South Africa's Transition to Democracy and the Rule of Law

I. The Rule of Law and Fundamental Rights

The cornerstone of the new democracy in South Africa after the historic free election of April 27, 1994, is chapter 3 of the new Constitution. This chapter on fundamental rights should guarantee that the prerequisites for a democratic South Africa will be fulfilled by the new government.

The notion that a society should be ruled by the law can be traced to medieval thinking, although the modern notion of a Rechtsstaat goes to the credit of the German legal science of the second half of the nineteenth century. It was the publications of jurists such as Stein, Bahr, Gneist, and Stahl who formulated clearly: "Der Staat soll Rechtsstaat seyn. Das ist die Losung und ist in Wahrheit der Entwicklungstrieb der neueren Zeit. [The state should be governed by the rule of law. That is the solution and is the development goal of the new time.]"

One of the principal goals of the allies in World War II was the restoration of the rule of law to Europe. This goal encompassed more than merely the maintenance of law and order, for law and order can be maintained effectively by an oppressive minority that totally disregards human rights. The notion of

* B.A. Law, LL.B., LL.M. (RAU), Drs. Iur., LL.D. (Leiden); Professor of Private Law, Law Faculty, Rand Afrikaans University, Johannesburg.

the rule of law takes the form of the supremacy of certain fundamental laws. Modern constitutions based on the continental rather than the British model stress the value of certain primary rights. The presence of these rights in a constitution is supposed to guarantee permanence of their applicability, regardless of the incumbent government.

Although the details of the individual perception of fundamental rights may differ from constitution to constitution, the independence of the judges of the higher courts is the crux of any effective rule of law. The judiciary should be free from interference by the administration and control by the parliament, or even worse, by a political party. The conclusion of a colloquium held at the University of Chicago on "The Rule of Law as Understood in the West" was that the rule of law is the instrument of organized society to create a community in which a person may fulfil himself by the full development of his capacities unhindered by arbitrary government intervention. Constitutionalism is "a government of laws and not of men. The very basis of the idea of limited government is that sovereignty vests in the individual citizen."

The rule of law is the antithesis to arbitrary and despotic forms of government that during this century have ruined the lives of so many people in the Soviet Union and its satellite states, in parts of Asia, and notably, in Africa. The impartial judiciary in the new South Africa must act as watchdog and guard the delicate embryo of a developing democracy in this subregion of an Africa not renowned for its long-standing democratic traditions. This article touches on some aspects of the "hardware" put in place by the new South African Interim Constitution. As in the new computer age, however, the hardware alone does not necessarily determine the success of the operation. Rather, the software used in conjunction with the available hardware enables the operators to accomplish the set goals. In the case of the new South Africa, the success of the new democratic operation will ultimately depend on the will and determination of its peoples to make successful use of the constitutionally guaranteed values. The fundamental rights enshrined in the Constitution must never be seen as Teilhaberchte [rights of a junior partner that can be ignored] only to be acknowledged by the government of the day as long as it is politically expedient to do so.

3. The Magna Carta can be considered the departing point in regards to the perception of the rule of law.
7. "De grondrechten zijn 'Ausgrenzungen.' [The fundamental rights mentioned in the constitution limit on an exclusive basis the powers of the state.]" See H.J. Van Eikema Hommes, De Materiële Rechtsstaatidee, 1978 TSAR 42, 47.
II. The Point of Departure in the New South Africa

One of the first sections of the new South African Interim Constitution states 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. 8

The supremacy of the Constitution stands in direct contrast to the previous administration system, where, in accordance with the British tradition that applied since the British War at the beginning of this century, parliament was sovereign and above the law. South Africa is now a democratic, constitutional state. All three branches of government, legislative, executive, and the judicial, are bound by the Constitution’s provisions. The courts, and the constitutional court in particular, can test the validity of any state action for legality and legitimacy. The federal character of the new South Africa, with the division of powers between central and federal government, can also be overseen by the courts. 9 For the legal fraternity this exposure opens new horizons and job opportunities.

A. Fundamental Rights

According to section 7, the fundamental rights chapter 10 will be binding on all legislative and executive branches of state at all levels of government and will apply to all law in force, all administrative decisions taken and all acts performed during the operation of this Constitution. 11 This mandate that state agencies are bound by this chapter indicates that this chapter is not intended to have direct, third-party applicability as is the case with the Namibian Constitution. 12 If read with section 35(3) of the new Constitution, the situation may develop comparably to the German indirekte Drittwerkung [indirect horizontal effect or

8. S. Afr. Const. § 4(1) (1993). It is unfortunate that within the first 100 days of operation, the new government had already experienced the need to pass four amendments to the Constitution, somehow making a mockery of the notion of a supreme law not subjected to numerous amendments.

9. It is, in general, with the exception of Switzerland, typical of a federal constitutional state that the courts do have such a testing capacity. See S.W. COUWENBERG, GEZAG EN VRUIHEID—INLEIDING IN DE CONSTITUTIONELE RECHTS—EN ONTWIKKELINGSTHEORIE 48 (1991). With regard to the Swiss position, see A. AFFOLTER, GRUNDZÜGE DES SCHWEIZERISCHEN STAATSRECHT 103-05 (1923). See also D. BASSON, SOUTH AFRICA’S INTERIM CONSTITUTION xxiv (1994) (“[T]he interim Constitution . . . does not introduce a classic system of federal government” but “the possibility exists that the Constitutional Court may carve out a niche for provincial competence.”).


11. Id. § 7(1)-(2).

12. Section 5 of the Namibian Constitution explicitly regulates that the fundamental rights and freedoms enshrined in that section shall be respected by “all natural persons and legal persons in Namibia.” See D. MÜLLER, VERFASSUNG VON NAMIBIA: ETHNISCHE VIELFALT UND ELEMENTE EINES MINDERHEITENSCHUTZES (1992).

FALL 1995
"spreading") so that the courts will have to take note of fundamental rights when interpreting common law.\textsuperscript{13}

Under the new Constitution, natural persons enjoy fundamental rights protection, as in some Anglo-American jurisdictions; and juristic persons enjoy the same protection as natural persons.\textsuperscript{14} This protection is in accordance with the German origins of this chapter and the explicit provisions in Section 35(1),\textsuperscript{15} and serves as a clear indicator of the foreign decisions that should be used to interpret the ambit of some of these principles in the future.

Although the Constitution's explicit mention of this mode of interpretation is welcomed, it is to be hoped that the interpreting courts will give a local interpretation to the relevant issues, recognizing the unique South African situation, rather than blindly applying foreign decisions.\textsuperscript{16}

Applicants may apply for relief that includes a declaration of rights applicable either to the applicant personally or to any person, class, association of persons, or the public at large with whom the applicant associates.\textsuperscript{17}

1. \textit{Equality}

For any real democracy, of paramount importance is that all peoples within the democracy should enjoy equal opportunities. According to section 8, every person shall have the right to equality before the law and to equal protection of the law.\textsuperscript{18} 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, color, sexual orientation, age, disability, religion, conscience, belief, culture, or language.\textsuperscript{19}

\begin{itemize}
\item \textsuperscript{13} G. Diamond, \textit{Voorlopige aantekeninge oor hoofstuk 3 van die Grondwet}, 1994 \textit{De Rebus [DR]} 380-84. On the application and interpretation of similar rules in German law, see Bundesarbeitsgericht (Federal Labor Court), judgment of May 5, 1957 (NJW 1957, 1688-90); Bundesverfassungsgericht (Federal Constitutional Court), judgment of Jan. 15, 1958 (BVerfGE 7, 198-230); Bundesverfassungsgericht (Federal Constitutional Court), order of Feb. 9, 1994 (NJW 1994, 1147-49).
\item \textsuperscript{14} \textquoteright‘Juristic persons shall be entitled to the rights contained in this Chapter where, and to the extent that, the nature of the rights permits.	extquoteright’ S. Afr. Const., \textit{supra} note 8, \S\ 7(3).
\item \textsuperscript{15} \textquoteright[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.	extquoteright’ \textit{Id.} \S\ 35(1); see \textit{South Africa's Crisis of Constitutional Democracy} (R.A. Licht \& B. de Villiers eds., 1994) [hereinafter \textit{South Africa's Crisis}].
\item \textsuperscript{16} Cf. Diamond, \textit{supra} note 13, at 384. But see the views of Murenik and Asmal, \textit{infra} note 83. \textit{See also} T.L. Pangle, \textit{South Africa, Viewed Through the Eyes of the American Constitution, in South Africa's Crisis, supra} note 15.
\item \textsuperscript{17} For example, (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 (v) a person acting in the public interest.
\item \textsuperscript{18} S. Afr. Const., \textit{supra} note 8, \S\ 8(1).
\item \textsuperscript{19} \textit{Id.} \S\ 8(2).
\end{itemize}
The Constitution of the former Republic of Bophuthatswana had a similarly worded equality section. This section has been used to interpret, inter alia, regulations governing the 1992 expulsion of pregnant students from a college by the superior court. The court held that, in the idiom used by American courts regarding quasi-suspect classifications, the particular regulation did not bear a "fair, substantial, natural, reasonable or just relation" to any of the mentioned objects or purposes. The South African courts will probably apply the equality principle along these lines.

The shifting of the burden of proof in subsection 8(4) will be an important tool in the hands of the interpreting judiciary: "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." Unfortunately, the sound principle of nondiscrimination is undermined by the very next subsection: "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." This subsection will most probably be used for what is known euphemistically as "affirmative action" or discrimination in reverse.

South African universities used to base student admissions on academic merit alone, without regard for color. During the last two decades, due to the educational boycott instigated by organizations within the fold of the mass movements (United Democratic Front (UDF); African National Congress (ANC); and South African Communist Party (SACP)), the educational standard of the majority of black students deteriorated to the point of nonexistence. The new government has, however, already announced that according to their interpretation of this subsection, it will enact by an act of parliament that every university must accommodate persons as students who may not comply with the usual standard of education necessary for academic studies but who must now be advanced to achieve equal enjoyment of all rights and freedoms.

Section 32(a) provides that every person shall have the right to basic education and to equal access to educational institutions. South African universities, unlike their Dutch counterparts, are traditionally separate, independent, legal entities

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22. Mfolo case 186H.
23. S. AFR. CONST., supra note 8, § 8(4).
24. Id. § 8(3)(a).
enjoying juristic personality. 25 Although up to 70 percent of the budget of the universities may be subsidized by the central fiscus, the state has, in the past, respected the independence and autonomy of the university councils and governing bodies to run the universities along internationally acceptable lines with the emphasis on academic merit.

Academic freedom and university autonomy relate to the mission of a university to pursue knowledge and understanding through research and teaching. 26 Autonomy is usually described as the independence of a university with regard to matters related to its mission, viz academic matters. 27 In Germany, 28 the United States, and Britain, legal rules have been formulated to regulate the relationship between universities and academics on the one hand and the government on the other hand to protect these valuable assets of a free society. While an entrenched bill of rights 29 ought to guarantee these values in the new South Africa, the opposite has happened. Although various proposals were tabled regarding academic freedom, 30 and a section modelled after the German article 5(3) was considered, the bill of rights did not materialize in that form.

Section 14(1) contains, ostensibly as an afterthought, a reference to academic freedom, but does not explicitly include academic autonomy: "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." The same can be said of the reference in section 15(1) to freedom of expression: "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."

On the insistence of the new government, subsections 247(2) and (3) were added to the Constitution, despite vehement protest from some universities. The national government may alter the rights, powers, and functions of the controlling bodies of universities by agreement of the parties resulting from bona fide negotia-

29. This position in the Spanish Constitution is stated as such: "The autonomy of universities is recognized under the terms which the law provides." CONSTITUCIÓN § 27(10) (Spain). This position in the Portuguese Constitution states: "The universities shall be autonomous with respect to the adoption of their rules and shall enjoy scientific, pedagogical, administrative and financial autonomy, all in accordance with the law." CONSTITUIÇÃO § 76(2) (Port.). See also CONSTITUCIÓN POLÍTICA DE LOS ESTADOS UNIDOS MEXICANOS § 3 (viii); Malherbe, supra note 26, at 379 nn. 197-99.
30. Cf. the proposals from the Law Commission, Inkatha, and the National Party, in Malherbe, supra note 26, at n.204.
tion. If an agreement is not reached, the national and provincial governments are not precluded from altering the powers of governing bodies in various schools as well as the controlling bodies of universities. These bodies can only respond by challenging the validity of such alterations in terms of this Constitution.

The universities are afraid that a new government could use these provisions to alter admission requirements to enable underqualified persons to enter the universities and to compel the universities to award degrees regardless of the students' real merit. Awarding a higher education degree to a student merely because that person was enrolled at an institution for the required term borders on deceit.

The prestigious academic institutions in Western Europe and America must show their true colors and protest to the new government if unsuitable students, armed with these worthless certificates, apply for post-graduate research fellowships or seats at these universities.

A document published under the auspices of the Centre for Education Policy Development stated that "National policy [is directed] to achieve enhanced African access" to universities. Special attention will be directed towards those historically white (Afrikaans) universities where enrollments are below capacity due to entrance criteria that required prospective students to have certain academic qualifications.

If equal access is read to mean enhanced African access, not much will be left of the nondiscrimination clause in the bill of rights. The universities will be compelled to rethink their position regarding their Western-oriented curricula and the maintenance of acceptable academic standards. That this shift of academic focus will most probably materialize can be gleaned from the same document's anticipating centrally managed "coordinated access" according to a central plan, an approach that will destroy the historical autonomy of the universities as academic institutions.

2. The Fundamental Rights of Children

Section 30(1) guarantees that every child shall have the right to: (a) a name and nationality as from birth; (b) parental care; (c) security, basic nutrition, and basic health and social services; (d) freedom from neglect or abuse; and (e)

31. The term "African" refers not to all people born in Africa, but must be read to refer only to black people.

32. HIGHER EDUCATION TASK TEAM, CENTER FOR EDUCATION POLICY DEVELOPMENT, Proposed Implementation Plan at 11 (1994).

33. If the overtones of "centralized planning" in the political manifesto and RDP (Reconstruction and Development Program) of the ANC, as echoed in the new Constitution, are actually implemented by the government, it will be the task of the judiciary to guard the newly found democracy. Cf. Sabine's remark: "No quality of Lenin's political thought was more constant than his preference for centralized organization, or, put negatively, his distrust of any kind of federalism, coalition, or even alliance, if the last threatened his freedom of action." GEORGE H. SABINE, A HISTORY OF POLITICAL THEORY 862 (3d ed. 1961).

34. Cf. "The present 'free-market' approach will result in chaos as demand increases. Some form of coordination of admissions, linked to growth projections, must be investigated immediately." HIGHER EDUCATION TASK TEAM, supra note 32, Policy Implications at 5.
freedom from exploitative labor practices or work that is hazardous or harmful
to his or her education, health, or well-being. For the purpose of this section,
a child shall mean a person under the age of eighteen years; and in all matters
concerning such child, his or her best interests shall be paramount.35

Unfortunately, the parties were not able to reach a consensus on the inclusion
of a fundamental right for the protection of the family or marriage. The mere
reference to a child’s right to a name does not say much about the problem of
whether the name should be the father’s, the mother’s, or the parent’s agreed-on
married name.36

B. LIMITATION37

The rights entrenched in chapter 3 may be limited by law,38 provided that such
limitation is reasonable, justifiable, necessary, and does not negate the essential
content of the right in question. Except as provided for in subsection (1) or any
other provision of the Constitution, no law, whether a rule of the common law,
customary law, or legislation, shall limit any right entrenched in this chapter.39
The entrenchment of rights in this chapter shall not be construed as denying the
existence of any other rights or freedoms recognized or conferred by common
law, customary law, or legislation to the extent that they are not inconsistent
with this chapter.40 And finally, section 33(4) of the Constitution states that “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).’’

C. INTERPRETATION

In interpreting the provisions of chapter 3, a court of law must “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.’’41

35. S. AFR. CONST., supra note 8, § 30(3).
36. See J.C. Sonnekus, Naamsvoering binne die Familiereg—Versoenbaar met Fundamentele
Menseregte?, 1993 TSAR 608-36; Cf. the difference between Anglo-American and Germanic legal
systems with regard to the importance attached to the family name. HAILSHAM OF ST. MARYLEBONE,
XXII HALSBURY’S LAWS OF ENGLAND 633, § 1018 (4th ed. 1979); PHILLIMORE EN FRY, CHANGES
OF NAME xvii (1905); WACKE, MONCHENER KOMMENTAR BÜRGERLICHES GESETZBUCH § 1355,
RdNr 1 ev (1989); SCHOTT, FESTSCHRIFT HEGNAUER 471-92 (1986); Krüger, Die Name der Frau
nach bürgerlichem Recht, 1957 AcP 232; SCHWENZER, NAMENRECHT IM ÜBERBLICK, 1991 FAMRZ
390, 392.
37. S. AFR. CONST., supra note 8, § 33.
38. Cf. the interpretation given to a similar wording in the European Convention on Human
supra note 13, at 383.
39. S. AFR. CONST., supra note 8, § 33(2).
40. Id. § 33(3).
41. Id. § 35(1).
South African lawyers and courts are accustomed to interpreting laws according to set rules of interpretation formulated to disclose the meaning or intention of the legislature. "Scire namque leges non est, verba earum tenere, sed vim ac potentiam."42 The rules of interpretation are to a great extent still uncodified and buried in the various writings of the old writers of the Roman Dutch law of the 17th century as interpreted by the courts.43 According to section 35 of the Constitution, courts will have to make a value judgment in every case. This discretion will be totally foreign to the classical Roman-Dutch principle that South African judges do not sit in courts of equity, as in some English courts.44

No law that limits any of the rights entrenched in this chapter shall be constitutionally invalid solely because the wording used prima facie exceeds the limits imposed in this chapter, provided such a law is reasonably capable of a more restricted interpretation that does not exceed such limits. If so, such law shall be construed as having a meaning in accordance with the more restricted interpretation.45 Until an applicable rule of law has been tested by a competent court and found to be unconstitutional, it remains in force.46 Any other interpretation will be to the detriment of legal certainty, which is a sine qua non for any orderly society.47

In the interpretation of any law and in 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.48

D. THE IMPLICATION FOR LEGAL PRACTICE OF THE BILL OF FUNDAMENTAL RIGHTS

South African lawyers schooled in the uncodified Roman-Dutch law will have to get used to the idea that every possible aspect of state action may be tested against the bill of rights. For comparative lawyers this development will be a boon in their practices. Their ability to be at home in various legal systems will be valued. Human-rights jurisprudence is the most international legal discipline. Legal practitioners will have to take note of developments and rulings in international forums,

42. DIG. 1, 3, 17 ("To know the laws is not to observe their mere words, but their force and power."); F.C. Von Savigny, Rekonstruktion des dem Gesetze inwohenden Gedankens, in I SYSTEM DES HEUTIGEN ROMISCHEN RECHTS 213 (1840).
44. Cf. the well-known dictum of the South African appellate division: "Equity could not override a clear rule of law." Bank of Lisbon and South Africa Ltd v. de Ornelas, 1988 3 S.A. 580 (A) 606A.
45. S. AFR. CONST., supra note 8, § 35(2).
47. See B. Rüthers, Das Ungerechte an der Gerechtigkeit—Defizite Eines Begriffs 107 (1991) ("Notwendige Bedingung der Gerechtigkeit und elementarer Bestandteil rechtsstaatlich verstandener Justizgarantie ist die Rechtssicherheit").
48. S. AFR. CONST., supra note 8, § 35(3).
such as the European Commission on Human Rights, the European Court of Human Rights, the United Nations Commission on Human Rights, and the jurisprudence of individual jurisdictions other than the Commonwealth countries. Advocates and attorneys will similarly have to acquaint themselves with new texts as well as foreign law reports. International human rights instruments, such as the United Nations Human Rights Covenants, will be more than useful reading.

Haysom pointed out that the interests of a client may be drastically affected by litigation in which the client is not a party. An attorney will continuously have to monitor litigation before the courts in order to intervene directly as an interested party or as an amicus curiae. Attorneys will have to file opinions and evidence to guide the courts in accordance with the interests of the client. Whether the new rules will make provision for such briefs is as yet unclear, but according to Haysom some provision to protect the interests of parties not before the court that goes beyond existing rights of third-party intervention will have to be made. These provisions are necessary, because the consequences of constitutional litigation are more far-reaching and may affect the rights of diverse groups and individuals who were not parties to a particular case.

The bill of rights mandates that in the interpretation and application of any law, including common law and customary law, the courts shall consider the "spirit, purport and objects" of the bill of rights. Thus, it will likely cast a shadow over all aspects of commercial and civil litigation and will require close scrutiny of all existing legal documents to ascertain its impact on the validity or interpretation of the individual provisions.

South African legal practitioners must acquaint themselves as soon as possible with this new field. Otherwise, foreign legal experts will be called on to interpret the applicability of the various norms against the background of the new Constitution. To avoid this inherent danger, practitioners must develop a working knowledge of human rights jurisprudence.

The first series of reported decisions on the effect of the new Constitution concerned the interpretation and scope of section 23, which deals with 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."

South African criminal procedure still uses an accusatorial, adversary system,

50. Id.
51. Id.
52. As to group actions and the relevant civil procedure implications, see W. le R. De Vos, Groepsgedingvoering in die Verenigde State van Amerika ingeval reël 23 van die Federale Reëls insake Siviele Proses, 1984 TSAR 263; 'n Groepsgeding vir Suid-Afrika, 1985 TSAR 296.
53. See S v. Fani, 1994 3 S.A. 619 (E); Qozeleni v. Minister of Law & Order, 1994 3 S.A. 625 (E); Mazele v. Minister of Law & Order, 1994 3 S.A. 380 (E); S v. James, 1994 3 S.A. 881 (E); S v. Smith, 1994 3 S.A. 887 (SE).
as opposed to an inquisitorial, procedural system used in many Western countries. The difference in disclosure and pleading procedures between the two systems must be kept in mind when applying this principle of access to information. Otherwise, the whole criminal procedure can be slanted to the detriment of the community at large if it results in criminals being acquitted because their counsel are able to turn evidence accumulated by the investigating officers. De Villiers hoped that

the principles . . . are adjusted to the extent that the prosecution (and thereby the broader public) receives some form of quid pro quo in that accused persons be compelled to reveal their defenses at the commencement of their trials. In this manner evidence could be limited, valuable court time saved, and expenses by the public reduced. Accused persons may also, if genuinely innocent, benefit from revealing their versions at the commencement of their trials because they may soon after their plea explanations be acquitted should their versions accord with the information at the disposal of the prosecution.  

Not only is the application of the principles contained in chapter 3 a new field for the practicing lawyers in South Africa, but the meaning of many of the provisions of the bill of rights is somewhat elusive. Further, the two versions of the Constitution, the Afrikaans text signed by the state president and the English text, which according to the Constitution of the Republic of South Africa Amendment Act 2 of 1994, “shall . . . prevail as if it were the signed text,” contain several disparities. In general, it will be sound practice if the “wider” text, which affords the subjects a more beneficial arrangement, should prevail.

Provisions relating to the right to economic activity or to the meaning of unfair discrimination can have various implications for economic and social life. Haysom refers to the following by way of example: Will the manufacturers of steel cans be able to challenge the constitutional validity of a regulation that unfairly discriminates against them by favoring the manufacturers of aluminum cans? Do restrictions on Sunday trading hours impair a company’s right to religious freedom? The meaning given to any of the fundamental rights cannot be ascertained from a simple textual reading, but will instead take its cue from an evolving but distinctive approach to the interpretation of human rights provisions.

The legal profession will have a prominent task in protecting and developing the bill of fundamental rights. In addition to the importance of these rights to a just and stable society, the rights will affect almost all aspects of legal practice. Attorneys will be required to advise their clients on the likely impact of the bill in regard to a wide range of social, political, and business concerns. Attorneys will be eligible to sit on the Constitutional Court and will be represented in the Judicial Service Commission. Moreover, attorneys will probably have rights of

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55. Van der Vyver, *supra* note 46, at 569.

audience in the Constitutional Court itself. Indeed, the bill of fundamental rights may even spur an attack on some of the irrational features of the divided bar. For all these reasons, attorneys must take the bill of rights seriously.

III. The Role of the Different Courts in a New South African Scheme

The new South African Constitution became effective on April 27, 1994, repealing the whole of the Republic of South Africa Constitution Act, 110 of 1983.57 The new Constitution provides for a Parliament comprising the National Assembly of four hundred representatives and the Senate consisting of ten representatives of each of the nine new provinces that will form the legislature. Judicial authority is regulated in chapter 7, and the main innovation is the new Constitutional Court of eleven members with the power to test any act of Parliament or lesser legislative assembly for compliance with constitutionally guaranteed fundamental rights. This important innovation diverges from the principle inherited from the British Westminster system in which Parliament was sovereign.

The South African constitutional fathers opted for a mixture of American and Austrian types of judicial control. The American5 model gives every court of law testing capacity, while the Austrian example59 reserves the testing capacity for a single constitutional court.60 According to the South African Constitution, only the Constitutional Court has the power to test acts of Parliament; but every division of the Supreme Court, with the exception of the appellate division, will have testing powers with regard to all other constitutional matters.61

A. THE CONSTITUTIONAL COURT62

The Constitutional Court has jurisdiction over all matters relating to the interpretation, protection, and enforcement of the Constitution's provisions.63 This jurisdiction includes: any alleged violation of fundamental right entrenched in chapter 3,64 any dispute over the constitutionality of any executive or administra-

58. Followed in, e.g., Mexico, Australia, Canada, Japan, Greece, Norway, Denmark, and India.
59. Introduced in Austria in 1920 and since followed in Italy, Germany (GRUNDGESETZ [Basic Law] arts. 93-94), Turkey, and Spain.
60. See Couwenberg, supra note 9, at 50.
61. Within the first 100 days of government, the minister has indicated that the Constitution will be amended in order to extend this capacity to the magistrates courts. This extension of authority was accomplished in the Constitution of the Republic of South Africa Third Amendment Act No. 13 of 1994, which came into operation retroactively on July 22, 1994.
63. S. Afr. Const., supra note 8, § 98(2). "The Constitutional Court shall be the only court having jurisdiction over a matter referred to in subsection (2), save where otherwise provided in § 101(3) and (6)." Id. § 98(3), amended by Act 13 of 1994, § 3.
64. This provision leaves the question of whether an Act concerning the official status of any language disregarding the provisions of § 4 that is not included in chapter 3, will be justiciable by the Constitutional Court.
tive act or proposal; any inquiry into the constitutionality of any law or proposed legislation; any dispute of a constitutional nature between organs of state at any level of government; and jurisdictional questions.65

The Constitutional Court's decision is binding on all persons and all state legislative, executive, and judicial organs.66 If the Constitutional Court finds that any law or any provision thereof is inconsistent with the Constitution, the court shall declare such law or provision invalid to the extent of its inconsistency. However, the Constitutional Court may, in the interests of justice and good government, require Parliament or any other competent authority within a period specified by the court, to change the law or provision, which shall then remain in force pending correction or the expiration of the period so specified.68

Unless the Constitutional Court orders otherwise, the declaration of invalidity of a law or a provision thereof existing at the commencement the Constitution, shall not invalidate any law in effect before the declaration. However, any laws passed after such a declaration would be invalid.69

In the event of the Constitutional Court declares an executive or administrative act or proposal unconstitutional, the court may order the relevant organ of state to refrain from such act or conduct, or, to correct the constitutionality of such act or conduct.70

As the Constitutional Court implements constitutionalism, lawyers accustomed to the old order where Parliament was sovereign will have to adjust their thinking. The judges of the supreme court have a proud record of excellent judgments on constitutional matters, including the well-known judgments in the 1950s handed down by the appellate division when the government of the day manipulated the Senate to pass certain acts through Parliament. In light of the reported judgments,71 the sleight-handed way in which the appellate division is excluded from jurisdiction in any constitutional matters can hardly be explained. The vast powers the Constitutional Court will wield makes its composition of great importance.

65. 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 case may be requiring him or her to do so.

S. Afr. Const., supra note 8, § 98(9).

66. Id. § 98(2), amended by Act 13 of 1994, § 3.

67. Id. § 98(4).

68. Id. § 98(5).

69. Id. § 98(6).

70. Id. § 98(7).

B. Composition of the Constitutional Court

The composition of the Constitutional Court and the appointment of its judges can give some indication of the effectiveness that can be expected from the new forum. No person is qualified to be appointed president or a judge of the Constitutional Court unless he or she is a South African citizen, and is fit to be a judge of the Constitutional Court. He or she must be a judge of the Supreme Court or be similarly qualified as a practicing advocate, attorney, or lecturer for at least ten years. A person who has training and experience in the field of constitutional law may also qualify.  

Four judges of the Constitutional Court are appointed from among the Supreme Court judges by the President in consultation with his cabinet and with the Chief Justice. Six more judges are appointed to the Constitutional Court by the President in consultation with his Cabinet and with the president of the Constitutional Court.

These qualifications should serve as a guarantee that the judges of the highest court of the new South Africa will be South African citizens with the necessary legal education, academic background, and practical experience as South African lawyers and should safeguard against the indiscriminate importation of foreigners under the disguise of so-called foreign legal experts.

Subject to subsection (6), appointments shall only be made from the recommendations of the Judicial Service Commission of not more than three nominees in excess of the number required appointees. In the first appointment after the commencement of the Constitution, the Judicial Service Commission shall submit a list of ten nominees. An apparent lacuna appears in the Constitution: although the Judicial Service Commission should make a seemingly binding recommendation to the appointing authorities, the Constitution does not authorize the Judicial Service Commission to make any recommendation regarding appointment of the Constitutional Court members. If the appointing authorities decide not to accept a recommendation, they must furnish the reasons for rejection to the Judicial Service Commission.

In response, the Judicial Service Commission must submit further recommendations to the appointing authorities.

In submitting its recommendations to the appointing authorities, the Judicial

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73. Id. § 99(3).
74. Id. § 99(4).
75. S. Afr. Const., supra note 8, § 105(2)(b) (limiting the functions of the judicial service commission, while only mentioning removal from office: "to make recommendations regarding the removal from office of judges of the Constitutional Court in terms of section 104(4)" (emphasis added)). By contrast, § 105(2)(a) explicitly mentions, as regards the judges of the supreme court, the following: "to make recommendations regarding the appointment, removal from office, term of office and tenure of judges of the Supreme Court in terms of section 104." Id. § 105(2)(a) (emphasis added).
76. Id. § 99(5)(b).
77. Id. § 99(5)(c).
Service Commission shall consider the need to constitute a court that is independent, competent, and representative in respect of race and gender. This rule clearly leaves the possibility that the best legally qualified persons will not necessarily be appointed, only the best representing the various race and gender groupings.

Subsection (6) explicitly provides that subsection (5) shall not apply to the first appointment after the commencement of the Constitution of the president of the Constitutional Court under section 97(2). Thus, the first president is free to appoint any lawyer he chooses as president of the Constitutional Court. This lawyer will be vastly influential, despite the safeguards built into the Constitution. This subsection does distract somewhat from the guarantees implicit in the requirements of evaluation by the independent Judicial Service Commission.

Before his appointment as minister of water affairs and forestry, Kader Asmal was one of the candidates for the Constitutional Court. For Asmal, as for other human rights jurists in South Africa, the primary role model for interpreting a bill of rights is the United States or Canada. These jurists are not fluent in some of the continental languages. They are therefore hampered in interpreting some of those constitutions, such as the German or the Netherlands constitutions, although the German Grundgesetz was the role model for some crucial provisions of the Constitution.

As it turned out, the president appointed a very competent senior lawyer of long standing, advocate Arthur Chaskalson S.C., as the first president of the Constitutional Court. However, the danger remains that the untainted lawyers, given the task of

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78. Id. § 99(5)(d).
79. As it turned out, not a single member of any of the Afrikaans-speaking law faculties was selected, notwithstanding the fact that some of them wrote most extensively on constitutional matters and are internationally renowned authorities on the subject—and that is more than can be said of many a newly appointed member of this Court.
80. Keeva, Defending the Revolution, 1994 A.B.A. J. 50, 60 (“Asmal, who is considered to be a likely candidate for the Constitutional Court”).
82. His appointment has been hailed by his colleagues, although his close links with the ANC, as an adviser since 1990, has also been noted. The Star, June 9, 1994, at 13.
83. See Keeva, supra note 80, at 58-60 (quoting Asmal and Murenik). As it turned out, the phrase “untainted” in no way hampered the appointment, nearly exclusively, of well-known sympathizers of the new government, although officially the candidates were not required to produce evidence of their card-bearing membership of the ANC. See P. Laurence, Openness Favors the Faithful, The Star, Oct. 13, 1994, at 16 (“A powerful ANC bloc on the JSC appears to have ensured that the voting favored candidates who are ANC members above those who are not.”). For example, the appointment of Sachs, a self-confessed, long-standing member of the ANC who was severely criticized during the open hearing by the Commission for his role in the white-washing of atrocities committed by the ANC in its camps, leaves room for questions as to the impartiality of some of the new appointments. Id.
84. The six members appointed after hearings by the Commission are: Kriegler, respected judge of appeal; Didcott, senior judge of the Natal bench; Sachs, law professor at the University of the Western Cape; Mokgorro, associate professor at the universities of the Western Cape and Bophuthats-
judicially guaranteeing and defending the new democracy and constitutionally guaranteed bill of rights, will be interpreting it along American or Canadian lines even though the bill was written from an entirely different angle. \(^{85}\)

**C. THE ROLE OF THE JUDICIAL SERVICE COMMISSION\(^{86}\)**

The functions of this new commission\(^{87}\) are to make recommendations regarding the appointment, removal from office, term of office, and tenure of judges of the Supreme Court; to make recommendations regarding the removal from office of judges of the Constitutional Court; and to advise the national and provincial governments on all matters relating to the judiciary and the administration of justice.\(^{88}\) Read with section 242(2) the national government must also consult the Judicial Service Commission on various jurisdictional areas and court structures.

**D. THE COMPOSITION OF THE JUDICIAL SERVICE COMMISSION**

The Judicial Service Commission, except for considering matters relating to a provincial division of the supreme court, consists of seventeen members of whom at least eight must be formally qualified lawyers: \(^{89}\) (a) the chief justice, who shall preside at meetings of the Commission; (b) the president of the Constitutional Court; (c) one judge president designated by the judges president; (d) the minister responsible for the administration of justice or his or her nominee; (e) two practicing advocates designated by the advocates' profession; (f) two practicing attorneys designated by the attorneys' profession; (g) one professor of law designated by the deans of all the law faculties at South African universities; (h) four senators designated en bloc by the Senate by resolution adopted by a majority of at least two-thirds of all its members; (i) four persons, two of whom shall be practicing

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\(^{85}\) "Because the United States has been interpreting bills of rights longer than anybody else and there is a whole lot more law there than anywhere else, we will be looking at American law probably more than at any other system." Keeva, supra note 80, at 53.

\(^{86}\) "The Commission shall determine its own procedure, provided that the support of at least an ordinary majority of all its members shall be required for its decisions." S. AFR. CONST., supra note 8, § 105(4); see Judicial Service Commission Act No. 9 of 1994.

\(^{87}\) Although the Afrikaans text of the Constitution was signed by the state president and became the official text of the Constitution, an amendment was brought about by Act No. 2 of 1994, resulting in the English text now prevailing. With regard to the Judicial Service Commission, this is a happy outcome of an otherwise tricky question, because in various sections, this commission is referred to by different names in the Afrikaans text.

\(^{88}\) S. AFR. CONST., supra note 8, § 105(2). "When the Commission performs its functions in terms of subsection (2)(c), it shall sit without the four senators referred to in subsection (i)(h)." Id. § 105(3).

\(^{89}\) In the last-mentioned case it will be augmented by the judge president and the premier of the relevant province.
attorneys or advocates, who shall be designated by the President in consultation with the cabinet; and (j) on the occasion of the consideration of matters specifically relating to a provincial division of the Supreme Court, the judge president of the relevant division and the premier of the relevant province.

One of the watchwords of the new South Africa is transparency. Almost everyone agrees that secret government in this country has been a shield for iniquity and corruption, and that secrecy is anathema to the new constitutional order. The Interim Constitution directly supports open government, instructing the courts to interpret the bill of rights, the centerpiece of the Constitution, and to promote the values underlying an open and democratic society based on freedom and equality.

The bill of rights also contains a guarantee of access to official information. Though imperfectly drafted, this guarantee puts South Africa at the international frontier of constitutional development. And the Interim Constitution requires the final Constitution, soon to be written by parliament, to provide for freedom of information so that open and accountable administration will exist at all levels of government.

These and other provisions make a commitment to open democracy one of the great themes of the new Constitution. The first test of that commitment was the selection of judges during September and October 1994 for the new Constitutional Court. The Constitutional Court is the linchpin of the new Constitution. The Constitution leaves a great many important questions to that court’s judgment. For instance, does the guarantee of gender equality in the bill of rights outlaw the traditions by which only men can become chiefs in most of the African tribes? Is the current law of defamation compatible with the new constitutional right of free speech?

On these and many other questions, the judgment of the Constitutional Court will prevail over that of the government and parliament, making the choice of Constitutional Court judges critical. Six of the eleven places on the court were filled by the government from a list of ten nominees supplied by the new Judicial Service Commission, a body comprising representatives of the government, the Senate, the bench, and the branches of the legal profession. Unfortunately, loading the Judicial Service Commission with a clear majority of ANC-inclined members biased the theoretically sound transparent appointment procedure.

The first great test for open government in the new order was whether the Judicial Service Commission would operate in the open, and whether it would

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91. The Rain Queen of Mojadzi being the exception to this rule.
92. The ANC bloc consisting of at least the four ANC senators, the ANC minister of justice, three presidential nominees with clear ANC inclinations, the nominee of the national association of democratic lawyers, as well Chaskalson, who acted as an advisor to the ANC, forms the single most important ideological influence in the Commission.
hold public hearings to consider candidates for the Constitutional Court. As it turned out, the Judicial Service Commission opted for a semi-open hearing. The twenty-five candidates on the short list were each interviewed for an hour by members of the commission in a session open to the public but closed to the electronic media.

The Judicial Service Commission is similar to the U.S. Senate Judiciary Committee, which advises the Senate whether to confirm the President’s nominees for the Supreme Court. The U.S. committee interviews nominees in truly public proceedings. Nominees are expected to answer questions about their constitutional philosophies before the media. The effect should be to engage the nation in debate about the proper criteria for appointment and about the kind of institution the Supreme Court should be. The hearing of Sachs in Johannesburg during October 1994, for instance, prompted Laurence to write:

Sachs’s behavior raised a fundamental question: If he failed to speak out clearly against the abuse of power [within the ANC] in March 1990 for reasons of expediency, what guarantee was there that he would not do the same as a judge on a court mandated to protect human rights?

The evidence about Sachs’s behavior would probably not have emerged had the process been closed. Sunlight, said U.S. Supreme Court Justice Louis Brandeis, is the best of disinfectants, and the history of public confirmation hearings proves it. Yet Sachs was appointed a judge and member of the new South African Constitutional Court by Mandela on October 13, 1994.

The open hearings can educate the country about the court, and give the country an opportunity to say what kinds of qualities it expects to find in judges who can strike down the laws of the highest legislators. These benefits are of the utmost importance to a country that has never had a constitutional court and urgently needs a national debate about the kind of institution to which the nation is aspiring. Views diverge sharply over the kind of court South Africa needs and over the kind of judges to appoint. All South Africans are entitled to express themselves on these questions. The major benefits to be reaped by using an open hearing system are lost if the selection commission is biased to ensure a safe majority for the governing party’s faithful.

Will the new South African Judicial Services Commission also work openly in the future? Unfortunately, many South African lawyers draw their inspiration from the British tradition and share its instinctive secretiveness. They can be expected to raise several impediments to public hearings.

First, they will argue that good candidates might refuse to expose themselves to public inquiry and be lost to the Constitutional Court. However, a candidate

93. As indicated, the Commission will determine its own procedure and rules according to S. Afr. Const., supra note 8, § 105(4).
95. The Final Arbiters of Justice, supra note 90, at 30.
who is unwilling to explain and defend his or her constitutional philosophy to the nation that will be governed by this philosophy is averse to the openness and accountability that animates this Constitution. Such a candidate should not be entrusted with upholding the Constitution. June Sinclair, a very competent lawyer, was not even put on the short list by the commission despite her willingness to answer all questions put to her in a frank and open manner that commanded respect.

The second impediment that will be raised is that public hearings might encourage an examination of a candidate's private life unconnected with judicial ability. The Judicial Service Commission has met this difficulty by adopting rules to restrict candidate questioning to topics relevant to judicial office, and to chair the hearings firmly. This restrictive stance was indeed the position during the semi-open sessions of the first public hearings of the commission.

The third argument against public hearings is that candidates might be asked to commit themselves about issues that could arise before them if they were appointed judges. American nominees usually deal with this difficulty very simply by declining to answer such questions.

But even if they do answer, no harm is done. Everyone understands that the answer a candidate gives to an abstract question cannot be binding if the same issue arises for concrete decision in court. Possibly the most important quality expected of a judge is a capacity to listen with an open mind to the parties' arguments, whatever the judge may have thought before the case began.

The Constitutional Court will determine the character of the Constitution. The selection of its judges will determine the character of the Constitutional Court. South Africans are entitled to know and scrutinize the candidates, and they are entitled to know and debate the criteria by which some are chosen for office. This scrutiny requires a process open to the nation not merely as far as the hearings are concerned but also in the actual voting for the candidates. The nation must be able to judge the level of bias and partiality of this important commission that is responsible for the selection of the members of the Constitutional Court and the ordinary judges of the supreme court who are entrusted with the fine balance of rights of the racially diverse citizens of the country.

E. SUPREME COURT

Since 1950 the highest court or the court of last appeal has been the appellate division of the supreme court sitting in Bloemfontein. The supreme court used to have at least a division in every province, although some provinces had more

96. Before 1950, appeals were allowed from the South African courts to the Privy Council in London, a very unhealthy state of affairs that severely influenced the development of the South African law. Since the abolition of this appeal possibility, the appellate division has endeavored to purge the South African law of irreconcilable influences of English law. Appeals to the Privy Council were abolished by Act No. 16 of 1950.
than one division. The new demarcation of the jurisdictions of the different divisions of the court is still not finished. For the present, the new section 241(2A) inserted in the Constitution of the Republic of South Africa Third Amendment Act provides for the continuation of the existing divisions of the court. The only exceptions are the appellate divisions of the previous self-governing and independent countries that were effectively closed on July 22, 1994.

The new Constitution provides for a supreme court of South Africa, consisting of an appellate division as well as provincial and local judicial bodies. The supreme court is to have jurisdiction over cases vested in the supreme court immediately before the commencement of this Constitution, as well as any further jurisdiction conferred by this Constitution or by any law.

The far-reaching limitation of the jurisdiction of the appellate division is contained in subsection 5: "The Appellate Division shall have no jurisdiction to adjudicate any matter within the jurisdiction of the Constitutional Court." This limitation was purposely added by the ANC to indicate contempt for the members of the highest court. It is rather ridiculous to give jurisdiction to a provincial division but to exclude the jurisdiction of the higher division, the appellate division.

Provincial or local divisions of the Supreme Court shall have jurisdiction over the following additional matters, namely any alleged violation of any fundamental right of chapter 3; any dispute over the constitutionality of any executive or proposal; any inquiry into the constitutionality of any law or proposal applicable within its area of jurisdiction; any dispute of a constitutional nature between local governments or between a local and a provincial government; any dispute over the constitutionality of any provincial legislation; jurisdictional questions; and the determination of any other matters as may be entrusted to it by an act of parliament. In jurisdictional matters, a provincial or local division of the Supreme Court shall have the powers of the constitutional court in terms of section 98(5), (6), (7), (8), and (9) relating to the interpretation, protection, and enforcement of the Constitution. The appellate division shall not have jurisdiction over matters within the jurisdiction of the Constitutional Court. The parties to a matter falling outside the jurisdiction of a provincial or local court may agree to provincial or local jurisdiction provided that a provincial or local division shall not acquire jurisdiction over any matter referred to in section 102(12).

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97. For example, Transvaal, Cape, and Natal.
99. Id. § 101(2).
100. Keeva, supra note 80, at 58.
101. "The American equivalent would be investing the U.S. District Courts and the U.S. Supreme Court with constitutional jurisdiction, but barring the courts of appeals from hearing such cases." Keeva, supra note 80, at 58.
South Africa still maintains two separate bars, the bar proper for advocates of the supreme court and the side bar for attorneys. Members of the side bar have been barred from appearing in the supreme court. This historical division has been linked to the British annexation, but can, in reality, be traced to the early days of Dutch authority at the Cape. The members of the side bar originally did not need to have the same academic schooling in law that was required for advocates. Although the historical reasons for this watertight division are still appropriate because a person can become an attorney after obtaining only one academic qualification, the B. Proc. degree, and the minimum qualification for an advocate is two degrees, the second being the LL.B., many people of color believe they are artificially barred from supreme court practice. All judges of the supreme court must have been practicing senior advocates before their appointment, and only two persons of color have been appointed as judges of the supreme court so far.\textsuperscript{102}

To widen the possible pool of lawyers who may practice in the supreme court, the Milne Commission has recommended\textsuperscript{103} to the minister that legislation be prepared to create a new class of legal practitioners as attorney-advocates. These attorney-advocates may include practicing attorneys of at least five years standing with at least a minimum academic qualification, the B. Proc. degree.

The Milne Commission still recommends that the status of senior counsel may only be conferred upon members of the bar in active practice and at the same time recommends that supreme court judges be appointed only from amongst the ranks of senior counsel.\textsuperscript{104} Save for the constitutionally regulated appointment procedure for members of the Constitutional Court, this anachronism means that no attorney from the side bar nor any senior academic will be eligible for appointment to the bench, and thus the legitimacy problem of the all-white bench\textsuperscript{105} remains. Part of the blame for this recommendation should be laid at the door of the two black lawyers associations that declined an invitation to make any submission to the Milne Commission.\textsuperscript{106} The new government should rethink this position and recognize the benefits to the status and quality of the South African judiciary if competently qualified attorneys are also eligible for appointment to the bench of the supreme court and the expertise of senior academics

\textsuperscript{102} Justices Mahomed and Madala.
\textsuperscript{103} This recommendation was released at the end of 1993 and comments were invited on the report, by the Department of Justice, until April 1994.
\textsuperscript{104} Milne Commission Report, Main Recommendation, No. 10 & No. 3.
\textsuperscript{105} There has never been any form of discrimination with regard to female appointments to the Supreme Court bench, and one of the judges on the court of appeals is the highly respected Mrs. Justice of Appeal Leonore Van den Heever.
can be put to valuable use in the courts of appeal. In the past, quite a few extremely well qualified and competent black lawyers have opted for the academic profession instead of private practice out of a sense of loyalty to the education of their own peoples. Their expertise can be put to the benefit of the new South Africa.

IV. The Role of the Commission on the Restitution of Land Rights

Although one of the fundamental rights guaranteed in chapter 3 is the "right to acquire and hold rights in property," the very next subsection qualifies this right with the reference to the deprivation of rights in property that will be permitted if the deprivation is "in accordance with a law."

Chaskalson, the president of the Constitutional Court appointed by Mandela, regrettably considers deprivation of property rights by the state uncompensable due to his distinction between deprivation and expropriation. Only formal expropriation will therefore be compensable.

Although expropriation of land is governed by the Expropriation Act, this subsection covers the expropriation of the rights of ownership in immovable property and property in general, including personal rights to performance as well as immaterial, incorporeal, property rights, such as rights to patents or a copyright of an author to his book.

The simple wording of this qualification in the Constitution belies the very complex behind-the-scenes bargaining that took place during the Kempton Park negotiations. The ANC was adamant that the new government must have the power to legislate on the so-called restitution of property rights. The government of the day, the National Party, was as insistent that any future restitution legislation should not undermine the basic principle of the recognition of property rights. These divergent views resulted in the present wording of, and the separate provisions regarding, the restitution of land rights.

In Southern Africa, the experiences of neighboring countries like Zimbabwe and Namibia with so-called restitution of property rights bodes ill for the possible misuse of such legislative powers. The government of the day retains the right

107. See Van der Merwe, ALS Continues to Press for Attorneys to be Appointed Judges, 1994 DR 709.
111. Expropriation Act No. 63 (1975) as amended.
112. See S. Camerer, Property Rights and Restitution in the Constitution—A Behind-the-Scenes Look, 1994 DR 299 ("the inclusion of a property-rights clause . . . [was] among the hardest-fought political battles at the World Trade Center").
113. With the exception of Canada, almost every well-known bill of rights includes a property-rights clause.
to a thinly disguised "theft" of their political opponents' land. Recently in Zim-
babe, the current president, Mugabe, evicted Sithole and more than 1000 black
tenants from this opposition leader's farm. Mugabe used scores of police and
government officials to accomplish this seizure just before the coming elections. 114

Section 121 decrees that an act of parliament shall provide for matters relating
to the restitution of land rights, as envisaged in this section and in sections 122
and 123. Forming a Commission on Restitution of Land Rights is instrumental
to any implementation of these restitution provisions. The previous government
created a Commission on Land Allocation with a broadly comparable purpose,
but a new government will most likely reconstitute it.

Subsection 121(2) provides that a person or a community115 is entitled to restitu-
tion of a right in land from the state if the person or community was dispossessed
of the right at any time after a date to be fixed by the act referred to in subsection
(1); and the dispossession was effected under or to further law that would have
been inconsistent with the prohibition of racial discrimination contained in section
8(2), had that section been in operation at the time of such dispossession. The
legislature, with no regard for the acknowledged principles against retrospecti-
vity,116 provides for an alteration of the existing legal position regardless of the
prevailing legal position's validity.

According to customary law, no individual person had or has ownership117
rights in land.118 All land is held by the chief of the tribe for the tribe or
community in a relationship that can be compared to a trust.119 Accordingly,
the wording in the section refers to land rights in contrast to rights of ownership
or dominium.

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115. The wording bears on the fact that according to indigenous law only communal rights (in
contrast to private ownership) in immovable property are recognized. See N.J.J. OLIVER ET AL.,
DIE PRIVAATREG VAN DIE SUID-AFRIKAANSE BANTOETALSPREKENDES 486 (1989).
117. This is different from the rights of a leasehold in landed property, regulated, with the exception
of leaseholds in the Transkei, by Proclamation R188 of 1969. Ex parte Minister of Native Affairs:
were sometimes referred to as rights of "'kraalsite,'" and any claims to such a right must be substantiated
with a relevant "'kraalsite certificate.'"
118. This obviously does not have any bearing on the entitlement of a person to own land and
to have any of the real rights on land held not under customary law but according to Roman Dutch
Gudase v. Swales NO, 1956 N.A.C. (NE) 140.
119. In this way, customary law safeguarded, in effect, the rights of certain relatives. A testator
cannot legally dispose of any real rights in his will. The proclamation confers certain rights upon,
for instance, a woman who was the "'great' or "'principal' wife of the deceased, entitling her to
the use and occupation of the immovable property held under the title granted under the provisions
of the relevant proclamation. "'The intention of the proclamation is to safeguard the rights of women
married according to 'native custom,' and in the opinion of this Court their rights and those of their
sons to landed property held under [this] proclamation are not affected by a subsequent Christian

FALL 1995
According to subsection 3, the date fixed by subsection (2)(a) shall not be a date earlier than June 19, 1913. In fixing the date at this stage, any open and still unsettled dispute between the various black tribes regarding land rights falls outside the scope of this section.

The exclusion under subsection (4)(a) of the applicability of the provisions of this section to any rights in land expropriated under the Expropriation Act or any other law incorporating that Act by reference, or the provisions of that act with regard to compensation, if just and equitable compensation as contemplated in section 123(4) was paid in respect of such expropriation, will exclude this avenue for use by any whites whose farms were expropriated for the use of Blacks.

A. The Functions of the Commission

The legislature will not only establish the commission, but will also provide that the commission be competent. The commission will have the power to investigate the merits of any claims as well as mediate and settle disputes. Its reports regarding unsettled claims can be submitted as evidence to a court of law.

Court orders in response to a submission by the commission may differ according to whether the land in question is still in possession of the state or privately held.

When the land in question is in the possession of the state and the state certifies that the restoration of the right in question is feasible, the court may, subject to subsection (4), order the state to restore the relevant right to the claimant.

If the land is in the possession of a private owner and the state certifies that the acquisition of such land by the state is feasible, the court may, subject to subsection (4), order the state to purchase or expropriate such land and restore the relevant right to the claimant. Any expropriation will by necessity be governed by subsection 28(3), which forms part of the bill of rights. Expropriation shall be permissible for public purposes only and shall be subject to the payment of agreed compensation. If an agreement regarding compensation cannot be reached, a court of law, taking into account all just and equitable factors, including the use of the property, the history of its acquisition, its market value, the value of the investments in it by those affected, and the interests of those affected, must determine the compensation payable. Some of these factors are actually echoed in the wording of section 123(2): The court shall not issue an order under

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120. This is the date of the commencement of the Black Land Act of 1913, erroneously referred to as June 13, 1913, by Basson. Basson, supra note 108, at 43 n.120.

121. In this section, the Expropriation Act, of 1975 shall include any expropriation law repealed by that Act. Expropriation Act, supra note 111.

122. The procedures to be followed for dealing with claims, in terms of this section, shall be as prescribed by or under the Act. Expropriation Act, supra note 111.

123. This is the crux of the wording of the present Expropriation Act. Id.
subsection (1)(b) unless it is just and equitable to do so, taking into account all relevant factors, including the history of the dispossession, the hardship caused, the use to which the property is being put, the history of its acquisition by the owner, the interests of the owner and others affected by any expropriation, and the interests of the dispossessed—provided that any expropriation under subsection (1)(b) shall be subject to the payment of compensation calculated in the manner provided for in section 28(3).

If the state certifies that any restoration in terms of subsection 123(1)(a) or any acquisition in terms of subsection 123(1)(b) is not feasible, or if the claimant instead of the restoration of the right prefers alternative relief, the court may order the state to give the claimant alternative state-owned land; to compensate the claimant; or to grant the claimant alternative relief.\footnote{Cachalia et al., supra note 81, at 96-99.}

Subsection 123(4) provides that the compensation referred to in subsection (3) shall be determined by the court as being just and equitable, taking into account the circumstances that prevailed at the time of the dispossession and all such other factors as may be prescribed by the Act referred to in section 121(1), including any compensation that was paid upon such dispossession. If the court grants the claimant the relief contemplated in subsection (1) or (3), it shall take into account, and, when appropriate, make an order with regard to, any compensation that the claimant received upon the dispossession of the right in question.

The ills of apartheid must be rectified, but at the same time the matter of restitution of land must be dealt with in a manner that affords legal certainty in relation to land tenure.

At the end of May 1994, a furor broke out regarding trust land of the Zulu nation that was legally transferred two days before the Constitution became effective from the Kwazulu government to a private trust of which the Zulu king is the sole trustee. According to South African law, the land is no longer held by the state, but forms part of the private property of the Zulu king. The status of the Zulu king was the subject of a last-minute alteration to the Constitution just three days before its commencement. The appointed cabinet committee’s solution for this 1.2 million hectares of Zulu land held in private trust by the Zulu king will give an early indication of the manner in which the new government will abide by the legal principles contained in the Constitution.

V. Conclusion

The success or failure of the first steps by the South African peoples on the road to a truly democratic society will depend not so much on the wording or paragraphs of the new Constitution as on the manner in which the Constitution moves the spirit and will of the very people governed according to the constitutional norms. Success presupposes a certain amount of political maturity and
acknowledgment of the differences between the peoples. The best constitution is of no use or effect if ignored by the subjects. South African people must be educated about the value of abiding by the Constitution. "The content of the Declaration [must be made] a living reality for every citizen of the world from his very youth up." 125

The history of post-independent Africa reveals an almost total failure of constitutionalism as exhibited by the lack of respect for constitutions or constitutional documents and the rule of law. Wamala 126 concludes that "Africa does not seem to be capable of upholding the sanctity of her constitutions." 127 The traditional attitude that nothing may hamper or restrict the ruler bodes ill for the hope of stemming arbitrary decisions and power wielding.

The role of the judiciary, and thus the lawyers, is merely to guide and balance the different aspirations and rights of the people in a harmonious way. 128 Enforcement of the fine sounding principles enshrined in the new Interim Constitution will be the task of the judiciary, from the lower courts, through the supreme court, and up to the Constitutional Court. This enforcement presupposes a fraternity of academically well-trained lawyers and judges who are independent and above the temptations of bribery. No government or political lobby should compromise constitutional enforcement for the sake of short-term gains of popularity with their constituency by changing the color of the judges.

Good will and bona fide citizens are present in the people of South Africa to make the Constitution successful, if left alone by international interventionists. We lawyers are prepared and able to smooth the transition in such a way that, thanks to the checks and balances built into the Constitution, no single party should be able to enforce its will onto the rest or any minority. The majority are as eager as the minority that the Constitution should work because South Africa is most probably the last place in Africa where the African people can demonstrate their ability to succeed at running a country along modern, acceptable lines.

126. Wamala is a member of the law faculty of the University of Swaziland. He was born in Uganda and educated in Nigeria.