the right in question," echoing the Supreme Court of Canada's analysis in the *P.S.B.G.M.* case distinguishing between "limits" on rights and their "denial."[59] We should take note, however, that since *PSBGM* the Court has declined to take up this distinction, preferring to carry on with its analysis under the *Oakes* criteria.[60]

A heavier onus of proof is required to be met for those limitations on rights and freedoms deemed of particular importance to the post-apartheid regime. For example, rights to human dignity, freedom of religion, political rights associated with freedom of expression, assembly and association, and the rights of detained, arrested and accused persons must meet a test of "necessity" in addition to satisfying the requirements of reasonableness and justification.[61] Du Plessis and Corder suggest, by way of example drawing on the Canadian experience, that application of the necessity requirement could require a court to demand that limitations not be just of "sufficient" importance, but be of "absolute" or "compelling" importance.[62] The Canadian cases, however, do call for

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56 David Beatty, *Constitutional Law in Theory and Practice* (Toronto: University of Toronto, 1995) at 70.

57 *S.* v. *Makwanyane*, 1995 (3) S.A. 391, para. 339.

58 *S.* v. *Zuma*, 1995 (2) S.A. 642, para. 35.

59 *A.G. Quebec* v. *Quebec Association of Protestant School Boards*, [1984] 2 S.C.R. 66.

60 See *Ford* v. *A.G. Quebec*, [1988] 2 S.C.R. 712 at 771-74.

61 Constitution of the Republic of South Africa, Act 200 of 1993, s.33(1)(b)(aa)(bb).

62 L. du Plessis and H. Corder, *Understanding South Africa's Transitional Bill of Rights* (Cape Town: Juta & Co., 1994) at 128.

"substantial and pressing" objectives in order to proceed with the *Oakes* criteria, even if this has meant a substantial measure of deference at this preliminary stage of the analysis. The least restrictive means requirement would seem to offer a better opportunity for the application of a strict scrutiny rule. A higher level of scrutiny for limitations on rights where the state is more easily characterized as "singular antagonist," suggests that a more relaxed level of scrutiny will be applied by courts for those limitations on non-listed rights. This more relaxed level of scrutiny may resemble the Canadian Supreme Court's approach in *Edwards Books*.[63]

The new Constitution irons out some of the interpretive questions which arise under the interim provisions. In the result, the limitations clause resembles more closely its Canadian counterpart. Rights may only be limited if made "in terms of law of general application" to the extent it is "reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom," taking into account a number of factors. These factors include: the nature of the right; the importance of the purpose of the limitation; the relation between the limitation and its purpose; and the less restrictive means to achieve that purpose. Abandoned is the enumeration of rights requiring stricter scrutiny and incorporated is a series of factors resembling even more the approach adopted by Canadian courts in *Oakes*.

The limitations clause suggests a two-stage interpretive process similar to the Canadian one.[64] First it is determined whether a right or freedom has been limited. An analysis of the particular right or freedom is undertaken — the Constitutional Court has, citing the Canadian case of *Big M* with approval,[65] adopted a "purposive" approach to the interpretation of rights and freedoms.[66] The second stage, outlined in the limitations clause, calls for reasonable justification of the limitation by government. In the Canadian context, the first stage of the inquiry calls for the 'large and liberal' interpretation of most rights and freedoms, although the Supreme Court has been inconsistent in its application of this interpretive rule. The fundamental freedom of expression has been given expansive meaning, while the freedoms of religion and association have been significantly narrowed in practice. The scope for the protection of

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63 *Edwards Books and Art Ltd.* v. *The Queen*, [1986] 2 S.C.R. 713.

64 *Zuma*, *supra* note 58, para. 21; *Makwanyane*, *supra* note 57, paras.100-02; A. Cachalia et al., *Fundamental Rights in the New Constitution* (Cape Town: Juta & Co., 1994).

65 *R.* v. *Big M. Drug Mart*, [1985] 1 S.C.R. 295.

66 *Zuma*, *supra* note 58 at para. 15; *Makwanyane*, *supra* note 57 at para. 9.

liberty and security of persons under section 7 has been given broad interpretation, while equality rights claimants under section 15 have been limited to claims made by members of historically disadvantaged groups.[67] It is apparent that the large and liberal approach to interpretation has been tempered by the techniques of purposive and contextual interpretation. This is despite the fact that the Supreme Court has declared that there is no hierarchy to the structure of the *Charter*'s rights and freedoms.[68]

The structure of the interim Constitution suggests that a different hierarchy would result. Limitations of freedom of religion, for example, which in Canada have not been strictly scrutinized outside of the criminal or quasi-criminal context,[69] are included within the group of enumerated rights which call for strict proof of "necessity," suggesting that freedom of religion is one of the more valued rights and freedoms in the interim Constitution's hierarchy of rights. Similarly, limitations on freedom of expression are subject to stricter scrutiny when expression is related to "free and fair political activity." This is in accord with the Canadian approach, where limitations on expression lying "at or near the core" of the purpose of the guarantee are subject to stricter scrutiny under section 1 than other forms of expression. This likely will suggest to South African courts that limitations on expression that promote hatred against identifiable groups[70] or constitute violent and degrading pornography[71] will more easily be defended by governments. The Constitutional Court has to date been ambivalent about this tension between the purposive approach and the requirement of generous interpretation.[72]

Because labour rights are included expressly in section 26 of the interim Constitution, the narrower construction accorded to the right of association in Canada likely will be avoided. Not only is the "right to form and join trade unions" expressly guaranteed (the constitutive approach adopted by the Supreme

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67 But see the Supreme Court's most recent statement in *Miron* v. *Trudel* (1995) 124 D.L.R. (4th) 693, where historical group disadvantage is not mentioned by the majority (at 739-45 per McLachlin J.).

68 *Dagenais*, *supra* note 39.

69 Compare *Big M Drug Mart*, *supra* note 65 with *R.* v. *Jones*, [1986] 2 S.C.R. 284 and *Edwards Books*, *supra* note 63.

70 For example, *R.* v. *Keegstra*, [1990] 3 S.C.R. 697.

71 For example, *R.* v. *Butler*, [1992] 1 S.C.R. 452. But see *Case* v. *Minister of Safety and Security* CCT/20/95 per Mokgoro J.

72 *Makwanyane*, *supra* note 57, at para.9, per Chaskalson P. and at para. 325, per O'Regan J.

Court of Canada in *P.I.P.S.*[73]), so are the correlative rights to organise and bargain collectively, and the right to strike. The interim Constitution also recognised an employer's recourse to lock-out,[74] a guarantee which, after intense negotiation and deadlocked constitutional talks, ultimately was left out of the new Constitution.[75] In addition, the right freely to engage in economic activity, guaranteed in the interim Constitution,[76] has been excised from the new Constitution.

Economic rights do have a place in both the interim and new Constitutions in the guise of property rights provisions.[77] Property rights were a matter of intense debate within the ranks of the ANC and a subject which, if not granted constitutional recognition, would have led to the withdrawal of the National Party from CODESA. As a critical plank in the NP constitutional platform and having gained constitutional status in the interim Constitution, it was difficult for the ANC to then advocate its erasure in the new Constitution.[78] The negotiated compromise in the final Constitution was to prohibit both deprivations and expopriations of property while making the clause subject to state measures to "achieve land, water and related reform, in order to redress the results of past discrimination,"[79] provided that such measures are in accordance with the limitations clause.[80] Land reform and restitution for the purposes of remedying past discrimination will be exempt from the strictures of the property clause provisions concerning deprivations and expropriations but subject to the general limitations clause. This is an important exception, particularly given the experience with takings clauses in other jurisdictions. Both the Indian experience after independence,[81] and recent American experience[82] suggest that courts may be just as apt to strictly scrutinize takings of property as they are to supervise the

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73 *Professional Institute of the Public Service of Canada* v. *Northwest Territories*, [1990] 2 S.C.R. 367.

74 Constitution of the Republic of South Africa Bill, (6 May 1996) s.23.

75 Instead, the Labour Relations Act, 1995 is shielded from constitutional review until amended or repealed by Parliament (*ibid.*, s.39[4]).

76 *Ibid.*, s.26.

77 Constitution of the Republic of South Africa, Act 200 of 1993, s.28; *Ibid.*, s.25.

78 See submission of the ANC to the Constitutional Assembly dated 10 September 1995.

79 Constitution of the Republic of South Africa Bill, (6 May 1996) s.25(8).

80 *Ibid.*, s.36.

81 See discussion in John Murphy, "Insulating Land Reform from Constitutional Impugnment: An Indian Case Study" (1992) 8 SAJHR 362.

82 For example, see the cases of *Nollan* v. *California Coastal Commission*, 483 U.S. 825 (1986) and *Dolan* v. *City of Tigard*, 129 L. Ed. 2d 304 (1994).

administration of the criminal justice system. The South African Constitution provides that expropriations must be "for a public purpose or in the public interest" and subject to the provision of compensation, calculated having regard to a number of enumerated factors.[83]

Attempting to break soundly with the constitutional regime of the past, the interim and new Constitutions both give pride of place to equality rights. The interim Constitution guarantees to every person "equality before the law and equal protection of the law" and the right to be free from state discrimination both generally and on a number of enumerated grounds, including sexual orientation, conscience, belief, culture and language,[84] similar to the 'enumerated and analogous grounds' approach under the Canadian *Charter*. The new Constitution extends equality rights to "equal benefit" of the law, drawing, perhaps, upon the experience under the Canadian Bill of Rights where maternity benefits were considered beyond the purview of the equality rights guarantee.[85] Both versions exempt from actionable discrimination affirmative measures designed to ameliorate the conditions of persons or groups of persons "disadvantaged by unfair discrimination."

Equality concerns seem to temper the whole of both the interim and new Constitutions. As mentioned, the limitations clause makes reference to South African society being based on the principles of human dignity, equality and freedom. Other substantive provisions in Chapter 3 of the new Constitution reinforce this equality dimension. Included are guarantees to "adequate housing,"[86] and a right of access to health care services (including reproductive health care) sufficient food and water, social security and social assistance.[87] As regard these guarantees, the state is required to take reasonable measures, "within its available resources, to achieve progressive realization of each of these rights." These guarantees move beyond the non-justiciable social union clause in the Charlottetown Accord,[88] although judicial oversight will be limited to ensuring that the state satisfies this means test of progressive realization.

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83 Constitution of the Republic of South Africa Bill, (6 May 1996) s.25(2)(3).

84 Constitution of the Republic of South Africa, Act 200 of 1993, s.8(2); *Ibid.*, s.9 (3).

85 *Bliss* v. *A.G. Canada*, [1979] 1 S.C.R. 183.

86 Constitution of the Republic of South Africa Bill, (6 May 1996) s.26.

87 *Ibid.*, s.27.

88 See Joel Bakan and David Schneiderman, eds., *Social Justice and the Constitution: Perspectives on a Social Union for Canada* (Ottawa: Carleton University Press, 1992).

At the time of writing, the new Constitution was awaiting certification before the Constitutional Court. The fact that the papers collected in this special issue were written and revised in the period between the coming into force of the interim Constitution and the drafting of the new Constitution caused some editorial grief. We are grateful to the authors for having been patient with our editorial requests and, in some instances, revising their work in order to take account of the most recent developments. Where appropriate, we have made reference to the provisions of the new Constitution in editorial notes, keeping in mind that the new Constitution cannot become law until certified by the Constitutional Court. Finally, we are appreciative of the early support given this project provided by Stephen Ellman and Penny Andrews, for the critical reviews by our anonymous referees, and for the able assistance of Christine Urquhart and our associate student editors.

PARTICIPATING IN THE DESIGN: CONSTITUTION-MAKING IN SOUTH AFRICA

Heinz Klug*

Constitution-making has typically been an elite driven process. The nature of this process and its outcome — the fettering of the will of the majority — has led to assertions that constitutionalism is anti-democratic. The author here concedes that these assertions are valid, but argues that the process leading up to the adoption of the interim South African Constitution tended to minimize elite domination and, indeed, was relatively inclusive. Professor Klug suggests that the confluence of a variety of forces, both domestic and international, necessitated an open and inclusive process of constitution-making in South Africa. As a result, groups based on shared characteristics, such as ethnicity, gender or class formed and, with varying degrees of success, were able to influence the outcome of constitutional negotiations. Indeed, South Africa's history is such that an elite dominated constitution-making process, particularly a process involving the National Party, would be widely perceived as profoundly illegitimate. The stage thus was set for the adoption of a final constitution by an inclusive, democratically elected South African Constitutional Assembly.

La rédaction d'une constitution a toujours été un processus influencé par l'élite. La nature de ce processus et son résultat — le bâillonnement de la voix de la majorité — a conduit à affirmer que le constitutionnalisme est anti-démocratique. L'auteur reconnaît ici la validité de ces assertions, mais démontre qu'en Afrique du Sud, le processus d'adoption de la Constitution provisoire a tendu à minimiser la domination de l'élite et qu'il s'est en fait avéré relativement inclusif. Le Pr Klug suggère que la confluence de diverses forces, domestiques et internationales, a imposé le caractère ouvert et inclusive de ce processus en Afrique du Sud. Il s'ensuit que certains groupes aux caractéristiques communes (ethnicité, genre ou classe) se sont formés et, avec un succès mitigé, ou pu infléchir le résultat des négociations constitutionnelles. Compte tenu de l'histoire sud-africaine, il est évident qu'un processus d'élaboration de la constitution dominé par l'élite, et impliquant de surcroît le National Party, avait de quoi être largement perçu comme profondément illégitime. Tout semble indiquer que le texte définitif sera donc adopté par une Assemblée constitutionnelle sud-africaine démocratiquement élue et inclusive.

I. INTRODUCTION

The act of constitution-making lies at the center of the tension between rational design,[1] which views the act as the supreme case of human societies'

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1 Rational design here invokes the logic of enlightenment rationality which asks of the present not how it fits into a wider scheme, or what does it say about tomorrow, or even whether it is the beginning of a new world, but rather "what difference does today introduce with respect to yesterday"? See M. Foucault, "What is Enlightenment?" in P. Rabinow, ed., *The Foucault Reader* (New York: Pantheon Books, 1984) at 33-34. Foucault describes this perspective as part of an attitude of modernity which has

self-definition and Karl Marx's most enduring insight, that 'men' make their own history but are burdened and shaped by what has gone before.[2] The two poles of this tension may be juxtaposed as agency and structure, with each emphasis having surprisingly counter-intuitive implications for the issue of participation. At one extreme, the practice of constitution-making through normatively framed deliberations of institutional design for good government is dominated by elite interventions or, at best, public debate. The other extreme is a constrained outcome of mobilization and contestation within structural limitations, yet it is often characterized by mass participation and democratic processes rather than elite consensus.

Most studies of constitution-making and constitutionalism emphasize the pole of deliberative rationality through their focus on institutional design and control over the exercise of political power.[3] But the creation of South Africa's first post-apartheid constitution seems to represent, simultaneously, both polar extremities. While bilateral *bosberaads* (secret retreats) between the negotiating parties seemed consistent with an analysis of the process as elite-pacting

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continued to be embroiled in "struggles with attitudes of 'countermodernity'" *Ibid.* at 39. See generally P. Hamilton, "The Enlightenment and the Birth of Social Science" in S. Hall & B. Gieben, eds., *Formations of Modernity* (Cambridge: Polity Press, 1992).

2 See K. Marx, "The Eighteenth Brumaire of Louis Bonaparte" (1852) reprinted in K. Marx, *Surveys from Exile: Political Writings*, Vol. 2, ed. by D. Fernbach (London: Allen Lane, 1973). Marx's formulation reads: "Men make their own history, but not of their own free will; not under circumstances they themselves have chosen but under the given and inherited circumstances with which they are directly confronted. The tradition of the dead generations weighs like a nightmare on the minds of the living" (*ibid.* at 146).

3 For examples of the privileging of discursive rationality over structural influences in United States constitutional discourse see generally J. H. Ely, *Democracy and Distrust: A Theory of Judicial Review* (Cambridge, Mass.: Harvard University Press, 1980); R. F. Nagel, *Constitutional Cultures: The Mentality and Consequences of Judicial Review* (Berkeley: University of California Press, 1989); B. Ackerman, *We the People: Foundations* (Cambridge, Mass.: Harvard University Press, 1991); C. R. Sunstein, *The Partial Constitution* (Cambridge, Mass.: Harvard University Press, 1993); and N. K. Komesar, *Imperfect Alternatives: Choosing Institutions in Law, Economics and Public Policy* (Chicago: University of Chicago Press, 1994) at 196-231. But see M. Tushnet, "The Politics of Constitutional Law" in D. Kairys, ed., *The Politics of Law: A Progressive Critique*, rev. ed. (New York: Pantheon Books, 1990) at 219-236 (giving more emphasis to the impact of constitutional structure on American constitutionalism and politics).

constrained by structural limits imposed by the local balance of power[4] and international imperatives, the record of the multi-party negotiations and the public debate reveals a process of deliberation and persuasion in negotiations over the 1993 Constitution.[5]

As the transition progressed, South Africans discovered that political participation is built on a far more complex, fluid set of identities and interests than those privileged by apartheid. Instead of remaining bound by the racial divisions which formed the primary political identity of most South Africans under apartheid, the process of constitution-making unleashed a range of claims for the recognition of specific social identities and conflicts. This mobilization of claims of difference and for specific recognition seemed, when based on race and ethnicity, to envelop the negotiations in the burdens of apartheid's past. However, in other respects, when it reflected claims based on gender, class, religious or cultural recognition, it generated public debate and activity aimed at resolving previously marginalized or excluded issues.

These observations confirm Daniel Elazar's argument that constitution-making "is an eminently political act."[6] Elazar, however, rejects the formal

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4 See D. M. Davis, "South Africa and Transition: From Autocracy to What? A preliminary analysis about a tentative process" Center for Applied Legal Studies, Working Paper 18, June 1992.

5 This process of deliberation goes beyond negotiations over the 1993 Constitution and includes a constitutional discussion/debate that has been going on at varying degrees of intensity since the all-white National Convention which formulated a united South Africa's first constitution in 1910. For an overview of South Africa's constitutional discourse see generally J. A. Benyon, ed., *Constitutional Change in South Africa* (Pietermaritzburg: University of Natal Press, 1978); L. J. Boulle, *South Africa and the Consociational Option: A Constitutional Analysis* (Kenwyn: Juta, 1984); R. Suttner & J. Cronin, eds., *30 Years of the Freedom Charter* (Johannesburg: Ravan Press, 1986); J. A. Polley, ed., *The Freedom Charter and the Future* (Mowbray, SA: IDASA, 1988); A. Sachs, *Protecting Human Rights in a New South Africa* (Cape Town: Oxford University Press, 1990); D. L. Horowitz, *A Democratic South Africa?: Constitutional Engineering in a Divided Society* (Berkeley: University of California Press, 1991); A. Sachs, *Advancing Human Rights in South Africa* (Cape Town: Oxford University Press, 1992); and R. A. Licht & B. de Villiers, eds., *South Africa's Crisis of Constitutional Democracy: Can the U.S. Constitution Help?* (Kenwyn: Juta, 1994).

6 D. J. Elazar, "Constitution-making: The Pre-eminently Political Act" in K. G. Banting & R. Simeon, eds., *Redesigning The State: The Politics of Constitutional Change in Industrial Nations* (Toronto: University of Toronto Press, 1985) at 233 [hereinafter *Redesigning The State*].

comparative approach of an earlier generation of political scientists who withdrew from the study of constitutional politics.[7] He proceeds by constructing a formal classification of constitutional models. Analyzing constitutions as "power-maps," Elazar argues that "processes for constitutional change are shaped by the fundamental form or character of the polity."[8] He identifies three basic models of constitution-making: hierarchical, organic and covenantal,[9] which traverse different degrees of participation, from the strictly hierarchial model to the more formal and participatory processes characteristic of constitutional pacts among equals.[10] Despite the descriptive power of such formal schema, this approach to constitution-making fails to recognize the centrality of the articulation of different forms and degrees of participation with the historical availability of particular constitutional norms and institutions.

While repudiating the privileging of concerns over the abuse of political power, the advocates of a "new constitutionalism" insist on a constructivist approach,[11] which retains the focus on institutional design and with it modernist assumptions of a universalistic rationality.[12] This approach does, however, adopt a more normative analysis, sharing many of the concerns of legal and political philosophy, compared to traditional political science approaches to constitution-making — which fluctuate between generalized descriptive analysis and the specificities of particular national experiences.[13] But even the more socio-legal and political economy approaches to constitution-making, which emphasize the structural impact of context by focusing on the relative strengths of opposing political forces and the consequences of elite pacting on the process of constitution-making,[14] tend to overlook external influences — structural, political and cultural.

Through an examination of the different degrees and forms of participation in South Africa's constitution-making process, I intend to explore the

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7 *Ibid.*

8 *Ibid.* at 242.

9 *Ibid.* at 243.

10 *Ibid.* at 242-246.

11 K.E. Soltan, "What Is the New Constitutionalism?" in S. L. Elkin & K. E. Soltan, eds., *A New Constitutionalism: Designing Political Institutions for a Good Society* (Chicago: University of Chicago Press, 1993) at 3 [hereinafter *New Constitutionalism*].

12 See S. L. Elkin, "Constitutionalism's Successor" in *New Constitutionalism, ibid.* at 70-95.

13 See generally, *Redesigning The State, supra* note 6.

14 See Davis, *supra* note 4.

relationship inherent in democratic constitution-making between processes of deliberative rationality and the structural, political and cultural influences which shape the boundaries of institutional design and participation. First, I will discuss the transmission of global political culture and its consequences for the constitution-making process. The impact of these influences will be reflected in a comparison of the practices and substantive goals of the main political actors in their formulation of alternative constitution-making proposals. Second, I will focus on the specific constraints associated with South Africa's democratic transition away from apartheid. This will be reflected in a discussion of the impact of the different factors — international pressures, political struggles, popular participation and negotiations — on the formulation of the two-stage constitution-making process adopted by the parties. Third, I will examine the different forms of political mobilization and popular 'participation' and their impact on the shaping of the 'interim' constitution, in particular, the provisions for the next round of constitution-making as defined by the 1993 Constitution. In conclusion, I will consider the relationship between different understandings of democratic constitution-making — as an act of self-binding, representation or elite pacting — and the aspirations and limits of popular participation in the creation of a constitutionalist order.

II. BURDENS OF THE PAST AND PRESENT: THE TRANSMISSION OF INTERNATIONAL POLITICAL CULTURE

Although even comparative discussions of constitutions and constitution-making tend to emphasize the historical uniqueness of individual national constitutions and the futility of the imposition of 'foreign' constitutional formulations,[15] it is acknowledged that the vast majority of the world's constitutions reflect the appropriation of a heterogeneous range of constitutional principles from the "prevalent international political culture."[16] Some analysts dismiss the significance of the normative impact of the constitutionalist tradition, arguing that in many cases constitutions — in the Third World and Africa in particular — are merely symbolic and bear no relation to reality within the particular polity.[17] Said Amir Arjomand, however, argues that constitutions are

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15 See K.G. Banting and R. Simeon, "Introduction: The Politics of Constitutional Change" in *Redesigning the State*, *supra* note 6 at 1.

16 S. A. Arjomand, "Constitutions and the struggle for political order: a study in the modernization of political traditions" (1992) XXXIII Arch. Europ. Sociol. 39, 73.

17 See A. W. O. Okoth-Ogendo, "Constitutions without Constitutionalism: Reflections on an African Political Paradox" in D. Greenberg *et al.*, eds., *Constitutionalism and*

important social realities and even when suspended or breached in practice "they delegitimize governments and constitute normative assets for the opposition."[18] The international revival of constitutionalism in the last quarter of the 20th century provides the grounding for Arjomand's argument, yet it remains necessary to trace both the general parameters of this international political culture and to examine its engagement within the specific contours of South Africa's constitution-making process.

Arguing that internal factors are less important to the outcome of processes of political reconstruction than the availability of constitutional models, Arjomand traces the historical emergence of the core principles of the international constitutionalist tradition. His analysis begins by identifying a number of processes, including: 1) the "idea of the impersonal rule of man-made law" which survived the Roman empire; 2) the gradual conversion within the Christian tradition of the power of finding the law into the power to legislate assumed by the Popes by the thirteenth century; 3) the medieval fragmentation of authority which led to the separation of the definition of right from the administrative order; 4) Montesquieu's idea of the separation of powers and his assertion of popular sovereignty in the argument that a prerequisite of individual freedom is that the people as a body must have legislative power; and 5) the emergence of specific procedures for constitution-making by a collective representative body and through ratification of draft constitutions by popular

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Democracy: Transitions in the Contemporary World (New York: Oxford University Press, 1993) at 65-82; Y. Ghai, "The Theory of the State in the Third World and the Problematics of Constitutionalism" in *Constitutionalism and Democracy*, *ibid.* at 186-196; R. B. Seidman, "Perspectives on Constitution Making: Independence Constitutions for Namibia and South Africa" (1987) 3 Lesotho L. J. 45; R. H. Green, "Participatory Pluralism and Persuasive Poverty: Some Reflections" (1989) Third World Legal Stud. 21; and A. K. Wing, "Communitarianism vs. Individualism: Constitutionalism in Namibia and South Africa" (1993) 11 Wis. Int'l L. J. 295 at 316-320. For the debate on Constitutionalism in Africa see, generally, I. G. Shivji, "State and Constitutionalism: A New Democratic Perspective" in I. G. Shivji, ed., *State and Constitutionalism: An African Debate on Democracy* (Harare: SAPE's Trust, 1991) at 27-54; B. Barry, "The One-Party System, Multiple Parties and Constitutionalism in Africa" in *State and Constitutionalism*, *ibid.* at 151-168; and Z. Motala, *Constitutional Options for a Democratic South Africa: A Comparative Perspective* (Washington, D.C.: Howard University Press, 1994) at 96-101.

[18] Arjomand, *supra* note 16 at 40.

vote in Virginia and Massachusetts, respectively.[19] To this list I would add what Robert Dahl terms the "Strong Principle of Equality," which he reduces to the idea "that all members of the association are adequately qualified to participate on an equal footing with the others in the process of governing the association," and which Dahl understands as producing a logic of political equality.[20]

While Arjomand acknowledges the influence of a society's pre-constitutional institutional structure and the increasing syncretism of later constitutions, he argues that, given the impact of the prevalent international political culture on constitution-making, the timing of constitution-making is more "consequential than the institutional structures of different countries."[21] The significance of this point is evident in the consolidation of international political culture since the collapse of state socialism. The ideologically inspired diversity of constitutional alternatives — one-party states, military dictatorships, liberal democracies, people's democracies, etc. — characteristic of the cold war period and reflected in the increasing syncretism of post-colonial constitutions gave way to an increasing hegemonization.[22] By the early 1990s liberal constitutional principles were hegemonic, with constitutional review by an independent judiciary increasingly becoming a prerequisite for international constitutional respectability.[23]

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19 *Ibid.* at 41-45. But see K. Pennington, *The Prince And The Law 1200-1600: Sovereignty and Rights in the Western Legal Tradition* (Berkeley: University of California Press, 1993).

20 See R. A. Dahl, *Democracy and its Critics* (New Haven: Yale University Press, 1989) at 30-33.

21 Arjomand, *supra* note 16 at 75 .

22 Post-colonial constitutions before the end of the cold war often reflected attempts to incorporate different aspects of international political culture, borrowing simultaneously from the socialist, social-democratic, and capitalist models, often resulting in an awkward syncretism in which some aspects were truely incorporated and meshed with local processes while others were simply ignored or abandoned as inappropriate. In the post-cold war period the hegemonic status of western models and in particular a United States-style constitutionalism was reflected in the quick adoption of bills of rights and justicible constitutions across the globe.

23 See D. Beatty, "Human Rights and the Rules of Law" in D. Beatty, ed., *Human Rights and Judicial Review: A Comparative Perspective* (Boston: Kluwer Academic Publishers, 1994) at 1-56. See also D. Held, "Democracy, the Nation-State and the Global System" in D. Held, ed., *Political Theory Today* (Stanford: Stanford University Press, 1991) at 197-235.

According to Arjomand, "constitutions are sediments of diverse historical processes, crystallized into a small number of indigenous and borrowed principles." However, these principles and the practices associated with them only "become effective social forces to the extent that they are borne by social groups and institutions."[24] Thus even if the significance of the emergence of a hegemonic international political culture is acknowledged, its integration into the political life of a society will be shaped by the specifics of the particular political transition including the degree and nature of public participation in the process.[25] In South Africa, the emergence of a hegemonic culture of constitutionalism in the international political culture of the late 1980s had a dramatic impact in shaping the boundaries of constitutional possibility and in reshaping the specific constitutional initiatives and objectives of different social groups and institutions. To this extent then, it is uncontroversial to state that South Africa's new constitutional order was shaped by and reflects the post-cold war hegemony of an American-style constitutionalism.

South Africans debating constitutional reform have always drawn freely on the international lexicon of constitutional options. In the 1970s and 1980s the Buthelezi Commission in Natal discussed consociationalism, federalism and bills of rights,[26] the National Party referred to the Swiss Canton system and consociationalism,[27] and the ANC asserted the right of South Africa's black

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24 Arjomand, *supra* note 16 at 49.

25 But see D. P. Franklin & M. J. Baun, eds., *Political Culture and Constitutionalism: A Comparative Approach* (Armonk, N.Y.: M.E. Sharpe, 1995). This study acknowledges the existence of international models but concludes that "constitutionalism is largely a cultural phenomenon and not simply the product of properly designed institutions and structures of government" (at 231). The potential success of democratic constitutionalism is ascribed by the authors to "favorable economic conditions and a certain amount of external security," which they consider "important factors supporting the establishment of democratic regimes in postwar West Germany and Japan" (at 232).

26 See G. Mare & G. Hamilton, *An Appetite for Power: Buthelezi's Inkatha and South Africa* (Johannesburg: Ravan Press, 1987) at 163-170.

27 See Chris Rencken, M.P. and spokesman for the National Party, statement to the *Weekly Mail* (22 November 1985) stating that a constitutional "model tailored specifically for the country's poly-ethnic nature may very well include elements of federalism, confederation, consociationalism, proportionalism, and even elements of the Swiss canton system," quoted in South African Institute of Race Relations, *Race Relations Survey 1985* (1986).

majority to self-determination.[28] While these were all respectable elements of the international political culture at that time, the ANC's argument, with its emphasis on decolonization, had direct implications for the constitution-making process. The claim of self-determination implied that it would be for the "people" of South Africa to decide on the specifics of a future political system including the possibility of a one-party state, state socialism or any other form of state recognized in the international system.

The end of the era of decolonization, the unravelling of military dictatorships in Latin America and the collapse of state socialism coincided with an increasing assertion of democratic principles in the international political arena. This democratic resurgence was closely associated with the growth of an international human rights movement and the increasing legitimation of bills of rights at both the regional and national level.[29] Tied to this development was the emergence of constitutional review as the essential element in the institutionalization of individual human rights and the constitutionalization of bills of rights.[30]

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28 The Principle of self-determination was incorporated into the ANC's 1949 Programme of Action but found its first application to South Africa in a resolution demanding the right of self-determination submitted by ANC President J. T. Gumede, J. A. la Guma and D. Colraine to the inaugural congress of the League Against Imperialism, in Brussels in February 1927. See F. Meli, *A History of the ANC: South Africa Belongs to Us* (Harare: Zimbabwe Publishing House, 1980) at 74-75. See generally H. Klug, "Self-determination and the Struggle Against Apartheid" (1990) 8 Wis. Int'l L. J. 251.

29 Although the international human rights movement has grown steadily since the second world war, the recent hegemony of fundamental rights as a basis for constitutional reconstruction is quite dramatic when compared to the situation in the mid-1970s when it was possible to argue that constitutional bills of rights were increasingly being abandoned. See B. O. Nwabueze, *Judicialism in Commonwealth Africa: The Role of the Courts in Government* (New York: St. Martin's Press, 1977) at 309. Indeed, after completing an extensive survey of the role of the judiciary under the constitutions of African Commonwealth countries Nwabueze was able to state that, at that time, not a single statute had been declared unconstitutional by the courts of Zambia, Kenya, Tanzania or Botswana, despite the existence of fundamental rights in their constitutions (*ibid.* at 308). Although Nwabueze points to a heritage of legal positivism, the statutory exclusion of the courts' jurisdiction, expatriate judges and English legal education as causes of the judiciary's failure to creatively protect fundamental rights, he does not consider the impact of the international environment in which the imperatives of cold war alliances were often more significant to a country's international standing than its internal human rights record.

30 See M. Rosenfeld, "Modern Constitutionalism as Interplay Between Identity and Diversity: an Introduction" (1993) 14 Cardozo L. Rev. 497; see generally Beatty, *supra*

These developments within international political culture were reflected in a number of different processes. The adoption of a set of "constitutional principles" by the Western Contact Group on Namibia,[31] establishing a minimum framework as a precondition for an internationally acceptable resolution of the Namibian conflict, saw the international community's first application of substantive principles, beyond a simple exercise of self-determination through a national plebiscite, in the context of decolonization. A second process was the development of the Conference on Security and Cooperation in Europe's (CSCE) human rights system, particularly through the follow-up process of intergovernmental conferences provided for in the *Helsinki Final Act*.[32] Most significant of these was the Vienna Follow-up Meeting which lasted from 1986 to 1989. Taking place in the context of transformation within the Soviet Union under Gorbachev, the Vienna Meeting saw a dramatic breakthrough on issues of human rights with agreement on the holding of conferences to address the "human dimension of the CSCE" and the establishment of the Human Dimension Mechanism to deal directly with allegations of failure by a party to uphold its human dimension commitments.[33] Moving beyond a traditional human rights framework, the Copenhagen Meeting of the Conference on the Human Dimension agreed that "pluralistic democracy and the rule of law are essential for ensuring respect for all human rights and fundamental freedoms."[34] A third and significant development in the African

note 23.

31 See "Principles Concerning the Constituent Assembly and the Constitution for an Independent Namibia," transmitted to the Secretary-General of the United Nations on 12 July 1982 (S/15287). But see M. Wiechers, "Namibia: The 1982 Constitutional Principles and Their Legal Significance" in D. van Wyk, M. Wiechers & R. Hill, eds., *Namibia: Constitutional and International Law Issues* (UNISA: 1991). Wiechers correctly, in my view, argues that the 1982 Constitutional Principles became part and parcel of the U.N. peace plan for Namibia through Security Council Res. 632 of Feb. 16, 1989 (see S/20412 of 23 Jan. 1989, para 35) and that they were subsequently adopted by the Namibian Constituent Assembly. However, I find rather strained his argument that they continue to directly bind the Namibian legislature as "conditions of Namibian statehood" (at 20).

32 See T. Buergenthal, "The CSCE Rights System" (1991) 25 Geo. Wash. J. Int'l L. & Econ. 333.

33 *Ibid.* at 370.

34 Conference on Security and Co-operation in Europe: Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE, June 29, 1990, 29 I.L.M. 1305 (1990), preamble at 1307. See M. Halberstam, "The Copenhagen Document: Intervention in Support of Democracy" (1993) 34 Harv. Int'l L. J. 163.

context was the World Bank's 1989 conclusion following a three year study of Africa's economic malaise, that no economic strategy would reverse Africa's economic decline unless political conditions in the continent improved. This conclusion, placing the blame for economic decline on the lack of public accountability and disrespect for individual rights, pointed directly to a new focus on the rule of law as an essential component of good governance.[35]

While these new international commitments to human rights and democratic governance cover a divergent range of opinion as to the specific content of these commitments, the idea of protecting individual rights through a system of constitutional review gained commanding authority in the transitions to democracy which marked the last part of the 1980s and the early 1990s. It is within this general context that the ANC constitutional principles were developed and in which the ANC sought the adoption of an internationally recognized framework for negotiations in South Africa. Likewise, the apartheid regime saw the opportunity of gaining international recognition of even a modified version of its 1983 Constitution collapse with the adoption of the Harare Declaration[36] and its subsequent incorporation into the UN Declaration on Apartheid in 1989.[37]

For the ANC the shift from a rhetoric of people's power, democratic centralism and state socialist models,[38] to an embracing of constitutional democracy and a bill of rights was grounded in the movement's ability to draw on its own rights-based tradition. Implicit in both the African Claims document, which was modelled on the Atlantic Charter, the expression of allied war aims in World War II, and the Freedom Charter, which, despite its emphasis on social and economic rights, was essentially a rights-based document, were claims to rights. The existence of this rights-based tradition within the ANC facilitated the

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35 See I. J. Wani, "The Rule of Law and Economic Development in Africa" (1993) 1 East African J. of Peace & Human Rights 52.

36 Declaration of the OAU Ad-hoc Committee on Southern Africa on the Question of South Africa, Harare, Zimbabwe, August 21, 1989, reprinted in ANC Department of Political Education, *The Road to Peace: Resource material on negotiations* (June 1990) at 34.

37 Declaration on Apartheid and its Destructive Consequences in Southern Africa, GA Resolution S-16/1, 14 December 1989, reprinted in Secretary-General, Second Report, U.N. Doc. A/45/1052 (1991), Annex III.

38 See African National Congress, "Strategy and Tactics of the South African Revolution" reprinted in A. la Guma, ed., *Apartheid: A Collection of Writings on South African Racism by South Africans* (New York: International Publishers, 1972).

transition towards constitutionalism and a convergence of ANC and international models for an internationally acceptable post-apartheid order.

Having accepted the inevitability of an inclusive democratic transition, the apartheid government continued to insist that the white minority (increasingly described by the National Party government in ways consistent with the international protection of national minorities) had a right to veto any majority decision on the constitutional future of South Africa. Indeed, the National Party's demand for entrenched power-sharing and a seventy-five per cent majority for the adoption of a new constitution led to the break-down of the Codesa round of negotiations in May 1992.

Despite the National Party government's rejection of international interference, and even initial tacit agreement by the major parties to avoid international participation, South Africans on both sides of the apartheid divide found their options constrained by an increasing international consensus on the characteristics of an internationally acceptable democratic transition in South Africa. Furthermore, South Africans found the boundaries of their debates and available options for future constitutional arrangements shaped by an international political culture increasingly dominated by a consolidating conception of democratic constitutionalism which held important implications for both the substantive content of a future constitution and the constitution-making process itself.

III. THE LIMITATIONS OF CONTEXT: CONSTITUTION-MAKING IN A DEMOCRATIC TRANSITION

In order to understand the resolution of conflicts over participation in the South African constitution-making process it is necessary to contextualise possible alternatives by identifying a number of relevant factors which framed the possible choices and, then, discussing these issues in the context of alternative constitution-making processes. Relevant factors related to South Africa's democratic transition would include first, the timing of the process; second, the domestic balance of forces between the negotiating parties; third, the range of acceptable options; and fourth, external influences on the choice of options.

The end of the cold war and the recognition by international agencies such as the World Bank that a country's economic success may be in part related to

the state of governance,[39] provide important markers in the changing international environment. The prevailing international situation may not only have made the democratic transition possible, as F. W. de Klerk argued in 1990,[40] but the timing also reinforced particular political options, including options in the constitution-making process.

Given the range of internationally recognized options for constitution-making in the post-World War II period, the South African parties would appear to have faced an unrestricted menu of examples. These ranged from General McArthur's imposition of a draft constitution on the Japanese legislature or the supervised post-war constitution-making bodies in Germany and Italy, to the unfettered drawing up of India's new constitution by a democratically elected Constituent Assembly. But the vast majority of new constitutions adopted since World War II, particularly in the context of decolonization, involved the negotiated transfer of political power from a foreign state to local bodies. Characteristic of these constitution-making processes was the role of the colonial power in formally passing new post-colonial constitutions. For the respective political elites — both colonial and indigenous — the issue of constitution-making generally took second place to the transfer of political power, particularly where the post-colonial constitution granted sovereign powers to the new legislature, ensuring easy passage of constitutional amendments.[41]

During most of the cold war era, the outgoing colonial power could actively frame the terms of the independence constitution before holding a national plebiscite in newly independent countries. Indeed, in former British colonies, the Westminster Parliament would formally produce each post-independence constitution. Although the process of constitution-making in these cases often involved prior negotiations between the colonial power and representatives of

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39 See World Bank, *Sub-Saharan Africa: From Crisis to Sustainable Growth* (Washington, D.C.: World Bank, 1989).

40 State President F. W. de Klerk argued in his speech announcing South Africa's political opening on February 2, 1990 that the removal of the threat of communism, following its collapse in eastern Europe, allowed the government the opportunity to open up the political process in South Africa.

41 Even where the post-colonial constitution gave the judiciary the power of constitutional review and a justiciable bill of rights, as in Kenya, the impact of constitutionalism was limited by both positivist traditions within the judiciary and the political dominance of the legislature which allowed the 65% required for constitutional amendment to be easily attained. See J. B. Ojwang, *Constitutional Development in Kenya: Institutional Adaptation and Social Change* (1990).

the nationalist movement (and in the case of Zimbabwe, even with representatives of opposing political factions within the colony), the former colonial power retained the initiative of framing the first post-independence constitution.

If Zimbabwe's new constitution reflected the legacy of decolonization, the Namibian and South African constitutional processes, by contrast, reflect a new international moment. This moment has seen a new wave of constitutionalism — reflected in the proliferation of new constitutional orders since the end of the cold war — and is marked, even in existing constitutional democracies, by the increasing politicization of constitutional change accompanied by demands for greater participation. In Canada, for example, the First Minister's Conference, which brings together the political leaders of the federal government and the ten provincial governments, assumed a right in the 1970s to negotiate constitutional change. But increasing mobilization shaped and changed the constitution-making process: women's groups, Indian organizations and calls for broader public participation in hearings, in the Quebec referendum and as an audience to whom politicians turned for support, opened up the process. Demands emanating from different sources and the establishment of different arenas had significant impacts on the contents of the constitutional agenda and changed the composition of participants in the process.[42] This expansion of participation in the constitution-making processes of established democracies provided a source of legitimacy to those in the midst of democratic transitions who were claiming the heritage of participation inherent in the promise of democratic constitutionalism. In Africa, Namibia's process in 1990 marked the reemergence of a democratically elected constituent assembly as the source of a democratic constitution.

IV. PROCEDURE AND SUBSTANCE IN CONSTITUTION-MAKING PROCESSES: THE PRACTICES AND PROPOSALS OF THE NEGOTIATING PARTIES

While each of the three major parties negotiating South Africa's transition to democracy — the ANC, NP government and the IFP — preferred a particular process of constitution-making. These preferences were intimately bound up with the party's substantive goals — goals that were premised on each party's particular conception of South Africa's future constitutional identity. For the

[42] See A. C. Cairns, "The Politics of Constitutional Renewal in Canada" in *Redesigning The State, supra* note 6.

ANC, a future South Africa should be based on a common citizenship and identity which could only be achieved through a collective effort to overcome apartheid's legacy.[43] The National Party conceived of a future South Africa in which local communities may voluntarily choose to pursue their own living arrangements without interference from the state.[44] To this end the National Party advocated a government of limited powers and the devolution of power to local communities. These local communities should, according to the proposal, be able to veto legislative action, if not directly at the national level then indirectly at the local level through self-government based on local property rights and through the erection of a fire-wall between public and private activity.[45] The IFP advocated complete regional autonomy which it described as 'federalism,' as a means to ensure the self-determination of particular communities. The IFP's federalism would require a national government of limited, enumerated powers, and a national constitution which would remain subject to the constitutions of the individual states of the federation.[46] Although labelled federalism, the essence of the IFP proposal is a system of confederation similar to the European Union.

These substantive goals shaped in large measure the practices and procedural preferences of the major players in the making of South Africa's transitional constitution. Significantly, the extent and nature of the participation, by either party members and allies or the general public, allowed or conceded by each party in the formulation of its own proposals, seems related to the character of the party's substantive goals and had a profound impact on its procedural preferences.

The ANC, under pressure from its membership and the democratic movement, campaigned for an open democratic process in which a constitution was ideally to be drawn up by an unfettered, democratically elected, constituent assembly. However, confronted with escalating violence, endless talks-about-talks and a national party government committed to a lengthy transition —

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43 See ANC, *The Reconstruction and Development Programme* (1994) at 1-3.

44 See National Party, *Constitutional Rule in a Participatory Democracy: The National Party's framework for a new democratic South Africa* (1991); and National Party, "Constitutional plan" (November 1991) 11 Nationalist 9 at 12.

45 *Ibid.* at 15-18.

46 See Inkatha Freedom Party, The Constitution of the Federal Republic of South Africa (Draft, June 18, 1993), reprinted in A. P. Blaustein, South Africa Supplement 93-6 (Oct. 1993), A. P. Blaustein & G. H. Flanz, eds., *Constitutions of the Countries of the World* (Dobbs Ferry, N.Y.: Oceana Publications, 1971) at 1.

including some form of power-sharing in which the white minority would continue to have a veto over power exercised by the black majority — the democratic movement launched a campaign for an interim government and a democratically elected constituent assembly.

Despite its preference for a democratically controlled constituent assembly, the ANC recognized that the white minority would refuse to negotiate a transition without some guarantees of the outcome.[47] Given the framework established by the international 'Contact Group' on Namibia, the ANC also recognized the importance of providing an internationally acceptable framework, and worked to promote the international adoption of its framework. In 1988 the ANC adopted a set of constitutional principles[48] which it then promoted through the Organization of African Unity[49] until they were included in United Nations resolutions as conditions that any future South African constitution would have to meet to gain acceptability by the international community.[50] The key benefit to linking ANC strategy to the recognition of an explicitly democratic and internationally recognizable framework was that this step undermined the possibility that any "limited democratization" process[51] — in which the apartheid regime would bring the black majority into the 1983 Constitutional framework without including the ANC and other banned political groupings —

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47 This was recognized by the ANC from before it initiated the process of negotiations in 1987; see "Statement of the National Executive Committee of the African National Congress on the Question of Negotiations," Lusaka, October 9, 1987.

48 African National Congress, Constitutional Guidelines for a Democratic South Africa (1988) reprinted in *The Road to Peace, supra* note 36 at 29.

49 See Harare Declaration, Declaration of the OAU Ad-hoc Committee on Southern Africa on the Question of South Africa, Harare, Zimbabwe, August 21, 1989 reprinted in *The Road to Peace, supra* note 36 at 34.

50 GA Resolutions 44/27A, B and K, 22 Nov. 1989; 44 GAOR, Supp. No. 49 (A/44/49), at 34-35. See also, GA Resolution S-16/1, 14 Dec. 1989. The Declaration is reprinted in Sec.-Gen., Second Report, U.N. Doc. A/45/1052 (1991), Annex III.

51 For example, the attempt by the Smith Regime in Rhodesia to promote an internal settlement with the hope of achieving international acceptability while continuing to exclude particular groups or parties from the democratic process. While the Muzorewa government in Zimbabwe-Rhodesia (a coalition of moderate African nationalists and Rhodesian whites) managed to obtain some degree of recognition it was unable to resist a further process of democratization which led to the Lancaster House negotiations, fully democratic elections and the emergence of Zimbabwe.

could receive international support.[52]

Although consistent with internationally recognized constitutional norms, the constitutional guidelines adopted by the ANC[53] were not consistent with ANC rhetoric of a "peoples' war," "peoples' power" and "ungovernability" which dominated the struggle in South Africa in the late 1980s.[54] The ANC Constitutional Committee's decision to launch a public debate on the ANC's constitutional proposals and proposed bill of rights in 1990 was therefore important both in engaging the ANC's own constituency and in reaching out to a broader South African and international audience. To this end the ANC Constitutional Committee engaged in a series of broadly inclusive conferences to formulate and discuss the detail of these proposals.[55] This series of about ten

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52 The apartheid government had in fact appointed a Special Cabinet Committee (SCC) in 1983 to investigate the constitutional position of Africans. The expansion of the SCC into a larger informal negotiating forum in mid-1985 was clear evidence of the regimes efforts to seek an "internal" solution. The SCC would, in the words of State President P. W. Botha, "enter into negotiations with black leaders who reject violence as a political solution," [*The Citizen* (20 April, 1985)] an implied exclusion of the banned political organizations including the ANC. See South African Institute of Race Relations, *Race Relations Survey 1985* (1986) at 62. See generally Samuel P. Huntington, "Reform and Stability in a Modernizing, Multi-ethnic Society" (1981) 8(2) Politikon 8 at 8-26.

53 The 1988 constitutional principles were ostensibly based on an elucidation of the Freedom Charter.

54 For a critical discussion of the introduction of a constitutionalist discourse into the National Liberation Movements perspective see Firoz Cachalia, "Constitutionalism and the Transition to Democracy" (draft) December 1992.

55 These included the following conferences: "Towards a non-racial, non-sexist Judiciary in South Africa," Constitutional Committee of the ANC and the Community Law Center, University of the Western Cape, Cape Town, March 26-28, 1993; "Structures of Government for a United Democratic South Africa," the Community Law Center, University of the Western Cape, ANC Constitutional Committee, Center for Development Studies, University of the Western Cape, Cape Town, March 26-28, 1992; "National Conference on Affirmative Action," University of the Western Cape, ANC Constitutional Committee and Community Law Center, Port Elizabeth, October 10-12, 1991; "Conference on a Bill of Rights for a Democratic South Africa," Constitutional Committee of the ANC and the Center for Socio-Legal Studies, University of Natal, Durban, Salt Rock, Natal, May 10-12, 1991; "Constitutional Court for a Future South Africa," ANC/CALS/Lawyers for Human Rights, Magaliesberg, February 1-3, 1991; and "Seminar on Electoral Systems," Center for Development Studies (CDS)/ANC Constitutional Department, Stellenbosch, November 2-4, 1990.

conferences between 1990 and 1993 focused on the elucidation of substantive constitutional issues, yet their format reveals a degree of participation, by both ANC aligned and independent (including foreign) participants, unique in the South African process. This was achieved first by the linkages between the ANC Constitutional Committee and a number of university-based legal institutes, allowing the co-hosting of these events. Second, invitations to different ANC regions, political structures, and members of the tripartheid democratic alliance (the ANC, SACP and Cosatu) ensured the participation of a range of activists from the trade unions, non-government organizations and community-based organizations. Third, international participants and local academics were involved in most of these conferences.[56]

The ANC Constitutional Committee was at times criticized by ANC membership for not bringing the constitutional debates down to the grass roots, since the distribution of documents and proposals was haphazard and unreliable at the branch level.[57] Nevertheless, the impact of the Constitutional Committee's work profoundly reshaped the ANC's constitutional posture.[58] Although the 1988 Constitutional Principles were ostensibly based on the ANC's political manifesto, the 1955 Freedom Charter, their elucidation by the Constitutional

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[56] The proceedings of a number of these conferences were subsequently published including: CDS/CLC/ANC, *Electoral Systems - A Discussion Document* (1990); ANC Constitutional Committee, *A Bill of Rights for a Democratic South Africa: Papers and Report of a Conferences Convened by the ANC Constitutional Committee* (Center for development Studies, 1991) and *Affirmative Action in a New South Africa: The Apartheid Legacy and Comparative International Experiences and Mechanisms of Enforcement* (Center for Development Studies, 1992).

[57] Although many ANC branches in the cities held discussions or political education sessions around many of the Constitutional Committee's documents there is little evidence that these processes were characteristic of ANC branches in either the rural areas or for that matter in the urban 'townships' where violence and basic organizing consumed the available resources.

[58] This shift is reflected in the "Declaration of the 48th National Conference of the African National Congress" July 6, 1991 which summarized the results of the ANC's first national conference after its unbanning held in Durban in July 1991. Section 10 of the declaration states that: "We reiterate our adherence to the principles of a united, non-racial, non-sexist and democratic South Africa as enshrined in the Freedom Charter. These include the guarantee of the fundamental human rights of all South Africans, reinforced by an entrenched Bill of Rights, a multi-party system of government, a representative and independent judiciary and regular elections. . ." reprinted in South African History Archive, *History in the Making: Documents reflecting a changing South Africa* Vol. 1, No. 6 (July 1991) at 41.

Committee clearly went well beyond it and in retrospect involved a significant shift in the ultimate vision. This shift was made possible by the participation and engagement of activists, regional representatives, and the ANC leadership itself in the discussions and debates initiated by the Constitutional Committee.[59]

In stark contrast, the National Party government at first resisted calls for a democratically elected constituent assembly, envisaging instead a long transition period in which a future constitution could be negotiated between the parties. As the holder of state power, the National Party was determined not to relinquish control before securing effective safeguards against the future exercise of state power by the black majority. This aim was, however, coupled with an understanding of political participation based on the relatively unrestrained exercise of executive power and the achievement of political change through the negotiation of elite interests.

ANC analysts tended to view the National Party's insistence that all 'recognized' political entities — including the minuscule political parties of respective self-governing bantustan governments, and the governments of 'independent' bantustans — be equal participants in the negotiations as an attempt to stack the table in the regimes' favor. In fact, however, this demand accurately reflected the National Party's understanding of participation, based on a notion of how competing political elites form a compact to govern. This type of elite decision-making reflected the National Party's own internal policy-making processes — which historically involved secret caucuses based on Broederbond membership and negotiations between the provincial leaderships of the party — and the apartheid state's tradition of investigating constitutional options through appointed government commissions. The government's constitutional proposals were substantially informed by two reports issued by the South African Law Commission in 1991.[60]

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[59] The shift from constitutional debate to negotiations was accompanied within the ANC by the demand for participation by the membership in the negotiations process where many felt the negotiators were becoming increasingly distanced from their democratic base. Again the ANC responded by attempting to establish negotiations fora at a regional and local level so as to keep a link between the negotiations process and membership. These too stretched the limits of resources and the representative capacities of local leaderships.

[60] See South African Law Commission, Project 58, *Interim Report on Group and Human Rights* (August 1991); and South African Law Commission, Project 77, *Constitutional Models* (3 volumes, Oct. 1991).

From the outset, the structure of formal participation in the negotiation process was premised on a notion of consensus building between contending elites.[61] The Conference for a Democratic South Africa (Codesa), formed to negotiate the transition to a new constitutional order, thus reflected Nationalist Party demands for an elite pact-making process. Nevertheless, the National Party government still refused to permit Codesa to exercise legal powers, insisting that legal continuity required the approval of any new constitution by the National Party-dominated tricameral Parliament.[62] This assertion of the need for legal continuity carried the additional advantage for the National Party of precluding a democratically elected constitution-making body and requiring that any future constitution be negotiated between the parties. In fact, the apartheid government argued that there could not even be a non-racial election until a new constitution allowed a legal basis for universal adult franchise. For the National Party government, any suggestion that there should be a legal break with the apartheid past raised issues of the sovereignty of the South African state and the legitimacy of its position as a *de jure* government and was thus non-negotiable. As holder of state power for over forty years, the National Party was determined to project its power into the future, if not to control the outcome, at least to ensure certain basic property and social interests through the insulation of private power in the post-apartheid order.[63] This project was threatened by claims asserting the right to immediate participation regardless of the provisions of the existing 1983 tricameral constitution.

The Inkatha Freedom Party adopted an even more non-participatory position, viewing the very notion of a democratically elected constituent assembly as inherently undemocratic.[64] In an astounding exercise of formal logic, the IFP argued that since the purpose of a justiciable constitution and a bill of rights is to protect minorities from the tyranny of the majority, the minorities to be protected must give their assent to the particular framework. This requires that all parties which are going to live under this framework give their prior consent. In other words, the IFP and every other minor party at the negotiating table,

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61 This was given clear, if realistic, expression in the notion of sufficient consensus, i.e. agreement between the National Party government and the ANC.

62 Established in terms of the Republic of South Africa Constitution Act 110 of 1983.

63 See generally S. Friedman, ed., *The Long Journey: South Africa's quest for a negotiated settlement* (Johannesburg: Centre for Policy Studies, 1993) at 26-7.

64 See, Inkatha Freedom Party, "Why the Inkatha Freedom Party Objects to the Idea of the New Constitution Being Written by a Popularly Elected Assembly (Whether called "Constituent Assembly" or called by any other name)", undated submission to Codesa Working Group 2 (1992).

regardless of the extent of their support, must reach consensus on the final constitution,[65] or else the result would, by definition, be anti-democratic.[66]

Recognizing the difficulties of obtaining universal consensus,[67] the IFP called for a depoliticized process of constitution-making, with a group of constitutional experts retained to produce a constitution which could then be adopted by parties and endorsed in a national plebiscite.[68] The assumption that a constitutional framework can be inherently neutral and that its neutrality can be ensured by the appointment of constitutional experts is itself questionable; but the IFP's proposal for a national referendum to confirm a negotiated constitution reflects a Machiavellian conception of democracy. If all the parties were to reach official consensus on a constitution, a national plebiscite to endorse the result would

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65 See Comments of IFP on document of Working Group 2 [Codesa] Steering Committee proposal on CMB [Constitution-making Body] 27 April 1992. The "Inkatha Freedom Party has on numerous occasions made clear its objection to any majoritarian approach to the drafting of the fundamental law of the land. Therefore IFP would insist that even in such interim parliament the rule of consensus should be applied instead of special majority whether such special majority be two-thirds as proposed by the ANC or seventy-five per cent as proposed by the government" (*ibid*).

66 See *The Long Journey, supra* note 63 at 71. While virtually all systems of constitutional rule-making require super-majorities or even unanimity among particular constitutionally defined institutions such as the provincial governments under Canadian federalism, the IFP's demand for universal consensus among political participants whose electoral support was completely untested and whose constitutional standing was equally unspecified was indeed a unique attempt to subject constitution-making to the veto of any group who by past association with apartheid, violent intervention or vociferous politicking could claim a place at the negotiating table.

67 Interestingly, the IFP has reversed its position, at least with respect to the making of Provincial constitutions, insisting that as the majority party — with less than 50 percent of the vote — in KwaZulu/Natal they have the right as the majority to determine the contents of the Provincial constitution despite the Constitutional requirement of a two-thirds majority. Frustrated at their inability to get their own way in the KwaZulu/Natal legislature the IFP threatened new elections claiming that they would secure a two-thirds majority so that they can pass their own constitution — a far cry from the demand for consensus which they continue to maintain at the national level. Unhappy with the direction of the Constitutional Assembly at the national level the IFP boycotted Constitutional Assembly proceedings from late 1994.

68 See Position Paper of the Inkatha Freedom Party for Submission at the CODESA meeting of February 6, 1992, reprinted in *Constitutions of the World, supra* note 46, South African Supplement, Release 92-2 (A. P. Blaustein, March 1992) at 173.

involve only the shadow of formal democracy.[69]

The IFP itself failed to invite any other significant political formations to participate in drafting a KwaZulu/Natal constitution. However, it was consistent in its commitment to an expert-led process. IFP constitutional proposals were produced by a group of experts, dominated by two American constitutional lawyers, Professors Blaustein and Ambrosini, and, in the case of the KwaZulu/Natal constitution, endorsed without discussion by the IFP dominated KwaZulu legislature. While this first attempt was still-born, the IFP continued to demand that its version of a provincial constitution be adopted under the interim constitution. In mid-1996 this latest version went before the Constitutional Court for certification in terms of the 1993 Constitution.

After nearly two-and-a-half years of slow progress, South Africa's democratic transition ground to a halt in mid-1992. While the collapse of the Codesa negotiations marked the outer-limits of the National Party government's ability to assert a purely elite constitution-making process, the gunning down of ANC protestors outside Bisho marked the ANC's inability to insist upon an unfettered constituent assembly. Although overcoming this stalemate would require concessions from both sides, it was the post-cold war international consensus on the parameters of democratic transitions which enabled the ANC to overcome both the National Party's and IFP's determination to avoid an elected constituent assembly.

V. CONSTRUCTING AN HISTORIC COMPROMISE: SUNSET CLAUSES AND A TWO-STAGE CONSTITUTION-MAKING PROCESS

ANC leader Joe Slovo's "sunset clauses" proposals, adopted by the ANC

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[69] Cf. the Charlottetown constitutional proposals which were finally agreed to by all the official parties in Canada but rejected in a national plebiscite. While this provides an interesting example of the weakness of political parties in the constitutional politics of developed democracies, this situation may be easily distinguished from that prevailing in newly emerging post-colonial democracies such as South Africa. In these circumstances the anti-colonial political movements usually carry a significant degree of legitimacy in the immediate post-colonial situation, such that, the possibility of public rejection of a consensus including the major anti-colonial party or parties would be very remote.

National Executive Committee in February 1993,[70] seemed to represent the epitome of an elite pact. The essential feature of the "sunset" proposal was the acceptance of a constitutionally entrenched system of executive power-sharing for five years after the first democratic election. During this period, the democratically elected parliament would be empowered to write a new constitution which could exclude these entrenched provisions, whose sun would thus set. In accepting the National Party's continued participation in government and the establishment of bilateral agreements which each party would respect in a future constituent assembly, the proposals seemed to grant the National Party's key demands: a negotiated constitution and future power-sharing.[71] While initially criticized within the ANC[72] and rejected by other parties such as the Pan Africanist Congress,[73] these proposals provided the linchpin enabling the political transition to continue.

In fact, the notion of a government of national unity was clearly distinct from the National Party's or other consociational power-sharing models.[74] Most importantly, where the National Party had called for a compulsory coalition government with a cabinet drawn equally from the three major parties and a rotating presidency,[75] Slovo proposed an election to determine proportional participation in executive government, a less static and more representative

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70 Bill Keller, "Mandela's Group Accepts 5 Years of Power-Sharing" *N. Y. Times* (19 February 1993) A1, col. 1. Slovo's article proposing the compromise first appeared in the *African Communist*.

71 For an example of this misunderstanding of the proposals see Stanley Uys, "Four rites of passage" *The Star* (16 January 1993) 9, col. 1.

72 See Charlene Smith, "Top ANC man in scathing attack on 'sunset' Joe Slovo" *Sunday Times* (8 November 1992) 11, col. 1; Paul Stober, "Slovo's 'sunset' debate is red hot" *The Weekly Mail* (30 October to 5 November 1992) 16, col. 1; Paul Stober, "Daggers drawn in the Slovo sunset" *The Weekly Mail* (13-19 November 1992) 8, col. 1; and Firoz Cachalia, "Case against power sharing" *The Star* (2 February 1993) 10, col. 2.

73 Barney Desai, "Proposed agreement can lead only to conflict" *The Star* (13 October 1992) 12, col. 1.

74 See S. Ellmann, "The New South African Constitution and Ethnic Division" (1994) 26 Columbia Human Rights L. Rev. 5 at 16. Ellmann notes that in "Lijphart's terms, the new South African Constitution provides for a measure of 'executive power-sharing,' but does not, in general, offer a binding 'minority veto' even on important issues" (*ibid.* at fn. 38).

75 Allister Sparks, "Clever footwork as FW redefines 'power-sharing'" *The Star* (10 February 1993) 12, col. 2.

vision.[76]

By conceding a government of national unity in November 1992, the ANC was responding to a more fundamental set of concessions implied in the National Party government's acceptance of an elected constituent assembly to write a final constitution, in the wake of the Bisho killings in mid-1992.[77] In a Cabinet *bosberaad* on July 23 and 24, 1992, the National Party and government leadership found itself caught between the urgency of restarting the negotiation process and increasing international concern and criticism of the government.[78] International frustration over the break-down of Codesa and the continuing violence began to be reflected in a growing irritation with the National Party's proposals for the transition. Reflecting the sea-change in international consensus on democracy, Herman Cohen, United States Assistant Secretary of State for the Bureau of African Affairs in the Bush Administration, told the Africa subcommittee of the U.S. House of Representatives Foreign Affairs Committee on July 23, 1992, that "[a]ll sides must recognize the right of the majority to govern, while assuring that all South Africans have a stake in their government," and rejected the right of any party to insist on "overly complex arrangements intended to guarantee a share of power to particular groups which will frustrate effective governance." Laying out a set of principles acceptable to the Bush Administration, he insisted that although "[m]inorities have the right to safeguards; they cannot expect a veto."[79] Indeed this implicit rejection of the

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76 Shaun Johnson & Ester Waugh, "'Sunset clause' offer as Slovo seeks harmony" *The Star* (1 October 1992) 1, col. 7.

77 On September 26, Mandela and de Klerk signed the Record of Understanding in which the government first accepted the notion of a democratically elected constitution-making body. See *The Long Journey, supra* note 63 at 160.

78 See *ibid.* at 156-160.

79 Testimony of Assistant Secretary of State for African Affairs, Mr. Herman J. Cohen before the House Foreign Affairs Subcommittee on Africa, "Violence in South Africa and its Effect on the Convention for a Democratic South Africa (CODESA): Hearing and Markup before the Subcommittee on Africa of the Committee on Foreign Affairs" H. Res. 497, H. R., 102nd Cong., 2d Sess., July 23, 1992. Assistant Secretary Cohen laid down the following points he considered "basic to a genuine democratic solution:

— that solution should include all relevant parties and promote tolerance in a country of great diversity
— it should acknowledge the right of the majority to govern while assuring that all South Africans have a stake in their government
— it should ensure that government functions within an agreed framework which includes protection of the fundamental rights of all citizens, but it should avoid

National Party's notion of power-sharing may have been a decisive element in the Cabinet's decision to accept an elected constituent assembly.

The National Party's concession of an elected constituent assembly and the ANC's acceptance of a government of national unity under a transitional constitution provided the key elements of agreement in South Africa's democratic transition. By accepting a democratic constitution-making process, the National Party made it possible for the ANC to agree to the adoption of a negotiated interim constitution which would entrench a government of national unity for five years and ensure the legal continuity the National Party government required. The architecture of this agreement, reflecting continuity and change, negotiation and participation, allowed the multi-party negotiations to resume at the World Trade Center outside Johannesburg, concluding with the adoption of an interim constitution by the South African Parliament in December 1993.

VI. PARTICIPATING FROM THE OUTSIDE: MOBILIZATION AND POPULAR PRESSURES ON THE MAKERS OF THE INTERIM CONSTITUTION

If Slovo's sunset clauses appeared to provide an example of elite pacting, mass action, demonstrations, and petitions provided simultaneous illustrations of popular participation. Mass action played an important part in the ANC-alliance's campaign to shape the transition, and various forms of public display of claims, outrage, and strength continued to be employed by groups on all sides, trying to ensure that their concerns or demands be placed on the agenda at the multi-party talks. These claims for the recognition of different identities and social interests took on new urgency, both as a consequence of, and in the context of, highly charged circumstances.[80] Although subject to continuing contestation,[81] many of these claims were ultimately accommodated in the

overly complex arrangements intended to guarantee a share of power to particular groups which will frustrate effective governance. Minorities have the right to safeguards; they cannot expect a veto" (*ibid.* at 49-50).

80 See Yash Ghai, "Legal Responses to Ethnicity in South and South East Asia" (mimeo) at 6, who argues that, "when the survival of a group and the stability of the state may appear as alternatives, . . . [the] choices (and the scope of compromise) are limited by the pressures on the negotiators."

81 For example, traditional leaders continued to demand that their recognition and powers be increased under the interim constitution. See "Power to the chiefs" *Weekly Mail & Guardian* (15-22 December 1994) 2, col. 5.

interim constitution.

Marked by protests, demonstrations, campaigns and even an invasion of the World Trade Center in Kempton Park, the site of the multi-party negotiations, mass participation in the constitution-making process exhibited both a diversity of claims and a degree of popular frustration with an undemocratic negotiating process. A plethora of organizations and alliances gave voice to this diversity. For example, representatives of communities who were forcibly removed under apartheid marched on the World Trade Center protesting the proposed constitutional protection of property, which they saw as an entrenchment of the apartheid distribution of property, and demanding constitutional recognition of their right to return to their land.[82] From a completely different perspective, the Inkatha Freedom Party joined with two other bantustan governments and ultra-right wing white racists to demand a halt to the negotiations and the cancellation of the April 24, 1994 elections in order that the "self-determination" of different ethnic groups be recognized.

While many different interests worked to influence the negotiations towards an interim constitution,[83] the three most important areas of mobilization and

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82 A march on the World Trade Center in June 1993 in which a land rights memorandum was delivered to the negotiators, was followed by a march in central Pretoria in September 1993 in which about 600 people from 25 rural communities threatened to reoccupy land from which they had been removed by the apartheid government as a way of highlighting their demands for the unconditional restitution of land, the establishment of a land claims court, and guaranteed security of tenure for farm workers and labor tenants. The Transvaal Rural Action Committee which organized the march also called for the rejection of the proposed property clause in the constitution. See Adrian Hadland, "Demonstrators hand gov't. land ultimatum" *Business Day* (2 September 1993).

83 Examples of non-party political interventions in the constitutional debate include the publication of a range of books, pamphlets and newspaper articles offering specific constitutional alternatives or contributions to the constitution-making process. Some of these include: B. Godsell, *Shaping a Future South Africa: A citizens' guide to constitution-making* (Cape Town: Human & Rousseau, 1990) the copyright of which is held by the Anglo American Corporation of South Africa Limited, South Africa's single largest corporate enterprise; H. Corder, S. Kahanovitz, J. Murphy, C. Murray, K. O'Regan, J. Sarkin, H. Smith and N. Steytler, *A Charter for Social Justice: A Contribution to the South African Bill of Rights debate* (Cape Town: Department of Public Law, University of Cape Town, 1992), produced by a prominent group of progressive lawyers and law teachers; I. Semenya and M. Motimele, *Constitution for a Democratic South Africa: A Draft* (Braamfontein: Skotaville, 1993), produced by two

contestation involved issues of gender, ethnicity and labor. The assertion and relative success of gender claims in the making of the interim constitution, through the multi-party Women's National Coalition and within different political groups, provides an example of a successful multi-faceted strategy.

The ANC's Women's League staged a sit-in at the negotiations and won the requirement that each delegation at the negotiations have a woman as one of its two negotiating council representatives. South Africa is the first case where a constitution-making body was formally constituted by an equal number of men and women.[84] At the same time the Women's League continued to press for greater participation within the ANC, winning a recommendation from the ANC's national working committee that one third of all ANC candidates in the April 1994 elections be women.[85]

Gender equality is, as a consequence, formally recognized in the interim bill of rights, and the interim constitution includes specific provisions for the establishment of a Commission on Gender Equality "to advise and to make recommendations to Parliament or any other legislature with regard to any laws or proposed legislation which affects gender equality and the status of women."[86] In addition, as part of a general attempt to preempt negotiations, the de Klerk government ratified the International Convention on the Elimination of All Forms of Discrimination against Women in January 1993, binding the South African state to particular international obligations in this area. This successful inclusion of the principle of gender equality into the interim constitution was the product of the interaction of local women's mobilization against gender discrimination and the increased recognition of gender equality as an internationally accepted norm of human rights and constitutionalism.

These gains were not unilinear. Despite these breakthroughs in an otherwise deeply sexist society, and despite the popular repetition of the democratic movement's vision of a "non-racial and non-sexist" South Africa, women active

South African Advocates who had taken part in drafting Swapo's draft constitution which was placed before the constituent assembly in Namibia; and "Constitution for a new South Africa ... cribbed from the United States constitution" *Sunday Times* (22 August 1993) 23, a Sunday Times editorial presentation modelling its proposal for South Africa on the United States Constitution.

84 Unfortunately this is not the case in the elected Constitutional Assembly.

85 *Saturday Star* (16 October 1993) 6, col.1.

86 S. Afr. Const. 1993, section 119(3).

in the negotiations process had to fend off a challenge resulting from the interim constitution's recognition of indigenous law. Traditional leaders' claims for the recognition of indigenous culture led to an attempt to include provisions in the interim bill of rights recognizing "customary law" and regulating the contradictions between indigenous law and other "fundamental rights." Although it was rejected, one proposed interim bill of rights granted "any court applying a system of customary law" the power to determine the extent to which customary law undermines the equality provision and to decide when and to what extent these rules, even where they discriminated against women, should be brought into conformity with the constitutional requirement of equality.[87] In the end the interim Constitution came down in favor of gender equality, making indigenous law "subject to regulation by law," implying its subordination to the fundamental rights contained in the constitution, and gender equality in particular.[88]

Claims for the recognition of ethnicity posed the greatest threat to the democratic transition. While all the parties at the negotiating table said they wished to respect South African cultural diversity, contestation over the nature of that diversity forced negotiators to confront claims made by the ruling party and its allies that, since the early 1970s, the policy of separate development was based on the protection of different cultures. Although this justification ignored the reality of ethnic and racial hierarchies and of racist domination of the black majority, it remained a significant source of many separatist claims during the negotiations.

While ANC negotiators remained committed to building a non-racial South Africa, the power and fear generated by a history of ethnic identification could not be ignored. Through the past forty years at least, South African ethnic diversity has been recreated through government sponsorship of separate ethnic administrations and separate language radio and television stations which, although controlled by apartheid propagandists, purported to serve the needs of cultural diversity. The reproduction of this "diversity" in the creation of bantustan elites and the preservation and promotion of ethnic "tribalism" has created an apartheid legacy which will continue to effect debates and political struggles over issues of national development and democracy. In contrast, the

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87 See Section 32(2) of the proposed chapter on fundamental rights, Technical Committee on Fundamental Rights During the Transition, Tenth Progress Report (1 October 1993).

88 See "Constitution of the Republic of South Africa Act 200 of 1993" [hereinafter S. Afr. Const. 1993], section 181.

African National Congress was premised at its founding in 1912 on the desire among African leaders to create a single nation, unifying Africans against colonial domination regardless of ethnic affiliation. Over the century, the quest for national liberation witnessed numerous reformulations aimed at extending the category of oppressed in ethnic and class terms while simultaneously presenting an alternative vision of a single non-racial South African nation, free of ethnic domination.

Despite the non-racial project's success in creating a united front against apartheid, most visibly in the Congress Alliance and later the United Democratic Front, questions of cultural diversity and language and education policies have continued to plague the democratic movement. This tension between a commitment to non-racialism and the recognition of cultural and other group-based differences has mediated the ANC's communitarian traditions and led to an embracing, in part, of individualism, constitutionalism and preferential policies. These proposals have not, however, placated those whose political standing remains tied to distinct group or ethnic identities and difference.

Although opinion polls revealed limited popular support for any ethnic-based party, ethnic assertions began to resonate across the political spectrum both during negotiations and the election campaign. Addressing a 20,000 strong Inkatha rally on April 5, 1994, an Inkatha regional secretary threatened that "if our demands cannot be addressed, then there is no election on the 27th of April . . . . We will do everything in our power to destroy any attempt by any state organ used by the ANC to divide the Zulu nation."[89] Like Buthelezi's Inkatha, hardline white separatists continued to insist on ethnic diversity. Faced with the conclusion of negotiations for the transition to a democratic order, in October 1993 an odd assortment of parties, including Inkatha and right wing white segregationists, formed the "Freedom Alliance" demanding that the new constitution enshrine ethnic identities. This trend led to the appearance of new and as yet unsupported claims, the most flamboyant being made by a "coloured separatist movement" demanding an independent state stretching across the Southern and Western Cape with Cape Town as its capital.[90] Even the ANC was forced to respond by challenging Buthelezi's claim to speak for South Africa's eight million Zulu-speakers as it did when Nelson Mandela celebrated Zulu history as part of the struggle to build a nation, telling 60,000 supporters at an

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89 Donatella Lorch, "Arms Ban is Defied at Rally by Zulu Party" *New York Times* (6 April 1994) A13.

90 *The Weekly Mail & Guardian* (1-7 October 1993) 9, col. 4.

ANC rally in Durban that "it is impossible to separate the threads that make the weave of our South African nation."[91] Although not overtly addressed in the interim constitution, the impact of mobilized ethnic claims on this first round of constitution-making is reflected in a range of constitutional provisions — including the structuring of a government of national unity — designed to ensure minority participation in governance.[92]

The interim Constitution contains a variety of provisions which are designed to reflect and offer protection to South Africa's acknowledged cultural diversity, yet it also lays the foundation stones for continued ethnic claims and divisions. Claims of cultural diversity and difference have come to reflect a complex interaction between real cultural and ethnic identities on the one hand and the claims of political leaders on the other. These leaders' assertions of cultural and ethnic particularities are intertwined with their own attempts to either preserve existing power or to seek future political advantage. It is this continuing ambiguity which is reflected in the interim Constitution's recognition of cultural diversity and the special accommodations made to Zulu and Afrikaner nationalists in the weeks prior to the April 1994 elections.

Cultural diversity is constitutionally recognized in a number of ways. First, eleven official South African languages[93] are recognized and their equal use and enjoyment shall be promoted. A Pan South African Language Board is to be created to promote the official languages as well as "other languages used by communities in South Africa," of which a further eleven are recognized in the Constitution.[94]

Second, an individual's right to "use the language and to participate in the cultural life of his or her choice" is guaranteed as a fundamental right[95] along with an individual right to instruction in the language of choice "where this is reasonably practicable."[96] Furthermore, the Constitution guarantees the right to "establish, where practicable, educational institutions based on a common culture, language or religion, provided that there shall be no discrimination on

91 *New York Times* (25 October 1993) 1, col. 3.
92 See generally Ellmann, *supra* note 74.
93 S. Afr. Const. 1993, section 3(1).
94 S. Afr. Const. 1993, section 10(c).
95 S. Afr. Const. 1993, section 31.
96 S. Afr. Const. 1993, section 32(b).

the ground of race."[97]

Third, while language and cultural rights are expressed in individual terms, the Constitution's recognition of traditional authorities and indigenous law[98] and the establishment of a Volkstaat Council[99] are phrased in the terminology of collective rights. The recognition of "the right to self-determination by any community sharing a common cultural and language heritage," introduces a notion of collective rights on the basis of cultural identity and even cultural self-determination[100] which strengthens the hand of those claiming power on the grounds of ethnic particularity.

The proletarianization of South Africa's workforce and the impact of class politics has provided a significant countervailing influence and source of identity for those who may otherwise place more weight on other social linkages — including language, family, clan, and ethnicity. As a countervailing source of identity, the labor movement's mobilization of working class support for a non-racial order was central to the ANC's success. However, the labor movement also launched an important claim for recognition beyond the formal management/worker relationship, asserting its right to represent workers as a class and arguing for the explicit recognition of socio-economic or class interests in the new constitutional order.

Labor's claim has received a significant degree of recognition in South Africa's democratic transition. Given apartheid's effective amalgamation of race and class, advocates and representatives of the working class, both in the South African Communist Party and the Congress of South African Trade Unions, are clearly influential in the democratic movement. Moreover, the trade union movement — as the most tightly organized segment of the democratic movement — has already won significant recognition in the constitution-making process. Although the unions were refused direct representation in the constitutional negotiations, the ANC included extensive constitutional protections for workers in its proposed bill of rights and supported Cosatu's call for a National Economic Forum for negotiating South Africa's economic and development priorities. Despite these gains, the interim bill of rights coupled workers' and employers' rights and tied the right to strike to an employers' right

97 S. Afr. Const. 1993, section 32(c).

98 S. Afr. Const. 1993, sections 181-184.

99 S. Afr. Const. 1993, sections 184A-B.

100 S. Afr. Const. 1993, Schedule 4, Constitutional Principle XXXIV.

to lock workers out. The trade unions have also complained that in the interim constitution the right to strike,[101] which is protected for the 'purpose of collective bargaining,' is unduly circumscribed as it appears to exclude strikes on social and economic issues. Correspondingly, unionists argue that the inclusion of employers' right to impose a lock-out fails to recognize the fundamental disparity between the power of individual workers and individual employers in the labor market. Thus labor argued that while the right to strike is fundamental, "the issue of lock-outs is at best a matter left to statutory regulation."[102] The alliance between Cosatu and the ANC ensured that this issue was reopened in the Constitutional Assembly, and the lock-out clause struck from the new Constitution passed on May 8, 1996.

VII. A NEW PROCESS, A NEW CONSTITUTION: THE 1993 CONSTITUTION AND PROVISIONS FOR THE NEXT ROUND OF CONSTITUTION-MAKING

The first phase of South Africa's democratic transition was premised on a two-stage process of constitution-making. The first round, while buffeted by popular participation and strengthened by elements of internal participation within the ANC alliance, was ultimately under the negotiating parties' control. In contrast, although the second round is formally constrained by a complex set of constitutional principles contained in the interim constitution,[103] it is to be

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101 S. Afr. Const. 1993, section 27(4).

102 E. Patel, "Ditch the lock-out clause!" (1994) Work in Progress 95 at 18.

103 See, S. Afr. Const. 1993, Fourth Schedule. The Constitutional Principles in the Fourth Schedule contain an amalgam of broad democratic principles consistent with the new international post-cold war consensus on constitutionalism and a host of detail specific to the needs of the negotiating parties. Most dramatic of these specific provisions were those requiring the recognition of "traditional leadership, according to indigenous law," (XIII) and "collective rights of self-determination" (XII). In addition recognition of the Zulu King and the provision of a Volkstaat Council were added by amendment to the main body of the constitution just prior to the April 1994 elections as a way to include parts of the Freedom Alliance, particularly the IFP and the Afrikaner right-wing led by ex-SADF head General Constant Viljoen. Finally, the constitutional principles were amended to provide that provincial recognition of a traditional monarch would be protected in a final Constitution (XIII(2)) and that any territorial entity established through the assertion of a right to self-determination by "any community sharing a common culture and language heritage" (XXXIV(1)) shall be entrenched in the new Constitution (XXXIV(3)).

The inclusion of a plethora of constitutional principles and provisions enabled the

driven by an elected Constitutional Assembly made up by a joint sitting of the National Assembly and the Senate of South Africa's first democratic Parliament.[104]

The sections of the interim Constitution providing for the creation of a final constitution clearly influence the distribution of power in the Constitutional Assembly. While requiring that a new constitution be passed within two years from the first sitting of the National Assembly,[105] Chapter 5 of the interim Constitution requires that at least two-thirds of all the members of the Constitutional Assembly vote for the new constitution.[106] In addition, sections of a final constitution dealing with the boundaries, powers and functions of the provinces must be adopted by two-thirds of all the members of the regionally constituted Senate, giving the provinces established under the interim Constitution an important lever of influence in the Constitutional Assembly.[107] It was these pressures that led to the retention of certain exclusive provincial powers in the new draft constitution.

Given the possibility that the Constitutional Assembly could fail to obtain the necessary two-thirds agreement on either a new constitution or on the provincial

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elections to go forward and the democratic transition to proceed, but they also served to defer a range of substantive issues into the next phase of constitution-making. Although the individual constitutional principles are open to differing interpretations, the interaction of the different principles will revive many of the conflicts their inclusion was designed to lay to rest. A significant difference, however, is that these conflicts will now be played out in a completely different arena. It is here that the impact of a democratically elected constitutional assembly is likely to dramatically shift the terms of the debate and to lead to the inclusion of a range of new issues. Despite this change, however, there is the danger that the assertion of different interpretations of the constitutional principles may lead to open conflict between the Constitutional Assembly, particular political parties, regional entities, and the Constitutional Court. These potential conflicts are likely to embroil a newly established Constitutional Court in direct political conflict with the consequent danger of undermining the court's ability to establish its own credibility as a mediating institution.

104 S. Afr. Const. 1993, section 68.

105 S. Afr. Const. 1993, section 73(1).

106 S. Afr. Const. 1993, section 73(2). The acceptance of a two-thirds threshold involved an important shift in position for the National Party which had attempted to require a seventy-five percent majority to pass a neconstitution within the constitution-making body. This demand led to the collapse of negotiations within the Codesa framework. See *The Long Journey, supra* note 63 at 31.

107 *Ibid.*

arrangements, the interim Constitution provides elaborate dead-lock breaking mechanisms. First, a panel of constitutional experts[108] appointed by two-thirds of the Constitutional Assembly (or alternatively, by each party holding forty seats in the Constitutional Assembly)[109] is required to seek amendments to resolve deadlocks within thirty days.[110] Second, if the draft text unanimously agreed upon by the panel of experts is not adopted by a two-thirds majority then the Constitutional Assembly may approve any draft text by a simple majority of its members.[111] However, in this latter case, the new text would have to be first certified by the Constitutional Court, then submitted to a national referendum, requiring ratification by at least sixty per cent of all votes cast.[112] Failure to obtain a sixty percent ratification would force the President to dissolve Parliament and call a general election for a new Constitutional Assembly.[113] The new Constitutional Assembly would then have one year to pass a new constitution;[114] however, the majority required for passage of the constitution would be reduced from two-thirds to sixty percent.[115] Failure to obtain consensus in early 1996 seemed at one point to bring the ANC close to calling for a referendum, however this possibility was averted with the adoption of the new Constitution on May 8, 1996.

Although the interim Constitution allowed any of these requirements to be amended by a two-thirds majority of a joint sitting of the National Assembly and Senate,[116] section 74 prohibited the repeal or amendment of both the Constitutional Principles contained in Schedule 4 of the 1993 Constitution and the requirement that the Constitutional Court certify that the new constitutional text complies with those principles. The possibility of amending the constitution-making procedures thus effectively reduced the interim Constitution's framework for producing the new constitution to three key elements. First, any amendment of the constitution-making procedures required a two-thirds majority of all the members of the National Assembly and Senate, requiring agreement between at least the ANC and the National Party or IFP. Second, under all circumstances the Constitutional Assembly was bound by the Constitutional

108 S. Afr. Const. 1993, section 72(2).
109 S. Afr. Const. 1993, section 72(3).
110 S. Afr. Const. 1993, section 73(3) and (4).
111 S. Afr. Const. 1993, section 73(5).
112 S. Afr. Const. 1993, sections 73(6)-(8).
113 S. Afr. Const. 1993, section 73(9).
114 S. Afr. Const. 1993, section 73(10).
115 S. Afr. Const. 1993, section 73(11).
116 S. Afr. Const. 1993, section 62(1).

Principles agreed to by the parties at the multi-party talks and included in Schedule 4 of the interim Constitution. And third, the Constitutional Court must declare that the new constitutional text complies with the Constitutional Principles.

The tension between adherence to constitutional principles and the unfettered powers of a democratic constitution-making body was explicitly addressed in the negotiations and was reflected in the 1993 Constitution. Invoking the need for legal continuity and minority guarantees, the National Party government always insisted on entrenching basic constitutional principles agreed upon through negotiations.[117] Although this stance was at odds with the ANC's demand for a democratic constituent assembly with unlimited freedom to draft the final constitution, the ANC nevertheless accepted the need to provide certain assurances as to the future constitutional framework. To this end the ANC had published its own constitutional guidelines in 1988 and had lobbied for their international endorsement. Conversely, while the National Party government eventually accepted that a new constitution would fail to gain popular acceptance unless it was adopted by an elected constitution-making body, it attempted to ensure that the constitutional assembly would be bound to produce a constitution within a framework acceptable to the national party.

Once the parties reached a compromise requiring the Constitutional Court to certify that the final constitution be consistent with the Constitutional Principles,[118] the different parties focused their attention on the content of the constitutional principles as a way of continuing their struggles for particular outcomes with respect to regional powers and racially or ethnically-defined governance. Similarly, the crucial role of the future Constitutional Court brought increased attention to bear on the process of appointment for the Constitutional Court. In fact the conflict over this process brought the multi-party negotiations, once again, perilously close to deadlock.

Initially, little political attention was paid to the technical committee's proposal that Constitutional Court Judges be nominated by an all-party parliamentary committee and be appointed by a seventy-five percent majority of both houses of Parliament. However, as the significance of the Constitutional

[117] See *The Long Journey, supra* note 63 at 62.

[118] S. Afr. Const. 1993, section 71(2).

Court became increasingly clear, a major political conflict exploded.[119] The resolution involved an elaborate compromise in which the executive appoints various members of the Constitutional Court for a non-renewable period of seven years[120] following three distinct processes. First, the President appoints a president of the Constitutional Court in consultation with the Cabinet and Chief Justice.[121] Second, four members of the court are appointed from among the existing judges of the Supreme Court after consultation between the President, Cabinet and the Chief Justice.[122] Finally, the President, in consultation with the Cabinet and the President of the Constitutional Court, appoints six members from a list submitted by the Judicial Service Commission,[123] which is dominated two-to-one by members of the legal profession.[124]

VIII. CONSTITUTIONALISM, SELF-BINDING, REPRESENTATION, AND THE LIMITS OF PARTICIPATION

Ultimately the most important issue resolved in the first round of constitution-making was how South Africa would adopt a new constitution as the final marker of the democratic transition. The centrality of this decision must not however distract us from acknowledging that the interim Constitution marked a dramatic, substantive revolution in South African law.[125] This revolution is represented by the triumph of constitutionalism over parliamentary sovereignty and while its impact is yet to fully work its way through the labyrinth of South African law, its basic premise — a justiciable constitution — was fully guaranteed in the constitutional principles which guided the Constitutional Assembly.

Constitutionalism is commonly understood as a "commitment to limitations on ordinary political power,"[126] and, therefore, an essentially anti-democratic strategy or, as Robert Dahl terms it, quasi-guardianship.[127] In a context of vast

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119 See E. Mureinik, "Rescued from illegitimacy?" *Weekly Mail & Guardian* (December 1993) Vol. 1, No. 5, Review/Law, Supplement at 1; and N. Haysom, "An expedient package deal?" *Weekly Mail & Guardian, ibid.*.

120 S. Afr. Const. 1993, section 99(1).

121 S. Afr. Const. 1993, section 97(2)(a).

122 S. Afr. Const. 1993, section 99(3).

123 S. Afr. Const. 1993, section 99(3).

124 S. Afr. Const. 1993, section 105(1).

125 See Anthony Lewis, "Revolution by Law" *New York Times* (13 January 1995) A15.

126 *Constitutionalism and Democracy, supra* note 17 at xxi.

127 *Democracy and its Critics, supra* note 20 at 188.

inequalities where economic dislocation and social marginalization has an uneven racial impact — which still defines the fate of the majority of South Africans — the notion of a restricted democracy is inherently delegitimizing. Concern that South Africa's new constitutional order may face a crisis of legitimacy seemed to be borne out by initial public response to the Constitutional Court's first major decision declaring the death penalty unconstitutional. The Court's decision was initially assailed as out of step with public opinion and the National Party called in Parliament for the reimposition of the death penalty. An escalating and brutal crime wave subsequently intensified demands for the Constitutional Assembly to provide a constitutional basis for the death penalty in the final constitution. Even senior ANC leaders who initially supported the Court's decision began to suggest that a referendum could be held to determine the view of the population, knowing full-well that there is significant public support for the reimposition of the death penalty. While President Mandela expressed support for the Court's decision and the ANC has continued to take a stand against the death penalty, the first draft of the final Constitution released by the Constitutional Assembly for public comment in November 1995 included an optional formulation of the right to life which would have permitted the reintroduction of the death penalty. Thus the circumstance of a two-stage constitution-making process has exposed the tension between the will of a temporary majority (in this case the founding majority) and constitutional commitments to the upholding of human rights. The debate over the death penalty implicitly became a debate over constitutionalism and the right of the judiciary to interpret the constitution in the face of popular sentiment.

An alternative understanding of constitutionalism argues that democracy "is never simply the rule of the people but always the rule of the people within certain predetermined channels, according to certain prearranged procedures"[128] — for example, representative democracy is always bounded by franchise rules and the division of electoral districts. From this perspective the pre-commitments inherent in constitutionalism make democracy stronger not weaker,[129] and the "idea of 'possibility-generating restraints' helps explain the contribution of constitutionalism to democracy."[130] Applying this understanding of constitutionalism as precommitment to the South African case, Tribe and

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128 S. Holmes, "Precommitment and the Paradox of Democracy" in J. Elster & R. Slagstad, eds., *Constitutionalism and Democracy* (Cambridge: Cambridge University Press, 1988) at 231.

129 J. Elster, "Introduction" in *Constitutionalism and Democracy, ibid.* at 9.

130 Holmes, *supra* note 128 at 235.

Landry present constitution-making as an opportunity to structure the future. Out of crisis and compromise, they argue, comes the opportunity to design institutions, to lay the framework for building a new nation and "to compose the atmosphere in which the politics of the future will be conducted."[131] This understanding of constitutionalism as "possibility-generating" is implicit in the shifting understanding of the power of abstract review. In making the interim Constitution it was argued that giving the Constitutional Court the power of abstract review — allowing a minority of the members of a legislature to send a bill directly to the Court for constitutional review before it is enacted into law — would enhance the democratic participation of legislative minorities. Furthermore, it would bolster constitutionalism by avoiding the counter-majoritarian dilemma, by giving the legislature a chance to respond to judicial determinations of unconstitutionality prior to the enactment of a law. In that way the Court would not be required to strike down a law but merely review a bill before it became law. The impact of abstract review has, however, been quite different. Minority parties in the provincial legislatures have threatened or actually referred bills to the Constitutional Court as a way of procedurally blocking or slowing legislation designed to effect social change. This practice heightened conflict and tension among the legislative majority who felt that constitutional review was being employed to frustrate movement away from apartheid. In the case of the Gauteng Education Bill, the whole legislative session was briefly suspended when it was felt that no further business could be conducted until the matter was resolved by the Constitutional Court. This led to a debate over abstract review in the Constitutional Assembly. Instead of seeing abstract review as an enabling mechanism conducive to the promotion of democratic rights and participation, there was concern that abstract review may function as a mere restraint. In the new draft constitution, jurisdiction to exercise abstract constitutional review has been limited to the Constitutional Court in circumstances explicitly provided in the Constitution. Provision is made for the President to refer bills to the Constitutional Court for abstract review as a weak form of executive veto or delaying mechanism, and the provincial Premiers have a similar power to submit a bill to the Constitutional Court in the event that the provincial legislature insists on passing a bill a Premier considers unconstitutional. The right of a minority within the national or provincial legislatures to demand abstract review of a bill, which was contained in section 98(9) of the interim Constitution was, however, removed. After protest by opposition parties, abstract review on an application by at least one third of the

[131] L. H. Tribe & T. K. Landry, "Reflections on Constitution-making" (1993) 8 Am. U. J. Int'l L. & Pol'y 627 at 630.

members of the National Assembly was restored. It is, however limited to Acts already passed by the Assembly and not merely bills before the legislature.[132]

Precommitment and design indeed capture the essence of constitution-making in the tradition of democratic constitutionalism but ignore the issue of participation. If earlier constitutions were "presented as an exchange of promises between separate parties,"[133] who entered into a compact in order to secure social stability, "modern constitutions are typically styled as frameworks which 'we the people' give ourselves."[134] As such, the precommitments entered into in the constitution-making process are presented as a form of self-binding, implying democratic participation in the constitution-making process. This is not, however, just an issue of future generations,[135] but also a question of incorporating all the eligible members of the present generation. It is this logic that calls for a democratically elected and representative constitution-making body, which, if created on the basis of proportional representation, provides the greatest opportunity for including the voices of all those willing to enter into a compact of future self-restraint. South Africa's democratically elected Constitutional Assembly (CA) has taken these concerns to a new extreme. The CA has engaged in a range of activities designed to encourage participation in the constitution-making exercise. These have included a vast publicity exercise, public meetings held around the country and a series of workshops, run by the CA's theme committees and designed to engage the relevant "stakeholders" in debate on controversial issues. There also has been a massive attempt to engage the public in an interactive discussion on constitutional issues. This has taken the form of a dedicated weekly television programme focusing on particular constitutional issues as well as a regular newsprint publication from the CA, both entitled "Constitutional Talk." Even before the publication of the first draft of the new constitution for public comment, the CA had received over two-million submissions from the public.[136] These included both written submissions as well as a range of electronic submissions. A toll-free, interactive, telephone service both provided prerecorded information as well as recorded comments while a world-wide web site provided access to the CA's documentation as well

132 Section 80 of the Const. of the R.S.A. Bill, 6 May 1996).

133 Holmes, *supra* note 128 at 209.

134 *Ibid.*

135 See Holmes, *ibid.*, discussing the question of precommitment in relation to the binding of future generations.

136 See, Writing for the Future, Special Focus on the Constitutional Assembly, A supplement to the *Mail & Guardian* (30 June - 6 July 1995).

as an e-mail service for the submission of comments. While the CA continues to welcome submissions and proudly publishes a running tally on the number of submissions, promising to ensure that all opinions are digested and forwarded to decision-makers, there has been a certain amount of scepticism about the capacity of the CA to in fact digest this volume of submissions. There is also concern that the submissions are being used more as a means of generating legitimacy in the process than as a way to garner public opinion or comment on specific constitutional issues.

The context of constitution-making in South Africa is now fundamentally changed. Unlike the drafting of the interim Constitution, this second phase of constitution-making was controlled by a democratically elected Constitutional Assembly. This shift, from a non-elected negotiations forum to an elected body, had at least two major consequences for participation. First, it shifted the emphasis of participation away from mass action or public demonstrations towards a more individualistic, yet equally active, form of participation in the attendance of discussion-meetings and the making of formal submissions to the CA. The only visible protest action in late 1995 was by groups who felt that they were not adequately represented, including: traditional leaders from both the IFP and the ANC who joined in protest outside the Union buildings in Pretoria; anti-abortion activists who were holding a vigil outside Parliament in Cape Town; and residents of the small KwaZulu/Natal hamlet of Hillcrest who displayed placards demanding the reimposition of the death penalty following the brutal murder of an elderly woman in a day-time car hijacking in the centre of the village. The national strike called by the trade unions in support of their demand to remove the lock-out clause from the new Constitution in late April 1996 was, however, a dramatic revision to the politics of mass participation in the final moments of the constitution-making process. Second, with the failure of ethnically-based parties to make a significant impact in the national elections, less attention was given to ethnically-framed demands and instead claims focussing on issues of material and individual equality, class and gender, received greater attention from the constitution-makers. This included a refocusing of attention onto questions of how to introduce social and economic rights[137] and away from the recognition of cultural and ethnic demands. As a result, the new draft constitution includes new clauses in the Bill of Rights creating new rights to "reasonable and progressive legislative measures" for the provision of housing, land, health, food, water and social assistance, but reduces

[137] See Kader Asmal & Ronald Roberts, "South Africa Needs Economic Rights" *International Herald Tribune* (31 October 1994).

the status of traditional leaders from that granted in the interim constitution. Instead of being guaranteed a national and provincial role in the legislative process, traditional leadership and law is now subject to both the Constitution and legislation. While local, pre-existing, traditional authorities are recognized and the courts are required to apply indigenous law, subject to the Constitution, and when that law is applicable, the constitutional status of the councils of traditional authorities provided for in the interim constitution has been demoted to an enabling clause allowing national or provincial legislatures to provide for such councils.

Finally, the Constitutional Court rejected attempts to use the constitutional principles to frustrate the will of the majority. When, for example, the National Party (whose relative influence in the constitution-making process diminished as a result of the electoral process) in the Western Cape asserted that any national interference in the province's restructuring of local government is a violation of the principle of provincial autonomy, the Constitutional Court argued that the principles are only relevant as a guide to the Constitutional Assembly and cannot be used to interpret the interim constitution. Thus while some members of the Constitutional Assembly may have been tempted to question South Africa's newly adopted constitutionalism as the product of an undemocratic negotiating process, this second-round of constitution-making has entrenched an essential feeling of belonging. Despite their origins, constitutional rights and their protection under a system of constitutionalism have been remade in the process of constitution-making as a product of South African participation.

IX. CONCLUSION

South Africa's new found constitutionalism was not just the product of an elite pact but was in many ways also a precondition to an internationally acceptable democratic transition. It also flows directly from the claim to equal rights which characterized the anti-apartheid struggle and which motivated popular participation in the constitution-making process. While a democratically elected Constitutional Assembly may have revolted against attempts to frustrate land reform or to exclude other socio-economic programmes in the first round of negotiated constitution-making, the question of whether the Constitutional Assembly could reject constitutionalism must be understood in a wider international context. Although the constitutional principles contained in the 1993 Constitution represent a compact of internal pre-commitments between the parties designed to facilitate the democratic transition, they also represent local

acceptance of a broader international consensus on democratic governance.[138] The emergence of this supra-national commitment to democratic constitutionalism seems, in turn, to impose a prior obligation to democratic governance in national constitution-making processes. It is the hybrid[139] created by the interaction of local participation, context, and history with international influences and conditionalities that will produce a particular South African constitutional culture.

[138] See T. M. Franck, "The Emerging Right to Democratic Governance" (1992) 86 American J. Int'l L. 46.

[139] See H. K. Bhabha, "The Commitment to Theory" (1988) New Formations 5 at 5-23.

TRADITIONAL AUTHORITY AND DEMOCRACY IN THE INTERIM SOUTH AFRICAN CONSTITUTION

Yvonne Mokgoro*

Among the many problems inherent in the post-apartheid South African reconstruction is the question of the extent to which traditional authority should be incorporated into the new and democratic political regime. The author argues that the role of traditional authority is problematic because such authority has not been acquired democratically and has been fundamentally patriarchal. This fact sits uneasily with the lofty and progressive ideals to which the new South African politics currently aspires. However, traditional "Chiefs" play an important role in government at the local level, serve as an important link with pre-Apartheid "Africanism," and should not be quickly discarded. The author here argues that while political necessity required the constitutional recognition and affirmation of traditional authority, justice demands that traditional authority be made more inclusive and democratic.

Parmi les nombreux problèmes inhérents à la reconstruction sud-africaine post-apartheid, on se demande à quel point l'autorité traditionnelle devrait être intégrée au nouveau régime politique démocratique. L'auteure note que le rôle de l'autorité traditionnelle est problématique parce qu'elle n'a pas été acquise par la voie démocratique et qu'elle est fondamentalement patriarcale. Cette constatation s'inscrit en porte-à-faux par rapport aux idéaux élevés et progressistes de la nouvelle classe politique sud-africaine. Cependant, les «Chefs» traditionnels jouent un rôle politique important au niveau local; ils constituent un lien important avec l'«africanisme» pré-apartheid et ne devraient pas être écartés à la légère. L'auteure affirme que, bien que des impératifs politiques exigent la reconnaissance et l'affirmation constitutionnelle de l'autorité traditionnelle, la justice exige que cette dernière devienne plus inclusive et démocratique.

I. BACKGROUND

The issue of continued recognition and protection of the institution of traditional leadership and the role it will play in a post-apartheid society was placed squarely on the agenda for constitutional reform in South Africa.[1] The

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* Justice of the Constitutional Court of South Africa. A revised version of this paper was presented at a seminar on The Role of Traditional Leaders in Local Government in South Africa organized by the *Konrad-Adenauer-Stiftung Foundation* in October 1994, Pretoria, South Africa. I am indebted to my Research Assistant, Phenyo Rakate, for his comments and editing both of form and content.

1. See, for example, ANC's "Constitutional Guidelines for a Democratic South Africa" (1989) 5 SAJHR 129. Principle (c) states: "The institution of hereditary rulers and chiefs shall be transformed to serve the interests of the people as a whole in conformity with the democratic principles embodied in the constitution" (at 130). See also Albie

method of reincorporation had important implications for the future role of traditional leaders and their traditional systems of law and government[2].

The demands for enhanced protection for the institution may be attributed to the underlying reassertion of African symbolism in a political system known for its suppression, manipulation and exploitation by successive colonial and apartheid governments.[3]

Sachs, *Advancing Human Rights in South Africa* (Cape Town: Oxford University Press, 1992) at 77: "Traditional leaders [in a new South Africa] are entitled to a dignified and respected role which enables them to take their place and make their contribution towards building a [new society]. Their position in the new constitutional order should be such as to permit them to recapture the prestige which was undermined by colonialism, segregation and apartheid;" and K. Motshabi & S. Volks, "Towards Democratic Chieftaincy: Principles and Procedures" in *African Customary Law* (Cape Town: Juta & Co., 1991) 104.

2 See J.Kerr "Customary Law, Fundamental Rights, and the Constitution" (1994) 111 SALJ 720 at 727: "[T]he history of the political settlement...led to the participation in the new dispensation of the King of the Zulus, the Zulu people and the traditional leaders of the tribes. One of the major factors in securing their participation was the promise of the recognition....[This led to the amendment of] s.1 of the Constitution of the Republic of South Africa Act of 1994, of s.160 of the present [Interim] Constitution." In terms of the Interim Constitution Act, 200 of 1993, traditional authority is a schedule 6 matter in terms of which both national and provincial governments have concurrent jurisdiction. See, generally, *President of Bophutatswana* v. *Milsell Chrome (pty) Ltd and Others* 1995 (3) BCLR 354 (B).

3 See, generally, I. Evans, *Native Policy in Southern Africa: An Outline* (Cambridge: Cambridge University Press, 1934) at 12: "The basic statute governing Native Administration in the South African Republic was a Law of 1885 which declared the President of the Republic to be the Paramount Chief of the Native population, and accorded him all the power and authority customarily vested in that office. In conjunction with his executive [*Bunga*], he could depose Chiefs and appoint others in their place, and such acts were not subject to review by the Judiciary." Also see D.M. Granulate, "The British Authority System in Africa" (1973) 5:6 *Ford Hare Papers* at 485 (noting the policy of *indirect rule* used by colonial governments to control chiefs); and *Mohloe* v. *Union Government and Another* 1925 AD 81 at 89: "[I] have come to the conclusion that under the law of 1885 as under the law of 1876 the power of appointing and removing native chiefs was in the State President acting by and with the consent of the Executive Council in whom was an absolute discretion. Hereditary chieftainship having been abolished by the later legislation of 1876..." (per De Villiers, J.A.).

In original African tradition, leadership is hereditary.[4] It is not subject to the electoral process.[5] Although this may seem to remove from within the institution any semblance of democracy, power was traditionally exercised only through council, thus negating absolutism. Structurally, councillors were drawn from the ranks of headmen, sub-headmen and prominent elders in the community acknowledged for their skills and leadership qualities.[6] Significantly, the hereditary process is fundamentally male primogeniture and, by its nature, therefore excludes women.[7] Only in exceptional circumstances would women

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4 See, for example, I. Schapera "Political Institutions" in I. Schapera, ed, *The Bantu-Speaking Tribes of South Africa: An Ethnographical Survey* (London: G. Routledge & Sons, Ltd., 1937) at 173, 174-5: "Chieftainship is hereditary. Many instances are known where it has been usurped or acquired in some other way by trickery or force; but as a rule a Chief succeeds automatically to his office by right of birth... '[A] Chief is Chief because he is born to it.' But the rules of succession vary somewhat from group to group;" B. Manson, "Traditional Rulers and their Realms" in W.D. Hammond-Tooke, ed., *The Bantu-Speaking Peoples of Southern Africa* (London: Routledge & K. Paul, 1974) 246; Motshabi & Volks, *supra* note 1.

5 H.P. Junod, *Bantu Heritage* (Johannesburg: Hortors, 1938) at 94: "This very absolute power was, however, very efficiently checked by the chief's counsellors who acted also as his assessors in court. These counsellors were usually close relatives of the chiefs, often his uncles. They had to watch over the chief and had the right to find fault with him. No chief would dare to go against the feelings of the majority of his counsellors. He himself was not above the law. If he transgressed any point of law he could be brought before the court, tried and punished;" Cf. *Pilane* v. *Linchwe and Another* 1995 (8) BCLR 932 (B) where the applicant purported to appoint his son as his successor. His proposal was rejected by the tribe. Hedler J said: "[No one has] a 'carte blanche' right to appoint *anyone* as chief, but the laws and customs of the tribe concerned must be considered and also the acceptability of the person to the tribe. The appointment of a chief who is not acceptable to the tribe would result in an intolerable situation;" Schapera, *ibid.* at 184: "[A] Chief is a Chief by grace of his tribe;" Cf. *Chief Molotlegi* v. *President of Bophuthatswana* 1992 (2) SA 480.

6 See, for example, E.J. Krige, *The Social System of the Zulus*, 4th ed. (Pietermaritzburg: Shuter & Shooter, 1962) at 219-223, 220: "[Councillors are seen as] the 'eyes and ears of the' [chief];" Schapera *supra* note 4 at 181-85.

7 See, for example, J.C. Bekker, *Seymours Customary Law in Southern Africa*, 5th ed. (Cape Town: Juta, 1989) at 273-274; W.A. Joubert & T.J. Scott, eds., *The Law of South Africa (LAWSA)*, vol. 32 (Durban: Butterworths, 1994) paras. 141-3: "Customary law of succession is further based upon the principle of primogeniture according to which the eldest son (or his eldest male descendant) is the person who succeeds...;" Kerr, *supra*, note 2 at 725: "The two basic principles of succession in customary law are primogeniture of males through males and universal succession" [footnote omitted]; Motshabi & Volks, *supra* note 1 at 111.

qualify to assume traditional leadership.[8] The hereditary nature of the institution nevertheless accommodates elected functionaries, who customarily would unfortunately exclude women. [9]

Currently, traditional leaders exercise governmental functions which range from the provision of services to the preservation of law and order to the allocation of tribal land held in trust. Essentially, though subject to national government, they provide a system of localised government to rural communities[10].

Although the institution of traditional leadership has historically suffered political manipulation, abuse and exploitation at the hands of successive colonial governments, a significant sector of rural societies, particularly in the former homelands, still cherishes the system.[11]Some progressive traditional leaders also still maintain the loyalty and respect of their communities.[12]

Considering that 40 per cent of all South Africans (most of whom are women) currently are permanently rural, and a significant number commute between town and country, where the communities essentially are traditional, the need to call for greater recognition and protection of traditional leadership seems

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8 See Schapera, *supra* note 4 at 175: "Women do not normally succeed, although they may at times act as regents. But among the Lobedu and certain other small North Sotho tribes the Chief *must always be a* woman....This form of Chieftainship is, as far as the Southern Bantu in general are concerned, decidedly exceptional" [emphasis added]; Sansom, *supra* note 5 at 268-71.

9 Kriige, *supra* note 6 at 219 (noting that councillors were elected from headmen and heads of leading families).

10 C. French, "Functions and Powers of Traditional Leaders" *Konrad-Adenauer Stiftung*, Occasional Paper Series, 20-28 at 20.

11 T.W. Bennett, *Human Rights and African Customary Law* (Cape Town: Juta, 1995) at 70: "traditional authorities have maintained an adaptable form of local government which, notwithstanding its faults, is more in touch with community sentiment than the central state;" Van Nieuwaal van Rouveroy, "Chiefs and African States" (1987) 26 J. Legal Pluralism 1 at 23: for many rural South Africans, traditional rulers constitute a "legal and constitutional horizon," a "personification of the moral and political order, protection against injustice, unseemingly behaviour, evil and calamity."

12 *Ibid.* See also S.M. Molema, *Montshiwa: Barolong Chief and Patriot 1815-1896* (Cape Town: C. Struik, 1966).

realistic.[13] At the same time, however, government power acquired through a hereditary process, coupled with a history of corruptibility and political manipulation by a racist and unjust government for its own ends, has alienated many democrat, educated elite and politically progressive sectors of South African society.[14] The continued existence of a system of government which is fundamentally male in character and governs predominantly female communities to the specific exclusion of women themselves has also become difficult to justify.[15]

The enhanced protection that the system of traditional leadership now enjoys in terms of the Interim Constitution, which aims to establish a non-racist and non-sexist democracy, not only seems a contradiction in terms but also results in significant constitutional tension.[16] In terms of the Interim Constitution, the easing of this constitutional tension has been left to the courts to resolve, notably, the Constitutional Court.[17]

This paper intends to argue that despite the apparent contradictions created by the enhanced protection of an unelected local government system of traditional leadership in a constitution that aims to establish a non-racial and non-sexist democracy, it is realistic under the current socio-political

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13 French, "Functions and Powers of Traditional Leaders," *supra* note 10 (noting that most South Africans living in rural areas range from 35% to 50% depending on what one means by rural).

14 M. Lawrence, "Chiefs, Tribal Authority and Village Education" 11:1 *Matlhasedi* (July 1992) 19-23.

15 Bennett, *supra* note 11 at 80-95.

16 For example, section 8(2) of the Constitution of the Republic of South Africa, Act 200 of 1993 (the Interim Constitution) provides: "No person shall be unfairly discriminated against, directly or indirectly,...on one or more of the following grounds in particular: *race, gender, sex, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief culture or language* [emphasis added]. Section 181(1) provides: "A traditional authority which observes a system of indigenous law and is recognised by law immediately *before the commencement of this Constitution,* shall continue as such an authority and continue to exercise and perform the powers and functions vested in it in accordance with the applicable laws and customs, subject to any amendment or repeal of such laws and customs by a competent authority" [emphasis added].

17 Section 98(2) of the Constitution of the Republic of South Africa, Act 200 of 1993 provides that: "The Constitutional Court shall have jurisdiction in the Republic as the *court of final instance over all matters relating to the interpretation, protection and enforcement of the provisions of this Constitution*" [emphasis added].

circumstances in South Africa to provide such protection. However, the paper will also advance the argument that due to these contradictions there is a need to redefine and reconstruct not only the character of traditional leadership but also the role that the institution should play in a new South African democracy, in order to retain a cherished traditional government that serves traditional interests but at the same time modify it in terms of contemporary democratic demands and needs.

II. NATURE AND FUNCTIONS OF TRADITIONAL LEADERSHIP

Whereas originally traditional leadership was acquired only through a hereditary process, with the advent of colonialism and throughout successive colonial and apartheid rule, government adopted the practice of appointing its own traditional leaders called "chiefs" to replace those who dared to challenge oppression and exploitation.[18] Moreover, chiefs themselves also acquired the power to appoint a larger number of councillors over whom they exercised control.[19]

A significant number of assertive traditional leaders were deposed in 1951 because they opposed the *Bantu Authorities Act*[20] which served to reinforce the political ideology of divide and rule.[21] It is essentially this history of colonial manipulation of traditional leadership in South Africa, more than its hereditary, exclusively male character, that gave rise to opposition to the system among non-governmental organisations[22] and alienated some sectors of traditional communities.

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18 See, generally, *Natal Code of Native Law* (Proc. No. 168, 1932) providing amongst others, the appointment of the State President as the Supreme Chief; *The Black Administration Act, 38 of 1927* and the *Bantu Administration Act 68 of 1951*.

19 French, *supra* note 10 at 26: "In contrast with their traditional position as political and judicial entities, the chief and his councillors became embedded in the administrative system."

20 Act 68 of 1951.

21 D. Marais, *South Africa: Constitutional Development* (Johannesburg: Southern Book Publishers, 1989) at 234-235. The ideology of divide and rule was a segregatory administrative policy based on tribal commitment and devised by Theophilus Shepstone whereby the lieutenant-general of Natal acted as paramount chief over all black races in Natal, divided in terms of tribal affiliation.

22 A. McIntosh, "The Rural Local Government Debate in South Africa: Centrist Control or Local Development?" Seminar Report, *Konrad- Adenauer-Stiftung,* HSRC, (27-28 October 1994) 19-27.

Comprehensively, the current functions of traditional authorities include the following:[23]

- The allocation of land held in trust for small-scale farming, grazing and residential purposes (not for commercialism);
- The preservation of law and order, including adjudication over minor disputes of a civil nature;
- The provision and administration of services at a local government level;
- Social welfare administration within their communities, including the processing of applications for social security benefits and business premises; and
- Promotion of education, including the erection and maintenance of schools and the administration of access to education finance, for example, scholarship and study loans to scholars and students.

Traditional leadership therefore plays the simultaneous role of development facilitator, law maker, executive, and judiciary.

These enmeshed and all-encompassing functions all fall within the jurisdiction of the "chief"-in-council, where the council is often appointed by the "chief" himself. However incompetent a traditional leader might be, he would remain in leadership year in and year out. It is also said that traditional leaders often represent government more than they do the communities they are intended to represent. The absence of ordinary mechanisms of checks and balances of power often renders the system vulnerable to corruptibility and abuse.

Based on the weaknesses of the system outlined above, there was great concern within the democratic movement at the advent of negotiations for a democratic South Africa, when calls from organised traditional leadership to

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[23] See generally Schapera note 4; I. Schapera, *Tribal Legislation Among the Tswana of Bechuanaland Protectorate: A Study in the Cultural Change,* London School of Economics and Political Science, Monographs on Social Anthropology No. 9 (1943); A.J. Kerr, *The Native Common Law of Immovable Property in South Africa* (Durban: Butterworth, 1953) at 11-20; W.D. Hammond-Tooke *Bhaca Society* (Cape Town: Oxford University Press, 1962) at 204-224; Krige, *supra* note 6 at 218 *et seq.*

provide constitutional guarantees for the continued and enhanced recognition, protection and enhanced powers for traditional leaders were made.[24] The future role of traditional leadership, it was argued, should actually be minimised rather than maximised through constitutional guarantees.

The call for enhanced and maximised power for traditional leadership, despite the system's notorious history, seemed to form part of the justification in the arguments that colonialism, apartheid and racism in South Africa had made Africanism an integral part of the history of the national liberation struggle.[25] Achieving national liberation should therefore include the restoration and revival of institutions symbolic of African pride, dignity and other forms of assertion.

The demands to structure an all-inclusive constitution and also Africanise government structures and legal institutions in a post-apartheid democracy did not come as a surprise. There was need, the argument advanced, to revive and enhance the original powers of traditional leadership and restore respectability and legitimacy to the system after decades of abuse, exploitation and manipulation. Besides, apartheid government had always been highly centralised and urban biased, as had organised social, political, and economic opposition to apartheid. As a result, the voices of the most downtrodden and least organised sectors of South African society, for example, the rural areas, have seldom been heard.

This had always been the case, despite the fact that these communities constitute more than 40 per cent of South Africa's population.[26] Logically redressing these imbalances through reconstruction efforts has to give particular consideration to the interests of rural communities, placing them in control of their own lives but through effectively representative government. A new democratic order is thus required to heed the call to optimise rural development and make it as participatory as possible.

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[24] See "Minutes of the Meeting of the Ad Hoc Committee on Fundamental Rights during the Transition" dated 14 September 1993; "Minutes of the Ad Hoc Committee on Fundamental Rights during the Transition" dated 12 October 1993; "Minutes of the Ad Hoc Committee and the Technical Committee on Fundamental Rights" dated 8 November 1993.

[25] M. Van Diepen, ed., *The National Question in South Africa* (London: Zed Books, 1988) at 67-76.

[26] T. Botha. "The Role of Traditional Leaders in Local Government" Seminar Report, *Konrad-Adenauer Stiftung* HSRC (27-28 October 1994) at 28.

Currently, traditional authorities constitute local governments with the traditional leader as head of the authority of the day in rural communities. The system itself, despite its flaws and the controversy around it, is firmly in place and is cherished by rural communities. They identify with it and see it as their own. Whether it is appreciated or not, these functionaries do exercise substantial power and authority, including that of a political nature, over their rural communities.

On the one hand, this form of identification with a government augers well for self-reliant development. However, the undemocratic aspects of traditional authority serving as local structures cannot be ignored. They have outlived their acceptability and are offensive to the principles of participatory development and government accountability. Because of this weakness, many rural communities have become the pariah of South African society. Meaningful development in rural areas is therefore imperative. As long as this need exists, there is no substitute for democratic government to promote self-reliance and implement sound development practices.

Within the context of these arguments, the retention of traditional authority in a new constitutional dispensation did not seem unrealistic. It received general acknowledgment, therefore, in the multi-party negotiations process. The more problematic issue, however, was the functional aspects of traditional authority and traditional leadership.

III. THE ROLE OF TRADITIONAL AUTHORITY IN THE NEW CONSTITUTIONAL DISPENSATION

Significant in the debate were the optional proposals submitted by Controlesa[27]:

- To carve out a high-level legislative function at the national level by reserving special seats in the National Assembly for a specified number of "chiefs" who will be elected from among their own ranks without regard to traditional and regional affiliation, or

- To create houses of traditional leaders at both the national and regional levels to play advisory roles in regard to the creation of laws that have a direct impact on traditional communities.

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[27] See *supra* note 24.

The first option immunises traditional authorities from the electoral process but gives them direct power over democratic legislative processes. This, it was feared, would undermine a basic principle of the democratic process, namely, legislative representivity. The second option, it was said, could discriminate against similar cultural representative structures and/or spur similar demands from counterparts which, in a society as highly polarised as South Africa, are anything but few.

Civic associations raised the more radical proposals of confining traditional authority to mere ceremonial functions.[28] Individual traditional leaders, they submitted, would not be precluded, however, from participation in the electoral process for local government authorities if they so desired. Traditional leaders could become *ex-officio* members of local government structures.

In my view, however, this democratic process should not be confined to the level of local government. All members of these local elected traditional structures could stand for election among themselves to form part of the legislature at regional and national levels government. At these levels of traditional representation, traditional leaders elected could then participate in regional and national legislative decision-making *inter pares,* on behalf of constituencies they represent. Traditional authority, as part of government, could be based on the fact that it represents *traditional interests* and not on the fact that it is *royal* in nature.

While these proposals remove traditional leaders from undemocratic government functions, they are silent regarding the fate of traditional executive and judicial functions. It suffices to say that these functions continue to be exercised by the self-same traditional structure, however representative, and problems remain due to the absence of a system of checks and balances on power. Still, there is a danger that accountability, responsiveness, and transparency might be compromised unless other measures are introduced to satisfy the need for checks and balances.

Needless to say, the political dynamics of the power relations between organised traditional leadership and political parties or organisations in the multi-party negotiations process, though rather subtle, played a vital role in the outcome of constitutional recognition provided for traditional leaders and authorities in the Interim Constitution. At the end of the day, the debates

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28 *Ibid.*

culminated in the creation of Provincial Houses of Traditional Leaders and a Council of Traditional Authorities which will operate at the provincial and national levels.[29]

Essentially, the Council and Provincial Houses will play an advisory role at respective levels of government. While the Provincial Houses will advise and submit proposals to provincial government "on matters relating to traditional authorities, indigenous law, tradition and custom," the Council of Traditional Leaders will do the same in regard to similar matters at national level. In addition, the President may seek the advice of the Council of Traditional Leaders on "any matter of national interest."[30]

Depending on the relationship between the bodies of traditional leaders and their respective legislatures, traditional leaders may have profound influence on legislative reform in their areas of jurisdiction. Although the possibility that traditional views might weigh heavily in the outcome of law reform does exist, such reform by respective legislatures would not of necessity be defeated or deterred by a united opposition by traditional leadership, since the constitution does not provide much clarity on how deadlock between these traditional structures and the respective legislatures will be resolved. In both instances, where traditional bodies are opposed to a bill, such a bill shall not be passed before the lapse of 30 days from the expression of such opposition.[31]

The prospects for democratic local government only in certain selected areas seem much better in the sense that, at this level, traditional leaders join local government structures in an *ex-officio* capacity, thanks to ideas mooted by strong civic organisations. This provision has, however, been made only in respect of those traditional leaders who function in jurisdictions of elected local

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29 Section 183 (1)(a) of the Constitution of the Republic of South Africa Act 200 of 1993 provides: "The legislature of each province in which there are traditional authorities and their communities, shall establish a house of Traditional Leaders consisting of representatives elected or nominated by such authorities in the province." And see section 184 (as amended by section 9 of the Republic of South Africa Second Amendment Act 44 of 1995); Cf. *Premier of KwaZulu/Natal and Others* v. *President of the Republic of South Africa and Others* 1995 (12) BCLR 1561 (CC), para. 32 (noting amendment of section 184).

30 Subsections 184(4)(b). This advice, however, has first to be sought by the President.

31 Subsections 183(1)(b)-(d); subsections 184 (4)(a)-(d). However, section 184(5)(a) has been amended by section 9 of Constitution Second Amendment Act, 44 of 1995.

government.[32] Where elected local government structures do not exist, the danger of unrepresentivity therefore persists.

It is conceded that, due to the central role that traditional authorities play in the areas of their jurisdiction, drastic reforms to the system will be impractical. Elsewhere on the continent, traditional leaders have demonstrated a capacity to set up alternative power bases outside of official structures making regulation difficult.[33] Reactionary responses can be avoided. At the same time, rural communities are no longer submissive about their exclusion from decision-making and ruling structures of traditional government. They demand systems of government that will address their needs in democratic environs. Rural women who suffer the worst brunt of traditional authority and government are particularly assertive and vocal in this regard.[34]

IV. TRADITIONAL AUTHORITY, GENDER AND DEMOCRACY

Not only is traditional authority insulated from the electoral process, it is also fundamentally patriarchal and discriminatory against women. The general exclusion of women from assumption to traditional leadership could result in a perpetual all-male traditional government authority in South Africa, where democratic governance is a basic principle of the constitution.[35] The newly created Provincial Houses of Traditional authorities and Council of Traditional Leaders would be virtually all male. Of particular concern to the women's movement as a whole and rural women in particular is the enhanced protection

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32 Section 182 (as amended in terms of section 9 of Constitution Second Amendment Act, 44 of 1995); Cf. *Premier of KwaZulu/Natal and Others* v. *President of the Republic of South Africa and Others* 1995 (12) BCLR 1561 (CC) (rejecting challenge to constitutionality of amendment to section 182).

33 Nana Wereko Ampem II "Chiefs and Chieftainship in Ghananian Constitution," paper presented at the Commonwealth conference on "International Roundtable on Democratic Constitutional Development," Pretoria, South Africa (17-20 July 1995) at 178-182 (in terms of the 1992 Ghanaian Constitution chiefs are forbidden from standing for election to parliament [article 94 (3)(c)]. Any chief who stands for appointment must abdicate his position.).

34 T. Nhlapo, "Accommodating Traditional Forms of Governance," paper presented at the Commonwealth Conference on "International Roundtable on Democratic Constitutional Development," Pretoria, South Africa (17-20 July 1995) 168 at 169.

35 See, generally, I. Curiae, "Indigenous Law" in M. Chaskalson *et al.*, eds., *Constitutional Law of South Africa* (Cape Twon: Juta, 1996) 36 1-18; Motshabi & Volks, *supra* note 1.

that customary law, with its discriminatory impact on women, has acquired by its new constitutionalised status.[36]

To the extent that customary law operates against the contemporary needs and interests of women in balancing gender power relations, the women's movement had expressed strong views before and throughout the multi-party negotiations process against allocation of influential power over the outcome of customary law reform generally, and structures of traditional authority which are exclusively male and are particularly conservative of the system of customary law as a whole.[37] It may be argued that these concerns are unfounded in that customary law as a system of law is subject to the Bill of Fundamental Rights and Freedoms.[38] This, however, would be a simplistic perspective of the social, political, and economic dynamics that surround the balance of gender power relations in South Africa[39]. Such a perspective would also lose sight of the social and political hold that traditional leadership could have on the outcome of customary law and traditional authority reform processes which they perceive as undermining their power base,[40] if women are not sufficiently involved in the process.

Significant in this regard is the creation of the Commission on Gender Equality[41] and the access it could provide for women to influence the weight of recommendations by the structures of traditional authority, discussed above. This commission is given a broad mandate to promote gender equality in a South African society which is lacking in a culture of human rights generally and gender sensitivity in particular. The Commission also has the function to "advise and make recommendations to parliament or any other legislature regarding any

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36 See *supra* note 30.

37 *Supra*, note 23.

38 *Ibid.*

39 T. Nthlapo, "The African Family and Women's Rights: Friends or Foes?" in *African Customary Law* (Cape Town: Juta & Co., 1991) 135 (noting that certain customary law and tradition are often considered discriminatory against women: polygamy, lobolo, the levirate, the sororate, child betrothal and mourning taboos).

40 There existed a perception within the womens' movement that political parties were dishonestly overly cautious with traditional leaders over issues of customary law reform for fear of political support from traditional leaders and their constituencies in the elections. Consider that traditional authorities still exercised substantial authority over a vast section of the then rural electorate. See Nhlapo, *supra* note 35.

41 Section 119(1) of the Constitution of the Republic of South Africa, Act 200 of 1993 (as amended).

laws or proposed legislation which affects the status of women."[42] The Commission is thus empowered to influence the outcome of all levels of legislation affecting women. It will therefore share with the Traditional Houses and Council of Traditional Leaders the ability to influence the process of democratising the system of customary law and promoting women's equality, including all issues central to the objectives of a strong, emergent women's movement in South Africa.

If the dramatic debates between traditional leaders and leaders from the women's movement throughout the multi-party negotiations process are anything to go by,[43] legislatures could find themselves confronted with strongly divergent views and recommendations from traditional structures, on the one hand, and the Commission on Gender Equality, on the other, regarding matters of customary law and rural issues.

A more constructive approach would have been to ensure women's representation on all structures of traditional authority — national, provincial and local. This would inject an element of representivity and enable them to find common ground on issues and recommendations submitted to the legislatures. In African customary law, however, succession to status and property is premised on the idea of perpetuating the family name.[44] At the same time, when a woman gets married, she acquires membership of her husband's family and is incapacitated from carrying forward her own family name.[45] This fact, among others, seems to have formed the basis for disqualifying women from inheritance to traditional leadership and also communal family property.[46] The assumption

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42 Section 119(3) of the Constitution of the Republic of South Africa, Act 200 of 1993 (as amended).

43 See note 24, above.

44 See *supra* note 8; J. Sinclair, "Family Rights" in D. van Wyk *et al.*, eds., *Rights and Constitutionalism: The New South African Legal Order* (Cape Town: Juta & Co., 1994) 502 at 561.

45 T.W. Bennett, *A Sourcebook of African Customary Law in Southern Africa* (Cape Town: Juta & Co., 1991) at 410-411. The death of a husband does not confer single status on a woman. Because a customary marriage is a union of the respective families, the marriage endures until formal dissolution. A levirate marriage may ensue. Divorce, however, can formally terminate a marriage, through settlement of the lobolo.

46 J. May, *Zimbabwean Woman in Customary and Colonial Law* (Gweru: Mambo Press, 1983) at 12: "[The African woman] has an inferior position, and she herself may feel this to be the case...she sees herself as different from man and as having a social status different from him but for her it is less a matter of level than of difference of status"

is that all women do get married.

The women's movement currently is working vigorously towards creating a sound balance for the position of women in this regard. While this is a longer-term issue, which for now remains unresolved, securing appropriate women's representation on all structures of traditional authority through a democratic process will be constructive.

V. CONCLUSION

It has been argued that the enhanced constitutional status provided for the institutions of traditional government authority, in a democratic non-racial and non-sexist constitution, where the institution of traditional authority is by definition hereditary and patriarchal, is contradictory. In terms of the current socio-political climate of transition in South Africa, however, this enhanced protection is for now necessary. Should the hereditary, undemocratic character and functions of the institution of traditional authority be left as intact as it currently operates, it will frustrate the very ideals of a new democracy.[47] Although the hereditary nature of traditional leadership is widely acceptable, its exclusively male character has to change. Rural women themselves demand the inclusion of women in the line of succession to traditional leadership status. While this may be seen a long-term ideal, in the immediate term there is a need to democratise structures of traditional authority through an all-inclusive electoral process. The gender imbalances in traditional leadership structures should be redressed by the inclusion of women at all levels of traditional authority. If women are elected to local traditional government structures, the electoral process could place them on regional and national traditional structures even before their inclusion in the line of succession.

As of now, the institution of traditional authorities should not of necessity be characterised by the royalty of its functionaries but by the traditional character

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[footnote omitted].

47 Other African countries have successfully managed to develop their customary law in line with their respective constitutions. See *The Attorney-General* v. *Dow* 1994 (6) BCLR 1 (Botswana) at 14: "A constitutional guarantee cannot be overridden by custom. But where it is impossible, it is custom not the Constitution which must go" (per Amissah J.P.); *Bernado Emphraim* v. *Holaria Pastory and Gervazi Kai Zilege,* High court of Tanzania (PC), Civil Appeal No. 70 of 1989 (the Tanzanian High Court held that a customary law which debarred African woman from inheriting customary-owned land was unconstitutional).

of its role and functions. Government within traditional communities, therefore, should be established through the electoral process.

At local levels, the electoral process should draw from the broader community, which would necessarily include women. The local traditional leader should be subjected to this political process. These local structures should then become the source for elected representatives on regional structures, where the latter would in turn feed into national traditional structures. If royalty participates in decision making, they should do so be because they have been placed in that position by a broad community mandate. Otherwise, the view that they should be confined to a ceremonial function is reasonable.

FEDERAL FEATURES OF THE INTERIM CONSTITUTION

Karthy Govender*

Achieving a workable distribution of powers in a federal state is always a delicate matter. Professor Govender here argues that the difficulty of this task in the South African context was exacerbated by the scepticism and antipathy of many South Africans, who viewed any attempt to subdivide the country politically as too close an approximation of the reviled "homeland" policy. The author argues, however, that any such fears should be allayed by the Interim South African Constitution. Indeed, the author asserts that on paper the interim constitution is sensitive to the country's regional and cultural diversity, while also recognizing the danger of creating regional governments which are too strong, thereby posing a risk of secession. Professor Govender acknowledges that the form the South African federation takes in practice will, of course, depend upon the particular interpretations of the broad language of the constitution rendered by the newly created Constitutional Court.

Dans un État fédéral, la distribution fonctionnelle des pouvoirs est un exercice toujours périlleux. L'auteur soutient que dans le contexte sud-africain, la difficulté de cette tâche était exacerbée par le scepticisme et l'aversion de nombreux citoyens, qui percevaient toute tentative de sous-division politique de leur pays comme une approximation trop évidente de la politique vilipendée du homeland. L'auteur affirme cependant que la Constitution provisoire sud-africaine devrait apaiser toute crainte de cet ordre. En substance, la nouvelle Constitution est sensible à la diversité régionale et culturelle du pays, et reconnaît aussi le danger de créer des gouvernements régionaux trop forts, susceptibles d'aboutir à une sécession. L'auteur reconnaît que la façon dont la fédération sud-africaine se réalisera concrètement dépendra bien évidemment des interprétations particulières que la nouvelle Cour constitutionnelle fera des termes généraux du texte constitutionnel.

I. INTRODUCTION

Many of the constitutional democracies in the world have federal or quasi-federal constitutions and hence debate about the concept, when drafting a new constitution for a divided region, is not only legitimate, but perhaps indispensable. In South Africa this debate became distorted and emotive because the concept of federalism bore, in the minds of some people, too close a resemblance to the iniquitous system of "grand apartheid" when fragments of South Africa were excised and dressed up as "independent states."

The ultimate goal of the homeland policy was the denationalization of all Africans. The African community was divided along tribal lines and allocated land. Authorities were created and empowered to govern these areas. Gradually

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the power of these tribal authorities was increased until they were granted self-governing status.[1] Legislative assemblies and executive councils with power to legislate in respect of certain defined subject matter over specified geographical areas were set up. The final step was the "granting of independence" to these states.[2] The territories were deemed to be sovereign and not part of South Africa. Pivotal to the entire scheme was the section which provided that citizens of the new sovereign state were to cease being South African citizens.[3] This process made aliens of South African citizens in the land of their birth. People linked to the independent states were to enjoy civil and political rights only within the boundaries of those states and had no claim to the rest of South Africa.

The concept of a unified South Africa contrasted sharply with this system and struck an emotional chord with those people who had suffered as a consequence of the denationalization policy. Any system which sought to divide the country into areas would have the onus of satisfying people that it was not the homeland system in elaborate disguise. The federalists had to convince a sceptical black population that the purpose behind a legitimate division of the country along geographical lines had nothing in common with the pernicious goals that underpinned the homeland policy of denationalization. This task was made all the more difficult by the virulent support given to the concept by the homeland authorities of Ciskei and Bophuthatswana and the self-governing state of KwaZulu which was under the control of the Inkatha Freedom Party.

The liberationists (the ANC and its allies) saw themselves as being dominant at national level. Further, as their constituency had been most affected by the ravages of apartheid, it was necessary for them to embark upon decisive remedial action. A central state with powers delegated to regions would allow for both nationally co-ordinated planning and decisive implementation. Clause 1 of the ANC's discussion document entitled *The Structure of a Constitution for a Democratic South Africa* therefore provided that "South Africa shall be reconstituted as a non-racial, non-sexist, democratic and unitary republic."

The National Party in its discussion document *Constitutional Rule in a Participatory Democracy* argued for the vesting of original powers in a three-tier structure of government. It argued for full legislative and executive functions

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1 The National States Constitution Act 21 of 1971.

2 Independence was granted in terms of Status Acts. Status Acts were passed in respect of each territory that was granted independence.

3 As an illustration see section 6(1) of the Status of Ciskei Act 110 of 1981.

for each tier, with its powers derived directly from the constitution. It argued that such a system took account of:[4]

1) the rich diversity of the population of South Africa, the needs of communities in regional and local context, and the consequent need for self-determination in regional and local context.

2) the need to bring government as close as possible, so that decisions can be taken at a level where the citizen's position is best understood.

The Inkatha Freedom party in its discussion document *The Constitution of the State of KwaZulu/Natal* argued for a "pure" federalism with an emasculated national authority and a powerful KwaZulu/Natal region. It listed the powers of the federal legislature and vested the residue in the state of KwaZulu/Natal. It provided that no federal armed forces could enter or be stationed in KwaZulu/Natal without the approval of the state. Further the federal government would not be allowed to levy taxes or duties within KwaZulu/Natal without the consent of the state.[5]

Clearly both the National Party and the Inkatha Freedom Party made the obvious and prophetic deduction that their support would, at best, be regional and that the ANC would be overwhelmingly successful at national level. This factor must have impacted on their proposals to have a constitutional arrangement where the vortex of power resided in the states/provinces as opposed to the national government.

The National Party were recent converts to the notion of federalism. Their history in government showed an unequivocal commitment to a unitary state. The union of South Africa was formed in 1910 with the four former British colonies becoming its component provinces. The provincial governments comprised an elected provincial council, an administrator and an executive committee. The administrator was appointed by the national government and the executive committees were elected by the provincial councils.[6] The provincial councils exercised legislative power over matters of local concern. The executive

4 *Constitutional Rule in a Participatory Democracy* issued by the Federal Council of the National Party at page 3.

5 Sections 67(a), (b), (c), (d) of the Constitution of the State of KwaZulu/Natal submitted by the Inkatha Freedom Party.

6 Sections 70 to 73 of the South Africa Act 1910. See L.J. Boulle, *South Africa and the Consociational Option* (Kenwyn: Juta, 1984) 94.

committees comprised the different parties represented in the councils and were based on the Swiss Council of Ministers and incorporated the principle of "grand coalition." This system of inclusivity was abolished in 1964 and replaced by the Westminster majoritarian system.[7] In 1986, the National Party government abolished the provincial councils and replaced them with nationally appointed executive committees.[8]

Despite the obvious political expediency that underpinned some of the proposals, a federal constitution with its inherent checks and limitations held seminal lessons for constitutional drafters. The over-concentration of power in the hands of single individuals or single institutions contributed to the disintegration of the constitutional state in many African countries. The dispersal of power, necessarily incumbent in a federal state, coupled with constitutional checks and balances contributes to the establishment of an ethos of constitutionality which is indispensable if constitutionalism is to survive and flourish in South Africa. It has been argued that the federal system of government is most apposite for a plural society such as South Africa with its a vastly differing cultures, languages and traditions:[9]

> The notion of the nation state, a unitary entity in which one "nation" resides in one "state" is outdated and is not responsive to the pluralist realities of countries such as South Africa, or the USA, for that matter. More blood has been spilled in intra-religious, intra-racial, and internecine conflicts and warfare than has been shed in wars between strangers. Vigorously waving a newly sewn flag of democracy without balancing the rights of the multitudes of the diverse economic, cultural, and ethnic communities that make up South Africa — a modern pluralistic state — is not going to produce justice or tranquillity.

The vastness of the country, its differing climatic conditions, socio-economic conditions, and degrees of development, according to this view, make the adoption of the federal system, with its flexibility to respond effectively to local conditions, irresistible.

Those in favour of a unitary state argue that a constitution ordering the affairs of state and regulating the relationships between the different organs of state must take cognisance of the reality of South Africa. South Africa has emerged from a period of enforced segregation with race- and tribe- based governmental

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7 G.E. Devenish, *Constitutional Change and Reform in South Africa* (unpublished doctoral dissertation) at 450.

8 Provincial Government Act 69 of 1986.

9 G.N. Barrie, "A plea for Federalism in the Final Constitution" (1994) 57 THRHR 465.

institutions and further pronounced divisions that will accentuate these differences and give impetus to latent secessionist movements. This would seriously threaten the unity and security of the republic. Further it is imperative to foster a common South African identity to counteract the fractious legacy of the past.

There also was the concern that an allocation of powers to different centres will prevent the decisive implemenation of remedial socio-economic programmes. If the central government is only allowed to act within a prescribed area of competence then the implementation of national economic policies may be impeded. The worst case scenario would be a repeat of the New Deal constitutional crisis in the USA when portions of the New Deal programme were set aside on the basis that the President had acted beyond the powers granted to him in the constitution.[10] If *portions* of the reconstruction and development programme were to be set aside on the basis that they infringe provincial autonomy, severe pressure would be placed on the constitution.

The challenge facing drafters of the South African constitution was to achieve that crucial balance between accountable and limited government on the one hand and effective and dynamic government on the other.

The Interim Constitution reflects the compromises reached in respect of both substance and process. Some of the minority parties strenuously argued that the Multi-Party Negotiating Forum should determine the final constitution. They argued that South Africa was undergoing a unique process in which the possessors of power were negotiating themselves out of power, without having been defeated. Hence the constitution should reflect the political settlement that was reached and not simply be drafted by the party that is dominant in a constitutional assembly. The contrary view was that for a constitution to be legitimate, it had to be sanctioned by the elected representatives of the people. This was necessary in order to distinguish this constitution from the failed models of the past. This argument was premised on the fact that many of the parties at the negotiating forum had very little, if any proven support.[11]

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10 J.E. Nowak, R. Rotunda and Young, *Constitutional Law*, Vol. 1, 5th ed. (St. Paul, Minn.: West Pub. Co., 1995) at 389 *ff.*

11 Two parties which featured very prominently in the negotiations were the Ciskeian Government and the Government of Bophuthatswana. The former failed to win a single seat in the national assembly and the latter decided not to contest the elections, after its allies in the Freedom Alliance decided to contest the elections.

The process of compromise involved a two stage procedure. The Multi-Party Negotiating Forum was given the power to draft an interim constitution which would be effective for two years, from the date of its coming into effect. The government of national unity and the legislature that was formed as a result of the Interim Constitution is to last for five years. The final constitution is to be drafted by a Constitutional Assembly which is composed of the National Assembly and Senate (the legislature). The constitutional text has to be ratified by at least two thirds of the members of the constitutional assembly. Further the text of the constitution is to be in accordance with stipulated constitutional principles. The Constitutional Court is given the responsibility of determining whether the approved text is in accordance with accepted constitutional principles.[12]

The following are some of the constitutional principles:

1) South Africa shall be a sovereign state with a democratic system of government committed to achieving equality.

2) Everyone shall enjoy universally accepted fundamental rights which shall be entrenched in the constitution. The constitution shall be the supreme law of the land.

3) There shall be a separation of powers and an independent and impartial judiciary.

Of direct relevance to this paper are the constitutional principles relating to the powers of the province:

1) The powers and functions of the province shall be defined in the constitution.

2) The powers and functions of the provinces as defined in the final constitution shall not be substantially less or substantially inferior to that provided in the interim constitution.

3) Any amendment to the powers and functions of the provinces shall in addition to the normal amendment procedure, be approved by the legislatures of the different provinces or by a two-thirds majority of a chamber of parliament comprising provincial representatives.[13]

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[12] Sections 71, 72 and 73 of the Constitution of the Republic of South Africa, Act 200 of 1993 [hereinafter the "Interim Constitution"]. [A final text was submitted to the Constitutional Court for certification on 13 May 1996 — Eds.]

[13] Constitution of the Republic of South Africa Amendment, Act 2 of 1994 introduced principles one and two and restated the third principle. This was part of the compromise that resulted in the Freedom Alliance participating in the elections.

4) The powers and functions at national and provincial levels of government shall include exclusive and concurrent powers as well as the power to perform functions for other levels of government on an agency or delegation basis.[14]

The principles relating to the powers of the province were part and parcel of the agreement that secured the late participation of the Inkatha Freedom Party in the elections. It was clearly designed to address the concern that an ANC dominated Constitutional Assembly would opt for a unitary state with limited delegated powers to the provinces and thereby fundamentally change the interim constitution in this regard. The additional safeguards regarding amendments ensures greater provincial participation in the amendment of provincial powers.

One of the issues that is evoking some debate is whether the Provincial legislatures have exclusive power over any matter. It is submitted that the constitution is explicit on this point. Original and not exclusive powers are vested in the provinces. Section 126(1) vests the powers listed in schedule 6 in the provinces and section 126(2A) states that the central legislature shall also be competent to make laws over these matters. However the constitutional principles clearly require some exclusive powers to be given to the provinces. The final constitution would thus, in order to be compatible with the constitutional principles, have to grant some exclusive powers to the provinces.

Initially it had been decided that a single ballot paper would be used for the elections of both the national and provincial legislatures. It was intended that this single ballot be used to determine support for the different political parties at both provincial and national levels. In order to assuage those of federalist sentiments, it was agreed that separate ballots be cast for the national and for the different provincial legislatures. The party list system was used in respect of the election of both provincial and national legislatures. Analysis of the voting patterns in the country indicated that in some instances voters voted for different political parties at provincial and national level. Thus the different provincial legislatures having been separately sanctioned by the electorate will more confidently exercise and carefully guard their allocated powers.

The decisive inquiry for the purposes of this paper is to determine the nature and extent of provincial autonomy against the scope that exists for the national legislature to effectively operate as a unitary state. Structures of government,

[14] Constitutional Principle XIX of the Interim Constitution.

division of powers, resolution of disputes and fiscal independence will be the categories in terms of which this inquiry will be analyzed.

II. THE INTERIM CONSTITUTION

A. STRUCTURES OF GOVERNMENT

The issue is to what extent do the structures of government contribute to provincial autonomy.

Provision is made in the constitution for a bi-cameral legislature comprising the Senate and the National Assembly. The National Assembly comprises four hundred members. For the purposes of the first election, the allocation of four hundred was divided into two groups of two hundred seats. Two hundred seats were allocated to the different parties in proportion to votes obtained nationally.[15]

The other segment of two hundred seats were divided amongst the different regions in proportion to their population numbers. Thus KwaZulu/Natal which has approximately a fifth of the nation's population was allocated forty of the two hundred seats. Parties were required to draw up a national list and nine regional lists. It was thus necessary to determine both the support of the different political parties in each province in relation to other parties and the aggregate support enjoyed nationally. Thus the allocation of seats in the national list reflected the support of the party nationally and the allocation of regional seats reflected the parties performance in each region.[16] At least 90 per cent of the people on a regional list had to be resident in that region. The absence of constituencies made this arrangement necessary.

The 90 senate seats are divided equally amongst the 9 provinces, thus ensuring equal representation for each province at this level. The 10 senatorial seats of each province are allocated to the parties in proportion to their

[15] The National Party received just over 20% of the vote and thus obtained 40 of the 200 seats.

[16] The Inkatha Freedom Party received approximately 50% of the national ballot cast in KwaZulu/Natal. It thus received 20 of the 40 Natal regional seats in the National Assembly.

representation in the provincial legislature concerned.[17] Thus structurally the provinces were represented in both houses of the national legislature. This invites the argument that, with this level of representation at the national level, provincial concerns will be adequately protected. In reality members of the national legislature owe their allegiance to the political party on whose list they appear. Party discipline will ensure compliance with party goals. Of particular relevance is the anti-defection clause.[18] Any person who ceases to be a member of the party that nominated him or her to the National Assembly or Senate is obliged to vacate his or her position in the legislature. This provides the party with the necessary power to control all its members and ensure compliance with its wishes.

At first sight it seems that powers and functions of the Senate are much more limited that its American counterpart. Ordinary bills may be introduced in either house, but have to be approved by both houses. If either house rejects a bill, it is referred to a joint committee of both houses. Thereafter the bill is referred to a joint sitting of both houses and a majority vote is taken.[19] Clearly the will of the National Assembly will predominate in the event of a conflict. The power of the Senate is even more circumscribed in respect of money bills.[20]

It is arguable, however, that in real terms the powers of the Senate are much more extensive. Section 61 provides:

> Bills affecting the boundaries or the exercise or performance of the powers and functions of the province shall be deemed not to be passed by parliament unless separately passed by both houses...

Accordingly, the Senate is given an effective veto in respect of bills affecting *inter alia* the exercise or performance of the powers and functions of the province. Unless "affecting" is given a highly restrictive interpretation it must mean any bill that impacts upon the province in the exercise of its powers and functions. The provincial powers are listed in schedule 6 and are clearly

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17 The IFP obtained just over 50% of the votes for the Provincial legislature in KwaZulu/Natal and were thus allocated 5 of 10 senatorial seats.

18 Section 43(b) of the Interim Constitution.

19 Section 59 of the Interim Constitution.

20 Section 60 of the Interim Constitution.

extensive and wide-ranging.[21] Thus any bill that impacts upon the exercise of any of these powers would require Senate authorization before it becomes law.

South Africa is divided into 9 provinces. Each province has a premier, an executive committee and a provincial legislature. The Constitution was subsequently amended to enable the provinces to adopt a constitution which allowed legislative and executive structures that differed from those stipulated in the Constitution.[22] However the text of the provincial constitutions must be in accordance with the rest of the national constitution, including the constitutional principles. The amendment was specifically designed to afford more powers to the provinces and allow them a greater flexibility in regulating domestic structures.

The provincial executive structures also incorporate the idea of a government of unity. The premier of a province must be elected by a majority of members of the provincial legislature.[23] The executive councils consist of the premier and 10 other members. Each party having at least 10% of the seats in the provincial legislature is entitled to portfolios in the executive council in proportion to the number of seats held by it relative to the number of seats held by the other participating parties.[24] The complement of each provincial legislature has been determined by the number of people within each province in relation to the total population.[25] Thus separate government structures exist

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[21] The legislative competencies of the provinces include:

Agriculture	Abattoirs	Animal control
Casinos	Consumer protection	Cultural Affairs
Education	Environment	Health Services
(except tertiary)	Local Government	Nature Conservation
Housing	Provincial Media	Provincial Sport
Police	Regional planning	Roads
Public transport	Traditional	Urban and rural
Tourism	authorities	development
Welfare services		

[22] Section 160 of the Interim Constitution as amended.

[23] Section 144(1).

[24] Section 149 of the Interim Constitution.

[25] The PWV being deemed to be the most populated area was allocated 86 seats whilst the Eastern Transvaal has a provincial legislature which consists of 30 people. Paragraph 10 of schedule 2 of the Interim Constitution.

at the provincial level for the making and implementation of laws that are within the competence of the provinces.

To assuage certain right wing Afrikaners, provision was made for the establishment of a Volkstaat Council.[26] The purpose is to enable members elected by members of parliament who support the idea of a volkstaat to use the council to pursue the idea of a volkstaat (or Afrikaner homeland). It is given an information gathering and advisory role.

The interim constitution is a political compromise and nothing illustrates that more than the last minute amendment which sought to ascribe a role for the Zulu monarch. The amendment stated:[27]

> Provided that a provincial constitution may —
>
> b) where applicable, provide for the institution, role, authority and status of a traditional monarch in the province, and shall make such provision for the Zulu Monarch in the case of the province of KwaZulu/Natal.

The Inkatha Freedom Party which, at that stage, had extremely close links with the Zulu king were adamant that he be allowed to play a role in the politics of KwaZulu/Natal. It was agreed that a team of mediators would be appointed to determine the exact nature of the role and the powers to be exercised by the traditional monarch. After the elections, however, there was a breakdown in the relationship between King Goodwill Zwelithini and Chief Buthelezi of Inkatha. No concerted efforts have since been made to define the role of the monarch as anything other than a ceremonial figure. However the issue of international mediation has erupted into a major constitutional conflict between Inkatha and the ANC. Whilst the issue of the Zulu monarchy as an institution is one of the issues on the agenda, it seems that Inkatha's main objective in insisting on mediation is to secure agreement on greater powers for the provinces. They further argue that the ANC is reneging on the agreement by failing to facilitate the mediation. The ANC are resisting mediation primarily on the ground that it is the task of the constitutional assembly to draft the constitution and this vital function should not be delegated to a group of foreign experts. Inkatha, in an effort to put further pressure on the ANC, pulled out of the Constitutional Assembly.

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[26] Constitution of the Republic of South Africa Amendment, Act 2 of 1994, Chapter 11A.

[27] Constitution of the Republic of South Africa Second Amendment, Act 3 of 1994, s.1.

It would seem that there are procedural and substantive dimensions to this problem. Clearly if an agreement as to mediation was reached it must be respected. However, on a substantive level, it is hardly possible that mediation would achieve anything if one of the parties is intractably opposed to the process. Further, the "South African solution" was achieved by South Africans negotiating between themselves. Thus the recent developments of bilateral negotiations between Inkatha and the ANC is the only real way of resolving this issue. It would have the substantive benefit to Inkatha of having a one-on-one debate with the ANC rather than just being a party with 10 per cent support in the constitutional assembly.

B. THE DIVISION OF POWERS

As part of the compromise it was decided to allocate original powers in respect of the same subject matter concurrently to both the provinces and the national legislature. Provinces have jurisdiction, within their boundaries, over matters listed in schedule 6[28] and are also competent to enact laws that are reasonably necessary for or incidental to the effective exercise of these powers.[29] The national legislature, in addition to matters listed in schedule 6, has exclusive jurisdiction in respect of the residue of powers.[30]

The cardinal question of which law is to take precedence in the event of a conflict is dealt with in section 126. The constitution originally stated that an act of the national legislature shall prevail over a provincial law if one of the circumstances listed in paragraphs (a) to (e) exists. This section was amended to provide:[31]

> A law passed by the provincial legislature in terms of this constitution shall prevail over an act of parliament which deals with a matter referred to in subsection (1) or (2) except in so far as —
>
> a) the Act of Parliament deals with a matter which cannot be effectively regulated by provincial legislation.

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28 *Supra* note 21.

29 Section 126 (2) and (3) of the Interim Constitution.

30 Section 126(2A) of the Interim Constitution.

31 Section 2 of the Constitution of the Republic of South Africa Amendment, Act 2 of 1994. The amendment also deleted any express reference to the expression "concurrent".

b) the Act of Parliament deals with a matter that, to be performed effectively, requires to be regulated or co-ordinated by uniform norms or standards that apply generally throughout the Republic.

c) the Act of Parliament is necessary to set minimum standards across the nation for the rendering of public services.

d) the Act of Parliament is necessary for the maintenance of economic unity, the protection of the environment, the promotion of interprovincial commerce, the protection of the common market in respect of the mobility of goods, services, capital or labour, or the maintenance of national security; or

e) the provincial law materially prejudices the economic, health or security interests of another province or the country as a whole or impedes, the implementation of national economic policies.

The core conflict was thus resolved by giving the provinces original, though not exclusive powers, and allowing for a generous override clause in favour of the national legislature in the event of a conflict. The vitally important and urgent reconstruction and development plan needs to be implemented with the acquiescence and active support of the provinces. However provincial obstruction of the policy can be overridden. It is ironic that the first real conflicts have occurred between the ANC controlled PWV administration and Mr Joe Slovo, the ANC Minister of Housing at the national level.[32]

The constitutional amendment resulted in a change of onus, requiring the national legislature to satisfy the overriding criteria in order to establish its supremacy. Clearly some of the overriding criteria overlap.

C. ANALYSIS OF THE CRITERIA JUSTIFYING THE OVERRIDE CLAUSE

In order to succeed under paragraph (a), the national legislature will have to demonstrate that either because of the nature of the subject matter or

[32] Mr. Dan Mofeking, the housing minister of the PWV announced that the arrears in respect of rentals and service charges were to be written off in certain "coloured areas" in the PWV. This declaration which was made after violent protests were coupled with a promise to transfer government homes to the people that occupied them. This was done without the consent of the national housing ministry which publicly questioned the wisdom of these unilateral actions. The act of benefitting some segments of the community would be at the cost of the "poorest of the poor." Mr. Mofeking has backed down from his ill-advised generosity. See *Business Day* (18 September 1994).

because of the lack of suitable provincial structures the matter cannot be effectively regulated by provincial legislation. As with paragraph (b), the constitutional court will be tasked with the duty of determining the definition of "effectively." It would seem that paragraph (a) would be relied upon if there is sufficient evidence to warrant a finding of inability on the part of provinces to effectively perform. It may thus be a criteria relied upon retrospectively as a result of incompetent provincial performance.

In order for the national legislature to successfully rely on paragraph (b), it must demonstrate how the effective implementation of the legislation would be prevented by the lack of uniform norms and standards applicable throughout the Republic. The width of paragraph (c) will depend on the interpretation given by the court to the word "necessary." At one end of the continuum, "necessary" may be interpreted as "required" and, at the other end, as "indispensable." This determination may be particularly important in respect of paragraph (d) where there is a list of criteria limited by the jurisdictional fact of necessity. It is submitted that the more restricted interpretation of "indispensable" accords more with the sentiments conveyed by the use of "necessary" in the limitation clause.[33] Clearly in the context of the limitation clause, the "necessary standard," places a more exacting and demanding onus upon the party relying on the limitation clause. Thus a similar interpretation may be given to "necessary" in the context of the override clause. The criteria allowing for the override in paragraph (d) are wide ranging. It expressly includes:

a) the maintenance of economic unity

b) the promotion of interprovincial commerce

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[33] Section 33(1) of the Interim Constitution provides:
The rights entrenched in this chapter may be limited by a law of general application, provided that such limitation —
a) shall be permissible only to the extent that it is -
i) reasonable; and
ii) justifiable in an open and democratic society based on equality and freedom;
b) ..., and provided further that any limitation to-
aa) a right entrenched in section 10, 11, 12, 14(1), 21, 25, or 30(1)(d) or (e) or (2); or
bb) a right entrenched in section 15, 16, 17, 18, 23, or 24, in so far as such right relates to free and fair political activity, *shall in addition to being reasonable as required in paragraph (a)(i), also be necessary* [emphasis added].

c) the protection of the common market in respect of the mobility of goods, services, capital or labour.

However the experience in the USA has demonstrated that the context in which the term "necessary" is used may determine its meaning. Article 1(8) of the US constitution empowers congress to make all laws which are *necessary* and proper for carrying out the enumerated powers. Thomas Jefferson argued that congress was only allowed those powers that were necessary and not just convenient for carrying out the enumerated powers. On this interpretation this power would be restricted to passing laws which are indispensable and without which the listed powers would be nugatory. Alexander Hamilton, on the other hand, was of the view that the question was simply whether the means to be employed had a natural relation to any of the acknowledged objects.[34] In *McCulloch* v. *Maryland*[35] Marshall C.J. accepted Hamilton's view:[36]

> Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adopted to that end, which are not prohibited but consistent with the letter and spirit of the law, are constitutional.

Thus "necessary" within this context was interpreted to refer to means that are appropriate to attain the permissible goals. However "necessary" within the context of limiting certain fundamental rights has been interpreted as incorporating the strict scrutiny test. This would require the court not to defer to the other branches of government, but to insist on a compelling government interest which justifies the infringement and which is tailored as narrowly as possible.[37] The drafting of the Interim Constitution of South Africa almost floundered on the division of powers between the provinces and the central government. Similar tensions are occurring during the drafting of the final constitution. Thus it is imperative that the court's interpretation acknowledge that the override clause is one of the fundamental compromises agreed to in the Interim Constitution. Any interpretation must give expression to the substance of the agreement and thus cannot totally emasculate the override clause.

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34 L. Tribe, *American Constitutional Law*, 2nd ed. (Mineola, N.Y.: Foundation Press, 1988) at 301.

35 17 U.S. (4 Wheat.) 16 (1819).

36 *Ibid.* at 421.

37 Nowak, Rotunda and Young, *supra* note 10 at 530.

Clearly, precedents of the United States courts dealing with the "commerce clause"[38] will be used as guides in order to determine the extent and parameters of the override criteria. Other criteria refer to the:

a) the protection of the environment

b) the maintenance of national security.

In paragraph (e), the jurisdictional fact requires the provincial law to "materially prejudice" other provincial or national interests. But, in order to prevent frustration of the reconstruction and development programme, national legislation will take precedence over provincial legislation that impedes the implementation of national economic policies.

Clearly the mere *ipse dixit* of the national legislature that one of the above paragraphs has been satisfied will not suffice. The national legislature will have to demonstrate on objective grounds and satisfy the court that one or more of the above criteria apply in justifying invocation of the override provision.

The override clause thus drags the court into making political and quasi-political decisions. Both the jurisdictional facts of effectiveness and necessity make this unavoidable. The Constitutional Court is entrusted with the role of acting as sole arbiter in disputes over jurisdiction between the national and provincial organs of government.

D. THE CONSTITUTIONAL COURT

Early in the negotiation process, the need for a fresh new court untainted by the legacy of apartheid was accepted. If judges appointed by the previous regime were to set aside legislation passed by the democratically elected legislature, the legitimacy of the process of judicial review would be seriously questioned and challenged. The Constitution vests both first instance and

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[38] Section 8(3) of the Constitution of the USA provides:

The Congress shall have the power:

To regulate Commerce with foreign Nations, and amongst the several States, and with the Indian Tribes.

See *Katzenbach* v. *McClung* 379 U.S. 294 (1964) and *Perez* v. *United States* 402 U.S. 146 (1971).

appellate jurisdiction in the Constitutional Court.[39] The Constitutional Court has exclusive jurisdiction in respect of:

a) the constitutionality of an act of parliament, irrespective of whether such law was passed before or after the commencement of this constitution

b) the constitutionality of any bill before parliament

c) any dispute of a constitutional nature between the provincial and national levels of government.

The Supreme Court may have jurisdiction in respect of the above mentioned matters if the parties to the litigation consent to the jurisdiction of the court. Thus, generally, the Constitutional Court is entrusted with the vital task of determining whether the override criteria have been satisfied and resolving disputes between the provincial and national levels of government. It is vitally important that members of this court not be regarded as political appointees.

In this regard it is fortunate that the initial proposal of a court appointed by the executive was rejected in favour of a more impartial selection process. The President of the Court is appointed by the President in consultation with the Cabinet and the Chief Justice.[40] Four judges are appointed from the ranks of existing judges of the Supreme Court by the President in consultation with the Cabinet and the Chief Justice.[41] The remaining six are judges appointed by the President in consultation with the cabinet and the President of the Court from a list of ten appointees drawn up by the Judicial Services Commission. The Judicial Services Commission comprises representatives from the ranks of judges, attorneys, advocates, academics, and four senators.[42]

E. FISCAL INDEPENDENCE OF THE PROVINCES

If the funding of the province is at the sole discretion of the national government, one may have a unitary state in elaborate disguise.

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39 Sections 98 and 101 of the Interim Constitution deal with the jurisdiction of the Constitutional and Supreme Courts.

40 Section 97(3) of the Interim Constitution.

41 Section 99 (3) of the Interim Constitution.

42 Section 105 of the Interim Constitution.

Provinces are entitled to raise taxes, levies and duties except income tax, value added tax or any other forms of sales tax.[43] Most of the revenue of the national fiscus is derived from income tax and value added tax. Provinces are entitled to levy taxes, other than income tax and VAT, provided that they are authorized to do so by an act of the national legislature and provided that the tax does not discriminate against non-residents of the province who are South African citizens.[44] The provinces have exclusive competence within the province to levy taxes on casinos, gambling, wagering, lotteries and betting.[45] The limited power of the provinces to levy taxes is in the final instance permissible only to the extent that it does not detrimentally affect national economic policies, inter-provincial commerce or the national mobility of goods, services, capital and labour.[46] Provinces are not entitled to raise loans to service current expenditure, but are entitled to raise loans for capital expenditure provided that it is done within the framework of norms laid down by an act of the national legislature.

Each province is entitled to an "equitable share of the revenue collected nationally to enable it to provide services and to exercise and perform its powers and functions."[47] In order to prevent the under-funding of some provinces by national government, an act of parliament shall fix a percentage of the income tax, value added tax, and fuel tax, collected nationally which shall be allocated to each province. The allocated percentage shall be fixed after taking into account the national interest and recommendation of the Financial and Fiscal Commission.[48]

Section 155 stipulates the criteria that must be taken into account in determining whether the allocation of revenue to a particular province is equitable. It is submitted that the issue of whether a particular province has been allocated an equitable share of the revenue is a justiciable issue and within the jurisdiction of the Constitutional Court. Thus the ability of the national government to financially punish a recalcitrant province is severely limited.

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43 Section 156 of the Interim Constitution.
44 Section 156 (1) (a) and (b) of the Interim Constitution.
45 Section 156(1b) introduced by Act 2 of 1994.
46 Section 156 (2) of the Interim Constitution.
47 Section 155(1) of the Interim Constitution.
48 Section 155(3) of the Interim Constitution.

F. AMENDING THE CONSTITUTION

Unlike previous South African constitutions, the Interim Constitution requires a special majority if it is to be amended. The Constitution may only be amended if two-thirds of the total number of members of both houses approve the amendment. Any amendment to the override clause or any change to the powers allocated to the executive authorities of the province is only permissible if the amendment is approved by both houses sitting separately by a two-thirds majority. The boundaries and legislative competence of a province shall not be amended without the consent of the relevant provincial legislature.[49]

III. CONCLUSION

No useful purpose is served by listing the elements of federalism and ticking off the features of the South African Interim Constitution that accord with these features. It is more important to ascertain the purpose and goals of a federal constitution and determine whether the South African Interim Constitution can attain those purposes and goals. As stated earlier, one of the main goals must be a diffusion of power together with checks and balances. Although the provinces are not granted exclusive powers, they are granted original powers which are subject to the override clause. Like the Canadian constitution and unlike the U.S. and Australian Constitutions, our Constitution granted enumerated powers to the provinces and the residue to the national government. The true extent of provincial autonomy will depend on the interpretation given to the override clause. Political factors may also have an impact. Recently, premiers of the different provinces including ANC members, have given notice that the powers allocated to them will be carefully guarded. They, together with their fellow provincial parliamentarians, have been elected to address the concerns of the region and all indications are that they will robustly exercise their functions. They are unlikely to let others make local decisions after fighting so strenuously for this very right.

The override clause provides the only means by which the national legislature may legislate within the jurisdiction granted to the province and contrary to the wishes of the province. The national legislature would further have to convince an independent arbiter that the criteria necessary to activate

[49] Section 62 of the Interim Constitution.

the override clause have in fact been satisfied. All other disputes between the provincial and national government are adjudicated upon by the Constitutional Court. Article 250 of the Indian Constitution provides that if a state of emergency is declared by the President, Parliament shall have the powers, during the emergency, to legislate in respect of matters within the exclusive competence of the state. This enables India, when threatened by internal or external disturbances, to revert to a unitary state.[50] Whilst the President of South Africa is given the power to declare a state of emergency and make regulations binding throughout the country,[51] no power is given to the national legislature to suspend the legislative competence of the province and substitute itself for the provincial legislature as the provincial law-making body.

A rigid constitution, requiring the approval of the Senate and in some instances the provinces themselves, makes wholesale amendments and redirection of powers difficult. Legal and political factors may, in combination, result in the Constitution being more federal in character than it at first sight appears. In addition to the constraints mentioned earlier there are other structural constraints in the constitution which are designed to prevent abuses of power, thus meeting one of the key concerns of the federalists. These include a justiciable bill of rights with specific provisions regarding administrative control, a constitutionally sanctioned Public Protector (ombudsman), a Human Rights Commission and a Constitutional Court staffed by respected jurists. It is thus vital that the process used in making these appointments is both seen to be, and is, impartial. In the final analysis the efficacy of these constraints will depend upon the independence, integrity, and abilities of the people that staff these institutions.

It would have been counter-productive to simply write a "pure" federal constitution for South Africa without taking cognisance of factors which militate against it. One of the main dangers is the impetus that such a constitution may give to secessionist movements. Regional, tribal or race-based political groupings with limited national support may find that the secession option best serves their parochial political interests. The pursuit of this option, given the volatility in certain areas of the country, is likely to endanger the very fabric of this society. Great consternation was caused in KwaZulu/Natal by the recent disclosure of a secret Inkatha document that was

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50 H.M. Seervai, *Constitutional Law of India*, 4th ed. (Bombay: Tripathi, 1991) at 290.

51 Section 34 of the Interim Constitution.

interpreted by some journalists as a "breakaway document."[52] Secession is not viable for KwaZulu/Natal from an economic perspective and will be inimical to efforts aimed at reducing violence in this province. The Constitution needs to spell out in substance that South Africa is a unified state and will remain so.

The real test is whether the provinces are given sufficient autonomy and power to independently and satisfactorily govern within their borders. The list of powers contained in schedule 6 are extensive. However the issue is whether the override clause can be used to emasculate provincial power. This would depend on the interpretation given to section 126 by the Constitutional Court. The distribution of power between the provinces and the federal government in the Canadian Constitution appears to be more favourable to the federal government than the constitution of the USA. However due to the different positions regarding the division of powers adopted by the Supreme Courts of Canada and of the U.S., these positions are effectively reversed.[53] The South African Constitutional Court in interpreting section 126 would have to take cognisance of the fact that respect for provincial powers is one of the principles that underpins the Interim Constitution. The international experience teaches that words alone in a constitutional document are no guarantee that the drafters' intent will be perpetually respected.

Given these factors, it is submitted that the Interim Constitution, in principle, does strike the necessary balance between the need for coordinated and decisive action on the one hand and the absolute necessity to prevent an over-concentration of powers and safeguards for the autonomy of the provinces on the other. The Constitution was written for South Africa and seeks a solution applicable to South Africa.

[The Constitution of the Republic of South Africa Bill (6 May 1996) provides a revised framework for the division of responsibilities between the central and provincial governments. Schedule 5 of the new Constitution enumerates areas of exclusive provincial responsibility, while schedule 4 enumerates concurrent areas of jurisdiction between the central and provincial governments. As in the

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52 Editorial of the *Sunday Tribune* (20 May 1995). The document has been interpreted as having as its end goal a confederation as opposed to a federation. Inkatha have denied that the document advocates secession and have argued that it is a "discussion document".

53 P. Hogg, *Constitutional Law of Canada*, 3rd ed. (Scarborough, Ont.: Carswell, 1992) at 112.

Interim Constitution, the new Constitution (section 146) details criteria for determining central paramountcy in the event of a conflict between central and provincial laws in areas of concurrent jurisdiction. Tipping the balance in favour of central paramountcy, there is a presumption of central "necessity" in certain cases where the legislation has been approved by the National Council of the Provinces (NCOP). The NCOP replaces the interim Constitution's Senate. The NCOP has a veto role as regards central legislation in the realm of concurrent areas of jurisdiction and an advisory capacity only as regards exclusively central matters

The division of powers between the central government and provincial governments is one of the issues which was debated in the certification process. It was argued before the Constitutional Court that this division of powers violates constitutional principles XVIII and XXI, inclusive. The Constitutional Court is charged with the responsibility of ensuring that the text of the Constitution complies with the principles listed in schedule 4. Judgement of the Court is awaited on this and other issues - Eds.]

THE CONSTITUTIONAL COURT OF SOUTH AFRICA: AN INTRODUCTION

Patric Mtshaulana* & Melanie Thomas**

The constitutional law of South Africa, like the nation itself, is undergoing monumental change. Under the present interim Constitution a new Constitutional Court was created to deal exclusively with constitutional matters. The authors provide an introduction to this Court, outlining the composition, jurisdiction, and procedures of the Court, and discussing past decisions of the Court. The authors emphasize that although the new Constitutional Court has looked to foreign judgments and international human rights jurisprudence — such as the Canadian Charter of Rights and Freedoms — for guidance, it has consciously developed an indigenous jurisprudence based on South African values.

À l'image du pays lui-même, le droit constitutionnel sud-africain vit une transformation monumentale. Dans le cadre de la Constitution provisoire actuelle, un nouveau tribunal constitutionnel a été créé pour traiter exclusivement des questions constitutionnelles. Les auteurs présentent cette cour, sa composition, son domaine de compétence et ses procédures, et examinent ses décisions antérieures. Ils soulignent que, bien que le nouveau tribunal s'inspire des jugements rendus à l'étranger et de la jurisprudence internationale en matière des droits de la personne — la Charte canadienne des droits et libertés notamment, il s'efforce d'élaborer sa propre jurisprudence, enracinée dans les valeurs sud-africaines.

I. INTRODUCTION

On 14 February 1995, the new Constitutional Court of South Africa was officially inaugurated by President Nelson Mandela. The Minister of Justice, Mr. Dullah Omar, said on this occasion that:[1]

> It was a long, long journey that brought us here, a journey full of suffering and pain. A journey that was so long and so arduous that many died in making it. But there was one thing that sustained us on that journey. Hope. The hope that, one day, in South Africa, we would win human rights for all. The belief that, one day, the cry that the people of South Africa sent out to the world in 1955 would at last be heard: 'That South Africa belongs to all who live in it, black and white, and that no government can justly claim authority unless it is based

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1 "Address by Minister of Justice, Mr. Dullah Omar at the ceremony marking the Inauguration of the Constitutional Court" (Johannesburg, 14 February 1995) [unpublished].

on the will of the people.' Today, forty years after the Congress of the People held at Kliptown, we come together to inaugurate an institution that will have, as its most sacred task, the guarding of the rights of all South Africans.

The Constitutional Court, as the culmination in many ways of that 'long journey' and the starting point for a fresh route towards a different future, bears a heavy responsibility: the emblem of the Court depicts a group of people, black and white, sheltered under the protective branches of a tree. In the paradigm of legal theory and in the popular imagination, the Court is the embodiment of the promise of 'never again.' Of course, the Court is established at present under an interim Constitution and, while it seems inevitable that the new Constitution will contain a bill of rights — the interpretation of which will be informed by the jurisprudence developed under the interim Constitution — and will empower an adjudicative institution of some nature to enforce the Constitution as the supreme law of the country, many details of how the final system will look remain to be decided.

This article is an introduction to the functioning of the Court. The first section deals with the composition, jurisdiction and procedures of the Court and the second section discusses the cases which have been decided thus far. The second section is divided into two subsections; the first deals with four identifiable themes which may already be discerned from the Court's first year of constitutional jurisprudence and the second briefly outlines the substantive constitutional principles decided in those cases.[2]

II. THE CONSTITUTIONAL COURT

A. THE APPOINTMENT OF JUDGES

The Constitutional Court consists of the President of the Court, his or her Deputy[3] and nine other judges. The President of the Court is appointed by the President of the Republic in consultation with[4] the Cabinet, after consultation

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2 It should be emphasised at the outset that we are employees of the Court and, accordingly, it would be inappropriate to do more than provide an introductory descriptive piece for those who are unfamiliar with South African constitutional law.

3 The appointment of a Deputy President was provided for by section 1 of the Constitution of Republic of South Africa Second Amendment Act, Act 44 of 1995.

4 According to section 233(3) of the Constitution of the Republic of South Africa, Act 200 of 1993 [hereinafter *"Constitution"*], the phrase "in consultation with" means "with the concurrence of."

with[5] the Chief Justice[6] and the Judicial Service Commission. For the purposes of the appointment of the first President of the Court, which took place before the establishment of the Judicial Service Commission, the consultation with that Commission is dispensed with by the Constitution;[7] the President had only to consult the Cabinet and the Chief Justice.

After appointing the President of the Court, the President of the Republic has to appoint four additional judges to the Court from the ranks of the judges of the Supreme Court. He makes the appointments in consultation with the Cabinet and with the Chief Justice.[8]

Because the Judicial Service Commission plays such an important role in the appointment of the judges of the Court, it is important to note the composition and role of this body. The Commission is a body established under section 105 of the Constitution. It consists of the Chief Justice, the President of the Court, one Judge President designated by the Judges President,[9] the Minister of Justice, two practising advocates designated by the advocates' profession, two attorneys designated by the attorneys' profession, one professor of law designated by the deans of all the law faculties at South African universities, four senators, and four persons who should be either practising attorneys or advocates designated by the President in consultation with the Cabinet. In general, the function of the Judicial Service Commission is to make recommendations regarding the appointment, removal, terms of office and tenure of the Supreme Court and

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5 Section 233(4) of the *Constitution*, *supra* note 4 provides that the phrase "after consultation with" means "such decision shall be taken in good faith after consulting and giving serious consideration to the views of such other functionary."

6 The court structure of South Africa consists of a Constitutional Court headed by the President of the Court, the Supreme Court, consisting of the Appellate Division and provincial and local divisions, headed by the Chief Justice, and the magistrates' courts.

7 Section 97(2)(a), read with section 99(6) of the *Constitution, supra* note 4 specifically dispenses with consultation with the Judicial Service Commission in relation to the first President appointed to the Court.

8 Section 99(3). It is important to note that these 4 judges are appointed without consulting the Judicial Service Commission. [If the Constitution of the Republic of South Africa Bill (6 May 1996) becomes law, there will be some changes in the procedure for the appointment of judges. The JSC and leaders of the parties represented in Parliament will be involved in the appointment of both the President of the Court and all the other judges of the Court including those that are appointed from the ranks of the Supreme Court judges — s.174.]

9 Every provincial division of the Supreme Court is headed by a Judge President.

Constitutional Court judges.

While the Judicial Service Commission has to be consulted in the appointment of the President of the Court and the other four judges, it plays an even greater role with regard to the appointment of the remaining six judges of the Constitutional Court. It and it alone has the power to invite nominations from the general public. From the nominations, it compiles a short list of twenty-five names and interviews the short-listed candidates. The interviews are public, but cameras are not allowed. On the basis of the interviews it then compiles a short list of ten names which is presented to the President. The President appoints six judges from the shortlist of ten.

Persons eligible to be nominated and appointed must be either: (i) judges of the Supreme Court, (ii) persons who are qualified to be admitted as advocates or attorneys and who have practised as such for a cumulative period of ten years or who have lectured in law at a university for that period, or (iii) persons who by reason of their experience or training have expertise in the field of constitutional law, provided that no more than two persons from this category may be members of the Court at the same time. The procedure for the appointment of judges of the Constitutional Court is similar to that for the appointment of the judges of the Supreme Court. The remuneration of all judges is guaranteed in section 104(2) of the Constitution[10] and a judge may only be removed from office by the President, "on grounds of misbehaviour, incapacity or incompetence, established by the Judicial Service Commission"; his or her removal must furthermore be requested by both the National Assembly and the Senate.[11]

The mode of appointment of judges differs from the manner in which judges were appointed under the old dispensation. Then, as in Canada now,[12] the State President, who was the head of the executive, had the power to appoint judges and had only to consult his cabinet. The new procedure allows for a greater involvement of the legal profession in the appointments and the interviews allow

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10 Section 104(2) of the *Constitution* provides: "Judges of the Constitutional Court and the Supreme Court shall receive such remuneration as may be prescribed by or under law, and their remuneration shall not be reduced during their continuation in office."

11 Section 104(4) of the *Constitution, supra* note 4.

12 According to P.W. Hogg, *Constitutional Law of Canada*, 3rd ed. (Toronto: Carswell, 1992) at 206-07, judges of the Supreme Court are appointed by the Governor in Council.

for some transparency in the process. All in all, the process by which judges are appointed is far more transparent: the executive retains the power to appoint, but that power is constrained by the extensive consultation requirements. Arbitrariness is minimized by the fact that the executive does not control the compilation of the list from which appointments have to be made, and by the greater involvement of the legal profession.

Another significant departure from the past in South Africa is the appointment of attorneys and advocates who are not members of the Bar.[13] In the past, to be appointed a judge one had to be a Senior Counsel. Attorneys and academic lawyers were completely excluded from appointment to the bench. This new framework for the appointment of judges is likely to contribute a different perspective to the deliberations of the Court and will in all probability lead to a closing of the gap between the academic profession and legal practice, both of which stand to be enriched by the new system. Allowing attorneys right of audience in the Court will undoubtedly make the Court more accessible to the public.

The appointment of judges was certainly the subject of some of the most heated debates at the multi-party negotiating process at Kempton Park. There were those who advocated that Parliament should have the power to appoint judges; some wanted the Constitutional Court judges to be appointed from the ranks of existing judges; others thought that the judges of the Constitutional Court should be drawn from outside the existing judiciary entirely. The formation of the Judicial Service Commission was a delicate compromise between these extremes[14] and remains controversial. Although only five of its members are politicians,[15] the President has the power to appoint the four attorneys and advocates and, although they may not necessarily be party members, the President is not constrained from appointing persons who might be sympathetic to his views. Thus, although direct political intervention in the appointment process has been minimized, it remains to be seen whether the present system will be retained in the final Constitution, given the significant

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13 In South Africa the legal profession consists of the Side Bar for attorneys and the Bar for advocates. Only members of the latter were eligible for appointment as judges in the past. Members of the Side Bar are in direct contact with the general public, whereas members of the Bar have to be briefed by an attorney first and never take instructions directly from their clients.

14 *The Weekly Mail and Guardian* (30 September 1994) at 37.

15 The Minister of Justice and the four senators.

influence which a single dominant political party is still able to extend.[16] Another question as to the future system is whether or not all candidates for appointment will be subjected to public interviews. Although Kriegler J. found it a 'bit embarrassing to have to sing for my supper,'[17] O'Regan J. indicated in her interview that the split process whereby some judges were interviewed and others were not was the product of a compromise, and that, in the future, all candidates should be subjected to the grilling process.[18]

Presently, the President of the Constitutional Court is Justice Arthur Chaskalson, a distinguished jurist with a long track record as a human rights lawyer. He was a member of the defence team which defended Nelson Mandela and his colleagues in the Rivonia trial in 1964 and was a founder of the Legal Resources Centre, a human rights organization which defended detainees and accused persons in the 1980s. The Deputy President of the Court is Justice Ismail Mahomed, Chief Justice of Namibia, Judge of the High Court of Lesotho and Swaziland, and a distinguished human rights lawyer. The judges drawn from the Supreme Court presently serving at the Court are: Justice Richard Goldstone, who had been appointed to chair the Goldstone Commission which investigated the 'third force' activities of the army and the police in the period before the elections, and who is presently serving as prosecutor for the International Criminal Tribunal for the former Yugoslavia and Rwanda,[19] Justice Johan Kriegler who was a judge of the Appellate Division and chairman of the Independent Electoral Commission which oversaw the first democratic elections, and Justices John Didcott, Tholakele Madala and Laurie Ackermann who are judges from the Natal, Transkei and Cape Provincial Divisions, respectively. These judges had distinguished themselves as vigorous advocates for the protection of human rights during the apartheid era. In 1987, Ackermann J.

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16 [Section 174(3) of the Constitution of the Republic of South Africa Bill (6 May 1996) provides that the President, "after consulting the Judicial Service Commission and leaders of parties represented in the National Assembly," appoints the President and Deputy President of the Constitutional Court. Section 174(4) provides that the President, "after consulting the President of the Constitutional Court and leaders of parties represented in the National Assembly" appoints other judges from lists provided by the Judicial Service Commission — Eds.]

17 *The Citizen* (6 October 1994) at 4.

18 *The Star* (4 October 1994) at 3.

19 The President appointed several acting judges in his place. Among them are Kentridge A.J. who became famous for his role as the defence lawyer in the Steve Biko inquest in the 1970s. He is presently a barrister in England and has served on the bench in Botswana. The other two acting judges were Trengove and Ngoepe J.J.

resigned his post as a judge and inaugurated the Harry Oppenheimer Chair in Human Rights Law at the University of Stellenbosch, the first of its kind in South Africa; Madala J. had been active as an advocate in the Transkei and had played an important role in establishing anti-apartheid advocates' forums; and Didcott J. is renowned for several decisions protective of human rights which were ultimately overturned by the Appellate Division.[20] In one of these decisions he proclaimed that indigent accused had a right to counsel in order to ensure a fair trial. The other four positions on the Court were filled by prominent academics and advocates. Justice Pius Langa was a Senior Counsel and noted defender of human rights who also served as President of the National Association of Democratic Lawyers. Justices Yvonne Mokgoro and Kate O'Regan, the only women on the Court, were both prominent academics with a reputation for outstanding scholarship and active involvement in human rights issues. Mokgoro J. is the first black female judge in the country. After completing her studies, she worked as a public prosecutor and later became a law professor. As a researcher attached to the Centre for Constitutional Analysis of the Human Sciences Research Council, she conducted extensive research and published many articles on human rights issues. O'Regan J. had a distinguished academic career and, as an attorney specializing in labour issues, she was often in contact with the problems of ordinary working people. She has published extensively on gender, equality, land redistribution and labour law. Justice Sachs was an advocate who left South Africa after having been detained under the 180 day detention law. He lived in exile and was the victim of a car bomb blast orchestrated by South African security agents in Maputo. In the blast he lost his right hand and survived by a miracle. He has written extensively on constitutional law and human rights and was the senior member of the ANC Constitutional Committee which assisted in the drafting of the Constitution. The term of office of the judges of the Constitutional Court is seven years and is not renewable.[21]

B. CONSTITUTIONAL JURISDICTION

Under the Interim Constitution, the Appellate Division remains the highest

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20 See *infra* note 119.

21 [According to section 176(1) of the Constitution of the Republic of South Africa Bill, (6 May 1996) judges of the Constitutional Court are appointed to non-renewable terms of 12 years, and must retire by age 70 — Eds.]

court of the land on all non-constitutional issues,[22] while the new Constitutional Court is the highest court on constitutional issues. The Constitutional Court has jurisdiction as the court of final instance[23] over all matters relating to the interpretation, protection and enforcement of the provisions of the Constitution. Section 98(2) of the Constitution gives the Constitutional Court exclusive jurisdiction over the following matters:

(i) any inquiry into the constitutionality of any law, including an Act of Parliament, irrespective of whether such law was passed or made before or after the commencement of the Constitution;

(ii) any dispute over the constitutionality of any Bill before Parliament;

(iii) any dispute of a constitutional nature between organs of state at any level of government; and

(iv) the determination of any disputes as to whether any matter falls within its jurisdiction.

According to section 101 of the Constitution, the Supreme Court retains the jurisdiction, including its inherent jurisdiction, which it had before the commencement of the Constitution. While the Appellate Division has no jurisdiction to adjudicate on any matter within the jurisdiction of the Constitutional Court,[24] the provincial and local divisions of the Supreme Court have concurrent jurisdiction with respect to the following constitutional matters:

(i) any alleged violation or threatened violation of any fundamental right entrenched in chapter 3;

(ii) any dispute over the constitutionality of any executive act or administrative act or conduct or threatened executive or administrative act;

(iii) any dispute of a constitutional nature between local governments or between a local and a provincial government;

(iv) any dispute over the constitutionality of a Bill before a provincial legislature; and

(v) the determination of disputes as to whether any matter falls within its jurisdiction.

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22 Section 101(2) of the *Constitution, supra* note 4 reads: "Subject to this Constitution, the Supreme Court shall have the jurisdiction, including the inherent jurisdiction, vested in the Supreme Court immediately before the commencement of this Constitution, and any further jurisdiction conferred upon it by this Constitution or by any law."

23 Section 98(2) of the *Constitution, supra* note 4.

24 Section 101(5) of the *Constitution, supra* note 4.

In all these matters, the provincial or local division of the Supreme Court is the court of first instance and appeals against its decisions lie to the Constitutional Court. With regard to the issues over which the Constitutional Court has exclusive jurisdiction, the provincial or local division of the Supreme Court has no jurisdiction and, if in any matter before it an issue which falls within the exclusive jurisdiction of the Constitutional Court is raised, the local or provincial division may suspend the proceedings and refer the issue to the Constitutional Court.[25]

C. SYSTEM OF JUDICIAL REVIEW

In theory two systems of judicial review are known in constitutional states: the centralized and the decentralized system. A centralized system of judicial review refers to the form of judicial review where a single court has the power to test the validity of legislative instruments. The German Constitutional Court is an example of such a system. It and it alone has the power to declare Acts of Parliament invalid on account of their inconsistency with the Constitution. In France, the Conseil Constitutionnel is also the only organ vested with this power, but its jurisdiction extends only to Bills which have not yet become law. 'Decentralized systems' refers to those forms of judicial review where all the courts at all levels have authority to test the validity of legislative instruments. The United States system of judicial review is decentralized, since lower courts also have jurisdiction to pronounce on constitutional issues if those issues are important and relevant for the determination of the matter they have to resolve. However, the Supreme Court is the court of appeal in all cases where the validity of a statute is in question. In this sense the United States Supreme Court is comparable with the Canadian Supreme Court.[26]

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25 Section 102(1) and (2) of the *Constitution, supra* note 4.

26 However, it must be stressed that there are differences between the two courts' jurisdictions in respect of non-constitutional issues. In the United States, the Supreme Court has held that, except in matters governed by the Constitution, the law to be applied in any case is the law of the state. The federal courts have no constitutional jurisdiction to develop a federal common law in the absence of constitutional issues. (*Erie Railroad Co.* v. *Tompkins*, 304 U.S. 64 (1938)). The position in Canada is different. The Supreme Court of Canada is the highest court of appeal for all provincial law matters and has jurisdiction to develop uniform common law rules for all the provinces of Canada.

Another way of classifying systems of judicial review is to examine whether the courts have a preventive or repressive power of judicial review. 'Preventive power of judicial review' refers to the power of a court to pronounce over a statutory instrument before that instrument becomes law. The French Conseil Constitutionnel has jurisdiction to pronounce over bills before they become law and its decisions are final and binding on all organs, with no appeal lying against them. Repressive judicial review, on the other hand, is exercised by a court which has jurisdiction to declare invalid an existing law which is in conflict with the Constitution. The United States Supreme Court and the German Constitutional Court have repressive powers of judicial review: in the United States the existence of a 'case or controversy' is a jurisdictional prerequisite for the hearing of constitutional issues; the court does not accept jurisdiction if it is being asked to adjudicate over an issue in which there is no adversarial relationship between the parties.[27]

The Constitutional Court of South Africa combines almost all of the above attributes. In the first place, South Africa has a centralized system of judicial review since the Constitutional Court alone has jurisdiction to pronounce on the validity of Acts of Parliament. No other courts, except the provincial and local divisions of the Supreme Court, have jurisdiction to deal with constitutional issues and even their jurisdiction is limited by the fact that they may not pronounce on the validity of Acts of Parliament. The Appellate Division has no jurisdiction whatsoever over constitutional matters.[28] It would appear that the main reason for choosing a centralized system of judicial review was that many felt that the Appellate Division was tainted by a legacy of gross violations of human rights; it had sent many prominent figures in the liberation struggle to the gallows and to prison. As a result, the Court had lost its credibility and legitimacy in the eyes of the majority and it seemed incongruous to vest such a court with the power to decide controversial political and human rights problems. The judicial structure appears, therefore, to attempt a compromise by establishing a special organ with the legitimacy to deal with human rights and

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27 "Embodied in the words 'cases' and 'controversies' are two complementary but somewhat different limitations. In part those words limit the business of federal courts to questions presented in an adversary context and in a form historically viewed as capable of resolution through the judicial process" (*Flast* v. *Cohen*, 392 U.S. 83 (1968) at 94-95).

28 Section 101(5) of the *Constitution, supra* note 4: "The Appellate Division shall have no jurisdiction to adjudicate any matter within the jurisdiction of the Constitutional Court."

constitutional law questions while retaining the Appellate Division's jurisdiction over civil, criminal and other cases. This is clearly expressed by Professor J. van der Westhuizen:[29]

> The legal system is widely alleged to be experiencing a legitimacy crisis. The majority of South Africans have come to perceive the laws of the country, the courts and the police, in fact the legal order as such ... as part and parcel of the apartheid system and an instrument of oppression and exploitation, rather than the embodiment of justice or a system of protection ... The mere possibility of entrusting a new bill of rights to the existing judiciary often invokes serious scepticism as to the bill of rights idea as such and causes the concept of judicial review to be suspected as but another device to perpetuate apartheid and to secure dominant class interests.

A further possible reason for the split jurisdiction was to enable the new democratic order to play a role in the appointment of the judges who were to play such a vital role in the shaping of the new democracy.

Secondly, the Court has both repressive and preventive powers of judicial review,[30] since, apart from the power to determine the validity of Acts of Parliament, it also has jurisdiction to pronounce on the validity of bills which have not yet become law. Thus, in addition to section 98(2)(c) which empowers the court to inquire into the constitutionality of an Act of Parliament, section 98(2)(d) also authorises it to inquire into the constitutionality of a bill before Parliament or a provincial legislature. This power must be distinguished from the power of the Canadian Supreme Court under section 53 of the *Supreme Court Act*, which empowers it to hear and consider questions of law and fact referred to it by the Governor General in Council. The power derives from an Act of Parliament and not from the Constitution. Further, while the decision of the Constitutional Court is binding on everyone, including non-parties, the view in Canada is that the answers to a reference "are only advisory and will have no more effect than the opinions of the law officers."[31] Consequently, the opinion

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29 J. van der Westhuizen, "The Protection of Human Rights and a Constitutional Court for South Africa: Some Questions and Ideas" (1991) 24 De Jure 1. See also papers delivered by J. Dugard, "Judicial Power and a Constitutional Court", A. Chaskalson, "A Constitutional Court: Jurisdiction, Possible Models and Questions of Access" and K. Asmal, "Constitutional Courts: A Comparative Survey" (Papers presented at a Conference entitled "A Constitutional Court for South Africa," Magaliesburg, 1-3 February 1991) [unpublished].

30 Repressive judicial review relates to an existing law. Preventive judicial review, on the other hand, prevents unconstitutional laws from coming into being at all.

31 *Attorney General of Ontario* v. *Attorney General of Canada*, [1912] A.C. 571 at 589.

is neither binding on the parties to the reference nor does it have the same precedential weight as an opinion in an actual case.[32]

D. PROCEDURES FOR GAINING ACCESS TO THE COURT

Before the present Constitution came into force, the power of the courts to inquire into the validity of Acts of Parliament was governed by section 34(3) of the Republic of South Africa Constitution Act, 110 of 1983, which provided:[33]

> Save as provided in subsection (2), no court of law shall be competent to inquire into or pronounce upon the validity of an Act of Parliament.

This section was a codification of a rule established by the courts that, "[i]f a Legislature has plenary power to legislate on a particular matter no question can arise as to the validity of any legislation on that matter and such legislation is valid whatever the real purpose of that legislation is."[34]

The present Constitution has signalled an end to the era of Parliamentary sovereignty. Section 4(1) of the Constitution proclaims that:

> This Constitution shall be the supreme law of the Republic and any law or act inconsistent with its provisions shall, unless otherwise provided expressly or by necessary implication in this Constitution, be of no force and effect to the extent of the inconsistency.

Parliament is now subject to the Constitution and its laws must conform to the Constitution. The power of the court to pronounce on the constitutionality of Acts of Parliament is not limited to the question of the manner and form of legislation; it may also pronounce on the constitutionality of Acts of Parliament if the content of the legislation is in any way in conflict with the spirit, purport or letter of the Constitution.

The only limitation placed on the power of the courts is that not all courts may pronounce on the validity of Acts of Parliament; only the Constitutional Court has this power. Thus, if the constitutionality of an Act of Parliament is in dispute before any court, the matter must be suspended and the issue of the constitutionality of the Act of Parliament referred to the Constitutional Court.

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32 Hogg, *supra* note 12 at 217-19.

33 Subsection (2) contained the manner and form provisions relating to parliamentary procedure.

34 *Collins* v. *Minister of the Interior* 1957 (1) S.A. 552 (A) at 565D.

According to section 102(1) of the Constitution, an issue may be referred to the Constitutional Court if that issue is decisive for the case, the issue is in the exclusive jurisdiction of the Constitutional Court, and the lower court considers it to be in the interests of justice that the issue be referred to the Court. Section 100 of the Constitution makes provision for direct access to the Court, the prerequisites for which are concretised in Rule 17 of the Constitutional Court rules. These requirements are that the matter be of such urgency, or otherwise of such public importance, that any delay necessitated by the use of the ordinary procedures would prejudice the public interest or the ends of justice and good government. Once the Court has made a finding that a law referred to it or a provision thereof is inconsistent with the Constitution, it has full powers to declare such law or provision to be invalid to the extent of its inconsistency.

However, the Court also has the power, under section 98(5) of the Constitution, to suspend the coming into operation of the order of invalidity and instead require Parliament to correct the defect in the law or provision. The law then remains in force pending the correction or the expiry of the period specified within which Parliament was required to correct the defect.[35]

The normal course for accessing the Court, therefore, is either by way of referral from the provincial or local division of the Supreme Court or on appeal from such a court. Because the magistrates' courts have no jurisdiction to handle constitutional issues, whenever such courts are confronted with constitutional issues, they either have to dispose of the matter as if the law whose constitutionality is being questioned was valid, or refer the matter to the local or provincial division of the Supreme Court. The latter court either decides the matter or, if there are issues which are in the exclusive jurisdiction of the Constitutional Court, refers those issues while suspending the proceedings pending the decision of the Court.

The Appellate Division of the Supreme Court is precluded from deciding constitutional issues. It has the power to refer to the Constitutional Court any

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[35] This power was used by the Court in the case of *Executive Council, Western Cape Legislature* v. *President of the Republic of S.A.* 1995 (4) S.A. 877 (C.C.) [hereinafter *Western Cape*] where the Court declared invalid section 16A of the *Local Government Transition Act* and all Proclamations which were made by the President under it. However, the Court gave Parliament 30 days in which to rectify the invalidity. Parliament was on recess at the time, but had to be reconvened and the proclamations legalised by passing them in the form of an Act of Parliament.

issue which is within the jurisdiction of that court. An interesting section of the Constitution which touches on the relationship between the two courts is section 35(3). This section provides that:

> In the interpretation of any law and the application and development of the common law and customary law, a court shall have due regard to the spirit, purport and objects of this Chapter [on fundamental rights].

The question is: who has the jurisdiction to develop the common law? Does the Appellate Division have that power or is that a constitutional issue, in which case the Constitutional Court has jurisdiction? The issue is intricately linked to the difficult question of whether the Constitution applies to relationships between private citizens ('horizontality') and, if so, whether that application is direct (in that constitutional rights may be relied on in horizontal relationships) or indirect (in that the entire legal system should be embued by constitutional values).

III. THE BEGINNINGS OF A CONSTITUTIONAL JURISPRUDENCE

Since its inception in February 1995, the Court has heard 21 matters, has delivered 11 judgments and has, at present, some 11 matters on the roll still to be heard.[36] This section provides an introductory examination of the judgments thus far delivered. Although 11 decisions does not provide a fertile basis for discerning with certainty the existence of trends within the Court's jurisprudence, it is possible to trace an identifiable approach to at least four issues: the appropriate interpretive approach to constitutional adjudication, the proper role for comparative jurisprudence, the utilisation of a 'two-stage approach' to the limitations clause, and the interpretation of the principles enunciated in the limitations clause. However, these approaches are in their infancy and, even where reasonably clear perspectives can be discerned, these are no doubt susceptible to modification as the jurisprudence of the Court grows in depth and sophistication.

A. EMERGING THEMES

1. Constitutional Interpretation

Three clearly identifiable considerations appear to have shaped the nature of

[36] As of December 1995.

constitutional interpretation by the Court. First, a recurrent theme has been the unique context of the South African Constitution. In *S v. Makwanyane*,[37] Mohamed J., as he then was, described the Constitution as follows:[38]

> In some countries, the Constitution only formalises, in a legal instrument, a historical consensus of values and aspirations evolved incrementally from a stable and unbroken past to accommodate the needs of the future. The South African Constitution is different: it retains from the past only what is defensible and represents a decisive break from, and a ringing rejection of, that part of the past which is disgracefully racist, authoritarian, insular, and repressive, and a vigorous identification of and commitment to a democratic, universalistic, caring and aspirationally egalitarian ethos expressly articulated in the Constitution. The contrast between the past which it repudiates and the future to which it seeks to commit the nation is stark and dramatic.

Given the reformative ideal of the Constitution, its dramatic context and the inherent genre of constitutional instruments, the Court has emphasised often that constitutional provisions are to be interpreted generously and purposively[39] and are not to fall victim either to the "austerity of tabulated legalism" or to an interpretation which restricts rights by "reading implicit restrictions into them, so as to bring them into line with the common law."[40]

On the other hand, there has been a strong recognition that the Constitution may not be treated as a document fallen from the sky, splashed onto the existing legal canvas with never a thought for its milieu. In *S. v. Zuma*, Kentridge A.J. warned that "regard must be paid to the legal history, traditions and usages of the country concerned, if the purposes of its constitution are to be fully understood."[41] Although the Court has referred extensively to foreign jurisprudence as an aid to interpreting the chapter on fundamental rights, it has not ignored the equitable principles dormant in our Roman-Dutch common law.[42]

Third, in *S. v. Mhlungu*, Kentridge A.J. pointed out in dissent that, despite the powerful reasons for interpreting fundamental rights generously, the court

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37 1995 (3) S.A. 391 (C.C.) [hereinafter *Makwanyane*].

38 *Ibid.* at para. 262.

39 Although, in *Makwanyane, supra* note 37 at para. 9 n8, Chaskalson P. noted that these two approaches would not always produce identical consequences.

40 *S.v. Zuma* 1995 (2) S.A. 642 (C.C.) [hereinafter *Zuma*] at para. 15, per Kentridge A.J., quoting *Attorney-General* v. *Moagi* 1982 (2) Botswana L.R. 124 at 184.

41 *Ibid.* at para. 15.

42 See, for example, Kentridge A.J.'s judgment in *Zuma*, *supra* note 40.

should not lose sight of the fact that the Constitution remains a legal text, that respect has to be paid to the language used,[43] and that the constitutional injunction to the Court to interpret the Constitution in a manner designed to promote the values underlying a democratic society based on freedom and equality[44] would not be served by "doing violence to the language of the Constitution in order to remedy what may seem to be hard cases."[45] A 'purposive' approach directed the Court to search for the purpose of a specific provision within the context of the Constitution as a whole[46] and might not always accord with a 'generous' interpretation. In *S.* v. *Zuma*, Kentridge A.J. stated that "[i]t cannot be too strongly stressed that the Constitution does not mean whatever we might wish it to mean."[47]

2. The Use of Legal Sources

Section 35(1) of the Constitution enjoins the Court, in interpreting the Constitution, to have regard to public international law and authorises it to consider "comparable foreign case law" and in a great many of the decided cases, there is extensive consideration of international and comparative human rights norms in the determination of concrete disputes. Reference is often made to case law from Canada, Germany, Australia, the United States, Botswana, Namibia, Zimbabwe and the Privy Council, as well as to international instruments such as the *International Covenant on Civil and Political Rights* and the *European Convention on Human Rights*. For example, the similar structure of the *Canadian Charter of Rights and Freedoms*[48] has persuaded the Court to accord substantial recognition to Canadian decisions in areas such as the constitutionality of 'reverse onus' provisions,[49] and the virtually unanimous international rejection of whipping as a form of punishment was an important guide to the interpretation of "cruel, inhuman or degrading treatment or punishment"[50] in our Constitution.

However, the most focused and pertinent attention to foreign case law has

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43 *S.* v. *Mhlungu* 1995 (3) S.A. 867 (C.C.) [hereinafter *Mhlungu*] at para. 78.

44 Section 35(1).

45 *Mhlungu, supra* note 43 at para. 84.

46 *Ibid.* at para. 63.

47 *Zuma, supra* note 40 at para. 17.

48 See discussion of the Limitations Clause in text associated with notes 70-78, below.

49 *Zuma, supra* note 40 at para. 21.

50 Section 11(2).

been in the construction of section 33 of the Constitution, which permits the limitation of rights by law of general application where it is shown to be, *inter alia*, reasonable and justifiable in an open and democratic society based on freedom and equality. In interpreting the meaning of the phrase "justifiable in an open and democratic society based on freedom and equality," the Court has looked to other democracies which might fit this description as a guide to the standards which it ought to set for the fledgling South African democracy,[51] while emphasising that "[t]his evaluation must necessarily take place against the backdrop of the values of South African society as articulated in the Constitution and in other legislation, in the decisions of our courts and generally against our own experiences as a people,"[52] as well as within the boundaries of the text.[53]

The comparative project, however, has not been entirely Eurocentric. In *S.* v. *Williams*, Langa J. noted the special relevance of decisions from the Supreme Courts of Namibia and Zimbabwe, since "[n]ot only are these countries geographic neighbours, but South Africa shares with them the same English colonial experience which has had a deep influence on our law; we of course also share the Roman-Dutch legal tradition."[54]

Moreover, several of the justices have pointed to the importance of not allowing the comparative injunction in the Constitution to blind us to the richness and fertility of our own long-ignored African heritage. In the death penalty judgment, Justices Langa,[55] Madala,[56] Mokgoro[57] and Sachs[58] pointed to the fact that the Constitution requires the Court to have regard to the legal values of *all* sections of South African society, and not merely those proceeding from our colonial heritage. The provision on National Unity and Reconciliation (which can be found as an epilogue to the main text of the Constitution) specifically declares that there is "a need for understanding but not for vengeance, a need for reparation but not for retaliation, a need for *ubuntu* but not for victimisation." Mokgoro J. described the African value of *ubuntu* as

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51 *Coetzee* v. *Government of the Republic of South Africa* 1995 (4) S.A. 631 (C.C.) [hereinafter *Coetzee*].

52 *S.* v. *Williams* 1995 (3) S.A. 632 (C.C.) [hereinafter *Williams*] at para. 59.

53 *Zuma, supra* note 40 at para. 35.

54 *Williams, supra* note 52 para. 31.

55 *Makwanyane, supra* note 37 at para. 223 et seq.

56 *Ibid.* para. 237 et seq.

57 *Ibid.* para. 300 et seq.

58 *Ibid.* para. 365 et seq.

follows:[59]

> Generally, *ubuntu* translates as 'humaneness.' In its most fundamental sense it translates as personhood and morality. Metaphorically, it expresses itself in *umuntu ngumuntu ngabantu*, describing the significance of group solidarity on survival issues so central to the survival of communities. While it envelops the key values of group solidarity, compassion, respect, human dignity, conformity to basic norms and collective unity, in its fundamental sense it denotes humanity and morality. Its spirit emphasises respect for human dignity, marking a shift from confrontation to conciliation. In South Africa *ubuntu* has become a notion with particular resonance in the building of a democracy. It is part of our rainbow heritage, though it might have operated and still operates differently in diverse community settings. In the Western cultural heritage, respect and the value for life, manifested in the all-embracing concepts of 'humanity' and 'menswaardigheid,' are also highly priced.

3. The Dual Enquiry

The South African Constitution, like the Canadian *Charter*,[60] contains a general limitations clause,[61] rather than specific limitations as found, for example, in the *European Convention on Human Rights*. Like the Canadian Supreme Court, the South African Court has adopted a two-stage enquiry into alleged infringements of fundamental rights. The first issue, sometimes referred to as the 'threshold' question, is whether there has been a contravention of a guaranteed right. If there has, the Court must consider whether or not that infringement is justified under the limitations clause.[62] The consequence of this split examination may have important ramifications: in *S* v. *Makwanyane*, Chaskalson P. noted that courts in jurisdictions such as the United States and Hong Kong, whose Constitutions do not contain general limitations clauses, "have been obliged to find limits to constitutional rights through a narrow interpretation of the rights themselves,"[63] whereas the two-stage approach may call for a broader interpretation of the fundamental right, qualified only at the second stage.[64]

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59 *Ibid.* para. 308.

60 *Canadian Charter of Rights and Freedoms*, section 1.

61 Section 33(1) of the *Constitution, supra* note 4. There are, however, noticeable differences between the two: the South African limitations clause has the further condition that no limitation may negate the essential content of the right. Furthermore, although s.33(1) is a general limitations clause, it does not operate at quite the same level of generality as the *Charter*'s limitation clause.

62 *Zuma, supra* note 40 at para. 21; *Makwanyane, supra* note 37 at paras. 100-102; *Williams, supra* note 52 at para. 54; *Coetzee, supra* note 51 at para. 9.

63 *Makwanyane, supra* note 37 at para. 100.

64 *Zuma, supra* note 40 at para. 21.

Furthermore, the division of argument into two stages has the further consequence that the applicant does not bear the onus of establishing that there is no justification for the infringement of his or her right: it is for the legislature, or the party relying on the legislation, to establish this justification and not for the party challenging it.[65]

Despite repeated references to, and adoption of, the 'two-stage approach,' the Court has not yet been confronted with potential complexities as to the relationship between the two provisions. For example, the equality clause incorporates a prohibition against indirect discrimination which, in every other jurisdiction in which the concept of indirect discrimination, or disparate impact, is used, contains a definitionally inherent defence of justification; the relationship between justification at this stage and justification under the limitations section is not at all apparent. In *S.* v. *Williams* Langa J. noted, but expressly left open, the question of possible tensions in the relationship between the threshold question and the limitations clause.[66] However, Sachs J., in his dissenting judgment in *Coetzee*,[67] warned against a tendency of technocratic legalism by counsel in their separation of the two stages and advocated instead a "focus on what has been called the synergetic relation between the values underlying the guarantees of fundamental rights and the circumstances of the particular case."[68] He noted that the question of limitation would have to be decided in the light of the profundity of the interest protected, the nature of the infringement and the propriety of limitation[69] and it would thus be inappropriate to split the two stages in a "mechanical and sequentially divided way."[70]

4. The Limitations Clause

Section 33(1) permits the limitation of rights where that limitation is by law of general application and it is shown that the limitation is reasonable, justifiable in an open and democratic society based on freedom and equality and that it does not negate the essential content of the right. In relation to some rights,[71] the

65 *Makwanyane, supra* at note 37 para. 102 and para. 184.

66 *Williams*, *supra* note 52 at para. 56.

67 *Coetzee, supra* note 51.

68 *Ibid.* at para. 46.

69 *Ibid.* at para. 45.

70 *Ibid.* at para. 46.

71 The right to dignity (section 10); the right to freedom and security of the person (section 11); the right to be free from servitude and forced labour (section 12); the right to freedom of religion, belief and opinion (section 14[1]); political rights (section

limitation moreover must be necessary. As previously noted, the onus is on the party seeking to uphold the provision under attack to show that it meets the criteria in the limitations clause.

The *dictum* by Chaskalson P. in *S.* v. *Makwanyane* (the death penalty case) has already, in this formative stage of the Court's existence, become something of a *locus classicus* with regard to the interpretation of section 33(1) and is worth citing at length:[72]

> The limitation of constitutional rights for a purpose that is reasonable and necessary in a democratic society involves the weighing up of competing values, and ultimately an assessment based on proportionality. This is implicit in the provisions of s.33(1). The fact that different rights have different implications for democracy and, in the case of our Constitution, for 'an open and democratic society based on freedom and equality,' means that there is no absolute standard which can be laid down for determining reasonableness and necessity. Principles can be established, but the application of those principles to particular circumstances can only be done on a case-by-case basis. This is inherent in the requirement of proportionality, which calls for the balancing of different interests. In the balancing process the relevant considerations will include the nature of the right that is limited and its importance to an open and democratic society based on freedom and equality; the purpose for which the right is limited and the importance of that purpose to such a society; the extent of the limitation, its efficacy and, particularly where the limitation has to be necessary, whether the desired ends could reasonably be achieved through other means less damaging to the right in question. In the process regard must be had to the provisions of s.33(1) and the underlying values of the Constitution, bearing in mind that, as a Canadian Judge has said, 'the role of the Court is not to second-guess the wisdom of policy choices made by legislators.'

This approach has been referred to and followed often.[73] In *Coetzee and Matiso*, Sachs J., in a separate judgment, expanded in detail on the meaning of each element of the test. He held that the meaning of 'reasonable' implied more than a rational connection between the purpose to be served and the invasion of

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21); the rights of detained, arrested and accused persons (section 25); the right of children not to be subject to neglect or abuse, or to exploitative labour practices (section 30[1][d] and [e]) and children's rights in detention (section 30[2]) all require a showing of necessity to justify limitation. Necessity is also required for the following rights insofar as they relate to free and fair political activity: free speech (section 15); assembly, demonstration and petition (section 16); association (section 17); freedom of movement (section 18); access to information (section 23); and administrative justice (section 24).

72 *Ibid.* para. 104 [footnotes omitted].

73 *Williams, supra* note 52 at para. 60; *Coetzee, supra* note 51 at para. 45.

the right.[74] Thus, even where such a rational connection was present, a limitation could be unreasonable if it undermined a long established and now entrenched right,[75] if it imposed a penalty that was arbitrary, unfair or irrational[76] or if it employed means that were unreasonable.[77] Second, the requirement of justifiability in an open and democratic society based on freedom and equality required the court to "locate [itself] in the mainstream of international democratic practice."[78] Third, the requirement of necessity imposed a more onerous burden of persuasion on the party seeking to uphold a *prima facie* unconstitutional law than the tests of reasonableness or justifiability.[79]

B. SUBSTANTIVE DECISIONS

1. Transitional Issues

Given the 'historic break with the past' that the new Constitution signals, it is not surprising that problems in regulating a smooth transition from the old to the new have been the focal point of two judgments[80] and have featured tangentially in many others. Despite the fact that the Constitution itself features many provisions dealing with transitional issues, disputes have arisen as to the application of the Constitution to litigation pending on the 27th of April 1994 (the date on which the Constitution came into force) and in relation to the jurisdiction of the Supreme Court.

In *Zantsi*, the court heard an appeal from a decision by the Ciskei Provincial Division which held that local and provincial divisions of the Supreme Court had the power to enquire into the constitutionality of statutes passed before the commencement of the Constitution. Although section 98(2) of the Constitution vests exclusive jurisdiction in the Constitutional Court to declare an Act of Parliament invalid, section 101(2) provides that the Supreme Court shall maintain the jurisdiction it had prior to the commencement of the Constitution, including its inherent jurisdiction, and section 101(3) vests in the Supreme Court

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74 *Ibid.* at para. 50.

75 *Zuma, supra* note 40 at para. 25.

76 *Makwanyane, supra* note 37 at para. 106.

77 *Williams, supra* note 52 at para. 58.

78 *Coetzee, supra* note 51 at para. 51.

79 *Ibid.* at para. 56 and 60.

80 *Zantsi* v. *Council of State, Ciskei, and others* 1995 (4) S.A. 615 (C.C.) [hereinafter *Zantsi*], and *Mhlungu, supra* note 43.

the additional jurisdiction to enquire into the constitutionality of any law, other than an Act of Parliament, irrespective of whether such law was passed before or after the commencement of the Constitution. The court below, directing itself to interpret the Constitution generously, accepted the argument that section 101(3)(c) amounted to an ouster of the Supreme Court's jurisdiction and, as such, should be interpreted narrowly, as referring only to those Acts of Parliament passed after the commencement of the Constitution.[81] The Constitutional Court allowed the appeal, noting that section 101 was subject to section 98(2) and could not be held to constitute a modification of the Constitutional Court's exclusive jurisdiction. The term "Act of Parliament" did not only refer to the present Parliament, but also to that existing before the operation of the Constitution. However, the Court agreed with the court below *a quo* that the term did not embrace laws passed by the legislatures of the so-called 'TBVC states'[82] and that these laws were thus susceptible to constitutional review by the Supreme Court.

In *Mhlungu*, the Court considered the meaning of section 241(8) of the Constitution which provides that:

> All proceedings which immediately before the commencement of this Constitution were pending before any court of law, including any tribunal or reviewing authority established by or under law, exercising jurisdiction in accordance with the law then in force, shall be dealt with as if this Constitution had not been passed: Provided that if an appeal in such proceedings is noted or review proceedings with regard thereto are instituted after such commencement such proceedings shall be brought before the court having jurisdiction under this Constitution.

Mhlungu concerned a criminal trial where the crimes were alleged to have been committed in April 1993 and the indictment was served on the accused on 11 March 1994, before the commencement of the Constitution. The state sought to tender as evidence confessions made before a magistrate by four of the accused. According to section 217(1)(b)(ii) of the *Criminal Procedure Act*, 51 of 1977, confessions given before a magistrate and which met certain other requirements, are presumed to have been voluntarily given and the onus is consequently on the accused to rebut that presumption.[83] Counsel for the defence indicated his intention to challenge the constitutionality of the provision in question on the basis of the constitutional right to a fair trial, including the right

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81 *Zantsi, supra* note 80 at para. 25.

82 The term 'TBVC' refers to the former 'homelands' of Transkei, Bophuthatswana, Venda and Ciskei.

83 The substantive dimensions of this issue were decided in *Zuma, supra* note 40.

to be presumed innocent. The issue before the Constitutional Court was whether the accused were entitled to invoke the protection of the Constitution, given the provisions of section 241(8).

Faced with conflicting judgments from different divisions of the Supreme Court, Mahomed J., for the majority, held that they were entitled to invoke the protection of the Constitution. He held that section 241(8) was intended to prevent legal uncertainty and dislocation in the judicial system by ensuring merely that the authority of pre-Constitutional courts continued and that these Courts were able to continue hearing trials commenced before the operation of the Constitution. This did not, however, mean that accused persons were not entitled to invoke the protection of the substantive rights in the Constitution in their defence. He recognised that section 241(8) was ambiguous and could be interpreted as excluding reliance on substantive rights in pending trials, but several absurdities and injustices would result from such an interpretation. For example, two accused might be arrested and charged for a crime which they committed together, but one of them might be charged after the commencement of the Constitution and the other before, in which case the former would be able to rely on her constitutional rights while the latter could not. Furthermore,[84]

> South African statutory law, prior to the enactment of the Constitution, is replete with the most disgraceful and offensive legislation which discriminates against South Africans of colour and criminalises, arbitrarily and purely on the grounds of race and colour, perfectly innocuous acts of life and living by such citizens. It is possible that a citizen charged with such an offence before the commencement of the Constitution could, on the literal interpretation, be convicted and sentenced, even after 27 April 1994, for having contravened a law, which sought to punish him on racial grounds, if his case was pending when the Constitution came into operation.

In these circumstances, and with due regard to the character of the Constitution as a "ringing and decisive break with [the] past"[85] and the need for a construction which is "most beneficial to the widest possible amplitude,"[86] the narrower interpretation of section 241(8) was to be preferred.

Kentridge A.J., writing for the minority, accepted that section 241(8) dealt with the continuing authority of pre-Constitutional courts, but held that it also referred to the invocation of substantive constitutional provisions in pending trials. While approving a generous approach to constitutional interpretation, and

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84 *Mhlungu, supra* note 43 at para. 7.

85 *Ibid.* at para. 8.

86 *Ibid.* at para. 9.

affirming the fundamental constitutional commitment to protecting individual rights against the public interest, he expressed the view that a generous interpretation would have to yield to the language itself, where it was "too clear to be capable of sensible qualification."[87] As to the absurdities which were of pressing concern to the majority, even Mahomed J.'s interpretation of section 241(8) would not obviate anomalous situations: in the example above, judgment in the trial of accused A might have been given before April 27th where judgment in accused B's case might only have been given afterwards; B would then be entitled to raise her constitutional rights when A could not. Section 241(8) of the Constitution is concerned with an orderly transition and the minimizing of dislocation within the legal system; given this purpose, anomalies are inevitable and are "the price which the lawmakers were prepared to pay for the benefit of orderly transition and for avoiding the disruption which would be caused by changing the applicable law in the middle of a case."[88]

Although it is now clear that accused persons are entitled to rely on substantive constitutional rights in trials which commenced before the 27th of April 1994, it remains to be seen whether the same principle will be applied in civil cases commenced before April 27th in which judgment has not yet been given and the parties seek to rely on rights acquired under laws which have subsequently been invalidated.

2. Federal and Provincial Powers

a. The 'Western Cape Case'[89]

The *Local Government Transition Act*, 209 of 1993, was passed at about the same time as the Constitution. Its function was to regulate the restructuring of local government until the first local government elections. Like the Constitution and the *Electoral Act*, this statute was also the product of negotiation. It provided for the formation of provincial committees which were to be elected by the then Transitional Executive Council consisting of representatives of the negotiating parties at Kempton Park. However, the *Act* provided that, once the provincial governments had been formed, the vacancies on the Committee would be filled by the Minister for Local Government of that province. The provincial committees had enormous powers because the Minister had to take all decisions

87 *Ibid.* at para. 84.
88 *Ibid.*
89 *Supra* note 35.

in relation to local government in consultation with the committees and all disagreements were to be referred to a Special Electoral Court whose decisions were binding on all the parties.

One of the tasks of the Minister for Local Government was to delimit districts and wards for the purposes of the election,[90] but he could only make those decisions after the Provincial Committee had made recommendations.

In the Western Cape, the Minister for Local Government disapproved of the recommendations of the Committee. As it happened, there were at the time two vacancies on the Committee. Instead of referring the demarcation to the Special Electoral Court, he went ahead and filled the vacancies himself. It was alleged that his appointees were sympathetic to his proposals. He then tabled his own suggestion and this was passed by a two-thirds majority.

The *Local Government Transition Act* had previously been amended to include section 16A which entitled the President to amend the *Act* itself. Section 16A read:

> (1) The President may amend this Act and any Schedule thereto by proclamation in the *Gazette*.
> (2) No proclamation under subsection (1) shall be made unless it is approved by the select committees of the National Assembly and the Senate responsible for constitutional affairs.
> (3) A proclamation under subsection (1) shall commence on a date determined in such proclamation, which may be a date prior to the date of publication of such proclamation.
> (4) (a) The Minister shall submit a copy of a proclamation under subsection (1) within 14 days after the publication thereof to Parliament.
> (b) If Parliament by resolution disapproves of any such proclamation or any provision thereof, such proclamation or provision shall cease to be of force and effect, but without prejudice to the validity of anything done in terms of such proclamation or such provision before it so ceased to be of force and effect, or to any right or liability acquired or incurred in terms of such proclamation or such provision before it so ceased to be of force and effect.

Soon after the appointments in the Western Cape had been made and the Minister's demarcation proposal accepted, the President amended the Act by proclamation and removed the power to fill vacancies from the provincial Minister and vested it in the national Ministers of Constitutional Affairs and of Justice. The proclamation was made retrospective and thus nullified all the

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[90] Prior to April 27th 1994, only the 'white' surburbs took part in local government elections. They were rich and had resources, whereas the black townships were no more than reservoirs of cheap labour, poor and without any resources. Gerrymandering of the districts and wards was an inherent danger in the whole process.

appointments in the Western Cape, together with the Minister's demarcation. The proclamation was submitted and agreed to by the relevant select committees in Parliament and was not disapproved of by Parliament within 14 days of being passed, as provided for in the Act. Thus, all the requirements in the *Local Government Transition Act* for passing the proclamation had been complied with.

The government of the Western Cape attacked the constitutionality of the power given to the President by section 16A. The Western Cape Government argued that, in terms of the new Constitution, the power to legislate vested with the legislature and that the legislature could not divest itself of that power by delegation and that, by granting the President the power to amend the *Act* without any guidelines, Parliament had in effect granted the President the power to alter, change and even abolish an Act of Parliament. The government maintained that such delegation of legislative authority amounted to an abdication by Parliament of its legislative power, and was not permitted under the Constitution.

Delivering the judgment on behalf of the majority, Chaskalson P. indicated that, although in the past South African courts had given effect to Acts of Parliament which vested wide plenary power in the executive, these decisions had been taken at a time when the Constitution was not entrenched and the doctrine of parliamentary sovereignty prevailed. Referring to cases from the United States,[91] Ireland,[92] Australia,[93] and Canada,[94] he concluded that delegation of legislative power to the executive to amend Acts of Parliament would be subversive of the manner and form requirements for passing legislation and would therefore purport to authorise the President to do what Parliament itself could not do. Ackermann and O'Regan J.J., who concurred with Chaskalson P., were more emphatic in their view. They held:[95]

> We also agree that, as stated in para. [51] of his judgment, Parliament has the implicit power to pass legislation delegating legislative functions within the framework of a statute under

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91 *INS* v. *Chadha*, 462 U.S. 919 (1983) at 951; *Panama Refining Co.* v. *Ryan*, 293 U.S. 388 (1935) at 421; *Hampton* v. *United States*, 276 U.S. 394 (1928) at 407.

92 *Cityview Press Limited* v. *An Chomhairle Oiliuna*, [1980] I.R. 381.

93 *Victorian Stevedoring and General Contracting Co.* v. *Dignam* (1931), 46 C.L.R. 73 at 99-100.

94 *Re Manitoba Government Employees Association and Government of Manitoba* (1977), 79 D.L.R. (3d) 1 at 15 (S.C.C.).

95 *Western Cape, supra* note 35 at para. 148.

which the delegation is made and that there is a difference between this situation and 'assigning plenary legislative power to another body, including, as section 16A does, the power to amend the Act under which the assignment is made.' In our view, however, it makes no diffference in principle whether, in the latter case, the power to amend includes the power to amend the Act under which the delegation occurs. The great difference lies in the delegation of legislative power which is subordinate to Acts of Parliament as opposed to the delegation of legislative power to amend Acts of Parliament; it being irrelevant, in our view, whether this power to amend applies to the Act conferring the power or to any other Act of Parliament.

b. The KwaZulu case[96]

As part of a national plan to cut state expenditure, President Mandela had managed to convince his own executive to reduce their incomes by 20 per cent. The national government wished the provincial Executive Council members to participate in this exemplary measure and Parliament amended the Constitution to accommodate for this. Originally the Constitution had provided that the salaries of Executive Council Members would be paid from the Provincial Revenue Fund and that their remuneration and allowances would be determined by the provincial legislature. The amendment provided that remuneration would continue to be paid from the Provincial Revenue Fund but that the remuneration and allowances would be determined by the President.

The attack launched by the applicants was that such an amendment of the Constitution had to follow the procedure prescribed by section 62(2) of the Constitution. Section 62 of the Constitution provides as follows:

Bills amending Constitution

62. (1) Subject to subsection (2) and section 74, a Bill amending this Constitution shall, for its passing by Parliament, be required to be adopted at a joint sitting of the National Assembly and the Senate by a majority of at least two-thirds of the total number of members of both Houses.

(2) No amendment of sections 126[97] and 144[98] shall be of any force and effect unless passed separately by both Houses by a majority of at least two-thirds of all the members in each House: Provided that the boundaries and legislative and executive competences of a province shall not be amended without the consent of a relevant provincial legislature.

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96 *Premier, KwaZulu/Natal* v. *President of the Republic of South Africa* 1996 (1) S.A. 769 [hereinafter *KwaZulu*].

97 Section 126 deals with the legislative competences of the provinces.

98 Section 144 deals with the executive competences of the provinces.

The applicants argued that, despite the fact that the amendment had been passed in a joint sitting and it thus conformed with section 62(1), it was passed without following the prescribed procedure since it amounted to an amendment of the legislative competence of the province. According to section 62(2), this could not be done without the consent of the KwaZulu/Natal legislature.

Mahomed D.P., for the Court, held that the amendment did not fall under section 62(2) because it applied not to one province but to all the provinces:[99]

> In order to be hit by the proviso, the purported amendment need not necessarily diminish "the legislative and executive competences of a province." It is equally effective against laws which might increase or qualify such competences. But, what is crucial is that if the law applies to *all* provinces, it is outside the proviso ... In its terms, the impugned amendment to section 149(10) does not, and does not purport to, target any particular province or provinces. It is of equal application to all the provinces. It therefore does not require the consent of the KwaZulu/Natal provincial legislature or any other provincial legislature.

However, in a significant *obiter dictum* the Court suggested that it "may perhaps be that a purported amendment to the Constitution, following the formal procedures prescribed by the Constitution, but radically and fundamentally restructuring and re-organizing the fundamental premises of the Constitution, might not qualify as an 'amendment' at all" and that the power of amendment of the Constitution could not be employed "to the extent of destroying the basic features and structure of the Constitution."[100]

This statement must be seen and understood against the backdrop of the South African Constitution which, according to Mahomed D.P., differs from other constitutions which only formalize in a legal instrument a historical consensus of values and aspirations evolved incrementally from a stable unbroken past to accommodate the needs of the future. The South African Constitution, on the other hand, is a break with the past and embodies a forceful rejection of that past.[101] From the *obiter* in the *KwaZulu* case, it is clear that the Court, while considering its power to strike down constitutional amendments as significantly constrained, believed nevertheless that it could strike down amendments which violate the fundamental precepts of the Constitution and seek to re-introduce rejected evils like racism, repression or authoritarianism.

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99 *KwaZulu, supra* note 96 at para. 23.

100 *Ibid.* at para. 47.

101 *Makwanyane, supra* note 37 at para. 262.

3. Criminal Procedure

a. The Death Penalty

Capital punishment has long been a burning issue in South Africa and it is not surprising that the first ever case heard by the Court concerned the constitutionality of the death penalty.[102] The applicants attacked the 'death penalty provision' on a number of grounds, including the right to life (section 9), the right to human dignity (section 10), the right not to be subject to cruel, inhuman or degrading punishment (section 11(2)), and the right to equality (section 8).

i. The Right to Life

Unlike many other Constitutions, the South African Constitution contains no internal limitation on the right to life.[103] The Court thus had to consider whether the death penalty constituted an infringement of a fundamental right which could nevertheless be justified under the general limitations clause. The most problematic issue was whether the right to life could ever be limited without negating its essential content. Justice Mahomed drew attention to conceivable distinctions between rights which are inherently capable of incremental invasion and those which are not.[104] In Mahomed J.'s opinion the right to life belonged to the latter category; if it was limited, the holder would be dead and forever deprived of the right, whereas other rights such as freedom of speech could be limited without being destroyed. Ultimately, however, the division of rights into those capable of incremental limitation and those which are not, could not prevail since it was not justifiable on any constitutional basis. Furthermore, a conclusion that the essential content of the right to life was negated by the death penalty would have had implications for other issues such as abortion and euthanasia and would have invalidated a provision of the *Criminal Procedure Act* which legalized killing by policemen trying to affect an arrest if there is no other way of arresting the criminal.[105] It might also have made it impossible to raise self-defence as a justification to a charge of murder.

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102 Section 277 of the *Criminal Procedure Act*, 51 of 1977 allowed the death penalty as a competent verdict.

103 *Constitution, supra* note 4, section 9.

104 *Makwanyane, supra* note 37 at para. 298.

105 Section 49 of the *Criminal Procedure Act*, 51 of 1977.

ii. The Right to Dignity

Against the background of these concerns, Chaskalson P. attempted to define the right to life in relation to other rights. He pointed out that the death penalty involves, by its very nature, a denial of the executed person's humanity since it treats "members of the human race as non humans, as objects to be toyed with and discarded. [It is] thus inconsistent with the fundamental premise of the clause that even the vilest criminal remains a human being possessed of common human dignity."[106]

The focus on the right to dignity produced a variety of opinions as to the scope and definition of that right. The President considered its scope as follows: "Respect for human dignity especially requires the prohibition of cruel, inhuman, and degrading punishments. [The state] cannot turn the offender into an object of crime prevention to the detriment of his constitutionally protected right to social worth and respect."[107] He concluded that the death penalty "is the supreme indignity to the individual, the ultimate corporal punishment, the final and complete lobotomy and the absolute and irrevocable castration. [It is] the ultimate desecration of human dignity."[108] Justice O'Regan, on the other hand, related the right to dignity to the right to life itself: "[i]t is not life as mere organic matter that the Constitution cherishes, but the right to human life: the right to live as a human being, to be part of a broader community, to share in the experience of humanity."[109] As this right to dignity was violated by the death penalty, capital punishment could not survive constitutional scrutiny.

iii. Cruel, Inhuman or Degrading Punishment

In the United States and in many countries where capital punishment is expressly authorized, courts nevertheless have been able to declare it unconstitutional in certain circumstances on the basis of the prohibition against cruel and inhuman punishment. The jurisprudence of the European Court of

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106 *Gregg* v. *Georgia*, 428 U.S. 153 (1976) at 230 quoted in *Makwanyane*, per Chaskalson P. at para. 57.

107 *Ibid.* at para. 59, adopting [1977] 45 BVerfGE 187 at 228 (Life Imprisonment Case) [transl. by Kommers, *The Constitutional Jurisprudence of the Federal Republic of Germany* (1989) at 316].

108 *Kindler* v. *Canada* (1992) 6 CRR (2d) 193. (S.C.C.) at 241 adopted by Chaskalson P. at para. 60.

109 *Makwanyane, supra* note 37 at para. 326.

Human Rights is replete with cases discussing what has become known as the "death row phenomenon." In their oral argument, the applicants emphasized that the majority of prisoners on death row had been awaiting their fate for up to 5 years. Justice Madala described the experience of awaiting death as follows: "Throughout all this time the condemned prisoner constantly broods over his fate. The horrifying spectre of being hanged by the neck and the apprehension of being made to suffer a painful and lingering death is, if at all, never far from mind."[110] The Court approved the view, adopted in many other jurisdictions, that capital punishment was unacceptable in relation to contemporary standards of decency because it had the inherent capacity to inflict pain. Ultimately, the finding that it was cruel and inhuman flowed from the conviction that dignity and the nature of punishment are inseparable and that the death penalty is a form of punishment that degrades and dehumanizes those subjected to it as well as those who execute it.

iv. Arbitrariness

The applicants, drawing from American jurisprudence, also argued that the provisions of the *Criminal Procedure Act* authorising the death penalty were unconstitutional because the language was vague and gave the judges unbounded discretion. The Court, however, pointed out that the South African judicial system was different from the American system, where death penalty decisions are taken by juries and not by judges. In the Court's view, while juries need to be guided in their discretion to impose capital punishment, the criteria laid down by the Appellate Division was a sufficient guide for the well experienced judges in South Africa.[111]

In any event, the Court found the death penalty to be arbitrary in another respect. Throughout the criminal justice system, a process of selection takes place. At each of the many different stages (arrest, trial, conviction, sentence) which culminate in a sentence of death, some offenders are screened out while others remain. The result is that only a small proportion of those who commit murders ultimately receive the death penalty. In this selection process, a great variety of factors play a role. Accused persons who are the victims of the gallows are usually uneducated, indigent and disproportionately black. Those who have the means to defend themselves and do not depend on inexperienced,

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[110] Per Madala, J., at para. 246, adopting *Catholic Commission for Justice and Peace in Zimbabwe* v. *Attorney-General, Zimbabwe* 1993 (4) S.A. 239 (ZSC) at 268E-H.

[111] *Makwanyane, supra* note 37 at para. 47.

state-paid, *pro deo* defence lawyers, but on the services of senior experienced advocates, are unlikely to hang: "The outcome may be dependent upon factors such as the way the case is investigated by the police, the way the case is presented by the prosecutor, how effectively the accused is defended, the personality and particular attitude to capital punishment of the trial judge and, if the matter goes on appeal, the particular judges who are selected to hear the case."[112] While the Court recognised that the same could be said of any other form of punishment, it nevertheless held that death was different, and that such a punishment ought not to be available when the procedure is so pregnant with inherent discrimination and arbitrariness.

v. *Ubuntu*

The court made reference to the postamble of the interim Constitution which provides that, although the country is emerging from a history of conflict, division and gross violation of human rights, the Constitution is a bridge between the past and a future of reconstruction and reconciliation. The Constitution further lays down the preconditions for this future by providing that in that future there is "a need for understanding but not for vengeance, a need for reparation but not for retaliation, a need for *ubuntu* but not for victimisation." Mokgoro J., in her judgment, used the African value of *ubuntu*[113] to explain why capital punishment is in conflict with the Constitution and the future envisaged by the Constitution. According to the learned judge, *ubuntu* encompasses society's recognition of the worth of every human being, even the worst criminal. This recognition of the worth and dignity of all members of society demands that all be treated with dignity and respect. The death penalty, by treating the offender as devoid of humanity and dignity, as an object to be annihilated or treated without respect, does not belong to the society envisaged by the Constitution and runs counter to the concept of *ubuntu*, as it is a form of punishment which is aimed at vengeance and premised on retributive justice. Justice in this form could hardly be accommodated in a value-based society where human dignity and life are respected values and where people ought to be treated and subjected to punishments befitting human beings.[114] Chaskalson P.,[115]

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112 *Ibid.* at para. 48.

113 See text associated with notes 55-59, above.

114 *Ibid.* at para. 313.

115 *Ibid.* at para. 131.

Mahomed,[116] Madala[117] and Langa J.J.[118] all supported the view that *ubuntu* was a value which could not be reconciled with the death penalty.

vi. Deterrence

Having rejected retribution because it is incompatible with the constitutional value of *ubuntu*, the Court considered the other traditional justifications for punishment. As to deterrence, the Court referred to the statistics that had been placed before it. A significant fact was that the rate of apprehension of criminals was anything between 30-40 per cent. In the Court's view, the "greatest deterrent to crime is the likelihood that offenders will be apprehended, convicted and punished. It is that which is presently lacking in our criminal justice system; and it is at this level and through addressing the causes of crime that the State must seek to combat lawlessness."[119] The Court further pointed out that there was no information which showed that abolition of the death penalty would increase the rate of crime. Justice Didcott dealt incisively with the issue of statistical evidence as follows:[120]

> The debate surrounding that question ... has often been marked by the production of statistical evidence tendered to show that the death penalty either does not or does serve a uniquely deterrent purpose, as the case may be. The rate of capital crimes committed in a state performing executions is compared with that of the selfsame crimes experienced contemporaneously in some place or another where none occurs. The records of countries that executed convicts formerly, but have ceased doing so, are also examined. Comparisons are then drawn between the rates of those crimes found there before the punishment was abandoned and the ones encountered afterwards. Such statistics, when analysed, have always turned out to be inconclusive in the end. ... Without empirical proof of the extent to which capital punishment worked as a deterrent, neither side could present any argument on the point better than the appeal to common sense that tends to be lodged whenever the debate is conducted. That the extreme penalty must inevitably be more terrifying than anything else was said, on the one hand, to speak for itself. It spoke superficially, we were told on the other, and unrealistically too. What stood to reason was this instead. A very large proportion of murderers were in no mood or state of mind at the time to contemplate or care about the consequences of their killings which they might personally suffer. Those rational enough to take account of them gambled by and large on their escape from detection and arrest, where the odds in their favour were often rather high. The prospect of conviction and punishment

116 *Ibid.* at para. 263.
117 *Ibid.* at para. 244.
118 *Ibid.* at para. 223.
119 *Makwanyane, supra* note 37 at para 122, per Chaskalson P.
120 *Ibid.* at para. 182-183.

was much less immediate and seldom entered their thinking. It was fanciful, should that happen on relatively rare occasions, to imagine their being daunted by the possibility of a journey to the gallows, a journey taken by only a small percentage of convicted murderers even at the height of executions in this country, but not by the probability of incarceration in a jail for many years and perhaps for the rest of their lives.

vii. Public Opinion

The respondents, touching on concerns about the anti-majoritarian nature of constitutional adjudication, led extensive statistical evidence indicating that the majority of the population and, in particular, the majority of ANC members living in the townships, favoured capital punishment. Although the respondent (the Attorney-General) represented the state in opposing capital punishment, the government also appointed counsel to plead for its abolition. This was interpreted by some as an attempt by the government to by-pass the democratic process and to avoid losing public support by taking responsibility for abolition.

The question of public opinion became a test for the Court. Was it to take a stand and oppose the overwhelming public opinion? If it did, how would this affect its legitimacy? On the other hand, a Constitutional Court exists precisely to strengthen democracy by serving as a counter to majoritarian control by being the champion of minority rights. The Court was prepared to assume that the evidence placed before it about public opinion was true and indicated that the majority was in favour of upholding capital punishment.[121] The Court also dismissed suggestions by the applicants that such public opinion was ill informed. However, it went on to emphasize the differences between itself and the democratic Parliament in Cape Town. The Court held that its task was not to consider and take a democratic decision. It was not called upon to decide what the majority of South Africans considered a proper sentence; its task was to consider whether the death penalty was consistent with the Constitution. The task of interpreting the Constitution had been expressly vested by the Constitution in the Court. This was one of the distinguishing features of the new Constitutional dispensation which was no longer characterized by Parliamentary sovereignty:[122]

The very reason for establishing the new legal order, and for vesting the power of judicial review of all legislation in the courts, was to protect the rights of minorities and others who

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[121] *Ibid.* at para. 87 (per Chaskalson P.) and para. 182 (per Didcott J.). These statistics were contained in the brief of the South African Police Services and were referred to by the Attorney General in argument.

[122] *Ibid.* at para. 88-89.

> cannot protect their rights adequately through the democratic process. Those who are entitled to claim this protection include the social outcasts and marginalised people of our society. It is only if there is a willingness to protect the worst and the weakest amongst us that all of us can be secure that our own rights will be protected. ... This Court cannot allow itself to be diverted from its duty to act as an independent arbiter of the Constitution by making choices on the basis that they will find favour with the public.

b. Corporal Punishment for Juveniles

In *Williams*[123] the Court considered whether whipping juvenile offenders was a constitutional sentencing option. Although it was challenged on four grounds — the right to equality (since it was only juvenile males who could be whipped),[124] the right to dignity,[125] the rights of children,[126] and the right to be free from punishment or treatment that was cruel, inhuman or degrading[127] — the Court concluded that it was unconstitutional solely on the basis of the latter. Writing for a unanimous court, Langa J. emphasised the consistent condemnation of corporal punishment as a judicial sentence by South African judges, in foreign case law and in international human rights instruments, and held that whatever interpretation of "cruel, inhuman or degrading" one adopted, corporal punishment clearly fell within the core of that right.

In determining whether the infringement was justified, Langa J. considered the context of South African society. He thought South African society was an endemically violent one in which "[d]isputes, whether political, industrial or personal, often end in violent assaults."[128] He noted the rising crime rate, as well as the history of institutionalized violence to which the Constitution was such a poignant response. The State argued that whipping was a punishment preferable to imprisonment which generally was a more brutalizing and traumatic experience for a young offender. Because of a lack of resources, imprisonment was often the only alternative to whipping. Justice Langa regarded this argument as "untenable." He noted that there had been moves afoot to reform the juvenile justice system (although these were still in their infancy) and rejected the suggestion that "the price to be paid for this state of unreadiness is to subject juveniles to punishment that is cruel, inhuman or degrading."[129] The

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123 *Supra* note 52.
124 Section 8.
125 Section 10.
126 Section 30.
127 Section 11(2).
128 *Williams, supra* note 52 at para. 51.
129 *Ibid.* at para. 63.

State also had sought to justify whipping by reference to the traditional punitive philosophy of deterrence. The Court rejected this argument, holding that in an enlightened society, rehabilitation was the central focus of punitive measures aimed at juveniles. While other aims of punishment such as deterrence and retribution were still important, no evidence had shown that whipping was a more effective deterrent than other sentences[130] and the retributive effects of whipping could not outweigh the brutalization of young people,[131] inconsistent with the values of the Constitution: "It would be a negation of those values precisely where we should be laying a strong foundation for them, in the young; the future custodians of this fledgling democracy."[132] In conclusion Langa J. noted that it "is a practice which debases everyone involved in it;"[133] the "juvenile is, indeed, treated as an object and not as a human being."[134]

Interestingly, this matter had come before the Supreme Court by way of automatic review from the magistrates' courts. One of the magistrates had requested that the sentence of strokes be subjected to special review and had suspended the execution of the sentence, despite cogent precedent which might have denied him the authority to do so.[135] In its judgment, the Constitutional Court commended this magistrate for his commitment to protecting fundamental rights and emphasised the importance of courts at all levels being vigilant in their roles as defenders of individual rights, particularly the rights of the weakest and most vulnerable.[136]

c. The Presumption of Innocence

In *S.* v. *Zuma*,[137] the Court was forced to deal with the constitutionality of section 217(1)(b)(ii) of the *Criminal Procedure Act*, 51 of 1977, which provided that, where a confession by an accused had been reduced to writing in front of a magistrate and it appeared *ex facie* the document that it had been voluntarily made, the confession was presumed to be voluntary unless proved otherwise. The accuseds claimed that this provision infringed their constitutional rights to

130 *Ibid.* at para. 80-86.
131 *Ibid.* at para. 86-88.
132 *Ibid.* at para. 63.
133 *Ibid.* at para. 89.
134 *Ibid.* at para. 90.
135 *Ibid.* at para. 6 n4.
136 *Ibid.* para. 6-8.
137 *Supra* note 40.

a fair trial, including the right of arrested persons to remain silent, the right not to be compelled to make a confession, the right of accused persons to be presumed innocent, and the right not to be compellable as a witness against oneself.[138]

Acting Justice Kentridge referred to the American 'rational connection' test which requires a presumption to bear a rational relationship between the fact proved and the fact presumed,[139] but pointed out that the test was not conclusive, and that ultimately the critical question was whether or not the accused could be convicted despite the existence of a reasonable doubt as to her guilt. The learned judge found the Canadian cases on reverse onus provisions to be particularly instructive, not only because of their persuasive reasoning, but also because of the similar 'two-stage' structure of the *Canadian Charter of Rights and Freedoms* and the shared English common law heritage between Canada and South Africa.[140]

The Court extrapolated three relevant principles from the Canadian case of *R.* v. *Downey*.[141] First, that the presumption of innocence is infringed whenever an accused stands to be convicted despite the existence of a reasonable doubt. Second that, if the accused is required by a presumption to establish, on a balance of probabilities, either an element of the offence or an excuse, this creates the risk of a guilty verdict where reasonable doubt exists, and is thus an infringement of the presumption of innocence. Finally, even if a rational connection exists between the proved and presumed facts, this would be insufficient to make valid a presumption which requires the accused to disprove an element of the offence.[142] The Court went on to hold the provision unconstitutional after considering the 'golden thread' of the presumption of innocence in the English common law, as recounted in *Woolmington* v. *DPP*.[143] However, the Court pointed out that the judgment should not be construed as a general condemnation of presumptions; the Court recognized the "pressing social need for the effective prosecution of crime" and suggested that there might be circumstances where the reversal of a legal onus would be justifiable, such as situations where the accused was required to show facts which were peculiarly

138 Sections 25(2) and (3).
139 *Zuma, supra* note 40 at para. 20 and 21.
140 *Ibid.* at para. 21-25.
141 (1992) 90 D.L.R. (4th) 449 (S.C.C.).
142 *Zuma, supra* note 40 at para. 25.
143 [1935] A.C. 462 (H.L.).

within her own knowledge and which would have been unreasonable to expect the prosecution to prove.[144]

The second case dealing with 'reverse onus' provisions is *S.* v. *Bhulwana*; *S.* v. *Gwadiso*.[145] This case concerned a section in the *Drugs and Drug Trafficking Act*, 140 of 1992, which provided that, where an accused is found in possession of more than 115g of marijuana, she is presumed to be dealing in the drug until the contrary is proved. Affirming the *Zuma* case and, again, informed by Canadian case law on reverse onuses, the Court, per O'Regan J., held that since there was the prospect of an accused being convicted despite the existence of a reasonable doubt, the constitutional right to be presumed innocent had been infringed.[146] In determining whether the infringement was justified, the Court recognized the importance of an effective prohibition on the abuse of, and trafficking in, illegal drugs, but concluded that it had not been shown that the presumption substantially furthered the state and society's interest in curbing drug abuse.[147]

d. The Right to Legal Representation

The South African legal system is haunted by the image of vast numbers of accused persons who appear daily in the courts and who are sentenced to, *inter alia*, imprisonment without the benefit of legal representation.[148] In *S.* v. *Vermaas*; *S.* v. *Du Plessis*,[149] the Court was asked to consider the meaning of section 25(3)(e) of the Constitution which grants to every accused person the right:

> to be represented by a legal practitioner of his or her choice or, where substantial injustice would otherwise result, to be provided with legal representation at state expense, and to be informed of these rights.

Although the Court, per Didcott J., held that the matter was improperly referred since it involved issues which were not within the exclusive jurisdiction

144 *Zuma, supra* note 40 at para. 41.

145 1996 (1) S.A. 388 (C.C.).

146 *Ibid.* at para. 15.

147 *Ibid.* at para. 24.

148 See, for example, *S.* v. *Khanyile and Another* 1988 (3) S.A. 795 (N); *S.* v. *Davids*; *S.* v. *Dladla* 1989 (4) S.A. 172 (N); *S.* v. *Rudman and Another*; *S.* v. *Mthwana* 1992 (1) S.A. 343 (A).

149 1995 (3) S.A. 292 (C.C.)

of the Constitutional Court, the Court nevertheless went on to make two points about the right to legal representation. First, the determination of whether or not "substantial injustice" would flow from a lack of representation was a matter preeminently for the trial judge to decide; the Constitutional Court was ill-equipped in the first instance to adjudicate on the various factors influencing this decision, such as the complexity of the case, the aptitude or ineptitude of the accused, the gravity of the consequences of a conviction and any other relevant factor.[150] Second, section 25(3)(e) should be read disjunctively — that is, where the state is called upon to provide legal representation, the accused does not enjoy a right to the legal practitioner of her choice.[151] The Court also expressed some concern about the apparent failure to create any financial and administrative structures to give effect to the right to representation and described as "disturbing" the fact that, while accuseds were most probably informed of their right to representation, "[i]mparting such information becomes an empty gesture and makes a mockery of the Constitution" where there are no adequate mechanisms to provide that representation.[152]

e. Civil Imprisonment

In *Coetzee*[153] the Court considered the constitutionality of sections 65A to 65M of the *Magistrates' Court Act*, 32 of 1944, which provided for imprisonment as one possible response to a recalcitrant debtor. Although the Court unanimously held that the provisions were unconstitutional as an infringement of the right to freedom of the person, the justices delivered separate judgments as to the reasons. Justice Kriegler, writing for the majority, held that the statute was a manifest encroachment on the right to freedom, since it committed judgment debtors to prison without any criminal charge being levelled or any trial being held.[154] Although effective debt collection was a legitimate and reasonable governmental objective,[155] the means chosen here were not reasonable; the statute was overbroad since it did not distinguish with sufficient precision between those who were not able to pay and those who simply refused to pay.[156] Furthermore, an examination of the procedure revealed

150 *Ibid.* at para. 15.
151 *Ibid.*
152 *Ibid.* at para. 16.
153 *Supra* note 51.
154 *Ibid.* at para. 10.
155 *Ibid.* at para. 12.
156 *Ibid.* at para. 13.

that it fell far short of the normal procedural safeguards enjoyed by criminal accused.[157] However, the Court expressly left open the question of whether or not a reformed procedure which did conform to certain minimum standards would be constitutionally permissible.[158]

Justice Sachs, in a separate concurring judgment,[159] responded to the state's argument that the Court ought to take a more expansive view of the values underlying the right to freedom and security of the person and postpone the declaration of invalidity pursuant to its powers under section 98(5).[160] Justice Sachs regarded civil imprisonment in circumstances where the debtor was unable to meet the debt as unconstitutional in principle, but left open the question of whether a more narrowly tailored provision dealing with wilful refusal to meet debts would pass the tests of reasonableness, necessity and justifiability.[161]

f. Access to Police Dockets

In *Shabalala and Five Others* v. *Attorney General of the Transvaal and others,*[162] the question referred to the Court was whether section 23[163] of the Constitution could be relied upon by an accused in the exercise of the rights contained in section 25(3) of the Constitution, and whether any provision in the Constitution permits an accused to consult with prospective witnesses who have given statements to the police.

According to South African common law, "when statements are procured from witnesses for the purpose that what they say shall be given in evidence in a lawsuit that is contemplated, these statements are protected against disclosure until at least the conclusion of the proceedings, which would include any appeal or similar step after the decision in the court of first instance."[164] The information falling within the privilege includes notes made by state witnesses and statements taken by police from witnesses in contemplation of a prosecution. In

157 *Ibid.* at para. 14.

158 *Ibid.* at para. 5 n.7; see also Didcott J.'s separate judgment at para. 20.

159 *Ibid.* at para. 37-76.

160 *Supra* note 35.

161 *Coetzee, supra* note 51 at para. 72.

162 1996 (1) S.A. 725 [hereinafter *Shabalala*].

163 Which provides a right to access to information where that is necessary for the exercise of constitutional rights.

164 *R.* v. *Steyn* 1954 (1) S.A. 324 (A) at 335A-B.

practice, witnesses' statements, even if they do not deal with state secrets, methods of investigation by the police, identity of informers, or communication between a legal adviser and his or her client, are covered by the privilege regardless of whether there is any risk that such disclosure might lead to the intimidation of witnesses or that it might impede the interests of justice.

As previously noted, the Constitutional Court is the highest court on constitutional issues, while the Appellate Division is the court of final instance on all matters relating to the interpretation of the common law. The question of whether the common law rule is in conflict with the Constitution is a constitutional issue, but the question of what should replace the old rule if it is found to be in conflict with the Constitution is not a constitutional issue. Mahomed D.P. pointed out that[165]

> This Court is therefore entitled to decide whether that rule of the common law is consistent with the Constitution. However, it is for the Supreme Court in the first instance to determine what the content of the common law should be having "regard to the spirit, purport and objects" of the relevant provisions of he Constitution and to develop the common law.

On the constitutional issue, the Court decided that the "blanket docket privilege"[166] expressed by the rule in *R.* v. *Steyn* was inconsistent with the Constitution to the extent that it protected from disclosure all the documents in a police docket, in all circumstances, regardless of whether or not such disclosure was justified for the purposes of enabling the acccused properly to exercise his or her right to a fair trial under section 25(3). An accused's claim for access to documents in the police docket cannot be denied merely on the grounds that such contents are protected by a blanket privilege; but a claim can be denied on the grounds that disclosure is not justified to enable the accused to exercise her right to a fair trial, that disclosure leads to intimidation of witnesses, or that it prejudices the interests of justice. The Court has the power to examine the state's claim and has the discretion to allow the disclosure of documents or statements to the accused.

IV. CONCLUSION

The establishment of the Constitutional Court was a milestone in the journey towards creating a legal system based on democratic principles and the observance of human rights, but it remains a transitional institution and many

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165 *Shabalala, supra* note 162 at para. 9.

166 *Ibid.* at para. 72.

questions as to the future of the Court, and of the judiciary in South Africa generally, remain unresolved. Especially problematic is the splitting of jurisdiction by the creation of two courts of final instance — the Constitutional Court for constitutional issues and the Appellate Division for non-constitutional issues. Although the Appellate Division has ultimate control over the common law, it must develop that law in accordance with the spirit, purport and objects of the Constitution. There is uncertainty, however, under the present Constitution as to how much control the Constitutional Court can exert over the interpretation of constitutional principles by the Appellate Division in interpreting the common law. It is not inconceivable that the division of responsibility will prove unworkable and that the framers of the final Constitution will opt instead for a unified constitutional and non-constitutional jurisdiction, although it is difficult to speculate on the relationship between the Constitutional Court and the Appellate Division which would result from such a merger.[167]

As previously noted, the Court at present has both preventive and repressive powers of judicial review, but it is not yet certain whether the final Constitution will retain the power to pronounce on the constitutionality of Bills before Parliament. This power was included in the interim Constitution as a compromise, to give minority political parties some control over the constitutionality of the legislative process. Given the fact that it was culled from the old German Constitution and that the framers of the final Basic Law decided to abandon it, its survival is not certain.[168] In addition, it raises a potentially difficult issue: once the Constitutional Court has certified a Bill to be constitutional, can an Act of Parliament resulting from it ever be challenged on the basis that a particular provision infringes the Constitution in a concrete set of facts? The relationship between repressive and preventive judicial review in a combined system has not yet confronted the Court, but this may well be another provision which the framers of the new Constitution might seek to

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[167] [No clear merger has resulted from the Constitution of the Republic of South Africa Bill (6 May 1996) although s.173 *inter alia* empowers the Constitutional Court "to develop the common law, taking into account the interest of justice." — Eds.]

[168] [The Constitution of the Republic of South Africa Bill (6 May 1996) grants the Constitutional Court both preventive and repressive powers of review. The President and provincial Premiers have the power to withhold their assent to legislative bills and to refer questions about their constitutionality to the Court (ss. 79, 121). Members of the National Assembly and provincial legislatures may apply to the Court for a determination of constitutionality only after an Act has been passed by the Assembly or Legislature (ss. 80, 122). — Eds.]

revise.[169]

Despite these, and other uncertainties, the present Court is not likely to have merely a transient influence: its jurisprudence on the interpretation of the bill of rights will most certainly be highly persuasive in the future and, although specific issues such as the division of powers between central and provincial governments are likely to be defined differently in the final Constitution, basic principles, such as that concerning the power of Parliament to delegate its legislative competence, will ensure that decisions such as the *Western Cape* case are not redundant in the future.

For more than fifty years, the South African legal community was isolated and inexperienced in the field of human rights and, in the initial stages, the Constitutional Court has understandably referred extensively to foreign judgments and international human rights jurisprudence. Yet, from the very beginning, the Court has been conscious of the need to develop an indigenous jurisprudence based on South African values such as *ubuntu* and other common law principles. No doubt this delicate combination of not reinventing the wheel, but at the same time continuing to interpret the Constitution to reflect the history, traditions and culture of South African society will continue. It is hoped that someday constitutional judges in other jurisdictions will find occasion to consult the judgments of their South African colleagues for a comparative perspective on human rights issues which is international in scope, but truly African in its roots.

Perhaps one of the most significant achievements of the Court to date is the extent to which it has been able to win the confidence of a broad cross- section of South African society. Despite popular fears that it would be an 'ANC court,' it has repeatedly affirmed the supremacy of the Constitution and its role as the guardian of the rights of ordinary citizens. Its members have guarded their independence jealously and have not shirked from striking down laws in conflict with the Constitution, regardless of who framed those laws.

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169 [The Constitution of the Republic of South Africa Bill (6 May 1996) makes no provision for this potential conflict — Eds.]

A Ringing and Decisive Break With The Past?

Hugh Corder* and Dennis Davis**

It is a trite observation that in a constitutional democracy, the constitutional text means whatever the courts say it means. The more interesting issue arises from the courts' construction of the constitutional text and the particular tools or sources the courts employ to give meaning to that text. The authors argue that the early jurisprudence of the new South African Constitutional Court reveals some interesting trends, not least of which is a marked departure from previous South African jurisprudence. Of particular interest to the authors and central to the interpretation of the new South African Constitution is the "reasonable" and "necessary" limits clause contained in section 33 of the interim Constitution, and the "interpretation" clause, section 35 of the Constitution. The authors argue that in construing these and other important sections of the transitional Constitution, the Court has placed great emphasis on certain interpretive tools, like legislative intent, while surprisingly little weight has been accorded other sources, like South African legal scholarship. The authors also assert that although adjudication under the interim Constitution is only in its nascent stages, a strong measure of support for constitutional supremacy seems to underpin the Court's jurisprudence to date. It remains to be seen whether the interpretive trends identified by the authors continue in evidence in future South African constitutional jurisprudence or whether they are revealed as mere context-specific responses to the Court's early cases.

Il est bien établi que dans une démocratie constitutionnelle, le texte constitutionnel a le sens que peuvent bien lui conférer les tribunaux. Des questions plus intéressantes concernent ce que les tribunaux construisent à partir du texte, et les outils ou sources particulières qu'ils utilisent pour lui donner un sens. Selon les auteurs, les toutes premières décisions rendues par la Cour constitutionnelle sud-africaine révèlent des tendances intéressantes — une nette démarcation par rapport à la jurisprudence sud-africaine antérieure, surtout. Ils relèvent plus particulièrement des éléments essentiels à l'interprétation de la nouvelle constitution: la clause des limites «raisonnables» et «nécessaires», et la clause d'«interprétation» contenues respectivement dans les art. 33 de 35 de la Constitution provisoire. Les auteurs soutiennent qu'en abordant ces articles et d'autres parties importantes de la Constitution provisoire, la Cour accorde une place prépondérante à certains outils d'interprétation — l'intention du législateur, notamment — tout en faisant étonnament peu de cas des autres sources, des juristes sud-africains par exemple. Les auteurs font également état, bien que les décisions assujetties à la nouvelle constitution soient encore à leur état naissant, d'un solide soutien pour la suprématie constitutionnelle étayant la jurisprudence de la Cour à ce jour. Reste à voir si les tendances relevées par les auteurs s'affirmeront ou si elles s'avéreront davantage liées au contexte des premières causes instruites par la Cour.

I. INTRODUCTION

Eighteen months have passed since South Africa's transitional Bill of Rights came into force at the time of the first democratic election. The incorporation of

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a "chapter on fundamental rights" in the transitional constitution[1] was a vital element of the package of compromises which was hammered out by the negotiating parties during 1993. The move to a system of constitutional supremacy and protection of basic rights, replacing the abuse of parliamentary sovereignty by the former government for the denial of human rights and dignity, represents a fundamental transfer of power in constitutional law.[2] The legal system is experiencing a quiet revolution, as lawyers (including judges) are presented with new opportunities and challenges. How have lawyers and the courts coped with these changed circumstances? More importantly, how has this affected judicial styles of interpretation?

A general assessment might produce the answer "quite well," especially considering the background. Besides a small group of mainly academic lawyers, knowledge of human rights and constitutional law at the inception of the transitional Constitution was very poor. This was quite understandable, in the light of South Africa's constitutional history and then-prevailing attitudes to civil rights and international law.[3] Most lawyers, therefore, had to undergo a crash course in constitutional education in order to establish a basic familiarity with the tools of a new discourse of law and government. That many of them have grasped the opportunities created by the transitional Bill of Rights is reflected in the pages of the law reports.[4]

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1 Constitution of the Republic of South Africa, Act 200 of 1993, Chapter 3. It is important to establish consistent use of terminology at the outset. We prefer to refer to this Constitution (which will endure till 30 April 1999) as the "transitional" Constitution, although many call it the "interim" Constitution. In regard to the Chapter headed "Fundamental Rights," we adopt the term "Bill of Rights," which is commonly used.

2 For a fairly detailed description of the series of political events which led to the adoption of the transitional Constitution and its main features, see H. Corder, "Towards a South African Constitution" (1994) 57 Modern L.R. 491.

3 For a review of these matters, see J. Dugard, *Human Rights and the South African Legal Order* (Princeton: Princeton University Press, 1978) and H. Corder and D. Davis, "Law and Social Practice: An Introduction" in H. Corder, ed., *Essays on Law and Social Practice in South Africa* (Cape Town: Juta, 1988) 1.

4 Constitutional points were taken in the courts on the day after the election period ended. Many judgments of the Provincial Divisions of the Supreme Court on such issues have been handed down, of which about one hundred have been reported. Delays in establishing the Judicial Service Commission, which plays a central role in the appointment of all judges, resulted in the Constitutional Court hearing its first case only in mid-February 1995.

The Constitutional Court has, at the time of writing, delivered judgment in eight cases argued before it. It has ruled that the death penalty,[5] the sentencing of juveniles to be whipped[6] and the manner of imprisonment of those who are unable to pay their financial debts[7] are all unconstitutional limitations on fundamental rights protected in the Constitution. The right to be presumed innocent until proven guilty in a criminal trial has triumphed over a statutory presumption that a confession in certain circumstances had been freely and voluntarily made.[8] The Court has ruled that it must have been intended that all criminal proceedings pending at the time of entry into force of the Constitution should immediately be affected by the protection afforded by the Bill of Rights, in particular the "due process" provisions.[9] The Court has sent back to a Provincial Division an issue which had been referred to it prematurely,[10] and has confirmed that it alone has the jurisdiction to rule an Act of Parliament unconstitutional.[11] Finally, the Court already has had to rule on an "inter-governmental dispute," in the form of a challenge by the Western Cape provincial government to the constitutional validity of central government action in respect of transition measures for local government.[12]

Our aim is not to provide an exhaustive treatment of the constitutional jurisprudence to date, nor an analysis of the decisions just mentioned. We seek rather to examine critically the manner in which the enterprise of constitutional interpretation has proceeded in the Constitutional Court. Crucial to this enquiry are answers to the following questions: what factors and legal systems have influenced the constitutional judicial process; is any single method of constitutional interpretation preferred; have the constitutional judges been able to throw off the rather confining shackles of legislative interpretation which have

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5 *S.*v. *Makwanyane and Another* 1995 (3) S.A. 391 (C.C.) [hereinafter *Makwanyane*].

6 *S.* v. *Williams and Others* 1995 (3) S.A. 632 (C.C.) [hereinafter *Williams*].

7 *Coetzee* v. *Government of the RS.A.*; *Matiso* v. *Commanding Officer, Port Elizabeth Prison* 1995 (4) S.A. 631 (C.C.) [hereinafter *Coetzee* and *Matiso*].

8 *S.* v. *Zuma and Others* 1995 (2) S.A. 642 (C.C.) [hereinafter *Zuma*].

9 *S.* v. *Mhlungu and Others* 1995 (3) S.A. 867 (C.C.) [hereinafter *Mhlungu*].

10 *S.*v. *Vermaas; S.* v. *Du Plessis* 1995 (3) S.A. 292 (C.C.) [hereinafter *Vermaas* and *Du Plessis*].

11 *Zantsi* v. *Council of State, Ciskei and Others* 1995 (3) S.A. 615 (C.C.) [hereinafter *Zantsi*].

12 *Executive Council, Western Cape Legislature* v. *President of the Republic of S.A.* 1995 (4) S.A. 877 (C.C.) [hereinafter *Western Cape*].

bound the South African judiciary in the past,[13] and in the style so characteristic of one of the constitutional judges,[14] has there been a ringing and decisive break with the past? We appreciate that these are early days to be making assessments of this nature and that a cohesive pattern has yet to be established. Yet we would argue that some important foundation stones have already been laid which point to the direction that constitutionalism in South Africa is likely to take.

II. THE FRAMEWORK

Political and constitutional transition in South Africa has been an extraordinary process.[15] The history of domination and resistance, the astonishing turnabout in 1990, the complex web of alliances, the pervasive context of political and criminal violence, and the remarkable series of negotiations which culminated in the transitional Constitution[16] have all influenced the final product deeply. Most of those who participated in the writing of the Constitution, either from a party-political or a "technical"[17] point of view, remain active and prominent in legal and political life.[18] It is inevitable, therefore, that personalities and inside knowledge will influence the interpretive process to a greater degree than might normally be the case. An additional unusual factor is the transitional nature of the constitutional text, although its

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13 See L. Du Plessis and J.R. De Ville, "Bill of Rights Interpretation in the South African Context (1): Diagnostic Observations" (1993) 4 Stell L.R. 63.

14 See the judgments of Mahomed J. in *Makwanyane*, *supra* note 5 at para. 262 and in *Mhlungu*, *supra* note 9 at para. 8. The writing of judgments by the Constitutional Court already indicates an innovative style: using numbered paragraphs makes for ease of reference where the judgments are made available immediately through the medium of the electronic internet and obviates the need for complex references to more than one set of law reports, while the use of footnotes is also a change from the norm.

15 Two of the best accounts of the years 1990-1994 are to be found in S. Friedman, ed., *The Long Journey* (Johannesburg: Ravan, 1993) and S. Friedman & D. Atkinson, eds., *The Small Miracle* (Johannesburg: Ravan, 1994).

16 Commonly known as the Multi-Party Negotiating Process (M.P.N.P.).

17 Seven Technical Committees were appointed to assist the M.P.N.P. formulate proposals on particularly contentious issues. The writers of this piece served on such a committee: Corder on "Fundamental Rights" and Davis on the "Electoral System."

18 Indeed, the President of the Constitutional Court, Arthur Chaskalson, was a member of the Technical Committee which was responsible for drafting the whole Constitution except the Bill of Rights.

terms[19] allow one to predict with some certainty that the final Bill of Rights will not be too dissimilar in approach and content.[20]

During the intense debates which took place prior to the finalisation of the Constitution, the role of the court was often at the centre of the controversy. Thus concern about the extension of the courts' role moved the African National Congress and South African Communist Party to argue against the horizontal application of the Bill of Rights, and had an influence on the decision to exclude administrative review on the grounds of unreasonableness.[21]

The President of the Constitutional Court has, on occasion, cited the views of John Hart Ely with approval.[22] The attraction of Ely's work for South African lawyers is essentially two-fold. Schooled and trained in the context of a conservative jurisprudence which defined the lawyer's role in procedural terms, it is not surprising that Ely's approach appeals, particularly the key assumption that "[l]awyers *are* experts on process writ small, the processes by which facts are found and contending parties are allowed to present their claims."[23]

For this reason, the judges of the Constitutional Court, amongst others, might regard the "selection and accommodation of substantive values" as best left to the political process. They are likely to argue that a constitution should be left to deal "with procedural fairness in the resolution of individual disputes (process writ small) and ... with what might capaciously be designated process writ large — with ensuring broad participation in the processes and distributions of government."[24] This proposed resolution of the counter-majoritarian difficulty caused by an unelected judiciary imposing substantive commitments upon an elected government appeals to lawyers schooled in a conservative legal

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19 The "final constitutional text" may not deviate from a series of "Constitutional Principles" agreed on prior to the transition, contained in Schedule 4 to the transitional Constitution: see s.71.

20 Constitutional Principles II, III and V, for example.

21 See in general, L. Du Plessis and H. Corder, *Understanding South Africa's Transitional Bill of Rights* (Cape Town: Juta, 1994), particularly Chapters 4 and 5. "Horizontal" application refers to the operation of the Bill of Rights between private parties; "*drittwirkung*" in German constitutional law.

22 For example, while he was President-designate, in proposing the vote of thanks to Professor Lorraine Weinrib of the University of Toronto at the Schreiner Memorial Lecture at the University of the Witwatersrand, August 1994.

23 J.H. Ely, *Democracy and Distrust* (Cambridge: Harvard University Press, 1980) at 102.

24 *Ibid.* at 87.

discourse. Judges must enforce the rules in terms of which all citizens may struggle for their substantive preferences, but it is not for the court to jump into the ring and interfere with the actual fight.

This approach had a clear influence in the formulation of the limitations clause, section 33 of the Constitution. Section 33(1) makes certain rights subject to a test stricter than the standard limitation test contained within that section. Although the rights which are given greater protection extend beyond the guarantee of political participation, section 33(1) makes it clear that a number of rights, including freedom of expression, assembly, association and movement, access to information, and administrative justice, attract a stricter limitation only in so far as they apply to free and fair political activity. The reinforcement of political representation was uppermost in the drafters' thoughts "bearing in mind the crucial need for free and fair political activity during the period of transition to democracy."[25]

Ely's claim that "representation-reinforcement" was the leitmotif of the United States' Bill of Rights has not gone uncriticised in the United States.[26] Whatever the merits of this debate, however, the theory runs into serious difficulties when applied to Chapter 3 of the South African Constitution. A series of interpretive provisions reveals clear, substantive commitments in the text of Chapter 3.

The main interpretive guidelines laid down in the Bill of Rights are to be found in section 33(1) and section 35. As these sections play an important part in what follows, it is appropriate to reproduce them in full at the outset:

Limitation

33. (1) The rights entrenched in this Chapter may be limited by law of general application, provided that such limitation —

(a) shall be permissible only to the extent that it is —

(i) reasonable; and

(ii) justifiable in an open and democratic society based on freedom and equality; and

(b) shall not negate the essential content of the right in question,

and provided further that any limitation to —

(aa) a right entrenched in sections 10, 11, 12, 14(1), 21, 25 or 30(1)(*d*) or (*e*) or (2); or

(bb) a right entrenched in sections 15, 16, 17, 18, 23 or 24, in so far as such right relates to free and fair political activity, shall, in addition to being reasonable as

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25 Du Plessis and Corder, *supra* note 21 at 128.

26 For example, see L.H. Tribe, "The Puzzling Persistence of Process-Based Constitutional Theories" (1980) 89 Yale Law Journal 1063.

required in paragraph (*a*)(i), also be necessary.

...

Interpretation

35. (1) In interpreting the provisions of this Chapter a court of law shall promote the values which underlie an open and democratic society based on freedom and equality and shall, where applicable, have regard to public international law applicable to the protection of the rights entrenched in this Chapter, and may have regard to comparable foreign case law.

(2) No law which limits any of the rights entrenched in this Chapter, shall be constitutionally invalid solely by reason of the fact that the wording used *prima facie* exceeds the limits imposed in this Chapter, provided such a law is reasonably capable of a more restricted interpretation which does not exceed such limits in which event such law shall be construed as having a meaning in accordance with the said more restricted interpretation.

(3) In the interpretation of any law and the application and development of the common law and customary law, a court shall have due regard to the spirit, purport and objects of this Chapter.

Unlike the U.S. Constitution, Chapter 3 thus has attempted to reconcile the output of a democratically-elected legislature with the supervisory role of an unelected judiciary by means of the limitation clause.[27] This section envisages the possibility that the state may trump any right guaranteed by the constitution. Thus, no rights are given absolute protection, and any may be limited provided that the state's act of limitation can be justified in terms of the test set out in section 33(1).

The formulation of the limitation clause was heavily influenced both by the wording of section 1 of the *Canadian Charter of Rights and Freedoms*[28] and by the interpretation given to it in *R.* v. *Oakes*.[29] In particular, the test of proportionality developed in *Oakes* was given serious consideration by the

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27 The two-tier standard (mostly reasonableness, sometimes necessity) contained within the current s.33(1) is the outcome of a confused attempt to build in differing levels of scrutiny as in American constitutional jurisprudence (see *supra* note 21 at 126-28). Current proposals for the formulation of the limitation clause in the final Constitution have dispensed with this dualism, but there is as yet no political agreement on the appropriate single standard — should it be reasonableness, justifiability, necessity, or a combination of two such concepts? See *Refined Working Draft*, 3rd ed. of 18 December 1995, clause 35(1).

28 Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act, 1982* (U.K.), 1982, c.11.

29 *R.* v. *Oakes* [1986] 26 D.L.R. (4th) 200 (S.C.C.).

drafters, namely:[30]

> To establish that a limit is reasonable and demonstrably justified in a free and democratic society, two central criteria must be satisfied. First, the objective, which the measures responsible for a limit on a Charter right or freedom are designed to serve, must be "of sufficient importance to warrant overriding a constitutionally protected right or freedom." The standard must be high in order to ensure that objectives which are trivial or discordant with the principles integral to a free and democratic society do not gain section 1 protection. It is necessary, at a minimum, that an objective relate to concerns which are pressing and substantial in a free and democratic society before it can be characterised as sufficiently important.
>
> Secondly, once a sufficiently significant objective is recognised, then the party invoking section 1 must show that the means chosen are reasonable and demonstrably justified. This involves "a form of proportionality test." Although the nature of the proportionality test will vary depending on the circumstances, in each case courts will be required to balance the interests of society with those of individuals and groups. There are, in my view, three important components of a proportionality test. First, the measures adopted must be carefully designed to achieve the objective in question. They must not be arbitrary, unfair or based on irrational considerations. In short, they must be rationally connected to the objective. Secondly, the means, even if rationally connected to the objective in the first sense, should impair "as little as possible" the right or freedom in question. Thirdly, there must be a proportionality between the *effects* of the measures which are responsible for limiting the Charter right or freedom, and the objective which has been identified as of "sufficient importance."

As initially conceived in the light of *Oakes*, section 33(1) would impose a relatively heavy onus of justification on the state if it wished to limit a guaranteed right, and a very heavy onus in the case of certain rights, as already discussed. By means of this section, Chapter 3 reflected a recognition of the need to balance the work of democratic political institutions with the consequences of constitutional review, itself designed to guarantee a range of protected rights. To this extent, the court was being assisted in striking a balance and was not left to its own jurisprudential autonomy as is the case in the United States.

The balance in favour of certain commitments, namely the establishment of a society based on freedom and equality, was further tilted in favour of the promotion of certain key values, as set out in s 35(1). Although the principle of equality is coupled to that of freedom, in deference to certain pro-libertarian

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30 *Ibid.* at 227. See, for the background to s.33(1), *supra* note 21 at 124-5 and H. Corder *et al.*, *A Charter for Social Justice: A contribution to the South African Bill of Rights Debate* (Cape Town: Department of Public Law, University of Cape Town, 1992), which had a clear influence on the draft, and which itself had taken careful account of the views of Canadian constitutional lawyer, David Beatty.

parties at the negotiations,[31] there are further interpretive indicators elsewhere in the text.

Section 232(4) of the Constitution is an unusual provision for it provides that the Schedules, the preamble and the "postamble" are to be given weight equal to the substantive clauses of the Constitution in the process of interpretation. The preamble and postamble read as follows:

PREAMBLE

In humble submission to Almighty God,
We, the people of South Africa, declare that —

WHEREAS there is a need to create a new order in which all South Africans will be entitled to a common South African citizenship in a sovereign and democratic constitutional state in which there is equality between men and women and people of all races so that all citizens shall be able to enjoy and exercise their fundamental rights and freedoms;

AND WHEREAS in order to secure the achievement of this goal, elected representatives of all the people of South Africa should be mandated to adopt a new Constitution in accordance with a solemn pact recorded as Constitutional Principles;

AND WHEREAS it is necessary for such purposes that provision should be made for the promotion of national unity and the restructuring and continued governance of South Africa while an elected Constitutional Assembly draws up a final Constitution;

NOW THEREFORE the following provisions are adopted as the Constitution of the Republic of South Africa:

'POSTAMBLE'

National Unity and Reconciliation

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

The pursuit of national unity, the well-being of all South African citizens and peace require reconciliation between the people of South Africa and the reconstruction of society.

The adoption of this Constitution lays the secure foundation for the people of South Africa to transcend the divisions and strife of the past, which generated gross violations of human

[31] See Du Plessis and Corder, *supra* note 21 at 53, which describes how libertarian negotiators claimed that were the qualification based on the principle of equality to be inserted, the balance between liberty and equality would be disturbed.

rights, the transgression of humanitarian principles in violent conflicts and a legacy of hatred, fear, guilt and revenge.

These can now be addressed on the basis that there is a need for understanding but not for vengeance, a need for reparation but not for retaliation, a need for ubuntu but not for victimisation.

In order to advance such reconciliation and reconstruction, amnesty shall be granted in respect of acts, omissions and offences associated with political objectives and committed in the course of the conflicts of the past. To this end, Parliament under this Constitution shall adopt a law determining a firm cut-off date, which shall be a date after 8 October 1990 and before 6 December 1993, and providing for the mechanisms, criteria and procedures, including tribunals, if any, through which such amnesty shall be dealt with at any time after the law has been passed.

With this Constitution and these commitments we, the people of South Africa, open a new chapter in the history of our country.

Nkosi sikelel' iAfrika. God seën Suid-Afrika
Morena boloka sechaba sa heso. May God bless our Country
Mudzimu fhatutshedza Afrika. Hosi katekisa Afrika

It is immediately clear that this Constitution is no colourless statement of governmental structures and procedures. The transitional Constitution is, in fact, unambiguously directed toward the achievement of openness and democracy in government and freedom and equality among the people of South Africa. The emphasis is placed, not on the will of a transient majority or the pressure of a powerful interest group, but rather on reason, openness and justification in the decision-making processes.

This position gains added support from Schedule 4, entitled Constitutional Principles, which contains any number of substantive commitments. Principle I provides that the Constitution of South Africa shall provide for the establishment of one sovereign state, a common South African citizenship and a democratic system of government committed to achieving equality between men and women and people of all races. Principle 3 provides that the Constitution shall prohibit racial, gender and all other forms of discrimination and *shall promote* racial and gender equality and national unity. Although such principles are binding on the Constitutional Assembly in its task of drafting the 'final constitutional text' and not on Parliament or the Constitutional Court, they nevertheless establish a normative framework for all government action.

In interpreting the rights guaranteed in Chapter 3, the courts are thus directed to focus on the substantive commitments of the Constitution. For example, section 8, dealing with equality, must be interpreted to contain substantive

commitments to promote equality in all its forms. Section 14 makes a substantive commitment to freedom of conscience, religion, thought, belief and opinion, including academic freedom in institutions of higher learning. Section 27 guarantees a particular form of labour relations, section 30 commits society to ensuring that every child shall have the right, *inter alia*, to security, basic nutrition, basic health and social services, and section 32 provides that every person shall have the right to basic education and to equal access to educational institutions.

We are not suggesting that constitutional interpretation does not involve the construing of words, intentions and purposes. However, when interpreted, the words of the text and the purpose of Chapter 3 give rise to consequences which in time are best tested against a particular conception of the society which the Constitution through the interpretive indications begins to promise.

In the light of these substantive commitments weighed against the technicist literalism employed in the interpretation of statutes by South African judges in the past,[32] the following three interpretive methods have been isolated because of their potential to unlock the meaning of the text of Chapter 3. Given the assumptions on which they are based, they provide useful benchmarks for the assessment of the approach of the Constitutional Court:

— the privileging of legislative history (or, in its American form, original intent); as has been explained, many factors facilitate this approach, not least among them the proximity in time of the drafting process;[33]

— marked deference to the legislature, born of an acute awareness of the courts' past role as the enforcer of legislative and executive

[32] See Du Plessis and Corder, *supra* note 21 at 62-72, and the criticism of the work, in particular, of L.C. Steyn *Die Uitleg van Wette*, 5th ed. (Cape Town: Juta, 1981).

[33] It could be argued that it is proper for the court to take judicial notice of events in the public domain so close to them in time, in which many of the judges had participated, in one form or another, and about which there was little controversy.

injustice,[34] the consequent erosion of judicial legitimacy,[35] and the 'counter-majoritarian difficulty'[36] which arises in the new democratic setting. These questions are particularly relevant in the interpretation of the limitation clause; and

— the pursuit of a purposive approach, informed by the constitutional experience of several modern democracies[37] and regional[38] and international[39] precedent.

III. THE INTERPRETIVE APPROACH OF THE CONSTITUTIONAL COURT

With South Africa's legislative, judicial and political history in mind, as has been described briefly, many wondered how the Constitutional Court would define its role as it set to work in early 1995. Most observers agreed that it was well equipped to undertake the pioneering role required of it, its members being drawn from a wider range of the South African population than any other court in the country's history and bringing diverse skills and interests to the bench. What could be described as the general interpretive approach of the Constitutional Court thus far? We plan to attempt to answer this question by pointing to several clear features of the Court's judgments and to weigh these against the interpretive methods described above.

A. BASIC POINT OF DEPARTURE

The crux of the interpretive enterprise has centred on the meaning of the limitation provision in section 33(1). In this regard the Constitutional Court has

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34 For the most thorough record of this role, see Dugard, *supra* note 3, A.S. Mathews, *Law, Order and Liberty in South Africa* (Berkeley: University of California Press, 1972), H. Corder, *Judges at Work* (Cape Town: Juta, 1984) and C.F. Forsyth, *In Danger for their Talents* (Cape Town: Juta, 1985).

35 Acknowledged by the Commission of Inquiry into the Structure and Functioning of the Courts: *Final Report* (RP78/1983) Part 1 para 3.4.2.8 and Part IV para 2.2.1.2.13.

36 Ely, *supra* note 23 at Chapter 3. See, in general, J. Elster & R. Slagstad, eds., *Constitutionalism and Democracy* (Cambridge: Cambridge University Press, 1988).

37 Such as Canada, India and Germany.

38 Such as the European Commission and Court of Human Rights.

39 Such as the *International Covenants on Civil and Political Rights* and *on Social, Economic and Cultural Rights*, both of 1966, and the work of the UN Committee on Human Rights.

consistently adopted a two-stage approach and has employed the ideas of proportionality and balancing in order to decide whether a restriction on a right is "reasonable and justifiable in an open and democratic society based on freedom and equality." The following statements from the judgments are typical:

> This calls for a "two stage" approach. First, has there been a contravention of a guaranteed right? If so, is it justified under the limitation clause? The single stage approach (as in the U.S. Constitution or the Hong Kong Bill of Rights) may call for a more flexible approach to the construction of the fundamental right, whereas the two-stage approach may call for a broader interpretation of the fundamental right, qualified only at the second stage.[40]

> The limitation of constitutional rights ... involves the weighing up of competing values, and ultimately an assessment based on proportionality.[41]

> [In regard to reasonableness and justifiability], the enquiry concerns proportionality: to measure the purpose, effects and importance of the infringing legislation against the infringement caused. In addition, it will need to be shown that the ends sought by the legislation cannot be achieved sufficiently and realistically by other means which would be less destructive of entrenched rights.[42]

> The test relies on proportionality, a process of weighing up the individual's right which the State wishes to limit against the objective which the State wishes to achieve by such limitation.[43]

B. UNDERLYING VALUES

That this is a value-laden process is clear, and the judges have not shied away from identifying those values which they perceive to be central to the Constitution, and the Bill of Rights in particular. In the process, the Court has given an idea of its views on the role of Parliament,[44] law and itself[45] in a society in transition, on the values inherent in the Constitution and the Court,[46] on the

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40 See *Zuma, supra* note 8 at para. 21, per Kentridge A.J.

41 See *Makwanyane, supra* note 5 at para. 104, per Chaskalson P. See also paras. 108, 110, 135 and 356.

42 *Makwanyane, supra* note 5 at para. 339, per O'Regan J.

43 See *Williams, supra* note 6 at para. 58, per Langa J. See also *Mhlungu, supra* note 12 at paras. 116 and 125-6, per Sachs J.

44 See *Western Cape, supra* note 12 at para. 200, per Sachs J.

45 See *Williams, supra* note 6 at para. 8, per Langa J, *Mhlungu, supra* note 9 at para. 8, per Mahomed J and *Western Cape, supra* note 12 at para. 100, per Chaskalson P

46 See *Mhlungu, supra* note 9 at para. 8, per Mahomed J. and at para. 127, per Sachs J.

place of "traditional African jurisprudence"[47] or "ubuntu"[48] in its deliberations, and on combatting crime and the goals of punishment[49] in South Africa.

It is once more instructive to note a representative sample of the judges' own words:

> Without law, society cannot exist. Without law, individuals in society have no rights. It is of fundamental importance to the future of our country that respect for the law should be restored, and that dangerous criminals should be apprehended and dealt with firmly.[50]
>
> The incumbents [of the Court] are Judges, not sages; their discipline is the law, not ethics or philosophy and certainly not politics.[51]
>
> The South African Constitution is different [from an instrument which formalises an historical consensus of values]: it retains from the past only what is defensible and represents a decisive break from, and a ringing rejection of, that part of the past which is disgracefully racist, authoritarian, insular, and repressive, and a vigorous identification of and commitment to a democratic, universalistic, caring and aspirationally egalitarian ethos expressly articulated in the Constitution.[52]
>
> The values urged upon the Court are not those that have informed our past. Our history is one of repression not freedom, oligarchy not democracy, apartheid and prejudice not equality, clandestine not open government.[53]

No reader can escape the judges' acute awareness of the historical juncture at which law and society find themselves in South Africa, as well as the Court's key role in the transformation of that society.

C. COMPARATIVE INFLUENCE

Although the Constitution expressly enjoins a comparative approach to interpretation,[54] and although such an approach might seem obvious for a legal

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47 See *Makwanyane, supra* note 5 at paras. 252-60, per Madala J, para. 300 and para. 304, per Mokgoro J. and para. 361, per Sachs J.

48 See *Makwanyane, supra* note 5 at paras. 224-27, per Langa J, para. 237 and paras. 243-45, per Madala J., para. 263, per Mahomed J., and paras. 307-08, per Mokgoro J.

49 See *Makwanyane, supra* note 5 at para. 122, per Chaskalson P. and paras. 169-71, per Ackermann J.

50 *Ibid.* at para. 117, per Chaskalson P.

51 *Ibid.* at para. 207, per Kriegler J.

52 *Ibid.* at para. 262, per Mahomed J.

53 *Ibid.* at para. 322, per O'Regan J.

54 See s. 35(1) above.

system so newly exposed to the wealth of authority in the human rights field, those familiar with the South African judicial process of the past regard the extent of the references to foreign and international precedent as an extraordinary change. Each judgment delivered is replete with references to the constitutional jurisprudence of Canada, Germany, Hungary, India, Namibia, the United States, Zimbabwe and Europe, as well as the Privy Council in the United Kingdom, Botswana and Tanzania.[55] The Court has allowed itself to be guided in its manner of interpretation by the experiences of these and other legal systems, while emphasising the peculiarity of the South African condition and constitutional dictates, and the necessity not to follow foreign trends slavishly.[56] The approach is summed up by the following statement of the President of the Court in the death penalty decision:[57]

> Comparative "bill of rights" jurisprudence will no doubt be of importance, particularly in the early stages of transition when there is no developed indigenous jurisprudence in this branch of the law on which to draw. Although we are told by section 35(1) that we "may" have regard to foreign case law, it is important to appreciate that this will not necessarily offer a safe guide to the interpretation of Chapter 3 of our Constitution.

D. CAREFUL CAUTION

Despite their awareness of the Court's important part in the legal revolution which the Constitution represents, the judges have counselled caution on numerous occasions. This has been manifested in a number of forms: they have been careful to decide only as much as is necessary for the case before them;[58] they have emphasized what their decision does *not* mean;[59] and they have been concerned that their judgments not cause undue dislocation to the administration of justice.[60] This desire to steer clear of ticklish questions until it is necessary to

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55 For a selected sample, see *Zuma, supra* note 8 at paras. 20-5; *Makwanyane, supra* note 5 at paras. 33-42, 56-86, 105-15, 158-65, 198-201; *Williams, supra* note 6 at paras. 23-40; *Mhlungu, supra* note 9 at paras. 78 and 113-14; *Western Cape, supra* note 12 at paras. 53-60 and 130-35; *Coetzee, supra* note 7 at paras. 44-59; and *Zantsi, supra* note 12 at paras. 2-7.

56 See *Zuma, supra* note 8 at para. 35, for example.

57 See *Makwanyane, supra* note 5 at para. 37, per Chaskalson P.

58 See, for example, *Zuma, supra* note 8 at para. 34; *Makwanyane, supra* note 5 at paras. 134, 149 and 297-98; *Williams, supra* note 6 at para. 94; *Coetzee, supra* note 7 at paras. 20, 21 and 69; and *Zantsi, supra* note 11 at paras. 2-7.

59 See *Zuma, supra* note 8 at paras. 41 and 42.

60 See *Mhlungu, supra* note 9 at paras. 35, 39-42 and 93; and *Zuma, supra* note 8 at para. 43.

confront them foursquare has been particularly evident in the court's approach to the meaning of the words "shall not negate the essential content of the right," which form an additional hurdle in the limitations test.[61] Although Chaskalson P. has proposed that these words can be read in an objective or a subjective sense,[62] he was careful not to choose either,[63] and the other judges have tended to regard them with much circumspection.[64]

Nevertheless, there have been at least two occasions on which Sachs J. has deemed it appropriate, for the purposes of fully considering the question before the Court, to go slightly further into the context than his colleagues on the Court have thought necessary.[65] The dominant influence remains, however, that expressed in the following dictum from American jurisprudence:[66]

> [N]ever ... anticipate a question of constitutional law in advance of the necessity of deciding it; ... never ... formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied.

E. CONSTITUTIONAL SUPREMACY

Allied to this concern for caution has been an insistence that the words of the Constitution are what matter, not judicial opinion as to their meaning.[67] Stress laid on this approach is especially significant for two target audiences: a Parliament which has been divested of its sovereignty and is only slowly becoming accustomed to the limits of its legislative power; and a public which is unused to the overt involvement of the courts in matters considered "political" and charged with emotion, such as the continued existence of the death penalty.

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61 See s.33(1)(b). The adoption of this formulation was influenced by article 19 of the German Constitution.

62 See *Makwanyane, supra* note 5 at para. 133.

63 *Ibid.* para. 134.

64 See, for example, *Makwanyane, supra* note 5 at para. 167, per Ackermann J. and para. 298, (Mahomed J. actually proposed a third sense of the words here); and *Williams, supra* note 6 at para. 93, per Langa J.

65 See *Makwanyane, supra* note 5 at para. 374 and *Coetzee, supra* note 7 at paras. 37-41.

66 *Liverpool, New York and Philadelphia Steamship Co* v. *Commissioners of Emigration*, 113 U.S. 33 (1884) at 39, per Matthews J., quoted in *Zantsi, supra* note 11 at para. 2, per Chaskalson P.

67 See, for example, *Zuma, supra* note 8 at paras. 17 and 18, per Kentridge A.J.; *Makwanyane, supra* note 5 at paras. 206, per Kriegler J. and 392, per Sachs J.; and *Mhlungu, supra* note 9 at paras. 15, per Mahomed J., 83-84, per Kentridge A.J. and 112, per Sachs J.

Such tensions become particularly acute when seen against the past in which the legislative power was wielded in an unrestricted fashion to achieve massive injustice, to which the judicial response was, at best, a tepid attempt to ameliorate the effects of such laws in isolated cases. The question which has arisen legitimately in many minds is: why this concern for limited legislative government at the precise moment when formal "democracy" has been established?

While this question demands a complex answer which is not part of the present exercise, the Constitutional Court has shown a proper sensitivity to the constituencies affected most immediately by its judgments,[68] without at any stage succumbing to populist sentiments. In the Court's first judgment, it said:[69]

> While we must always be conscious of the values underlying the Constitution, it is nonetheless our task to interpret a written instrument. Nor is it easy to avoid the influence of one's personal intellectual and moral preconceptions. But it cannot be too strongly stressed that the Constitution does not mean whatever we might wish it to mean.

F. ACADEMIC RELEVANCE?

Amidst the host of innovative steps taken by the Constitutional Court in its first year of operation, as regards the form of its judgments, the sources which it uses, its interpretive approach (of which more below), and its open acknowledgment of values, the relative dearth of reference to academic authority is slightly puzzling. With notable exceptions,[70] the judges have chosen to cite judicial authority, from whatever quarter, rather than home-grown academic commentary,[71] despite the extensive use of such sources by counsel in argument before the Court and the background of those acting as judge's clerks (most of whom are recent graduates and thus more susceptible to academic influence). In this sense, at least, the Court is behaving traditionally!

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68 An example of sensitivity to Parliament is the Court's use of the concept of "severability" in order to preserve as much of an Act of Parliament as possible: see *Coetzee, supra* note 7 at paras. 15-7 and 74-6.

69 *Zuma, supra* note 8 at para. 17, per Kentridge J.

70 Ackermann, O'Regan and Sachs JJ.

71 The Court has, by contrast, relied quite frequently on foreign textbooks on constitutional law.

G. METHODS OF INTERPRETATION

Against the background of these comments on the general manner in which the Constitutional Court has approached its work, what methods of interpretation has it claimed to follow, or followed in fact, in its first eight judgments? In particular, in the context sketched in Part II above, to what extent has weight been given to legislative history, legislative deference and contextualised purpose? Indicators of each will be reviewed in turn.

First, the role accorded to legislative history, although still minor, has undoubtedly surprised many commentators. For all the reasons on the strength of which the doctrine of "original intent" would be opposed in most constitutional democracies,[72] as well as those which were peculiar to the South African transitional process,[73] few would have forecast that the Constitutional Court would be prepared to entertain arguments on legislative history. In the event, the Court solicited such debate by requesting the parties to the very first hearing (on the death penalty) to address the court on the process of formulating the right to life.[74]

The outcome of this intervention is to be seen in the main judgment in that case. After stating that the context of a constitutional provision "includes the history and background to the adoption of the Constitution"[75] and reviewing the extent to which South African courts in the past and foreign courts had dealt with this issue,[76] Chaskalson P.[77] stated:[78]

> The Multi-Party Negotiating Process [MPNP] was advised by technical committees, and the

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72 For example, it appears that in Canada originalism has never enjoyed support: P. Hogg, *Constitutional Law of Canada*, 3d ed. (Toronto: Carswell, 1992) at 1289. It is significant that the South African court has not taken the opportunity of minimising the importance of legislative history as did Lamer J. in *Re Section 94(2) of the BC Motor Vehicle Act* [1985] 2 S.C.R. 486 at 509.

73 Such as doubts concerning the legitimacy of participants in the M.P.N.P., the fractured nature of the constitution-drafting process, and the limited and confused extent of the constitutional mandate given to the drafters: see *supra* note 21 at 83-5 and 101.

74 In s.9 of the Constitution.

75 *Makwanyane, supra* note 5 at para. 10.

76 *Ibid.* paras. 13-6.

77 In whose judgment all the judges were content to concur, with slight variations in reasoning, none of which touched on this issue.

78 *Makwanyane, supra* note 5 at para. 17.

> reports of these committees on the drafts are the equivalent of the *travaux préparatoires* relied upon by the international tribunals. Such background material can provide a context for ... interpretation ... and ... I can see no reason why such evidence should be excluded.

Having counselled caution in this regard,[79] the President of the Court went on to hold:[80]

> Background evidence may, however, be useful to show why particular provisions were or were not included in the Constitution. [W]here the background material is clear, is not in dispute, and is relevant in showing why particular provisions were or were not included ..., it can be taken into account by a Court in interpreting the Constitution.

The Court then proceeded to apply this approach in regard to the death penalty, in order to demonstrate that the negotiating political parties had intended that the Court should have the jurisdiction to decide on the constitutionality of the death penalty.[81] Attention was also paid to "historical background" in *Zuma*,[82] the first decision handed down, while in the first split decision, *Mhlungu*,[83] the "intention of the framers" was referred to in determining the meaning of section 241(8).

While some of the pitfalls surrounding the use of legislative history do not apply to the South African Constitution, by virtue of its extremely recent origins, it is highly unlikely that its use will increase in prominence with the passage of time. In any event, its role is likely to be limited to tipping the balance, or confirming what has already been concluded, where the legislative history is uncontroversial.[84]

Second, the political conditions of the transitional period and the extraordinary social history of South Africa indicate that a degree of deference to the legislature is likely. In fact, there have been few overt signs of such an approach, and those which are apparent seem to be inconclusive. Chaskalson P. posed the question in *Makwanyane* thus:[85] "Can, and should, an unelected court substitute its own opinion of what is reasonable or necessary for that of an

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79 *Ibid.* at para. 18.

80 *Ibid.* at para. 19.

81 See *Makwanyane, supra* note 5 at paras. 20-5.

82 See *supra* note 8 at paras. 15, 33, 36 and 37, per Kentridge A.J.

83 See *supra* note 9 at paras. 112 and 142, per Sachs J.

84 As has been argued by Du Plessis and Corder, *supra* note 21 at 83-5, under the notion of "surrounding circumstances" as an aid to interpretation.

85 *Supra* note 5 at para. 107.

elected legislature?," and then proceeded to describe what the Canadian courts had said on the matter. In the same case, Sachs J. set out clearly how he saw the roles of Parliament and the Court, again without expressly indicating how the Court would deal with a clash with the legislature.[86]

On the other hand, Chaskalson P. displayed a strong commitment to Constitutional supremacy, even in the face of legislative wishes to the contrary, in the *Western Cape* case, doubly significant for being an inter-governmental dispute where the provincial government was run by a minority party.[87] He put it thus:[88]

> Constitutional cases cannot be decided on the basis that Parliament or the President acted in good faith or on the basis that there was no objection to action taken at the time that it was carried out. It is of crucial importance at this early stage of the development of our new constitutional order, to establish respect for the principle that the Constitution is supreme. Our duty is to declare legislative and executive action which is inconsistent with the Constitution to be invalid, and then to deal with the consequences of the invalidity in accordance with the provisions of the Constitution.

A similar stance was adopted by Didcott J. for the Court in *Vermaas* and *Du Plessis*.[89] So it would appear that the anticipated legislative deference has not yet materialised, even though the dissenting judgment[90] in the *Western Cape* decision could be read in that light.

Third, there can be no doubt that the commonest way in which the Court has described its interpretive method is to state that it is seeking the "contextualised purpose" of the words used in the Constitution. In other words, the aim of constitutional interpretation is, unlike statutory interpretation,[91] to seek the purpose of the provision in the context of the rest of the Constitution and its underlying values.[92] Although there seems to be a tendency to identify the purposive with a "broad or generous" reading,[93] O'Regan J. surely is correct when she points out that a purposive approach may require a generous reading

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86 *Ibid.* at para. 370.

87 The Western Cape government is controlled by the National Party, the party which conceived and implemented apartheid.

88 *Supra* note 12 at para. 100.

89 *Supra* note 10 at para. 16.

90 See *Western Cape, supra* note 12 at paras. 211ff, per Madala J. and Ngoepe A.J.

91 A point made in *Zuma, supra* note 8 at para. 14 and *Mhlungu, supra* note 9 at para. 99.

92 See *Makwanyane, supra* note 5 at paras. 9 and 10.

93 See *Zuma, supra* note 8 at para. 15.

on some occasions, and a narrow reading on others.[94] In fact, the Constitutional Court has, in pursuit of the purpose of a Constitutional provision, found it more often by assuming a generous stance[95] than a narrow one[96], although it is important to realise that neither route is necessarily correct. It also has been suggested that the purposive approach is to be contrasted with a "literalist" one.[97]

As much as it is possible to identify them after such a short period of operation, these seem to be the main features of the Court's interpretive method. It remains to evaluate them critically, and to speculate on likely developments in the near future.

IV. SUBSTANTIVE COMMITMENT OR LEGISLATIVE DEFERENCE?

It is clearly too early in the life of the Constitutional Court to provide a definitive analysis of the court's approach to the interpretation of the Constitution. Accordingly, this contribution can do no more than to seek certain hairline divisions which have begun to appear amongst the eleven judges of the court.

The difficulty in venturing an opinion of the court's performance is compounded by two further considerations. The cautious approach described above has resulted in a fairly generalised aproach to interpretation. Although Chaskalson P. conceded that there may "possibly be instances where the 'generous' and 'purposive' interpretations do not coincide," he declined to develop an analysis of the differences and simply contented himself with the conclusion that "that problem does not arise in the present case."[98] The court might well know what the proper approach to interpretation might be but they are not telling the country as yet!

The only occasion on which marked interpretive divisions have appeared was

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94 See *Makwanyane, supra* note 5 at para. 325.

95 See *Zuma, supra* note 8 at paras. 14, 15 and 18; *Williams, supra* note 6 at para. 51; *Mhlungu, supra* note 9 at paras. 8, 23, 26, 46, 105, 108, 110-12, 123, 131; and *Western Cape, supra* note 12 at para. 198.

96 See *Mhlungu, supra* note 9 at paras. 63, 64 and 69, per Kentridge A.J. and 97, per Kriegler J., both of whom take a "narrow" approach and reach opposite conclusions as to the purpose of s.241(8).

97 See *Mhlungu, ibid.* at paras. 8, 23, 26 and 46, per Mahomed J.

98 See *Makwanyane, supra* note 5 at para. 9.

in *Mhlungu*,[99] the case which dealt with the interpretation of a transitional provision of the Constitution, section 241(8), which provides for the manner in which the Constitution is to deal with cases which were pending on 27 April 1994, the date of the commencement of the Constitution. The majority of the court found that an accused who was charged in March 1994 for crimes allegedly committed in April 1993 could enjoy the rights of an accused person guaranteed in terms of section 25 of the Constitution.

Judge Mahomed, on behalf of the majority, set out his approach to the section as follows:[100]

> An interpretation of section 241(8) which withholds the rights guaranteed by Chapter 3 of the Constitution from those involved in proceedings which fortuitously commenced before the operation of the Constitution would not give to that chapter a construction which is "most beneficial to the widest possible amplitude" and should therefore be avoided if the language and context of the relevant sections reasonably permits such a course.

Judge Mahomed went on to say that "the literal interpretation of section 241(8) involves a very radical constitutional consequence because ..., it would deny to a substantial group of people the equal protection of fundamental rights guaranteed by Chapter 3."[101] He concluded that such an interpretation would deny such a right to many:[102]

> The Constitution expressly entrenches the presumption of innocence allowing an accused person the right to protection from laws which effectively reverse this presumption; the literal approach denies such protection to potentially large classes of persons, including the very accused in this case. The contrast, in every area of legitimate concern for the ends of justice, is stark and distressing. I am not persuaded that a proper reading of the Constitution compels me to accept these distressingly anomalous consequences of the literal approach.

In a concurring judgment, Sachs J. went even further in his rejection of a literal approach to the section. He said:[103]

> The introduction of fundamental rights and constitutionalism in South Africa represented more than merely entrenching and extending existing common law rights, such as might

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99 *Supra* note 9.

100 *Ibid.* at para. 9.

101 *Ibid.* at para. 33.

102 *Ibid.* at para. 46.

103 *Ibid.* at para. 111. Judge Sachs indicated that his preferred approach is to seek the essential purposes of section 241(8) and Chapter 3 and balance them. This does not seem to be the common understanding of a purposive approach.

> happen if Britain adopted a Bill of Rights. To treat it with the dispassionate attention one might give to a tax law would be to violate its spirit as set out in unmistakably plain language. It would be as repugnant to the spirit, design and purpose of the Constitution as a purely technical, positivist and value-free approach to the post-Nazi Constitution in Germany would have been.

Acting Judge Kentridge delivered a dissenting judgment on behalf of four judges.[104] He found that section 241(8) had a clear purpose of ensuring "that there would be an orderly transition from the old to the new legal order, so as to avoid the dislocation which would be caused by introducing a radically different set of legal concepts in the middle of ongoing proceedings."[105] Given the express, clear language of the section, he could not accept that the section could be read so as to extend constitutional rights to cases commenced prior to 27 April 1994. In answer to the majority judgment, Kentridge A.J. said:[106]

> There are limits to the principle that a Constitution should be construed generously so as to allow to all persons the full benefit of the rights conferred on them, and those limits are to be found in the language of the Constitution itself. Thus, in *Minister of Home Affairs (Bermuda)* v. *Fisher and Another* (1980) A.C. 319 (P.C.) at 329E-F, Lord Wilberforce was at pains to point out that a constitution is a legal instrument, and that respect has to be paid to the language used.

It is perhaps a reflection of the uncontroversial *legal* nature of the cases heard by the court which have involved Chapter 3 (with the possible exception of the death penalty) that the only case in which significant interpretive divisions have appeared in the court concerned a transitional provision. However, the judgments do reveal a division between those judges who are more comfortable with traditional legal analysis and those who are prepared to seek meaning way beyond the literal formulations in order to promote the underlying values of the Constitution. Whether this division is but temporary will be tested when the Court is confronted with more controversial cases dealing with the Bill of Rights.[107]

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104 Judges Chaskalson, Ackermann and Didcott agreed with his approach.

105 *Supra* note 9 at para. 69.

106 *Ibid.* at para. 78.

107 The approach adopted by Mahomed J. can be compared to the *Suroya* decision of the German Constitutional Court in 1973 (34 BVerfGE 269). The Constitutional Court found that damages for non-pecuniary injury could be awarded in cases which were not specified in a statute, notwithstanding a provision to the contrary in the Civil Code. The court found that judges were not only bound by "Gesetz" but by "Recht" as well, that "Recht" was not co-extensive with Statute and consequently that judges could employ additional norms derived from the constitutional legal order as a whole. Although this

Given the nature of the cases which have come before the courts, there has been little opportunity to test the question of legislative deference. As has been noted, however, Chaskalson P. in *Makwanyane* raised this "fundamental issue": the counter-majoritarian problem of judicial review and the balance to be struck between the judgments of an unelected court and the output of an elected legislature.[108] Significantly, Chaskalson P. failed to answer his own question, but he did observe that "[s]ince the judgment in *R* v. *Oakes*, the Canadian Supreme Court has shown that it is sensitive to this tension, which is particularly acute where choices have to be made in respect of matters of policy."[109]

Undoubtedly the court has decided, albeit not as part of its *ratio* for a decision, that the *Oakes* approach is not to be followed as the basis of the limitation test as set out in section 33(1). In the Court's first judgment, Kentridge A.J. observed that the *Oakes* test "may well be of assistance to our Courts in cases where a delicate balancing of individual rights against social interests is required. But section 33(1) itself sets out the criteria which we are to apply, and I see no reason, in this case at least, to attempt to fit our analysis into the Canadian pattern."[110]

In *Makwanyane*, Chaskalson P. confirmed this approach, declined to lay down a clear test and said "there is no absolute standard which can be laid down for determining reasonableness and necessity."[111] He went on to quote approvingly from *R.* v. *Chaulk*[112] to the effect that where differing reasonable policy options are in dispute the court must defer to the legislature.

V. CONCLUSION

It is understandable that in its first year of operation the court has chosen to tread warily. In the majority of cases, the judgments have been neither surprising nor constitutionally controversial. In the *Western Cape* judgment there was a measure of legislative deference shown by two judges, Madala J. and Ngoepe

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decision proved to be controversial, the teleological approach advocated is similar to that followed by the majority in *Mhlungu*. See, in general, D.P. Currie, *The Constitution of the Federal Republic of Germany* (Chicago: University of Chicago Press, 1994) at 116-18.

108 *Supra* note 5 at para. 107.

109 *Ibid.*

110 *Zuma, supra* note 8 at para. 35.

111 *Makwanyane, supra* note 5 at para. 104.

112 *R.* v. *Chaulk* [1990] 3 S.C.R. 1303; (1991) 1 C.R.R. (2 ed) 1 at 30.

A.J., but the majority of the court found against the national government and for the National Party-controlled Western Cape government.

To date, thus, the challenges which have been based on the Bill of Rights have not raised the kind of difficulty which would allow for clear commitments or definite divisions to be ascertained. For these reasons, perhaps, the majority of the judgments reflect a judicial note which even minimalists acutely aware of the counter-majoritarian difficulty would have no problem in supporting. For example, Michael Walzer has written:[113]

> judges must hold themselves as closely as they can to the decisions of the democratic assembly, enforcing first of all the basic political rights that serve to sustain the character of the assembly and protecting its members from discriminatory legislation. They are not to enforce rights beyond these, unless they are authorised to do so by a democratic decision.

The constitutional debates analysed in this contribution have taken place within the context of a country governed by a Government of National Unity which has been in office for scarcely more than eighteen months. Accordingly, it is too early in its term of office to judge whether government will fulfil its electoral promises of the reconstruction and development of an apartheid-ravaged society in line with the substantive commitments contained in the Constitution. To the extent that government discharges these commitments, the Court would naturally be entitled to act deferentially. Whether the Court is forced to hold the government to the substantive promises of the Constitution when legislative or executive action purports to depart from them remains to be seen, perhaps over the next eighteen months.

Within a shorter period, however, more difficult choices will confront the court, including the question of the scope of Chapter 3, whether it applies horizontally and whether the Constitution contains an unenumerated right for a woman to choose to have an abortion. These cases will test more clearly whether the court is prepared to develop the substantive commitments contained in the Constitution or whether the kind of deference advocated by Walzer dominates South African constitutional jurisprudence.

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[113] M. Walzer, "Philosophy and Democracy" (1981) 9 Political Theory 379 at 397.

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INTERIM AND NEW SOUTH AFRICAN CONSTITUTIONS: SELECTED PROVISIONS

Appendix 1

CONSTITUTION OF THE REPUBLIC OF SOUTH AFRICA, ACT 200 OF 1993

PREAMBLE

In humble submission to Almighty God,

We, the people of South Africa declare that-

WHEREAS there is a need to create a new order in which all South Africans will be entitled to a common South African citizenship in a sovereign and democratic constitutional state in which there is equality between men and women and people of all races so that all citizens shall be able to enjoy and exercise their fundamental rights and freedoms;

AND WHEREAS in order to secure the achievement of this goal, elected representatives of all the people of South Africa should be mandated to adopt a new Constitution in accordance with a solemn pact recorded as Constitutional Principles;

AND WHEREAS it is necessary for such purposes that provision should be made for the promotion of national unity and the restructuring and continued governance of South Africa while an elected Constitutional Assembly draws up a final Constitution;

NOW THEREFORE the following provisions are adopted as the Constitution of the Republic of South Africa:

Appendix 2

CONSTITUTION OF THE REPUBLIC OF SOUTH AFRICA BILL (6 MAY 1996)

PREAMBLE

We, the people of South Africa,

Recognise the injustices of our past;

Honour those who suffered for justice and freedom in our land;

Respect those who have worked to build and develop our country; and

Believe that South Africa belongs to all who live in it, united in our diversity.

We therefore, through our freely elected representatives, adopt this Constitution as the supreme law of the Republic so as to -

Heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights;

Lay the foundations for a democratic and open society in which government is based on the will of the people and every citizen is equally protected by law;

Improve the quality of life of all citizens and free the potential of each person;

Build a united and democratic South Africa able to take its rightful place as a sovereign state in the family of nations.

May God protect our people.

Nkosi Sikelel iAfrika. Morena boloka setjhaba sa heso.
God seën Suid-Afrika. God bless South Africa.
Mudzimu fhatutshedza Afurika. Hosi katekisa Afrika.

CHAPTER 1
CONSTITUENT AND FORMAL PROVISIONS

1. REPUBLIC OF SOUTH AFRICA
(1) The Republic of South Africa shall be one, sovereign state.
(2) The national territory of the Republic shall comprise the areas defined in Part 1 of Schedule 1.

SUPREMACY OF THE CONSTITUTION
4.(1) This Constitution shall be the supreme law of the Republic and any law or act inconsistent with its provisions shall, unless otherwise provided expressly or by necessary implication in this Constitution, be of no force and effect to the extent of the inconsistency.
(2) This Constitution shall bind all legislative, executive and judicial organs of state at all levels of government.

...

CHAPTER 1
FOUNDING PROVISIONS

REPUBLIC OF SOUTH AFRICA
1. The Republic of South Africa is one sovereign democratic state founded on the following values:
(a) Human dignity, the achievement of equality and advancement of human rights and freedoms.
(b) Non-racialism and non-sexism.
(c) Supremacy of the constitution and the rule of law.
(d) Universal adult suffrage, a national common voters roll, regular elections, and a multi-party system of democratic government, to ensure accountability, responsiveness and openness.

SUPREMACY OF CONSTITUTION
2. This Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the duties imposed by it must be performed.

...

CHAPTER 3
FUNDAMENTAL RIGHTS

APPLICATION

7.(1) This Chapter shall bind all legislative and executive organs of state at all levels of government.

(2) This Chapter shall apply to all law in force and all administrative decisions taken and acts performed during the period of operation of this Constitution.

(3) Juristic persons shall be entitled to the rights contained in this Chapter where, and to the extent that, the nature of the rights permits.

(4) *(a)* When an infringement of or threat to any right entrenched in this Chapter is alleged, any person referred to in paragraph *(b)* shall be entitled to apply to a competent court of law for appropriate relief, which may include a declaration of rights.

(b) The relief referred to in paragraph *(a)* may be sought by -

(i) a person acting in his or her own interest;

(ii) an association acting in the interest of its members;

(iii) a person acting on behalf of another person who is not in a position to seek such relief in his or her own name;

(iv) a person acting as a member of or in the interest of a group or class of persons; or

CHAPTER 2
BILL OF RIGHTS

RIGHTS

7.(1) This Bill of Rights is a cornerstone of democracy in South Africa. It enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom.

(2) The state must respect, protect, promote, and fulfil the rights in the Bill of Rights.

(3) The rights in the Bill of Rights are subject to the limitations contained or referred to in section 36, or elsewhere in the Bill.

APPLICATION

8.(1) The Bill of Rights applies to all law and binds the legislature, the executive, the judiciary, and all organs of state.

(2) A provision of the Bill of Rights binds natural and juristic persons if, and to the extent that, it is applicable, taking into account the nature of the right and of any duty imposed by the right.

(3) In applying the provisions of the Bill of Rights to natural and juristic persons in terms of subsection (2), a court -

(a) in order to give effect to a right in the Bill, must apply, or where necessary, develop, the common law to the extent that legislation does not give effect to that right; and

(b)may develop rules of the common law to limit the right, provided that the limitation is in accordance with section 36(1).

(4) Juristic persons are entitled to the rights in the Bill of Rights to the extent required by the nature of the rights and of the juristic persons.

(v) a person acting in the public interest.

8. EQUALITY

(1) Every person shall have the right to equality before the law and to equal protection of the law.

(2) No person shall be unfairly discriminated against, directly or indirectly, and, without derogating from the generality of this provision, on one or more of the following grounds in particular: race, gender, sex, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture or language.

(3)*(a)* This section shall not preclude measures designed to achieve the adequate protection and advancement of persons or groups or categories of persons disadvantaged by unfair discrimination, in order to enable their full and equal enjoyment of all rights and freedoms.

(b) Every person or community dispossessed of rights in land before the commencement of this Constitution under any law which would have been inconsistent with subsection (2) had that subsection been in operation at the time of the dispossession, shall be entitled to claim restitution of such rights subject to and in accordance with sections 121, 122 and 123.

(4) *Prima facie* proof of discrimination on any of the grounds specified in subsection (2) shall be presumed to be sufficient proof of unfair discrimination as contemplated in that subsection, until the contrary is established.

9. LIFE

Every person shall have the right to life.

10. HUMAN DIGNITY

Every person shall have the right to respect for and protection of his or her dignity.

EQUALITY

9.(1) Everyone is equal before the law and has the right to equal protection and benefit of the law.

(2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.

(3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language, and birth.

(4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.

(5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair.

HUMAN DIGNITY

10. Everyone has inherent dignity and the right to have their dignity respected and protected.

LIFE

11. Everyone has the right to life.

11. FREEDOM AND SECURITY OF THE PERSON

(1) Every person shall have the right to freedom and security of the person, which shall include the right not to be detained without trial.

(2) No person shall be subject to torture of any kind, whether physical, mental or emotional, nor shall any person be subject to cruel, inhuman or degrading treatment or punishment.

13. PRIVACY

Every person shall have the right to his or her personal privacy, which shall include the right not to be subject to searches of his or her person, home or property, the seizure of private possessions or the violation of private communications.

14. RELIGION, BELIEF AND OPINION

(1) Every person shall have the right to freedom of conscience, religion, thought, belief and opinion, which shall include academic freedom in institutions of higher learning.

(2) Without derogating from the generality of subsection (1), religious observances may be conducted at state or state-aided institutions under rules established by an appropriate authority for that purpose, provided that such religious observances are conducted on an equitable basis and

FREEDOM AND SECURITY OF THE PERSON

12.(1) Everyone has the right to freedom and security of the person, which includes the right -

(a) not to be deprived of freedom arbitrarily or without just cause;

(b) not to be detained without trial;

(c) to be free from all forms of violence from both public and private sources;

(d) not to be tortured in any way; and

(e) not to be treated or punished in a cruel, inhuman or degrading way.

(2) Everyone has the right to bodily and psychological integrity, which includes the right -

(a) to make decisions concerning reproduction;

(b) to security in and control over their body; and

(c) not to be subjected to medical or scientific experiments without their informed consent.

PRIVACY

14. Everyone has the right to privacy, which includes the right not to have -

(a) their person or home searched;

(b) their property searched;

(c) their possessions seized; or

(d)the privacy of their communications infringed.

FREEDOM OF RELIGION, BELIEF AND OPINION

15.(1) Everyone has the right to freedom of conscience, religion, thought, belief and opinion.

(2) Religious observances may be conducted at state or state-aided institutions provided that -

(a) those observances follow rules made by the appropriate public authorities;

(b) they are conducted on an equitable basis; and

(c) attendance at them is free and voluntary.

(3)(a) This section does not prevent legislation recognising -

attendance at them is free and voluntary.
(3) Nothing in this Chapter shall preclude legislation recognising -
(a) a system of personal and family law adhered to by persons professing a particular religion; and
(b) the validity of marriages concluded under a system of religious law subject to specified procedures.

15. FREEDOM OF EXPRESSION
(1) Every person shall have the right to freedom of speech and expression, which shall include freedom of the press and other media, and the freedom of artistic creativity and scientific research.
(2) All media financed by or under the control of the state shall be regulated in a manner which ensures impartiality and the expression of a diversity of opinion.

16. ASSEMBLY, DEMONSTRATION AND PETITION
Every person shall have the right to assemble and demonstrate with others peacefully and unarmed, and to present petitions.

17. FREEDOM OF ASSOCIATION
Every person shall have the right to freedom of association.

...

21. POLITICAL RIGHTS
(1) Every citizen shall have the right -
(a) to form, to participate in the activities of and to recruit members for a political party;
(b) to campaign for a political party or cause; and

(i) marriages concluded under any tradition or a system of religious, personal or family law; or
(ii)systems of personal and family law under any tradition or adhered to by persons professing a particular religion.
(b) Recognition in terms of paragraph (a) must be consistent with this section and the other provisions of the Constitution.

FREEDOM OF EXPRESSION
16.(1) Everyone has the right to freedom of expression, which includes -
(a) freedom of the press and other media;
(b) freedom to receive and impart information and ideas;
(c) freedom of artistic creativity; and
(d) academic freedom and freedom of scientific research.
(2) The right in subsection (1) does not extend to -
(a) propaganda for war;
(b) incitement of imminent violence; or
(c) advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm.

ASSEMBLY, DEMONSTRATION, PICKET AND PETITION
17. Everyone has the right, peacefully and unarmed, to assemble, to demonstrate, to picket, and to present petitions.

FREEDOM OF ASSOCIATION
18. Everyone has the right to freedom of association.

POLITICAL RIGHTS
19.(1) Every citizen is free to make political choices, which includes the right-
(a) to form a political party;
(b) to participate in the activities of, or recruit members for, a political party; and
(c) to campaign for a political party or cause.
(2) Every citizen has the right to free, fair

(c) freely to make political choices.
(2) Every citizen shall have the right to vote, to do so in secret and to stand for election to public office.

...

23. ACCESS TO INFORMATION

Every person shall have the right of access to all information held by the state or any of its organs at any level of government in so far as such information is required for the exercise or protection of any of his or her rights.

...

26. ECONOMIC ACTIVITY
(1) Every person shall have the right freely to engage in economic activity and to pursue a livelihood anywhere in the national territory.
(2) Subsection (1) shall not preclude measures designed to promote the protection or the improvement of the quality of life, economic growth, human development, social justice, basic conditions of employment, fair labour practices or equal opportunity for all, provided such measures are justifiable in an open and democratic society based on freedom and equality.

27. LABOUR RELATIONS
(1) Every person shall have the right to fair labour practices.
(2) Workers shall have the right to form and join trade unions, and employers shall have the right to form and join employers' organisations.
(3) Workers and employers shall have the right to organise and bargain collectively.
(4) Workers shall have the right to strike for the purpose of collective bargaining.
(5) Employers' recourse to the lock-out and regular elections for any legislative body established in terms of the Constitution.
(3) Every adult citizen has the right -
(a) to vote in elections for any legislative body established in terms of the Constitution, and to do so in secret; and
(b) to stand for public office and, if elected, to hold office.

...

[ACCESS TO INFORMATION - S.32]

FREEDOM OF TRADE, OCCUPATION AND PROFESSION
22. Every citizen has the right to choose their trade, occupation or profession freely. The practice of a trade, occupation or profession may be regulated by law.

LABOUR RELATIONS
23.(1) Everyone has the right to fair labour practices.
(2) Every worker has the right -
(a) to form and join a trade union;
(b) to participate in the activities and programmes of a trade union; and
(c) to strike.
(3) Every employer has the right -
(a) to form and join an employers' organisation; and
(b) to participate in the activities and programmes of an employers' organisation.

for the purpose of collective bargaining shall not be impaired, subject to section 33(1).

(4) Every trade union and every employers' organisation has the right -
(a) to determine its own administration, programmes and activities;
(b) to organise;
(c) to bargain collectively; and
(d) to form and join a federation.
(5) The provisions of the Bill of Rights do not prevent legislation recognising union security arrangements contained in collective agreements.

...

28. PROPERTY

(1) Every person shall have the right to acquire and hold rights in property and, to the extent that the nature of the rights permits, to dispose of such rights.
(2) No deprivation of any rights in property shall be permitted otherwise than in accordance with a law.
(3) Where any rights in property are expropriated pursuant to a law referred to in subsection (2), such expropriation shall be permissible for public purposes only and shall be subject to the payment of agreed compensation or, failing agreement, to the payment of such compensation and within such period as may be determined by a court of law as just and equitable, taking into account all relevant factors, including, in the case of the determination of compensation, the use to which the property is being put, the history of its acquisition, its market value, the value of the investments in it by those affected and the interests of those affected.

...

PROPERTY

25.(1) No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property.
(2) Property may be expropriated only in terms of law of general application -
(a) for public purposes or in the public interest; and
(b) subject to compensation, the amount, timing, and manner of payment, of which must be agreed, or decided or approved by a court.
(3) The amount, timing, and manner of payment, of compensation must be just and equitable, reflecting an equitable balance between the public interest and the interests of those affected, having regard to all relevant factors, including -
(a) the current use of the property;
(b) the history of the acquisition and use of the property;
(c) the market value of the property;
(d) the extent of direct state investment and subsidy in the acquisition and beneficial capital improvement of the property; and
(e) the purpose of the expropriation.
(4) For the purposes of this section -
(a) the public interest includes the nation's commitment to land reform, and to reforms to bring about equitable access to all South Africa's natural resources; and
(b) property is not limited to land.
(5) The state must take reasonable legislative

and other measures, within its available resources, to foster conditions which enable citizens to gain access to land on an equitable basis.

(6) A person or community whose tenure of land is legally insecure as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to tenure which is legally secure, or to comparable redress.

(7) A person or community dispossessed of property after 19 June 1913 as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to restitution of that property, or to equitable redress.

(8) No provision of this section may impede the state from taking legislative and other measures to achieve land, water and related reform, in order to redress the results of past racial discrimination, provided that any departure from the provisions of this section is in accordance with the provisions of section 36(1).

(9) Parliament must enact the legislation referred to in subsections (6).

HOUSING

26.(1) Everyone has the right to have access to adequate housing.

(2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right.

(3) No one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions.

HEALTH CARE, FOOD, WATER, AND SOCIAL SECURITY

27.(1) Everyone has the right to have access to -

(a) health care services, including reproductive health care;

(b) sufficient food and water; and

(c) social security, including, if they are unable to support themselves and their dependants, appropriate social assistance.
(2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights.
(3) No one may be refused emergency medical treatment.

...

ACCESS TO INFORMATION
32.(1) Everyone has the right of access to -
(a) any information held by the state; and
(b) any information that is held by another person and that is required for the exercise or protection of any rights.
(2) National legislation must be enacted to give effect to this right, and may provide for reasonable measures to alleviate the administrative and financial burden on the state.

...

33. LIMITATION
(1) The rights entrenched in this Chapter may be limited by law of general application, provided that such limitation -
(a) shall be permissible only to the extent that it is -
(i) reasonable; and
(ii) justifiable in an open and democratic society based on freedom and equality; and
(b) shall not negate the essential content of the right in question, and provided further that any limitation to -
(aa) a right entrenched in section 10, 11, 12, 14(1), 21, 25 or 30(1) *(d)* or *(e)* or (2); or
(bb) a right entrenched in section 15, 16, 17, 18, 23 or 24, in so far as such right relates to free and fair political activity,
shall, in addition to being reasonable as required in paragraph *(a)* (i), also be necessary.
(2) Save as provided for in subsection (1)

LIMITATION OF RIGHTS
36.(1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors including-
(a) the nature of the right;
(b) the importance of the purpose of the limitation;
(c) the nature and extent of the limitation;
(d) the relation between the limitation and its purpose; and
(e) less restrictive means to achieve the purpose.
(2) Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights.

...

or any other provision of this Constitution, no law, whether a rule of the common law, customary law or legislation, shall limit any right entrenched in this Chapter.

(3) The entrenchment of the rights in terms of this Chapter shall not be construed as denying the existence of any other rights or freedoms recognised or conferred by common law, customary law or legislation to the extent that they are not inconsistent with this Chapter.

(4) This Chapter shall not preclude measures designed to prohibit unfair discrimination by bodies and persons other than those bound in terms of section 7(1).

(5)*(a)* The provisions of a law in force at the commencement of this Constitution promoting fair employment practices, orderly and equitable collective bargaining and the regulation of industrial action shall remain of full force and effect until repealed or amended by the legislature.

(b) If a proposed enactment amending or repealing a law referred to in paragraph *(a)* deals with a matter in respect of which the National Manpower Commission, referred to in section 2A of the Labour Relations Act, 1956 (Act No. 28 of 1956), or any other similar body which may replace the Commission, is competent in terms of a law then in force to consider and make recommendations, such proposed enactment shall not be introduced in Parliament unless the said Commission or such other body has been given an opportunity to consider the proposed enactment and to make recommendations with regard thereto.

...

35. INTERPRETATION

(1) In interpreting the provisions of this Chapter a court of law shall promote the values which underlie an open and demo-

INTERPRETATION OF BILL OF RIGHTS

39.(1) When interpreting the Bill of Rights, a court, tribunal or forum -

(a) must promote the values that underlie an

cratic society based on freedom and equality and shall, where applicable, have regard to public international law applicable to the protection of the rights entrenched in this Chapter, and may have regard to comparable foreign case law.

(2) No law which limits any of the rights entrenched in this Chapter, shall be constitutionally invalid solely by reason of the fact that the wording used *prima facie* exceeds the limits imposed in this Chapter, provided such a law is reasonably capable of a more restricted interpretation which does not exceed such limits, in which event such law shall be construed as having a meaning in accordance with the said more restricted interpretation.

(3) In the interpretation of any law and the application and development of the common law and customary law, a court shall have due regard to the spirit, purport and objects of this Chapter.

...

open and democratic society based on human dignity, equality and freedom;

(b) must consider international law; and

(c) may consider foreign law.

(2) When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport, and objects of the Bill of Rights.

(3) The Bill of Rights does not deny the existence of any other rights or freedoms that are recognised or conferred by common law, customary law or legislation, to the extent that they are consistent with the Bill.

CHAPTER 3
CO-OPERATIVE GOVERNMENT

GOVERNMENT OF THE REPUBLIC

40.(1) In the Republic, government is constituted as national, provincial and local spheres of government, which are distinctive, interdependent and interrelated.

(2) All spheres of government must observe and adhere to the principles in this Chapter and must conduct their activities within the parameters that the Chapter provides.

PRINCIPLES OF CO-OPERATIVE GOVERNMENT AND INTERGOVERNMENTAL RELATIONS

41.(1) All spheres of government and all organs of state within each sphere must -

(a) preserve the peace, national unity and the indivisibility of the Republic;

(b) secure the well-being of the people of the Republic;

(c) implement effective, transparent, accountable and coherent government for the Republic as a whole;

(d) be loyal to the Constitution, the Republic, and its people;

(e) respect the constitutional status, institutions, powers and functions of government in the other spheres;

(f) not assume any power or function except

CHAPTER 4
PARLIAMENT

36. CONSTITUTION OF PARLIAMENT
Parliament shall consist of the National Assembly and the Senate.

37. LEGISLATIVE AUTHORITY OF REPUBLIC
The legislative authority of the Republic

those conferred on them in terms of the Constitution;
(g) exercise their powers and functions in a manner that does not encroach on the geographical, functional or institutional integrity of government in another sphere; and
(h) co-operate with each other in mutual trust and good faith by -
(i) fostering friendly relations;
(ii) assisting and supporting each other;
(iii) informing each other and consulting on matters of common interest;
(iv) co-ordinating their actions and legislation with each other;
(v) adhering to agreed procedures; and
(vi) avoiding legal proceedings against each other.
(2) An Act of Parliament must establish or provide for structures and institutions to promote and facilitate intergovernmental relations.
(3) An Act of Parliament must provide for appropriate mechanisms and procedures to facilitate settlement of intergovernmental disputes.
(4) An organ of state involved in an intergovernmental dispute must make every reasonable effort to settle the dispute by means of mechanisms and procedures provided for that purpose, and must exhaust all other remedies before it approaches a court to resolve the dispute.
(5) If a court is not satisfied that the requirements of subsection (4) have been met, it may refer a dispute back to the organs of state involved.

CHAPTER 4
PARLIAMENT

...

LEGISLATIVE AUTHORITY OF REPUBLIC
43. In the Republic, the legislative authority -
(a) of the national sphere of government is vested in Parliament, as set out in section 44;
(b) of the provincial sphere of government is

shall, subject to this Constitution, vest in Parliament, which shall have the power to make laws for the Republic in accordance with this Constitution.

...

61. BILLS AFFECTING CERTAIN PROVINCIAL MATTERS

Bills affecting the boundaries or the exercise or performance of the powers and functions of the provinces shall be deemed not to be passed by Parliament unless passed separately by both Houses and, in the case of a Bill, other than a Bill referred to in section 62, affecting the boundaries or the exercise or performance of the powers or functions of a particular province or provinces only, unless also approved by a majority of the senators of the province or provinces in question in the Senate.

...

vested in the provincial legislature of a province, as set out in section 104; and

(c) of the local sphere of government is vested in Municipal Councils, as set out in section 156.

NATIONAL LEGISLATIVE AUTHORITY

44.(1) The national legislative authority as vested in Parliament -

(a) confers on the National Assembly the power -

(i) to amend the Constitution;

(ii) to pass legislation with regard to any matter, including a matter within a functional area listed in Schedule 4, but excluding, subject to subsection (2), a matter within the functional areas listed in Schedule 5; and

(iii) to assign any of its legislative powers, except the power to amend the Constitution, to any legislative body in another sphere of government; and

(b) confers on the National Council of Provinces the power -

(i) to participate in amending the Constitution, in accordance with section 74;

(ii) to pass legislation in accordance with section 76, with regard to any matter within a functional area listed in Schedule 4, and any other matter required by the Constitution to be passed in accordance with section 76; and

(iii) to consider, in accordance with section 75, any other legislation passed by the National Assembly.

(2) Parliament may intervene by passing legislation, in accordance with section 76, with regard to a matter falling within a functional area listed in Schedule 5, when it is necessary -

(a) to maintain national security;

(b) to maintain economic unity;

(c) to maintain essential national standards;

(d) to establish minimum standards required for the rendering of services; or

(e) to prevent unreasonable action taken by a province which is prejudicial to the interest of another province, or to the country as a

whole.
(3) Legislation with regard to a matter that is reasonably necessary for, or incidental to, the effective exercise of a power concerning any matter listed in Schedule 4 is, for all purposes, legislation with regard to a matter listed in Schedule 4.
(4) When exercising its legislative authority, Parliament is bound only by the Constitution, and must act in accordance with, and within the limits of, the Constitution.

...

NATIONAL COUNCIL OF PROVINCES

COMPOSITION OF NATIONAL COUNCIL
60.(1) The National Council of Provinces is composed of a single delegation from each province consisting of ten delegates.
(2) The ten delegates are -
(a) four special delegates consisting of-
(i) the Premier of the province or, if the Premier is not available, any member of the provincial legislature designated by the Premier either generally or for any specific business before the National Council of Provinces; and
(ii) three other special delegates; and
(b) six permanent delegates appointed in terms of section 61(2).
(3) The Premier of a province, or if the Premier is not available, a member of the provinces delegation designated by the Premier, heads the delegation.

...

POWERS OF NATIONAL COUNCIL
68. In exercising its legislative power, the National Council of Provinces may -
(a) consider, pass, amend, propose amendments to, or reject any legislation before the Council in accordance with this Chapter; and

CHAPTER 5
THE ADOPTION OF THE NEW CONSTITUTION

71. CONSTITUTIONAL PRINCIPLES AND CERTIFICATION

(1) A new constitutional text shall -
(a) comply with the Constitutional Principles contained in Schedule 4; and
(b) be passed by the Constitutional Assembly in accordance with this Chapter.
(2) The new constitutional text passed by the Constitutional Assembly, or any provision thereof, shall not be of any force and effect unless the Constitutional Court has certified that all the provisions of such text comply with the Constitutional Principles referred to in subsection (1) *(a)*.
(3) A decision of the Constitutional Court in terms of subsection (2) certifying that the provisions of the new constitutional text comply with the Constitutional Principles, shall be final and binding, and no court of law shall have jurisdiction to enquire into or pronounce upon the validity of such text or any provision thereof.
(4) During the course of the proceedings of the Constitutional Assembly any proposed draft of the constitutional text before the Constitutional Assembly, or any part or provision of such text, shall be referred to the Constitutional Court by the Chairperson if petitioned to do so by at least one fifth of all the members of the Constitutional Assembly, in order to obtain an opinion from the Court as to whether such proposed text,

(b) initiate or prepare legislation falling within a functional area listed in Schedule 4 or other legislation referred to in section 76(3), but may not initiate or prepare money Bills.

...

BILLS OUTSIDE SCHEDULE 4

75.(1) When the National Assembly passes a Bill falling outside the functional areas listed in Schedule 4, the Bill must be referred to the National Council of Provinces and dealt with in accordance with the following procedure:
(a) The Council must either -
(i) pass the Bill;
(ii) pass the Bill subject to amendments proposed by it; or
(iii) reject the Bill.
(b) If the Council passes the Bill without proposing amendments, the Bill must be submitted to the President for assent.
(c) If the Council rejects the Bill or passes it subject to amendments, the National Assembly must reconsider the Bill, taking into account any amendment proposed by the Council, and may -
(i) pass the Bill again, either with or without amendments; or
(ii) decide not to proceed with the Bill.
(d) A Bill passed by the National Assembly in terms of paragraph (c) must be submitted to the President for assent.
(2) When the National Council of Provinces votes on a question in terms of this section, section 65 does not apply; instead -
(a) each delegate in a provincial delegation has one vote;
(b) one third of the delegates must be present before a vote may be taken on the question; and
(c) the question is decided by a majority of the votes cast, but if there is an equal number of votes on each side of the question, the delegate presiding must cast a deciding vote.

BILLS WITHIN SCHEDULE 4

76.(1) When the National Assembly passes a Bill falling within a functional area listed in

or part or provision thereof, would, if passed by the Constitutional Assembly, comply with the Constitutional Principles.

...

Schedule 4, the Bill must be referred to the National Council of Provinces and dealt with in accordance with the following procedure:
(a) The National Council must either -
(i) pass the Bill;
(ii) pass an amended Bill; or
(iii) reject the Bill.
(b) If the National Council passes the Bill without amendment, the Bill must be submitted to the President for assent.
(c) If the National Council passes an amended Bill, the amended Bill must be referred to the National Assembly, and if the Assembly passes the amended Bill, it must be submitted to the President for assent.
(d) If the National Council rejects the Bill, or if the National Assembly refuses to pass an amended Bill referred to it in terms of paragraph (c), the Bill and, where applicable, also the amended Bill, must be referred to the Mediation Committee, which may agree on -
(i) the Bill as passed by the Assembly;
(ii) the amended Bill as passed by the Council; or
(iii) another version of the Bill.
(e) If the Mediation Committee is unable to agree within 30 days of the Bill s referral to it, the Bill lapses unless the National Assembly again passes the Bill, but supported by a vote of at least two thirds of its members. ...

[CHAPTER 6 - PROVINCES SEE BELOW]

...

CHAPTER 7
THE JUDICIAL AUTHORITY AND THE ADMINISTRATION OF JUSTICE

98. CONSTITUTIONAL COURT AND ITS JURISDICTION

(1) There shall be a Constitutional Court consisting of a President and 10 other judges appointed in terms of section 99.

CHAPTER 8
COURTS AND ADMINISTRATION OF JUSTICE

...

CONSTITUTIONAL COURT

167.(1) The Constitutional Court consists of a President, a Deputy President and nine other judges.
(2) A matter before the Constitutional Court must be heard by at least eight judges.

(2) The Constitutional Court shall have jurisdiction in the Republic as the court of final instance over all matters relating to the interpretation, protection and enforcement of the provisions of this Constitution, including -

(a) any alleged violation or threatened violation of any fundamental right entrenched in Chapter 3;

(b) any dispute over the constitutionality of any executive or administrative act or conduct or threatened executive or administrative act or conduct of any organ of state;

(c) any inquiry into the constitutionality of any law, including an Act of Parliament, irrespective of whether such law was passed or made before or after the commencement of this Constitution;

(d) any dispute over the constitutionality of any Bill before Parliament or a provincial legislature, subject to subsection (9);

(e) any dispute of a constitutional nature between organs of state at any level of government;

(f) the determination of questions whether any matter falls within its jurisdiction; and

(g) the determination of any other matters as may be entrusted to it by this Constitution or any other law.

(3) The Constitutional Court shall be the only court having jurisdiction over a matter referred to in subsection (2), save where otherwise provided in sections 101(3) and (6) and 103(1) and in an Act of Parliament.

(4) A decision of the Constitutional Court shall bind all persons and all legislative, executive and judicial organs of state.

(5) In the event of the Constitutional Court finding that any law or any provision thereof is inconsistent with this Constitution, it shall declare such law or provision invalid to the extent of its inconsistency: Provided that the Constitutional Court may,

(3) The Constitutional Court -

(a) is the highest court in all constitutional matters;

(b) may decide only constitutional matters, and issues connected with decisions on constitutional matters; and

(c) makes the final decision whether a matter is a constitutional matter or whether an issue is connected with a decision on a constitutional matter.

(4) Only the Constitutional Court may -

(a) decide disputes between organs of state in the national or provincial sphere concerning the constitutional status, powers or functions of any of those organs of state;

(b) decide on the constitutionality of any parliamentary or provincial Bill, but may do so only in the circumstances anticipated in Chapter 4 or 6;

(c) decide that Parliament or the President has failed to comply with a constitutional duty; or

(d) certify a provincial constitution in terms of section 144.

(5) The Constitutional Court makes the final decision whether an Act of Parliament, a provincial Act or conduct of the President is constitutional, and must confirm any order of invalidity made by the Supreme Court of Appeal, a High Court, or a court of similar status, before that order has any force.

(6) National legislation or the rules of the Constitutional Court must allow a person, when it is in the interest of justice and with leave of the Constitutional Court -

(a) to bring a matter directly to the Constitutional Court; or

(b) to appeal directly to the Constitutional Court from any other court.

(7) A constitutional matter includes any issue involving the interpretation, protection or enforcement of the Constitution.

...

in the interests of justice and good government, require Parliament or any other competent authority, within a period specified by the Court, to correct the defect in the law or provision, which shall then remain in force pending correction or the expiry of the period so specified.

(6) Unless the Constitutional Court in the interests of justice and good government orders otherwise, and save to the extent that it so orders, the declaration of invalidity of a law or a provision thereof -

(a) existing at the commencement of this Constitution, shall not invalidate anything done or permitted in terms thereof before the coming into effect of such declaration of invalidity; or

(b) passed after such commencement, shall invalidate everything done or permitted in terms thereof.

(7) In the event of the Constitutional Court declaring an executive or administrative act or conduct or threatened executive or administrative act or conduct of an organ of state to be unconstitutional, it may order the relevant organ of state to refrain from such act or conduct, or, subject to such conditions and within such time as may be specified by it, to correct such act or conduct in accordance with this Constitution.

(8) The Constitutional Court may in respect of the proceedings before it make such order as to costs as it may deem just and equitable in the circumstances.

(9) The Constitutional Court shall exercise jurisdiction in any dispute referred to in subsection (2) *(d)* only at the request of the Speaker of the National Assembly, the President of the Senate or the Speaker of a provincial legislature, who shall make such a request to the Court upon receipt of a petition by at least one-third of all the members of the National Assembly, the Senate or such provincial legislature, as the

POWERS OF COURTS IN CONSTITUTIONAL MATTERS

172.(1) When deciding a constitutional matter within its power, a court -

(a) must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency; and

(b) may make any order that is just and equitable, including -

(i) an order limiting the retrospective effect of the declaration of invalidity; and

(ii) an order suspending the declaration of invalidity for any period and on any conditions, to allow the competent authority to correct the defect.

(2)(a) The Supreme Court of Appeal, a High Court or a court of similar status may make an order concerning the constitutional validity of an Act of Parliament, a Provincial Act or any conduct of the President, but an order of constitutional invalidity has no force unless it is confirmed by the Constitutional Court.

(b) A court which makes an order of constitutional invalidity may grant a temporary interdict or other temporary relief to a party, or may adjourn the proceedings, pending a decision of the Constitutional Court on the validity of that Act or conduct.

(c) National legislation must provide for the referral of an order of constitutional invalidity to the Constitutional Court.

(d) Any person or organ of state with a sufficient interest may appeal, or apply directly, to the Constitutional Court to confirm or vary an order of constitutional invalidity by a court in terms of this subsection.

INHERENT POWER

173. The Constitutional Court, Supreme Court of Appeal and High Courts have the inherent power to protect and regulate their own process, and to develop the common law, taking into account the interest of justice.

...

case may be, requiring him or her to do so. *(s.98 amended by s.3 of the Constitution of the Republic of South Africa Third Amendment Act 13 of 1994)*

CHAPTER 9
PROVINCIAL GOVERNMENT

126. LEGISLATIVE COMPETENCE OF PROVINCES

(1) A provincial legislature shall be competent, subject to subsections (3) and (4), to make laws for the province with regard to all matters which fall within the functional areas specified in Schedule 6.

(2) The legislative competence referred to in subsection (1), shall include the competence to make laws which are reasonably necessary for or incidental to the effective exercise of such legislative competence.

(2A) Parliament shall be competent, subject to subsections (3) and (4), to make laws with regard to matters referred to in subsections (1) and (2).

(3) A law passed by a provincial legislature in terms of this Constitution shall prevail over an Act of Parliament which deals with a matter referred to in subsection (1) or (2) except in so far as-

(a) the Act of Parliament deals with a matter that cannot be regulated effectively by provincial legislation;

(b) the Act of Parliament deals with a matter that, to be performed effectively, requires to be regulated or co-ordinated by uniform norms or standards that apply generally throughout the Republic;

(c) the Act of Parliament is necessary to set minimum standards across the nation for the rendering of public services;

(d) the Act of Parliament is necessary for the maintenance of economic unity, the protection of the environment, the promotion of interprovincial commerce, the pro-

CHAPTER 6
PROVINCES

LEGISLATIVE AUTHORITY OF PROVINCES

104.(1) The legislative authority of a province is vested in its provincial legislature, and confers on the provincial legislature the power -

(a) to pass a constitution for its province or to amend any constitution passed by it in terms of sections 142 and 143;

(b) to pass legislation in and for its province with regard to -

(i) any matter within a functional area listed in Schedule 4;

(ii) any matter within a functional area listed in Schedule 5; and

(iii) any matter outside those functional areas, and that is expressly assigned to the province by national legislation; and

(c) to assign any of its legislative powers to a Municipal Council in that province.

(2) The legislature of a province, by a resolution supported by two thirds of its members, may request Parliament to change the name of that province.

(3) A provincial legislature is bound only by the Constitution and, if it has passed a constitution for its province, by that constitution, and must act in accordance with, and within the limits of, the Constitution and that provincial constitution.

(4) Provincial legislation with regard to a matter that is reasonably necessary for, or incidental to, the effective exercise of a power concerning any matter listed in Schedule 4, is for all purposes legislation with regard to a matter listed in Schedule 4.

(5) A provincial legislature may recommend to the National Assembly legislation

tection of the common market in respect of the mobility of goods, services, capital or labour, or the maintenance of national security; or

(e) the provincial law materially prejudices the economic, health or security interests of another province or the country as a whole, or impedes the implementation of national economic policies.

(4) An Act of Parliament shall prevail over a provincial law, as provided for in subsection (3), only if it applies uniformly in all parts of the Republic.

(5) An Act of Parliament and a provincial law shall be construed as being consistent with each other, unless, and only to the extent that, they are, expressly or by necessary implication, inconsistent with each other.

(6) A provincial legislature may recommend to Parliament the passing of any law relating to any matter in respect of which such legislature is not competent to make laws or in respect of which an Act of Parliament prevails over a provincial law in terms of subsection (3).

(s.126 amended by s.2 of the Constitution of the Republic of South Africa Amendment Act 2 of 1994)

...

concerning any matter outside the authority of that legislature, or in respect of which an Act of Parliament prevails over a provincial law.

CONFLICTS BETWEEN NATIONAL AND PROVINCIAL LEGISLATION

146.(1) This section applies to a conflict between national legislation and provincial legislation falling within a functional area listed in Schedule 4.

(2) National legislation that applies uniformly with regard to the country as a whole prevails over provincial legislation if any of the following conditions are met:

(a) The national legislation deals with a matter that cannot be regulated effectively by legislation enacted by the respective provinces individually.

(b) The interests of the country as a whole require that a matter be dealt with uniformly across the nation, and the national legislation provides that uniformity by establishing -

(i) norms and standards;

(ii) frameworks; or

(iii) national policies.

(c) The national legislation is necessary for -

(i) the maintenance of national security;

(ii) the maintenance of economic unity;

(iii) the protection of the common market in respect of the mobility of goods, services, capital and labour;

(iv) the promotion of economic activities across provincial boundaries;

(v) the promotion of equal opportunity or equal access to government services; or

(vi) the protection of the environment.

(3) National legislation prevails over provincial legislation if the national legislation is aimed at preventing unreasonable action by a province that -

(i) is prejudicial to the economic, health or security interest of another province or the country as a whole; or

(ii) impedes the implementation of national economic policy.

(4) National legislation that deals with any

matter referred to in subsection (2)(c) and has been passed by the National Council of Provinces, must be presumed to be necessary for the purposes of that subsection.
(5) Provincial legislation prevails over the national legislation if subsection (2) does not apply.
(6)(a) National and provincial legislation referred to in subsections (1) to (5) includes a law made in terms of an Act of Parliament or a provincial Act only if that law has been approved by the National Council of Provinces.
(b) If the Council does not reach a decision within 30 days of its first sitting after the law was referred to it, the legislation must be considered for all purposes to have been approved by the Council.
(7) If the National Council of Provinces does not approve a law referred to in subsection (6)(a), it must, within 30 days of its decision, forward reasons for not approving the law to the authority that referred the law to it.

OTHER CONFLICTS
147.(1) If there is a conflict between national legislation and a provision of a provincial constitution with regard to -
(a) a matter, concerning which this Constitution specifically requires or envisages the enactment of national legislation, the national legislation prevails over the affected provision of the provincial constitution;
(b) national legislative intervention in terms of section 44(2), national legislation prevails over the provision of the provincial constitution; or
(c) a matter within the functional areas listed in Schedule 4, section 146 applies as if the affected provision of the provincial constitution were provincial legislation referred to in that section.
(2) National legislation referred to in section 44(2) prevails over provincial legislation in respect of matters referred to in the functional areas contained in Schedule 5.

CONFLICTS THAT CANNOT BE RESOLVED

148. If a dispute concerning a conflict cannot be resolved by a court, the national legislation prevails over the provincial legislation or provincial constitution.

STATUS OF LEGISLATION THAT DOES NOT PREVAIL

149. A decision by a court that legislation prevails over other legislation does not invalidate that other legislation, but that other legislation becomes inoperative for as long as the conflict remains.

INTERPRETATION OF CONFLICTS

150. When considering an apparent conflict between national and provincial legislation, or between national legislation and a provincial constitution, every court must prefer any reasonable interpretation of the legislation or constitution that avoids a conflict, over any alternative interpretation that results in a conflict.

...

CHAPTER 11
TRADITIONAL AUTHORITIES

181. RECOGNITION OF TRADITIONAL AUTHORITIES AND INDIGENOUS LAW

(1) A traditional authority which observes a system of indigenous law and is recognised by law immediately before the commencement of this Constitution, shall continue as such an authority and continue to exercise and perform the powers and functions vested in it in accordance with the applicable laws and customs, subject to any amendment or repeal of such laws and customs by a competent authority.

(2) Indigenous law shall be subject to regulation by law.

CHAPTER 12
TRADITIONAL LEADERS

RECOGNITION

211.(1) The institution, status and role of traditional leadership, according to customary law, are recognised, subject to the Constitution.

(2) A traditional authority that observes a system of customary law may function subject to any applicable legislation and customs, which includes amendments to, or repeal of, that legislation or those customs.

(3) The courts must apply customary law when that law is applicable, subject to the Constitution and any legislation that specifically deals with customary law.

183. PROVINCIAL HOUSE OF TRADITIONAL LEADERS

(1) *(a)* The legislature of each province in which there are traditional authorities and their communities, shall establish a House of Traditional Leaders consisting of representatives elected or nominated by such authorities in the province.

(b) Draft legislation providing, subject to this Chapter, for the establishment, the composition, the election or nomination of representatives, and the powers and functions of a House contemplated in paragraph *(a)*, and for procedures applicable to the exercise and performance of such powers and functions, and for any other matters incidental to the establishment and functioning of such a House, shall be introduced in a provincial legislature not later than six months after the election of the first Premier of such province in terms of this Constitution.

(c) The traditional authorities resident in a province shall before the introduction of draft legislation referred to in paragraph *(b)*, be consulted, in a manner determined by resolution of the provincial legislature, to establish their views on the content of such legislation.

(2) *(a)* A House referred to in subsection (1) *(a)*, shall be entitled to advise and make proposals to the provincial legislature or government in respect of matters relating to traditional authorities, indigenous law or the traditions and customs of traditional communities within the province.

(b) Any provincial Bill pertaining to traditional authorities, indigenous law or such traditions and customs, or any other matters having a bearing thereon, shall be referred by the Speaker of the provincial legislature to the House for its comments before the Bill is passed by such legislature.

ROLE OF TRADITIONAL LEADERS

212.(1) National legislation may provide for a role for traditional leadership as an institution at local level on matters affecting local communities.

(2) To deal with matters relating to traditional leadership, the role of traditional leaders, customary law and the customs of communities observing a system of customary law -

(a) national or provincial legislation may provide for the establishment of houses of traditional leaders; and

(b) national legislation may establish a council of traditional leaders.

...

(c) The House shall, within 30 days as from the date of such referral, indicate by written notification to the provincial legislature its support for or opposition to the Bill, together with any comments it wishes to make.
(d) If the House indicates in terms of paragraph *(c)* that it is opposed to the Bill, the provincial legislature shall not pass the Bill before a period of 30 days as from the date of receipt by the Speaker of such written notification has lapsed.
(e) If the House fails to indicate within the period prescribed by paragraph *(c)* whether it supports or opposes the Bill, the provincial legislature may proceed with the Bill.

...

[POSTAMBLE]

NATIONAL UNITY AND RECONCILIATION

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

The pursuit of national unity, the well-being of all South African citizens and peace require reconciliation between the people of South Africa and the reconstruction of society.

The adoption of this Constitution lays the secure foundation for the people of South Africa to transcend the divisions and strife of the past, which generated gross violations of human rights, the transgression of

CHAPTER 14
GENERAL PROVISIONS
INTERNATIONAL LAW

...

APPLICATION OF INTERNATIONAL LAW

233. When interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law.

OTHER MATTERS

CHARTERS OF RIGHTS

234. In order to deepen the culture of democracy established by this Constitution, Parliament may adopt Charters of Rights consistent with the provisions of the Constitution.

SELF-DETERMINATION

235. The right of the South African people as a whole to self-determination, as manifested in this Constitution, does not preclude, within

humanitarian principles in violent conflicts and a legacy of hatred, fear, guilt and revenge.

These can now be addressed on the basis that there is a need for understanding but not for vengeance, a need for reparation but not for retaliation, a need for ubuntu but not for victimisation.

In order to advance such reconciliation and reconstruction, amnesty shall be granted in respect of acts, omissions and offences associated with political objectives and committed in the course of the conflicts of the past. To this end, Parliament under this Constitution shall adopt a law determining a firm cut-off date, which shall be a date after 8 October 1990 and before 6 December 1993, and providing for the mechanisms, criteria and procedures, including tribunals, if any, through which such amnesty shall be dealt with at any time after the law has been passed.

With this Constitution and these commitments we, the people of South Africa, open a new chapter in the history of our country.

Nkosi sikelel' iAfrika. God seën Suid-Afrika
Morena boloka sechaba sa heso. May God bless our country
Mudzimu fhatutshedza Afrika. Hosi katekisa Afrika

the framework of this right, recognition of the notion of the right of self-determination of any community sharing a common cultural and language heritage, within a territorial entity in the Republic or in any other way, determined by national legislation.

FUNDING FOR POLITICAL PARTIES

236. To enhance multi-party democracy, national legislation must provide for the funding of political parties participating in national and provincial legislatures on an equitable and proportional basis.

...

AGENCY AND DELEGATION

238. An executive organ of state in any sphere of government may -

(a) delegate any function that is to be performed in terms of legislation to any other executive organ of state, provided that the delegation is consistent with the legislation in terms of which the function is performed; or

(b) perform any function for any other executive organ of state on an agency or delegation basis.

DEFINITIONS

239.(1) In the Constitution, unless the context indicates otherwise, organ of state means -

(a) any department of state or administration in the national, provincial or local sphere of government; and

(b) any other functionary or institution -

(i) exercising a power or performing a function in terms of the Constitution or a provincial constitution; or

(ii) exercising a public power or performing a public function in terms of any legislation.

(2) Despite subsection (1), organ of state does not include judicial officers or courts.

...

LABOUR RELATIONS ACT, 1995

241.(1) A provision of the Labour Relations Act, 1995 (Act No. 66 of 1995) remains valid, despite the provisions of the Constitution, until the provision is amended or repealed.

(2) A Bill to amend or repeal a provision of the Labour Relations Act, 1995 may be introduced in Parliament only after consultation with national federations of trade unions, and employer organisations.

(3) The consultation referred to in subsection (2), including the identification of the federations to be consulted, must be in accordance with an Act of Parliament.

...

SHORT TITLE AND COMMENCEMENT

244.(1) This Act is called the Constitution of the Republic of South Africa, 1996, and comes into effect on a date set by the President by proclamation, but no later than 1 January 1997.

...

[SCHEDULE 4 BELOW]

SCHEDULE 6

LEGISLATIVE COMPETENCES OF PROVINCES

Agriculture
Abattoirs
Airports, other than international and national airports
Animal control and diseases
Casinos, racing, gambling and wagering
Consumer protection
Cultural affairs
Education at all levels, excluding university and technikon education
Environment
Health services
Housing

SCHEDULE 4

FUNCTIONAL AREAS OF CONCURRENT NATIONAL AND PROVINCIAL LEGISLATIVE COMPETENCE

PART A

Administration of indigenous forests
Agriculture
Airports other than international and national
Animal control and diseases
Casinos, racing, gambling and wagering, excluding lotteries and sports pools
Consumer protection
Cultural matters
Disaster management
Education at all levels, excluding tertiary education
Environment

Indigenous law and customary law
Language policy and the regulation of the use of official languages within a province, subject to section 3
Local government, subject to the provisions of Chapter 10
Markets and pounds
Nature conservation, excluding national parks, national botanical gardens and marine resources
Police, subject to the provisions of Chapter 14
Provincial public media
Provincial sport and recreation
Public transport
Regional planning and development
Road traffic regulation
Roads
Soil conservation
Tourism
Trade and industrial promotion
Traditional authorities
Urban and rural development
Welfare services
Schedule 6 substituted by s14 of the Constitution of South Africa Amendment Act 2 of 1994

...

SCHEDULE 4
CONSTITUTIONAL PRINCIPLES

I

The Constitution of South Africa shall provide for the establishment of one sovereign state, a common South African citizenship and a democratic system of gov-

Health services
Housing
Indigenous law and customary law subject to Chapter 12 of the Constitution
Industrial promotion
Language policy and the regulation of official languages to the extent that the provisions of section 6 of the Constitution expressly confer upon the provincial legislature legislative competence
Nature conservation, excluding national parks, national botanical gardens and marine resources
Media service directly controlled or provided by the provincial government subject to section 192
Police to the extent that the provisions of Chapter 11 of the Constitution confer upon the provincial legislature legislative competence
Pollution control
Population development
Property transfer fees
Provincial public enterprises in respect of the functional areas in this Schedule and Schedule 5
Public transport
Public works only in respect of the needs of provincial government departments in the discharge of their responsibilities to administer functions specifically assigned to them in terms of the Constitution or any other law
Regional planning and development
Road traffic regulation
Soil conservation
Tourism
Trade
Traditional leadership subject to Chapter 12 of the Constitution
Urban and rural development
Vehicle licensing
Welfare services

PART B

The following local government matters to the extent set out in section 155(3):

ernment committed to achieving equality between men and women and people of all races.

II

Everyone shall enjoy all universally accepted fundamental rights, freedoms and civil liberties, which shall be provided for and protected by entrenched and justiciable provisions in the Constitution, which shall be drafted after having given due consideration to *inter alia* the fundamental rights contained in Chapter 3 of this Constitution.

III

The Constitution shall prohibit racial, gender and all other forms of discrimination and shall promote racial and gender equality and national unity.

IV

The Constitution shall be the supreme law of the land. It shall be binding on all organs of state at all levels of government.

V

The legal system shall ensure the equality of all before the law and an equitable legal process. Equality before the law includes laws, programmes or activities that have as their object the amelioration of the conditions of the disadvantaged, including those disadvantaged on the grounds of race, colour or gender.

VI

There shall be a separation of powers between the legislature, executive and judiciary, with appropriate checks and balances to ensure accountability, responsiveness and openness.

VII

The judiciary shall be appropriately qualified, independent and impartial and shall exercise its powers and perform its functions without fear, favour or prejudice.

Air pollution
Building regulations
Child care facilities
Electricity and gas reticulation
Firefighting services
Local tourism
Municipal airports
Municipal planning
Municipal health services
Municipal public transport
Municipal public works only in respect of the needs of municipalities in the discharge of their responsibilities to administer functions specifically assigned to them under this Constitution or any other law
Pontoons, ferries, jetties, piers and harbours excluding the regulation of international and national shipping and matters related thereto
Stormwater management systems in built up areas
Trading regulations
Water and sanitation services limited to potable water supply systems and domestic waste-water and sewage disposal systems

SCHEDULE 5
FUNCTIONAL AREAS OF EXCLUSIVE PROVINCIAL LEGISLATIVE COMPETENCE

PART A

Abattoirs
Ambulance services
Archives other than national archives
Libraries other than national libraries
Liquor licences
Museums other than national museums
Provincial planning
Provincial cultural matters
Provincial recreation and amenities
Provincial sport
Provincial roads and traffic
Veterinary services excluding regulation of the profession

PART B

fied, independent and impartial and shall have the power and jurisdiction to safeguard and enforce the Constitution and all fundamental rights.

VIII

There shall be representative government embracing multi-party democracy, regular elections, universal adult suffrage, a common voters' roll, and, in general, proportional representation.

IX

Provision shall be made for freedom of information so that there can be open and accountable administration at all levels of government.

X

Formal legislative procedures shall be adhered to by legislative organs at all levels of government.

XI

The diversity of language and culture shall be acknowledged and protected, and conditions for their promotion shall be encouraged.

XII

Collective rights of self-determination in forming, joining and maintaining organs of civil society, including linguistic, cultural and religious associations, shall, on the basis of non-discrimination and free association, be recognised and protected.

XIII

1. The institution, status and role of traditional leadership, according to indigenous law, shall be recognised and protected in the Constitution. Indigenous law, like common law, shall be recognised and applied by the courts, subject to the fundamental rights.

The following local government matters to the extent set out in section 155(3):
Beaches and amusement facilities
Billboards and the display of advertisements in public places
Cemeteries, funeral parlours, crematoria
Cleansing
Control of public nuisances
Control of undertakings that sell liquor to the public
Facilities for the accommodation, care and burial of animals
Fencing and fences
Licensing of dogs
Licensing and control of undertakings that sell food to the public
Local amenities
Local sport facilities
Markets
Municipal abattoirs
Municipal parks and recreation
Municipal roads
Noise pollution
Pounds
Public places
Refuse removal, refuse dumps and solid waste disposal
Street trading
Street lighting
Traffic and parking

SCHEDULE 6
TRANSITIONAL ARRANGEMENTS

...

CASES PENDING BEFORE COURTS

17. All proceedings which were pending before a court when the new Constitution took effect, must be disposed of as if the new Constitution had not been enacted, unless the interest of justice requires otherwise.

[END]

mental rights contained in the Constitution and to legislation dealing specifically therewith.

2. Provisions in a provincial constitution relating to the institution, role, authority and status of a traditional monarch shall be recognised and protected in the Constitution.
Principle XIII substituted by s2 of the Republic of South Africa Constitution Act 3 of 1994

XIV

Provision shall be made for participation of minority political parties in the legislative process in a manner consistent with democracy.

XV

Amendments to the Constitution shall require special procedures involving special majorities.

XVI

Government shall be structured at national, provincial and local levels.

XVII

At each level of government there shall be democratic representation. This principle shall not derogate from the provisions of Principle XIII.

XVIII

1. The powers and functions of the national government and provincial governments and the boundaries of the provinces shall be defined in the Constitution.
2. The powers and functions of the provinces defined in the Constitution, including the competence of a provincial legislature to adopt a constitution for its province, shall not be substantially less than or sub-

stantially inferior to those provided for in this Constitution.

3. The boundaries of the provinces shall be the same as those established in terms of this Constitution.
4. Amendments to the Constitution which alter the powers, boundaries, functions or institutions of provinces shall in addition to any other procedures specified in the Constitution for constitutional amendments, require the approval of a special majority of the legislatures of the provinces, alternatively, if there is such a chamber, a two-thirds majority of a chamber of Parliament composed of provincial representatives, and if the amendment concerns specific provinces only, the approval of the legislatures of such provinces will also be needed.
5. Provision shall be made for obtaining the views of a provincial legislature concerning all constitutional amendments regarding its powers, boundaries and functions
Principle XVIII substituted by s13 of the Constitution of the Republic of South Africa Amendment Act 2 of 1994

XIX

The powers and functions at the national and provincial levels of government shall include exclusive and concurrent powers as well as the power to perform functions for other levels of government on an agency or delegation basis.

XX

Each level of government shall have appropriate and adequate legislative and executive powers and functions that will enable each level to function effectively. The allocation of powers between different levels of government shall be made on a basis which is conducive to financial viability at each level of government and to

effective public administration, and which recognises the need for and promotes national unity and legitimate provincial autonomy and acknowledges cultural diversity.

XXI

The following criteria shall be applied in the allocation of powers to the national government and the provincial governments:

1. The level at which decisions can be taken most effectively in respect of the quality and rendering of services, shall be the level responsible and accountable for the quality and the rendering of the services, and such level shall accordingly be empowered by the Constitution to do so.

2. Where it is necessary for the maintenance of essential national standards, for the establishment of minimum standards required for the rendering of services, the maintenance of economic unity, the maintenance of national security or the prevention of unreasonable action taken by one province which is prejudicial to the interests of another province or the country as a whole, the Constitution shall empower the national government to intervene through legislation or such other steps as may be defined in the Constitution.

3. Where there is necessity for South Africa to speak with one voice, or to act as a single entity in particular in relation to other state's powers should be allocated to the national government.

4. Where uniformity across the nation is required for a particular function, the legislative power over that function should be allocated predominantly, if not wholly, to the national government.

5. The determination of national economic policies, and the power to promote interprovincial commerce and to protect the

common market in respect of the mobility of goods, services, capital and labour, should be allocated to the national government.

6. Provincial governments shall have powers, either exclusively or concurrently with the national government, *inter alia* -

(a) for the purposes of provincial planning and development and the rendering of services; and

(b) in respect of aspects of government dealing with specific socio-economic and cultural needs and the general well-being of the inhabitants of the province.

7. Where mutual co-operation is essential or desirable or where it is required to guarantee equality of opportunity or access to a government service, the powers should be allocated concurrently to the national government and the provincial governments.

8. The Constitution shall specify how powers which are not specifically allocated in the Constitution to the national government or to a provincial government, shall be dealt with as necessary ancillary powers pertaining to the powers and functions allocated either to the national government or provincial governments.

XXII

The national government shall not exercise its powers (exclusive or concurrent) so as to encroach upon the geographical, functional or institutional integrity of the provinces.

XXIII

In the event of a dispute concerning the legislative powers allocated by the Constitution concurrently to the national government and provincial governments which cannot be resolved by a court on a construction of the Constitution, precedence shall be given to the legislative powers of

the national government.

XXIV

A framework for local government powers, functions and structures shall be set out in the Constitution. The comprehensive powers, functions and other features of local government shall be set out in parliamentary statutes or in provincial legislation or in both.

XXV

The national government and provincial governments shall have fiscal powers and functions which will be defined in the Constitution. The framework for local government referred to in Principle XXIV shall make provision for appropriate fiscal powers and functions for different categories of local government.

XXVI

Each level of government shall have a constitutional right to an equitable share of revenue collected nationally so as to ensure that provinces and local governments are able to provide basic services and execute the functions allocated to them.

XXVII

A Financial and Fiscal Commission, in which each province shall be represented, shall recommend equitable fiscal and financial allocations to the provincial and local governments from revenue collected nationally, after taking into account the national interest, economic disparities between the provinces as well as the population and developmental needs, administrative responsibilities and other legitimate interests of each of the provinces.

XXVIII

Notwithstanding the provisions of Principle

XII, the right of employers and employees to join and form employer organisations and trade unions and to engage in collective bargaining shall be recognised and protected. Provision shall be made that every person shall have the right to fair labour practices.

XXIX

The independence and impartiality of a Public Service Commission, a Reserve Bank, an Auditor-General and a Public Protector shall be provided for and safeguarded by the Constitution in the interests of the maintenance of effective public finance and administration and a high standard of professional ethics in the public service.

XXX

1. There shall be an efficient, non-partisan, career-orientated public service broadly representative of the South African community, functioning on a basis of fairness and which shall serve all members or the public in an unbiased and impartial manner, and shall, in the exercise of its powers and in compliance with its duties, loyally execute the lawful policies of the government of the day in the performance of its administrative functions. The structures and functioning of the public service, as well as the terms and conditions of service of its members, shall be regulated by law.
2. Every member of the public service shall be entitled to a fair pension.

XXXI

Every member of the security forces (police, military and intelligence), and the security forces as a whole, shall be required to perform their functions and exercise their powers in the national interest and shall be prohibited from furthering or prej-

udicing party political interest.

XXXII

The Constitution shall provide that until 30 April 1999 the national executive shall be composed and shall function substantially in the manner provided for in Chapter 6 of this Constitution.

XXXIII

The Constitution shall provide that, unless Parliament is dissolved on account of its passing a vote of no-confidence in the Cabinet, no national election shall be held before 30 April 1999.

XXXIV

1. This Schedule and the recognition therein of the right of the South African people as a whole to self-determination, shall not be construed as precluding, within the framework of the said right, constitutional provision for a notion of the right to self-determination by any community sharing a common cultural and language heritage, whether in a territorial entity within the Republic or in any other recognised way.

2. The Constitution may give expression to any particular form of self-determination provided there is substantial proven support within the community concerned for such a form of self-determination.

3. If a territorial entity referred to in paragraph 1 is established in terms of this Constitution before the new constitutional text is adopted, the new Constitution shall entrench the continuation of such territorial entity, including its structures, powers and functions.

(Principle XXXIV added by s.13 of the Constitution of the Republic of South Africa Act 2 of 1994)