

South Africa

Introductory Notes

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I. Origins and Historical Development of the Constitution

When South Africa's Constitution of 1996 came into operation on 4 February 1997, it represented the historical culmination of a focused process of constitution-writing which commenced in December 1991 when the Convention for a Democratic South Africa (CODESA), a national multi-party constellation established to negotiate a transition to inclusive democracy, got underway. 1997 was, however, not the year in which South Africa underwent its profound constitutional and political transition: that occurred on 27 April 1994, when the essential fruits of the negotiating process matured. That was the date when inclusive elections were held for the first time in terms of the—albeit expressly transitional—Constitution of the Republic of South Africa, Act 200 of 1993, which came into operation on that date as the first South African 'supreme law': that is, a constitutional instrument endowed with superior normative effect.

For an understanding of the nature and significance of the Constitution, some insight into South Africa's pre-constitutional history is essential, because it introduced elements such as the supremacy of the Constitution containing a Bill of Rights, whereas constitutional notions such as the sovereignty of Parliament had dominated South African constitutional thinking for many decades. Despite this notional constitutional 'revolution', the transition was evolutionary, as is evidenced inter alia by the fact that a new state was not founded in 1994 or in 1997, and that the new Constitution was formally established by the institutions operating under the previous (1983) constitutional system in accordance with its procedural and structural requirements.

All the territory presently comprising the Republic of South Africa was systematically absorbed into the domain of the British Crown in the course of the 19th century. The Cape of Good Hope was first occupied by British forces in 1795 and permanently annexed in 1806 as a Crown Colony. This colony, initially sparsely populated by nomadic Khoi and San bands, was gradually extended eastward and northward by conquest, barter, and cession. The colonists' expansion eastward began colliding with Bantu-speaking tribes that had been migrating slowly down the east coast, originating mostly from the great lakes in Central East Africa. The interior of Southern Africa was furthermore systematically occupied from 1836 onward by migrating non-British pioneer farmers, historically known as the Voortrekkers, whose purpose was to break away from British colonial rule, which they perceived as being oppressive and hostile towards them. First, the Republic of Natalia was established following clashes with the AmaZulu. When the British annexed Natal as a colony in 1843, the Voortrekkers moved further inland and established in the early 1850s the Boer Republics of the Orange Free State and South African Republic (Transvaal). For the rest of the century, what was later to become South Africa constitutionally consisted of two British colonies and two sovereign 'Boer' republics. Despite their numerical

superiority, the power of the black tribes inhabiting the various Southern African regions inevitably crumbled before that of the British colonists and the Voortrekkers, who were equipped with European technology and organization.

Following the discovery of gold and diamonds in the interior, the British Empire resolved to expand its territory to include the Boer Republics. The 20th century therefore dawned upon the Anglo-Boer War, ending in the annexation of the two republics as new British colonies. The four South African colonies shared a common—especially railway—infrastructure. In addition, having rapidly reached the same constitutional status as self-governing colonies in the first decade of the century, the advantages of unification became self-evident, leading to the formation of the Union of South Africa in 1910. This Union in the next few decades came to share the external status of British *dominion* with Canada, Australia, and New Zealand. Internally, however, it had its own unique composition and challenges.

In the preparations for unification, the federal option was seriously considered. However, at union in terms of a constitution (the South Africa Act, 1909) adopted by the British Parliament, the four colonies became provinces, each with a measure of autonomy but as parts of a unitary state governed in Westminster, fashioned by a national cabinet controlling a sovereign parliament. The boundaries of the provinces related only to their 19th century colonial and republican history, and had no special relation to culture, nationality, economy, or geography. The South Africa Act contained some entrenched provisions, but could not generally be considered to be a supreme constitution.

The Union was formed in a colonialist frame of mind: the black inhabitants, the majority of the population, had no part in the process and were, consistent with British imperial notions of the incapacity of ‘uncivilized’ people to participate in government, considered to be an administrative problem rather than a constitutional component of the newly established dominion.

By the middle of the 20th century, Afrikaner republicanism, nurtured by decades of opposition to British domination, and also inspired by the gradual constitutional emancipation of the Union, prevailed politically. This introduced a period of significant constitutional change: a little more than a decade later (in 1961) the Union took the last step in the process of emancipation towards sovereignty and was restructured to its present format as the Republic of South Africa. In the two following decades the policy of ‘separate development’—which was universally notorious as Apartheid—unfolded.

The constitutional aim of separate development was to establish ten sovereign black ethnic nation states, leaving the rest of the territory to the white, ‘colored’, and Asian (mainly Indian) population. Despite the international outrage, the policy produced four constitutionally independent ethnic states—Transkei, Bophuthatswana, Ciskei, and Venda (the ‘TBVC states’)—and six self-governing territories which could theoretically also aspire to independence.

By the 1980s, the nature of the South African state was quite complicated. At the national level, the Constitution provided for a sovereign parliament with a parliamentary executive in full control of the legislative process. Also constitutionally

sovereign—and therefore beyond the direct control of the South African legislature, executive, and judiciary, but lacking international recognition or financial independence—were the TBVC states. Having self-governing status, the other six ‘black homelands’ each had their own constitutional arrangements, providing for partially elected legislatures, cabinets, lower courts, and administrations. In 1983 a new Constitution (essentially an ordinary piece of parliamentary legislation) was adopted for the Republic in terms of which an extremely powerful executive presidency was created, and the (still sovereign) Parliament became a tri-cameral body (one house each being reserved for, respectively, the Indian, ‘colored’, and white population groups, the latter having the power of veto). The powers of the four provinces had, since 1920, gradually declined until, in 1986, the elected legislative provincial councils were abolished, and the provincial executives became administrative extensions of the national executive. It was the tri-cameral Parliament that formally adopted the transitional Constitution of 1993 after its text was negotiated in minute detail in extra-parliamentary procedures.

Although maximal political inclusiveness was sought and achieved in the negotiating process that started in December 1991, it was generally accepted that the major role-players were the (essentially white) government as composed in terms of the 1983 Constitution and the African National Congress (ANC), which had been a banned liberation movement until 1990. The government wielded the established constitutional power, and formally represented only those structures under its exclusive constitutional control in the negotiations. The governments of the TBVC states also took part in the negotiations. Although some of the ‘homelands’ purported to cling to their constitutional independence or autonomy in the negotiations, it was generally assumed that they, the constitutional products of apartheid, would be fully absorbed, with their public services, police, and military, into a single restructured state.

The negotiation process was a harsh contest of wills essentially between the established government, faced with the impossibility of remaining in power without massive deployment of force, and the ANC, anticipating imminent accession of power. Despite the broad participation in the negotiations, agreement between these two parties was a *sine qua non* for progress and agreement between them, regardless of other dissenting voices, was deemed to be ‘sufficient consensus’. At the second plenary session of CODESA in May 1992, the negotiations deadlocked and the ANC and allies launched public protests in the form of a ‘mass action campaign’ intended to weaken the government’s negotiating position. The mass action campaign was characterized by various tragic incidents leading to significant civilian loss of life.

By September 1992, the two main parties renewed their efforts to reach a negotiated settlement and by early 1993 a new negotiating structure, known as the Multi-Party Negotiating Process (MPNP), could get underway. From April onward the revived negotiating process took the form of a focused constitutional drafting process guided by non-political ‘technical committees’ whose proposals were presented to, discussed, and eventually approved by a plenary body in which the political spectrum was represented.

The involvement of constitutional expert committees allowed for the moderation of adversarial politics by means of juridical logic. The initial focus was upon the

development of a set of constitutional principles acceptable to all participating political groupings. These principles not only guided the formulation of the text of a first constitution, which was to be the product of a non-elected multi-party negotiating process, but they eventually became an integral part of the subsequent process of constitution-making, legitimized by the elections of 1994.

The impact of the profound change brought by the adoption of a supreme constitution, involving the introduction of constitutionalism superimposed on a legal and political system characterized by notions of British colonialism, was moderated by a two-phased approach to the finalization of the new arrangement. The first (1993) transitional, or interim, Constitution was not only a complete constitution, but it also prescribed the procedures, time schedule, and especially the principles for the writing of a permanent, 'final' constitution. These principles were quite comprehensive, setting out the requirements for the establishment of a constitutional state, ranging from the fundamental precepts of the new state to some detail regarding the horizontal and vertical distribution of powers. They furthermore tended—extraordinarily for a country with a history of one-and-a-half centuries of British colonial constitutional law—to prescribe the adoption of a final constitution in the style of European constitutionalism. The procedure for the writing of the final constitution included further (post-election) multi-party negotiations and two-thirds majority support for its adoption by an elected constitution-writing body: the preamble to the 1993 Constitution determined that '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'. Thirty-four unamendable Constitutional Principles were entrenched in a schedule to the 1993 Constitution.

On 27 April 1994 a National Assembly, consisting of 400 members, was elected and a Senate consisting of 90 members, representative of the nine newly demarcated provinces, could be established. In terms of the transitional Constitution, a joint sitting of these bodies formed the Constitutional Assembly, which was entrusted with the task of adopting a final constitution.

The adoption process, less remarkable for the text it produced than for the success of some of the extraordinary procedures that were carried through successfully, was completed by the unconventional means of judicial legitimization. As an element of the 'solemn political pact' that was forged, unconditional compliance with the Constitutional Principles had to be certified by the Constitutional Court established in terms of the 1993 Constitution. This task was undertaken by the Court with such application that the first draft of the permanent Constitution was referred back to the elected constitution-makers before its amended version could be certified and put into operation. A notable component of the judicial task was to adjudicate key elements of the text against standards that were considered to be 'universally accepted'. Thus it is no exaggeration to describe the final (1996) Constitution as a product of constitutional globalism. The exhaustive certification judgments of the Constitutional Court

provided valuable interpretative and descriptive references that were useful for the understanding of the new Constitution.¹

The ‘final’ Constitution was firmly built upon the 1993 Constitution as is clear, *inter alia*, from the express continuation by the 1996 provisions (Schedule 6) of all the essential institutions, structures, and organs that were established in 1994. Since its coming into operation a number of ‘Constitution Amendment Acts’ have been duly adopted by Parliament. None of these amendments, however, profoundly affected the structural principles or the key constitutional notions laid down in the original text.

II. Fundamental Principles of the Constitution

As the product of contentious adversarial negotiations that were intended to transform a diverse and deeply divided society, the South African Constitution is an ambitious document. The ideals set out in the text are, however, not utopian and indeed reflect hopes of resolving the intractable social and moral ailments of a country emerging from centuries of dysfunctional social and political relationships. The values expressly articulated in the Constitution and the principles upon which the text was written, and on which the Republic is intended to function, reflect those of a contemporary constitutional state.

A. Constitutional goals

The constitutional goals are primarily set out in the preamble, where it is stated that the Constitutional Assembly adopted the Constitution ‘so as to . . .’:

- heal the divisions of the past;
- establish a society based on democratic values, social justice, and fundamental human rights;
- lay the foundations of a democratic and open society;
- ensure that government of the country is based on the will of the people;
- have every citizen equally protected by law;
- improve the quality of life;
- free the potential of each person;
- build a united and democratic South Africa; and
- enable the country to take its rightful place in the family of nations.

Although the realization of many of these goals depends not on constitutional regulation but on government policy and its implementation, the development of such policies and their implementation are supported and encouraged by various substantive provisions of the Constitution. The following are some examples:

- section 41(1) requires all governmental entities to ‘preserve the peace, national unity and the indivisibility of the Republic’;

1 The ‘*First Certification judgment*’ was reported as *Ex Parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa, 1996 1996 (4) SA 744 (CC)*, and the ‘*Second Certification judgment*’ as *Ex Parte Chairperson of the Constitutional Assembly: In re Certification of the Amended Text of the Constitution of the Republic of South Africa, 1996 1997 (2) SA 97 (CC)*.

- democracy as an entrenched constitutional value is referred to in various provisions, but also given content in provisions such as section 195(1) ('public administration must be governed by the democratic values and principles enshrined in the Constitution'), and the funding of political parties is allowed in terms of section 236 'to enhance multi-party democracy';
- under the heading 'Public access to and involvement in National Assembly', section 59 requires the National Assembly to 'facilitate public involvement in the legislative and other processes of the Assembly and its committees';
- equal protection under the law is axiomatically included in the relevant provisions of the Bill of Rights, as is the goal of the improvement of the quality of life in, especially, the elevation (in, for example, sections 26 and 27) of socio-economic needs to the level of objects of enforceable fundamental rights;
- in addition to mechanisms such as the promotion of access to education as a fundamental right, an express provision regarding the development of potential is to be found in section 195(1)(h), which states as a 'principle of public administration' that '[g]ood human-resource management and career-development practices, to maximise human potential, must be cultivated';
- the opening words of the substantive provisions of the Constitution (in section 1) are 'The Republic of South Africa is one, sovereign, democratic state . . .'

B. Constitutional values

Constitutional interpretation in the new constitutional era was driven from the outset by the values articulated in the text. The foundation for this approach was laid in the last provision of the chapter on fundamental rights (section 35(1)) of the 1993 Constitution, which read: '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 . . .'. The importance of values was mentioned in the very first published judgment in which the new Constitution was applied in the ordinary courts.² When the Constitutional Court began its work, it immediately built upon the *Qozoleni* judgment of Judge Froneman.³ Whereas section 35 of the 1993 Constitution was the only provision in which values were mentioned, the 1996 Constitution employs the notion of values extensively. In fact, its opening provision (section 1) spells out a relatively elaborate set of *founding values* by asserting that the 'Republic of South Africa is one, sovereign, democratic state founded on the following values . . .'.⁴

Section 1 is the most entrenched provision of the Constitution: A supporting vote of at least 75% in the National Assembly and a supporting vote of at least six of the nine provinces represented in the National Council of Provinces is required by section 74(1) for the amendment of section 1. Although it is not unamendable and therefore does not have the character of an 'eternity clause', like Article 79(3) of the German *Grundgesetz* which completely proscribes certain amendments, this provision may well be described as the most important founding provision of the Constitution. Its content must constantly form part of the equation when interpreting all other

² *Qozoleni v Minister of Law and Order* 1994 (3) SA 625 (E).

³ *S v Zuma* 1995 (2) SA 642 (CC) and *S v Makwanyane* 1995 (3) SA 391 (CC).

provisions of the Constitution and, for that matter, any other legal norm, whether contained in a statute or the common law. Section 1 therefore provides the interpreter with the most important general standard for understanding the Constitution and the rest of South African positive law.

The founding values, or their essence, are recurrently referred to in various other provisions of the Constitution, notably sections 7(1), 36(1), and 39(1), all contained in the Bill of Rights. Furthermore, section 143(2) requires that a provincial constitution ‘must comply with the values in section 1’ and section 195(1) provides that ‘public administration must be governed by the democratic values and principles enshrined in the Constitution.’

The relatively long list of founding values set out in section 1 is encapsulated in the formula ‘the values that underlie an open and democratic society based on human dignity, equality and freedom’, which is echoed in sections 7, 36, and 39. ‘Human dignity, equality and freedom’ therefore seem to emerge as the essential founding values of the Constitution. The Constitutional Court has been at pains to avoid the construction of a hierarchy of values, but human dignity more often than not serves as a point of reference. Thus, for example in paragraph [111] of the *Makwanyane* judgment, it was said that ‘[r]espect for life and dignity . . . are values of the highest order under our Constitution’; in the judgment in *President of the Republic of South Africa v Hugo*⁴ it was stated that ‘[a]t the heart of the prohibition of unfair discrimination lies a recognition that the purpose of our new constitutional and democratic order is the establishment of a society in which all human beings will be accorded equal dignity and respect regardless of their membership of particular groups’, and in the *Pillay* judgment⁵ the Court said that ‘religious and cultural practices are protected because they are central to human identity and hence to human dignity which is in turn central to equality’.

Constitutional interpretation in South Africa is an art guided by the manner in which the understanding of the founding values of the Constitution evolves. The following *dictum* of the Constitutional Court in the *Pillay* case⁶ attests to this:

Freedom is one of the underlying values of our Bill of Rights and courts must interpret all rights to promote the underlying values of ‘human dignity, equality and freedom.’ These values are not mutually exclusive but enhance and reinforce each other. In *Ferreira v Levin NO and Others and Vryenhoek and Others v Powell NO and Others* Ackermann J wrote that: ‘Human dignity has little value without freedom; for without freedom personal development and fulfilment are not possible. Without freedom, human dignity is little more than an abstraction. Freedom and dignity are inseparably linked. To deny people their freedom is to deny them their dignity.’

4 1997 (4) SA 1 (CC) para [41].

5 *MEC for Education: KwaZulu-Natal v Pillay* 2008 (1) SA 474 (CC) para [62].

6 Para [63] of the judgment. Cf also *Njongi v MEC Department of Welfare* 2008 (3) SA 237 (CC) para [17]: ‘We remind ourselves that the Constitution in its preamble looks to the improvement of the quality of life of all citizens and that the foundational values of our Constitution revolve around “human dignity, the achievement of equality and the advancement of human rights and freedoms.”’

C. Constitutional principles

The distinction between constitutional goals, values, and principles is arguably vague. Nevertheless, considering the history of the writing of the Constitution and the nature of principles as foundational rules, it may be said that the following are core principles upon which the Constitution is founded:

- supremacy of the Constitution
- constitutional state/rule of law
- separation of powers
- cooperative government
- democracy
- social justice

These principles are obviously inter-related and are indeed dealt with as such by the courts. The separation of powers, cooperative government, democracy, and social justice will be dealt with below in the appropriate sections. Constitutional supremacy and the constitutional state, however, require attention at this junction.

D. Supremacy of the Constitution

Due to the novelty in South African legal history of a supreme constitution, the impact since 1994 on the legal system as a whole has been profound. The Constitutional Court has consistently linked the supremacy of the Constitution to the establishment of a 'constitutional state'. The Court, for example, stated in *The National Gambling Board* case:⁷ 'It is true that in a constitutional state all public power is derived from the Constitution.'

The Court associated the supremacy of the Constitution from the outset with the notion of the constitutional state.

E. Constitutional state/rule of law

Significant for South African constitutional law, the foundations for the notion of the *rule of law* was laid at the end of the 19th century as a concept of English law intended to be applied in the context of the English system, characterized by parliamentary sovereignty. In pre-constitutional South African literature, some serious scholarly efforts were undertaken to develop a more refined rule of law doctrine,⁸ but due to the limitations of the political context, this had little success.

Due to its colonial history, South African constitutional law operated almost exclusively with English constitutional terminology before 1994. When the German notion of *Rechtsstaat*, as an unavoidable component of universal constitutionalism, presented itself to the authors of the Constitution of 1993, a terminological difficulty cropped up: since *Rechtsstaat* cannot be translated directly into English, the closest equivalent that could be found was 'constitutional state' ('*regstaat*' in the Afrikaans

⁷ *The National Gambling Board v the Premier of KwaZulu-Natal* 2002 (2) SA 715 (CC) para [23].

⁸ Cf A Mathews, *Law, Order and Liberty in South Africa* (Cape Town, Juta, 1971) and A Mathews, *Freedom, State Security and the Rule of Law* (Cape Town, Juta, 1986).

version). Under pressure of the English terminology, ‘constitutional state’ was not used again in the text of the 1996 Constitution. Nevertheless, the Constitutional Court has, for all intents and purposes, conflated the two concepts. This was graphically demonstrated when the Constitutional Court stated in *Bernstein v Bester*⁹ that the constitutional provision for the independence of the judiciary ‘is a provision fundamental to the upholding of the rule of law, the constitutional state, the “regstaatidee”, for it prevents legislatures, at whatever level, from turning themselves by acts of legerdemain into “courts”.’

Despite the linguistic limitations, it is possible to construe the reception of the essence of *rechtsstaatlichkeit* into contemporary South African constitutional law, frequently associated with the concomitant development of the content of the *rule of law* as a foundational constitutional value.

On various occasions since 1995 the expression has been used by the Constitutional Court, in the first place to indicate orderly legal regulation of the community in contrast to the arbitrary exercise of government power. An example is to be found in *Matatiele Municipality v President of the RSA*,¹⁰ where the Court stated with reference to earlier judgments:

Fundamental to the rule of law is the notion that government acts in a rational rather than an arbitrary manner,
and
Our Constitution accordingly requires that all legislation be rationally related to a legitimate government purpose. If not, it is inconsistent with the rule of law and invalid.

It was, however, not left at that. The Court also made it clear that the acknowledgement and protection of fundamental rights must be considered to be a basic tenet of the constitutional state. The first of various instances is to be found in the celebrated *Makwanyane* judgment:¹¹

The Constitution is premised on the assumption that ours will be a constitutional state founded on the recognition of human rights.

The independent authority of the judiciary to enforce the Bill of Rights and the Constitution was also identified from the outset as a key element of the constitutional state. Again in *Bernstein v Bester*:¹²

In all democratic societies the state has the duty to establish independent tribunals for the resolution of civil disputes and the prosecution of persons charged with having committed crimes. In a constitutional state that obligation is of fundamental importance and it is clearly recognised as such in our Constitution.

Even more explicitly, in *De Lange v Smuts* the Court declared:¹³

9 *Bernstein v Bester* 1996 (2) SA 751 (CC) para [105].

10 *Matatiele Municipality v President of the RSA* 2006 (5) SA 47 (CC) para [100].

11 *S v Makwanyane* 1995 (3) SA 391 (CC) para [130].

12 1996 (2) SA 751 (CC) para [51].

13 *De Lange v Smuts* 1998 (3) SA 785 (CC) para [31].

In a constitutional democratic state, which ours now certainly is, and under the rule of law (to the extent that this principle is not entirely subsumed under the concept of the constitutional state) citizens as well as non-citizens are entitled to rely upon the state for the protection and enforcement of their rights.

The separation of powers is inevitably also indicated as a characteristic of the constitutional state, and it also imposes heavy obligations on the state: organs of state must consistently act lawfully, and the state is the guardian of constitutional rights. Legal justification of government action as an element of the constitutional state has frequently been pointed out in the jurisprudence of the Court. Thus, for example in the *Matatiele Municipality* judgment, the Court said:¹⁴

As this case demonstrates, far from the foundational values of the rule of law and of accountable government existing in discreet categories, they overlap and reinforce each other. Openness of government promotes both the rationality that the rule of law requires, and the accountability that multi-party democracy demands. In our constitutional order, the legitimacy of laws made by Parliament comes not from awe, but from openness.

The Court has furthermore incorporated the idea of legal certainty into the notion of the constitutional state, for example in the early judgment of *Ferreira v Levin*:¹⁵

The Constitutional Court, or any other competent Court for that matter, ought not to restrict its enquiry to the position of one of the parties to a dispute in order to determine the validity of a law. The consequence of such a (subjective) approach would be to recognise the validity of a statute in respect of one litigant, only to deny it to another. Besides resulting in a denial of equal protection of the law, considerations of legal certainty, being a central consideration in a constitutional state, militate against the adoption of the subjective approach.

Related to legal certainty is the requirement that legal norms should be clear and accessible. Thus in the judgment in *De Reuck v Director of Public Prosecutions* we find the following analysis:¹⁶

The first question is whether [the relevant provision] is a ‘law of general application’ as required by section 36(1). This Court has held that this requirement derives from an important principle of the rule of law, namely that ‘rules be stated in a clear and accessible manner’.

In the judgments quoted above, democracy was also mentioned a few times. The specific meaning of ‘democracy’ as an element of the constitutional state has not been

14 2006 (5) SA 47 (CC) para [110]. Similarly in *Merafong Demarcation Forum v President of the Republic of South Africa* 2008 (5) SA 171 (CC) paras [62] and [167].

15 *Ferreira v Levin* 1996 (1) SA 984 (CC) para [26]. Similarly, *Gcaba v Minister for Safety and Security* 2010 (1) SA 238 (CC) para [62].

16 *De Reuck v Director of Public Prosecutions, Witwatersrand Local Division* 2004 (1) SA 406 (CC) para [57].

defined in constitutional jurisprudence, but statements such as ‘respect for the rule of law is crucial for a defensible and sustainable democracy’¹⁷ are not uncommon.

Thus the rule of law has become the South African rendering of the *Rechtsstaat* with much more substance than the original Diceyan concept, and with crystallizing doctrinal content. In the judgment in *Van der Walt v Metcash*,¹⁸ the Court expressly listed the absence of arbitrary power, equality, the protection of fundamental rights, and exclusion of unpredictability (legal certainty) as ‘some of its basic tenets’.

Taking it a step further, the Constitutional Court infused the notion of material *rechtsstaatlichkeit* into the interpretation of the Constitution in, for example, the *Carmichele* case, where it said with reference to the German example (BverfGE 39, 1) ‘[o]ur Constitution is not merely a formal document regulating public power. It also embodies, like the German Constitution, an objective, normative value system.’¹⁹

Against this background it may be said that South Africa is, in terms of its Constitution and the authoritative interpretation thereof by the Constitutional Court over more than a decade, a constitutional state in which the Constitution prevails over all law and all actions of the state; where fundamental rights are acknowledged and protected through the independent authority of the judiciary to enforce the Bill of Rights and the Constitution; a separation of powers is maintained; all government action is required to be legally justified; the state has a duty to protect fundamental rights; legal certainty is promoted; democracy and the rule of law are maintained; a specific set of legal principles apply; and an objective normative system of values guides the executive, the legislature, and the judiciary.

III. Fundamental Rights Protection

A. The introduction of fundamental rights

Until 27 April 1994, ‘fundamental rights’ was not a concept with which the material South African law operated. Naturally, human rights and the implications of the incorporation of an entrenched charter of fundamental rights had by then already been an important debating point for many years, but its realization was not expected as soon as it did indeed occur. A supreme constitution and an enforceable catalog of fundamental rights were incompatible with the pre-constitutional system in South Africa. This had not only political grounds, but also systemic reasons: before 1994, South African constitutional law was premised on an extreme version of parliamentary sovereignty which did not allow for the possibility of the testing of the validity of legislation against a higher norm. The concretization of constitutionally-entrenched rights could therefore only begin when the 1993 Constitution came into operation. The preoccupation with parliamentary sovereignty was profoundly changed

17 In eg para [17] of the judgment in *Chief Lesapo v North West Agricultural Bank* 2000 (1) SA 409 (CC).

18 *Van der Walt v Metcash Trading Ltd* 2002 (4) SA 317 (CC) paras [65], [66], [68], and [76].

19 *Carmichele v Minister of Safety and Security* 2001(4) SA 938 (CC) para [54]. This was reconfirmed by Ngcobo J (as he then was) in his minority judgment in *Thint v National Director of Public Prosecutions*; *Zuma v National Director of Public Prosecutions* 2009 (1) SA 1 (CC) para [375].

by the coming into operation of sections 4 and 7 (the latter being the first provision of the chapter on fundamental rights) of the 1993 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.

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.

Much of the early ground-breaking fundamental rights jurisprudence was based on these provisions. Their successors in the current Constitution are sections 2, 7(2), and 8(1).

The Constitution of the Republic of South Africa 1996 and, consequently, also the Bill of Rights (Chapter 2 of the Constitution), is a fully autochthonous document. In its development, however—as was the case with the 1993 Constitution—full use was made of examples, experiences, formulations, dogmas, and ideas gleaned from a variety of foreign and international systems and documents. It is therefore not strange that section 39(1)(b) and (c) require, for the interpretation of the Bill of Rights, the compulsory consideration of international law and optional consideration of foreign law. In practice, the courts have thus far made much more use of comparative foreign material than of international law.

Despite the immense influence that the oldest constitutional catalog of constitutional rights—the United States’ Bill of Rights—has had in the development of modern constitutions and charters of rights in many parts of the world, the direct influence of US law upon the South African constitution-writing process was relatively small. The influence of the wording of various post-war international human rights declarations and conventions regarding rights is, however, evident and demonstrable in various provisions of the Bill of Rights.

Important wordings and mechanisms occurring in the Bill of Rights have been derived directly from the Canadian Charter of Rights and Freedoms of 1982. Consequently, Canadian judicial precedent on rights has, since 1994, had a notable influence upon the interpretation and application of South African fundamental rights, and certain Canadian doctrines and dicta of the Canadian Supreme Court have been received directly into South African law. Similarly, the catalog of *Grundrechte* in the German *Grundgesetz* influenced the development and, thereafter, the process of the implementation of the Bill of Rights.

Section 39(1)(c) furthermore causes legal systems other than those that directly influenced the formulation of the Constitution to be of some importance to the development of the new rights system. South Africa shares a British colonial legal history with various countries where written constitutions and rights catalogs were adopted in recent decades. These include Canada, but also India. The system and jurisprudence of surrounding African countries, such as Namibia, have also proved to be of value, as well as the experiences and approaches followed in new democracies

such as the many central and eastern European states where new constitutions establishing constitutional states have recently come into operation.

Substantial volumes of literature and commentaries have been published on this South African Bill of Rights. It therefore suffices here to present only a few guidelines as an introduction to the study of South African fundamental rights law.

B. The spectrum of rights

The Bill of Rights covers the whole range of fundamental rights. This is, *inter alia*, a consequence of the constitution-writing requirement of Constitutional Principle II of the 1993 Constitution, which demanded that '[e]veryone 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 . . . '.

As might be expected, the context in which the fundamental rights arrangement was introduced caused some of the rights to draw immediate attention. Thus, for example, the Constitutional Court was required by implication to resolve at the outset an unsettled point of difference in the constitutional negotiations, namely the constitutionality of the death penalty. This was done in what might be called the magisterial inaugural judgment of the newly established court in the case of *S v Makwanyane*,²⁰ in which each of the eleven judges of the Court delivered a separate judgment all concurring that the death penalty was inconsistent with the (1993) Constitution. The focus of the judgment was more on the prohibition in section 11(2) of the 1993 Constitution that any person be subjected to cruel, inhuman, or degrading treatment or punishment than on the right to life, which was protected in section 9. In paragraph [144] of the judgment in the *Makwanyane* case, the President of the Court said: 'The rights to life and dignity are the most important of all human rights, and the source of all other personal rights in Chapter Three.' The Court has nevertheless since been at pains to assert that there is no hierarchical order of fundamental rights.

The Gini coefficient (inequality of income) for South Africa is among the highest on the globe. This, and the country's history of discriminatory politics, explains the great emphasis placed by the Constitution, the government, and the courts on equality. As well as being included in section 1 of the Constitution as a founding value, section 9 deals with it extensively. Although the expression '*unfair* discrimination' in section 9(2) appears to be tautological, it must be understood as a technical concept bearing the implication that discrimination or differentiation which is fair is technically possible in law when it can be justified. Section 9(2) is the most important provision, permitting 'affirmative action'. The affirmative action sentiment is, however, supported by sub-section (4), in terms of which national legislation must be adopted to prevent or prohibit unfair discrimination. This has led to the adoption of various pieces of parliamentary legislation, such as the Promotion of Equality and the Prevention of Unfair Discrimination Act 4 of 2000.

Thus, the Constitution does not create 'a right to equality', but deals throughout with the concept of equality as a *value*. In section 1(a), it is stated that the South African State is 'founded' on certain values, the second of which is 'the achievement of equality'. In section 7(1) (the first provision of the Bill of Rights), it is stated that the

20 1995 (3) SA 391 (CC).

Bill, among other things, affirms the ‘democratic value of equality’, and section 9(1) creates a right to equal protection and benefit of the law.

From its inception the Constitutional Court, following Canadian jurisprudence, has drawn a direct link between equality and human dignity. This approach is not without controversy and has drawn quite sharp criticism in the literature. Despite the controversy, there can be little doubt that the prevailing doctrine accepts that the core value of *human dignity* determines the manner in which equality rights must be interpreted, applied, and limited. The courts have also employed human dignity in this manner with regard to various other rights, such as the freedom of expression and the right to freedom and security of the person.

In its jurisprudence, the Constitutional Court has developed a particularly South African substantive equality doctrine, clearly distinguished from the US formal notion of equality which requires that everyone be treated equally regardless of their circumstances. The Constitutional Court coined the phrase ‘remedial or restitutionary equality’ in its judgment in *National Coalition for Gay and Lesbian Equality v Minister of Justice*,²¹ where its construction is justified inter alia by the statement ‘[l]ike justice, equality delayed is equality denied.’

The first sentence of section 9(2) is the only provision which gives specific content to equality by providing that it includes ‘the full and equal enjoyment of all rights and freedoms.’ Section 9(2) furthermore justifies affirmative action ‘to promote the achievement of equality’; that is to say, to realize the constitutional value mentioned in section 1. Legislative and other measures that are designed for the protection or development of persons who have been disadvantaged by unfair discrimination must thus be primarily related to the achievement of equality as a value.

The South African version of affirmative action distinguishes itself from the Anglo-US formal or symmetric model, which accentuates individual rights, and from the European ‘equal opportunity’ model, where individual interests are also accentuated but remedial steps are allowed as a transitional measure to prevent structural discrimination. The South African substantive equality model requires active involvement by the state to counteract the continuation of discrimination. This model rejects individualism and is explicitly asymmetric. Measures that favor relatively underprivileged groups at the cost of those who are faring relatively well are not regarded as discriminatory, especially because the goal is to bring about a more equal society. The South African affirmative action model is firmly embedded in communitarian and social democratic thinking, in stark contrast to the individualism which characterizes US doctrine.²² Whether the communitarian emphasis will consistently typify South African equality jurisprudence beyond issues of affirmative action cannot be certain: indications of a tension between liberal democratic individualism and African communitarianism are evident in both judgments delivered in the *Pillay* case, referred to above in Section II.B.²³ An area in which the texts of the Constitution and the ensuing jurisprudence have taken some bold leaps is the

21 *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 (1) SA 6 (CC) paras [60] and [61].

22 Cf Frank Michelman, ‘Reflection’ (2004) 82 Texas Law Review 1737–1761, 1761.

23 2008 (1) SA 474 (CC). Cf Section II.B above. In this judgment, a prohibition by a school of a pupil to wear a nose stud, being an expression of her Hindu religion, was found to be unfairly discriminatory.

promotion and protection of enforceable socio-economic rights against the background of the historical socio-economic discrepancies within a complex society. The Constitutional Court has, in its adjudication of the controversial matters arising out of the relevant provisions in the Bill of Rights, blazed a new trail in various respects. The rights in question concern, primarily, rights to access to adequate housing (section 26) and rights of access to health care services (section 27). The questions of whether these rights—which require positive action on the part of the state (as opposed to providing the bearers of the rights with defences against state incursion)—could be enforced and adjudicated were controversial from the outset. The Constitutional Court, however, consistently took the stance that socio-economic rights were both enforceable and justiciable.²⁴

In the *Soobramoney* judgment of 1997,²⁵ the Court refused to order a state hospital, which argued that it had limited resources at its disposal, to provide renal dialysis to a patient. The Court stated that a ‘court will be slow to interfere with rational decisions taken in good faith by the political organs and medical authorities whose responsibility it is to deal with such matters.’²⁶ In two subsequent judgments, however, the Court issued very specific orders to the government.

In the *Grootboom* judgment,²⁷ government policies concerning the provision of housing to indigent and vulnerable people were pointed out by the Court as falling well short of the requirements of the Constitution. The Court held that section 26(2) required the state to devise and implement a coherent, coordinated program designed to meet its obligations, and that it had failed to do so. The state was ordered to develop programs at national, provincial, and local levels for ‘reasonable measures . . . to provide relief for people who have no access to land, no roof over their heads, and who are living in intolerable conditions or crisis situations.’ Where the Court in *Soobramoney* used good faith and rationality as criteria for the adjudication of the constitutionality of state action, the *reasonableness* of the relevant policies was emphasized in *Grootboom*.

Some two years later, the Constitutional Court found in the *TAC* case²⁸ that the Government’s HIV/AIDS policy to make an antiretroviral drug available only to mother-and-child patients at specified clinics, where the effectiveness and safety of the drug were being determined experimentally, not to be reasonable. As part of a thorough consideration of the jurisdiction of the courts to decide disputes concerning socio-economic rights, the Court determined²⁹ that:

A dispute concerning socio-economic rights is . . . likely to require a court to evaluate state policy and to give judgment on whether or not it is consistent with the Constitution. If it finds that policy is inconsistent with the Constitution it is obliged . . . to make a declaration to that effect. But that is not all. . . . [T]he Constitution contemplates that where it is established that a right in the Bill of Rights has been infringed a court will grant ‘appropriate relief’. It has wide powers to do so and in addition to the declaration that it is obliged to make . . . a court may also ‘make any order that is just and equitable.’

24 Cf para [78] of the *First Certification* case, 1996 (4) SA 744 (CC).

25 *Soobramoney v Minister of Health, KwaZulu-Natal* 1998 (1) SA 765 (CC).

26 In para [29] of the judgment.

27 *Government of the Republic of South Africa v Grootboom* 2001 (1) SA 46 (CC).

28 *Minister of Health v Treatment Action Campaign (No 2)* 2002 (5) SA 721 (CC).

29 In para [101] of the judgment.

An extensive order was issued in which the Government was required, inter alia, to devise and implement a comprehensive and coordinated program affording access to health services to combat mother-to-child transmission of HIV to pregnant women and new-born children, specifying key elements of the plan to be devised against the background of the shortcomings of the existing policy.

The criterion of reasonableness of social policies now seems to be settled, as was confirmed in the *Khosa* judgment,³⁰ in which the Constitutional Court judicially amended parliamentary legislation in order to grant rights to social security not only to citizens, but also to permanent residents.

The importance of reasonableness as a standard for government conduct is recognized also beyond social policy. An indication of this is to be found, for example, in the *Zealand* judgment,³¹ which concerned the mismanagement of an accused person's prosecution and detention pending trial. The applicant was arrested and charged with murder, rape, and assault in 1997, but the case was repeatedly postponed. After more than a year of detention, he escaped from custody but was re-arrested, after which he was charged and convicted on a new charge of murder allegedly committed after his escape. He successfully appealed against his sentence of 18 years' imprisonment, but he continued to be held in detention in a maximum security facility because the registrar of the appeal court failed to inform the prison authorities of his successful appeal. The original case was, however, still pending, and after the trial had been postponed many times while he continued to be held (as an awaiting trial prisoner) in the maximum security prison, the charges were dropped in July 2004. His detention, however, continued until the end of 2004. This established, according to the Constitutional Court, a breach of the right not to be deprived of freedom arbitrarily or without just cause, and the Court concluded the judgment with the following dictum:³²

It is appropriate to conclude this judgment by emphasising that the circumstances that gave rise to the claim for damages by the applicant are cause for grave concern. The type of error that resulted in his unlawful detention for about five years has the potential to bring the administration of justice into disrepute. Those responsible must make sure that every reasonable measure is taken to prevent a recurrence of this kind of error.

Fundamental rights in other categories, such as those requiring the state to protect its citizens nationally and internationally, property, and so on, have been developed judicially since 1994. These developments may effectively be traced in the jurisprudence of the Constitutional Court over its relatively short, but dynamic, period of existence.

C. Application

Although only section 8 is headed 'application', some other provisions also deal with aspects of the application of the Bill of Rights in general terms, namely sections 7, 37, and 38. Sections 7(2), 8(1), and 8(2) expressly cause the state and all of its organs, as well as (but with some qualification) all natural and juristic persons, to be bound by

30 *Khosa v Minister of Social Development* 2004 (6) SA 505 (CC).

31 *Zealand v Minister of Justice and Constitutional Development* 2008 (4) SA 458 (CC).

32 Para [54]. Cf also para [39].

the Bill of Rights. Bearers of rights, as explicitly identified in each provision, are either ‘everyone’ (where applicable, including juristic persons), or citizens, workers, trade unions, children, or arrested, detained, or accused persons. Section 37 makes allowance for the declaration of a state of emergency and for the derogation of some of the fundamental rights during such an emergency, but also provides for the ‘non-derogability’ (that is, the continued application) of certain rights, including equality, human dignity, and life. Section 38 allows for the enforcement of rights by all and sundry, including those taking class actions, those acting in the public interest, or those acting on behalf of an association.

Section 8(1) subjects all law to the provisions of the Bill of Rights and section 8(3) explicitly calls for the development of the common law (that is, all non-statutory law) where necessary to give effect to the Bill of Rights.

A difficult (and not yet fully resolved) question emerges from the wording of sections 8(2) and 8(4): do the fundamental rights apply directly to legal relationships between private persons? The discussion of this matter is conducted in terms of the expression ‘horizontal application’. The Constitutional Court addressed the issue, still under the 1993 Constitution, in *Du Plessis v De Klerk*,³³ and, leaning strongly on the German example, construed an ‘indirect horizontal application’ of the fundamental rights provisions. Although the current wording has been interpreted academically to have introduced a more direct horizontal application of fundamental rights, no judicial shift in such direction has occurred. Until such time as the interpretation in *Du Plessis v De Klerk* is rejected or taken further by the Constitutional Court, it should be considered to represent the accepted doctrine.

D. Limitation and interpretation

The Bill of Rights distinguishes itself from many comparable documents in that it contains very specific arrangements for the limitation of rights. In the first place, section 36 is devoted as a whole to limitation, essentially, of all the rights in the Bill of Rights, and secondly, some of the other provisions contain ‘internal’ limitation clauses, such as section 16(2), which provides that ‘[t]he right in subsection (1) does not extend to –’ propaganda for war, hate speech, and so on.

Section 36 was, for all intents and purposes, formulated by the Constitutional Court. The *Makwanyane* judgment³⁴ was handed down at a time when the Constitutional Assembly was still working on the final text of the Bill of Rights, and the decision presented the process with a helpful, well-conceived formulation. The Court was in the process of applying the more cumbersome section 33 of the 1993 Constitution, making use of the Canadian example. The following dictum in paragraph [104] of *Makwanyane* continues to provide a key to the understanding of the limitation of fundamental rights in South Africa:

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 *section* 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

33 1996 (3) SA 850 (CC).

34 1995 (3) SA 391 (CC).

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 *section 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.’

For the interpretation of the provisions of the Bill of Rights, a structured two-phase process has been adopted, which unfolds as follows: first, it must be determined whether there has been an invasion of the fundamental right under consideration. If that is found to be the case, it must in the second stage be determined whether or not the incursion can be justified under the provisions of *section 36*.

The Constitutional Court expressly adopted the interpretative approach of the Canadian Supreme Court right from the outset, and it continues to employ proportionality as the basic measure for the determination of the justification of the objective to be achieved by the limitation of a right in terms of *section 36*. Again mainly following the Canadian example, the Court has expressly described the model for constitutional interpretation with the terms *purposive*, *generous*, *contextual*, *historical*, *genetic*, and *teleological*. The further dogmatic development of constitutional hermeneutics naturally continues to receive scholarly and judicial attention.

IV. Separation of Powers

A. Horizontal distribution of authority: the executive and the legislature

Separating the executive from the legislature, in terms of the requirement of Constitutional Principle VI of the 1993 Constitution—‘There shall be a separation of powers between the legislature, executive and judiciary, with appropriate checks and balances to ensure accountability, responsiveness and openness’—against the Westminster background of South African constitutional law, effectively amounted more to symbolism than to innovation. In paragraph [111] of the *First Certification* judgment,³⁵ the Constitutional Court concluded that:

As the separation of powers doctrine is not a fixed or rigid constitutional doctrine, it is given expression in many different forms and made subject to checks and balances of many kinds. It can thus not be said that a failure . . . to separate completely the functionaries of the executive and legislature is destructive of the doctrine.

Separate chapters of the Constitution deal, respectively, with Parliament (Chapter 4), the President and the National Executive (Chapter 5), and ‘Courts and Administration of Justice’ (Chapter 8). Furthermore, Chapter 6 deals with the provincial legislatures

35 1996 (4) SA 744 (CC).

and provincial executives under separate sub-headings, and section 151(2) distinguishes between the executive and legislative authority of local governments, although both are entrusted to municipal councils.

B. The executive

The President as head of state and head of government (section 83 of the Constitution) dominates the executive, in that the Cabinet Ministers are appointed and dismissed by and in the discretion of the President (section 91(2)). The initiative to launch legislation largely vests in Cabinet (section 73(2)), and unavoidably the President's party controls the majority in Parliament. The President is elected by the majority in the National Assembly (section 86). This places the President in a very powerful position regarding both the executive and legislative branches of government.

The nature and extent of the executive authority are set out succinctly in section 85(2) of the Constitution, providing for the executive authority to be in the hands of the President, who exercises it 'together with' the rest of the Cabinet. The combination of this authority and the President's power to appoint and dismiss Cabinet Ministers effectively means that all executive authority is exercised under the direction of the President. The executive authority essentially entails the preparation, initiation, and implementation of legislation, the development and implementation of national policies, and the coordination of the functions of state departments.

Some provision is also made in the Constitution for parliamentary control over the executive. Thus, in terms of section 89, the National Assembly may remove the President from office by a two-thirds majority vote, members of the Cabinet (which includes the President) are collectively and individually responsible to Parliament and must report regularly to Parliament concerning matters under their control (section 92), and a motion of no confidence passed by a majority of the members of the National Assembly enforces the resignation of the whole of the Cabinet (including the President) or the dismissal and replacement by the President of the Ministers (section 102). Furthermore, the National Council of Provinces may require a Cabinet member, a Deputy Minister, or an official in the national executive or a provincial executive to attend a meeting of the Council or a committee of the Council (section 66(2)).

Although the President is in terms of section 86(1) elected from among the members of the National Assembly, the elected person is divested of membership upon assumption of office (section 87). The President appoints the Deputy President and the Ministers from among the membership of the National Assembly, although a maximum of two may be appointed from outside the National Assembly. Thus, the vast majority of the members of Cabinet must also be members of the legislature. Nevertheless, the President and any member of the Cabinet who is not a member of the National Assembly may in terms of section 54 attend, and may speak in, the Assembly, but may not vote. Similarly, Cabinet members may attend, and may speak in, the National Council of Provinces, but may not vote (section 66(1)).

C. Parliament

Parliament is composed of two chambers: the National Assembly and the National Council of Provinces (section 42). The National Assembly has 400 members, directly elected for a term of five years according to a proportional list system. The National

Council of Provinces primarily represents provincial interests in the form of nine provincial delegations, each consisting of the provincial Premier, three further ‘special delegates’, and six permanent delegates appointed by the relevant provincial legislature. The provincial delegations are composed in proportion to the political representation in the relevant legislature. The South African Local Government Association may, in terms of section 163, also ‘designate representatives to participate’ in the National Council of Provinces. Both Houses are involved in the adoption of legislation and amendment of the Constitution.

The introduction of the new constitutional dispensation in 1994 caused Parliament to undergo a significant change in constitutional status, from being endowed with legislative sovereignty, to the most superior legislature, subject however to the provisions of the Constitution. Parliamentary legislation is now subject to judicial scrutiny for constitutionality.³⁶ A certain degree of deference to Parliament is, however, allowed by the courts.³⁷

Initially, the Constitutional Court, referring to the 1993 Constitution, started out with a caveat in its inaugural judgment by stating:³⁸

The jurisprudence of the European Court of Human Rights provides some guidance as to what may be considered necessary in a democratic society, but the margin of appreciation allowed to national authorities by the European Court must be understood as finding its place in an international agreement which has to accommodate the sovereignty of the member states. It is not necessarily a safe guide as to what would be appropriate under s 33 of our Constitution.

In later cases some latitude was, however, allowed. In 2000 it was found³⁹ that:

One may accept that insistence on rigid and inflexible rules would be inappropriate in this developing area, with its complex nuances and new procedures. Provided it remains within constitutionally appropriate limits, the Legislature must enjoy a reasonable degree of latitude or margin of appreciation in choosing appropriate solutions to a grave social ill, particularly when the need for special law enforcement procedures has become manifest.

And again more recently, in a case concerning procedural issues raised regarding parliamentary approval of an extradition agreement:⁴⁰

Thus, save in very exceptional circumstances, late challenges to the validity of legislative processes should not be permitted. Legislatures should be allowed a margin of appreciation in deciding on and implementing their procedures, provided the basic prescriptions of the Constitution are adhered to. In addition, there is a strong need for procedural finality, which should not be confused with the ever-present right to challenge the constitutional consistency of the resultant law.

36 Cf Section V.E. below.

37 The degree of deference in this regard was explored by the Constitutional Court in *International Trade Administration Commission v SCAW* Case No CCT59/09, pointing out, inter alia, in para [93]: ‘It is a necessary component of the doctrine of separation of powers that courts have a constitutional obligation to ensure that the exercise of power by other branches of government occurs within constitutional bounds. But even in these circumstances, courts must observe the limits of their own power.’

38. *S v Makwanyane* 1995 (3) SA 391 (CC) para [109].

39. *S v Baloyi* 2000 (2) SA 425 (CC) para [30].

40. *President of the Republic of South Africa v Quagliani* 2009 (2) SA 466 (CC) para [30].

V. Federalism/Decentralisation

A. The provinces

The Negotiating Council of the Multi-Party Negotiating Process appointed a demarcation commission in 1993 to investigate and propose a regional demarcation, to be regulated by a new constitution. The commission was provided with a set of criteria, classified into four broad groups: economic aspects, geographic coherence, institutional and administrative capacity, and socio-cultural issues. The result was the delimitation of nine new provinces jointly comprising the territory of the Republic. The geographical areas of two of the four British colonies that were united in 1910 as provinces of the Union of South Africa are still recognizable on the current map of the nine provinces, namely the Free State and KwaZulu-Natal. The former Colony of the Cape of Good Hope was, however, subdivided in 1994 into the Western Cape, the Eastern Cape, and the Northern Cape, and the former Transvaal was re-demarcated into the provinces of Gauteng, North-West Province, Limpopo, and Mpumalanga.

The establishment of the provinces as both distinct constitutional and geographical entities does not warrant the designation of the Republic as a 'federal' state, but the provincial system does represent a significant form of governmental and administrative de-concentration, if not decentralization. It is, however, not unlikely that the current provincial arrangement will undergo fundamental changes in due course, since various provinces have since 1994 not been able to establish efficient legislative, executive, and administrative structures.

In terms of section 43 of the Constitution, the legislative authority of the provincial sphere of government is vested in the provincial legislature of a province, and the executive authority of a province is allocated to the Premier in section 125(1). The provinces have executive authority mainly for the implementation of provincial legislation, the implementation of national legislation concerned with the functional areas listed in Schedules 4 and 5, and the administration of national legislation not concerned with those functional areas but assigned to the province by Act of Parliament.

Schedules 4 and 5 provide the key to the determination of the governmental competency of the provinces relative to that of the national government. Schedule 4 lists the 'functional areas of *concurrent* national and provincial legislative competence' and Schedule 5 the 'functional areas of *exclusive* provincial legislative competence.' Section 104(1)(b) empowers a provincial legislature to pass legislation on all matters listed in both of these schedules.

Parliament may, in terms of section 44, pass legislation on any subject, specifically also those listed in Schedule 4, but excluding in principle those falling within the exclusive legislative competence of the provinces listed in Schedule 5. However, the exclusion of the legislative competence of Parliament from the functional areas mentioned in Schedule 5 is relative. Parliament has the authority to adopt legislation that will take precedence over 'exclusive' provincial laws under certain circumstances. Whether the provincial competency to perform exclusive legislative acts can truly be described as being 'exclusive' is therefore doubtful.

Chapter 3 of the Constitution, consisting only of sections 40 and 41, is devoted to the regulation of relationships between the different spheres of government under the banner of 'cooperative government'. This notion was incorporated into the

Constitution following the example of the German concept of *Bundestreue*, and also resonates with the Canadian notion of ‘cooperative federalism’.

Section 40(1) describes government in South Africa as consisting of ‘distinctive, interdependent and interrelated’ national, provincial, and local *spheres* of government. The avoidance of the usual term ‘level’ of government was apparently intended to avoid emphasis on a hierarchical governmental structure, while simultaneously discouraging claims of autonomy by provincial and local governments.

Probably the most important purpose of the constitutional injunction of cooperative government is to avoid inter-governmental litigation. Mechanisms for the (extra-judicial) resolution of inter-governmental differences must be (and have been, especially in the area of fiscal relations) provided for in parliamentary legislation. These mechanisms must be exhausted to a reasonable extent before a court may be approached to resolve inter-governmental disputes. In the *Uthukela* judgment the Court stated:⁴¹

In view of the important requirements of co-operative government, a court, including this Court, will rarely decide an intergovernmental dispute unless the organs of state involved in the dispute have made every reasonable effort to resolve it at a political level. . . . this Court must thus bear in mind that Chapter 3 of the Constitution contemplates that organs of state must make every reasonable effort to resolve intergovernmental disputes before having recourse to the courts.

The principles of cooperative government are idealistic, complex, and diverse. They include principles that emphasize national unity, principles that allow organs of government to defend their areas of competence, and principles that are intended to promote good government and service to the public.

In contrast to the sentiments of cooperative government, provision is also made, in an even more intricate fashion, for inter-governmental competition for power and the resolution of disputes in this regard. This is manifested in the provisions dealing with parliamentary legislative procedures and in recent litigation.

Section 42(3) determines that the National Assembly ‘is elected to represent the people and to ensure government by the people under the Constitution.’ In terms of section 42(4), however, the National Council of Provinces ‘represents the provinces to ensure that provincial interests are taken into account in the national sphere of government’ by ‘participating in the national legislative process and by providing a national forum for public consideration of issues affecting the provinces.’

Section 76 deals extensively with the procedure for the adoption of ‘ordinary Bills’ affecting the provinces. Where a Bill is adopted by the National Assembly in the field of the functional areas of *concurrent* competence (listed in Schedule 4), it is referred to the National Council of Provinces, where it can also either be passed, rejected, or passed in an amended form. If the National Assembly accepts amendments to the Bill introduced by the National Council, the Bill is adopted. Should the two Houses, however, disagree on the proposed legislation, the matter is referred to a Mediation Committee, which can approve the version of the Bill supported by either of the two Houses, or it may develop a new version of its own. If the Committee fails to come to an agreement within 30 days or the National Council of Provinces rejects the Bill in the form agreed to by the

41 *Uthukela District Municipality v the President of the Republic of South Africa* 2003 (1) SA 678 (CC) para [14].

Committee, the Bill lapses, but the National Assembly may again consider and adopt it if the Bill is supported by a two-thirds majority of its members.

In 2010, the Constitutional Court declared the entire Communal Land Rights Act 11 of 2004 (generally referred to by the acronym 'CLARA') to be invalid 'for want of compliance with the procedures set out in section 76 of the Constitution.'⁴² The Act was to have the effect of replacing the existing administration of the tracts of land concerned, according to indigenous law, with statutory structures that were not acceptable to the communities living on the land. At issue was the question whether the National Council of Provinces, in its role in the enactment of CLARA—a piece of legislation directly affecting the province—appropriately facilitated public involvement, as was required by section 72(1)(a) of the Constitution. That deciding on the sufficiency of public participation is no simple matter was demonstrated clearly in a split decision of the Court two years earlier.⁴³ It may nevertheless be said that this judgment, at least symbolically and by way of judicial insistence on procedural correctness on the part of Parliament, reconfirmed the constitutional weight of both the provinces and the National Council of Provinces.

With the support of the National Council of Provinces, Parliament may also legislate on matters within the *exclusive* domain of the provinces. The procedure for the adoption of legislation in the field of concurrent jurisdiction, described above, must also be followed in such cases. The test for the validity of such legislation in terms of section 44(2) is whether the intervention by Parliament is objectively necessary to attain the goals of the maintenance of national security, economic unity, essential national standards, the establishment of minimum standards required for the rendering of services, or the prevention of unreasonable action taken by a province which is prejudicial to the interest of another province or the country as a whole. If these requirements are met, section 147(2) provides that it will prevail over provincial legislation. Sections 146 to 150 comprehensively deal with the resolution of conflicts between national and provincial laws. The National Council of Provinces can prevent conflicting national legislation from prevailing if it does not approve the Bill within 30 days and provides reasons for the disapproval.

The national executive is empowered by section 100 to intervene when 'a province cannot or does not fulfil an executive obligation in terms of legislation or the Constitution.' The national executive may under such circumstances either issue a directive to the provincial executive to meet its obligations, or it may itself assume the responsibility for that obligation. The National Council of Provinces must be informed of such intervention and may disapprove and terminate it.

B. Local government

The South Africa Act, 1909, entrusted local government affairs to the provinces at the time of union in 1910. After the Republic was established in 1961 and when constitutional changes were introduced by the Constitution of 1983, the system, in terms of which municipalities were dealt with as administrations rather than as governments, was perpetuated. This third level of government was, however, effective only in urban areas inhabited by white people.

42 *Tongoane v Minister Agriculture and Land Affairs* 2010 (6) SA 214 (CC).

43 *Merafong Demarcation Forum v President of the Republic of South Africa* 2008 (5) SA 171 (CC).

Since local government (especially of the black residential areas) was a specific political target in the 1980s and the early 1990s, it was clear at the beginning of the 1990s that the reform of the local government system was to become an important component of constitutional and social reform. The Local Government Transition Act 209 of 1993 was therefore negotiated concurrently with the 1993 Constitution, Chapter 10 of which was devoted fully to local government. This part of the transitional Constitution provided a framework for the further development of completely revised local government arrangements by means of detailed parliamentary and provincial legislation, and the final constitutionalization of local government in Chapter 7 of the current Constitution.

The new constitutional system elevated local government to a new status of a constitutionally entrenched sphere of government, notionally on a par with the national and provincial spheres. Extensive structural and regulatory parliamentary legislation was eventually adopted on these constitutional foundations, whereby a local government system consisting of some 284 municipalities was established to cover all parts of the territory of the Republic. Provision is made in section 155 of the Constitution and the relevant legislation for three categories of municipality, ranging from metropolitan to district municipalities. Part B of both Schedules 4 and 5 of the Constitution lists the matters that are allocated to the executive and administrative competence of municipalities. The members of municipal councils are elected for terms of five years (section 159), and the elections do not coincide with parliamentary and provincial elections. In terms of section 139, a provincial executive is empowered to intervene when ‘a municipality cannot or does not fulfil an executive obligation’.

In *Johannesburg Metropolitan Municipality v Gauteng Development Tribunal*,⁴⁴ the Constitutional Court dealt with a dispute between municipal and provincial authorities about which sphere of government was entitled by the Constitution to exercise the powers relating to the establishment of townships and the re-zoning of land within the municipal area of the city. It emerged that the Development Facilitation Act, 1995 (a parliamentary statute) unconstitutionally awarded functions to the provincial sphere (municipal planning) which, in terms of the Constitution, should reside with the municipal sphere of government. The Act was therefore declared to be unconstitutional and Parliament was given two years within which the legislation should be rectified.

VI. Constitutional Adjudication

A. The judiciary

Section 165 vests the judicial authority in the courts, and renders them ‘independent and subject only to the Constitution and the law’. Interference with the functioning of the courts by other organs of state is expressly proscribed.

The formal appointment of members of the bench is, however, entrusted to the President ‘as head of the national executive’ in section 174. The identification of candidates for appointment is undertaken by the Judicial Service Commission, which is composed of a majority of politicians or political appointees (section 178). In the

44 2010 (6) SA 182 (CC).

appointment of the Chief Justice and the Deputy Chief Justice, the President must consult the Judicial Service Commission and the leaders of political parties represented in Parliament. For the final decision on the appointment, the President's personal preferences are however decisive, since he is not bound to the advice offered. For the appointment of the President and Deputy President of the Supreme Court of Appeal, the President also consults the Commission, but is not bound to its suggestions. Regarding all other judges, the Judicial Service Commission presents the President with a list containing three names more than the number of appointments to be made, from which list the President makes the appointments, unless none of the names on the list is acceptable to the President, in which case the Commission must provide an additional list from which the appointments must then be made.

The Constitutional Court consists of eleven judges, including the Chief Justice and Deputy Chief Justice. Matters are heard by all judges, but if all are not available, a quorum consists of eight judges. The Constitutional Court has the highest jurisdiction (only) in constitutional matters, which includes 'any issue involving the interpretation, protection or enforcement of the Constitution' (section 167). The Supreme Court of Appeal decides appeals in any matter, but the Constitutional Court may hear appeals from the Supreme Court of Appeal in constitutional matters (section 168) and has exclusive jurisdiction in terms of section 167(4) in matters such as the constitutionality of national and provincial legislation, disputes between organs of state, and the constitutionality of amendments to the Constitution.⁴⁵

As is already apparent from the above exposition, the impact since 1995 of the jurisprudence of the Constitutional Court on the legal system in general, but more specifically on the development of a coherent system of constitutional law, has been profound. The Court has adjudicated over a large spectrum of intricate and sensitive questions, providing strong guidance and principled interpretative argumentation. Although constitutional adjudication, however thoroughly motivated, cannot be expected to be generally accepted without cogent alternative views being presented, few commentators will dispute the view that the Constitutional Court is performing an essential and constructive role in the establishment of constitutionalism in South Africa. A selective overview of the Court's work follows.

B. Constitutionalism

The first constitutional principle prescribed in the transitional Constitution of 1993 for the writing of the 'final' Constitution required, inter alia, 'the establishment of one sovereign state, a common South African citizenship and a democratic system of government.' Constitutional Principle VII determined that the judiciary shall have the power and jurisdiction to safeguard and enforce the Constitution and all fundamental rights.'

In the still frequently quoted *Makwanyane* case (1995)⁴⁶, Sachs J eloquently linked, in paragraphs [389]–[392], the judiciary's task towards constitutionalism:

Historically, constitutionalism was a product of the age of enlightenment. It was associated with the overthrow of arbitrary power and the attempt to ensure that government functioned according to established principles and processes and in the

45 *Van Straaten v President of the Republic of South Africa* 2009 (3) SA 457 (CC).

46 1995 (3) SA 391 (CC).

light of enduring values. It came together with the abolition of torture and the opening up of dungeons. It based itself on the twin propositions that all persons had certain inherent rights that came with their humanity, and that no one had a God-given right to rule over others.

The second great wave of constitutionalism after World War II, was also a reaction to gross abuse of power, institutionalised inhumanity and organised disrespect for life. Human rights were not merely declared to exist: against the background of genocide and crimes against humanity committed in the name of a racial ideology linked to state sovereignty, firm constitutional limits were placed on state power. . . .

Constitutionalism in our country also arrives simultaneously with the achievement of equality and freedom, and of openness, accommodation and tolerance. . . .

Accordingly, the idealism that we uphold with this judgment is to be found not in the minds of the judges, but in both the explicit text of the Constitution itself, and the values it enshrines.

C. Interpretation and independence

The judicial function of interpretation is not a mechanical process. Legal hermeneutics in South Africa, as elsewhere, are the subject of much theorizing and philosophizing, and rightly so. Despite the necessary self-confidence with which a court should proclaim its findings, choices, commentaries, distinctions, formulations, and orders, adjudication of points of law and legal disputes is inevitably influenced by the subjective, conscious, or sub-conscious considerations of the justices on the bench.

On more than one occasion the Constitutional Court has been confronted with applications for the recusal of its judges. Some of the salient points of the position taken by the Court on recusal may be summarized as follows:⁴⁷

1. Because judges are human, their life experiences will unavoidably influence their understanding of judicial duties. ‘Absolute neutrality’ in the judicial context is therefore not achievable.
2. Judicial impartiality, clearly distinguished from ‘colorless neutrality’, is however an absolute requirement for a civilised system of adjudication. The Court defines such impartiality as ‘that quality of open-minded readiness to persuasion—without unfitting adherence to either party or to the Judges’ own predilections, preconceptions and personal views.’; in practical terms, therefore, ‘a mind open to persuasion by the evidence and the submissions of counsel.’

That the Court squarely confronted this issue and drew clear lines for dealing with recusal is praiseworthy. However, its predominant political disposition was simultaneously demonstrated when it held (in paragraphs [72] and [75]) that, because the core values of the Constitution are fundamentally different from those of pre-constitutional times, political opposition in those times to the old order is practically a requirement for appointment to the bench of the Constitutional Court. This amounted to a rejection of the possibility that persons who were not politically active or not in

⁴⁷ Taken from the judgment in *South African Commercial Catering and Allied Workers Union v Irvin and Johnson Ltd* 2000 (3) SA 705 (CC) paras [12]–[17].

express opposition to the pre-constitutional system might be fit and proper appointees to the bench. The Court did, however, qualify its opinion by stating that ‘all judges are expected to put any party political loyalties behind them on their appointment and it is generally accepted that they do so.’

D. Political disputes and democracy

Since 1994, matters emanating from political disputes frequently required the attention of the courts, in which issues concerning constitutionalism and democracy inevitably had to be confronted. In producing results in their adjudicative activity, especially in contentious matters regarding inter-governmental relations and the separation of powers, the Court has frequently emphasized the supremacy of the Constitution. The line of argument is, in over-simplified terms, ‘whatever anyone else might think, the Court is bound by the terms of the Constitution’ (as the Court interprets it authoritatively).

The Constitution is replete with references to, and elements of, democracy. Nevertheless, neither the Constitution nor the jurisprudence of the Constitutional Court contains a definition or focused characterization of democracy. In a very early judgment of the Court,⁴⁸ Justice Sachs endeavored to identify the main components of the framework established by the 1993 Constitution which articulated ‘the transformation from a system based on Parliamentary sovereignty to one founded on Parliamentary democracy in a constitutional state.’ The first element was contained in the entrenchment of fundamental rights which could not be infringed by Parliament; the second was the limitation of the legislative power of Parliament, both substantively and procedurally, in relation to the power of the provinces; thirdly, the powers of Parliament to amend the Constitution were subject to special procedures requiring a high majority; fourthly, in its capacity as Constitutional Assembly responsible for drafting a new Constitution, Parliament was obliged to comply with the 34 Principles contained in Schedule 4 of the 1993 Constitution; and lastly, certain procedures affecting the functions of and relationship between the National Assembly and the Senate were laid down by the Constitution.

The intention could not have been to list these elements as part of a comprehensive definition of South African democracy, but it is interesting to note how they all cropped up in subsequent constitutional judgments concerned with the development of the newly established South African democracy. A cursory review of selected judgments of the Court provides a general understanding of the Constitutional Court’s attitude towards democracy.

The degree of immunity of municipal councilors from civil liability for anything said in, produced before, or submitted to the council provided for in the relevant legislation was considered by the Court in 2003. The principles enunciated in the judgment should apply equally to provincial legislatures and Parliament. The matter before the Court was an appeal against a High Court decision that councilors whose conduct in making a majority decision (which was accepted by the Court to have been ‘incompetent, malicious, and to a degree racist’) should pay for the costs incurred in the litigation out of their own pockets. The Court found the legislative protection of

48 *Executive Council, Western Cape Legislature v President of the Republic of South Africa* 1995 (4) SA 877 (CC) para [202].

the councilors' immunity to be such that they were not personally liable for their actions and that the courts should not make such cost orders 'to teach councillors a lesson', since it 'trenches upon the separation of powers because it is judicial conduct aimed at influencing the conduct of the legislative and executive branch of government.'⁴⁹

In 1995, the Court found a provision of the Local Government Transition Act affecting local government elections, which was inserted by parliamentary amendment to empower the President to further amend the Act by proclamation, to be inconsistent with the Constitution and therefore invalid. Parliament was, however, given the opportunity to correct the defect in the provision within a month (*Executive Council, Western Cape Legislature v President of the RSA*). This judgment was an early indication of the Court's preparedness to exercise its constitutional authority, even against Parliament and the President.

Two months later, still during 1995, the Court again had to deal with the constitutional relationship between the national and provincial governments when amendments to the Constitution, concerning the transfer of the power to determine the remuneration of provincial Premiers and members of executive councils from provincial legislatures to the President, were attacked. The Court rejected the attack and found the amendments to be effective.⁵⁰

Again in 1996, the Court considered the relative positions of authority of the national and provincial spheres of government to adopt legislation in the concurrent field of competence of education. The Speaker of the National Assembly submitted a Bill to the scrutiny of the Court to establish its constitutionality. The Bill was found not to be inconsistent with the Constitution.⁵¹ The circumstances of this case indicated a growing political confidence in, and respect for, the Court.

In a dispute between the provincial governments of the Western Cape and KwaZulu-Natal, on the one hand, and the national government on the other regarding their respective constitutional powers concerning local government, the Court in 1999 declared certain provisions of the Local Government: Municipal Structures Act, adopted by Parliament in 1998, to be invalid due to conflict with provisions of the Constitution. This was another in a series of judgments in which the Court adjudicated with confidence between organs of state in which the level of political antagonism was quite pronounced, due to the fact that the KwaZulu-Natal and Western Cape Provinces were at the time under the political control of parties other than the ANC. Thus in 1996, the ANC members of the KwaZulu-Natal Legislature objected to Bills adopted by the Legislature prohibiting the Zulu King and other traditional leaders from accepting any remuneration other than in terms of the Acts, arguing that the Bills were unconstitutional. The Court rejected the arguments and the Bills were found to be consistent with the Constitution.⁵²

The question whether persons serving prison sentences were disqualified from taking part in elections was determined by the Court in April 1999, when it held that

49 *Swartbooi v Brink* 2003 (5) BCLR 497 (CC) para [25].

50 *Premier, Kwazulu-Natal v President of the Republic of South Africa* 1996 (1) SA 769 (CC).

51 *Ex Parte Speaker of the National Assembly: In re Dispute Concerning the Constitutionality of Certain Provisions of the National Education Policy Bill 83 of 1995* 1996 (3) SA 289 (CC).

52 *KwaZulu-Natal Amakhosi and Iziphakanyiswa Amendment Bill of 1995, In re: Ex Parte Speaker of the KwaZulu-Natal Provincial Legislature* 1996 (4) SA 653 (CC).

prisoners retained their constitutional right to vote and that the Independent Electoral Commission was obliged to make all the necessary and reasonable arrangements to enable them to vote.⁵³

The Premier of the Western Cape challenged a determination by the Independent Electoral Commission that the provincial legislature should consist of 39 members instead of 42, as provided for in the provincial constitution. In May 1999, the Court declared the Commission's determination to be invalid and the arrangement of the provincial constitution to be dominant in this regard.⁵⁴

In dealing with a dispute between the Stilbaai municipality and the Independent Electoral Commission, the Court had to determine the status of the Commission for the purposes of the application of the constitutional provisions on cooperative government to the Commission. The Court found that the Commission was not part of the national sphere of government, since it should manifestly be seen to be outside government.⁵⁵

In the run-up to the April 2009 general elections, the Chief Electoral Officer declared a prospective candidate for election to the National Assembly to be ineligible on the grounds that his identity number appearing on the voters' roll did not correspond to that provided in his nomination. When the matter reached the Constitutional Court on appeal from the Electoral Court, it appeared that the problem was due to an administrative error and the Court made an order rendering the candidate to have been duly nominated.⁵⁶

In another elections-related judgment, the Court confirmed the finding of the High Court in Pretoria that a provision in the Electoral Act 73 of 1998, which purported to disallow registered voters living abroad on polling day to cast a special vote, was unconstitutional.⁵⁷ The Court also extended the period within which qualifying voters could give notice to the Chief Electoral Officer of their intention to vote in order to make its ruling effective.

E. Constitutionality of legislation

In 1996, the Court was called upon to certify a draft constitution for the province of KwaZulu-Natal. The document was very ambitious, in the sense of purporting to provide the province with extensive autonomy verging on independence. The Court found the draft to be in conflict with the provisions of the 1993 Constitution. The KwaZulu-Natal Legislature did not pursue the matter further.⁵⁸

In accordance with the requirements of the 1993 Constitution, the Court considered a draft provincial constitution for the Western Cape in 1997. It found the draft to be consistent with the Constitution, but refrained from certifying it due to three elements of the draft which could not be reconciled with the Constitution. The Legislature duly

53 *August v Electoral Commission* 1999 (3) SA 1 (CC).

54 *Premier of the Western Cape v Independent Electoral Commission* 1999 (11) BCLR 1209 (CC).

55 *Independent Electoral Commission v Langeberg Municipality* 2001 (3) SA 925 (CC).

56. *African National Congress v Chief Electoral Officer of the Independent Electoral Commission* 2010 (5) SA 487 (CC).

57. *Richter v Minister of Home Affairs* 2009 (3) SA 615 (CC).

58 *Ex Parte Speaker of the KwaZulu-Natal Legislature: In re Certification of the Constitution of the Province of KwaZulu-Natal* 1996 1996 (4) SA 1098 (CC).

rectified the shortcomings and the Court certified the provincial constitution in November 1997. This is the only provincial constitution that has been validly adopted.⁵⁹

When the ANC in the KwaZulu-Natal Legislature challenged the validity of delegated provincial legislation which established a number of regional councils and provided for membership of such councils of traditional leaders, the Court in 1998 rejected the challenge and found the legislation to be consistent with the provisions of the 1993 Constitution in which it was sought, in the interests of continuity of governance, to balance democratically elected and traditional modes of government.⁶⁰

Apart from those already mentioned above, a number of cases resolved constitutional disputes regarding the validity of legislation adopted since 1994. In 1996, the Court determined that the Gauteng Education Bill, which precluded language competency testing as an admission requirement to public schools and which also dealt with matters of religious policy in such schools, did not offend against the 1993 Constitution. This was a decision which revealed the Court's ideological inclinations more clearly than most of its other judgments. One of the judges even applied sarcasm, by using a phrase from the pre-constitutional national anthem in his judgment to make the point that people who preferred to preserve their cultural heritage were free to do so, but at their own cost.⁶¹

In 1999, the Court pronounced upon the validity of national legislation in which the public service was restructured in a manner that the Premier of the Western Cape believed amounted to an encroachment upon the constitutionally-regulated authority of the provinces. The Court, however, found the legislation, excepting a provision which purported to empower a national minister to transfer provincial functions to national authorities without the consent of the provincial executive, to be reconcilable with the Constitution.⁶²

When Parliament adopted four pieces of legislation in 2002 purporting to terminate the constitutional prohibition on 'floor-crossing' (ie defecting from the political party on whose list a member obtained a seat in Parliament, a provincial legislature, or a municipal council, to join another party while retaining the seat), the constitutionality of the legislation was contested by the United Democratic Movement. In a set of three judgments, the Court in 2002 found the mechanism of floor-crossing not to be inconsistent with the Constitution, despite the requirements of an electoral system of proportional representation and multi-party democracy. The limitations provided for in the legislation were found to be rational. The legislation dealing with floor-crossing at provincial and parliamentary level was, however, declared unconstitutional due to a procedural flaw, in that the legislation did not duly amend the Constitution, but was an attempt to introduce floor-crossing by means of ordinary legislation.⁶³

59 *Ex Parte Speaker of the Western Cape Provincial Legislature: In re Certification of the Constitution of the Western Cape*, 1997 1997 (4) SA 795 (CC); 1998 (1) SA 655 (CC).

60 *African National Congress v Minister of Local Government and Housing, KwaZulu-Natal* 1998 (3) SA 1 (CC).

61 Para [42] of the judgment in *Ex Parte Gauteng Provincial Legislature: In re Dispute Concerning the Constitutionality of Certain Provisions of the Gauteng School Education Bill of 1995* 1996 (3) SA 165 (CC).

62 *Premier, Western Cape v President of the Republic of South Africa* 1999 (3) SA 657 (CC).

63 *United Democratic Movement v President of the Republic of South Africa* 2003 (1) SA 493 (CC). Subsequently the Constitution was amended to remove the possibility of lawful floor crossing:

Parliament adopted a Liquor Bill in 1998 and submitted it for approval to the President who, however, due to reservations as to its constitutionality, referred it to the Court to decide the point. The issue was whether the national legislation dealt with matters that were reserved in the Constitution for the provincial authorities. In November 1999, the Court declared most of the Bill to be unconstitutional.⁶⁴

In 1999, the President erroneously brought an Act regulating medicines into operation before the comprehensive set of regulations in terms of the Act was promulgated. This caused a dangerous situation and the President approached the courts to nullify his actions in this regard. A sensitive question that had to be decided was whether the judiciary had the power to review such a presidential action. The Court found that it did have such jurisdiction if it could be shown, as was indeed done in the matter, that the presidential decision did not conform to the Constitution. The decision was found to be irrational, and thus in conflict with the rule of law, a foundational principle of the Constitution.⁶⁵

In various cases where the Court has ruled on the constitutional incompatibility of a law, the law was left intact for the time being in order to allow the legislature to remedy the legislation. Thus, for example in the *Nyathi* case,⁶⁶ the Court confirmed a judgment of the High Court that a provision in the State Liability Act of 1957, which prohibited the attachment of state property for the enforcement of judgments against the state, was unconstitutional. The Court, however, suspended its order for 12 months to allow Parliament to provide for effective means for the enforcement of money judgments against the state.⁶⁷

As may be expected, cases involving the constitutionality of parliamentary legislation more often than not deal with highly controversial matters. This is due to the fact that the legislative process is steered politically, and political instincts, especially in young democracies, have a tendency to sacrifice constitutionalism for expediency. Such was the situation with which the Court had to deal in *Glenister v President of the Republic of South Africa*, decided by a bench split five against four in March 2011.⁶⁸ In 2001, a politically independent Directorate of Special Operations (nicknamed ‘the Scorpions’) was established in terms of the National Prosecuting Authority Act, 1998, for the purpose of strengthening law enforcement by empowering it to investigate and

Constitution Fourteenth Amendment Act of 2008 and the Constitution Fifteenth Amendment Act of 2008.

64 *Ex Parte President of the Republic of South Africa: In re Constitutionality of the Liquor Bill* 2000 (1) SA 732 (CC).

65 *Pharmaceutical Manufacturers Association of SA In re: the ex parte application of the President of the Republic of South Africa* 2000 (2) SA 674 (CC).

66 *Nyathi v MEC for Department of Health, Gauteng* 2008 (5) SA 94 (CC). Also *Johannesburg Metropolitan Municipality v Gauteng Development Tribunal* 2010 (6) SA 182 (CC), discussed above in Section IV.B.

67 At the time of writing, an amendment Bill intended to rectify the situation was pending in Parliament after extension of the suspension order had been granted twice on application by the Government. In *Minister for Justice and Constitutional Development v Nyathi* 2010 (4) SA 567 (CC), the Constitutional Court issued an order to regulate the satisfaction of judgment debts against the state in the interim until 31 August 2011 or until Parliament adopts appropriate remedial legislation prior to that date. In some previous cases (*Minister of Justice v Ntuli* 1997 (3) SA 772 (CC) and *Ex Parte Minister of Social Development* 2006 (4) SA 309 (CC)), the Court had refused applications for extension. However, see also *Zondi v MEC, Traditional and Local Government Affairs* 2006 (3) SA 1 (CC).

68 Case CCT 48/10, unreported at the time of writing.

institute criminal proceedings in cases concerning organised crime. In 2008, amending legislation was adopted by Parliament amidst high political drama relating to reports on corruption and criminal activity involving senior government officials and politicians and a change of government.⁶⁹ In terms of the new law, the Scorpions were dissolved and replaced by a new Directorate for Priority Crime Investigation, situated within the South African Police Service and subject to executive oversight. On the grounds that ‘the mechanisms to protect against interference are inadequate’, the majority of the Constitutional Court declared the newly inserted Chapter 6A of the South African Police Service Act 68 of 1995, in terms of which the new Directorate was established, to be inconsistent with the Constitution. This declaration was, however, suspended for eighteen months ‘in order to give Parliament the opportunity to remedy the defect.’

F. The separation of powers

In 2000, in the *Heath* case, the Court declared the appointment by the President of a judge to head a special investigating unit into alleged malpractices and maladministration in state institutions to be untenable, due to the violation of the principle of the separation of powers. It was found that the intrusive nature of the investigations that were required should not be required of a member of the judiciary.⁷⁰

When a group of men being held and tried in Zimbabwe inter alia for suspected mercenary activity approached the Court for an order directing the Government to take urgent steps to ensure the protection of the prisoners’ constitutional rights abroad and to seek their release or extradition, the Court found in 2004 that a decision as to whether, and if so, what protection should be given was an aspect of foreign policy which was essentially a function of the executive. This does not, however, mean that courts have no jurisdiction to deal with issues concerned with diplomatic protection, because all public power is subject to constitutional control.⁷¹

The confiscation by the Zimbabwean Government without compensation of land belonging to white farmers starting in 1997 led to a High Court judgment to the effect that the failure of the South African Government to provide an applicant who had suffered considerable loss with appropriate diplomatic assistance was inconsistent with the Constitution. The Government, various Ministers, and the President were respondents in that case. Since the President was a respondent, the applicant assumed that it was necessary for the Constitutional Court to confirm the order of the High Court that the conduct of the President was unconstitutional. In its judgment, the Constitutional Court, however, distinguished constitutional obligations from other conduct of the President, stating:⁷²

section 167(4)(e) [of the Constitution] which provides for the exclusive jurisdiction of the Constitutional Court should be construed restrictively in order to give full

69 This controversy caused the OECD Working Group on Bribery in International Business Transactions to express its concern: cf its report at [<http://www.oecd.org/dataoecd/51/30/40883135.pdf>].

70 *South African Association of Personal Injury Lawyers v Heath* 2001 (1) SA 883 (CC).

71 *Kaunda v President of the Republic of South Africa* 2005 (4) SA 235 (CC).

72 *Von Abo v President of the Republic of South Africa* 2009 (5) SA 345 (CC) para [36].

recognition to the power of the Supreme Court of Appeal and the High Court to determine whether conduct of the President is constitutionally valid.

The Constitutional Court found the application for confirmation to be unfounded and therefore left the High Court order in favor of the applicant intact.

The Constitutional Court has expressed itself frequently on the doctrine of the separation of powers. In doing so it has been active in developing a specifically South African perspective on the doctrine.

When called upon in the *First Certification* judgment (1996)⁷³ to determine whether the Constitution conformed to the requirements of the separation of powers as was prescribed by Constitutional Principle VI in the 1993 Constitution, it took the position (in paragraphs [109] and [112]) that despite some basic principles characteristic of the doctrine, ‘no constitutional scheme can reflect a complete separation of powers: the scheme is always one of partial separation’ and that the South African model ‘reflects the historical circumstances of our constitutional development’.

In the *Heath* case,⁷⁴ the Court stated that the South African model to be developed by the courts should establish

a delicate balancing, informed both by South Africa’s history and its new dispensation, between the need, on the one hand, to control government by separating powers and enforcing checks and balances and, on the other, to avoid diffusing power so completely that the government is unable to take timely measures in the public interest.

The Court also tended to depend on its interpretation of the Constitution to discern the perimeter of the separation, confirming its support of Tribe’s opinion that ‘where constitutional text is informative with respect to a separation of powers issue, it is important not to leap over that text in favor of abstract principles that one might wish to see embodied in our regime of separated powers, but that might not in fact have found their way into our Constitution’s structure.’⁷⁵ In paragraph [48] of the judgment in *Van Rooyen’s* case, the Court described its responsibility for upholding the separation of powers as follows:

In a constitutional democracy such as ours, in which the Constitution is the supreme law of the Republic, substantial power has been given to the judiciary to uphold the Constitution. In exercising such powers, obedience to the doctrine of the separation of powers requires that the judiciary, in its comments about the other arms of the state, show respect and courtesy, in the same way that these other arms are obliged to show respect for and courtesy to the judiciary and one another.

It is especially in the field of the development of the notion of enforceable socio-economic rights that the Constitutional Court has established the boundaries of judicial authority *vis-à-vis* the other branches of government, based on its interpretation of the Constitution.

As has been pointed out above in the discussion of socio-economic rights in Section III.B., the Court had already, in the *First Certification* judgment (paragraph [78]), stated its view that the socio-economic rights were ‘at least to some extent, justiciable’ and that, at the very least, ‘socio-economic rights can be negatively

73 1996 (4) SA 744 (CC).

74 2001 (1) SA 883 (CC), referred to above in Section V.F.

75 *Van Rooyen v S* 2002 (5) SA 246 (CC) para [34].

protected from improper invasion.’ In paragraph [38] of the judgment in the *Treatment Action Campaign* (2002) case,⁷⁶ the Court unambiguously occupied its jurisdictional territory:

Courts are ill-suited to adjudicate upon issues where court orders could have multiple social and economic consequences for the community. The Constitution contemplates rather a restrained and focused role for the courts, namely, to require the state to take measures to meet its constitutional obligations and to subject the reasonableness of these measures to evaluation. Such determinations of reasonableness may in fact have budgetary implications, but are not in themselves directed at rearranging budgets. In this way the judicial, legislative and executive functions achieve appropriate constitutional balance.

The Court has left no doubt that it is its own constitutional task, and not that of any other institution, to finally determine what is consistent with the Constitution and what is not. Its dealing with socio-economic rights gave the Court the opportunity to stake out its claim to constitutional authority, as for example in paragraph [99] of the *Treatment Action Campaign* (2002) judgment:

Even simple declaratory orders against government or organs of state can affect their policy and may well have budgetary implications. Government is constitutionally bound to give effect to such orders whether or not they affect its policy and has to find the resources to do so.

Although concerns that government institutions do not consistently comply with judgments of the courts in general have lately been raised, blatant refusal to comply with the orders of the Constitutional Court is not in evidence. Problems in this regard may arise mostly due to the notoriously increasing inefficiency of the public service.⁷⁷

When the introduction by Cabinet of draft legislation to Parliament was challenged in 2008, the Constitutional Court thoroughly considered the implications of the doctrine of separation of powers and concluded,⁷⁸ with reference to British Privy Council jurisprudence, that judicial intervention

would only be appropriate if an applicant can show that there would be no effective remedy available to him or her once the legislative process is complete, as the unlawful conduct will have achieved its object in the course of the process. The applicant must show that the resultant harm will be material and irreversible. Such an approach takes account of the proper role of the courts in our constitutional order: While duty-bound to safeguard the Constitution, they are also required not to encroach on the powers of the executive and legislature. This is a formidable burden facing the applicant.

G. Final remarks

⁷⁶ 2002 (5) SA 721(CC).

⁷⁷ See eg *Njengi v MEC, Department of Welfare, Eastern Cape* 2008 (4) SA 237 para [4]. Most recently the Court had reason to express its concern in *Van Straaten v President of the Republic of South Africa* 2009 (3) SA 457 (CC) para [9] in the following terms: ‘This is not the first occasion that the State has not responded to a matter that is before this court. This failure on the part of the State is regrettable. The State has an obligation to respond to court processes. It cannot simply disregard court processes. It must lead by example. . . . this . . . is cause for grave concern in a country governed by the rule of law.’

⁷⁸ *Glenister v President of the Republic of South Africa* 2009 (1) SA 287 (CC) para [44]. See also *Director of Public Prosecutions Transvaal v Minister for Justice and Constitutional Development* 2009 (4) SA 222 (CC) paras [39], [57], [173], [181], and [220].

Many more elements of the work of the Constitutional Court may be described to provide a broader picture of the constitutional developments in South Africa since 1994. Mention might also be made, for example, of ground-breaking decisions concerning the limitations on the protection of the reputation of public figures, religious freedom, equality, the status of alien residents, the effects of the Constitution on family relations, the extension of fundamental rights to private relationships, and so on. The judgments on all of these issues, and a variety of other matters, have contributed substantially to the development of the current constitutional and political system.

There can be little doubt that opinions on the correctness of specific decisions will always vary. This is also demonstrated by the relatively frequent splits in the Court on the outcome of a case and the publication of minority judgments. It is very likely, also, that the tenor and direction of the jurisprudence of the Court will vary in the course of time as the composition of the bench changes. This should, however, not be considered strange, especially in a relatively young and dynamic constitutional democracy faced with intractable social problems.

VII International Law and Regional Integration

Various provisions of the South African Constitution explicitly deal with international law. The key measures are contained in Sections 231–233, which consecutively deal with international agreements, customary international law, and the application by courts of international law. Other provisions are—

- Section 35(3)(l), which affords every accused person a right to a fair trial ‘not to be convicted for an act or omission that was not an offence under . . . international law at the time it was committed or omitted’;
- Section 37(4)(b)(i), which provides for the derogation by legislation of rights entrenched in the Bill of Rights when a state of emergency is declared, only insofar as such legislation ‘is consistent with the Republic’s obligations under international law applicable to states of emergency’;
- Section 37(8), which requires the state to ‘comply with the standards binding on the Republic under international humanitarian law in respect of the detention of “non-citizens” detained in consequence of an international armed conflict’;
- Section 39(1)(b), which imposes the duty upon courts, tribunals, and forums, when interpreting the Bill of Rights, to ‘consider international law’;
- Section 198(c), which lays down as one of the principles governing ‘national security in the Republic’ that it should be pursued in compliance with, *inter alia*, international law;
- Similarly, Section 199(5) requires security services to act and to ‘teach and require their members to act, in accordance with the Constitution and the law, including customary international law and international agreements binding on the Republic’; and
- Section 200(2), which states, as the primary object of the defence force, to protect and defend the Republic ‘in accordance with the Constitution and the principles of international law regulating the use of force’.

International agreements (treaties) are entered into by the national executive and become binding on the Republic in terms of Section 231(2) and (3) if—

- both Houses of Parliament approve an agreement by resolution, or without parliamentary approval, if
- the agreement is of a technical, administrative, or executive nature, or
- it is an agreement which does not require ratification or accession.

In terms of Section 231(4), international agreements require transformation in order to become domestic law: that is, the agreement must be adopted as law by means of parliamentary legislation. The only exception to this is a self-executing provision which has been approved by resolution of Parliament.

Despite the extensive constitutional recognition of the significance of international law, the Constitution notably does not in any way subject itself to, or qualify its supremacy, with reference to any norm or rule of international law. Section 232 expressly renders the binding force of customary international law in the Republic subject to being consistent with the Constitution, and Section 231(4) equally makes the binding force of a self-executing provision of an agreement approved by Parliament dependent upon compatibility with the Constitution.

The Constitution does not expressly deal with regional integration. This does not preclude the fact that South Africa, through executive and administrative action, is deeply involved in the affairs of regional structures and organizations such as the Southern African Development Community (SADC) and the African Union, focused specifically on the harmonization of legislation and state conduct in particular fields. South Africa has also, since 1910, been a key member of the Southern African Customs Union, the oldest of its kind in the world. With regard to such involvement, the primary relevance of the Constitution is that the conduct of the executive and other organs of state, in their interaction with other states and entities in the region, must in terms of Sections 2 and 7(2) conform in all respects to the dictates of the Constitution and the Bill of Rights.

Since the new constitutional dispensation gave new impetus to the recognition, application, and implementation of international law by and in South Africa, the field is undergoing renovation and development in its finer nuances. Regarding these nuances, the sources listed in Section IX of the Select Bibliography below are recommended, *inter alia*.

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