University of the North West

The Acceptance of International Human Rights Norms in the South African Legal System

By

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A thesis submitted in fulfilment of the requirements for the degree of Doctor of Philosophy in the Department of Public Law and Legal Philosophy in the Faculty of Law at the University of the North West

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Date : 1 December 2000

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DECLARATION

I declare that this dissertation for the Degree of Doctor of Philosophy at the University of North West hereby submitted has not previously been submitted by me for a degree at this or any other University, that it is my own work in design and execution and that all material contained herein has been duly acknowledged.

JOSEPH SHIMA SEDUMEDI

ACKNOWLEDGEMENTS

- I wish to express my sincere gratitude and indebtedness to my supervisor, Professor Melvin Mbao, who not only helped me to get the research off the ground, but also continued to provide me with much needed intellectual guidance and stimulation throughout the work.

- I would also like to thank the library staff at the University of the Witwatersrand, who were at all times willing to help in whatever way they could with the research of this thesis.

- I am greatly indebted to the Right Honourable Judge Yvonne Mokgoro of the Constitutional Court of South Africa, who made her library available to me for continued research work on this thesis. I thank the researcher in her office, Mr Lindelani, who worked tirelessly to provide me with the necessary literature.

- My sincere thanks to Mrs Raksha Maharaj for the typing and editing of this thesis.

- Lastly, I would like to gratefully acknowledge and thank my wife, Boitumelo, for her understanding and co-operation when I needed to work for long hours.

DECLARATION BY SUPERVISOR

I hereby recommend that the dissertation by candidate no. 81/00468, J. S. Sedumedi, entitled The acceptance of international human rights norms in the South African Legal System: An Historical and Comparative Study, for the Degree of Doctor of Philosophy in the Department of Public Law and Legal Philosophy, be accepted for examination.

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PROF. M. L. MBAO
SUPERVISOR

DEDICATION

This thesis is dedicated to my wife, Boitumelo, our sons, Refilwe and Obakeng, and our daughter, Lerato.

Joseph Shima Sedumedi
Pretoria, September 2001

TABLE OF ABBREVIATIONS

1.	AA	Ars Acqvi
2.	ACJ	Acting Chief Justice
3.	AJA	Acting Judge of Appeal
4.	ANC	African National Congress
5.	BAD	Bophuthatswana Appellate Division
6.	BGD	Bophuthatswana General Division
7.	BUPO	International Verdrag inzaken Burgerlike en politieke Rechten en Vrijheden
8.	Chicago L.R.	Chicago Law Review
9.	CILSA	Comparative and International Law Journal of South Africa
10.	CJ	Chief Justice
11.	CODESA	Convention for a Democratic South Africa
12.	CSCE	Conference on Security and Co-operation in Europe
13.	ECHR	European Convention of Human Rights
14.	ECOSOC	Economic and Social Council
15.	E.E.C	European Economic Community
16.	H.R.	Human Rights
17.	HRC	Human Rights Commission
18.	HRLJ	Human Right Law Journal
19.	HSRC	Human Sciences Research Council

20.	ICCPR	International Covenant on Civil and Political Rights
21.	ICESCR	International Covenant on Economic, Social and cultural Rights
22.	ICJ	International Court of Justice
23.	I.C.J	International Commission of Jurists
24.	IDAF	International Defence Aid Fund
25.	JA	Judge of Appeal
26.	JJA	Judges of Appeal
27.	MAWU	Metal and Allied Workers Union
28.	NILR	Netherlands International Law Review
29.	NMH	Namibian High Court
30.	NJCM	Nederlandse Jurishen Comitè Meuseurechten
31.	NMS	Namibian Supreme Court
32.	NQHR	Netherlands Quarterly on Human Rights
33.	NVU	Nederlandse Volksunie
34.	OSCD	Older Supreme Court Divisions
35.	Buch.	Buchanan Reports
36.	EDC	Eastern District Court
37.	Off Rep.	Official Reports of the South African Republic
38.	SC	Supreme Court Cases
39.	TS	Transvaal Supreme Court Cases
40.	RDC	Recueil des Cours
41.	S/RES	Security Council Resolution
42.	SA	South Africa
43.	SAJHR	South African Journal of Human Rights

44.	SALJ	South African Law Journal
45.	SAYIL	South African Yearbook of International Law
46.	SWA	South West African Provincial Division
47.	THRHR	Tydskrif van die Hedendaagse Romeins Hollandse Reg
48.	TSAR	Tydskrif vir Suid-Afrikaanse Reg
49.	UDF	United Democratic Front
50.	UN GAOR	United Nations General Assembly Official Reports
51.	UN	United Nations
52.	UNESCO	United Nations Educational, Scientific and Cultural Organisation
53.	UNISA	Unversity of South Africa
54.	VN	Verenigde Naties
55.	Wis. L. Rev.	Wisconsin Law Review
56.	ZaöRV	Zeitschrift Für ausländisches öffentliches Recht und Völkerrecht

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19. Du Toit v Kruger 1905 22 SC 234

20. Ex parte Chairperson of the Constitutional Assembly: In re the Certification of the Constitution of the Republic of South Africa 1996 (First Certification Judgment) 1996 (4) SA 744 (CC

21. Executive Council, Western Cape Legislature v President of the Republic of South Africa 1995 (4) SA 877 (CC)

22. Exparte Ebrahim: In re S v D Maseko 1988 (1) SA 991 A

23. Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council 1999 (1) SA 374 (CC)

24. Ferreira v. Levin 1996 (1) SA 984 (1) (CC)

25. Fraser v. Children's Court, Pretoria North 1997 (2) SA 267 (CC)

26. Ganyile v Minister of Justice 1962 (1) SA 647 E

27. Gandhur v Rand Townships Registrar 1913 AD 250

28. Government of Bophuthatswana v Segale 1990 (1) SA 43 (BAD)

29. Government of the Republic of South Africa v. Grootboom 2000 (11) BCLR 1169 (CC)

30. Harksen v. Lane 1998 (1) SA 300 (CC)

31. Harris v Minister of the Interior 1952 9a) SA 428 AD

32. Hoffman v. South African Airways 2000 (11) BCLR 1255 (CC)

33. Hurley v Minister of Law and Order 1985 (4) SA 709 D

34. Interscience Research and Development Service Pty Ltd v Republica Popular de Mozambique 1980 (2) SA 111

35. Jajbhay v Cassim 1939 AD 537

36. Jooste v. Score Supermarkets Trading (Ptyt) LTd. 1999 (2) SA 1 (CC)

37. Kabinet van die Tussentydse Regering vir Suid-Wes Afrika v Katofa 1987 (1) SA 696 (A)

38. Kaffreira Property Co. Pty Ltd v Government of The Republic of Zambia 1980 (2) SA 709E

39. Kauesa v. Minister of Home Affairs 1995 (11) BCLR 1540 (NMS)

40. Komani N.O. v Bantu Affairs Administration Board Peninsula Area 1980 (4) SA 448 A

41. Kruse v Johnson 1898 (2) QB 91 at p. 99-100

42. Larbi-Odam v. MEC for Education (North-West) 1998 (1) SA 745 (CC)

43. Lotus River, Ottery, Grassy Park Residents Association v. South Peninsula Municipality 1999 (2) SA 817 (CC)

44. Mandela v Minister of Prisons 183 (1) SA 938

45. Metal and Allied Worker's Union v State President 1986 (4) SA 358 D

46. Minister of Law and Order v Dempsey 1988 SA 19 A

47. Minister of Law and Order v Hurley 1986 (3) SA 568 (A)

48. Minister of Justice v Alexander 1975 (4) SA 530 AD

49. Minister of the Interior v Harris 1952 (4) SA 709 (A)

50. Minister of Posts and Telegraphs v Rasool 1934 AD 167

51. Minister of the Interior v Lockhat and Others 1961 (2) SA 597 AD

52. Mistry v. Interim Medical and Dental Councils of South Africa 1998 (4) SA 1127 (CC)

53. Mkwini v Commissioner of Police 1986 (2) SA 421 (CC)

54. Moller v Keimoes School Committee 1911 AD 635

55. Monnakale v Government of the Republic of Bophuthatswana 1991 (1) SA 598 (BGD)

56. Motala v. University of Natal 1995 (3) BCLR 374 (D)

57. Mushapa v Receiver of Revenue, Litchenburg and Others 1958 (3) SA 343 AD

58. Natal Indian Congress v State President 1989 (3) SA 588 D

59. National Party v Jamie N.O. 1994 (3) 483

60. National Coalition of Gay and Lesbian Equality v. Minister of Home Affairs 1999 (3) SA 173 (CC)

61. National Coalition of Gay and Lesbian Equality v. Minister of Home Affairs 2000 (2) SA 1 (CC)

62. Ndlwana v Hofmeyer 1937 AD 229

63. Nduli & Another v Minister of Justice 1978 (1) SA 893 A

64. Nel v Le Roux 1996 (4) BCLR S92 (CC)

65. New National Party v Government of the Republic of South Africa 1999 (3) SA 191 CC

66. Ngqumbu v State President 1988 (4) SA 224 A

67. Nkondo and Gumede v Minister of Law and Order 1986 (2) SA 756 (A)

68. Omar v Minister of Law and Order 1986 (3) SA 306C

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70. Pan African World Airways Incorporated v Fire and Accident Insurance Co. Ltd 1965 (3) SA 150 A

71. Pharmaceutical Manufacturers Association of South Africa: In re: Ex Parte President of the Republic of South Africa 2000 (2) SA 674 (CC)

72. Pickin v British Railways Board 1974 A.C. 765

73. Pretoria City Council v. Walker 1998 ((2) SA 363 (CC)

74. President of the Republic of South Africa v Hugo 1997 (4) SA 1 (CC)

75. President of the Republic of South Africa v South African Rugby Football Union 2000 (1) SA 1 (CC)

76. Publications Control Board v William Heineman Ltd 1965 (4) SA 137 AD

77. Prinsloo v. Van der Linde 1997 (3) SA 1012 (CC)

78. R v Abdurahman 1950 (3) SA 136 AD

79. R v Bunting 1916 TPD 578

80. R v Heyns 1959 (3) SA 634 T

81. R v Lusu 1953 (2) SA 484 AD

82. R v Ngwevela 1954 (2) SA

83. R v Padsha 1923 AD 281

84. R v Pitje 1960 (4) SA 709 AD

85. R v Sisulu 1953 (3) SA 276 AD

86. R v Slabbert 1956 (4) SA 18T

87. Radebe v Hough 1949 (1) SA 380 A

88. Radebe v Minister of Law and Order WL Case no. 14862/96

89. Rossouw v Sachs 1964 (2) SA 551 A

90. S v Adams, State v Werner 1981 (1) SA 187 A

91. S v Angula & Another 1986 (2) SA 540 SWA

92. S v Anzula 1986 (2) SA 540 SWA

93. S v Dawson 1996 (1) SA AD

94. S v Hassim 1973 (3) SA 443 AD

95. S v Heita 1987 (1) A 311 SWA

96. S v Christie 1982 (1) SA 464 AD

97. S v Ebrahim 1991(2) SA 553 A

98. S v Heita 1987 (1) 311 SWA

99. S v Khanyile 1998 (3) SA 795 NPD

100. S v Makwenyane 1995 (6) BCLR 665 (CC)

101. S v Marwane 1990 (1) SA 45 BA

102. S v Moer 1981 (4) SA 604 AD

103. S v Ntuli 1996 (1) SA 1207 (CC)

104. S V Rens 1996 (1) SA 1218 (CC)

105. S v Rudman 1992 (1) SA 343 A

106. S v Thuhadeleni 1975 (2) SA 294 AD

107. S v Williams 1995 (3) SA 632 (CC)

108. S v William and Others 1995(7) BCLR 861 (CC)

109. S v Zuma and Others 1995 (1) BCLR 401 (CC)

110. S v Van Niekerk 1972 (3) SA 711 AD

111. Sacks v Minister of Justice 1934 AD 194

112. Schermbrucker v Klint 1965 (4) SA 606 AD

113. Sobukwe v Minister of Justice 1972 (1) SA 693 AD

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115. South African Defence and Aid Fund and Another v Minister of Justice 1967 (1) SA 263 AD

116. South African National Defence Force Union v. Minister of Justice 1999 (4) SA 469 (CC)

117. Smith v Attorney General 1984 (1) SA 196 (B)

118. Shabalala and Others v Attorneys General, Transvaal and Others 1995 (2) BCLR 1593 (CC)

119. Staatpresident v Release Mandela Campaign 1988 (4) SA 903 A

120. Staatpresident v UDF 1988 (4) SA 830 A

121. Stanton v Minister of Justice 1960 (3) SA 354 (T)

122. State v Ashley Alexander Forbes et al Supreme Court of South Africa (Cape of Good Hope Provincial Division (unreported)), cited in Die Burger on 28 April 1988

123. Tayob v Ermelo Local Road Transportation Board 1951 (4) SA 440 AD

124. Trendtex Trading Corporation v Central Bank of Nigeria 1977 2 WLR 356 (CA) at p. 365

125. Trumpleman v Minister of Justice 1940 TPD 242

126. Van Deventer v Hancke en Noisop 1903 TS 401

127. Wood and Others v Ondangwa Tribal Authorities and Another 1975 (2) SA 294 AD

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1. Liversidge v Anderson 1942 AC 206

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1. Brown v Board of Education 347 US 483 (1954)

2. Missouri v Holland 252 US 416 (1920)

3. Sei Fujii v California 271 P 2d 481 (Cal/Disb. App. 1950)

4. Oyama v California 323 US 633 p.649

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1. Dave Marais v Madagascar, Communication No. 49/1979

2. John Wright v Madagascar, Communication No. 115/1982

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25	1945	Bantu (Urban Areas) Consolidation Act
26	1978	Proclamation AG26 (SWA)
27	1951	Bantu Buildings Workers Act
28	1956	Industrial Conciliation Act
30	1950	Population Registration Act
33	1980(B)	Criminal Procedure Act
41	1950	Group Areas Act
45	1959	Extension of University Education Act
46	1951	Separate Representation of Voters Act
47	1953	Bantu Education Act
49	1953	Reservation of Separate Amenities Act
51	1979	Criminal Procedure act
55	1949	Mixed Marriages Act
74	1982	Internal Security Act
76	1962	General Laws Amendment Act
83	1967	Terrorism Act
101(R)	1985	Fundamental Rights Proclamation (SWA)
110	1983	Republic of South Africa Constitution Act

200	1993	Constitution of the Republic of South Africa (the Interim Constitution)
108	1996	Constitution of the Republic of South Africa (the Final Constitution)

CHAPTER ONE: INTRODUCTION

1.0 STATEMENT OF THE PROBLEM

The focus of this research concerns the supremely important question of the acceptance of international human rights norms in the South African legal system. The research will also discuss the relationship between the international law of human rights and the South African legal order in a historical and comparative analysis.

For many decades South Africa refused to become party to any of the recognised international instruments. In 1948 South Africa abstained from adopting the Universal Declaration of Human Rights. Whereas 1948 was the year of the adoption of the Universal Declaration of Human Rights, in South Africa it marked the introduction of apartheid as an institutionalised legal order[1]. Our study endeavours to find out how the South African courts reached to this and whether they indeed observed these human rights norms. In order to achieve our goal we will investigate the pre-1948 legal order and the era between 1948 and 1994. We will also discuss the new dispensation starting from 1994 up to September 2000.

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[1] This does not mean that no discriminatory legislation exited in 1948.
See also Ozdemir, O. in Apartheid: The United Nations and Peaceful Change in South Africa (1982) Transitional Publishers, Houndmills at p. 181

1.0.1 THE COLONIAL ERA

The factor of race has bedevilled the workings of South African Courts throughout the colonial era and the post Union period down to 1994. On the one hand there has been the legitimate demand that South African Courts should adhere to the ideal of impartial justice, and administer justice without fear or prejudice. On the other hand, the main body of South African Courts had functioned as the outgrowth of and as an adjunct to the white government, and had been made to feel acutely the impact of pressures and prejudices. On repeated occasions during South Africa's history, important elements of the white populace had striven to make the courts a bulwark for the preservation of their exclusivity and their property-based values.

In 1910, the Appellate Division became the pre-emanate Court in South Africa except for further appeal to the Privy Council which lasted until 1950. Initially the judges of the Appellate Division expressed their commitment to an administration of justice which was free of racial discrimination. For example in Radebe v. Hough[2], Hoesta A.J.A declared that, in assessing damages for pain and suffering, most decidedly the victims character cannot be determined by race.

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2 1949 (1) SA 380 (A) at p. 385

However, the Appellate Division had laboured under factors that had circumscribed its freedom of action in racial matters. First the period since 1910 witnessed an enormous increase in the amount of racially-discriminatory legislation and administrative rules. Secondly, the judges of the Appellate Division were appointed on the advice of an executive responsible to a white electorate. Both factors weighed heavily upon the Appellate Division, especially since the coming to power of the National Party Government in 1948. Between the years 1950 and 1980, the Government introduced an unprecedented range of racial laws for the purpose of implementing a national racial policy.

Furthermore, from 1950s, the Government appointed a number of Appellate Division judges who readily earned the label of being "executive-minded". Most prominent of these was L. C. Steyn, Chief Justice between 1959 and 1971. Steyn C.J.s (as he then was) empathetic approach to the Government's programme of legislative racialism facilitated the development of an Appellate Division that acquired the image of being establishment-minded.[3]

In this context, it is not surprising that the Appellate Division's recurrent attitude in the years between 1910 and 1980, was to resist challenges to

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3 Cameron, E. Legal Chauvinism, Executive-Mindedness and Justice – L. C. Steyn's Impact on African Law (1982) 99 SALJ 38 at p. 74-5

fundamental government policies and to adopt a role which was sympathetic to government strategies. This was evident in a wide range of case law that will be discussed in much detail in Chapter 3 of this research.

While acknowledging the generally passive role that the Appellate Division played in racially-discriminatory legislation, it must be noted that, on several occasions[4], activist minority judgments indicated that not all the appeal judges shared the Courts quiescent stance. A classic example of this was Schreiners J. A's dissenting judgment in the Collins case.[5]

However, the 1980s witnessed certain remarkable decisions of the Appellate Division that had been heralded as marking a relatively distinct break with the past.[6] In Komani N.O. v Bantu Affairs Administration Board, Peninsula Area[7], Oosrandse Administrasieraad en 'n ander v. Rikoto[8], the Appellate Division gave judgments in favour of black urban residents and effectively challenged Government policy in an unprecedented way. In the Komani case, supra, the Appellate Division gave sanction to the wife of a qualified black man living in the city with him. In Rikhoto case the Appellate Division gave wide berth to the provision that a black person who had worked continuously in an urban area for one employer for a period of not

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4 Stratford C.J. in Jajbhay v. Cassim 1939 AD 537

5 1957 (1) SA 552 (A)

6 Forsyth C.F. In danger for their Talents, 1985

7 1980 (4) SA 448 (A)

8 1983 (3) SA 595

less than ten years should have the right to remain in the urban area. The effect of these judgments was to undermine seriously government policy by assuring urban residence rights to many blacks who had apparently lacked them.

The Appellate Division's shift in attitude, which had been reflected also in security matters[9], must be seen against the political background of the time. The 1980s witnessed an increasing rejection of old-style apartheid in South Africa's ruling circles, and this had been particularly evident in such area as influx control and, to a lesser extent, forced removals. Furthermore, there were public interest agencies such as the Legal Resources Centres, which had effectively taken up and argued test cases affecting blacks in an unprecedented way. [10] It is submitted that South Africa was not yet a member of the family of civilised nations at the time, but nothing prevented the courts to use Common Law principles to decide in favour of the individuals should it be necessary to do so. The cases of Rikhoto and Komani, supra, bear testimony to this.

1.0.2 THE APARTHEID ERA

It has been said that the majority of South Africans accorded less legitimacy to their laws than perhaps any other governed group in modern society.[11]

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9 Minister of Law and Order v. Hurley 1986 (3) SA 568(A)

10 Forsyth op cit. 90

11 Sachs A. "Instruments of Dominaton in South Africa" (1975) SALJ Vol. 3 p. 223

For the majority of black South Africans, apartheid had little appeal due to its failure to meet their economic and political needs: the white domination secured by the apartheid state was by definition inimical to black interests. Where rule by consensus was weak control through coercion became imperative.[12] As the criminal justice system was par excellence the instrumentality of state power, the constituent parts of the system – the criminal law, the police, the courts and the prisons played an important, if not, pervasive role in the construction, maintenance and continuance of the apartheid state. The military force used in the 19th century to subjugate blacks has been replaced in the 20th Century - by coercion mediated by the criminal justice system. Although the 1985 and 1986 declarations of states of emergency suggested a return to rule by the military gun and caspir rather than through the law and the legal process, we will later, through decided cases in Chapter 3, assess the consequences of the blatant political use of the criminal justice system.

The advent of National Party rule in 1948 led to the refinement, consolidation and extension of the then existing practices of racial segregation and white dominance, now under the overarching ideology of apartheid. The policy of apartheid, based on a rigid system of race classification, attempted to exclude blacks from the political, social and economic worlds of whites while retaining their labour and the criminal

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12 ibid, at 224

sanction was used extensively to affect the basic structure. The rigidity and ideological vehemence with which the Nationalist government consolidated the apartheid state evoked black opposition of an equal magnitude. The state sought to repress this resistance by criminalizing it. An outline of the offences aimed at the creation of apartheid is fully discussed in Chapter 3 of this research.

We may mention the role of the police in the policing of the Apartheid. The South African Police was the primary law enforcement agency of the executive, and has played an instrumental role in the construction and maintenance of the apartheid state.

The use of the police to enforce apartheid legislation had a twofold effect on general law enforcement – first, the deployment of such a large portion of police force resources to maintain the apartheid structure had diminished their ability to perform their primary task of protecting society through the prevention and investigation of crime. Secondly, the enforcement of apartheid laws had compromised their traditional role as the protectors of society. The arrest of millions of blacks, most often in humiliating and degrading pass raids, had firmly established their image as the aggressors.

The police have also played a key role in dealing with political opposition to apartheid. The special machinery created to meet this challenge was the

Security Police and it had achieved a dominant place in the South African Police. In 1969 the security apparatus was complemented by the Bureau of State Security, renamed and reshaped after the Information scandal, first as the Department of National Security and later as the National Intelligence Service.

The unbridled executive powers granted to these institutions created a state that recognized little control over their action. General Van den Bergh, the former head of the Bureau of State Security, told the Erasmus Commission that he did not consider himself to be bound by the law.[13] In practice this resulted in arbitrary decision-making and conduct. Where the Supreme Court Jurisdiction was ousted, for example, over the indefinite detention of persons for the purpose of interrogation, evidence of the abuse of police powers abounds. Since the inception of the incommunicado detention in 1963 over fifty persons died in detention.[14] A study undertaken at the time revealed that of 176 former detainees questioned, 83% claimed that they were subjected to physical abuse and torture.[15]

Where, by executive fiat, large numbers of persons had been banned, organizations outlawed, meeting prohibited, and thousands of persons

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13 See also the comment by Col. Goosen in the Biko inquest that his men did not work under statutes.

14 Mathews A. S., "Freedom, State Security and the Rule of Law – Dilemmas of the Apartheid Society" (1986) SALJ p. 39

15 Luyt C., "The Blue man's burden: policing the police in South Africa" (1986) SAJHR p.297

detained without facing a criminal trial, there is much truth in the observation that the statutory powers of the police had replaced martial law as the main means of counteracting actual or threatened rebellion.[16] Where political domination was thus maintained by the police largely outside judicial control, the very foundation of the state is undermined and further suggested that South Africa had become a police state. We now look at the role of the courts.

In an analysis of the machinery of domination in South Africa, the role of the courts cannot be under-estimated. Although executive branches played an increasingly important role in the implementation and protection of apartheid, domination had been largely exercised through the law rather than outside it, with coercive violence mediated by the courts.[17] The court process in the form of commissioners' courts was explicitly used for the control of blacks in urban areas. Less overt was the control exercised by the lower courts, where offences primarily affecting blacks were efficaciously enforced. The prosecution of political opponents in the Supreme Court, although not extensive had been of great ideological significance in the legitimization sought for the elimination of political opponents.

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16 Sachs, supra, at p.239

17 Sachs, supra, at p.227

Although separate courts for blacks were initially justified by the application of customary law and procedure in criminal proceedings, they were used increasingly from 1902 onwards for the enforcement of influx control.[18] From 1927, when the Commissioner's courts were established on a national basis, their criminal jurisdiction was employed for the enforcement of native policy and ordinary criminal procedure was applied.

The lower courts in general, and the magistrates courts in particular, complemented the commissioners courts in the processing of race-based crimes and general offences which were prosecuted primarily in relation to blacks. Although these courts adhere more to the principles of a fair trial than the Commissioner's courts, their process was not less effective in securing convictions. Because the proceedings were adversarial, the attainment of procedural justice was predicated on the skillful service of a lawyer. As the vast majority of black accused were illiterate or undereducated and indigent, and hence undefended, they were crippled by their forensic ignorance and incompetence from challenging the prosecution. Their inability to participate effectively in the proceedings resulted in arbitrary and discriminatory bail practices, high conviction rates and hasty sentencing.[19] Hardly any attempt was made however, to provide state-funded legal aid to indigent accused persons. They were not

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18 Transvaal Proclamations 21 of 1902 see also section 57 of Act 40 of 1902

19 Steytler N.C., The Undefended Accused on Trial: Justice in the Magistrate's Court (1986) Unpublished PHD Thesis, University of Natal

informed of their right to apply for assistance.[20] Although the rules of criminal procedure were formulated in universal terms, the structural inequality among accused persons had reduced the principle of equal and impartial justice to mere rhetoric.

Where the legal process was inaccessible to the majority of blacks, and administered by court officials who were predominantly white, it was understandable that a black accused would be skeptical as to whether there was equal justice. Years of exploitation and repression, primarily through the legal system, led to an increased questioning of its legitimacy[21]. We now look at the operations of the Supreme Court.

In view of the Supreme Court's attributes of independence and judicialism, the state's approach to this institution was twofold. First, where applicable, it exploited the legitimization the court could render to execute action particularly in the prosecution of political opponents; secondly, it sought to exclude the courts supervising and controlling powers over administrative actions when these related to political opponents. Both these strategies however, affected the Supreme Court's image and status profoundly.

The legitimization function which political trails were expected to perform

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20 Legal Aid Board Annual Report 1984 at p. 81

21 See Main Committee of the Human Sciences Research Council Investigation into Inter-group Relations - The South African Society: Realities and Future Prospects (1988) p. 166

were subverted by legislative tampering with the normal rules of procedure. The courts jurisdiction over bail could be ousted by the Attorney-General, [22] and it could be compelled, at the direction of the Minister of Justice, to try a case falling outside its territorial jurisdiction.[23] The proceedings could further be heard in camera.[24] The court's power to uphold a plea of double jeopardy was curtailed in relation to a charge of sabotage and terrorism.[25] The extensive use of pre-trial detention of accused and state witnesses often reduced the trial to an appeal from a "conviction" obtained during solitary confinement.[26] The use of presumptions whereby an accused was burdened with the onus of disproving intent,[27] further disturbed the balance between the prosecution and the accused. The imposition of mandatory minimum sentences[28] made the court the mouth-piece of the legislature.

Where the court had to operate under reduced standards of due process the fairness of the trial would be in doubt and the courts credibility would be diminished.[29] The state's use of such an attenuated court process to legitimate the elimination of its political opponents did not only fail on an

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22 Section 30 of Act 74 of 1982

23 Section 68(1) of Act 72 of 1982

24 Section 65 of Act 74 of 1982

25 Section 5(4) of Act 74 of 1982

26 Escobedo v. Illionois 378 US 478 787-8 (1984)

27 Section 21 of Act 76 of 1962

28 Section 11 of Act 44 of 1950

29 Mathews, supra, at p. 29

ideological level,[30] but more importantly, compromised the independent status of the courts, the very factor through which authentication was sought.[31]

The identification of the judiciary, with the security laws, was further strengthened by the judiciary's acquiescence and/or acceptance of the political expediency underlying the legislation's form and content. The Internal Security Act of 1982 was the product of the Rabie Commission, chaired by Mr. Justice P. J. Rabie, who was later appointed Chief Justice.[32] It is submitted that a charge of dereliction of duty against the court could be sustained because it failed, with some exceptions, to protect individual liberty, to understand and apply the requirements of due process, to check or restrain arbitrary action and to speak resolutely against uncivilized and sometimes barbarous official behaviour. One can conclude that the status of the Supreme Court as protector of individual rights and liberties, was tarnished both by the security laws it had to apply and the compliant way in which this had been done.

As indicated earlier in this Chapter, we are gong to discuss case law pertaining to the Apartheid era in detail in Chapter 3. From what we have

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30 Mathews, supra, at p. 31

31 See the delegation of the International Commission of Jurists Complete identification of the judiciary with the laws they apply, Sunday Tribune, 22 March 1977

32 Die verlsag can die Kommissie van Ondersoek van Veiligheidswetgewing RP 90/1980

discussed so far, it clearly appears that it was desirable to have a Bill of Rights in South Africa. The other important factor is that the lower courts never had the necessary independence right from the time of the Union until today. This is one area where the system needs a total overhaul. We will come to this in our conclusions to show that the lower courts, even in the new dispensation, needs to be empowered in order to apply the international human rights norms in their deliberations. Our courts still suffer the crisis of legitimacy in the eyes of the African people. As at February 1993, the developments at the political level were not reflected in the South African legal system yet. The legal system still faced a crisis of legitimacy associated with or brought on by minority domination.[33]

The crisis of legitimacy on the level of the judiciary was succinctly articulated by Nelson Mandela in his trial in 1962 in these seminal words:

> In a political trial such as this where the aspirations of the Blacks and Whites are opposing each other, the courts of the land as they are constituted now just cannot be independent and impartial. .... a judiciary totally controlled by and upholding laws promulgated by a White parliament in which we are not represented, laws which are promulgated despite the unanimous resistance of the Black population, such a judiciary cannot be regarded as

33 This crisis was also recognised by official sources, i.e. the Report of the Commission of Inquiry into the Structure and Functioning of the Courts (RP78/1983)

> impartial in a political process where a Black man is standing trial. Why is it that in this courtroom I am faced with a White magistrate, confronted by a White prosecutor and escorted into the dock by a White orderly? Why is it that no African in the history of this country has ever had the honour of being tried by his own kith and kin? I detest violently the set-up that surrounds me here. It makes me feel that I am a Black man in a White man's court. [34]

1.0.3 THE NEW DISPENSATION (1994 – 2001)

In order to appreciate the fundamental changes brought in by the changes of 1994, it is essential and imperative, to critically analyse and document discerning changes in the attitude of the judiciary, in particular the influence of international human rights norms. The Interim Constitution came into force on 27 April 1994. Its effect on the South African Legal System can justifiably be described as revolutionary.

It must be remembered that it was not until 1990 that the South African government indicated a willingness to change. It legalised and unbanned political organisations, released political prisoners, terminated the state of emergency and abolished other key elements of the apartheid legislation such as the Population Registration Act of 1950; the Group Areas Act of

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[34] Mandela R.N., The Struggle is my life, IDAF (London, 1986) at pp. 134-138

1966; the Land Act of 1983 and the Reservation of Separate Amenities Act of 1953.

With the advent of democracy in South Africa, the significance of the rule of law to the process of democratisation created a uniquely important role for the courts to apply human rights norms in their decisions. The judicial branch is the institution normally charged with the enforcement of the Constitution, human rights and other democratic procedures in constitutional democracies. Ideally, though the application of judicial or constitutional review, judges do not only mediate conflicts between political actors but also prevent arbitrary exercise of government power.[35]

1.0.3.1 THE INTERIM CONSTITUTION (1994)

Basically, the Interim Constitution brought about three fundamental changes:

1. For the first time in South Africa's history, the franchise and associated political and civil rights were accorded to all citizens without racial qualification. The Interim Constitution brought to an end the racially- qualified constitutional order that accompanied three hundred years of colonialism, segregation and apartheid.

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35 Larkin, "Judicial Independence and Democratization: A Theoretical Conceptual analysis" American Law Journal Comparative Law 1966, Vol. 4. p. 605

2. The doctrine of parliamentary sovereignty was replaced by the doctrine of constitutional supremacy. A Bill of Rights was put in place to safeguard human rights, ending centuries of state-sanctioned abuse. The courts were empowered to declare law and conduct inconsistent with the Bill of Rights and the Constitution invalid.
3. The strong central government of the past was replaced by a system of government with federal elements. Significant powers were devolved to the provinces and local government.

The Interim Constitution was formally adopted as an Act of the pre-democratic Tri-cameral Parliament, ensuring the continuity of the South African State. After the 1994 elections, the new Parliament and Government of National Unity were established and began to function in accordance with the Interim Constitution.

The Interim Constitution was a transitional Constitution. One of its principal purposes was to set out the procedures for the negotiation and drafting of a final Constitution. Once the 1996 Constitution was adopted the Interim Constitution fell away. But, in spite of its transitional status, the Interim Constitution was nevertheless binding, supreme and fully justiciable. Because the Interim Bill of Rights was for the most part similar to that in the 1996 Constitution, most of the judicial decisions on rights handed down under the Interim Constitution remain binding. We will attempt to show that

under the new dispensation the courts more particularly, the Constitutional Court applied International Human Rights Norms in its decisions. In most of its decisions it referred to comparative international law as well as to foreign law. It is the focus of this thesis to show that while under the new dispensation, courts applied international human rights norms, not all the courts, especially lower courts, can be credited with this phenomenon. We will also endeavour to show the constraints placed on these lower courts to apply these norms and make recommendations as to empower these courts to accept and apply International human rights norms in their practice.

1.0.1.2 THE 1996 CONSTITUTION

The 1996 Constitution completed South Africa's negotiated revolution. Whereas the Interim Constitution was not past of a democratically-elected body, the 1996 Constitution was drafted and adopted by an elected Constitution assembly.[36] The Constitutional Assembly was given two years to produce a constitution that conformed to the 34 Constitutional Principles that had been agreed upon during the 1991-1993 political negotiations.[37] In order to ensure that the final Constitution conformed to the Principles, the Constitutional Court was required to certify the draft final constitutional

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36 The Constitutional Assembly was effectively the Parliament that had been elected in 1994 elections with a different name.

37 The Principles were contained in Schedule 4 and governed by Chapter 5 of the Interim Constitution.

text.[38] The Court held, inter alia, that the provisions of the draft constitution relating to provincial powers, local government, entrenchment of the Bill of Rights and the Public Service Commission did not comply with the Constitutional Principles.

The Constitutional Assembly then reconvened and made several changes to the May text in order to comply with the decision of the Constitutional Court. The amended text passed on the 11 October 1996 was once again submitted to the Constitutional Court. This time, the Court found the text to be consistent with the Constitutional Principles.[39] The Constitution was signed into law by President Nelson Mandela at Sharpville on 4 February 1997, bringing to a close a long and bitter struggle to establish constitutional democracy in South Africa. The 34 Constitutional Principles were a framework for the creation of a democratic state with a supreme constitution in which the fundamental rights and freedoms of all were protected.[40]

The basic principles and features which underlie the new constitutional order are constitutionalism, the rule of law, co-operative government, devolution of power, democracy and accountability, separation of powers

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38 Ex-parte Chairperson of the Constitutional Assembly: in re Certification of the Constitution of the Republic of South Africa 1996 (First Certification Judgment) 1996 (4) SA 744 (CC) par. 13

39 Certification of the Amended Text of the Constitution of the Republic of South Africa, 1996 (Second Certification Judgment) 1997 (2) SA 97 (CC)

40 First Certification Judgment (note 38 above) paragraph 34

and checks and balances. Some of the basic principles are expressly entrenched in the text of the Constitution, while others – such as constitutionalism and separation of powers are implicit in the new constitutional order. The principles nevertheless are all justiciable in the sense that any law or conduct inconsistent with them may be declared invalid. But the basic principles do more work than this. They tie the provisions of the Constitution together and shape them into a framework that defines the new constitutional order. The basic principles therefore have a broader effect on the Constitution in that they influence the interpretation of many other provisions of the Constitution, including the provisions of the Bill of Rights. The Constitution in turn, shapes the ordinary law and must inform the way legislation is drafted and interpreted and the way the courts develop the common law.

While the principles provide the blueprint for the new constitutional order, there are sound reasons why the basic features must be sparingly invoked by judges when resolving legal disputes. Immediate direct reliance on the basic principles turns the proper inquiry on its head. Legal disputes should be resolved wherever possible by reference to the rules and principles of ordinary law, interpreted in a way that gives effect to the provisions of the Constitution. More over as was stated above, the specific provisions of the Constitution are shaped by the basic principles. As a rule, therefore, a

specific provision must be applied before a general provision.[41] The reason for this is not that the basic principles are not justiciable. Rather, it would be contrary to some of the basic principles themselves, most clearly democracy and the doctrine of separation of powers, if the courts were to disregard the concretisation of these principles in specific constitutional provisions and ordinary law in favour of their own interpretation of their meaning.

The courts must respect the implementation of the basic principles by the democratically-elected legislatures, whether it is in legislation or in the specific provisions of the Constitution. In addition, the courts must leave room for the legislatures to give effect to the Constitution (including the basic features) by first applying the common law and ordinary legislation, rather than imposing their view on the meaning of the Constitution by directly applying it.

As discussed above in this introduction Chapter the first principle, constitutional supremacy, dictates that the rules of the Constitution are binding on all branches of the government and have priority over any other rules made by the government. Any law or conduct that is not in accordance with the Constitution, either for procedural or substantive

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41 For, example, in most cases, there would be no point in relying directly on the value of equality that is declared in Section 1 to be one of the founding provisions of the Constitution to test the validity of a law or conduct. This is because section 9 of the Bill of Rights is a detailed elaboration of this value.

reasons, will therefore not have the force of the law.[42] Section 2 of the Constitution gives expression to the principle of constitutional supremacy. It states that the Constitution is the supreme law of the Republic: law or conduct inconsistent with is invalid, and the obligations imposed by it must be fulfilled.[43] Section 8 provides that the Bill of Rights has supremacy over all forms of law and that the Bill of Rights binds all branches of the state and, in certain circumstances, private individuals as well.

Constitutional supremacy would mean little if the provisions of the Constitution were not justiciable. For a supreme constitution to be effective the judiciary must have the power to enforce it. Section 172 provides that, provided that it has the jurisdiction to do so, a court must declare any law or conduct that is inconsistent with the Constitution invalid to the extent of its inconsistency. Court orders must be obeyed by the other branches of the state. According to Section 165(5) an order or decision issued by a court binds all persons to whom and organ of state to which it applies.

When the court uses its powers of judicial review to strike down, for example an Act of Parliament, it is arguable that in doing so it thwarts the

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42 Executive Council of the Western Cape Legislature v. President of the Republic of South Africa 1995 (4) SA 877 (CC) p. 62

43 See Section 237 of the Constitution "All constitutional obligations must be performed diligently without delay."

will of the people.[44] Should the courts have the power to do so? Just as the Bill of Rights has greatly increased the powers of the courts, the new Constitution has given the other branches of the state a great deal more legitimacy than they had in the past. Under Apartheid, the racially-exclusive Parliament and executive were anything but proper democratic institutions. In such a context it was easy to justify calls for a Bill of Rights and calls to give the courts the power to uphold human rights by striking down government decisions.[45] Why should courts and the unelected judges who staff them have the power to strike down the decisions of a democratic legislature and a democratic representative government?

The idea of constitutionalism provides an answer to this argument. Democracy is not simply the rule of the people but always the rule of the people within certain predetermined channels, according to certain pre-arranged procedures.[46] From this perspective, the pre-commitment to certain procedural and substantive constraints on the power of the majority that are inherent in constitutionalism make democracy stronger not weaker. The new Constitution is a democratic pre-commitment to a government that

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44 Bickel A., "The Least Dangerous Branch" (1962) SALJ Vol. 2 p. 16-17 e.g. the Constitutional Court invalidating the death penalty in the face of overwhelming public opinion for its retention.

45 Van der Vyver, J. D., "Parliamentary Sovereignty, Fundamental Freedoms and a Bill of Rights" (1982) 99 SALJ 557 at p. 553

46 Holmer S., "Precommittment and the Paradox of Democracy" (1988) SALJ Vol. 44 p. 231

is constrained by certain rules, including the rule that a decision of the majority may not violate the fundamental rights of an individual.

The fact that the provisions of the Constitution are justifiable does not mean that the courts are the only way to enforce them. The Constitution is not only enforced through litigation but through a number of other democratic means. The principle of democracy means that citizens are entitled to lobby and pre-criticise the government to give effect to their right. The importance of a free press in ensuring that the government keeps tot is commitments and that it does not abuse its powers should not be underestimated. More over Chapter 9 of the Constitution creates a number of state institutions supporting constitutional democracy. Of these, the Human Rights Commission, the Public Protector, the Commission for Gender Equality, the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities have important roles to play in the protection and enforcement of human rights.

The third principle, entrenchment, prevents parliament from amending the Constitution without following special procedures and without the support of the special majorities. Section 74 deals with amendment. The manner and form requirements for amending the Constitution are complex, since some sections of the Constitution may be amended by a two-thirds majority of the

National Assembly, an amendment of the Bill of Rights must also be passed by six provinces in the National Council of Provinces.

The idea of constitutionalism is bolstered by the specific entrenchment of the rule of law in the founding provisions - Section 1 of the Constitution. As originally conceived by the English Constitutional Lawyer, A. V. Dicey more than a century ago, the purpose of the rule of law was to protect basic individual rights by requiring the government to act in accordance with pre-announced, clear and general rules that are enforced by impartial courts in accordance with fair procedures.[47] Put at its simplest, the rule of law requires state institutions to act in accordance with the law. This means two things. The first is that branches of the state must obey the law. The second is that the state cannot exercise power over anyone unless the law permits it to do so. This means that there must be a law authorising everything the state does.[48] If it acts without legal authority it is acting lawlessly, something that a constitutional democracy cannot permit.

The South Africa courts have provided little guidance on the meaning of the rule of law. Not surprisingly, the courts avoided referring to the concept altogether in a pre-democratic era. In the new dispensation, the High (superior) Courts have referred periodically to the rule of law but have made

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47 Dicey A.V., An Introduction to the Study of Laws of the Constitution 10ed (1959)

48 President of the Republic of South Africa v Hugo 1997 (4) SA 1 (CC) par. 8

no attempt to define it.[49] The Constitutional Court has, however, made decisive use of the principle in a number of cases.

The first of these was Fedsure Life Assurance Ltd. v Greater Johannesburg Transitional Metropolitan Council[50] which was decided under the Interim Constitution. The lawfulness of a substantial increase in property rates levied by the Council was challenged. The Court held that the exercise of legislative powers by an elected local government was not administrative action for purposes of Section 241.[51] This did not, of course, mean the local government legislation was beyond constitutional control. Local Government had to act within the powers lawfully conferred on it. This is a fundamental principle of the rule of law that is in turn a fundamental principle of constitutional law. Legislation or conduct must be fully authorised by the Constitution and the law. In this case, the Council had to act within the corners of its constitutional mandate and the specific laws governing local government.

In New National Party v Government of the Republic of South Africa[52] the Court took the rule of law principle to a new level. The case involved a challenge to provisions of the Electoral Act 73 of 1998 that provided that

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49 National Party v. Jamie Mo 1994 (3) SA 483 p. 429F

50 1999 (1) SA 374 (CC)

51 ibid, at paragraph 41

52 1999 (3) SA 191 (CC)

voters could only register on the voters roll and subsequently vote if they produced a bar-coded identity document issued after 1986, or a temporary identity certificate. The essence of the challenge was that the practical effect of these requirements would be a violation of the right to vote of millions of people who did not have the proper documentation. A majority of the Constitutional Court, Parliament was empowered by the Constitution to require potential voters to identify themselves. This is in order to comply with the Constitution's insistence on a national common voters roll and free and fair elections. Two constitutional constraints are placed on Parliament in the exercise of its power. The first is that there must be a rational relationship between the scheme that it cannot act capriciously or arbitrarily. To do so would be inconsistent with the rule of law that is a core value of the Constitution. The absence of a rational connection will result in the measure being unconstitutional. The second constraint is that the electoral scheme must not infringe any of the fundamental rights enshrined in Chapter 2 of the Constitution.[53]

In Harksen v. Lane N.O[54] it was decided that there would be a violation of Section 9(1) of the Constitution if a measure differentiates between categories of people and the differentiation does not bear a rational connection to a legitimate government purpose.

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53 Ibid, at paragraph 20-24

54 1998 (1) SA 300 (CC) para. 53

The case of President of the Republic of South Africa v. South Africa Rugby Football Union[55] put the enquiry back on its feet. The case dealt with the power of the President in terms of Section 84(2)(b) of the Constitution to appoint Commissions of Enquiry. The Constitutional Court held that the exercise of the power did not constitute administrative action. This was because the power was political and did not involve the implementation of legislation. An exercise of the power could therefore not be challenged as a violation of the administrative justice right.

In Pharmaceutical Manufacturers[56] case the Constitutional Court had to consider the basis on which the exercise by the President of a power granted by an Act of Parliament to bring the Act into operation was constitutionally reviewable. The power, it was held, through derived from legislation and close to the administrative process was not administrative action. Instead the power that was given to the President lay between the law-making process and the process of the administrative of the legislation. Although not administrative action and therefore not subject to the administrative justice right in the Bill of Rights, the President's conduct was,

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55 2000 (1) (SA) 1 (CC)

56 Pharmaceutical Manufacturers Association of South Africa: In re: ex-parte President of the Republic of South Africa 2000 (2) SA 674 (CC)

however, an exercise of public power which had to be carried out lawfully and consistently with the provisions of the Constitution.[57]

In Chief Lasapo v North Wet Agricultural Bank[58] the Court followed the SARFU sequence of analysis, treating the provisions of the Bill of Rights as an elaboration of general principles implied by the rule of law. The decision holds that self-help, in the sense of taking the law in one's own hands, is inimical to a society in which the rule of law prevails.[59] The right of access to court in Section 34 of the Constitution is an elaboration of this foundational principle in that one of its purposes is to guarantee the protection of the judicial process to persons who have disputes that can be resolved by law, thereby avoiding the need to resort to self-help.[60]

In this introductory chapter we have only dealt with the nature of the new Constitution and a few cases to illustrate that in the new order the rule of the law and constitutionalism prevail. We have indicated how the Constitutional Court have interpreted the Constitution. In Chapter 4 we will deal extensively with case law in trying to show how international human rights norms have been accepted into the South African legal system.

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57 ibid, at paragraph 79

58 2000 (1) SA 409 (CC)

59 ibid, at paragraph 11

60 ibid, at paragraph 16

1.1 OBECTIVES OF THE STUDY

The main objective of this study is to assess the acceptance of international human rights norms in the South African legal system in an historical perspective. This study undertakes to assess the effectiveness of the judiciary in its application of international human rights norms and extract some lessons that can be learnt from these experiences, with a view to providing better information and guidance to future similar activities in government and the courts in particular. The role played by the judiciary is particularly important in that unless the judges embrace the new order, the rights in the constitution cannot be realized. More specifically the objectives of the study are:

1.1.1 To identify prospects and problems, if any, in the acceptance of international human rights norms; and

1.1.2 To identify lessons from South Africa or other comparable constitutional democracies from which future policy-makers can learn; and

1.1.3 To determine how the lower courts can be empowered in order to enable them to embrace and apply international human rights norms in their application of the law.

1.2 DATA COLLECTION

Data for this thesis was gathered in two main ways. First, by analysis of primary and secondary sources, namely:

(a) Official publications such as statutes, statutory instruments, regulations, court decisions, reports of commissions of inquiry, government green and white papers on policy and legislation as well as public ministerial pronouncements on matters of policy.

(b) Legal documents found in the libraries of the University of the Witwatersrand and UNISA.

(c) Published books and unpublished thesis found at these institutions.

(d) Articles in journals and monographs.

(e) Field work through structured and unstructured interviews.

Secondly, through personal observation during court sessions and in-depth interviews with people and institutions possessing detailed and practical knowledge of the subject under investigation. A full list of those interviewed is given as an Annexure "B" to this thesis.

A large Part of the data collection is through participant observation by the researcher who has worked in the magistrate's court for many years in both the districts courts and the regional courts. The researcher started as an

interpreter in court and later promoted to become Deputy State Attorney and Principal State Law Adviser in the Department of Justice.

1.3 RESEARCH METHODOLOGY

The methodology includes document research, analysis of legal materials in their social political order, as well as non-legal materials informed by history. Through this methodology the study aims at capturing and understanding the acceptance or otherwise of international human rights norms in the South African legal system.

1.4 LITERATURE REVIEW AND POINT OF DEPARTURE

There is no comparative work on the subject under investigation and, even if, there is any the works are now obsolete having been written during the sixties and seventies. I am now building on the existing literature.

1.5 RATIONALE AND JUSTIFICATION

The research is an original and pioneering work in that it contributes to current knowledge in the subject. The research on the acceptance of international human rights in the South African legal system is new and no one has ever written about the topic. This is an in-depth study to find out whether human rights norms are applied across the board in our legal system and not only by the Constitutional Court but all courts in South Africa. The aim is to identify the weaknesses in the legal system and

recommend corrective measures. In our conclusions and recommendations in Chapter 6 we will recommend certain measures to rectify the weakness identified through our research. My research differs with any other research done previously in that it involves also the attitudes of the judiciary in their approach and acceptance of international human rights norms in our legal system.

1.6 SCOPE AND LIMITATION OF STUDY

1.6.1 In Chapter One an outline is presented of the focus of the research, its importance and relevance, the modus operandi as well as the subsequent order in which the subject will be treated.

1.6.2 In Chapter Two we present a more detailed picture of the international law of human rights. Attention will be given to the existence and operation of an international law of human rights and its historical development. We will consider the historical development of the international law of human rights in terms of the need for such internationalization of human rights and we will briefly view the effect of this development on the theoretical approaches of monism and dualism. The legal principles on the individual as a subject of international law are also discussed. We will also establish that while this development laid great emphasis on public international law, this could not be at the extension of the domestic legal order.

1.6.3 In Chapter Three the Old South African legal landscape will be examined in order to consider in particular what the attitude of the South African Judiciary to public international law were and how international norms could have best found application in the country. We will concentrate upon two fields of the old South African law, namely, constitutional law and public international law. The then South African judiciary and its role in the recognition of international human rights norms will then be considered by way of case law delivered during the colonial and the apartheid eras, i.e. between 1948 and 1994. Cases that pre-date 1948 from 1909 to 1948 will also be discussed. It is through these decided cases that we will attempt to show how the pre-1994 courts failed to apply international human rights in their deliberations. It is submitted that South Africa was not, as yet, a member of the family of civilised nations, but the courts could at least have used common law principles in its handling of subordinate legislation. It is through this subordinate legislation by way of regulations and proclamations etc that apartheid was applied and the court in most cases were at liberty to declare these regulations invalid. They had a choice that they refused to make in favour of the individual.

1.6.4 In Chapter Four we deal with the new dispensation in a constitutional state. The main thrust of our discussion herein will be the transition to the

democratic order as well as the acceptance of international human rights norms in the new dispensation.

The values that underpin the new state as well as the paradigm shift that has taken place since the advent of the new Constitution will be discussed herein. We will show through case law how international human rights norms have been applied by the Constitutional Court.

Both the general features of the interim and final constitutions will be discussed to show the clear break with the apartheid past and the acceptance of international human rights norms.

1.6.5 In Chapter Five we will focus on experiences of a selected number of countries with respect to the application of international human rights norms in the domestic sphere, and find out what we could learn from them. We will discuss the European Convention of Human Rights as they also have a long tradition of applying human rights norms in their deliberation.

1.6.6 In Chapter Six, the Summary and Conclusions carry on broad conclusions and recommendations.

CHAPTER TWO: THE DEVELOPMENT OF INTERNATIONAL LAW OF HUMAN RIGHTS

2.0 INTRODUCTION

In this chapter we trace the development of the international law of human rights. Attention will be given to the existence and operation of the international law of human rights and its historical development. We will consider the historical development of the international law of human rights in terms of the need for such internationalisation of human rights.

In order for South African domestic law to be placed in its international setting, we need to know what this international setting of human rights is. To establish this, we will, in this Chapter, view the development of international law from co-existence to co-operation, the legal principles on the individual as a subject of public international law, as well as the principle of non-interference. Brief reference will also be made to the changing role of the South African judiciary in this development.

The relevance of this Chapter is that it provides the background material and foundation for what appears in the later Chapters.

In this Chapter we will sketch the development of international law of human rights, refer to writers on the subject and also indicate why in the next Chapters we will be assessing the reception of these norms in the South African legal system.

2.1 THE HISTORICAL DEVELOPMENT OF THE INTERNATIONAL LAW OF HUMAN RIGHTS

Henkin provides us with the basic framework of what may be termed traditional international law:

> ..... for hundreds of years international law and the law governing individual life did not come together. International law, true to its name, was law only between states on the state level. What a state did inside its borders in relation to its own nationals remained its own affair, an element of its autonomy, a matter of its "domestic jurisdiction.[1]

While this statement is an indication of one side of the historical spectrum, Meuwissen provides the other:

> Fundamental rights, if anything, manifests the relationship between international law and municipal law. They are no longer the basis of municipal law only, but also of international law.[2]

In tracing this historical development between these two points, we need to consider how fundamental human rights developed from municipal basis to a direct linkage with international law.

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1 Henkin L., Recueil des Cours, Paris (1989-IV) at p. 209

2 Meuwissen D.H.M, "The relationship between international law and municipal law and human rights", NILR 1977, p. 189-204 at p.189

2.2 THE DEVELOPMENT OF INTERNATIONAL LAW FROM CO-EXISTENCE TO CO-OPERATION

International concern with human rights dates largely from the Second World War. However, an evaluation of the international human rights movement will have to also consider certain events preceeding the Second World War.

During the 16th and 17th centuries the concept of the secular sovereign state was established. Sovereignty indicated the supreme potestas of the state, the highest authority. It also meant therefore that the state as the highest power on earth was not subject anymore to either the Pope or Emperor. However, as states started to interact, certain supra-national rules were developed, viz: to regulate these inter-national relations and the use of areas outside the national sovereignty, e.g. the sea. This may be termed the law of co-existence.

Towards the middle of the 19th century, however, states began to realise that certain objectives needed to be addressed in co-operation with other states. The abolition of slavery was one such objective, an institution which was generally legal under national law. By the Treaty of Paris in 1814, the British and French Governments agreed to co-operate in the suppression of the traffic in slaves, and thereby took what is considered to be the first international measure for the protection of human rights.[3]

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[3] Robertson A. H., and Merrils J. S., Human Rights in the World, An Introduction To The Study Of The International Protection of Human Rights, 3rd Ed, Manchester University Press (Manchester and New York, 1989) at p.14

The second stage in the development of human rights law was the evolution of humanitarian law that led to the Geneva Convention of 22 August 1864. Under this Convention, twelve states undertook to respect the immunity of military hospitals and their staff, to care for sick and wounded soldiers whatever their nationality and to respect the emblem of the Red Cross.

The protection of minorities constituted the third major development whereby international law came to be concerned with the rights of individuals as opposed to states only. This was principally the result of the drawing of frontiers which formed part of the peace settlement in 1919[4], though in the Treaty of Berlin of 1878, Bulgaria, Montenegro, Serbia, Romania and Turkey had all assumed obligations to grant religious freedom to their nationals.

The last phase in the development of international law came with the birth of the International Labour Organisation in 1920 and its developing of conventions establishing minimum social standards and working conditions.

It is thus evident that before World War II there were a number of matters which bore testimony to the fact that international law was no longer merely concerned with relations between states, but with the status or

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4 ibid, at p.19

treatment of the individual as well.[5] The need for co-operation was therefore increased, having a strong influence upon the character of international law. Whereas international law of co-existence required states to abstain from interfering with the sovereignty of other states, the approach of co-operation required international organisations to work together in order to ensure effective administration of common interests on the basis of continuity.

However, despite this development towards the law of co-operation, it did not eliminate the law of co-existence. The well-known article 2(7) of the UN Charter prohibiting the United Nations from intervening in matters which are essentially within the domestic jurisdiction of any state..... is ample evidence of this fact.

But while Henkin on the one hand describes article 2(7) as the voice of impenetrable statehood, he recognises that what the Charter contemplated regarding human rights from the beginning viz: promoting human rights and co-operating with member states to that end, recommending measures, creating a commission, was not conceived of as intervention by the United Nations in the domestic jurisdiction of any state. A brief glance at the human rights provisions of the Charter also reflects this ambivalence between co-existence and co-operation; between municipal law and international law.

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5 Henkin, note 1, supra, at p.213

In article 68, the Charter directed the Economic and Social Council to set up a commission for the promotion of human rights. Articles 55 and 56 go a little further than the above article in that article 55 states that:

> The United Nations shall promote universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language or religion.

Article 56 states that:

> all members pledge themselves to take joint action in co-operation with the organisation for the achievement of the purposes set forth in article 55.

Yet the provisions of the Charter were considered too vague and imprecise to confer any rights on individuals.[6] Experience in the United States courts bears further testimony to this. In the well-known case of Sei Fujii vs California,[7] the California Supreme Court rejected the reasoning of the lower court that a racially motivated statute was contrary to the non-discrimination provisions found in article 55(c) of the UN Charter. The court held that there was nothing in articles 55 and 56 to indicate that:

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6 Akehurst M., A Modern Introduction to International Law (London, 1987) at p.77

7 97 A.C.A. 154, 217 p. 2d 481 (1950)

> these provisions were intended to become rules of law for the courts of this country upon the ratification of the Charter. The articles lack the mandatory quality and definiteness which would indicate an intent to create justiciable rights in private persons immediately upon ratification.[8]

According to Lillich,[9] the judiciary in the USA will have to experience much more international human rights law consciousness-raising before the rationale behind the Fujii case is rejected and the self-executory nature of the Charter's human rights provisions accepted. Akehurst[10] views the word "pledge" in article 56 as a legal obligation not to observe human rights now, but to work towards their fulfillment in the future. Akehurst[11] is of the view that the provisions of articles 55 and 56 do not confer international rights on individuals, but only benefits.

The Charter did not erode state autonomy and provide a clear set of enforceable human rights legislation. It should be borne in mind that in 1945, the principal powers were not prepared to fundamentally alter the established international system of sovereign states. On the other hand the crucial role of the UN Charter in providing the basis for future human rights development is undeniable. The human rights development until

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8 38 Cal. 2d at p.722-25, 242 P. 2d, at p. 621-22

9 Lillich R., The Role of Domestic Courts in Enforcing International Human Rights Law (Oxford 1984) p. 223-247 at p.229

10 Supra at p.76

11 Akerhurst, supra at p.77

the UN Charter, may therefore be termed the piercing of the corporate veil of statehood.[12]

In the consideration of the question on the need for an international law of human rights, we have established the development of international human rights as a historical fact, and further that international human rights norms determines the relationship between municipal law and international law. We will now consider the effect of this development on traditional international law.

2.3 EFFECT OF INTERNATIONAL HUMAN RIGHTS NORMS ON TRADITIONAL INTERNATIONAL LAW

The traditional co-existence argument has always been that Public International Law or the Law of Nations is the system of law which governs relations between states. It is modified slightly in that it recognises that the time when states were the only bodies which had rights and duties under international law is over, and that today international organisations, individuals, and to a certain extent, companies also have rights and duties under international law. However, without any further concession to the co-operation approach, it is still maintained that international law is primarily concerned with relations between states.

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12 The notion of piercing of the corporate veil of statehood will be revisited infra in the section dealing with the development of the International Bill of Rights

The argument concerning human rights protection is that this protection is afforded within the domestic jurisdiction of the state. The primary responsibility for the protection of human rights lies within the state and its national legal order. It is not only the purpose of the state and its legal order to protect these rights, but being closer to the community than the organised international community, the state is in a better position to protect them.[13] Elaborating on this argument, Humphrey states that the state has a prior right to human rights protection and this is further recognised by the rule of customary international law that international organs have jurisdiction in disputes relating to individuals only when it is shown that all domestic or national remedies have been exhausted.[14]

Summarising the traditional law argument, it can be said that human rights are primarily of domestic concern. The individual was not classically the subject of international law, and how a state treated its own nationals was its own affair.

2.4 EMERGENCE OF INTERNATIONAL HUMAN RIGHTS NORMS

While the abovementioned initiatives towards co-operation since the 19th century posed serious challenges to classical international law, the

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13 Humphrey J., No Distant Millenium; The International Law of Human Rights, UNESCO (1989) at p.12

14 ibid, at p. 12

development of international human rights protection effectively gained momentum after the Second World War. This next phase set in with the abhorrent treatment Nazi Germany meted out to its Jewish subjects, as well as to sections of the population in German-occupied territories. The treatment included homosexuals, gypsies and political opponents. Public International Law as it existed under the approach of non-intervention in the affairs of a sovereign state proved inadequate to deal effectively with these violations of human rights. The human rights of nationals of a state were considered to fall essentially within its exclusive jurisdiction.

What emerged clearly from these human rights violations was the realisation that human rights enforcement could not be entrusted to the state and its legal order anymore. The recognition of the individual as a subject of international law and the development of an international law of human rights are established facts and perhaps the most important factor for changing the exclusively interstate character of traditional international law. This vacuum in public international law, this need for a law of co-operation led to Article 1(3) of the United Nations Charter which represents the international attempt in 1945 to counter inadequacy of national legal systems.

The national state may have the primary responsibility for the protection of human rights but, as Humphrey[15] submitted, it does not follow that it has the sole and exclusive responsibility.

Humphrey[16] then takes issue with the conventional wisdom of some foreign offices that countries should mind their own business and let other countries mind theirs. He does so, inter alia, on moral grounds, on political grounds and in terms of international law developments.

(i) On Moral Grounds: There is such a thing as common humanity and we are in a very real sense our brothers and sister's keepers. It is morally wrong to stand aside when our brothers and sisters are being persecuted. It is my business as a human being if other human beings are being tortured or exterminated in concentration camps, and if it is my business, it is also the business of the collectivity to which I belong.

(ii) On Political Grounds: Violations of human rights, especially where there is a persistent pattern of gross violations can be, have been and are causes of international conflict and even war. A sine qua non for the creation of mutual confidence in a true international community is the enshrinement of the rule of law at the international level and that includes international norms protecting human rights. There is a close

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15 ibid, at p. 12-13
16 ibid, at p. 13

relationship between respect for human rights and the maintenance of peace, both international and national.

One further reason for the international protection of human rights is the view also espoused by Henkin:

> In fact, the impression that the issue of human rights is essentially domestic, not international, is patently mistaken..... Many infringements of human rights are now violations of international law, and by definition, no longer matters of domestic jurisdiction.[17]

Therefore, although the primary responsibility for protecting human rights lies with the state at national level, they must be protected by some legal order superior to that of the state. In this regard, we may also refer to Resolution 688 of the Security Council on the humanitarian aid operation in Iraq in terms of which it was demanded of Iraq, inter alia, to co-operate with the UN Secretariat for this purpose.[18] The Security Council in particular demanded of Iraq to end the repression in the region and expressed the hope that the human and political rights of all Iraqi citizens were to be respected. It also insisted that Iraq should allow immediate access by international humanitarian organisations to all those in need of

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17 Henkin L., "The Internationalization of Human Rights", in Human Rights: A symposium Columbia University , Vol. 6. No. 1 (1977) at pp 10-11

18 S/Res/688 (1991), 5 April 1991, adopted by the Security Council at is 2982nd meeting.

assistance in all parts of Iraq and to make available all necessary facilities for their operations.[19]

In his special report entitled An Agenda for Peace, the then Secretary-General of the UN, Boutros Boutros-Ghali, reiterated that the UN was a gathering of sovereign states, and states that what it could do depended on the common ground they created between them. Referring to the changing developments worldwide, he further stated that a conviction had grown among nations large and small and that an opportunity has been regained to achieve the great objectives of the Charter – a United Nations capable of maintaining international peace and security; of securing justice and human rights and of promoting in the words of the Charter, "social progress and better standards of life in larger freedom".[20]

Lauterpacht was one of the first commentators in the early days of the UN who expressed himself on this inter-relationship between states.[21] He regarded the guarantee of human rights protection as a difficulty that revealed the Achilles Heel of human rights (natural rights as he called them) so long as they depended for their validity and their practical recognition upon the uncontrolled will of the sovereign state, and as long as the ultimate sanction of their being was grounded exclusively in the state:

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19 UN Chronicle, September 1992, pp 2-4

20 Ibid at p.24 Note 19

21 Lauterpacht R., International Law and Human Rights (London, 1950) at p.93

> Where else can that ultimate sanction be found? It must rest in a legal source superior to that of the state.[22]

To Lauterpacht, the two superior legal sources were the law of nature which was conceived as a limitation inherent in the nature of all rational law and as a standard of justice, and the other was the law of nations or international law. He continued:

> The rights of man cannot in the long run be effectively secured except by the twin operation of the latent force of the law of nature and of the compelling force of the law of nations both conceived as a power of the state[23]

Some form of a superior legal order in terms of which national laws can be judged is thus imperative. This is due to the fact that national laws, even those entrenched in a constitution may prove inadequate for human rights protection, or if they do, can be changed.[24] Elaborating on this inter-play in the national sphere with human rights in the international sphere, Alkema[25] in his definition goes a little further than Meuwissen[26].

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22 ibid, at p. 95

23 ibid, at p. 96

24 Humphrey, ibid, at p. 15

25 Alkema, E.A., "The Application of Internationally Guaranteed Human Rights in the Municipal Order", at p.181 et.seq. in Kalshoven (ed.) "Essays on the Development of the International Legal Order", 1980

26 Supra, Chapter 2.1, p. 14

According to Alkema, human rights are constitutional in a three-fold sense:

(i) they determine the most fundamental legal relationship of the individual with the community or the state;

(ii) they are relevant for the relationship between the major constitutional powers as the rights often lay down a division of powers between the legislature and the judiciary, and finally;

(iii) as international human rights, they also determine an important segment of the relationship between the state and the international community, and do so by limiting national sovereignty.

In conclusion, it is submitted that the need for an international law of human rights as opposed to, or in concurrence with, a national law of human rights is well established.

Consequently, in terms of the human rights provisions of the Charter, no reliance can be placed on article 2(7) of the Charter in claiming violations of human rights to be essentially within the domestic jurisdiction of any state.

This conclusion is reinforced by two decisions of the International Court of Justice. In the famous obiter-dictum in the case of Barcelona Traction[27], the court stated that there was a distinction to be drawn between the obligations of a state towards the international community as a whole, and those arising vis-à-vis another state. The former are by their very nature the concern of all states, and in view of the importance of the rights involved, all states can be held to have a legal interest in their protection; these are obligations erga omnes. These obligations, derived in contemporary international law from the outlawing of acts of aggression, and of genocide and also from the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination.

The second case is the 1971 Advisory Opinion where the Court had its second opportunity to pronounce on the policy of apartheid as practiced in the then South West Africa (presently Namibia).[28] South Africa expressed the desire to supply the court with factual information in order to show that its policy did not constitute a violation of its international obligation. The court, however, found that no factual evidence was needed and stated:

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27 Case concerning Barcelona Traction, Light and Power Company Limited (New Application: 1962) (Second Phase) Belgium v Spain (1970) I.C.J. Rep 3 at paras 33-34

28 Legal consequences of state of the continued presence of South Africa in Namibia notwithstanding Security Council Resolution 276 (1970), Advisory opinion 1971, ICJ Reports 16, at pp. 56-57

> It is undisputed and amply supported by documents annexed to South Africa's written statement in these proceedings, that the official government policy pursued by South Africa in Namibia is to achieve a complete physical separation of races and ethnic groups in separate areas within the territory ..... To establish instead, and to enforce, distinctions, exclusions, restrictions and limitations exclusively based on grounds of race, colour, descent or national or ethnic origin which constitutes a denial of fundamental human rights which is a flagrant violation of the purposes and principles of the Charter.[29]

The relationship between the superior legal order of the United Nations is also reflected in the Draft Articles on State Responsibility of 1976. Article 19(3) is of particular relevance:

> 3. Subject to paragraph 2 (relating to the international wrongful acts that constitute international crimes), and on the basis of the rules of international law in force, an international crime may result, inter alia, from:
>
> (c) a serious breach on a widespread scale of an international obligation of essential importance for safeguarding the

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29 ibid, at p. 57

> human beings such as those prohibiting slavery, genocide and apartheid.

Commenting on this article, the South African Law Commission said that an objective examination of state practice in the United Nations enabled it to conclude that:

> the forcible maintenance of colonial domination and the application of a coercive policy of apartheid or absolute racial discrimination appeared to be considered within the legal system of the United Nations – and probably in general international law as well – as breaches of an established international obligation.[30]

2.5. THE PRESENT STATUS OF THE INTERNATIONAL LAW OF HUMAN RIGHTS

The concept of human rights started well before the inception of the United Nations.[31] It is important to refer to the period before the founding of the United Nations in order to understand and appreciate how international human rights instruments developed.

According to Shaw (1991), in the nineteenth century the positivist doctrines of state sovereignty and domestic jurisdiction reigned supreme. Very few issues were regarded as of international concern as such.

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30 UN, GAORY, Thirty First Session, supp 10 (A/31/10), 3 May – 23 July

31 Mbao M., Selected topics on public international law, unpublished Mimeo, 1993

Virtually all matters that today would be classified as human rights issues, were at that stage universally regarded as within the internal sphere of national jurisdiction.

An important change occurred with the establishment of the League of Nations in 1919. Article 22 of the Covenant of the League set up the mandates system for peoples in ex-enemy colonies "not yet able to stand by themselves in the strenuous conditions of the modern world." Mandatory powers were obliged to guarantee freedom of conscience and religion and a Permanent Mandates Commission was created to examine the reports the mandatory authorities had undertaken to make. The arrangement was termed a "sacred trust of civilisation".

After the Second World War, nations decided to have a lasting peace and to protect an individual from the oppression of their dictatorial governments.[32] The Charter of the United Nations was then signed in 1945 and member states re-affirmed to uphold fundamental human rights in their States. An attempt was made to set standards of behaviour to which all nations should aspire.

a) In the preamble to the Charter, the founding fathers expressed their determination to "re-affirm faith in fundamental human rights; in the dignity and worth of the human person, in the equal rights of men and women and of the nations large and small".

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32 Mbao, ibid, at p.1

b) There are a number of human rights provisions in the Charter, viz.:

i) Article 1 includes in the purposes of the UNO the promotion and encouragement of respect for human rights and the fundamental freedoms of all without distinction as to race, sex, language or religion.

ii) Article 3(1) notes that the General Assembly shall initiate studies and make recommendations regarding the realisation of human rights for all.

iii) Article 55 provides that the UNO shall promote universal respect for and observance of human rights.

2.6 UNIVERSAL DECLARATION OF HUMAN RIGHTS

The Universal Declaration of Human Rights was adopted by the General Assembly of the United Nations on the 10th December 1948. This was the first definition of what was meant by human rights by the world body. Freedom, justice and peace of the individual were recognised as the foundation of the rights of an individual. The Declaration recognised that all human beings are equal and are born free, and that everyone has a right to life, liberty and security. It abolished slavery and servitude. No one shall be subjected to torture, to cruel and inhuman or degrading treatment. The Declaration also recognised that no one shall be subjected to arbitrary arrest, detention or exile.

The stated intention of the Universal Declaration when it was unanimously adopted by the General Assembly was that it should represent:

> a common standard of the achievement for all peoples and all nations to the end that every individual and every organ of society, keeping this declaration constantly in mind, shall strive by teaching and education to promote respect for the rights and freedoms and by progressive measures, national and international, to ensure their universal and effective recognition and observance.[33]

It must be stated that the Declaration was not a treaty and could not be enforced. It was a statement of intent by civilised nations. It was expected that civilised countries were to respect the fundamental rights enshrined in the declaration but individuals were helpless if the country chose not to respect those rights. There was no enforcement machinery.

However, since its adoption many nations have adopted its principles, and many countries have incorporated these principles in their constitutions, including South Africa.

The Universal Declaration is complied with by many countries in the world. So what started as a mere inspirational document is now widely

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33 Mbao, ibid, supra at p. 3

acclaimed as an authoritative interpretation of human rights provisions of the UN Charter.

It is accepted that the Universal Declaration has become the authoritative catalogue of the universally recognised international human rights. It is also accepted that not all its provisions constitute customary international law but most states and scholars would agree that failure to respect some of the provisions would constitute a violation of international law.

Although those provisions did not have a force of law, this is apparently the legal assumption the United Nations acted on when it took various measures in respect of human rights violations by apartheid South Africa.[34]

2.7 FROM THE DEVELOPMENT OF HUMAN RIGHTS TO INTERNATIONAL COVENANTS

The United Nations decided to have two Covenants, one dealing with civil and political rights and the other with social, economic and cultural rights. It was decided that separate Covenants should be adopted because civil and political rights could be attained immediately whereas

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34 Henkin L., The International Bill of Rights: The Universal Declaration and the Covenants in International Enforcement of Human Rights, Rudolf Bernhardt, John A Jolowicz (eds) (Reports submitted to the Colloquium of the International Association of Legal Science, Heidelberg 28-30 August 1985, Springs Verlag, pp. 1-79 at p.6

adequate economic, social and cultural rights would take time to achieve.[35]

The Assembly adopted the International Covenants and the Optional Protocol on 16 December 1966. A decade went by before the Covenants were ratified by a required minimum of thirty-five states. The International Covenant on Economic, Social and Cultural Rights came into effect as of 3 January 1976. The International Covenant on Civil and Political Rights entered into force on 23 March 1976, together with its Optional Protocol.

The Covenant on Civil and Political Rights requires a country to protect its people by law against cruel, inhuman or degrading treatment. The Covenant recognises the right of every human being to life, liberty, security and privacy of a person. It prohibits slavery, guarantees the right to a fair trial and protects persons against arbitrary arrest or detention. It recognises freedom of movement, conscience and religion, freedom of opinion and expression; and freedom of association. A Country must ratify this Covenant to be binding on it.[36]

The International Covenant on Economic, Social and Cultural Rights deals with second-generation rights, such as the right to work (article 6), to the enjoyment of just and favourable conditions of work – including fair

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35 Henkin, ibid at p.7

36 Barrie S. N., International human rights conventions : public international law applicable to the protection of rights, Tydskrif vir die Suid Afrikase, reg, Iss 1, p. 66-80,1995

wages and safe and healthy working conditions (article 7), to form and joint trade unions (article 8), to social security (article 9), to an adequate standard of living (article 9), to the enjoyment of the highest attainable standard of physical and mental health (article 12), to education – including free and compulsory primary education (article 13), and to participate in the cultural life of one's community.[37] Instead a supervisory body, the Committee on Economic, Social and Cultural Rights which in stature resembles that of the international Covenant on Civil and Political Rights Committee, receives national reports and considers them in much the same way as that body.

Civil and political rights are capable of immediate implementation in the sense that they do not require material resources for their implementation. They are also negative in that they prohibit certain forms of conduct, which renders them open to judicial determination – i.e they are justiciable. On the other hand, economic, social and cultural rights differ in these respects. First, they depend on the availability of resources for their implementation. Hence Article 2 of the International Covenant on Economic, Social and Cultural Rights provides that each party to the Covenant undertakes not to implement the Covenant immediately, as is the case with the International Covenant on Civil and Political Rights, but instead to take steps to the maximum of its available resources, with a view to achieving progressively the full realisation of

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37 Libenberg S., "The International Covenant on Economic, Social and Cultural Rights and its implications for South Africa", S.A..J.H.R; Vol. 11, 1995 p. 359-378

the rights recognised in the present Covenant by all appropriate means. Secondly, the rights protected require positive implementation in accordance with the available resources, which renders them less capable of judicial determination. For this reason no provision is made for inter-state claims or individual complaints, as with the International Covenant on Civil and Political Rights.

The most important international instrument relating to socio-economic rights, is the International Covenant on Economic, Social and Cultural Rights of 1966 which has been ratified by approximately 130 states.[38] The primary responsibility for the enforcement of the Covenant lies with the United Nations Committee on Economic, Social and Cultural Rights. The Committee was established in 1987 to monitor the compliance of state parties with their obligations under the Covenant.[39] Given that the socio-economic rights in the present South African Constitution were modelled on those in the Covenant , the Committees interpretations of the Covenant and its comments on state reports are a valuable source of guidance for South African Courts.

According to the Committee a state's obligations under the Covenant do not end with the duty to refrain from interference with the enjoyment of the socio-economic rights. The rights have an additional positive dimension in that they can be adequately realised only by taking positive

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38 South Africa signed the Covenant in 1994.

39 The Committee consists of eighteen independent experts elected by the Economic and Social Council of the Untied Nations for a four-year term.

steps directed towards fulfilling the rights. It is generally recognised that the positive component of socio-economic rights requires two forms of action from the state. The first, following article 2(1) of the Covenant, is that the state must adopt legislative measures – this meaning creating a legal framework that grants individuals the legal status, rights and privileges that will enable them to pursue their rights. The second, requires the state to implement other measures and programmes designed to assist individuals in realising their rights.

The positive dimension of the international socio-economic rights is qualified by the use of the phrase employed in article 2(1) obliging a state to take steps to the maximum available resources, with a view to achieving progressively the full realisation of the right. The terms progressive realisation and the available resources qualification are understood to grant the state a margin of discretion in selecting the means for achieving socio-economic rights. However, it is clear that the qualification does not mean that the state is simply left to its own devices in choosing whether and how to implement the rights. The following principles have emerged from international practice:

1. The fact that the full realisation of socio-economic rights can only be achieved progressively does not alter the obligation on the state to take those steps that are within its power immediately and other steps as soon as possible. The burden is on the state to

show that it is making progress toward the full realisation of the rights.[40]

2. While the requirement that a state take appropriate steps towards the realisation of the rights confers considerable margin of discretion on states, there is nevertheless an obligation to justify the appropriateness of the measures adopted. The determination whether a state has taken all appropriate measures remains one for the Committee to make.[41]

3. Resource scarcity does not relieve state of what the Committee on Economic, Social and Cultural Rights terms core minimum obligations.[42] Violations of socio-economic rights will occur when the state fails to satisfy obligations to ensure the satisfaction of minimum essential levels of each of the rights, or fails to prioritise its use of its resources so as to meet its core minimum obligations. The core minimum obligations apply unless the state can show that its resources are demonstrably inadequate to allow it to fulfil its duties. However, even when resources are scarce, the obligation remains on the state to strive to ensure the widest possible enjoyment of the relevant rights, or fails under the prevailing circumstances.

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40 This accords with the approach of the Constitutional Court in Soobramoney V Minister of Health (KwaZulu-Natal 1998 (1) SA 765 (CC))

41 Soobramoney, ibid at para 10

42 Soobramoney, ibid at para 11

4. It is important to distinguish the inability from the unwillingness of a state to comply with its obligations. The fact that obligations are to be realised progressively dos not mean that the state may postpone its obligations to some distant or unspecified time in the future. A state claiming that it is unable to carry out its obligations because of resource scarcity is under a burden of proving that this is the case.

In the Government of Republic of South Africa v. Grootboom[43] The Constitutional court decided on socio-economic rights as enshrined in the 1996 Constitution and considered the extent of the positive duties placed on the state by section 26(2) of the Constitution. The Court found that the 1996 Constitution entrenches both civil and political rights and social and economic rights and further:

> That all rights in our Bill of Rights are inter-related and mutually supporting. There can be no doubt that human dignity, freedom and equality, the foundational values of our society, are denied those who have no food, clothing or shelter. Affording socio-economic rights to all people therefore enables them to enjoy the other rights enshrined in Chapter 2. The realisation of these rights is also key to

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43 2000 (1) BCLR 119 (CC)

> advancement of race and gender equality and the evolution of a society in which men and women are equally able to achieve their full potential.[44]

According to the Constitutional Court, the key to justiciability of the socio-economic rights in the 1996 Constitution is the standard of reasonableness. Though a considerable margin of discretion must be given to the state in deciding how it is to go about fulfilling the socio-economic rights, the reasonableness of the measures it adopts can be evaluated by the Court.

Here Part IV of the Covenant contains provisions for reports by parties to the Secretary-General of the United Nations, concerning the achievement and observance of the rights specified in the Covenant. It also provides for further action by the United Nations and particularly the Economic and Social Council and the Commission on Human Rights, on the basis of those reports.

The obligations that a state party assumes by ratifying this Covenant differ significantly from the requirement of immediate implementation found in civil and political rights. A very different approach is followed.

The reasons for the difference in approach is obvious. The protection of most civil and political rights require a few economic resources. The

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44 ibid, para 23.

burden tends to be heavier however and the task more complicated when economic, social and cultural rights are involved. Their enjoyment cannot be fully ensured without economic and technical resources, education and planning and the re-ordering of social priorities and, in many cases, international co-operation. There can thus be no uniform standards by which to measure compliance under the Economic, Social and Cultural Rights Covenant.

The implementation of the International Covenant on Economic, Social and Cultural Rights is governed by the Principles which postulates that the obligation "to achieve progressively the full realisation of the rights" requires state parties to move as expeditiously as possible towards the realisation of the rights. The phrase should not be interpreted as implying for state parties the right to defer indefinitely efforts to ensure full realisation of the rights. On the contrary, all state parties have an obligation to take steps to fulfill their obligations under the Covenant.[45]

According to Kooijmans, one of the reasons for the 18 years delay that elapsed before the nations of the world accepted the Covenants, was the different visions people had on human rights.[46]

In 1948 the world organisation was relatively homogeneous, with the western countries in the majority. The East-European countries at that

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45 McCorguodale R, Noorgaard Principles: "South Africa and the right of self-determination." S.A.J.H.R; Vol. 10, 1994, p. 4-30

46 Kooijmans, P.H., "De VN Commissie voor der rechten van des mens : een kromme stok voor reghte slagen?". In Staatkundig Jaarboek, The Netherlands (1983-1984) p. 177-192

time abstained from voting on the Universal Declaration. Their argument was, inter alia, that insufficient attention had been given to economic and social human rights. To the countries of the west, human rights entailed classical freedoms which required a duty of non-interference from governments and which could be justiciable. The rights presented as social and economic rights, for example the right to work and the right to social security, were not regarded as subjective rights, but as social objectives.[47]

With the increased number of developing countries joining the United Nations, countries which viewed the right to a dignified human existence as priority, the urgency for economic and social rights in treaty form also increased and, according to Kooijmans[48] on the side of the west the conviction was growing that economic and social rights were imperative for human development in the same fashion as were classical rights, albeit not exactly enforceable before a court of law. This, says Kooijmans, is an example of the fact that political confrontation need not always lead to an impasse, but also to better understanding and even enrichment of your own value system.

It is submitted that while these developments relate to the international legal order, their relevance to municipal legal orders could not be over-emphasised.[49]

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47 Kooijmans, ibid, p. 181
48 Kooijmans, ibid at p. 186
49 Kooijmans, ibid, at p. 182

Whereas in the Universal Declaration of Human Rights, states were prepared to readily accept the hortatory declaration of human rights, they were more cautious when it came to accepting the same terms in a legally binding instrument. The Covenants may, therefore, be regarded as constituting the serious considerations given by the nations of the world to the international law of human rights at the time.

2.8 THE INTERNATIONAL LAW OF HUMAN RIGHTS AND ITS EFFECT ON NATIONAL LEGAL ORDERS

2.8.1 THE Human Rights Committee (THE COMMITTEE)

This Committee was established in 1977 and consists of 18 members of high moral character and recognised competence in the field of human rights. The tasks of the Committee are set out in Articles 40 to 50 of the International Covenant on Civil and Political Rights, as follows:

I. To study reports on the measures state parties have taken to give effect to the rights recognised in the Covenant and on the progress made in the enjoyment of those rights.

II. To transmit its reports and such general comments as it may consider appropriate, to the state parties.

III. To perform certain functions with a view to settling disputes among states parties concerning the application of the Covenant, provided

that those parties have recognised the competence of the Committee to that effect.

The Committee normally holds three sessions each year, and reports annually to the General Assembly, through the Economic and Social Council. At each session, the Committee examines reports from state parties to the Covenant on the measures taken by them to give effect to the rights recognised in the Covenant, on the progress made in the enjoyment of those rights, and on any factors and difficulties affecting the implementation of the Covenant. It considers the reports in public meetings in the presence of representatives of the reporting states.[50]

We have already seen that international law requires of the municipal legal order (state parties to the Covenant) to ensure the right to effective remedies[51]. Despite these requirements, however, the possibility still existed that state parties would not respect the enumerated rights of the Covenant. Walker refers us to the drafters of the Covenant, who in recognition of that possibility, decided that:

> international machinery ... would provide a more effective guarantee that states parties honoured their obligations under the political Covenant. The setting up and acceptance of such a machinery ... implies a willingness among states parties to subject their actions to

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50 Barrie, op cit, at p. 69

51 See page 37 par. 3 supra.

> a modicum of international scrutiny. States relying solely on a national system of implementation, deny their people the additional safe-guard provided for by an international guarantee.[52]

The Committee is thus the international machinery created by the drafters. The Committee was established as the monitoring body of the International Covenant of Civil and Political Rights, and may rightly be considered as the most experienced of the expert human rights treaties bodies within the United Nations. It is the monitoring organ of most important human rights treaties to date,[53] and while it operates concurrently with regional conventions on human rights, the International Covenant of Civil and Political Rights is a multilateral treaty aimed at universal participation and a committee of distinguished experts from all continents and legal traditions, with a truly global perspective.[54]

The Committee is not a court, like the Permanent Court of Human Rights in Europe, but it has more the character of a quasi-judicial body. Its decisions are described as views and not as judgments. The Committee nevertheless expresses its opinions on the merits of cases it considers under the Optional Protocol in the language of court judgments, and experience has shown that states which accept its competence in

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52 Walker R., "The remedies of law of the international Covenant on Civil and Political Rights". Current trends and a conceptual framework for the future. New Youth University Journal of International Politics, Vol. 20(2). (Winter 1988) at p. 525-555

53 De Zayas, A.M., "The follow up procedure of the UN Human Rights Committee". The Review International Commission of Jurists, N. 47 (December 1991) at p. 28-35

54 ibid at p. 30

practice take its findings seriously[55] by adopting administrative, judicial and legislative measures in line with the Committee's decisions.[56]

Mindful of the resistance of municipal legal orders to international law and mindful therefore of the delicate and fragile nature of the activities of the Committee, it is with a special interest that we view these activities of the Committee. What is of significance is the fact that the obligations of states to respect and ensure the rights recognised in the Covenant without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, and the commitment to take the necessary steps in accordance with its constitutional procedures and with the provisions of the Covenant, to adopt such legislation or other measures as may be necessary to give effect to the rights recognised in the Covenant, are not forced upon them by the Committee or any other international body. The states freely, voluntarily and without any coercion accept the obligations themselves, as a manifestation of sovereignty.[57]

These obligations along with the submission of reports on the measures adopted as required by Article 40 of the Covenant, constitute obligations under a treaty.

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55 De Zayas A.M., "Application of the International Covenant on Civil and Political Rights under the Optional Protocol by Human Rights Committee", German Yearbook of International Law (1985) at p. 9-64

56 Cassese A, Modern constitutions and international law, Recueil de Cours (1985) at p. 438

57 ibid, at p. 440

A selection of comments by some authors on the Committee reveals the high esteem for the Human Rights Committee as being an integral part of the international human rights machinery. Walker,[58] for instance, considers the evolution of effective international human rights protection as one of the most pressing needs of today's world, and acknowledges the crucial role of the Human Rights Committee as the body charged with its interpretation. Alluding to the interplay between international law and municipal law, Walker[59] concludes that:

> by insisting on effective domestic remedies while still remaining sensitive to state sovereignty and national image, the Human Rights Committee can ensure the evolution of article 2(3) of the International Covenant of Civil and Political Rights into an effective guarantor of international human rights

Brar, in his 1985 study, concluded that the Human Rights Committee has, since its inception in 1977, established that:

> there exists a basis for universal standards of human rights and that the rights guaranteed in the Covenant can be implemented in the domestic law of states' parties irrespective of their diverse levels of economic and political

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58 Walker R., The remedies of Law of the International Covenant on Civil and Political Rights", Current Trends and a Conceptual Framework for the Future, supra at p. 555

59 ibid, at p. 558

> development, ideology, social systems and cultures. [60]

Brar goes on to observe that this experience has:

> dispelled fears that the very definition of these rights may be so culturally biased that it would not be possible to find a consensual basis in other cultures and other philosophies making effective implementation impossible[61]

In 1985, the Human Rights Committee was still at an early stage of evolving its jurisprudence and practical procedure. It was establishing its credibility as an impartial arbiter, working in co-operation with states' parties for implementation purposes, and avoiding an adversarial attitude as far as possible. [62]

The judicial nature of the Human Rights Committee has been a contentious issue of long standing.[63] According to De Zayas[64], the Human Rights Committee is admittedly not an international court of human rights, but it does exercise analogous responsibilities, and it is the only international body to fulfil this need. The views of some previous

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60 Brar P.,"The practice and Procedure of the Human Rights Committee under the Optional Protocol of the International Covenant on Civil and Political Rights", Indiana Journal of International Law, 1985 at pp 506-543

61 Brar, ibid at p 542

62 Brar, ibid, at p. 542-543

63 Lauterpacht R., International Law of Human Rights, (London 1950) at p. 374

64 Zayas A.M., "The Follow-Up Procedure of the UN Human Rights Committee", supra at p. 30

members of the Human Rights Committee as quoted by McGoldrick[65] provide substantial insight on this question. The following views of the Commissioners were stated at their 1991 meeting at the United Nations in Geneva.

Mr Uribe-Umgas:

> The Committee was quite different in nature from other bodies, and even though it was not a court or a tribunal it did hear testimony and had evidence presented to it.[66]

Mr Tomuschat:

> The Committee was ruled by the Covenant and while it was true that members were not judges, they had the task of applying the provisions laid down in the Covenant, and therefore, had to exercise judgment. It was the duty of the Committee to ensure that parties fulfilled their obligations under the Covenant. Also the Committee was not an international court, but was similar to one in certain respects, particularly in regard to its obligation to be guided by exclusively legal criteria which rightly distinguishes it from a political body[67]

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65 McGoldrick S., "The Human Rights Committee: Its role in the development of the International Covenant in Civil Rights and Political Rights", Oxford, England, Clarendon, 1991.

66 McGoldrick S., ibid, at p. 43

67 MaColdrick S., ibid, at p 48

Mr Ermacora expressed concern that the Committee should avoid the impression that it was:

> a sort of advisory service, or had technical assistance functions, whereas in fact its activities were based on legally binding instruments with all the attendant consequences that entailed[68]

Mr Aguilar:

> the Human Rights Committee was not a judicial body and its role is not to find fault.[69]

Mr Bouzri:

> the Committee was not a court of law[70]

Mr Pocar:

> the Committee's function was not to judge and then neither to condemn or congratulate state parties.[71]

Mr Graefrath:

> Unlike a court, the Committee was not required to make judgments, but simply to consider comment on reports and to act as a conciliatory

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68 McColdrick, ibid, at p 49
69 McColdrick, ibid, at p 51
70 McColdrick, ibid, at p 52
71 McColdrick, ibid, at p 53

> body on reports in dealing with complaints and communications[72]

Mr Opsahl:

> the Human Rights Committee is the executive organ of the Covenant[73]

After noting these differences within the Human Rights Committee on its nature and purposes, McGoldrick observed that many of these comments broadly accord with the shift from the largely judicial nature as envisaged by the Human Rights Committee to a Human Rights Committee with a "more amorphous nature"[74]. According to McGoldrick, any understanding of the true nature of the Human Rights Committee must recognise that its nature may alter in accordance with its exercise of the various functions and roles it performs or could perform.

Brar in his conclusion in 1985 argues that the challenge before the Committee and the yardstick by which it will be judged will depend on:

(i) The manner in which it elaborates substantive content of the rights protected in the Covenant.

(ii) How it adopts that substantive content to local circumstances while preserving the essence of the right, and

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72 McColdrick, ibid, at p 53
73 McColdrick, ibid, at p. 54
74 McColdrick, ibid, at p. 56

(iii) How effective it is in influencing states' parties to have its final views and the rights guaranteed in the Covenant implemented in domestic law.

Brar admits that it is a difficult task, but the Committee's experience since 1977 has shown that it is certainly possible.

Anna Michalska[75] in support of this conclusion states that:

> the Committee can play a significant role in the promotion of new human rights, as well as the new methods of their international and national protection.

What is evidently clear from the above commentaries is the presence of the "dialectic link" between international law and municipal law, and the crucial role of the domestic legal system in that relationship. It was, however, the United Kingdom expert on the Human Rights Committee, Higgins[76] who drew our attention again to, inter alia, the precarious nature of the domestic legal system. While she, on the one hand, recognised that for many states not having a regional human rights instrument, the International Covenant for Civil and Political Rights

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75 Michalska T., "Interpretation of the International Covenant on Civil and Political Rights in the light of Reports of the Human Rights Committee", Polish Yearbook of International Law, Vol. 15 1986, p. 70

76 Higgins R., "The United Nations ' Still a Force for Peace", 52 The Modern Law Review (1989) No. 1 pp 1-21

stands at the "apex of human rights law"[77] and welcomed the wide approval of the work of the Human Rights Committee, Higgins on the other hand saw dangers for the International Covenant of Civil and Political Rights. She concluded that it would be bitterly ironic that:[78]

> having won the battle to place human rights at the legitimate centre of international concern, the liberal democracies throw away the fruits of that victory by a failure to recognise that, in large part, the integrity of the Covenant lies now in their own hands

Higgins was referring here to, inter alia, the failure of states to submit their reports timeously, which, despite all the praises sung for the Human Rights Committee, undermines its work, states subjugating the autonomy of an international instrument to domestic law by applying domestic law rather than the treaty obligation, states neglecting to fund the human rights organs properly. It falls outside the scope of this study to discuss these questions in greater detail. It goes without saying that these sobering comments by Higgins enable us to deepen rather than blunt our perspective on international human rights law.

The last question we want to consider on the Human Rights Committee is its effectiveness. Do the decisions of the Human Rights Committee have any effect on the municipal legal systems of states' parties? We

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77 Higgins, ibid, at p.1

78 Higgins, ibid at pp 20-21

have seen that the Human Rights Committee sets standards for the interpretation of the International Covenant of Civil and Political Rights, that it enters into a constructive dialogue with states' parties on domestic human rights issues. We have also indicated that the Human Rights Committee considers individual cases under the Optional Protocol. In its consideration of reports of states' parties, we also pointed out that the Human Rights Committee oversees the implementation of the International Covenant of Civil and Political Rights by states' parties. The institution of the Human Rights Committee is therefore, shrouded with great expectations.

The question as to the effectiveness of the Human Rights Committee is therefore, highly relevant to establish the success or failure of international human rights law. Moreso, its significance to countries not being states' parties, i.e. former apartheid South Africa, cannot be overstated.

In our attempt to respond to this question, we will rely largely on two studies[79] regarding this question. Cohn's study is based upon analysis of forty-one periodic reports, and thirty-eight summary record considered by the Human Rights Committee through its thirty-seventh session.[80] The study indicates the effectiveness of the Covenant procedure by charting those states that report legislative or judicial changes in their domestic

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79 Cohn G.A., "The Early Harvest : Domestic Legal Changes related to the Human Rights Committee and the Covenant on Civil and Political Rights, 13 Human Rights Quarterly (1991) at pp 295-321.

80 Cohn G.A., ibid at p. 300

systems.[81] De Zayas views the question of effectiveness not so much from the vantage point of states' parties, but from that of the Human Rights Committee itself. His discourse on the follow-up procedure of the Human Rights Committee indicates how the Human Rights Committee responds to its "generally perceived need to know how states' parties are implementing its decisions".[82]

Cohn relates the domestic changes effected by states regarding both the Committee and the International Covenant of Civil and Political Rights in three categories:

(i) Legislative changes related to comments by Members

Here six states, viz: the then Soviet Union, the then East Germany, Senegal, New Zealand, Mongolia and Mexico noted the comments and discussions of Committee members during the "constructive dialogue" of the consideration of reports as the basis for changes. The then Soviet Union and the East Germany used the work of the Committee in the development of new laws on the treatment of aliens, under Articles 26 and 13 of the International Covenant of Civil and Political Rights. Senegal's changes related to freedom of movement and restrictions on political parties. The state used the discussion of the Committee as a direct springboard to domestic change.[83] New Zealand revoked, as a result of the discussion with the Committee, a regulation requiring inmate

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81 Cohn, ibid, at p. 295

82 De Zayas A.M., "The Follow-Up Procedure of the Human Rights Committee", supra at p. 34

to attend services of worship. The New Zealand report also linked the complete review of its mental health system by domestic authorities, and a shift to a consideration of the need for treatment to questions by the Committee.

Two countries, viz: Mauritius and the Netherlands, reported how the comments by the Human Rights Committee under the First Optional Protocol impacted on their national legislation. The Immigration Act of Mauritius was amended to remove the discriminatory provisions against women and in the Netherlands, the social security system came under review regarding non-discrimination under Article 26 of the International Covenant of Civil and Political Rights.

(ii) Legislative changes related to the Covenant on Civil and Political Rights

This category is further divided into the following six sub-categories, viz: explicit mention of the Covenant in a domestic statute, use of Covenant language as a model for legislation, explicit mention of international human rights law, general mention of Covenant standards, legislation complying with the Covenant and the use of the Covenant as a general filter for all new laws.

Cohn's study can obviously not be reproduced here. However, it is submitted that the number of categories on the ways that states have

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83 Cohn, supra, at p. 299

used the Covenant is indicative of the increasing effectiveness of the Covenant in domestic legal systems. Reinforcing this conclusion are the types of changes states parties effected in order to have their legislation to comply with the Covenant. Cohn groups them according to the articles of the Covenant to which they related: non-discrimination and equality of sexes (articles 2(1), 3 and 26), state of emergency (article 4), right to life (article 6), treatment of prisoners and other detainees (article 7 and 10), liberty and security of the person (article 9 and 11), freedom of movement and expulsion of aliens (article 12 and 13), right to a fair trial and equality before the law (article 14, 15 16 and 26), freedom of assembly and association (articles 21 and 22), protection of family and children (article 23 and 24), political rights (article 25), rights of minorities (article 27) and those not categorised. [84]

(iii) Judicial changes related to the Covenant

Cohn points out that although many states reported that the Covenant could be used in the courts, at the time only eight countries reported actual use of the Covenant by the judiciary. Two states reported on the use of the Covenant in legal argument before the courts, and almost all states reported that their judiciary used the Covenant to aid in the interpretation of domestic statutes.[85]

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84 Cohn G.A., supra, at pp 304-313

85 Cohn, ibid, at p. 316

Cohn quotes from the report of the Netherlands, which she describes as the "most extensive report" on the use of the Covenant by the judiciary:

> With reference to question 1(a) on the existence of court decisions in cases where the Covenant has been directly invoked, as many of the provisions containing substantive rights in Part 111 of the Covenant, are self-executing by virtue of their content and the way in which they are formulated, provisions of the Covenant are frequently invoked before the courts, generally in conjunction with similar provisions of the European Convention for the Protection of Human Rights and Fundamental Freedoms, which are also self-executing. In 1982, 34 judgements by the courts referred to the provisions of the Covenant, in 1984 there were 45; and 1986, 58.[86]

The Norwegian report indicated that the Covenant was a source of legal standards of the courts:

> A person who claims that his rights have been violated can invoke the Covenant and other international instruments before the courts; the European Convention on Human Rights is the instrument cited most frequently. International human rights instruments have been mentioned in some 20 Supreme Court decisions; one decision rested exclusively on the authority of the Covenant, while in another articles 26 and 14(7) of the Covenant were mentioned,

> together with certain provisions of other international instruments.[87]

We are further referred to judicial use of the Covenant in such countries as Sweden, New Zealand, Poland, Trinidad and Tobago, the then West Germany, Japan, the United Kingdom and Australia. We accordingly consider the point of judicial use to be well established.

Cohn[88] considers the results of the study to be "quietly encouraging" and points to the fact that thirty-two out of thirty-six state parties have reported progress in implementing the Covenant standards as an indication of the value of the process. Cohn[89] concludes that we cannot dismiss the changes that have occurred. Looking at the types of changes, we see the inclusion of an explicit reference to the Covenant, or the use of Covenant language in new statutes, and we also see the use of the Human Rights Committee's comments in the revision of laws by the countries mentioned above. In the light of this ongoing commitment to the Covenant standards, and the fact that countries are utilising the expertise of the Human Rights Committee, it is clear that the Covenant, and with it the Human Rights Committee, are pushing states' parties to make systematic changes towards better protection of human rights.[90]

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86 Cohn, supra, Quoting from 34 UN CCPR HR Comm (861 st mtg) par. 15, UN doc CCPR ICISR 861 (1988)

87 34 UN CCPR HR Comm (844th mtg) par 10 UN doc. CCPR/C/SR 844 (1988) – Cohn supra at p.317

88 Cohn, ibid at pp 320-321

89 Cohn, ibid at p. 321

In his discourse, De Zayas[91] points out that the First Optional Protocol does not provide for an enforcement mechanism. The views of the Human Rights Committee are considered as recommendations which leaves it open to states' parties to implement them or not. Beyond the moral weight of the Human Rights Committee's findings and the presumption that when a state adheres to the recommendations, it does so in good faith, a state may also make provision in its domestic legislation that it will carry out decisions of the Human Rights Committee. What the Human Rights Committee does when it has made a finding of a violation of a provision of the Covenant, is to ask the state party to take steps to remedy the violation. This it did in cases concerning the disappearance and possible death of the victims,[92] an alien held pending extradition,[93] and also concerning a death sentence the Human Rights Committee asked the state party to release the convicted person.[94] The fact that certain state parties have honoured their commitments under the First Optional Protocol by releasing prisoners, paying compensation to victims or amending legislation which was incompatible with the Covenant is certainly encouraging.

2.8.2 NOTES ON CASES ADOPTED BY THE HUMAN RIGHTS COMMITTEE UNDER THE OPTIONAL PROTOCOL TO THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS

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90 ibid, at p. 321

91 De Zayas, "The Follow-Up Procedure of the Human Rights Committee" supra, at p. 161

92 Human Rights Committee 1990 Report, Annex IX, Section D, para 1 – 13.2, De Zayas, supra at p. 29

93 De Zaya, ibid, annex IX, Section K, para 9

94 De Zaya, ibid, Annex IX, Section J, para 12.2

Kitok V. Sweden, Communication No. 197/1985, Views adopted on 27 July 1998

The author, a Sami of Swedish nationality, complained that he had been arbitrarily denied his ancestral right to membership of the Sami community and to carry out reindeer breeding by his formal exclusion from the community. He claimed to be the victim of a violation of article 27 of the Covenant.

The Committee's view was that the regulation of an economic activity is normally a matter for the State alone. However, where that activity is an essential element in the culture of an ethnic community, its application to an individual may fall under article 27 of the Covenant. It was not disputed that reindeer breeding was an essential component of the Sami culture. The restrictions had been imposed to protect the environment and continued existence of the indigenous Sami culture. The Committee noted that there was conflict between the protection of the minority as a whole and the application of the rules to individual members. It concluded that there was a reasonable and objective justification for the rule. The Committee found no violation of article 27.

(Similar principles were applied by the Committee in the case of Mahuika et al v. New Zealand, Communication No. 547/1993, Views adopted in October 2000).

Gueye v. France, Communication No. 196/1985, Views adopted on 3 April 1989

Seven hundred and forty-three retired soldiers of Senegalese nationality who had served in the French Army before independence had their pensions frozen by legislation in 1974. This law did not apply to former soldiers who were French citizens. The question for the Committee was whether it was compatible with the Covenant to distinguish between former members of the French Army, based on whether they were French nationals or not, in regard to their pensions.

The Committee found no evidence to support the allegation that the State party had engaged in racially discriminatory practices vis-à-vis the authors. Although nationality is not mentioned as a prohibited ground of discrimination in the Covenant, in the Committee's opinion the differentiation by reference to the nationality of the authors acquired upon independence fell within the reference to "other status", a ground covered by article 26. The difference in treatment was not based on reasonable and objective criteria and constituted discrimination prohibited by the Covenant. A violation of article 26 was found.

Bernard Ominayak, Chief of the Lubicon Lake Band v. Canada, Communication NO. 167/1984, Views adopted on 26 March 1990 (A/45/40, vol. II)

The author alleged violations by the Government of Canada of the Lubicon Lake Band's right of self-determination and, by virtue of that right, to determine freely its political status and pursue its economic, social and cultural development, as well as the right to dispose freely of its natural wealth and resources and not be deprived of its own means of subsistence. The circumstances were that, despite laws and treaties, the Government of Canada had allowed the provincial government of Alberta to expropriate the territory of the Band for the benefit of private corporate interests, including leases for oil and gas exploration.

The Committee determined that it cold not deal with the question of whether the Lubicon Lake Band was a "people" under the Optional Protocol and could not, therefore, consider whether their right to self – determination under article 1 of the Covenant had been violated. Nevertheless, groups of individuals claiming to be similarly affected could submit a communication about alleged breaches of their rights. The authors were not obliged to pursue remedies through litigation unless they were likely to be effective in restoring the traditional or cultural livelihood of the Lubicon Lake Band, which was at the time allegedly at the brink of collapse.

The Committee acknowledged that many of the claims presented by the authors raised issues under article 27, which protects the right of persons, in community with others, to engage in economic and social

activities which are part of the culture of the community to which they belong (para. 32.2). The Committee recognised (para. 33) that "historical inequities and more recent developments threaten the way of life and culture of the Lubicon Lake Band and constitute violation of the Band's collective right to enjoy its traditional way of life and culture, a violation of article 27 so long as they continue". The Committee noted that the State party proposed to rectify the situation by a remedy deemed appropriate.

Faurisson v. France, Communication No. 550/1993, Views adopted on 8 November 1996

The author in this case was convicted of an offence against the French law outlawing denial of the Holocaust. The background to his conviction as an interview given to a French magazine in which the author spoke of the "mythical" gas-chambers in Auschwitz and intimated that the Jews had invented the "myth" of the Holocaust for their own purposes. The author claimed that in convicting him for this offence the State party had violated his right to freedom of expression under article 19 of the Covenant. The Committee was unanimous in deciding that there had been no violation, although a number of members appended separate concurring opinions to the Committee's Views.

The Committee was of the opinion that, while the conviction of the author involved a restriction on his freedom of expression, this restriction was

justified under article 19, paragraph 3. The rights in respect of which restrictions may be placed under this paragraph include not only the rights of individuals, but of groups too. Thus a restriction placed in order to protect an ethnic, national or religious group's right not to be subjected to racial incitement may be a legitimate restrictions. In this case the restriction on the author's freedom of expression was necessary in order to protect the Jewish community in France against anti-Semitism. In their concurring opinions, several members stressed the connection between the restriction placed on freedom of expression in this article and article 20, paragraph 2, of the Covenant, which obligates States parties to prohibit by law inciternent to discrimination, hostility or violence.

Some members saw fit to emphasize that a whole law that prohibits denial of "historical truths" is problematical, use of such a law in cases involving racial incitement is legitimate.

The Committee adopted a similar approach in the case of Ross V. Canada, (Communication No. 736/1997, Views adopted on 18 October 2000). In this case, the author, a teacher, had been removed from his teaching position by decision of a board of inquiry, because of repeated public statements which denigrated the faith and beliefs of Jews and called upon those of Christian faith not only to question the validity of Jewish beliefs and teachings but to hold individuals of Jewish faith and ancestry in contempt as undermining democracy, freedom and Christian

beliefs and values. The Committee, following the reasoning in Faurisson, considered that the removal of the author from teaching position could be considered as a restriction that was necessary to protect the right and freedom of Jewish children to have a school system free from bias, prejudice and intolerance.

Waldman v. Canada, Communication No. 694/1996, Views adopted in November 1999

The author complained that he was the victim of discrimination by the Ontario Government because public funds were provided for Roman Catholic schools but not for schools of the author's religion. As a result, he had to meet the full cost of school education in a religious school.

The Committee rejected the argument of the State party that, because the preferential treatment of Roman Catholic schools was a constitutional obligation it could not be considered discriminatory. The differences in treatment between Roman Catholic religious schools which were publicly funded as a distinct part of the public education system and schools of the author's religion which were private by necessity could not be considered reasonable and objective. The Committee observed that the Covenant did not oblige States parties to fund schools that was established on a religious basis. However, if a State party chose to provide public funding to religious schools, it should make this finding available without discrimination. In the absence of reasonable and

objective criteria for providing funding for schools of one religion and not for those of another, the Committee found that the author's rights under article 26 had been violated.

2.9 REGIONAL PROTECTION OF HUMAN RIGHTS

International human rights law has also been deployed on the regional level, viz. in the European Convention on the Protection of Human Rights and Fundamental Freedoms of 1950; the American Convention on Human Rights of 1969; and the African Charter of Human and Peoples' Rights of 1986. The Arabic League instituted a Permanent Commission for Human Rights in 1968. It concerns itself with the issues arising from the conflict in the Middle East.[95]

The European system is considered the most effective regional system for the protection of human rights[96] in existence today, and transcending the traditional boundaries drawn between international law and domestic law.[97] The European Convention had a special significance to South Africa, in that the South African legal heritage was firmly rooted in both the United Kingdom and the Netherlands. As a result of the constraints of time and space we will concentrate on the African system.

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95 Ministeerie van Buitelandse Zaken, Vademecum Mensenrechtgen, Den-Haag (1987), p. vii

96 Cemezenki, A.Z. The European Human Rights Convention in Domestic Law, a comparative study (1983) London.

97 ibid, at p. 23.

The African Charter certainly is highly relevant to the development of international human rights law in South Africa. With the increasing democratisation in Africa, human rights activism is experiencing improved developments.[98]

2.9.1 THE AFRICAN CHARTER ON HUMAN AND PEOPLES' RIGHTS

Although the Organisation of African Unity (OAU) initially did not have the protection and promotion of human rights as one of its major pre-occupations, it could not remain impervious to the violations of human rights in Africa. Moreover, it provided a suitable platform for the evolving of a regional human rights system in Africa.[99]

The African Charter on Human and Peoples' Rights which ultimately resulted from these efforts, is an attempt at stemming the tide of human rights violations by African governments. It is also a modest attempt to create a regional mechanism for the protection and promotion of human rights in Africa. Whatever criticism is levelled against it, will be done with this idea in mind.[100] Despite the many limitations of the African Charter, its adoption is a commendable step in the direction of greater involvement and commitment by the OAU in the field of human rights.

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98 Berat L, "A new South Africa? Prospects for an Africanist Bill of Rights and a transformed judiciary." Los Angeles International and Comparative Law Journal, Vo. 13(3), Febuary 1991, p. 467-497

99 Kannyo, Human Rights in Africa: Problems and Prospects Nairobi, Kenyatha Publishers (1980) et seq.

100 Eze J., Human Rights in Africa: Some Selected Problems Nairobi, Kenyatha Publishers (1984) at p. 201

The present African Charter is an innovation in many ways. The impact of its provisions, however, is limited by the widespread use of clawback clauses which tends to give the states too much autonomy allowing them to violate human rights with impunity. This may have been made with the intention of attracting many African states to ratify the Charter, otherwise they would have been reluctant to do so. The African Commission, which is established under the Charter, is a conciliatory rather than adjudicatory body. The success of this venture is still not yet certain. The very fact, however, that African states have adopted this strategy is indicative that African states were not unconcerned about the violation of human rights.

The African Charter is important because it is an African initiative. It was developed within Africa itself by Africans and is not an imposition from outside. As Sachs puts it:

> It is not a case of Africans trying to show the West or North Americans how civilised they were but for African Lawyers and social political leaders grappling with the problems of achieving in Africa the quality of life that we all want.[101]

Although it has many weaknesses especially on the question of enforceability of these rights, it is a first step towards the development of

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101 Sachs A., "Coming to terms with the African Charter", 1991 Rights: "A lawyer's for Human Rights" Publication, p.24

a human rights culture in Africa. It provides a standard to which reference can be made when human rights are violated.

For supporters of human rights instruments, the African Charter is evidence that however weak, human rights documents have a role to play. This is so because many African countries have bills of rights in their constitutions. Despite these bills of rights, human rights have been violated. The violation of those rights does not mean that these documents are useless. It only means that far more than impressive documents are required to develop a human rights culture. For us in South Africa this is an important lesson as we have moved from an authoritarian to a democratic dispensation. [102]

2.9.2 The Distinctive Features

The preamble to the African Charter differs from the preambles to the other regional conventions for the protection of human rights. It demonstrates that the Charter drew its inspiration from the O.A.U Charter that stipulates that freedom, equality, justice and dignity were essential objectives for the achievement of the legitimate aspirations of the African people.

Member states of the O.A.U who are parties to the Banjul Charter have an obligation to recognise the rights, duties and freedoms enshrined in the African Charter and to undertake to adopt legislative or other

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102 Sachs, supra at p. 28

measures to give effect to them[103]. This language differs substantially from the American Convention and from earlier drafts of the present African Charter. Article 1, of the American Convention, for instance provides that a state has an obligation not to violate an individual's rights and may also have the obligation to adopt affirmative measures necessary and reasonable under the circumstances to ensure the full enjoyment of the rights that the American Convention guarantees. It is not clear whether the African Charter requires an equally strong obligation from member States.

To recognise rights without a guarantee to implement them could lead to the interpretation that the Charter is merely a set of rights to be promoted rather than protected. This contention is, however, contradicted by the provisions of Article 1, which enjoin member states to undertake to adopt legislative or other measures to give effect to the Charter. The deletion of the express guarantee and obligation to ensure protection of rights may, however, be regarded as supportive of the proposition that the Charter is non-binding and non-protective[104].

When a state ratifies a human right instrument, it recognises the existence of these rights and agrees to incorporate them into its own domestic legal system. It may then no longer refuse to allow the international community to discuss alleged breaches of the instrument on

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103 Article 1 of the Charter

104 Eze J., Human Rights in Africa; supra, at p.60

the basis that such a discussion violates its sovereignty. According to the principle, Pacta Sunt Servanda, a state must honour its treaty obligations[105].

2.9.2.1 Types of Human Rights

The African Charter contains three generations of rights, namely civil and political rights, economic, social and cultural rights and people's rights. The interdependence of the generations is mentioned in the preamble that states as follows:

> It is henceforth essential to pay particular attention to the rights to development and that civil and political rights cannot be dissociated from economic, cultural and social rights in their conception as well as universality, and that the satisfaction of economic, social and cultural rights is a guarantee for the enjoyment of civil and political rights.

It will not be possible to discuss in detail all the rights contained in the Charter. A broad generalisation will be made under this heading to point out the salient features thereof. The civil and political rights of the individual provided for in the Charter have much in common with other regional instruments.

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105 Shepherd S., "The Tributary State and Peoples Rights in Africa: The Banjul Charter and Self-reliance." 1985, Africa Today p. 44-45

Article 21(4) of the Charter stipulates that all peoples shall freely dispose of their wealth and natural resources. African states themselves also possess this right. The economic social and cultural rights provided for in the Charter are all geared towards development not in simple economic terms, but by taking into account the standard of living and opportunities for advancement of the individual as a member of society[106].

2.9.2.2 Peoples' Rights

The African Charter also provides for the protection of peoples' rights. The inclusion of these rights in the African Charter reflects its importance as a part of the African conception of human rights. According to customary law the individual usually exercises his rights in the context of the group and is therefore limited by the group. For instance, the principle of non-discrimination against individuals in Article 2 is extended by Article 19 to all people who are also supposed to enjoy the same rights and should not be dominated by any other people. Article 20 reinforces this. It confers on all people the right to self-determination. This involves the free determination of their political status and the pursuit of their economic and social development according to the policy they have freely chosen.

2.9.2.3 Duties

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106 Article 62 of the Charter

The African Charter appears unique among the regional instruments of its kind in that it imposes duties on the individual towards his family and society, the State and other legally recognised communities and international community, as well as rights against the state[107]. The duties enumerated in Article 29 comprise respect for the family and care of parents, the preservation of social and natural solidarity, as well as contributing to the achievement of African unity, defence of the state, the payment of taxes and the strengthening of African cultural values.

Although some of these duties are general, they are not necessarily unenforceable. These are for example the duty to support one's parents in case of need[108], or to pay taxes. Other duties, however, such as the duty to serve one's national community by placing one's physical and intellectual abilities at its service[109] merely place a moral rather than a legal duty on individuals. It appears that the section on duties generally, whilst reflecting African cultural values, is probably not to be strictly regarded as capable of effective implementation but as a code of good conduct for all citizens of African countries. The drafters of the African Charter considered this an innovation. According to them until now, international instruments referring to the duties of individuals do so in a few words.

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107 Article 27(1) of the Charter

108 Article 29(1) of the Charter.

109 Article 29(6) of the Charter.

It is necessary to point out here that if individuals have rights to claim, they also have duties to perform. In traditional African societies, there is no opposition between rights and duties or between the individual and the community – they blend harmoniously[110].

2.9.3 The African Commission on Human Rights and Peoples Rights

The African Charter provides for the establishment of an African Commission of eleven members, chosen to serve in their personal capacity from among African personalities with the highest consideration for their morality, integrity, impartiality and competence in matters of human and legal experience.[111] Membership of the Commission terminates on death or resignation of a member. It may also terminate if, in the unanimous opinion of other members of the Commission, a member stops discharging his duties for any reason other than a temporary absence or because he is unable to discharge them.

The Commission's powers are limited to reporting and making recommendations to the Assembly of Heads of State and Government of the OAU.

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110 See Eze J., Human Rights in Africa; supra at p.60

111 Article 31 of the Charter

The functions of the Commission are mainly promotional. Although the Commission may resort to "any appropriate method of investigation"[112], it appears that it is not sitting in judgment on the matter like a formally constituted judicial organ, and its first function is to try and reach an amicable solution. It gathers information, establishes facts, concludes and makes recommendations to the Heads of State. The recommendations are, however, not binding. In addition, the Commission has the function of interpreting the provisions of the Charter at the request of the state party, an institution of the OAU or an organization recognised by the OAU. It is also expected to perform other functions that may be entrusted to it by the Assembly of Heads of State and Government.[113]

A state party to the Charter, which has good reason to believe that another state party has violated the provisions of the Charter, may by written communication draw the attention of the state to the Charter. Within three months of receiving the communication, the state to which the communication is addressed is supposed to give the inquiring state, written explanations or statements elucidating the matter. These should include all possible information indicating the laws and rules of procedure applied and applicable and the redress already given or pending.[114] If the issue is not settled by bilateral negotiation or other peaceful procedure, either state has the right to submit the matter to the

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112 Article 46
113 Article 45
114 Article 47

Commission through its chairman and should notify the other state involved.[115] This notwithstanding, where a state party has violated the provisions of the Charter, it may refer the matter directly to the Commission by addressing a communication to its chairman and to the Secretary-General of the OAU and the state concerned.[116]

Before the Commission can deal with the matter submitted to it, it must ensure that local remedies, where they exist, have been exhausted, unless it is obvious that these will be ineffective or that the procedure is unduly prolonged.[117] The Commission is empowered to ask the state parties concerned to provide it with all relevant information. State parties concerned may be presented before the Commission and submit written or oral representations.[118]

If the Commission has obtained from the states concerned and from other sources all the information it deems necessary and after trying all appropriate means to reach an amicable solution, it must prepare within a reasonable period a report stating the facts and its findings. The report must be sent to Heads of State and Government of the OAU. The report may include such recommendation as the Commission deems useful.[119]

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115 Article 48
116 Article 48
117 Article 49
118 Article 50
119 Article 51

Communications other than those from states, such as those from individuals or groups received by the Commission, are only to be considered if certain conditions are satisfied. These are that they must disclose the authors even if the latter request anonymity, be compatible with the Charter of the OAU and the provisions of the African Charter, be based on fact other than information obtained from the news media; and ensure that the communication is not insulting or disparaging.[120]

It is provided that when it appears after deliberations of the Commission that one or more exceptional situations apparently reveal the existence of a series of serious or massive violations of human and peoples' rights, the Commission should draw the attention of the Assembly of Heads of State and Government to them. The latter may then request the Commission to undertake an in-depth study of these situations and make a factual report accompanied by its findings and recommendations. The Commission can act on its own initiative if it has duly noticed a state of emergency. The state of emergency must be reported to the chairman of the Assembly of Heads of State and Government, who may request an in-depth study.[121]

The measures taken within the provisions of the African Charter are supposed to remain confidential until such time as the Assembly of Heads of State and Government decide otherwise. The chairman of the

120 Article 56
121 Article 58

Commission may, however, publish the report if the Assembly of Heads of State and Government so decide.[122]

Although the Assembly of Heads of State and Government is entitled to decide on the appropriate action to be taken on the recommendations of the Commission, it is not clear what that competence involves. This vagueness may have been intended to allow the Assembly a measure of flexibility in dealing with specific issues. The absence of a judicial organ seems to be unfortunate. It makes the role of the Charter ineffective. Yet considering the length and breadth of the scope of the rights protected, it might have been a pragmatic step.[123]

Despite the limitations of the competence of the Commission, it will nonetheless draw inspiration from international law on human rights, especially from the provisions of the Charter of the United Nations, from the Charter of the OAU, from the Universal Declaration of Human Rights, from the provisions of other instruments adopted by the United Nations and by African countries in the field of human rights as well as from the provisions of various instruments adopted within the specialised agencies of the UN of which the state parties to the present Charter are members.[124]

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122 Article 59
123 Article 60
124 Article 61

2.9.4 The African Court Of Human And Peoples' Rights

According to Mbao, a meeting of government experts held in Cape Town, South Africa, in September 1995, negotiated a Draft Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights. The Draft Protocol was again considered by the meeting of legal experts in Nouakchott, Mauretania (April 1997) and Addis Ababa (December 1997). It was subsequently adopted by the Heads of State and Government of the OAU at its summit in Ougadougou, Burkina Faso, in June 1998, and is now open for ratification. It will come into force upon fifteen ratifications.[125]

In terms of Article 5(1) of the Protocol, the Court will only take up matters from the following parties:-

(a) the plaintiff state;

(b) the respondent state;

(c) a state whose citizen is a victim and;

(d) the Commission itself.

The court authority will extend to all disputes relating to the interpretation and application of the Charter, the Protocol, and all human rights instruments ratified by the state. [126]

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125 Mbao M., Selected topics on public international law, unpublished, Mimeo, 1993

126 Article 3(1) of the Protocol

The Commission still plays an important role even with the introduction of the Court. It remains the preliminary body for the settlement of disputes between states and between individuals and a state.

2.10 THE JUDICIARY AND PUBLIC INTERNATIONAL LAW

As has been pointed out earlier, modern Public International law is not only confined to the regulation of relations between states. Individuals are increasingly being brought into the ambit of public international law. In the development of international law from a law of co-existence to a law of co-operation, states have increasingly incorporated their international obligations into their domestic legislation.[127] In the case of international human rights agreements, it is discemible, generally, that states parties are explicitly obliged to modify their domestic laws so as to bring them in line with their international law obligations.

These are the formal questions that belong to the domain of the national judiciary, for it is the domestic judge who will have to give effect to rules of international law whether contrary to domestic law or not, and to determine the self-executory nature of the provisions. Whether the judge will give effect to these rules will depend on the constitutional order itself and on the approach of the judge to the relationship between the international legal order and the national legal order of the particular state and the subsequent legislation arising from such attitude.

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127 Cassese. A, "Modern Constitutions and International Law" in Recueils des Courts, 1985, supra, at 351

It is common cause that the domestic court fulfils an essential and crucial role in the relationship between international law and municipal law. As stated by Falk, the domestic court operates at that peculiarly sensitive point where national and international authority intersect. [128] The above statement[129] that domestic courts may function as part of the international legal system, is also supported by other authors. Kooijmans, in his discussion of the self-executing provisions of international law and the role of the judge in applying them, states that the national judge in a monistic system acts as functionary of the international legal order; after all he directly applies international law within the municipal legal order[130]

2.11 THE ROLE OF THE JUDICIARY IN THE IMPLEMENTATION OF INTERNATIONAL HUMAN RIGHTS LAW

Domestic implementation of the international law of human rights, for example, the International Covenant of Civil and Political Rights, requires, inter alia, effective remedies which include judicial remedies.[131] However, despite its strong normative character, international law and the international law of human rights, in particular, is a weak law.

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128 Falk R.A., The role of modestic courts in the international legal order, supra, p. 170

129 Supra, note 3

130 Kooijmans P.H, International Publikreght in vogelvlucht (Wallter Noordhoff Groningen) 1980, p.76-83

131 Article 2(3)(b) of the International Covenant on Civil and Political Rights of 1966

Features of a modern state with a legislature, a judiciary and an executive body are "almost wholly lacking" in international law.[132]

It is within this context of vulnerability that commentators continuously caution against excessive expectations and optimism when discussing human rights issues.[133] It is also within this context that we want to view Falk's statement that domestic courts function as part of the international legal system in "applying and developing its norms and in giving them effectiveness, publicity and prestige".

2.12 THE DOMESTIC ELEMENT IN THE INTERNATIONAL LAW OF HUMAN RIGHTS

What Partsch considers a remarkable development that is taking place on a larger scale, is what we will focus upon in the discussion regarding the international law of human rights. This development is:

> directed towards a greater readiness to open the domestic legal order to international obligations and to recognise therewith the need for harmonising rules. It would be premature to state that the rule of the supremacy of international law has been accepted everywhere in the domestic sphere. The widely accepted principle that domestic

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132 Akerhurst M., A Modern Introduction to International Law, (6th Ed), London, Allen and Unwin, 1987 at p. 5

133 Van Boven P., Rechter van de mens op niewe paden, Amsterdam, 1968

> norms have to be constructed in conformity with international obligations is a step in this direction, increasing the international element in the "dialectic link" with the internal order.[134]

In the field of international human rights law, article 2(2) of the International Covenant of Civil and Political Rights presents clear evidence of this dialectic link. Jhabvala[135] refers to the international and domestic requirements for the implementation of the provisions of the Covenant. His conclusion that the domestic requirement is a more significant one is also supported by Henkin.[136]

Article2(3) of the International Covenant of Civil and Political Rights provides us with a clearer insight of what the international law of human rights requires of the domestic legal order:

> Article 2(3) : Each state party to present Covenant undertakes:
>
> (a) To ensure that any person whose rights or freedoms as herein recognised are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;
>
> (b) To ensure that any person claiming such

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134 ibid, at p. 256

135 Jhabvala, supra at p. 9

136 Henkin, supra Rdc, 1989 (IV) at p. 227. "The new international law of Human Rights penetrated the state monolith, but it was essentially contained within the state system and its axioms and traditions

> remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the state, and to develop the possibilities of judicial remedy;
>
> (c) To ensure that the competent authorities shall enforce such remedies when granted.

We have thus far arrived at that peculiarly sensitive point where the international law of human rights meets national law, and what is clear is that international law does not operate in opposition to the national legal order, but in concurrence with it.

Henkin is of the view that:

> International law has penetrated the state monolith in yet another respect, by requiring the state to pass laws and if necessary transform the legal system and its institutions.[137]

However, re-emphasising the domestic element, he continues:

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137 Henkin, ibid at p. 251

> Compliance with international law as to civil and political rights then takes place within a state and depends on the legal system or its courts and other official bodies.

2.13 PARLIAMENTARY SOVEREIGNTY AND THE SOUTH AFRICAN JUDICIARY:

Two approaches regarding parliamentary sovereignty are the absolute and the relativist approach. According to the absolute approach, parliament may make or unmake any law and no person or body may override or set aside the legislation of parliament.[138] There are no legal limitations upon the legislative competence of parliament, and the courts are to apply the legislation of parliament and not to hold the Act of Parliament invalid or unconstitutional. John Austin, with his command theory of the law, claimed that the law was a command of the sovereign and therefore the sovereign was not bound by the law.[139] Parliament, in terms of this theoretical justification for absolution, was accordingly not bound by a self-imposed restriction.

The sovereignty of parliament therefore, entails that one parliament cannot bind successive parliaments.

Jennings who is a relativist claims that parliament can bind its successors by legislation regarding its composition and procedure for

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138 Dicey A.J., An Introduction to the Study of Law of the Constitution (1959) supra, at p.39

139 Paton A., A Text Book on Jurisprudence, London (1951) at p.274

legislation.[140] He disagreed with the notion that parliament is a "supreme prince" which cannot be restricted. Parliament can be sovereign only with regard to legislation, and even then parliament is still obliged to make laws as prescribed by law.

South African writers on Constitutional law seemed to follow the relativist approach to parliamentary sovereignty.[141] The relativist view of parliamentary sovereignty entails that when the courts declared that the requirements regarding the manner and form have not been met, the courts do not pronounce on the validity of parliamentary legislation. They merely declare that a parliamentary statute never came into being, meaning that in actual fact, parliament has not spoken.[142] We will return to this question of judicial review subsequently when we view the approach of the courts under the State of Emergency in this chapter.

In 1984 Wacks proposed that if the South African judge was to be true to his conscience, there would be no choice but to resign.[143] While there is little indication in the literature of commentators supporting Wacks' proposal, his assessment that:[144]

> an exclusively White judiciary applies the essentially unjust laws of an exclusively White legislature to an unconsenting majority. Talk of

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140 Jennings I., The Law and the Constitution, London (1959) at p. 153
141 Wiechers in Verloren van Themaat-Wiechers, Staatsreg, (3 ed) 1981, at p. 319
142 Basson & Viljoen supra, at p. 183
143 Wacks R., "Judges and Injustice" (1984) 101 SALJ 266 at p. 282
144 See John Dugard, "Should judges resign?" – a reply to Prof. Wacks, SALJ (1984) at pp 287-294

> the independence of the judiciary rings decidedly hollow in the context of the political-legal configuration that is contemporary South Africa.[145]

We will return later to this subservience of the judiciary to the legislature and its executive-mindedness, in this chapter. This study, however, cannot bypass the constitutional crises of the 1950's. The crisis clearly demonstrated the judiciary as not always being that subservient, but willing to resist the encroachments of a determined government (executive).

The background to this crisis was the National Party government's determination to remove all persons who were not White from the common voters' roll. In 1951, parliament passed the Separate Representation of Voters' Act 46 of 1951. This Act intended to remove South African citizens taxonomically referred to as "Coloureds" from the common voters' roll, and place them on a separate voters' roll. This Act was clearly in conflict with the entrenched provision of the Constitution (South Africa Act of 1909), viz: section 152 which entrenched section 35.

Section 35 of the South Africa Act as amended by section 44 of Act 12 of 1936 was as follows:

> 35(1) Parliament may by law prescribe the qualifications which shall be necessary to

145 Wacks, ibid, at p. 281

> entitle persons to vote at the election of numbers of the House of Assembly, but no such law shall disqualify any person (other than a Native, as defined in setion 1 of the Representation of Natives Act, 1936) in the Province of the Cape of Good Hope at the establishment of the Union, is or may become capable of being registered as a voter from being so registered in the Province of the Cape of Good Hope by reason of his race or colour only or disqualify any Native, as so defined, who under the said Act would be or might become capable of being registered in the Cape Native Voters' Roll instituted under the act from being so registered, or alter the number of the members of the House of Assembly who in terms of the Act may be elected by the persons registered in the said roll, unless the Bill embodying such disqualification or alteration be passed by both House of Parliament sitting together, and at the third reading be agreed to by not less than two-thirds of the total number of members of both houses. A Bill so passed at such joint sitting shall be taken to have been duly passed by both Houses of Parliament.

It will thus be seen that prior to the establishment of Union there was only one voter's roll and that the qualification for becoming registered as a voter was the same for all British subjects irrespective of race or colour. Section 35 was thus entrenched by the Constitution. The requirement of amending section 35 was that the amendment had to be

adopted by a two-thirds majority in a joint session of both houses of parliament, viz: the Senate and the House of Assembly. Parliament contrary to section 35 adopted the abovementioned Act during an ordinary bicameral session of parliament.

In Harris v Minister of the Interior, the Appellate Division unanimously found that the Act was of no legal force.[146] It held that Ndlwana v Hofmeyr had been wrongly decided;[147] that the Statute of Westminister had been passed to remove the legislative supremacy of the British Parliament and not to modify the South Africa Constitution Act; that the unicameral procedure laid down in the entrenched sections was an essential feature of parliament itself when matters affecting the Coloured vote or the equal language rights come before parliament, and that by passing legislation dealing with matters falling within the purview of the entrenched sections by the ordinary bicameral procedure, "parliament" had not functioned as parliament within the meaning of the South Africa Act.

If the government did not respond verbally as did President Kruger in the previous century, it certainly worked feverishly to contain this devilish opponent called judicial review. The government then passed, again by the ordinary bicameral method, the High Court of Parliament Act 35 of 1952, which provided that any judgment of the Appellate Division

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146 1952 (2) SA 428 AD

147 1937 AD SA at page 221

invalidating an Act of Parliament (in casu the voters case) was to be reviewed by parliament itself, sitting as a High Court of Parliament. Not surprisingly, this High Court of Parliament then set aside the decision in the voters case, but the Appellate Division struck back.

In Minister of the Interior v Harris[148], the Appellate Division found that the High Court of Parliament was not a court, but simply parliament in disguise, and that the entrenched sections envisaged judicial protection by a proper court of law. Legislation such as this which deprived the entrenched sections of their judicial protection could not be passed by the ordinary bicameral procedure.

But the government was still not deterred. Firstly, it increased the size of the Appellate Division from five judges to eleven where the validity of an Act of Parliament was in issue.[149] Secondly, the Senate Act 53 of 1955 was passed, bicamerally again, which increased the size of the Senate from forty eight to eighty nine. The government was now assured of the support of the overwhelming majority in the Senate which was packed by the same government.

At last the scene was set for the introduction of the South Africa Act Amendment Act 9 of 1956. It was passed by a two-thirds majority of both Houses sitting together. It revalidated the 1951 Separate

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148 1952 (4) SA 769 AD

149 Appellate Division Quorum Act 27 of 1955, passed bicamerally

Representation of Voters Act, removed section 35 from the scope of the entrenching procedure and provided that:

> no court of law shall be competent to enquire into or to pronounce upon the validity of any law passed by parliament other than a law which alters or repeals or purports to alter or repeal provisions of section 137 or 152 of the South Africa Act, 1909.[150]

The government finally triumphed over the judicial intervention and in Collins v Minister of the Interior,[151] where the newly constituted Appellate Division gave the seal of approval to the government's plans, it upheld the validity of the South Africa Act Amendment Act 1956 on the ground that neither the Senate Act, nor the South Africa Amendment Act, viewed separately, could be described as invalid.

The National Party government thus convincingly established the principle of parliamentary supremacy. It came to realise that all its apartheid aspirations could be achieved under the existing British-type Constitution. This did, of course, depend on the acceptance of parliamentary sovereignty in its "pristine purity" cleansed of the devilish testing right.[152]

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150 Dugard J., "Human Rights and the South African Legal Order", supra at p. 31

151 1957 (1) SA 552 AD

152 Dugard J., ibid at p. 33

In 1961, a new Constitution was adopted. It brought very little change institutionally as the Queen of England was replaced by the State President, but with the same limited powers of a figurehead. Legislative power remained with the lower house, the House of Assembly, and political power with the Cabinet.

As far as the courts were concerned, section 59 (the forerunner of section 34(2) of the 1983 Constitution) of the new Constitution emphasised that:

(i) Parliament shall be the sovereign legislative authority in and over the Republic, and shall have full power to make laws for the peace, order and good government of the Republic.

(ii) No court of law shall be competent to enquire into, or to pronounce upon the validity of any Act passed by parliament, other than an Act that repeals or amends or purports to repeal or amend the provisions of section one hundred and eight and one hundred and eighteen. These sections dealt with the language provisions that were entrenched.

The government was thus firmly committed to legislative supremacy, and the testing rights of the courts restricted to matters affecting the language rights only. Parliament now had a clear hand over individual rights without fear of judicial obstruction.

Traditionally, the judicial authority in South Africa found itself in an exceptionally subdued constitutional position against the sovereign (omnipotent) parliament. This was similar to the English constitutional set up from which the old South African Constitutional law developed.[153] The courts accordingly had no substantial testing rights regarding the legislation of parliament. As we will subsequently point out, procedural testing rights did exist.

The constitutional framework was governed by the South African Constitution Act No. 110 of 1983. This Constitution was adopted by an all-White parliament, and provided for the establishment of a new parliament, with separate White, Indian and Coloured houses, under a powerful executive State President. The Constitution left the power in predominantly White hands.[154] Judicial review was dealt with in section 34(2)(a) which read:

> Any division of the Supreme Court of South Africa shall, subject to the provision of section 18, be competent to inquire into and pronounce upon the question as to whether the provisions of this Act were complied with in connection with any law which is expressed to be enacted by the State President and Parliament, or by the State President and any house.

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153 Basson & Viljoen, "Suid-Afrikaanse Staatsreg", (2 ed) (1988), at p.177

154 Van der Meulen, Alternatieven voor het bloedbad, ('s-Gravenhage, 1989) at p.33

Section 18 of the Act excluded the jurisdiction of the Supreme Court to enquire into or to pronounce upon the substantive validity of a decision of the State President in relation to the classification of any matter for purposes of administration or legislation as an "own affair" or "general affair".[155]

It can be safely argued that section 34(2)(a) expressly provided the Supreme Court with a testing right regarding the manner and form procedures as required by the Constitution. However, it must be submitted that the Constitution was restricted explicitly to "the provisions of this Act", and that section 34(3) obviously excluded any other judicial review.[156]

We therefore had section 32(2) which provided the courts with a form of judicial review, but subject to section 18 which excluded the jurisdiction regarding the substantive validity of a decision of the State President in relation to what was to be designated "own affairs" and "general affairs". The government were to remove any doubts that section 34(3) reiterated that judicial review was not applicable to the validity of Acts of Parliament, however, as it did not explicitly indicate whether it was substantial validity or procedural validity, we have to assume that it was substantial validity.

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155 "General Affairs" are those not defined as "Own Affairs". See Sec. 14(1) of the Constitution Act No. 110 of 1983.

156 See Section 34(3) of the S A Constitution Act No. 110 of 1982

What is clear is that the judicial review granted by section 34(2)(a) was only confined to the Constitution. Van der Vyver therefore reviewed the "seemingly wide latitude" section 34(2)(a) offered the Supreme Court as its bark being worse than its bite, and that the practically unassailable power of the State President to designate "own affairs" and "general affairs" remained the thorn in the flesh of judicial review.[157]

As far as judicial review regarding parliamentary legislation was concerned, the content or merit of legislation was still beyond the reach of the courts.

The Constitution was silent on this issue, and it can be safely assumed that it was meant to remain unchanged. The South African Law Commission proposed to substantially broaden the grounds for judicial review.[158] Sachs strongly cautioned against excessive reliance on judicial review. The judicial review in the then constitutional order was "founded on the lie of imputting a will of parliament in favour of protecting individual liberties" when that same parliament at is next session expresses true intention to discriminate as much as possible, and to give the administration uncontrolled discretion. The new dispensation, says Sachs, will be different in that parliament will be constrained by the Bill of Rights, and:[159]

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157 Van der Vyver J.D., "Judicial review under the new Constitution", S.A.L.J. 1986, Vol 103, pp 236-258 at p. 257

158 Working Paper 25, Clause 31 at p. 479

159 Sachs A., "From the violable to the inviolable: A soft-nosed reply to hard-nosed criticism", SAJHR, Vol 7, part 1 (1991), pp 98-101 at p. 99

> the fundamental rights and freedoms will be guaranteed in clear and express language, and they will be inviolable. Instead of assertions and often contradictory and always insecurely based common law tradition, the courts will proclaim fundamental constitutional rights.

Against the above outline of the constitutional framework within which the judiciary found its operation, we can now turn to the operation of the judiciary within that framework.

2.14 THE PLACE OF PUBLIC INTERNATIONAL LAW IN OLD SOUTH AFRICAN LAW

The South African Constitution of 1983 paid minimal attention to compliance by domestic authorities with international law.[160] We will therefore, consider the works of respected authors, selected case-law and judicial attitudes in order to ascertain the general approach on international law.

The discussion between what is called the international law-is-part-of-our-law school[161], and the comparative historical approach[162] provides us with an illustration of the relationship between public international law

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160 The Constitution of the Republic of South Africa, 1983 Act 110 of 1983, Section 6 thereof.

161 Dugard J., "The "Purist" Legal Method, International Law and Sovereign Immunity in J.C. Noster, (1979) at p.44

162 Booysen H., "Is gewoonteregtelike Volkereg deel van ons reg?", (THRHR, 1975) at p.319

and municipal law in old South Africa. While the first approach supports the doctrine of "international law forms part of our law", it also recognises the exceptions to the rule.[163] The latter argument by Booysen claims that a rule of international law adopted by the courts becomes a rule of Roman-Dutch law, and thereby loses its quality as a rule of international law. This means that the only role international law can play is in a comparative context.

The discussion started in 1971 when Dugard[164] reviewed three cases involving the question whether international law formed part of South African law. In the first, the court was prepared to assume for the purposes of judgment that international law formed part of old South African law.[165] In the next case, the court held that international law was to some extent recognised as part of South African common law.[166] In the last of the trio, South Atlantic Islands Development Corporation Limited v Buchan[167], the court stated, as per Diemonot J, that international law formed part of South African law:

> Although I am surprised that there is no decision in which a South African court has expressly asserted that international law forms part of our law, I would be even more surprised

163 Schaffer R.P., :The Inter-relationship between Public International Law and the Law of South Africa", International and Comparative Law Journal. (1983) at pp 277-315

164 Dugard J., "International Law is part of our Law" SALJ 1971, AT pp 13-15

165 S v. Ramotse and others TPD 14 September 1970 at p.4. Quote by Dugard, ibid

166 Parkin v Government of the Republique Democratique du Congo Another 1971 (1) SA 259 (W)

167 1971 (1) SA 234 at p. 238

> if there were a decision asserting the contrary. In my view it is the duty of this court to ascertain and administer the appropriate rule of international law in this case.

The conclusion is therefore, that international law did indeed form part of old South African law. However, this should not be interpreted to include all rules of international law, but only rules of customary international law.[168] We will return to the question of treaties where explicit incorporation by legislation was required.

Booysen[169] disputes this and points out that this "theory" was based on an obiter dictum of Diemont J in the abovementioned Buchan case where he stated that international law was part of South African law, and that "it is the duty of this court to ascertain and administer the appropriate rule of international law in this case". This statement, Booysens argues, had been made with regard to the question whether international law was foreign law which needed to be proved in our law and whether the court could take judicial notice of it. Public international law was never at issue in this case, and the court decided it on a different point wholly in terms of South African law with international law playing no part in it.[170]

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168 Dugard J., "International Law is part of our Law", supra at p.15

169 Booysen H., "Is Gewoontregtelike Vokereg deel van ons Reg?", (THRHR, 1975) at p. 319

170 ibid, at p. 319

To Booysen the view that international law was part of South African law was untenable, because it would mean that the court must, in every case where international law might be relevant, consider international law, previous South African decisions as well as common law. If there was a conflict between any of these, then the courts must decide which one prevailed; the common law, previous decisions or international law.

According to Booysen, there was no evidence that the courts did in fact follow such a procedure:

> International law plays a role only in a comparative context. The courts will take international law into account in cases where it is relevant and where the South African law is vague or uncertain, or where the South African common law is totally out of date on a particular point.[171]

Reiterating his strong opposition to the view that international law formed part of South African law, Booysen stated that international law did not form part of Roman-Dutch law at all. Some of our Roman-Dutch authors might have written about international law, however, it did not imply that

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171 ibid, at p. 315 (English summary)

the modern international law was part of our common law, or was part of Roman-Dutch law.[172]

Sanders[173] viewed Booysen's argument as somewhat out of step with reality. In a survey of some 35 cases ranging from 1882 to 1975, he found that the courts considered customary international law as being, in principle, directly operative in the municipal sphere, so that they could take immediate judicial notice of it, just as they did with the law of municipal origin. Sanders considered the Buchan case as the locus classicus of the monist approach of the courts.[174]

Schaffer[175] states that before 1970 there was no positive judicial statement on the relationship between international law and South African municipal law. What the courts did was to take judicial notice of customary international law. Schaffer[176] along with Bridge[177], concludes that this practice of judicial notice must have been based on the assumption that international law was part of the municipal law. This assumption continued until 1970 when the abovementioned trilogy of

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172 Booysen, "Volkereg en sy verhouding tot die Suid Afrikaans reg", (THRHR, 1975), pp 315-322 at p. 316

173 Sanders A.J.S.M., :"The applicability of customery international law in municipal law – South Africa's Monish tradition" , (THRHR, 1977), pp 147-155

174 ibid, at p. 151

175 Schaffer R.P., "The inter-relationship between Public International Law and the Law of South Africa : An Overview", supra at p. 296

176 ibid, at p. 151

177 Bridge J.W., "The Relationship between International Law and the Law of South Africa", International and Comparative Law Quarterly (1971) pp 746-749 at p. 747

cases brought more explicit judicial statements on the inter-relationship between the two systems of law.[178]

Dugard[179] did not agree with Booysen either. He found his statement extraordinary and not supported by the writings of the Roman-Dutch jurists. The contention that international law and municipal law were inherently different legal orders, said Dugard, was only raised at the end of the nineteenth century, and consequently did not concern Roman-Dutch jurists. They did not hesitate to apply international law rules in the municipal law of Holland.

A further brief look at South African history brings us to 1806 when the British took over occupation of the Cape from the Dutch. The Cape retained Roman-Dutch as its common law, and this common law was in due course accepted by the other colonies and states in Southern Africa.[180]

International law remained part of the common law of South Africa[181], and according to the case of Ncumata v Matwa and others[182], international law was applied directly by the courts without any statutory incorporation. The court held that the property of a subject taken during the hostilities rested upon capture in the Crown, just as property

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178 Schaffer R.P., supra at p. 290

179 Dugard J., "The place of Public International Law in South African Law" in Essays in Honour of Ellison Kahn, (Juta 1989, Cape Town), at pp. 110-11

180 See page 86, supra, para. one

181 Schaffer R.P., "Public International Law and South African Law" supra

182 Schaffer R. P., ibid, at p. 223

captured from an enemy in war. The court rejected the plaintiff's reliance upon certain provisions of a Placaat of April 22, 1779, and held that international law which allowed a government to deprive a rebel or an enemy of his property during hostilities had not been touched on by that Placaat. The case of C.C. Maynard et allii v The Field Cornet of Pretoria[183] also illustrated the application of this principle. Kotze' C.J. quoted Sir Henry Maine on the fact that the state which disclaimed the authority of international law placed herself outside the circle of civilised nations, Kotze' C.J. continued:[184]

> It is only by a strict adherence to these recognised principles that our young state can hope to achieve and maintain the respect of all civilised communities, and so preserve its own national independence.

Then came the Anglo-Boer war in 1899-1902 which brought a range of international law issues before the national courts, e.g. the rights of belligerents,[185] the confiscation of property for war purposes,[186] the seizure of enemy property,[187] and the legality of the annexation of the Boer republics.[188] All these issues were considered by the municipal courts within the context of international law. The views of Roman-Dutch jurists, particularly Grotius, were examined in the search for the relevant

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183 (1894) ISAR 214
184 ibid, at p. 223
185 Van Deventer v Hancke and Mossop 1903 TS 401 at p. 419
186 Alexander v Pfau 1902 TS 155 at pp 159-161 at p. 166
187 Du Toit v Kruger (1905) 22 SC 234 at 237
188 Van Deventer v Hancke and Mossop, supra, at p. 42

rule of international law, and in no case was it suggested that international law was a foreign system of law.[189]

The comparative historical approach of Booysen therefore came under severe criticism. We will leave the debate for the moment to view the approach of the then highest judicial body in the country, the Appellate Division, as it is embodied in the 1978 case of Nduli and another v Minister of Justice and others[190] and in the 1991 case of S v. Ebrahim.[191]

In Nduli and another v Minister of Justice and others,[192] the Appellate Division in its first opportunity to pronounce on the place of public international law in South African law, stated the following:[193]

> While it is obvious that international law is to be regarded as part of our law, it has to be stressed that the fons et origo of this proposition must be found in Roman-Dutch law.

The facts of the case were as follows. The South African security police had pre-arranged a trap by means of which the appellants would cross the Swaziland border in order to be arrested on South African territory. Contrary to strict orders of the commanding officer, his men nevertheless abducted the appellants from Swaziland and brought them on South

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189 Dugard J., "The place of International Law in South African Laws", supra at p. 113
190 1978 (1) SA 893 (A) at 906D
191 1991 (2) SA 553 A
192 Supra, 96, p. 188 nite 278
193 ibid, at 906B, 906C and 906D

African soil where they were arrested and charged. The court held the following to be the sole question in the case. Whether a South African Court of law was entitled to try an accused who was apprehended on foreign soil, but who was arrested within the Republic and charged with criminal acts triable by a South African court?[194] The Appellate Division held that a South African court had jurisdiction in respect of a person abducted on foreign territory, and brought to South Africa against his will, provided that the state had not expressly authorised the abduction.

The Nduli case has been cited as authority for the proposition that principles of international law must be applied by South African courts in appropriate cases.[195] The South African Law Commission in its consideration of human rights as part of international law also extensively cited the Nduli case as an authority.[196]

The decision, however, has been criticised on numerous grounds.[197] We will concentrate on the following three because of their relevance to our discussion on international human rights.

(i) The almost passing reference that "it is obvious that international law is to be regarded as part of our law" does not refer to the Buchan or

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194 ibid, at 906H

195 Interscience Research and Development Service (Pty) Ltd v Republica Polular de Mozambique, 1980 (2) SA 111 T at p. 124 also Kaffreira Property Co. (Pty) Ltd v Government of the Republic of Zambia, 1980 (2) SA 709E

196 Working Paper 25, par 8-34 at pp 176-177

197 Schaffer R.P., "Public International Law and South African Law", supra at pp 307-308

the Parkin cases[198] at all. The court, instead, stressed that the fons et origo of this proposition must be found in Roman-Dutch law. The court, however, does not illustrate this general observation by means of reference to Roman-Dutch law authorities.

(ii) The court's statement that our own concept of public international law is based on the acceptance of the territorial sovereignty of independent states and its reliance on Huber does not add very much substance to the judgment. According to Sanders[199], Huber was in effect proclaiming the private international law principle of the territoriality of laws.

(iii) The reference in the judgment that "according to our law only such rules of customary international law are to be regarded as part of our law" as are either universally recognised or have received the assent of this country. Sanders cites these passages in Oppenheim:[200]

> As regards Great Britain, the following points must be noted: (a) all such rules of customary international law as are either universally recognised, or have at any rate received the assent of this country are precisely part of the law of the land. To that extent these are still valid in England under the common law doctrine. The fact that International law is part

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198 ibid, at p.52
199 ibid, at p. 204
200 At p.205

> of the law of the land and is binding directly on courts and individuals does not mean that English law recognises in all circumstances the supremacy of international law.

By quoting these passages of Oppenheim, Sanders[201] points out that the Appellate Division had clearly indicated that the applicability of customary international law in South Africa was subject to certain English law inspired qualifications. This certainly placed a question mark behind the court's insistence that the fons et origo of the notion that international law was part of old South African law, must be found in Roman-Dutch law. Furthermore, while the notion that certain rules of international law are universally accepted is a clear one, the idea that other rules must "receive the assent of this country" remains vague. Schaffer[202] found it disappointing that the court did not expound more on the form the assent should take or whether the transformation or incorporation theory should apply.

These critiques clearly illustrate that instead of being a definitive pronouncement on the point, the Nduli decision brought more uncertainties regarding the relationship between public international law and the old South African law.

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201 At p. 307

202 At p. 303. See also Trendtex Trading Corporation v Central Bank of Nigeria (1977) 2 WLR 356 (CA) at pp 365-366

Thirteen years later in S.V. Ebrahim[203], a case with striking similarities with Nduli case came before the Appellate Division. It was a case with a completely different judgment and followed by judicial comments from the two major exponents of the "international-law-part-of-our-law" school and the comparative historical school.

The facts of the case were that Ebrahim, a member of the military wing of the ANC, who had fled South Africa while under a restriction order, had been abducted from his home in Mbabane, Swaziland by persons acting as agents of the South African State, and taken back to South Africa, where he was handed over to the police and detained in terms of security legislation. He was subsequently charged with treason in a Circuit Court, which convicted and sentenced him to 20 years imprisonment. Ebrahim had, prior to pleading, launched an application for an order to the effect that the court lacked jurisdiction to try the case inasmuch as his abduction was in breach of international law and thus unlawful. The application was dismissed and the trial continued.

On appeal against the dismissal of the application, the Appellate Division held, inter alia, that:

1. The effect of the abduction to jurisdiction of the court was still governed by Roman and Roman-Dutch common law. The question was not determined by the rules of the relevant international law (as was argued

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203 1991 (2) SA 553 AD

by counsel for the defence, as well as for the state), but by South African law and therefore, South African common law.[204]

2. Roman and Roman-Dutch common law regarded the removal of a person from an area of jurisdiction in which he had been illegally arrested to another area as tantamount to abduction, and this constituted a serious injustice. Therefore, a court before which such a person had been brought also lacked jurisdiction to try him, even where such person had been abducted by agents of the authority governing the area of jurisdiction of the said court.
3. The court long ago lacked the jurisdiction to try the appellant and his application should therefore succeed. Both the conviction and sentence were accordingly set aside.

Glancing back at Nduli, where the Appellate Division followed a different approach to similar facts, it would appear that the Appellate Division in Ebrahim would have to overrule its own decision. However, Steyn, J.A., who delivered the unanimous judgment (with Joubert, A.C.J., van Heerden, J.A., Grosskopt, J.A. and Nicholas, A.J.A.) circumvented this option by distinguishing Nduli from Ebrahim. "In Nduli", said Steyn, J.A.[205], "the Appellate Divsion held that an abduction from Swaziland by members of the South African Police contrary to their orders which did not involved the South African state in the abduction, did not violate international law, and consequently did not deprive the court of its jurisdiction to try the accused".

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204 at p. 569A of the report

205 At p. 568 H of the report

There, just as in Ebrahim, the accused were formally arrested within the borders of South Africa. However, in this case (Ebrahim), the facts were that the applicant was abducted from Swaziland to the RSA by persons not of the police, but acting under orders of another state institution. Therefore, concluded Steyn, J.A., the ratio decidendi and the conclusion of the court in Nduli case were not applicable in the case under discussion. The fact that the actions of the South African Police, even if contrary to their orders, were in terms of article 10 of the Draft Articles of State Responsibility, constituted a clear violation of international law was neither raised by the litigating parties, nor considered by the court.

The case of Ebrahim has also been reviewed respectively by Dugard[206] and Booysen[207]. Both commentators welcomed the Ebrahim decision, albeit from different perspectives. Dugard[208] said it "emphasises the importance of respect for fair standards of criminal justice, due process of law, human rights and international law, and warns against the abuse of law by the state", and for its essential part in rescuing Roman-Dutch law from the reputation it acquired under apartheid. Booysen[209] welcomed the court's refraining from applying international law and confining itself to the application of South African law.

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206 Dugard J., "No Jurisdiction over abducted persons in Roman-Dutch Law; Male Captus, Male Dentus", SAJHR, Vol 7 part 2, 1998 at pp 199-203

207 Booysen H., 'Jurisdiction to try abducted persons and the Application of International Law in South African Law", 16 South African Yearbook on International Law (1990/1991) at pp 133-140

208 Dugard, supra, at p. 198

209 Booysen H., supra at pp 137 and 138

The case of Ebrahim is of wider significance to our study in that it was handed down in an era when the apartheid legal order was being dismantled. Furthermore, its reference to human rights is also crucial to our broader examination of the approach towards human rights by the South African courts. We will therefore, have a closer look at the judgment and also return to the two commentaries mentioned above.

Booysen has two comments on the effect the Ebrahim decision had on the "International Law is Part of Our Law Doctrine". They could be summarised as follows:-

(i) In Ebrahim, the court regarded the rules of public international law as inapplicable. The question that was raised was whether the court's view was reconcilable with Nduli that public international law was part of South African law. In at least one respect, Ebrahim excluded public international law from South African law, viz: jurisdiction in respect of abduction because this point was regulated by Roman-Dutch laws which did not include international law. Interpreting Nduli strictly, Booysen conceded that public international law could only be part of South African law where it concerned the jurisdiction of a South African court over a person abducted other than on the authority of the state.

(ii) If Nduli was taken to have general and dimensional application in South African law, in the sense that it applied to every branch of that law, it must be regarded as irreconcilable with Ebrahim. Thus as a dimensional

statement, Nduli was overruled by Ebrahim and it did not apply to every aspect of South African law to which international law might be relevant.

However, Booysen cautioned against total disregard of international law where the interests of other states were involved.[210] This begs the question whether Booysen considered such disregard having been displayed in Ebrahim. On the Appellate Division's legal reasoning, Booysen had the following to say:

1) The conclusion of court that it is unlikely that Roman authorities would have recognised such a conviction, based on abduction, was not borne out by the source quoted by the court.[211] Booysen, however, left this allegation unsubstantiated. He merely stated the court's conclusion that such abduction was a serious violation of the law.

2) The question on the legal effect of the abduction on the jurisction was answered on "the rather unpersuasive ground of a single legal opinion, and whether or not one acclaims the rule laid down by the court, the general impression was inescapable that the decision was based on rather weak authority.[212] According to Booysen, this was due to the fact that Roman-Dutch sources, which might contain statements against the general trend of argument adopted by the

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210 at p. 137

211 Booysen H. at p. 137

212 Booysen H., supra at pp 137 and 138

court, were not addressed adequately. As to what exactly these sources might be, Booysen remained silent.

3) The single legal opinion that the court referred to came from the Hollandse Consultatien, con 97 at 331-7. This, says Booysen.

> Has more to do with the complicated demarcation of authority and the legal effect of a transgression of this demarcation within the Republic of the United Netherlands than with the out-and-out, according to public international law, illegal abduction of a citizen by its own sovereign state from the territory of another sovereign state. [213]

He therefore, concluded that the court's ruling on what Roman-Dutch law is or was, is not above suspicion. It certainly was not without significance for a formidable commentator as Booysen to be criticising, with such ferocity, the highest court in the land which was, for the first time in its history, adopting an approach he (Booysen) had been advocating for almost twenty years. However, we have to point out that Booysen's criticism on this single legal opinion was without foundation.

On the basis of Roman and Roman-Dutch authorities, the removal of a person from an area of jurisdiction in which he had been illegally arrested to another area constituting abduction, and therefore a serious

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213 At p. 138 of the report

injustice. Booysen criticised the Roman law authorities referred to by Steyn, .A., but is silent on the extensive evaluation of the Roman-Dutch authorities.[214]

The court before which such an accused is brought, lacks jurisdiction to try him. The court worked on the assumption that if the Roman and Roman-Dutch authorities cited considered the removal of the person as being tantamount to abduction and a serious injustice, then by the same token, one could expect it not to have jurisdiction in the matter. "It would be senseless", said the court, "to have such a stringent impediment on the violation of territorial sovereignty if it could be ignored without any adverse consequences on the legal proceedings arising from it"[215]. It is against this background that the court referred to the legal opinion in the Hollandse Consultatien as representing the law in everyday practice at the time.

To intimate, as Booysen did, that this jurisdiction decision has been reached on the isolated legal opinion from the Hollandse Consultatien is, in our opinion, a misrepresentation of the judgment.

Dugard, in his review of Ebrahim, did not refer to the "international law is part of our law" doctrine at all. He focused on the Ebrahim decision as constituting a break with the past in several respects.

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214 Maws F., De Groote Raad der Nederlanden en Zijn Arresten (THRHR 1949), at pp 58-76

215 Ebrahim, AD at pp 576 D-576F

Reliance on Roman-Dutch authority in the past was confined largely to private law matters and criminal law of non-political character. English law principles and precedents rooted in parliamentary sovereignty and executive absolutism were invoked in disputes between an individual and the executive.

In cases concerning international law judicial reliance was placed on English authority. This was also the case with exercising jurisdiction over persons abducted from outside the country:

> In the "bad old days'" when "instruments" of the South African state frequently crossed into neighbouring territories to arrest (or kill) anti-apartheid "operatives", South African courts readily assumed jurisdiction over kidnapped persons, relying on English decisions such as R v. O/C Depot Battalion, RASC, Colchester: Exparte Elliot (1949) 1 All ER 373, and the decision of the Israeli Supreme Court in Attorney-General, Israel v Eichmann 36 International Law Reports 18 which studiously followed Anglo-American precedent:[216]

Dugard attempted to bring Ebrahim into the international law orbit by stating that the Appellate Division enunciated a rule that gave full effect to the rule of international law prohibiting the exercise of police powers

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216 Dugard J., supra at p. 200

by the agents of one state in another state. The truth is, however, that the Appellate Division expressly disregarded the rules of international law. While recognising this disregard by the Appellate Division, Dugard tried again to qualify the disregard by saying of the Appellate Division that "it is nevertheless sensitive to the international dimension".[217] The passage quoted by Dugard, 582 C-E,[218] does not, in our opinion, support his qualification either. His translation of the Afrikaans "landsgrense" with "international borders" is forcing his interpretation unnecessarily and in our opinion, the translation should be "national borders". The judgment, however, left certain questions unanswered, for instance:

(1) The judgment express a disregard for public international law? This question did not only arise from Booysen's caution above, but also from the fact that both defence and state counsel in Ebrahim premised their heads of argument on the rule laid down by the Appellate Division in Nduli that public international law was part of South African law.[219]

2) The court's reliance on Roman and Roman-Dutch authorities may be utilising as Dugard[220] says "a rational enlightened system of law, motivated by considerations of fairness and sensitive to the realities of inter-state relations". However, the application of this

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217 At p. 200 of the report

218 ibid, at p. 200

219 Ebrahim, 1991 AD, at pp 555=561 African law", 16 South African Yearbook on International Law (1990/91) at pp 133-140

220 Dugard J., supra at p. 203

system of law by the Appellate Division in its public international law decisions in Nduli and Ebrahim was open to question.

In Nduli, we saw Rumpff, C.J., holding public international law to be part of South African law, and that the fons et origo of that proposition had to be found in Roman-Dutch law. We have seen above that Rumpff[221] did not refer to Roman-Dutch authorities to illustrate his point, that in his reliance on Huber for his reference to territorial sovereignty as the basis of South African public international law, the Chief Justice was in effect proclaiming the private international law principle of the territoriality of laws, and that his reference to the Oppenheim passages on the rules of customary international law being part of our law was reflecting English law, rather than the Roman-Dutch fons et origo.[222]

A close comparison of Nduli and Ebrahim further reveals that the defence in Nduli did indeed present Roman and Roman-Dutch authorities in its argument, but that Rumpff, C.J., rejected it on the basis that did not deal with international law, but related to the territorial jurisdiction of Provincial Judges.[223] The irony is that these authorities that the Appellate Division rejected in Nduli, formed the basis of the Roman and Roman-Dutch authorities followed by the Appellate Division in Ebrahim. The court which

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221 Nduli, supra, at p.57-58

222 See page 191, supra, para. one

223 Nduli, 1978 AD, at pp 910-C

regarded Roman-Dutch law as the fons et origo rejected the Roman-Dutch sources as not constituting law while the court which rejected international law accepted the same sources as constituting South African common law.

(3) The court in Ebrahim came very close to overruling its previous decision in Nduli. Other than Nduli, the Appellate Divsiion in Ebrahim did not consider public international law relevant and other than Nduli, the Appellate Division in Ebrahim followed the Roman and Roman-Dutch authorities, albeit without proper reference to the defence in Nduli. Booysen[224] was certainly correct that the Nduli statement that public international law was part of South African law has been overruled as a "dimensional statement". It did not apply to every aspect of South African law to which public international law might be relevant. By distinguishing Nduli, Booysen concludes that the court would still, by virtue of Nduli, have jurisdiction to try the persons abducted, if the abduction was not performed by the state or by persons acting on state orders. Furthermore, this would also apply, even if the abductions were performed by the police, as long as they acted without orders from their superiors. While these conclusions are debatable, it certainly reinforced the unsettled nature of public international law in the old South African law. The reconcilability

224 Booysen H., supra at p. 139

of Ebrahim with Nduli on the question of public international law being part of South African law remains in question.

In the commentaries of both Dugard and Booysen, public international law is referred to by implication.[225] It is submitted that the South African legal system needed much more than public international law by implication. Clearer direction was required from the courts, but even more so from the legislature, to bring this relationship between the two legal orders on a firmer footing. The situation has, however, been remedied by the new Constitution as will be seen later in the next chapter.

2.15 RECEPTION OF PUBLIC INTERNATIONAL LAW IN THE OLD SOUTH AFRICAN LAW

We have earlier in this Chapter referred to the two approaches of monism and dualism as presenting the theoretical base for the relationship of municipal law to public international law.[226] We have also established how the historical development from traditional public international law of co-existence to a public international law of co-operation has influenced this theoretical base.[227] We have concluded[228], with Partsch, that in this new relationship between international and municipal law, international law needed the collaboration of states for its

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225 Dugard J., "No jurisdiction over abducted persons" supra at p.200

226 See p age 71, supra. Para. 2

227 Graue E., Review of W.A. Joubert, "The Law f South Africa", in 24 German Yearbook of International Law (1981) pp. 555-559 at p. 556

228 Partsch, supra at p. 176

implementation and that reciprocal co-operation was necessary from both sides.

The theory which has been adopted in South Africa is the theory of harmonisation which developed in the United Kingdom. The theory is stated by O'Connell in these words:

> The theory of harmonisation assumes that international law, as a rule of human behaviour, forms part of municipal law; and hence is available to a municipal judge, but in the rare instance of conflict between the two systems, this theory acknowledges that he is obliged by his jurisdictional rules to follow municipal law[229]

The reference to the jurisdictional rules of the judge qualifies the absolute monist approach and the emphasis of purist dualism on the two distinct legal systems is also avoided. The resulting harmony that is brought about has the effect of customary international law being applied directly as part of the common law, subject to conflicting statutory rules and acts of state, and treaties to be applied only by means of legislative incorporation.[230] Booysen supported the harmonisation theory, but pointed to the following exceptions.[231]

(i) Treaty law does not form part of South African law unless it has been incorporated into legislation.

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229 O'Connell, International Law (1970-1) at pp 44-45

230 Dugard J., op cit, supra, at p.114

231 Booysen H., "Vokereg" supra, at pp 68-69

(ii) The Act of State doctrine whereby it is the prerogative of the executive to conduct foreign affairs on behalf of the state, binds the courts. Schaffer[232] points out that in Sachs v Donges,[233] the court rejected the contention that the revocation of a passport was an act of state which could not be questioned by a court of law. The court held that the defence of act of state could not be raised against a subject because between His Majesty and one of his subjects there can be no such thing as an act of state, and that the revocation of a passport is an executive act directed only against citizens.[234]

(iii) South African legislation enjoyed priority over any rule of international law and the courts were bound to apply legislation even if it conflicted with international law. Schaffer argues that this did not really constitute an exception to the Blackstone doctrine that international law is part of the common law.[235] Legislation would always take priority over a rule of common law provided it was clear and unambiguous. On the basis of a 1902 decision of Alexander v Pfau,[236] Schaffer further argued that while statute law took precedence over conflicting international law, South African courts followed their English counterparts and applied the rule of interpretation that Parliament did not intend to legislate contrary to a

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232 Schaffer R.P., supra at p.313
233 1950 (2) SA 265 AD, at p. 286
234 cf at p. 286
235 Schaffer, supra at p. 308-309
236 1902 TS 155

rule of international law. If a statute proved to be ambiguous, a South African court adopted a meaning more favourable to established rules of international law. It is submitted that while this argument is in opposition to Booysen's exception, it did not help Dugard in S v Adams, S v Werner[237] where the Appellate Division rejected it. We will return to this decision in our discussion on international human rights in the old South Africal.[238]

(iv) In terms of the stare decisis doctrine, South African courts normally follow their own precedents which led to international customary law not being applied. Schaffer states that where the doctrine of precedent applies, it will not operate to exclude a rule of international law merely because it is international law.[239] It follows therefore, that it cannot be regarded as an exclusionary rule, but a rule of interpretation.

According to Schaffer[240] the doctrine was applied more flexibly in South Africa than in England, although there has been no blatant denial of the doctrine as did the Late Lord Denning M.R. (as he then was) in Trendtex Trading Corporation v Central Bank of Nigeria.[241]

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237 S v Adams, State v Wener 1981 (1) SA 187 A

238 See page 214, supra, para. 2

239 Schaffer, supra at p. 313

240 ibid, at p. 311

241 (1977) 2 WRL: 356 (CA) where he held that international law knows no rule of stare decisis

(v) Roman-Dutch law applied in South Africa as a general rule and a court was obliged to apply it. We have seen how this exception has been applied in the above mentioned decisions of Nduli and Ebrahim.

As far as the Appellate Division was concerned, the position was still governed by Nduli.

The judgment of Rumpff, C.J., clearly did not follow Trendtex Trading and is not as conclusive.[242] Dugard pointed out that it was not clear whether Rumpff C.J. supported the monist or the dualist position.[243]

On the other hand, the monist approach was reaffirmed that customary international law formed part of South African law without any act of incorporation. On the other hand, the insistence that the fons et origo was to be found in Roman-Dutch law to a certain extent supported the dualist approach. The concession of counsel for the appellants that customary international law ought to be universally recognised or receive the assent of their country strengthened this dualist support in particular. However, whatever the inconclusiveness of the Nduli judgment, it has been cited as authority for the monist approach to customary international law by subsequent judicial decisions.[244]

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242 Note 136 above, Judgment of Lord Denning at pp 553-554

243 Dugard J., supra at p. 117

244 Interscience Research and Development Services (Pty) Ltd v Republica Popular de Mocambique, 1980, (2) SA 111 JI at p. 124; Kaffraria Co. (Pty) Ltd v Government of the Republic of Zambia 1980 (2) SA 709 E at 712F – 712-G; S v Petane 1988 (3) SA SI C

Having viewed the application of international law to the old South African law, we can now view more specifically the position of customary international law in the old South African law and the place of treaties. We have seen that the old South African law appeared to apply the monist approach to customary law, and to the transformation approach to treaties. The conclusion of treaties was considered an executive function and required "transformation" by Act of Parliament for their municipal application. This remains the position under modern English law, and the transformation rule also formed part of South African law.[245]

2.16 INTERNATIONAL CUSTOMARY LAW AND OLD SOUTH AFRICAN LAW

We have seen above that the rules of customary international law enjoyed no privileged position in the old South African legal system. Like the common law rules, they had to give way to legislation, and they could also be overlooked in the interest of an "act of state". We will first look at the approach of the then South African judiciary to customary international law and then view the conflict between customary international law and domestic legislation. The position of the then South African judiciary has been spelled out by Conradie, J. in S v Petane 1988 (3) SA C 52. The court accepted the international definitions as expounded by, inter alia, Akehurst, Oppenheim and the International Court of Justice.

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245 Sanders A.J.S.M., "The Applicability of Customary International Law in Municipal Law – South Africa's monist tradition, (THRHR 1977) at pp 147-155 at p. 148: the authoritative South African case in Pan American World Airways Incorporated v Fire and Accident Insurance Co. Ltd 1965 (3) SA 150 A at p. 161

According to Akehurst[246] when rules of customary law were inferred from the conduct of states, it was necessary to examine not only what states do, but also why they did it. This meant that there was a material as well as a psychological element in the formation of customary law. The psychological element is called the opinion juris sive necessitates, which is usually defined as a conviction felt by states that a certain form of conduct is required by international law.

Oppenheim[247] describes custom as usage which is considered by states to be legally binding:

> All that theory can say is this:
> Whenever and as soon as a line of international conduct frequently adopted by states is considered legally obligatory, or legally right, the rule which may be abstracted from such conduct is a rule of customary international law.

The International Court of Justice formulated the position as follows:[248]

> Not only must the acts concerned amount to a settled practice, but they must also be such, or be carried out in such a way as to be evidence on a belief that this practice is rendered obligatory by the existence of a rule of law

246 Akehurst M., A Modern Introduction to International Law, supra at p. 29
247 Oppenheim, International Law, (London) Vol 1, at p. 27
248 The North Sea Continental Shelf Cases (1969) (C Reports 3 at p.44

> requiring it. The need for such a belief, i.e. the existence of a subjective element, is implicit in the very notion of the opinion juris sive necessitates. The states concerned must therefore feel that they are conforming to what amounts to a legal obligation. The frequency or even habitual character of the acts is not in itself enough.

The conduct of states is thus referred to as state practice and the view that such conduct is legally right or obligatory is called the opinio juris.

The court held in *S v Petane* that when a line of conduct frequently adopted by states was considered legally binding or obligatory by those states, then the rule which could be abstracted from such conduct would be recognised as a rule of customary law. The court, following Nduli, accepted that where a rule of customary international law was recognised as such by international law, it would be recognised as having been incorporated into South African law. However, the court held that whether a rule of customary international law was created by usus and opinio juris, or only by the latter, it would at the very least have to be widely accepted as such before being considered as being incorporated into South African law.

Before discussing the question of conflict with statutory law, let us consider the approach of the then South African courts when it came to the proof of customary international law.

It has been stated above that, contrary to Booysen, that international law was not foreign law, and therefore, courts could take judicial notice of it as if it were part of the common law. This meant that the courts availed themselves of the judicial decisions of international tribunals and domestic courts, both South African and foreign, and to international treaties for guidance.

Dugard supporting the above argues as follows:[249]

> International law is part of our law. We know neither "an English international law", nor a purely "South African International law". Consequently it is necessary for South African courts to "ascertain and administer the appropriate rule of international law" in all cases concerning international law which come before them.

It appears through certain South African decisions that the qualification of usus needed a more stringent interpretation. In early 1905 in Du Toit v Kruger[250] it was stated that for a customary rule to be applied, it was necessary that it be universally accepted. Chief Justice Rumpff used similar language in Nduli where he agreed with counsel for the appellants that:

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249 Dugard J., "The Purist" Legal Method, International Law and Sovereign Immunity", 1989, S.A.L.J. Vol. 2 at p. 331

250 (1905) 22 SC at p. 238S

> According to our law only such rules of customary international law are to be regarded as part of our law as are either universally recognised or have received the assent of this country[251]

As this test was considered to be too strictly formulated, Margo, J. added a qualification in Inter-Science Research and Development (Pty) Ltd v Republica Popular de Mocambique:[252]

> the concept of universal recognition in this context is obviously not an absolute one, despite the ordinary meaning of the word "universal", for "if a custom becomes established as a general rule of international law, it binds all states which have not opposed it, whether or not they themselves played an active part in its formation.

Conradie, J. in S v Petane[253] also had problems as to whether Rumpff C.J. meant to lay down requirements for the incorporation of international law usages into South African law stricter than the requirements laid down by international law itself for the acceptance of usages by states.

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251 Nduli, supra at p. 160
252 1980 (2) SA 111, TI at pp 125 A-B
253 Supra, at p. 95

He accepted the qualification of Margo, J and was prepared to accept that:

> Customary law may be created very quickly, but before it will be considered by our municipal law as being incorporated into South African law the custom, whether created by usus or opinio juris or only the latter, would at the very least have to be widely accepted.[254]

Proving customary law thus entails that the courts could take judicial notice of it and insofar as the proving of state practice was concerned, it needed not of necessity be universally accepted, but at the very least it had to be widely accepted.

We can now turn to the second question regarding conflict with statute. We have already established that the rules of customary international law did not enjoy a privileged position in the old South African legal system and that like the common law rules, they had to give way to legislation.[255] Furthermore, they could be overlooked in the interest of an "act of state".

This was underscored by two Supreme Court decisions in 1980 which held customary international law subordinate to both legislation and common law.[256] It followed that if customary international law was a

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254. Supra, at pp 57H - 571
255 See page 209, para. one
256 See page 213, para. One and two

species of common law, it had to give way to legislation when a conflict arose.[257] If, however, there was any ambiguity as to whether or not there was a conflict, an attempt had to be made to reconcile the statute with the customary rule, since there was a statutory presumption that the legislature did not intend to violate international law.[258]

2.17 TREATIES AND THE OLD SOUTH AFRICAN LAW

In the old South Africa the power to enter into and to ratify treaties was in the hands of the executive State President.[259] This meant that wide law-making powers appeared to be vested in the executive State President. However, it did not mean that Parliament was prevented from limiting or even abolishing this treaty-making power; it was still Parliament that was endowed with legislative sovereignty and certainly not the executive.

As treaties under the old South African law were not directly self-executing in the municipal sphere, a certain amount of transformation was required to give treaties domestic effect.[260]

This is where the legislature played its part as this formal process of specific introduction viz: transformation was effected by legislative intervention. The transformation requirement and the way in which the transformation was performed were conditioned by a balance of power between the executive and the legislature taken over from English law; it

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257 Ex parte Ebrahim: In re S v D Maseko 1988 (1) SA 991 JI at pp 1003-1004

258 Dugard J., supra at p. 121 and Cockram, Interpretation of Statutes 3 ed. (1987) at p. 131

259 Section 6(3)© of the Republic of South Africa Constitution Act 110 of 1983

260 Khan, E.: "Transformation of Treaties", (THRHR, 1974) at p. 369

was the executive's function to make treaties, but the executive could not legislate by treaty for the sovereign law-giver was Parliament which, in turn, did not take part in the treaty-making process.[261] The legislature was therefore, still firmly in control in that although they could not change the treaties they could refuse to transform them.

International law therefore, had two ways of entering South African municipal law. The one was monism by the application of customary international law, and the other was dualism where the legislature transformed treaties for their municipal application.

The Appellate Division through, Steyn, C.J., held in Pan American World Airways Incorporated v S.A. Fire and Accident Insurance Co. Ltd,[262] that it was trite law:

> that in this country the conclusion of a treaty, convention or agreement by the South African government with any other government is an executive and not a legislative act. As a general rule, the provisions of an international instrument so concluded are not embodied in our law except by legislative process. In the absence of any enactment giving its relevant provisions to the force of law, it cannot affect the rights of the subject.

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261 Khan, E., op cit, at p. 370

262 1965, (3) SA 150 A at pp 161C – 161D

On the question of transforming treaties into municipal law, there were three principal methods:

- The provisions of a treaty could be embodied in the text of an Act of Parliament
- The treaty could be included as a schedule to a statute, and
- An enabling Act of Parliament could give the executive the power to bring a treaty into effect by means of proclamation in the Government Gazette.

South African law, however, recognised alternative methods whereby a treaty not incorporated into municipal law could be considered by a municipal court. These methods were as follows:

- In the interpretation of an ambiguous statute, a municipal court could have recourse to an unincorporated treaty. The rationale for this English law rule was that Parliament was presumed to intend to legislate in accordance with, and not contrary to, the state's international obligations.[263]

In S v Werner; S v Adams[264] it was argued that the Group Areas Act was ambiguous in that it did not expressly authorize substantial inequality of treatment, and therefore, regard should be had to the "human rights"

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263 S v Werner: S v Adams, suupra at pp 209E-209F

264 ibid, at p. 209 E

provisions of the unincorporated Charter of the UN. The court, however, rejected the argument on the grounds that the Act clearly provided for discrimination on grounds of race.

- When the validity of delegated legislation is challenged on grounds of unreasonableness recourse may be had to an unincorporated treaty. According to Dugard[265] since the concept of reasonableness is inextricably linked with presumptions of legislative intent, and that there is the presumption that the legislature in enacting a law did not intend to violate South Africa's international obligations, this would logically seem to be sound.

- If an unincorporated treaty provides evidence of a rule of customary international law, it may be applied as a customary rule, but not as a treaty.[266] In this was a municipal court may take cognisance of the main provisions of international human rights conventions,[267] and recommendations of the ILO.[268]

- A municipal court could also consider an unincorporated treaty if that treaty fell solely within the scope of executive prerogative.[269] The concerns, for example, the declaration of war or the cession of territory.

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265 Dugard J., supra, at pp 128-129

266 S v Petane, 1988 (3) SA 52 C where the Geneva Protocol No. 1 of 1977 was discussed

267 Dugard J., "International Human Rights Norms in Domestic Courts: Can South Africa learn from Britan and the United States?" in Ellison Khan (ed) Fiat Justitia: Essays in Memory of Olive Denys Schreiner (1983) at pp 221-243

268 Woolfrey D.J., "The Application of International Labour Norms to South African Law", (1986-87) 12 SAYIL 135

269 Dugard J., "The Place of Public International Law in S A Law", supra at p. 129

Such proclamation by the executive became part of municipal law without the need for transformation by the legislature.

Dugard informs us in this regard that South African courts applied the Geneva Convention dealing with the treatment of prisoners of war, despite the fact that neither the 1929 Convention, nor the four Geneva Conventions of 1949, to which South African was a party, were incorporated into South African law by legislation.[270] He nevertheless argued that, to dispel any doubt, it would be wiser to enact the Conventions into municipal law".[271]

We have had one opportunity to see Dugard's arguments being met with responses by Booysen.[272] It is submitted that Booysen's views were reflective of, to a large extent, the legal establishment of apartheid. We therefore give him the last word on treaties in the old South African legal order. Public international law, said Booysen, could never be applied by the courts when such application was in conflict with a statute.[273]

It did not matter how flagrantly such parliamentary legislation violated public international law, and even if the application of such legislation amounted to a violation of the country's international obligations, the courts were bound to give effect thereto.

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270 Dugard, ibid, at p. 130 also R.V. Giuiseppe and others 1943 TPD 139
271 Dugard J., supra at pp 130-131
272 Booysen, "Volkereg", supra at p. 109
273 See page 211, para. one

Furthermore, the courts were prevented by section 34(3) of the Constitution from challenging the validity of legislation for being in violation of public international law, or on the basis that the application of the legislation would lead to international responsibility.[274]

In a passage referring to Dugard, Booysen almost triumphantly uttered the following:[275]

> Is there a rule of administrative law that holds that a statutory power is not empowered to act contrary to public international law, or that the executive must exercise its powers in order to respect the international responsibilities of the state? Is there a rule protecting the rights of the individual, acquired through the provisions of public international law, against the executive just as his common law rights are protected.

2.17 SUMMARY AND CONCLUSION

In this chapter we set out to trace the development of the international law of human rights. We have established in this chapter that it is imperative for lawyers and, in particular, lawyers of the common law, to

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274 Booysen, ibid, at p. 110
275 Booysen, ibid, at p. 110

seriously take cognisance of the international law of human rights. We further established the need for an international law of human rights and also viewed its existence and operation. The development of international law from a law of co-existence to co-operation clearly indicated how traditional international law precepts had to give way to this new development. We arrived at the conclusion that while this new development lays great emphasis on international law, this cannot be to the exclusion of the domestic legal order.

We will return to this discussion in chapter 3 where we will consider the influence of international law of human rights on the South African municipal legal order. In the next chapter, we will also first consider the South African legal landscape in order to determine where and how the international law of human rights could find its application.

CHAPTER 3: THE OLD SOUTH AFRICAN LEGAL SYSTEM AND OBSERVANCE OF HUMAN RIGHTS NORMS (1948-1994)

3.0 INTRODUCTION

This chapter is concerned with the old South African legal landscape and the observance of international human rights norms. The central thrust of this chapter is to show through case law how the then South African judiciary failed to observe international human rights norms in their decisions.

In the previous chapter we set out to present a more detailed portrayal of the international law of human rights. We also established that it is imperative for lawyers and in particular lawyers of the common law, to seriously take cognisance of the international law of human rights. We further established the need for an international law of human rights and also viewed its existence and operation. The development of international law from a law of co-existence to co-operation clearly indicated how traditional international law precepts had to give way to this new development.

It is submitted that South Africa was not yet a party to international conventions but its courts had, to a certain extend, discretion in terms of the common law. In terms of the common law, judges could have decided in favour of the individual in appropriate cases. It is also submitted that Parliament could legislate to repeal the common law, but

where it had not done so, the judiciary had an obligation to safeguard the rights of an individual in terms of the common law.

We will also focus on the apartheid legal order to indicate the legal environment within which the then South African judiciary operated, and to assist us in establishing the extent to which the South African judiciary could be influenced by observing international human rights norms.

The period under discussion in this chapter is 1949 to 1994 when the National Party of South Africa was in power although some of the cases mentioned pre-dates 1948. In order to understand this period, we will try to indicate the nature of the state, its central values and ideology during the National Party rule.

The National Party of South Africa came into power in 1948 in a general election that was known as the apartheid election, but Afrikaner political unity was an important underlying factor. There were more immediate reasons for the new government to interfere with the franchise, segregation politics and the racist ideology. The National Party constituted a minority government in that it held only seventy of the 153 seats in the House of Assembly, just five more than the opposition United Party. In terms of electoral support its position was even more precarious in that it had received only 36,3 per cent of the votes cast in the election, the plurality principle and constituency delimitation having diluted the parliamentary strength of the other parties. In the provincial council elections in 1949, moreover, the United Party won back two seats

it had lost the previous year, the constituencies of Paarl and Bredasdorp. Drastic action was needed to consolidate the government's power and to ensure the anticipated Afrikaner dominance.

The next major step in broadening its legislative strength was the provision in 1949 for the parliamentary representation of Namibia[1], despite the mandatory territory not being an integral part of the country. All six seats of the House of Assembly were won the following year by the National Party, as were four seats in the Senate. Inevitably, attention turned next to coloured voters who had historically tended to support the United Party, and before it, the Unionists, against the Afrikaner national parties. It had been an old fear of the latter that the predominantly English parties would seek electoral support from black and coloured voters to compensate for the numerical deficiency in English-speaking voters[2]. The fear was accentuated by the suspicion that coloured voters had played an important role in the 1948 elections, and by reports that large numbers of coloureds would register as voters before the next election.

The Separate Representation of Voters Act[3] was thus part of a concerted strategy to consolidate the parliamentary and electoral position of the National Party by diluting the opposition's strength in a large number of constituencies in return for the probable loss of the four new seats.

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1 South West Africa Affairs Amendment Act 23 of 1949
2 Welsh D., The Politics of White Supremacy, 1960 Acta Juridica Vol. 1 p. 342
3 Act 50 of 1968

While its contribution cannot be quantified exactly, the overall strategy was successful because in 1953 the government had increased its parliamentary majority without obtaining a popular majority. In the 1958 election the National Policy won 103 of the 163 assembly seats and in 1961, for the first time, it won a majority of the popular vote. Other distortions of the White electoral system were to follow: the abuse of delimitation provisions, the creation of large-size rural constituencies, the pegging of provincial quotas, and even the introduction of nominated members of parliament.[4] The ease with which the franchise and electoral systems could be manipulated also vindicated the principle of parliamentary supremacy, about which National Party had complained while in opposition.

There was more political resistance to the constitutional machinations of the 1950s than had been the case in the 1903s. Among whites this was focused in the prominent but short-lived activities of the Touch Commando, an extra-parliamentary opposition group that drew considerable support from ex-servicemen. Among Blacks and Coloureds it formed expressions in the Defiance Campaign which began in 1952 and gave rise to another tradition of extra-constitutional activity for the voteless majority. As a result of the pressure on the government, the immediate quest was for ways of developing existing policies so as to accommodate Coloured and also Indians politically but without affecting the control of the White dominant group. The result of the lengthy period

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4 Boulle L. J., "South Africa and the Consociational Option" (1984) SALJ p.80

of debate within the dominant group was the birth of the 1983 Constitution.

The civil disturbances that commenced in Soweto in 1976 added a new agency to the deliberation. The massive political opposition to the government that erupted in the ensuing years was symptomatic of the acute legitimacy crisis affecting state institutions.

The extension of the franchise in 1983 served several overlapping objectives. In the first place it purported to address the legitimacy problems at the constitutional level, with particular reference to an increasingly critical international community, in that it implied full political rights for all South African citizens, who in terms of dogmatic homeland theory would be exclusively non-black. The early fate of the constitution exposed the futility of this objective. Secondly, it created new allies for the dominant group, by incorporating Coloured and Indian elitès into the highest policy-making bodies – there soon immersed a close working relationship between the three majority parties in the new system. This in turn increased the available pool of managers for the apartheid system, ranging from ambassadors to local officials, and since the franchise implied duties as well as rights, created a potential target group for military conscription. Thirdly, the new franchise provided further grounds for dividing subordinate political forces, in particular between those opting for participation in the new institutions and those remaining outside.

Because of its co-optive objectives the 1983 franchise was more constraining than enabling for Indian and Coloured voters. It intended to have a system-maintenance function and not to be an instrument of participatory democracy.

The racially-restricted nature of the South African franchise had profound implications for the social system. It had allowed for the domination of the state and its coercive agencies by a small minority, with few limitations on arbitrary rule. It had led to the identification of political interests with factors of race, which had in turn made the process of constitutional reform so problematic.

It had accorded a symbolic significance to the parliamentary franchise that could be out of proportion to its practical significance. And the inability to replace the government through the exercise of the franchise had led to the development of extensive extra-parliamentary opposition and demand for the replacement of the state system rather than for mere participation in it.

Although the approach of the National Party Government for many years appeared to have formulated in stone tablets, the government increasingly realised that change was inevitable.[5] A comparison between the approach of the South African Government to human rights in 1946, when the United Nations started to consider the question of

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5 Ozdemir O., Apartheid: The United Nations and Peaceful Change in South Africa, Transnational Publishers New York 1982

racial discrimination against people of Indian origin in South Africa, and the approach in 1990 when the government began unbanning liberation organisations and releasing political leaders provides clear evidence of this. We will ascertain in this chapter whether the movement by government implied a change towards the observance of international human rights norms.

We now discuss the old South African Legal System and its attitude towards the acceptance of international law of human rights.

3.1 THE OLD SOUTH AFRICAN LEGAL SYSTEM AND ITS ATTITUDE TOWARDS THE OBSERVANCE OF INTERNATIONAL LAW OF HUMAN RIGHTS

Roman-Dutch law became accepted as the common law of the Cape Colony, Natal, the so-called Trekker republics and later even Southern Rhodesian. It became accepted as the basis of a South African common law at the time of the arrival of Jan Van Riebeck in the Cape in 1652.

The term "common law" is mainly used in three senses. First of all, when one says that the legal system applicable to all inhabitants of the Republic, whatever their colour or creed, is South African law, one is saying, in effect, that South African law is their common law or national law. Any other law, apart from South African national law, that is applied to an inhabitant of the Republic is applied only in special circumstances.

Secondly, the common law is sometimes used to differentiate a type of law found in the prevailing legal system.[6]

Thirdly, the common law may be used as part of a classification of legal systems to indicate the law of those regions of the world, which have been influenced by the English common law. Despite the fact that the common law was to apply equally to all citizens of the Republic, there was also special laws applicable to the black people of this country. From the advent of the Union of South Africa in 1910 there was this so-called "Native" policy.

For more than a century the relationship of the white man with the black man in South Africa has been based upon the separation of the races in varying degrees in the social, political and economic life of the country – from the mere social apartness of the early Cape to the non-equality in-church-and-state of the South African Republic. Different names have been given to this policy – segregation, apartheid, parallel development – but they all had the same aim: the separation of races.[7]

The Prime Minister, in April 1955, Mr J G Strydom, in a debate on the Prime Minister's vote in the House of Assembly in April 1955, made a short, clear and forthright speech on this subject:

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6 Hosten et al: Introduction to South African Law and Legal Theory, 2nd Edition Butterworths, Durban 1995

7 Dr Malan, Prime Minister, Joint Sitting Debates, 14 June, 1954

> There is only one way that the white man can maintain his leadership of the non-European in this country and that is by domination. Call it paramountcy, baaskap or what you will, it is still domination. I am being as blunt as I can. I am making no excuses. Either the white man dominates or a black man takes over. [8]

It was this policy of apartheid that was to lead to a head-on collision between the Union of South Africa and the United Nations, as we shall attempt to show hereunder.

The attitude of the government of the day was not to embrace international human rights norms, as they did not believe in equality. Many laws were passed which entrenched the apartheid system.

3.2 THE STRUCTURE OF THE JUDICIARY

Immediately before the establishment of the Union there was a Supreme Court in each of the four colonies. On the establishment of the Union one Supreme Court was created for the whole of the Union,[9] the colonial courts becoming provincial and local divisions of the Supreme Court of South Africa,[10] with an Appellate Division sitting in Bloemfontein as a last

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8 Strydom, Prime Minister, House of Assembly, Cape Town, 20 April, 1955
9 Section 95 of the South Africa Act, 1909
10 Section 98 of the South Africa Act, 1909

court of appeal in the Union. Provision was made for the continuation in office of existing judges and for pending suits to be continued in the corresponding divisions of the new court.

In terms of section 106 of the South Africa Act, there were also inferior courts i.e Magistrates' Courts, Native Courts, Native Chief's Court and Headmen's Courts. The native Commissioners Court had magisterial jurisdiction in respect of offences committed by blacks. There was also Native Appeals Court as well as Native Divorce Courts.

The structures of the courts, here clearly show and represent racial divisions. The philosophies and values that informed the system were based on apartheid. The courts were expected to be impartial but this was a fallacy considering the fact that blacks were not allowed to become judges or even presiding officers in the magistrate's courts. The presiding officers of the native courts were all white males who were supposed to be experts in native law.

The courts continued as they were until the passing of the Supreme Court Act, 1959 (Act 59 of 1959) repealed Part VI of the South Africa Act, 1909. There has been amendments and repeals of sections of the Act until the enactment of the Constitution of South Africa Act 32 of 1961 which created the Republic of South Africa.

The Tri-Cameral system of Government was created in terms of the Republic of South Africa Act, 110 of 1983. In terms of this Constitution,

no court was allowed to enquire into the validity of any Act of Parliament nor the discretionary powers of the President with regard to own affairs matters and general affairs. The tricameral system is discussed more fully in the following pages of this Chapter.

The Republic of South Africa Constitution Act, 200 of 1993 created the first democratic and non-racial South Africa, and the Court structure also changed. We will deal with the courts in the old dispensation in this Chapter and about the role of the courts in the new dispensation in Chapter 4.

3.2.1 THE SOUTH AFRICAN JUDICIARY AND FUNDAMENTAL HUMAN RIGHTS BEFORE THE 1994 DISPENSATION

In order to understand the South African judiciary and its handling of fundamental human rights issues before 1994, we will present a selection of better-known South African case law concerning the following areas: [11]

1. Racial legislation, as this constituted the legal basis of apartheid.
2. Security legislation, and
3. State of emergency legislation, as these were the laws used to maintain apartheid.

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[11] A large part of this section, viz: the case law is based on the period between 1911 and 1963

Our focus for now remains the apartheid legal order to indicate the legal environment within which the then South African judiciary operated, and to assist us in establishing the extent to which the South African judiciary could be influenced by international norms of human rights.

3.2.2 RACIAL LEGISLATION

We include case law before 1948, as well as from after the formal inception of apartheid in 1948 to indicate the imprimatur of the Appellate Division to the policies and practices of racial discrimination. In 1905 the Cape Parliament provided that special schools should be established, which by law were to be restricted to children of European parentage or extraction or descent. In Moller v Keimoes School Committee,[12] a white man married to a woman whose father was white and mother was not, enrolled his children at such a school, but after complaints from other parents, the School Board ordered his children to leave. He contended that he was obliged to pay rates toward the school, that no other school in the district existed for his children and that since three out of four of his grandparents were of European descent the children should be classed as European and be readmitted to the school.

The lower court as well as the Appellate Division, however, rejected the application unanimously. Chief Justice de Villiers conceded to the argument of the defence that the statute nowhere mentioned colour, but said that the Court could not ignore the universal meaning attached to

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12 1911 AD 635

the term "European" in South Africa, according to which a white citizen of the United States who had never been to Europe was a "European", whereas a black man born and bred in Europe was other than a "European". "In construing a vague expression in a statute, the court should place itself as far as possible in the position of the authors, the Chief Justice" said.[13] To the other De Villiers on the bench, Japie de Villiers J.A, the word "European" - as commonly used in South Africa - had no geographical meaning. Apart from the races inhabiting the continent of Europe, it included an American, a Canadian, an Australian, a New Zealander and a South African. Even a Jew was considered to be a European while a Turk was an Asiatic:

> Although colour is not the only criterion it is usually the chief factor in determining whether a particular person is of European descent or not. But other traits such as type of feature, hair, etc. cannot be ignored.

To him there was nothing vague about the Act. According to Kotze, JA the Act was also plain and unambiguous and the word "European" meant pure "European":

> A certain amount of sympathy must naturally be felt for the innocent children, but the appellant has no one but himself to blame in this matter. It is true he married his wife before the Act was

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13 At p. 643 of the Report

> passed, yet he could hardly have been ignorant of conditions of life and of race existing in a country like South Africa.[14]

In the case of Gandur v Rand Townships Registrar[15], the Appellate Division had to decide whether Syrians were debarred from owning property in the Transvaal by the terms of a statute that discriminated against persons belonging to one of the native races of Asia, including the so-called Coolies, Arabs, Malays and Mohammedan subjects of the Turkish Empire.

Overruling the lower Court, the Appeal Court held that the native races were intended to be confined to coloured native races. Syrians, though natives of Asia, belonged to a white race and were accordingly not excluded from owning property. According to the then Chief Justice, the whole tenor of laws relating to locations was such that the legislator would have been horrified at the idea of confining white men, even if they came from Asia Minor, in locations like those set aside for other Asiatics.[16]

In 1923 the Immigrants Regulation Act was passed[17]. The Act empowered the Minister of the Interior to prohibit as immigrants "any person or class of persons deemed by the Minister on economic grounds to be unsuited to the requirements of the Union or any particular province

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14 Kotze, ibid, at p. 641
15 1913 AD 250 at p. 114
16 Gandur, supra at p. 255
17 Section 4 of Act 22 of 1923

thereof". Later that year the Minister issued regulations declaring every Asian person to be unsuited on economic grounds to the requirements of the Union and unsuited to every province in which he was not already domiciled. The effect of these regulations was to make all Asians prohibited immigrants and to restrict the free movement of Asians from one province to another.[18]

In the case of R v Padsha,[19] the validity of these regulations was challenged before the Appeal Court. The majority decision of three to two upheld the validity of the regulations. Delivering the majority judgment Solomon JA stated.

> In conversation, when Asiatic immigrants are spoken of the ordinary man would have in mind coloured persons, such as Indians, Chinese, Malays etc. not white persons such as Jews, Syrians etc. And I think it was reasonable to suppose that it was of the former races and not the latter of whom the Minister was thinking when he drafted the notice in question.[20]

In their dissenting judgments, Chief Justice Innes and Kotze J. refused to accept the popular meaning of "Asiatics" in South Africa and argued that if the regulations were valid they must extend to all Asians, white or coloured. It was in any event impossible to exclude all Asians on

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18 R v Padsha 1223 AD 281
19 Padsha, supra at p. 256
20 Padsha, ibid at p. 281

economic grounds because individual Asians differed fundamentally in their economic standing and professional qualifications. The Minister therefore adopted a racial and not an economic standard as required by the Act. Accordingly the Minister had exceeded his power under the Immigrants Regulation Act. Innes C. J.opined:

> Courts of law should not be astute to construe doubtful words in a sense which will prevent them from doing what prima facie is their duty, namely from investigating cases of alleged injustice or illegality. The intention of the legislature must be gathered from the language which it uses. Had the object been to exclude all the inhabitants of Asia by administrative decree, it would have been possible so to frame the clause as to leave no doubt upon the point. In its present form it does not, in my opinion, sanction such a course. If words do not carry the real intention Parliament is at hand to remedy the defect. To do so is the function of the legislature not of the courts.[21]

In the case of Dadoo Ltd v Krugersdorp Municipal Council,[22] two Asians had formed a company, of which they were sole shareholders, to enable them to purchase and control land which Asiatics were prohibited from owning. The trial court held that the transfer of land to the company was in *fraudem legis* because the Asians in question had deliberately created a colourless corporation to acquire land and control it, whose members

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21 Innes at p. 304 and Kotze, J. A. at p. 316

22 1920 AD 530

themselves were prohibited by law from acquiring and controlling such land.

The Appellate Division held that the company had acted lawfully and not in fraudem legis. The legislature had clearly not contemplated the possibility of a company (which in law acquired a separate personality) with Asian or coloured shareholders acquiring land and had not legislated against that.

In the case of Minister of Posts and Telegraphs v Rasool,[23] an Indian who was refused service at a whites only section of a post office, applied to court for an order declaring the direction invalid on the grounds that the statute which gave the Postmaster-General his powers did not authorise him to impose differentiation on racial grounds.

The lower court of the Transvaal Provincial Division found against the Postmaster-General on the ground that the authorities did not permit separate facilities of this kind without statutory authorisation. The court held that the Postmaster-General's instructions were unreasonable because they were partial or unequal in their operation, as the cases in that court had laid down that a discrimination based purely on race or colour was a discrimination of that kind (i.e. one unequal in its operation between different classes).[24]

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23 1934 AD 167

24 Rasool's case, supra, p. 172

The Appellate Division overruled the decision of the lower court and in so doing expressed a variety of social philosophies. According to two of the judges, discrimination had to be coupled with an inequality before an instruction or by-law could be invalidated. Stratford, J.A. found that it ran counter to principle and common sense to suggest that a by-law was invalid purely because it divided the community into white and coloured. De Villiers J.A. supported him in this argument. Beyers J.A. expressly doubted whether the principle of equality before the law had any application in the Transvaal, which like the Orange Free State, had known a long historical division between Europeans and non-Europeans. He went on to opine:

> The statement that all are equal in the eyes of the law cannot be unreservedly accepted. It is undoubtedly subject to considerable qualification; and as far as the Transvaal is concerned, it is a fact that Europeans and non-Europeans were never equal in the eyes of the law. Segregation runs right through our society in the Union for example, hospitals, burial grounds, public baths and facilities, play grounds, trains and countless other examples could be given. Classification is also a marked feature of our society, e.g. smokers and non-smokers, men and women, adults and children.[25]

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25 Minister of Posts and Telegraphs v Rasool, 1934 AD, p. 176-178

To the fourth and only dissenting judge Gardiner, the history of statutory discrimination created one status for the European, another and inferior status for the Asiatic, and a more inferior status to the native. A part of a man's status was his dignitas, which varied with his status. Dignitas, derived from the inborn right of every person to enjoy tranquillity of mind and to be secure against degrading and humiliating treatment, it carried a corresponding obligation on others to refrain from assailing that right. Reaching his conclusion, Gardiner invoked the fundamental principle of law that in the eyes of the law, all men were equal.[26]

In 1948 the National Party was elected to office on the platform of apartheid or as it was then understood, "*Baasskap*" (white domination). The instrument of the law was soon invoked to enforce practices of segregation that had previously been left to social and economic convention. Moreover, there was no longer room for equality of treatment in the new segregationist dispensation, as implicit in the apartheid policy, was the notion of white supremacy and superior white facilities.

In the case of R v Abdurahman,[27] the Appellate Division unanimously set aside a conviction of inciting non-Europeans to use the Europeans-only first class coaches on a train. The rationale of the Appellate Division was that the railways administration had failed to reserve separate first-class coaches for non-Europeans and thereby failed to provide substantial

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26 ibid at p. 185-187

27 1950(3) SA 136 AD at p. 136

equality of treatment. The test adopted by the court was that of substantial inequality of treatment.

In R v Lusu,[28] a separate but not substantially unequal doctrine was reflected. The court set aside a conviction imposed upon a black man during the defiance campaign of the early 1950s for entering a European waiting room on the Cape railway station on the ground that the administration had failed to provide substantially equal facilities for blacks.

In Tayob v Ermelo Local Road Transportation Board,[29] the court unanimously overruled the decision of a transportation board withholding a taxicab licence from an Asian on the grounds of his race. Centlivres C.J. rejected a reference to the relevance of public opinion in granting licences where it was implicitly limited to white opinion and suggested that the court was obliged to take both black and white opinion into account in assessing public opinion – something revolutionary at the time.[30]

3.2.3 THE NATIONAL PARTY GOVERNMENT STRIKES BACK

The Nationalist Party government was not pleased at all by the behaviour of the Appellate Division. This commitment of the Appellate Division to the principle of equality before the law was unacceptable to the

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28 1953(2) SA 484 AD
29 1951(4) SA 440 AD
30 Tayob v Ermelo Local Road Transportation Board, 1951(4) SA 440 AD at p. 446

government. In 1953 the government showed its conviction with the Reservation of Separate Amenities Act 49 of 1953 (abolished only in 1990 by the De Klerk government). This Act empowered local authorities and other bodies to provide separate facilities for different races, and expressly excluded the courts from pronouncing on the validity of such reservations where they resulted in a substantial inequality of treatment for the different races, or where they failed to provide similar but separate amenities at all for one or other group. Dugard commented as follows:

> The separate but equal doctrine is now, by legislative fiat, replaced by the separate but unequal doctrine only a year before the separate but equal doctrine was struck down by the supreme court of the USA in Brown v Board of Education and replaced with true equality before the law.[31]

In Minister of the Interior v Lockhart and Others,[32] a number of Indians from Durban sought an order setting aside a proclamation that divided the city into exclusive areas for whites and for Indians on the grounds that zoning resulted in substantial inequality of treatment for the Indian group, which was not authorised by the Group Areas Act.[33]

In the lower court, Henochsberg J., relying on the Abdurahman case, held that the proclamation of group areas could and should be exercised

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31 Dugard, Human Rights and the South African Legal Order, supra at p. 304-324

32 1961(2) SA 587 AD

33 Dugard, ibid at p. 589

without the treating of members of different races on a footing of partiality and inequality to a substantial degree.

The Appellate Division, however, overturned this ruling. Holmes J.A., delivering the judgment of the court, acknowledged that the Group Areas Act did not expressly permit substantial inequality of treatment, but added the statement "it seems to me clearly implied". Hereafter he uttered these immortal words, putting a judicial stamp to one of apartheid's cornerstones:

> The Group Areas Act represents a colossal social experiment and a long term policy. It necessarily involves the movement out of group areas of number of people throughout the country. Parliament must have envisaged that compulsory population shifts of persons occupying certain areas would inevitably cause disruption and within the foreseeable future, substantial inequalities. Whether all this will ultimately prove to be for the common wealth of all the inhabitants is not for the court to decide.[34]

In Mustapha and Another v Receiver of Revenue, Lichtenburg and Others,[35] the Appellate Division upheld the termination of a permit to occupy a trading site, granted to Indians in a native area, primarily because the permit-holders were Indians.

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34 Minister of the Interior v Lockhart and Others, supra at p. 589

35 1958(1) SA 343 AD

In R v Pitje,[36] the reasonableness of a separate table for a black lawyer in a court of law was the subject matter. Mr Pitje, a black attorney employed by the firm of Nelson Mandela and Oliver Tambo, refused to take his seat at a separate table for black practitioners in the magistrate's court. Because of his refusal he was convicted of contempt of court.

At the Appellate Division, Steyn C.J. found that the magistrate's order was reasonable and hence lawful. He held that legal practitioners were not treated unequally by being required to sit at separate tables and that the attorney could not possibly have been hampered in the slightest in the conduct of his case by having to use a particular table.

Although no reservation of a separate table has been made under the Separate Amenities Act, Steyn C.J. held that the fact that such action could have been taken was not entirely irrelevant. It showed that the distinction drawn by the provision of tables in this magistrate's court, was of a nature sanctioned by the legislature, and made it more difficult to attack the validity of the magistrate's order on the ground of unreasonableness.

The Appellate Division surely emerged with a different look. The jibe of Sachs[37] that "having failed to turn parliament into a court, the government was now seeking to turn the court into a Parliament", provides an apposite description of this new look Appellate Division.

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36 1960(4) SA 709 AD

37 Sachs, ibid at p. 144

"Apartheid case" law obviously did not terminate in 1960 with the Pitje case. We saw above that the Appellate Division in S v Adams; S v Werner holding the Group Areas Act not ambiguous, and therefore not allowing recourse to a presumption of compliance with international obligations. The court held the Act to be unambiguous, and that it by implication allowed discrimination and manifest injustice.[38]

It is submitted that the cases discussed above give sufficient evidence of the racialistic nature of judicial decisions. We conclude with Forsyth on these decisions. [39]

> It was the judges who heard this case (Minister of the Interior v Lockhart 1961(2) SA 587 AD), not Parliament, who gave the imprimatur to the Group Areas Boards to divide the country up into racial areas unequally; and it is the Appellate Division which bears some of the moral responsibility for the bitterness sown by the unequal application of the group areas legislation.

3.2.4 SECURITY LEGISLATION

An avalanche of security laws began to roll off the parliamentary press only two years after the National Party came to power. With a legislative programme of racial separation, resisted consistently by the majority of

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38 S.V. Werner and S.V. Adams 1981*1(SA 187 A

39 In danger of their talents, supra at p. 234

the population, the government had to resort to the force of security legislation to usher their policy through. As will be indicated below, the courts played no small part in assisting this security apparatus.

In R v Sisulu and Others,[40] the court upheld the convictions of leaders of the ANC defiance campaign. Communism, which was a crime to advocate, was defined so as to penalise almost all-effective extra-parliamentary opposition. The court even extended it to an innocuous protest march of women who breached municipal by-laws in the course of their campaign to change marriage laws.[41]

In R v Ngwevela,[42] the appellant was convicted of violating the terms of a banning order under the Suppression of Communism Act by attending a gathering. On appeal, he contended that the banning order was invalid on the ground that it had been issued without first giving him an opportunity to be heard in his own defence. In upholding the appeal the court exercised its choice in favour of the audi alteram partem rule, despite a series of obstructive principles and precedents.

> The maxim should be enforced unless it is clear that Parliament has expressly or by necessary implication enacted that it should not apply or that there are exceptional circumstances which would justify the court's not giving affect to it.[43]

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40 1953(3) SA 276 AD
41 Sisulu, supra at p.80
42 1954(1) SA 123 AD
43 R v Ngwevela, supra per Centliuves at p. 131

This decision meant that all orders of this kind became invalid. The legislature was, however, not slow to re-assert its will and an amendment was hurriedly introduced to provide for the right to request reasons for a banning order after its issue.[44]

In Rossouw v Sachs,[45] the issue was whether Albie Sachs, an advocate, was entitled to reading and writing material while a detainee under the 90-day detention law. The statute did not clarify this question and the courts were requested to determine the intention of the legislature. The lower court in Cape Town ordered that Sachs be permitted to receive a reasonable supply of reading and writing material, as deprivation of such materials constituted punishment. The court went on to opine that "it would be surprising to find that the legislature intended punishment to be meted out to an unconvicted prisoner".[46]

The Appellate Division, however, in a unanimous judgment, held differently. Ogilvie Thompson J.A., acknowledged that the statute departed fundamentally from accepted principles of law by requiring a suspect to incriminate himself under interrogation and by excluding a detainee's right to be visited by counsel.

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44 Section 6(c) of the Suppression of Communism Act, supra

45 1964(2) SA 551 AD

46 c.f. THE Appellate Division's decision at p. 556-564

However, the legislature had expressly deprived the detainee of some of these rights, viz. right to counsel, right to bail, right against self-incrimination. The purpose of the Act, the judge held, was to induce detainees to talk and that this purpose might be interfered with if the detainee was permitted to relieve the tedium of his confinement by being permitted to receive reading and writing materials. [47]

In 1969-70 Professor Barend van Niekerk of the University of the Witwatersrand published an article in the South African Law Journal advocating the abolition of the death penalty. Commenting on the questionnaire he had circulated among the judiciary and advocates, he stated the following:

> .. .. almost 50% in fact, believe that justice as regards capital punishment is meted out on a differential basis to the different races, and that 41% who so believe are also of the opinion that such differentiation is conscious and deliberate.[48]

For these comments Van Niekerk was charged with contempt of court on the ground that his statement was calculated to bring the judiciary into contempt, to violate their dignity and respect, and to cast suspicion upon the administration of justice.

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47 Ibid at p. 561-565

48 Prof. Barend van Niekerk, "The abolition of the death penalty." S.A.J.L (1969) (86) 457 at p. 467

He was acquitted as it was found that he could not have had the necessary intention to commit a crime but the judge sternly rebuked him for the article which, according to the judge, could on its own be viewed as contempt of court. The effect of this was to stifle research in this field for at least six years. [49]

In 1971 Van Niekerk joined the academic critics of the judicial role in the application of the security laws, and was charged with contempt of court and convicted - a conviction confirmed by the Appellate Division. [50] The allegations were: contempt of court, by insulting or scandalizing the court making comments with intent to prejudice and influence the judgment in the case of S v Hassim and Others[51], and attempting to defeat or obstruct the course of justice by calling upon the judges of the Supreme Court of the Republic of South Africa and other judicial officers not to admit or attach any credence to evidence given or statements made by persons detained in accordance with the provisions of the Terrorism Act. He was convicted of contempt of court.

In the case of Sobukwe and Another v. Minister of Justice,[52] Robert Sobukwe, who was the founder of the Pan African Congress, was sentenced to three years imprisonment on Robben Island in 1960 and detained there until 1969. He was then restricted to the Kimberley magisterial district for five years. In 1970 he was offered a teaching post

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49 Dugard, supra at p. 293
50 S v van Niekerk 1972(3) SA 711 AD, at p. 716-719
51 1973(3) SA 443 AD
52 1972(1) SA 693 AD

at an American University. His application for a passport was refused by the Ministry of the Interior but not his application for a permit to leave the country. When he applied to the Ministry of Justice to leave the magisterial district of Kimberly in order to embark on an aircraft for the USA, this was refused.

The matter reached the Appellate Division, which held that it was somewhat anomalous that a permit granted to leave the country by one Ministry acting under an Act of Parliament should be rendered ineffective by another Ministry acting under another Act of Parliament. However, in rejecting the order sought, the Appellate Division relied on the 1934 Sachs case that Parliament was sovereign, and so the Appellate Division increasingly became more inclined towards the executive. In Minister of Justice v Alexander,[53] the Appellate Division overruled a persuasive judgment of the lower court that would have compelled the Minister to discover (list by description) the documentation which he relied on in concluding that a person (banned after serving a 10-year jail sentence in a maximum security prison), had somehow managed to further the aims of communism while so held.

In S v Meer,[54] the Appellate Division, overruling a powerful judgment of the Natal court, upheld a banning order which contained a vague prohibition on attending social gatherings.

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53 1975(4) SA 530 AD

54 1981(4) SDA 604 AD

In concluding this section dealing with security laws, the approach of the court to the admission, confessions and evidence from persons held in solitary confinement will be discussed briefly.

In S v Christie,[55] the court accepted a confession made during detention largely because the detainee was being held under a short-term detention law, not under indefinite detention. The fact that the police had the power to convert short-term detention to indefinite detention with relative ease, did not appear to have been considered by the court.

Matthews (1985)[56] boldly stated that if the courts, right from the outset, had been resolutely sceptical about detainee evidence and confessions, there would certainly have been fewer deaths during interrogation and detention, and the political justice dispensed by the courts would now enjoy more credibility.

In the leading case on evidence of detainees, S v Hassim,[57] the court held that extra vigilance and scrutiny was required in assessing detainee evidence. However, the need for extra vigilance and scrutiny did not prevent the court from accepting in S v Gwala[58] July 1977, the evidence of a detainee who had been detained in solitary confinement for over 500 days.[59]

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55 1982(1) SA 464 AD

56 Matthews A.S., "The South African Judiciary and the Security System", SAJHR Nov 1985, Vol 1, part 3 at p. 119

57 1973(3) SA 443 AD

58 1977(1) SA 314 NPD

59 Matthews, supra at p. 204

Matthews, in referring to barbarous official behaviour, singles out the unreported case of S v Mogale.[60] The trial court had convicted the accused on the basis of a confession and rejected his evidence that the confession was coerced by assaults consisting of punches, kicks, throttling, electric shocks and the breaking of two teeth with a pair of pliers. The Appellate Division overruled the trial court's judgment and rejected the confession as inadmissible. The Appellate Division accepted the evidence of the accused above that of police on the question of physical coercion. However, while the treatment meted out to the accused was undoubtedly savage and barbarous, the Appellate Division administered no rebuke to the police responsible for it.

In 1985-86, however, the Appellate Division astonished both friend and foe alike when it took a clear stand against the draconian measures of the Internal Security Act 74 of 1982. In Nkondo and Gumede v Minister of Law and Order,[61] the court held that the statutory duty to give reasons for the detention of an individual could not be discharged by merely citing statutory grounds for the detention.

In Minister of Law and Order v Hurley,[62] an application was brought by Archbishop Hurley for the release of a church worker. The court held that where the statutory condition of a decision to detain was that the

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60 Riekert J.G., Police assaults and the admissibility of Voluntary Confessions, (1982) 99 SALJ at p. 175

61 1986(2) SA 756 A

62 1986(3) SA 568 A

decision-maker had to have reason to believe certain kinds of fact existed, the decision-maker had to show, on review, that he indeed had reason to believe that those facts existed and that his belief was reasonable. The court held that in both cases the executive failed to comply with the requirements of the statute and released the detainees.

In Schermbrucker v Klindt N.O.[63], Mrs Schermbrucker applied for an order restraining the security police from using unlawful methods of interrogation on her husband, a detainee. She was relying on a note which had been smuggled out of prison in which her husband alleged that he had been interrogated without interruption for 28 hours by a team of security police officers, who had threatened him with longer periods of detention if he refused to answer their questions satisfactorily.

The Transvaal Provincial Division ruled against her, so Mrs Schermbrucker turned to the Appellate Division. The court dismissed her appeal, but were divided on the question whether the court's jurisdiction to order a detainee to testify before it in such circumstances had been excluded by necessary implication or not. Botha J.A. for the majority relied on the case of Rossouw v Sachs, supra, that the object of the Act was to induce the detainee to talk. If a detainee was permitted to leave his place of detention to testify in legal proceedings, this would interfere with the interrogation process and negate the inducement to speak.[64]

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63 1965(4) SA 606 AD

64 Schermbrucker v Lindt, supra, at p. 619

Rumpff J.A., dissenting, held that the state had a vital interest in ensuring that the Act was not abused by third-degree methods of interrogation, and that this interest could be guaranteed only by permitting a court of law to determine whether the methods of interrogation employed by the police were lawful. Such a determination could be made only by summoning the detainee to give evidence on the question.

Williamson, J.A., also dissenting, held that:

> It was unnecessary .. .. .. and manifestly wrong in modern times to impute the extraordinary and unprecedented intention to Parliament of legalising a system of compelling a person to speak. There is nothing to prevent Parliament from doing that if it decides to do so, but at least one would expect such an intention disclosed with far greater clarity

In South African Defence and Aid Fund and Another v Minister of Justice[65] the majority of the judges of the Appellate Division denied a right to a hearing before an investigating committee to an organisation about to be banned.

The late Murenik said of Nkondo and Hurley cases that the judicial emancipation of a detainee was unaccustomed and the spectacle of

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65 1967(1) SA 262 AD

actual success in *habeas corpus*, and confirmation of that success on appeal, was a heady one.[66] According to Basson these judgments proved that in the face of the most reprehensible provision of the security legislation, the court was prepared to decide in favour of the individual and to protect human rights.[67] While expressing the hope that this would become a new trend, Basson warned that dire consequences would result should the courts return to their former position and give executive-minded rulings.[68] In our subsequent discussion on the state of emergency legislation, this return to the former approach will be demonstrated.

3.2.5 STATE OF EMERGENCY LEGISLATION

In 1953 the South African Parliament enacted the Public Safety Act (Act 3 of 1953) in order to put an end to the passive resistance campaign against discriminatory legislation. The Government was empowered by this Act to declare a state of emergency when it considered public safety to be threatened and to issue such emergency regulations as it considered necessary or expedient for providing for the safety of the public. In 1985 a state of emergency was declared and renewed annually until June 1990.[69]

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66 Murenik S., "Judicial review and the emergency : the record of the Appellate Division", in Democracy and the Judiciary, Hugh Corder (ed) 1989

67 Basson D., "Judicial activism in a state of emergency : an examination of recent decisions of the South African Courts", SAJHR, (1987) Vol. 3, part 1, at p. 137

68 Basson D., supra Judiciary Activism, at p. 43

69 Proclamation 120 of 1985 in Government Gazette 9876 of 21/07/1985

This study will focus on selected cases relevant to the state of emergency legislation during the period 1985-1990. This period has been identified because it provides the immediate context for the present day reforms in South Africa. Moreover, it is also within this period that the South African Law Commission received instructions from the South African Government to investigate the feasibility of group rights and to consider the extension of the protection of individual rights and the role the courts could play in this regard.[70] The irony here is that all these human rights activities on government instruction continued, while states of emergencies laid the basis for the most drastic erosion of civil liberties - when the law was taken out of "law and order" and when information on political developments and police conduct was placed under state management.[71]

When asked about this irony, the then Chairman of the South African Law Commission, Mr Justice Olivier, responded that "it was precisely at such time that it is necessary to pay attention to the protection of human rights."[72] His instructor, Minister of Justice the late Kobie Coetsee, took the point a little further:[73]

> A Bill of Rights need not ... impede the pursuit of public safety or state security, but (should be

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70 The Commission received its instructions on 23 April 1986 and submitted its 490 page working paper (25) on 11 March 1986 for general comment.

71 Basson, Mensergtehandves, SAJHR 1986 Vol 2. Part 2 at p. 2532

72 Van der Westhuizen. J., "An update on the Law Commission's Bill of Rights Investigation: An Interview with the Hon. Mr. Justice P.J.J.Olivier", SAJHR, Vol 4, part 1 1988 at p. 99-102

73 Coetzee's speech at the Federal Congress of the National Party, held in Durban on 12-13 August 1986

considered) an additional and equivalent means.

The Minister admittedly prefaced his statement with a reference to individual rights. His equation of a Bill of Rights with state security was, in our submission, too wide an interpretation, certainly within the South African situation. This brings us to Article 4 of the International Covenant of Civil and Political Rights, which provides for the derogation from the obligation in the Covenant in times of public emergency. Ghandi described this as certain "situations when a state may feel that in these circumstances it is unable, for one reason or another, to respect certain fundamental or human rights".[74]

It is submitted that when the South African case law is viewed during the states of emergencies, in terms of Article 4 of the International Covenant of Civil and Political Rights, the distance between international human rights norms and the South African municipal law is distinctly reaffirmed. It is, however, also true that South Africa was not a state party to the Covenant.

3.2.6 SELECTED DECISIONS UNDER STATE OF EMERGENCY LEGISLATION

The South African government had defended the state of emergency as being necessary to restore law and order. However, this public

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74 Ghandi P.R., "The Human Rights Committee and derogation in public emergencies", in 32 German Yearbook of Interlational Law, 1989

emergency was not threatening the life of the nation.[75] From the viewpoint of the disenfranchised majority in the country, it was the widespread resistance and protests to the apartheid legal order that challenged the legitimacy of the minority government.

What was significant of the state of emergency regulations was not so much the new powers it conferred on the executive, but that it attempted to exclude the supervision of executive powers by legal institutions and the press.[76] However, while the intention of the state was to diminish the role of the courts, the willingness of political organisations and trade unions to approach the courts was increasing.

Hayson and Plasket explain this as:

> Law that had been used as an attenuated form of accountability in a country where the majority of citizens are denied the right to exercise the more conventional form of accountability, the franchise.[77]

Furthermore, the learned authors continued that:

> During the intense political repression where popular organisations and trade unions are prohibited from exercising Parliamentary and

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75 Article 4(1) of the ICCPR on public emergencies

76 Haysom & Plasket, "The war against law, judicial activism and the Appellate Division", SAJHR, 1988, Vol 4, part 3, at p. 303-306

77 Haysom, ibid, p. 307

> extra-Parliamentary pressure to effect political restraint, the courts are forced to the centre stage. It is not surprising then, that during the state of emergency many of the leading challenges to emergency powers .... were brought in the name of black political organisations, trade unions or their leaders.[78]

The scenario that unfolded during this period is one of hopes raised and hopes dashed. An important index of the raised hopes is provided in Basson.[79]

De Villiers J. A., in Ganyile v Minister of Justice[80] said:

> In Plato's Republic where one has the *res politica* the judiciary often has to state that action taken by the executive is justified on the *principle Salus reipublicae Suprema lex est.* On the other hand the Supreme Court is the protector of the rights of the individual citizen, and will protect him against unlawful action by the executive in all its branches in the same way as in England the Supreme Court will protect the British even from the Crown.[81]

Lord de Villiers in de Kok and Bailie, said:

> The disturbed state of the country ought not, in my opinion, to influence the court, for its first

78 Haysom, ibid, at p. 308
79 Basson D., "Judicial activism in a state of emergency", supra
80 1962(1) SA 647 E
81 Basson, ibid, at p. 653

> and sacred duty is to administer justice to those who seek it and not to preserve the peace of the country. The civil courts have but one duty to perform and that is to administer the laws of the country without fear, favour and prejudice independently of the consequences which ensue.[82]

The trust placed in the court to act as a shield against the onslaughts of the state was, or so it appeared to be, not misplaced. Expressing the enthusiasm of jurists at the time, Basson exclaimed:

> Whenever judges have a choice ..... they will actively protect the rights and freedoms of individuals who seek redress. In a state of emergency and in the face of severe and draconian security legislation the courts will not be executive-minded, but will lean towards the position of the individual whose rights are infringed and be careful to ensure that the infringement will be no greater than is absolutely necessary. In this way the courts will act as independent and impartial arbiters and will control the exercise of government power as best as they can.[83]

Basson's enthusiasm was certainly not unfounded. We will discuss the hammering blow given by the Appellate Division to this enthusiasm

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82 1879 Buch 45, p. 66 cited in Radebe v Minister of Law and Order, WLD case No.14862/96

83 Basson, ibid, p. 29

below, but let us first consider the basis of that optimism. Basson[84] delineates four areas where the courts had indeed been able to protect individual rights and freedoms against the exercise of executive power.

First where the legislation which authorised arrest and detention required only the subjective opinion of the arresting officer, the court held that opinion must be formed properly to justify the arrest and detention. Basson referred here to the development from Minister of Law and Order v Hurley[85] where, as we have already seen, the court had to decide on the competence of a police officer to detain an individual in terms of section 29 of the Internal Security Act 74 of 1982 for the purpose of interrogation in detention for an indefinite period.

The executive stepped in and came forward with a new power of arrest under the emergency regulations, viz: Regulation 3(1) which read as follows:

> A member of a force may, without a warrant of arrest, arrest or cause to be arrested, any person whose detention is, in the opinion of such member, necessary for the maintenance of public order, or the safety of the public, or that person himself, or for the termination of the state of emergency, and may under a written order signed by any member of a force detain

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84 Basson, supra, at pp 41-43

85 1986 (3) SA 568 A

> or cause to be detained, any such person in custody in a prison.

A person could now be arrested and detained, if in the opinion of the member of the force, it was necessary for the objectives set out in Regulation 3(1).

However, in Nkwini v Commissioner of Police[86] the court held that despite the fact that the arresting officer was now given a "free discretion", the holding of the opinion still constituted a jurisdictional fact, the existence of which was necessary for the validity of the arrest. The court was therefore not excluded from determining whether the officer had acted mala fides in forming that opinion.

Similarly in Radebe v Minister of Law and Order[87] the court held that the arresting officer must have bona fide formed the opinion that the individual's arrest was necessary for the purposes set out in Regulation 3(1), e.g. to maintain the public order. The court went on to opine :

> the vague say-so (of the arresting officer) does not dissuade me from coming to any other conclusion than he did not apply his mind to the precise terms of Regulation 3(1) and did not form an opinion that the detention of Machiyane was necessary for one or more of the purposes stated therein

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86 1986 (2) SA 421 E

87 WLD Case No. 14862/86 (unreported)

In Dempsey v Minister of Law and Order[88] the arresting officer failed to consider whether the detention of the individual would be necessary for the purposes stated in the regulation. The court required that the opinion of a particular kind: "The question to which a member of a force must apply his mind is not whether such detention is desirable or expedient, but whether it is necessary".[89]

The second was where the courts controlled the executive authority with regard to rules of natural justice especially the audi alteram partem rule. Again we saw, in preceding pages, a development from the Internal Security Act 74 of 1984 to the harsher emergency regulations. In terms of section 30 of the Internal Security Act 74 of 1982, the Attorney-General (AG) was empowered to issue an order preventing the court from granting bail to an accused.

In Buthelezi v Attorney-General of Natal[90] the court held that the Attorney-General made serious inroads upon individual rights and freedoms and deprived the courts of a power they traditionally exercised, the section was to be construed in such a way that its harsh effect was alleviated.

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88 1986 (4) SA 530 C
89 1986 (4) SA 530 C
90 1986 (4) SA 337 D

The executive stepped in and amended regulation 3(3) which pertained to the continuation of detention. The operation of the audi alteram partem rule was not expressly excluded. The regulation read as follows:

> The Minister may, without notice to any person and without hearing any person, by notice signed by him and addressed to the head of a prison, order that a person arrested and detained in terms of sub-regulation (1), be further detained, and in that prison for the period mentioned in the notice or for as long as these regulations remained in force[91]

In Omar v Minister of Law and Order[92] the court held that the power of the State President to exclude the audi alteram partem rule was impliedly incorporated in the enabling Act, and that he did not act ultra vires when he issued the new regulation 3(3).

However, the court in the case of Momoniat & Naidoo v Minister of Law and Order[93] held differently. While the court recognised that regulation 3(3) was substituted by a provision which in effect did expressly exclude the audi alteram partem principle, it held as per Goldstone J, that regulation 3(3) did not exclude the right of a detainee to make representations after the Minister had ordered his continued detention.

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91 ibid, at p. 207
92 1986 (3) SA 306C
93 at p. 212

In Bill v State President[94], Leveson J took this point a step further. He confirmed Momoniat and held that since this right existed, the detainee was entitled to the reasons for his or her detention, had a right to respond to them by way of representations which the Minister was obliged to consider, and was entitled to the wherewithal with which to make representations i.e. pen and paper.

The court held that normally the right to make representations and to be heard will be jealously protected and the importance of the liberty of the subject and the duty of the courts in this regard must never be lost sight of.

Regulation 3(3) may have excluded the right of a detainee to make representations before the Minister had ordered his continued detention, but the detainee retained the right to make written representations to the Minister after the order to further detain had been issued.

The Minister was accordingly ordered to furnish the detainee in writing with the grounds for his continued detention in terms of regulation 3 of the emergency regulations.[95]

Regulations had been held to be ultra vires because the executive authority did not stay within the four corners of the enabling Act, or because the regulations were void for uncertainty, or void for

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94 1987 (1) SA 265 W

95 Supra at p. 266

unreasonableness, i.e. they involved such oppressive interference with human rights that they could not have been contemplated by Parliament. We will only focus on the right to legal representation although Basson[96] also included freedom of speech and freedom of the press as well.

In Omar v Minister of Law and Order[97] it was held that the provisions of regulation 3(10)(a) and rule 5(1) which inhibited the access of legal advisers to detainees held under the emergency regulations were not so unreasonable that interference by the court was justified. In Bloem v State President[98] it was similarly held that the provisions which restricted access to detainees by lawyers were not in any way legally improper.

However, in Metal and Allied Workers' Union v State President,[99] the full bench of the Durban and Coast Local Division held that the State President had no power to go beyond the scope of the enabling provision, wide as it was, to require that permission must be obtained for visits by lawyers on issues which might have nothing to do with the state of emergency at all.

The court relied on a judgment by the Appellate Division in Mandela v Minister of Prisons[100] and declared the provisions which restricted access to the lawyers to be ultra vires the enabling Act. Following the case of Metal and Allied Workers' Union and in the case of Bill v State

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96 Supra, at p. 75
97 1986 (3) SA 306 C
98 1986 (4) SA 1064 O
99 1986 (4) SA 358 D
100 1983 (1) SA 938 A at p. 957

President[101] the Court held that access by a lawyer to detainee in the circumstances outlined could not affect the safety of the public or interference with the maintenance of good order.

Basson[102] lastly referred to the fact that an "ouster" clause did not operate to prevent the court from exercising control over executives' actions which were invalid or ultra vires. He pointed to the alarming phenomenon of the legislature intervening to destroy the benefits of many of the above decisions.[103] He advised the government:

> not to misuse the principle of parliamentary sovereignty to further violate human rights, but instead to increase the possibility for the courts to become true pioneers for democracy in a just South Africa[104]

As will be made clear from the ensuing hands-off-the-executive approach by the Appellate Division in the following pages in this Chapter, Basson's counsel was much more applicable to the highest judicial body in the land.[105]

We will approach this executive-mindedness of the Appellate Division by considering the watershed case of Omar and the judicial outrage that followed.

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101 1987 (1) SA 265
102 ibid, at p. 42
103 ibid, at pp 43-44
104 ibid, at p. 42-43
105 See page 154, infra, para 2.

3.2.7 THE APPROACH OF THE FORMER APPELLATE DIVISION

The three appeals subsumed under the above name, viz: Omar & Fani v Minister of Law and Order raised essentially the same question: Could emergency regulations that excluded the right to legal representation and the audi alteram partem rule without clear authorisation, express or implied, in the enabling statute, be good in law?

In Omar, the Appellate Division was faced with the first challenge to the validity of the emergency regulations of 1985-1986 on the basis of their incompatibility with human rights.

In effect in the provincial divisions of the Supreme Court, five judges had upheld the validity of regulation 3(3) (Munnik and Cloete, JP and Vivier, Zietsman and Eksteen JJ), and five had held in favour of the retention of the audi alteram partem rule under regulation 3(3) (Friedman, Leveson, Kannemeyer, Jennett and Jones JA). Similarly five judges had upheld the validity of regulation 3(10)(a), and rule 5(1) (Munnik, JP and Vivier, M.T. Steyn, Edeling and Hattingh JJ), and five had found it to be ultra vires (Friedman, Leveson, Didcott, Kumbleben and Theron JJ).

Regarding the exclusion of the audi alteram partem rule, the majority judgment of the Appellate Division rejected the argument that regulation 3(3) was ultra vires on the grounds of unreasonableness within the

meaning of the test in Kruse v Johnson[106] ("oppressive or gratuitous interference" with the rights of the subject that can find no justification in the minds of reasonable men), or unauthorised interference with fundamental rights in R.V. Slabbert[107] and R v Heyns.[108]

The court dismissed the challenge to the validity of regulation 3(10)(a) and rule 5(1) regarding the exclusion of legal representation in similar fashion.

In both instances, the court found that the wide powers conferred on the State President by the Public Safety Act permitted him to take drastic actions that he considered to be necessary or expedient for dealing with the emergency situation, even if that resulted in the violation of fundamental rights.

Acting Chief Justice Rabie[109] articulated the approach of the majority judgment in the following passage:

> the power which section 3(11)(a) confers on the State President to make regulations for the achievement of the purposes stated in the section is a power not only to make such regulations as appear to him to be expedient for achieving the said purposes. The test of what is expedient is obviously a less stringent one than

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106 (1898) 2 QB 91 at pp 99-100
107 1956 (4) SA 18 T
108 1959 (3) SA 634 A at 639
109 Omar, supra at p. 892 D-G

> that of what is necessary. This illustrates how wide the discretion is which the Act confers on the State President. It is clear from the terms of the section that the State President is empowered to make such regulations for achieving the purposes mentioned in the section as appears to him, i.e. in his subjective judgment, to be necessary or expedient. It follows that it is not open to a court, when considering a regulation, to substitute its assessment of what would be necessary or expedient to achieve the purposes mentioned in the section for that of the Sate President and to hold that the regulation is invalid because the State President could, in his judgment, have dealt with the matters in issue in another, less harsh way.[110]

The hands-off-the-executive approach of the Appellate Division in Omar left South Africans in general and legal commentators, in particular, shocked, disappointed and devastated. The door to legal control of the executive in emergency situations was slammed shut with a vengeance in Omar. Further locks and bolts were attached to the door in Castle No v MAWU[111], Minister of Law and Order v Dempsey[112], Ngqumbu v State President[113], Staatspresident v UDF[114], Staatspresident v Release Mandela Campaign[115]. We consider the watershed decision of Omar sufficiently representative of the Appellate Division forming a bulwark

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110 Omar, supra, at p. 895
111 1987 (4) SA 795 A
112 1988 (3) SA 19 A
113 1988 (4) SA 224 A
114 1988 (4) SA 830 A
115 1988 (4) SA 903 A

against the individual in its protection of the executive. The Omar decision led to an outcry by numerous commentators.[116]

Dugard[117] regarded the Omar decision as a disappointment to those who naively believed that the Appellate Division was becoming more rights-conscious. Previous decisions had given rise to hopes that the judiciary's dark ages had ended and that the Appellate Division had embarked upon a course in which fundamental common law rights would be given preference over interests of national security and governmental bullying in the interpretation of ambiguous statutes, and the review of administrative action. Omar suggests that this optimism was misplaced and that we were back to square one, which, in judicial terms is Rossouw v Sachs.[118]

André Rabie concluded that effectiveness might be at the steering wheel when executive actions are undertaken in the public interest, but the justice should be at the breaks. [119] In Omar the wheels of justice failed to function effectively.

To Matthews the aura of battlement that surrounded Omar, was quickly dispelled, when the judgment was viewed for what it actually was, a statement of politics rather than a statement of law.[120] Politics, in this sense, did not carry the squalid connotation of party politics. It did not

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116 SAJHR (1987) 3 at pp 295-337
117 Professor of Law at University of Witwatersrand at p. 295
118 1964 (2) SA 551 AD
119 Professor of Law, University of Stellenbosch, at p.311
120 Professor of Law, University of Natal, SAJHR (1987) at p. 313

imply that the court was favouring one of the contestants in the political market-place, though that may indeed be the result of the ruling. The judgment was political because it represented a categorical choice between certain policy alternatives, and because the preference imprimatured by the Appeal Court was inevitably significant in a broad political sense.

Baxter[121] stated that for all its paranoia, the old South African Government had never dared to go so far as to impose an executive "state of siege", that extreme form of martial law which Dicey described as "the suspension of ordinary law and the temporary government of the country by military tribunals".

With decisions like Omar, the government needed no longer to be apprehensive. Nowhere in the majority judgment did the court assert an independent role, instead we were treated to a lengthy, uncritical explanation of the point of view of the government. Rabie ACJ did not seem concerned with the responsibility of the courts at all. He simply erased them from the picture.

McQuid-Mason concluded with this statement:

> The more the South African courts are perceived as mere handmaidens of the executive which reflect an official set of values,

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121 Professor of Law, Duke University School of Law, North Carolina, at p. 322 of the SAJHR (1987) supra

> the more our judiciary and legal system will be brought into disrepute in the eyes of oppressed people in South Africa, and the free societies in the outside world[122]

To Dennis Davies, the Omar judgment was a watershed in our jurisprudence for it marked an acceptance by the highest court in the land of a legal theory in which the courts play no role in assessing the validity of executive action, particularly within the emergency context. In a society in which the executive enjoyed the widest of powers, nothing could be more devastating to the continued belief of the majority of the population in the value of the rule of law. [123]

Van der Vyver stated that the judgment in Omar was not one that, either from the point of view of substance or as a matter of judicial practice, added lustre to the annals of the administration of justice in this country[124].

The above outrage, however, had very little effect upon the Appellate Division. In Staatspresident v Release Mandela Campaign,[125] the Commissioner of Police issued a notice prohibiting any statement encouraging members of the public to participate in a campaign or protest or action which aimed at the release of an emergency detainee or one held under sections 28 or 29 of the Internal Security Act 74 of 1982.

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122 Professor of Law, University of Natal, at p. 326 of the SAJHR (1987) 3 supra
123 Former Professor of Law, University of Cape Town, at p. 331 of the SAJHR (1987) 3 supra
124 Former Professor of Law, University of Witwatersrand, at p. 337 of the SAJHR (1987) 3 supra
125 1988 (4) SA 903 A

The prohibition included the signature of a petition or a protest, carrying a placard or wearing a garment in public bearing a slogan protesting the detention, attending a gathering in honour of a detainee, doing anything as a token of solidarity with a detainee, and even calling on the government for the release of the detainee. The highest court in the land upheld the notice of the Police Commissioner.

It was not enough to detain people and silence them. The executive went further: they now silenced protests about detention or as Murenik remarked, it is "difficult to know how much further they can go in destroying freedom than this, when they suppress the liberty to talk about the denial of liberty". [126]

While this was how far the legislature would go, Didcott J., said the following:

> The legislature, not a democratic one in the first place since it does not represent or speak for the large majority of South Africans, has statutorily delegated to the executive the power to make laws by regulation and decree. This the executive has done voraciously intensifying the evil of imprisonment without trial, restricting wholesale our freedom of speech, assembly, movement and association and the freedom of the press, and often entrusting to its mere

126 Murenik E., "Judicial Review and the Emergency", supra at p. 140

> underlings, decisions with the same consequences.[127]

To conclude this section on the Appellate Division, we want to refer to the statements of two Supreme Court judges. In the first, Friedman J., stated in open court:

> In the result I regret that the application must fail. I use the word "regret" advisedly. In general one of the traditional roles of the court is to act as a watchdog against what I might term executive excesses in the field of subordinate legislation. It fulfils its role by measuring that legislation against long and well-established legal principles. It is therefore, a matter of regret that in the field of security legislation, the legislature should have seen fit to remove from the court the role which, as I have said, is traditionally entrusted to it, of fairly and without favour or prejudice, safeguarding the interests of both the state and its officers on the one hand and those of its citizens on the other[128]

The other statement that is often quoted in the literature is that by Didcott J.[129] where he articulated the conflict between the Provincial Division of the Supreme Court and the Appellate Division. They did endeavour to curb the extensive powers of the executive, he said:

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127 Murenik, supra at p. 135

128 Natal Indian Congress v State President 1989 (3) SA 588 D at p. 594

129 "Salvaging the Law" Second Ernie Wentzel Memorial Lecture delivered at the University of the Witwatersrand, Johannesburg on 4 October 1988

> and this has been attempted by no wild unorthodoxy, by no splurge of adventurism, but by invoking and applying tried and tested rules of administrative law common to our legal system and others, rules developed with the very object of safe-guarding the Rule of Law in such a situation. Sad to say, these effort have proved to be largely in vain, the Appellate Division in its wisdom having decided in case after case that has come before it during the past couple of years that the capacity of the courts to assert and protect the Rule of Law in that situation is so attenuated as to be for all purposes, insignificant[130]

3.2.8 THE APPROACH OF THE JUDICIARY TO THE PROTECTION OF HUMAN RIGHTS

The avenues open to the Supreme Court were the testing of subordinate legislation,[131] interpretation of statutes,[132] and judicial law making via judicial precedent.[133] As concerns the approach towards human rights protection, the South African Law Commission provided the following summary:[134]

> There is full recognition of and respect for, the rights of the individual as recognised in our common law. The court saw it as their task to

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130 ibid
131 cf Section 19 of the Supreme Court Act 1959
132 See R. v Tebetha 1959 21 SA 337 AD at p. 347
133 The rule is that decisions by higher courts on principles of law binds the lower courts
134 Working paper 25, at p. 169 pp 8 – 22

> protect their rights, and it is said that the court formed a bulwark between the individual and the executive.
>
> However, where there was an Act of Parliament that apparently infringed upon one or more of the recognised human rights, the courts would carefully examine that Act in question, and even interpret it strictly so as to curtail the infringement as far as possible. If, however, it appeared at the end of the examination that it was the intention of the legislature to infringe upon the rights in question, the court was powerless and had to enforce the provisions of the Act, however unjust the results may be.

Opposing this approach, we have the approach widely associated with Dugard.

In 1971, John Dugard delivered his inaugural lecture in which he challenged the approach that the courts were powerless against unjust legislation. The main thrust of his argument was that the judges were drawn from a small section of the population, the White group, and they tended to share a whole range of inarticulate, but influential, premises with members of the executive, who were drawn from the same group. Because of these inarticulate premises, it was necessary for the judges to use the natural law foundations of the legal system particularly in

penumbra cases as a legal corrective to the influences of extra-legal premises.[135]

Dugard's lecture provided the jurisprudential platform on which a new form of legal analysis of the judiciary took place.[136] It contended basically that the judiciary had the choice of basing its judgments on one of two conflicting value systems, viz:

(a) The common law system which was rooted in the western legal tradition and its emphasis on the freedom of the individual, and

(b) The values of the status quo as enshrined in legislation which was unjust in terms of the common law system, viz: apartheid legislation with its racial segregation and inequality, security legislation and other related legislation whereby arbitrary and uncontrolled state authority interferes with the freedom of the individual.

Cameron[137] in an analysis of the decisions of Chief Justice Steyn shows that the actions of the executive had been sanctioned by the courts in cases where human rights could and should rather have been protected. He also indicated that Steyn's insistence on judicial interpretation as being only a mechanical process was also reflected in his judgments, and this led to the subjection of individual freedom to the interest of the executive. The court was therefore, executive-minded in that it was

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135 Dugard J., "The Judicial Process, Positivism and Civil Liberty" (1971) SALJ Vol 88 at p. 181

136 Dugard J., "Human Rights and the South African Legal Order", supra at p. 38

137 Cameron E., "L C Steyn's Impact upon South African Law", SALJ (1982) Vol 99 at pp 38-75

sympathetic to the racial legislative programme and did little to protect human rights at a time when the executive showed little regard for it.

Corder[138] and Forsyth[139] continue this line of argument that the judge had a choice when interpreting legislation in cases where he was not bound by one interpretation in particular. The question was thus whether the judges identified with the executive even if they were in no way compelled to do so. These authors (Cameron included) concluded that there was no evidence of deliberate prejudice.[140]

Cameron continues-[141]

> If criticism is to be made, it must be that the Appellate Division failed to display a positive commitment to Justice on these occasions when the legislative will was advancing injustice in the social formation. In this way, the judges unwittingly aided the development of the socio-legal system which ignored many of the basic principles of justice in South Africa then.

As will also be indicated by the line of case law quoted below in this chapter, the judges showed a propensity towards harsh and unjust interpretation, thereby displaying bias towards the status quo and the executive. It was particularly during the period of Steyn C J that the

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138 Corder H., Judges at Work, (Cape Town, 1984)
139 Forsyth C., In danger for their Talents (1985) at pp 230-236
140 Corder, at p. 238, Forsyth at p. 225 and Cameron at p. 52
141 Ibid at p. 241

courts became more executive-minded than the executive.[142] Matthews[143] typifies this failure to exercise this choice in favour of the individual as "judicial dereliction".

It is submitted that while these analyses appear to belong to a forgotten apartheid era, they provide a sound basis for the evaluation of the ability of the judiciary to interpret our current Bill of Rights.

Defending the choice approach, Dugard[144] pleaded for judges not to resign, but for judicial activism in pursuit of justice within the framework of the law. "Exercise the choices that you have," he urged the judges. He was supported by the International Commission of Jurists[145] which concluded that judges could choose to make an impact, particularly being a judge under such a repressive regime, there could be no excuse for failing to exercise his choice in favour of individual liberty.

Wacks[146] challenged this choice approach as having little impact. "What choices?", he asked when an exclusively White judicature applies the essentially unjust laws of an exclusively White legislature to an unconsenting majority. "Rather resign", he argues, "and thereby send a clear signal to the legislature of the direction to take.".

142 Forsyth, at p. 226
143 Mathews A.S, "The South African Judiciary and Security System" SAJHR 1985 Vol. 1 p. 201
144 Dugard, op cit at pp 293-294
145 Thed, Erosion of the Rule of Law in South Africa (Geneva, 1968) p. iv
146 Wacks R., Judges and Injustice, supra at p.281

Adrienne van Blerk[147] took issue with these criticisms of the South African Judiciary. In her view, the crux of the problem was not judicial conservatism. It could be accepted that judges tended to support the status quo operating as they had to within the established order. But when the courts were urged to display a greater commitment to individual liberties, they are inevitably in the South African climate of polarisation and conflict, expected to adjudicate on political grounds to curb the executive:

> The problem here is that the judiciary functions within the constitutional system of legislative sovereignty which characteristically gives "precarious" scope to the rule of law and within which, also, questions of democracy militate against the legitimacy of an overly activist unelected judiciary, and without a Bill of Rights[148]

She further argued that it served little purpose to castigate the judiciary for its failure to restrain the authorities politically when, within its limited framework, it could only do so within the limits of the law.

These respective approaches on the judiciary enables us to formulate a general idea of the operation of human rights in the old South African legal system. We have established that despite the new development of

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147 Van Blerk A., Judge and be judged, (1988) at p. 163

148 Van Blerk, supra, at p. 158

the 1990's, the constitutional structure of apartheid still remained intact. What is evident is that the human rights focus had shifted from the judiciary to the broader constitutional framework. The focus was now on a Bill of Rights as the imperative for a truly independent judiciary. We will concentrate in greater detail on the ability of the judiciary to interpret a Bill of Rights in this chapter, and will also consider the Appellate Division's decisions in this regard.

3.2.9 THE RECOGNITION OF INTERNATIONAL HUMAN RIGHTS NORMS BY THE SOUTH AFRICAN JUDICIARY UNDER APARTHEID

As in Chapter 2, we will follow by means of definition the international approach to human rights,[149] which distinguishes between civil and political rights on the one hand, and economical, social and cultural rights on the other. This definition had not been followed in the old South Africa.

The rights the South African courts were seeking to protect and thereby forming a bulwark between the individual and the executive were the rights of the individual as recognised by the common law.[150] These rights, which according to Dugard,[151] emanated "from the value system upon which the then South African legal system was founded" were as follows:

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149 As is embodied in the Universal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights of 1966 and the International Covenant on Civil and Political Rights of 1966

150 Working paper 25, S.A. Law Commission, pp 8.22 at p. 169

151 Dugard J., Human Rights and the S.A. Legal Order, supra at p. 383

> freedom from arbitrary arrest and detention without trial; freedom from cruel and unusual punishment, the right to legal representation when the individual's liberty is at stake; the right to be heard in one's own defence before one's liberty is curtailed; equality before the law; freedom of speech and literary expression; freedom of the press; freedom of assembly; and freedom of movement.[152]

The late Murenik[153] noted that the Supreme Court had hinted for some time at the existence of a nascent general doctrine of fundamental rights. However, in the absence of a clear statement of the attitude of the Supreme Court, the doctrine had to remain nascent. It is submitted that the Appellate Division came very close to such statement in S v Ebrahim.[154] There it held that Roman-Dutch law rules contained several fundamental legal principles, namely the protection and promotion of human rights, good inter-state relations and a healthy administration of justice. The court also relied on an American judgment in the case of the United States v Toscanino.[155] Two passages of the Toscanino judgment relating particularly to human rights were quoted in Ebrahim by Steyn, J.A.:

> We view due process as now requiring a court to divest itself of jurisdiction over the person of a defendant where it has been acquired as

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152 ibid, at p.380

153 Murenik E., Fundamental Rights and Delegated Legislation, SAJHR part 2, Aug 1985 at p. 111

154 Ebrahim, supra at p. 582C

155 500 F 2d 267 (2nd Cir 1974). See Ebrahim at p. 583-583

> the result of the Government's deliberate, unnecessary and unreasonable invasion of the accused's constitutional rights.[156]

Steyn, J.A. continued to say:

> Crime is contagious. If the government becomes a lawbreaker, it breeds contempt for the law; it invites every man to become a law unto himself; it invites anarchy. To declare that in the administration of the criminal law the end justifies the means – to declare that the government may commit crimes in order to secure the conviction of a private criminal would bring terrible retribution. Against that pernicious doctrine the court should resolutely set its face.[157]

Steyn, J.A. then concluded[158] that this thinking was to a large extent also fundamental to the Roman-Dutch law rules mentioned earlier. In this chapter, we will discuss human rights protection within the municipal legal order in more detail.

The old South African case law abounds with human rights violations, that is, relating to racial legislation and legislation enacted to maintain the racial domination viz: security, legislation and legislation emanating from successive states of emergency.[159]

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156 Toscanino, at 275 Co., 2 par 4; Ebrahim at p. 583D

157 Dissenting opinion of Justice Brandeis in Olmstead v United States 277 US 438 (1928) at p. 484-485; Ebrahim supra at p. 584B

158 S v Ebrahim, supra at p. 584F

159 Sachs A, Justice in South Africa, Berkeley (University of California Press, 1973)

The first case, however, where the South African court had occasion to consider the country's obligations under the human rights provisions of the United Nations Charter was S v Werner (on appeal reported as S v Adams; S v Werner).[160]

In this case the validity of a proclamation under the Group Areas Act was challenged. The Group Areas Act[161] was one of the old South Africa's most controversial laws, and it provided for the zoning of urban areas into different group areas for four different groups racially determined by the Population Registration Act as "Whites", "Coloured", "Indians" and "Blacks".[162]

The factual situation briefly was as follows. As a result of the operation of the Group Areas Act, a housing crisis arose in the late 1970's. People classified as "Coloured" and "Indian" were unable to find any accommodation in their own group areas, and moved into houses and flats in the white group area where there was an over-supply of accommodation. In order to evict these people from the white group area, they were prosecuted under the Group Areas Act.

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160 S v Werner 1980 (2) SA 313 W; S v Werner; S v Adams 1981 (1) SA 187 A

161 Act 36 of 1966 (repealed in 1991)

162 Act 30 of 1950

The Group Areas Act did not, per se, define the geographical limits of each "group area", it enabled the executive to do so by means of a proclamation by the State President.

It was argued in court that the Act did not expressly authorise discrimination, yet the proclamation was clearly discriminatory. The Act was therefore ambiguous and should thus be interpreted as closely as possible with South Africa's obligations under the human rights provisions of the United Nations Charter, and that this required the court to insist on an equality of treatment of the races in the implementation of the Act. The court was thus invited to be guided by the unincorporated treaty obligations in interpreting an ambiguous statutory provision. An additional argument was that the proclamation was invalid on the grounds of unreasonableness. This unreasonableness occurred where a subordinate legislative authority acted without regard to the international obligations of the state in terms of the United Nations Charter.

Both the trial court and the Appellate Division held that the Act was not ambiguous, and therefore did not allow recourse to a presumption of compliance with international obligations. The courts simply held that the Group Areas Act was unambiguous, and that by implication, it allowed discrimination and manifest injustice.

In the lower court, Le Roux, J. stated that it was unnecessary to consider the arguments on the grounds that:

> when an Act of our own Parliament authorises something, then in my opinion it cannot be influenced by a controversial obligation in the Charter of the United Nations.[163]

On appeal, Rumpff declared:[164]

> the argument that international relations, e.g. the Charter of the United Nations, must be used as a norm is, in the circumstances, unacceptable. A proclamation in terms of the Group Areas Act must be tested against the provisions of the Act, an Act which explicitly provides for the creation of group areas for different ethnic groups.

3.2.10 THE LAW COMMISSION AND PUBLIC INTERNATIONAL LAW NORMS OF HUMAN RIGHTS

The Law Commission represented a very significant shift in the direction of human rights development in the country. For the first time the apartheid South African government was recognising the importance and relevance of fundamental human rights and freedoms. The views of the Commission on international norms of human rights were therefore, of crucial importance as regards the future of human rights development. These views of the Commission were largely a response to the plea of Dugard for the application of international human rights norms in

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163 The court a quo at p. 328
164 The court a quo, at p. 328

domestic courts. It should be noted in this regard that the terms of reference of the Commission have been "to investigate and to make recommendations on the definition and protection of group rights and individual rights in South Africa. The Commission was thus in a position to not only establish the status quo position regarding international norms of human rights, but also to move beyond that position.

The Law Commission accepted that a human rights norm of international law could become part of South African law, and could be applied by South African courts if the legislature assented to it, or if it was universally recognised. This principle, said the Commission, had to be immediately qualified with the warning that a customary international law rule of this kind, which enjoyed universal recognition, would be applied only if there was no rule in South African law with which it conflicted. All the other sources of the positive law, i.e. all the norms of legislation, previous judgments, the common law and usages and customs that had themselves developed into legal rules in the country, must therefore be silent on the question of law before the court could apply the international law rule.

This meant that, in the application of the above qualified principle, the court would first have to determine whether there was any South African legal rule on the particular question of law. The law of nations only applied when there was no South African legal rule. The court then had to determine whether there was an appropriate norm for the question of law, and only then the court could apply the norm.

Then the Commission went on to explain what all this meant in practical terms.

Firstly, it stated that almost the whole of every sphere of life of the individual or the group in the Republic was covered and controlled by legislation. Add to this the large number of ordinances and the countless municipal by-laws, and it becomes clear that there was very little room, if any, for the application of other legal rules. Secondly, the Commission stated that South African common law was not casuistic, but was based on general principles. The result was that on any conceivable subject it would be possible to find a common law principle that could be applied before the norms of international law came into the picture.

Using racial discrimination as an example, the Commission then continued its argument:

> Let us accept, for the moment, Judge Tanaka's finding that there is an international law norm to which racial discrimination is repugnant. This is also a norm in our court, but it has been said repeatedly that this norm must yield to legislation that authorises discrimination, either expressly or by necessary implication. As far as racial discrimination is concerned, therefore, it is not necessary to refer to a norm of international law; our common law already contains a complete prohibition, but legislation

> can authorise discrimination. The courts are bound by this. The application of a norm of international law therefore does not come into the picture.[165]

According to the Commission, the above argument rendered Dugard's plea for the application of international human rights norms almost impossible in the sense that whatever the international law norm said, there would always be municipal legislation to which it would have to give way. The Commission then addressed itself to the two further proposals of Dugard[166] viz: that South Africa's international obligations, under both the common law and treaties, could be invoked to reinforce common law principles that were not firmly established, and that the Appellate Division, which was not absolutely bound by precedents, could in deciding the question as to whether a precedent should be deviated from or not, have regard to our country's international obligations.

The Commission concluded that although the theory could be sound in these proposals, in practice the courts would exhaust all the other authorities before considering international law, "and this leaves little, if any, room for applying international law".[167]

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165 ibid. para 8.39 at p. 178 of working paper 25

166 Dugard J., supra at p. 234 also Working Paper 25, supra par 8.39 – 8.46 at p. 178

167 Working Paper 25, ibid, par. 8.40 at p. 179

On the argument of Dugard[168] that unincorporated and, in most cases, ungratified treaties and declarations should be used as aids to interpretation, the Commission once again accepted the theory as sound. However, said the Commission, "the problem is that in practice we have a very well developed system of rules of interpretation".[169]

Long before referring to norms of international law as an aid to interpretation, the court would have regard to known rules of interpretation, which provided a complete basis for interpretation. Therefore, the possibility of norms of international law being used in respect of human rights when it came to interpreting statutes in practice was therefore, extremely limited or indeed non-existent.

Then the Commission considered Dugard's proposal that norms of international law could be used to declare subordinate legislation void on the grounds of unreasonableness. The Commission,[170] referring to the English case of Kruse v Johnson[171], concluded that the grounds that existed for invalidation were limited and were already defined. Furthermore, the role, if any, to be played by the norms of international law was therefore, a very small one, if such a role existed.

The Commission then finally concluded on this discussion which we consider a point of departure of this study in these words:

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168 Dugard J., supra at p. 251
169 Working Paper 25, ibid, par 8.43 at p. 180
170 Ibid, par 8.44 – 8.46 at pp 180-181
171 (1898) 2 QBD 91, at p. 99

> In practical and realistic terms it cannot be envisaged that human rights norms under international law can play any, much least, significant role in the decisions of our courts. The salvation of the protection of group and human rights in South Africa therefore, does not lie in the hope that our courts will apply the norms of international law in this regard.[172]

3.2.11 THE ATTITUDE OF THE SOUTH AFRICAN JUDICIARY TOWARDS A BILL OF RIGHTS

As an illustration of developments inside South Africa, it is interesting to observe the growing consensus toward a Bill of Rights for South Africa.[173] In order to illustrate the fragility of this consensus, we will first consider the differing approaches to the Bill of Rights, viz: a development from suspicion to acceptance on the side of the minority government and its followers, and on the side of the majority of the population a reverse development from acceptance to suspicion. Then we will turn to the Appellate Division's interpretation of the Bill of Rights of Namibia and the former independent homeland of Bophuthatswana. In conclusion, we will view the Appellate Division's interpretation in the 1992 case of S v Rudman.

3.2.11.1 DIFFERING APPROACHES TO THE BILL OF RIGHTS

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172 Working Paper 25, supra, par. 8.46 at p. 181

173 Working Group 2 of CODESA , cf, Cachalia, Delegate to Codesa, "A Report on the Convention for a Democratic South Africa", SAJHR , Vol 8, part 2 1992, pp 249-262 at p. 252

The attitude of a large section of the white population in old South Africa to the concept of human rights and what it stood for was one of "outspoken repugnance".[174] This was due largely to the incompatibility of a Bill of Rights with the racially structured South African society, and the feeling that the international condemnation of apartheid was unfair and selective. On the other hand, the resistance by the majority of the South African population to the continued violation of their human rights by the minority regime was deeply ingrained and could be traced back to as early as 1659.[175] In the ANC (established in 1912), this resistance was first articulated as a programme of rights in 1943 in the Africans' Claims Document.[176]

In this connection, the South African Law Commission, however, made a further claim that we deem rather controversial. It claimed the Free State Constitution of 1854 to be the first document in South Africa that contained provisions of a human rights nature, inter alia, the right to assemble freely, to petition the government, the promotion of religion and education, equality before the law, the right to personal freedom and freedom of the press. What the Law Commission forgot to mention was that the Free State Constitution bluntly stated that those rights and "burgherdom" (citizenship) were, in typical South African fashion, for

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174 Kotzé, ex judge of Appeal, "Menseregte : Suid-Afrika se dilemma" in a Bill of Rights for South Africa, van der Westhuizen en Viljoen (eds) supra pp 1-7, at p. 7

175 Meli, South Africa belongs to us, a history of the ANC 1988 London at p.216

176 Asmal K., "Democracy and Human Rights : Developing a South African Human Rights Culture", Conference on Democracy in Post-Apartheid South Africa, 3 – 5 September 1990 at p.6

whites only.[177] Van Aswegen[178], in a section dealing with fundamental human rights, openly doubted the applicability of these rights to people not classified as "white". The Constitution was drawn up by whites for whites and there was no indication that the recognition of human rights for non-whites was ever intended by the white legislators.[179] Furthermore, people of Asian origin were denied residence in that Orange Free State.[180]

It would be a slight exaggeration to accuse the Law Commission of romanticising the past. However, this attempt to be selective in terms of historical texts is also evident in the American interpretation of their fourteenth amendments regarding equal protection. We are reminded in this regard by Wills[181] that:

> to understand any text remote from us in time,
> we must re-assemble a world around that text.
> The preconceptions of the original audience, its
> taste, its range of reference, must be recovered
> so far as that is possible

According to Perry,[182] there is in the USA an even greater temptation to read the language of the fourteenth amendment, written only over a

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177 "Constitutie van den Oranje Vrye Staat", article 1 cf Van Aswegen, "Die Verhouding tussen Blank en Nie-Blank in the Oranje-Vrystaat" 1854-1902, Pretoria 1971 at p. 171

178 Van Aswegen, ibid pp 176-180 at p. 177

179 ibid, Translated from the Afrikaans "Nie-blanke menseregte" of van Aswegen

180 In Cassim & Solomon v S (1899) 9 Cape L.J. 58, the court held that a law which prohibited Asians from settling in the Free State did not conflict with the requirements of equality before the Section 13 of the Wetboek van den Oranje Vrijstaat which was repealed by Act 53 of 1986

181 Wills S., Inventing America – Jefferson's Declaration of Independence, (Garden City, NY, Doubleday 1978) at p. 259

182 Perry C., The Constitution, the Courts and Human Rights (New Haven, 1983) at p. 62

century ago, as "our language, pregnant with our sensibilities". The truth of the matter is that during the post-civil war period in which the amendment was drafted and ratified, Negro-phobia and racism were the order of the day.[183] The framers therefore, could not possibly have intended the fourteenth amendment to be a charter for the political and social equality of all races.

In the old South Africa, it was, inter alia, within this context of what may be termed the reluctance to admit the sins of apartheid that a Bill of Rights was suspected as yet another ploy by whites to protect themselves and thereby to entrench their position of privilege. These suspicions were specifically articulated at the Pretoria human rights symposium in 1986 by, inter alia, Dugard, Corder and Moseneke. Dugard[184] had this to say:

> For years blacks have pleaded for the legal protection of human rights. Now that many whites, and possibly even the Nationalist Party government, are more sympathetic towards a Bill of Rights, Blacks, who increasingly see power round the corner, appear to be reluctant to accept an instrument perceived to be a method of protecting Whites or Afrikaaners who see themselves as a potentially threatened minority

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183 ibid, at p. 62

184 Dugard J., "Changing attitudes towards a Bill of Rights in South Africa", In a Bill of Rights for South Africa van der Westhuizen and Viljoen (eds) supra, pp 28-34 at p. 33

Corder[185] also referred to the growing white support for a Bill of Rights as expediency to the protection of their "group rights" (read apartheid). "No wonder," continues Corder, [186]"that this is viewed with the greatest amount of deeprooted suspicion by those who for decades were suffering under white prejudice and privilege." According to Moseneke,[187] it was the apartheid system that would have to be dismantled because it was the system that had thoroughly dehumanised people, so much so that very few of them would trust any institution that the apartheid government were to introduce.

Didcott,[188] while clearly understanding the above cynicism and suspicion, did not consider the "too little, too late" argument powerful enough to the case for a Bill of Rights, as the function of the Bill of Rights was to protect neither blacks nor whites, but everybody.

It may be argued that since that symposium in 1986, South Africa did experience breathtaking developments. In this respect, the following observation by Devenish was prophetic:

> South Africa requires audacious political leadership to cut through the gordian knot that has entangled our land in a spiral of ever increasing violence and to systematically negotiate for the removal of constitutional,

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185 Corder H., Panel Discussion in a Bill of Rights for South Africa, van der Westhuizen en Viljoen (eds) supra, at p. 132

186 ibid

187 ibid, at p. 148

188 ibid, at p. 61

> statutory and political obstructions to an enforceable Bill of Rights within a new and just constitutional paradigm[189]

This prophecy, to a large extent, was met in 1990. Political organisations were unbanned, political prisoners were released, statutes described as "pillars of apartheid" were repealed. It is true that both the ANC and the South African government agreed on the fact of a Bill of Rights.[190] Yet despite these remarkable developments, as far as the people of South Africa were concerned, their fundamental human rights were still beyond their reach.[191] Continuing to depict this quest for human rights as a struggle for freedom was therefore no exaggeration and the concept of struggle by no means outdated.[192]

These differing approaches of the two major political actors were reminiscent of the 18 year gridlock between the western countries with their emphasis on the classical rights and freedoms, and the eastern countries with their emphasis on economic and social rights.[193] This is why the conclusion of Kooijmans[194] that the consensus which subsequently resulted was ample testimony to the fact that political confrontation needed not always lead to an impasse, but could result in a

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189 Devenish S., "Cardinal constitutional and statutory obstacles which obstructed the introduction of a justifiable Bill of Rights in South Africa", in van der Westhuizen and Viljoen, (eds) A Bill of Rights for South Africa, supra

190 Asmal K., "The Discourse o Human Rights : Are we speaking the same language?" Conference on a Bill of Rights for a Democratic South Africa, supra

191 Budlender G., SAJHR , Vol 7, part 3 1991, editorial at pp v-vi

192 Mandela N., No Easy Walk to Freedom, Heineman, London 1965

193 Kooijmans P.H., VN–Commissie voor de rechten van de mens, supra at p. 28

194 ibid, at p. 30

better understanding, and even enrichment, of your own value system, has typical relevance to the Bill of Rights discussion which took place in South Africa.

We want to shift the focus now to the judiciary and the Bill of Rights.

3.2.11.2 THE JUDICIARY AND THE BILL OF RIGHTS DEBATE

The stark reality of the human rights situation in apartheid South Africa was that, despite the fact that the judiciary generally took sides with the oppressor against the individual, the country simply did not have the material resources to replace them. According to Mathew Phosa, the wholesale sacking of judges was not practical and although a new government would be justified in removing all of them, no such action was planned.[195] What was proposed was to find and train suitable replacements for retiring judges so that the judiciary would better represent the make-up of the population. This would help to restore popular confidence in the courts. The Law Commission, however, viewed the standing of the judiciary differently:

> On their way to the bench, the judges of the supreme Court have been through the mill of practice. They know the ordinary man or woman, and they also understand the interest of the state. By virtue of their experience in practice they can be objective, independent and

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195 Former Representative of the ANC's Legal and Constitutional Affairs Department, in Weekly Mail, 28 August – 3 September at p.20

> fearless. The public has a large measure of confidence in the courts they already know[196]

Forsyth commented that the question to consider would be that of the capability of the judiciary in dealing effectively with fundamental human rights. Did the proven executive-mindedness of the judiciary not render them wholly unqualified to deal with a Bill of Rights? While any attempt at answering this question could only lead to speculation, there were certain decisions by the Appellate Division regarding the Bills of Rights of the former Bophuthatswana homeland and the former South West Africa (Namibia), which provided useful indicators of the Appellate Division's approach to a Bill of Rights.

3.2.12 BOPHUTHATSWANA CASE LAW

In terms of the National States Constitution Act 21 of 1971,[197] the South African State President could establish a legislative assembly for an area governed by a black territorial authority. The legislative assembly could, but need not necessarily be elective in nature.[198] Laws passed by the assembly enjoyed the status of original rather than delegated legislation and, with the prior approval of the State President, could even be applicable to citizens of the national state living outside its borders but within South Africa.[199]

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196 Law Commission working paper 25, supra at p. 449, para 14-89
197 Act 21 of 1971
198 Section 2 of Act 21 of 1971
199 Section 3(1)(c) of Act 21 of 1971

The South African State President could grant independence to the national state in terms of the National States Constitution Act, supra. The granting of independence to the national states involved two steps. First, the South African Parliament had to surrender sovereignty over the territories concerned. This was done in terms of the Status Acts,[200] which provided that these territories would no longer be part of the Republic of South Africa and that South Africa would cease to have any authority within them.

Once South Africa had passed the relevant Status Acts, the independent states were free to proceed to enact their own Constitutions. The taking of this final step was politically controversial first, because many saw it as an implicit endorsement of apartheid and, secondly, because of the serious ramifications it had for the citizenship rights of black of South Africans.[201]

Bophuthatswana was granted independence this way. It adopted its own Constitution which deviated from the Westminster system because it combined the characteristics of the presidential and the parliamentary executive systems, by providing for an executive President, who was elected by the legislature and, who along with the members of his cabinet had to be members of the legislature. The Constitution was also inflexible and contained a justiciable Bill of Rights.

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200 e.g. The Status Act of Bophuthatswana Act 89 of 1977

201 Baxter L., Administrative Law Cape Town Juta 1984

The first case to bring the Bophuthatswana Bill of Rights under the spotlight, was S v Marwane[202] in 1982. The main issue here was whether legislation that had been transferred from South Africa into Bophuthatswana (viz. the Terrorism Act 83 of 1967 and the General Law Amendment Act 76 of 1962, known as the Sabotage Act), and which conflicted with the Bophuthatswana Bill of Rights, should be declared null and void.

Section 93(1) of the Constitution provided:

> Subject to the provisions of this Constitution (a) all laws which immediately prior to the commencement of this Constitution were in operation in any district of Bophuthatsawna ... shall continue in operation and continue to apply except in so far as such laws are superseded by any applicable law of Bophuthatswana or are amended or repealed by Parliament in terms of the Constitution.

The court rejected the argument of the prosecution that since the two security statutes were both in force prior to the Bophuthatswana Constitution, they should continue to apply in terms of Section 93(1). The Appellate Division held that regard should be given to the first seven words of the section, viz. "Subject to the provisions of this constitution". This meant that laws in conflict with the Bophuthatswana Constitution were necessarily to be excluded from the body of existing laws, which

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202 1982 (3) SA 717 A

were to continue in operation. The Appellate Division also held that the provisions of the Terrorism Act 83 of 1967 which placed the onus on the accused to prove beyond any reasonable doubt the absence of participation in terrorist activities, conflicted with Section 12(1) of the Constitution which provides for a presumption of innocence until guilt is proved. It should be noted that this was a majority of seven judges.

The impact of the judgment was not widespread. In our subsequent discussion on the Namibian case law it will be indicated how the judgment was restricted and held inapplicable by the same Appellate Division. In Bophuthatswana itself this did not herald new beginnings. In Smith v Attorney General Bophuthatswana[203] Section 61A of the Criminal Procedure Act 51 of 1977 that denied bail to an accused on the mere statement of the Attorney-General that the accused is likely to abscond, was struck down. The court held it to be in conflict with section 12(3)(b) of the Constitution which guaranteed a bail decision by a judge. Hiemstra C.J., as he then was, held that section 61A effectively eliminated due process of law. However, the Chief Justice then launched a scathing attack upon Marwane in these words:

> The Marwane case is a typical example of over-eager invalidation leaving a large lacuna in a country's legislation. The good was thrown out with the bad, although the bad played no part in

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203 1984 (1) SA 196 B

> the relevant decision. A Bill of Rights is not an open door to the invalidation of legislation[204]

We respectfully disagree with the learned Chief Justice in that the said legislation was clearly unconstitutional and had to be set-aside.

In two subsequent Bophuthatswana decisions, a swing towards the executive became clear. In Segale v Government of Bophuthatswana[205] an opposition political party wished to hold a series of meetings and applied for authority to do so. The Minister's reply simply stated that the application had been refused. The General Division of the Supreme Court of Bophuthatswana held that section 31 of the Internal Security Act 32 of 1979 (of Bophuthatswana), which prohibited political gatherings and meetings of more than twenty persons without the prior consent of the Minister of Law and Order, conflicted with section 16 of the Constitution and was therefore null and void.

The Bophuthatswana Appellate Division, however, overturned this decision and held that section 1(b) of the Bophuthatswana Constitution, which guaranteed the right to freedom of peaceful assembly and freedom of association, did not conflict with the Internal Security Act. We respectfully do not agree with the Bophuthatswana Appellate Division. The section clearly conflicted with the Constitution. It is submitted that Section 31 of the Internal Security Act was indeed passed by Parliament

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204 At p. 204 B of the Report

205 1990 (1) 435 B AD

and did have a general application in the sense that all political meetings were prohibited unless the Minister consented to their being held. What the judge omitted to deal with was the further requirement that restrictions placed on freedom of expressions and of assembly must, in terms of the provisions concerned, be necessary in a democratic society. This criterion was ignored altogether. At the very least, the court should have addressed the question whether a blanket ban such as that imposed by section 31 would be regarded as necessary by other democracies which boasted a bill of rights; whether such a provision in permanent, rather than emergency legislation, met this basic requirement; and whether the delegation of the actual decision-making power to a member of the executive, who need give no reasons for his decision, was in keeping with the democratic ideal which purportedly underpins the Constitution. It is submitted that the decision was patently wrong.

In Monnakale v Government of the Republic of Bophuthatswana,[206] the continued detention of the accused had been ordered by the Attorney-General in terms of section 25 (1) of the Internal Security Act. The court held that the statute had conferred upon the Attorney-General a subjective discretion and that the exercise of the discretion was not justiciable. It is submitted that what was most striking about the

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206 1991 (1) SA 598 BGD

judgment, was that from the beginning to the end, the judge treated the issue exactly as if it had been a matter of South African law.[207]

There was little or no indication that the law of Bophuthatswana, based as it was on a supreme constitution with a justiciable Bill of Rights, differed in any material respect from that of South Africa. Carpenter points out that the only part of the Smith judgment, which is cited in the Monnakale decision, is where Hiemstra warns against the South African Appellate Division's approach in Marwane.[208] The majority decision in Marwane therefore had very little impact inside Bophuthatswana. It even appears as if that influence was deliberately being curtailed.

It was also significant that the South African Law Commission, in its evaluation of the Bophuthatswana cases of Marwane and Smith v Attorney-General, emphasised Hiemstra's decision in Marwane that the Terrorism and Sabotage Acts were not in conflict with the Bophuthatswana Bill of Rights, and Rumpff's minority support thereof in the South African Appellate Division.[209]

The Law Commission only cursorily referred to the milestone decision of the majority in the Appellate Division and instead focused upon Hiemstra's warning. It was rather peculiar for the Law Commission at such an early stage in its report, to openly identify with a clear executive-

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207 Carpenter G., "Constitutional Interpretation in Bophuthatswana – still no joy", SAYIL, Vol 16, 1990/91, at p. 143-149

208 Carpenter, ibid, p. 146

209 Working paper 25, at p 243, par 9.21

minded approach of a minority in the Appellate Division, and the equally executive-minded approach of Hiemstra.

3.2.13 THE FORMER SOUTH WEST AFRICA CASE LAW

On 17 June 1985 the State President of the Republic of South Africa, acting in terms of section 38 of the South West Africa Constitution Act 39 of 1968, issued a Proclamation R101 of 1985 in which he made provision for the establishment of a legislative body, to be known as the Cabinet, for the territory of South West Africa. The statutory provisions relating to the National Assembly , and the Cabinet were set out in a schedule to the proclamation. There were several annexures to the schedule. The first of these, annexure 1, was headed "Fundamental Rights contained in the Bill of Fundamental Rights and Objectives". It consisted of a preamble that concluded with the statement that:

> We, the people of South West Africa/Namibia, claim and reserve for ourselves and guarantee to our descendants the following fundamental rights which shall be protected and upheld by our successive governments and protected by entrenchment in the Constitution.

The former South West African situation presents us with an increasing body of case law on fundamental rights. However in terms of our discussion on the capability of the judiciary in dealing effectively with fundamental human rights, we will mainly concentrate on the Appellate Division case of Kabinet van die Tussentydse Regering vir Suidwes-

Afrika v Katofa.[210] We will also refer to a few other cases to prove our point.

Similar to the Bophuthatswana decision of Marwane, the issue there was one of conflict between previously enacted legislation and the Bill of Rights. The issue of concern to us was whether legislation which provided for detention without trial, as in section 2 of Proclamation AG 26 of 1978 (SWA), was valid in the light of the Bill of Fundamental Rights and Objectives as contained in Proclamation R101 of 1985. The relevant section of the Proclamation R101 was section 34.

This case had been preceded by divergent judgments of the South West Africa Division of the Supreme Court. In S v Angula and Another[211] the court held that the sections of the Internal Security and Terrorism Act were not invalid, notwithstanding the fact that they violated the rights of the accused persons as set out in the Bill of Rights. In S v Heita [212] Levy J. refused to follow the decision in Angula. He followed the reasoning in Marwane's case and held that the Terrorism Act was incompatible with the Bill of Fundamental Rights and therefore abrogated by section 34 of the Proclamation.

The Appellate Division then had to decide the question of Katofa. The contention of counsel for the respondent was that the words "subject to

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210 1987 (1) SA 696 A
211 1986 (2) SA 540 SWA
212 1987 (1) SA 311 SWA

the provisions of this Proclamation...." had the effect that all laws inconsistent with Proclamation R101 of 1985, which included the Bill of Rights in Annexure 1, had no force after the enactment of Proclamation R101 on 17 June 1985. Rabie A.C.J., who delivered the Appellate Division's judgment, assumed for the sake of argument that the Bill of Rights formed an integral part of Proc R101 and that Section 2 of the Bill of Rights, which outlawed detention without trial, conflicted with section 2 of Proclamation AG 26 of 1978, which provided for detention without trial.

He did not follow Marwane's decision, as he found that section 3(3) and 19 of Proclamation R101 recognised that laws which were in conflict with the Bill of Rights, continued to be valid, even after proclamation R101 had come into force. Therefore, the words "subject to" in section 34 did not bear the meaning the respondent had wished to assign to them. Therefore, the entire draconian panoply of South African security laws continued to apply in South West Africa, not withstanding their clear conflict with the Bill of Rights.

We respectfully submit that the decision by the Acting Chief Justice Rabie was flawed in that the sections he referred to recognise the continued validity of offending laws and did not establish that the Bill of Rights did not prevail over those provisions. We also refer to article 12.9 of the Bill of Rights which recognised the continued validity of offending laws but also contemplated, that notwithstanding such validity, offending laws may nonetheless be struck down by the courts in appropriate proceedings.

It is further submitted that it was inconceivable for the State President to enact such a proclamation incorporating "a fine and noble Bill of Rights" yet still intended that horrors such as the Terrorism Act and the Internal Security Act to continue unabated.

It became obvious that the protection of fundamental human rights could not just be left to the municipal legal order exclusively. Furthermore, when viewing the performance of the South African Appellate Division in interpreting the Bills of Rights in Bophuthatswana and the former South West Africa, it became clear that the adoption of a justiciable Bill of Rights in the then South Africa was no final guarantee for the appropriate enforcement of the rights. We will argue below that the international element of human rights through the international law of human rights will considerably enhance the possibilities of rights conscious.

3.2.14 THE APPELLATE DIVISION AND HUMAN RIGHTS WITHOUT THE LEGAL RESTRAINTS OF APARTHEID

In this section we want to consider the Appellate Division's case of Rudman v S.[213] This case is regarded as significant in that it was decided by an Appellate Division in the period after the State of Emergency was lifted, liberation organisations unbanned, and also with a brand new Chief Justice, that is the libertarian Corbert C.J. (as he then

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213 1992 (1) SA 343 A

was). Furthermore, as far as substance is concerned, the case has very little to do with the apartheid legal order, but it was rather concerned with the right to counsel. The question before the court was whether an accused person who did not have the means to pay for this own defence, was to be provided at his trial with legal representation, if necessary at the expense of the state. In S v Khanyile and Another[214] Didcott J. held that it was the duty of the presiding officer not only to advise the accused of his or her right to legal representation, but also to assess whether the lack of legal representation would place the accused at so great a disadvantage that the ensuing trial would be grossly unfair. Should the judge conclude from his assessment that the trial will be grossly unfair, he should refuse to proceed with the trial until representation had been procured through some agency, be it the legal aid scheme or otherwise. Therefore it was not only a question of the right to legal representation but also the corollary right in some instance to be provided with such representation.

It should be pointed out that Mr. Justice Didcott before discussing the authorities of Cananda, the United States and South Africa, commenced with article 14 of the International Convent on Civil and Political Rights and article 6 of the European Commission of Human Rights as indicative of modern legal thinking.[215] It is therefore with special interest and expectation that we consider the approach of the Appellate Division in

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214 1988 (3) SA 795 NPD

215 According article 14(2)(d) of the International Convent on Civil and Political Rights everyone charged with a criminal offence shall be entitled to certain guarantees, inter alia, to have legal assistance assigned to him, in any case whether the interests of justice so require.

Rudman. This was a clear case where the Court could have applied the principles laid down in the International Human Rights norms.

In Rudman, however, the Appellate Division rejected the Khanyile rule on what appears to be three grounds. In the first place the court held that there is no principle or rule in South African law which provides that an indigent accused is entitled to legal represenation. The Appellate Division, as per Nicholas AJA, did not agree with Didcott J that the touchstone in a procedural appeal was whether the trial was unfair and held that the dicta in the cases cited by Didcott j were confined to irregularities or illegalities of procedure.[216]

The second ground seems to be the premise of Rudman where Corbett C J admitted that the right to counsel is an ideal that is not attainable under present circumstances in South Africa. Ultimately, Corbett C. J. continued thus[217]:

> It depends on how much the state is able and willing to provide for the funding of public defender, legal aid and such-like schemes and for the establishment of the additional infrastructure required. The many claimant demands on the public purse are well known. It becomes a question of deciding on priorities.[218]

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216 Khanyile, supra, at p. 377
217 Khanyile, supra, at p. 392
218 Khanyile, supra, at p. 386

Nicholas A.J.A. formulated it as follows:

> The Supreme Court has a no power to issue a mandamus on the Government to provide legal aid, and it should not adopt a rule the tendency of which would be to oblige the Government to do so.[219]

Lastly, the court held that the adoption of the Khanyile rule without a thorough feasibility study would dislocate and disorganise the business of the courts and would throw the criminal work of the courts into chaos.

The judgment of the Appellate Division came under strong criticism. However, before referring to some of the criticism, suffice it to say that this judgment underscored our submission that the South African municipal order was not equipped to oversee the enforcement of fundamental human rights on its own. With so many factors operating in favour of a rights-conscious judgment, the post-apartheid libertarian Appellate Division unfortunately slipped back into the arms of the executive.

According to MeQuid-Mason who cogently argued with a tentative feasibility study that the task was not as insurmountable as the Appellate Division seemed to think, the South African judiciary would soon (particularly under the Bill of Rights), have to decide human rights issues

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219 Khanyile, supra, at p. 388

on legal principle alone, without reference to the attitude of the government.[220]

Steytler agreed with the Appellate Division that there had never been a rule that an indigent accused was entitled to legal representation, but pointed to the analogy with the rule that an undefended accused should be informed of his right to legal representation.[221] This latter rule only came to the fore in 1988 through a judgment of the Transvaal Division of the Supreme Court. It was not innovative in principle, because the principle of equality before the law was a foundational principle of the South African common law.

The same applied to Rudman.[222] In similar vein Steytler had little comprehension for the argument of Nicolas, A.J.A., that the court had no power to impose a positive duty on the state to provide legal aid.[223] He referred to the obvious example of the provision of interpreters where the Supreme Court had formulated such positive duty with considerable financial implications for the state.[224]

It is submitted that in Rudman, the Appellate Division did not give effect to a fundamental right recognised in South African common law. While this rendered the protection of fundamental human rights in South Africa

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220 McQuid-Mason D.J., "Rudman and the right to counsel : Is it feasible to implement Khanyile?", SAJHR, Vol 8, part 1 1993, at p. 96-113

221 Steytler N., "Equality before the law bing practical about principle", SAJHR, Vol. 8, part 1 1992, p. 113-119

222 Rudman, supra, at p. 346

223 Rudman, supra, at p. 348

224 Rudman, supra, at p. 115-116

particularly precarious, it reinforced the general conclusion in this chapter, namely that human rights protection in South Africa could not be entrusted to the municipal order only, and that the South African judiciary had to be enabled to break out of the confines of the national legal system.

3.2.15 EVALUATION

From the foregoing discussion of case law under state of emergency legislation and regulations the overriding conclusion is of course that of the judiciary upholding the power of the executive to intrude into the life of the individual. This observation is equally applicable to the case law on apartheid and security legislation.

"But" lamented Van Blerk,[225] "why castigate the judiciary?". They did not have a Bill of Rights, how could they restrain the authorities politically when within their limited framework they could only do so within the limits of the law? She is supported in this by Cowling[226] who also argues that the judges really had little room for judicial manoeuvre. To a certain extent, Van Blerk is also supported here by two prominent American lawyers.[227]

The truth, however, was that the Appellate Division was not asked to restrain the authorities beyond the limits of the law. The Appellate

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225 Van Blerk, supra p., 176

226 Cowling M.S., "Judges and the Protection of Human Rights in South Africa: Articulating the Inarticulated Premise", SAJHR 1987 (July), Vol 3, Part 2 at p. 177

227 Frank, "Some Reflections on Judge Learned Hand" (1957) Chicago LR 666 at p. 698 and also Cahn E., Parchmen Barriers in confronting Injustice, 2nd (ed) 1962 at p. 115

Division was asked to exercise its choice of testing subordinate legislation[228] within the margins of the limited framework of the law. The emergency regulations in particular and the rules that were made under them were delegated legislation, and the Appellate Division had the opportunity to affirm and apply the doctrine that fundamental rights enjoyed a special protection against invasion by delegated legislation.[229] This, the Appellate Division refused to do.

We will return to the then judiciary and the Bill of Rights subsequently, but let us for the moment acknowledge that it would be grossly inaccurate to point the finger exclusively at the judiciary. It was the legislature, says Didcott,[230] "not a democratic one ..... since it did not represent or speak for the large majority of South Africans", with its enabling legislation that, according to the interpretation of the Appellate Division, "ousts the jurisdiction of the courts from most of these matters and gave the executive virtual carte blanche". It was therefore almost chilling to read a 1986 statement by the "supreme commander" of that same legislature and executive viz: State President Botha, reciting with characteristic vigour, what could best have been the Universal Declaration of Human Rights. "We believe in the sovereignty of the law as the basis for the protection of the fundamental rights of the individual, as well as groups. We believe in the sanctity and indivisibility of law and the just application thereof.. We believe that human dignity, life, liberty

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228 Section 19 of the Supreme Court Act 1959

229 Murenik E., "Judicial review and the emergency", supra at p.138

230 Salvaging the law, supra

and property of all must be protected regardless of colour, race, creed or religion. We have outgrown the old colonial system of paternalism, as well as the outdated concept of apartheid."[231] A clear example not of homage paid to human rights, but of the homage that vice pays to virtue, viz: lipservice.

As to the claim by the Law Commission at the time that there was sufficient protection within the confines of the common law, we submit that it was not supported by the authorities we have discussed above.

The statement that there was full recognition of and respect for the rights of the individual in the common law, but that the courts were powerless in the face of the unjust legislation of Parliament when viewed in the light of the above line of case law, was also strikingly misleading. It is in our submission an illustration of human rights violations being clothed in a language of human rights protection.

Supporting its claim, the Law Commission[232] stated that "there were numerous cases in which this principle had been laid down". Forsyth,[233] however, reminds us that the cases which the Working Paper cited in detail were all Provincial Division cases,[234] and in the only two Appellate

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231 The State President, Mr P.W. Botha, in his opening address to Parliament on 31 January 1986

232 Working Paper 25, supra at pp 265-6

233 Forsyth, "Interpreting a Bill of Rights : The Future Task of a Reformed Judiciary", SAJHR Vol 7, part 1 1991, pp 1-23 at p. 4

234 Ramgoobin 1985 93) SA 587 N. Akweenda v Cabinet for the Transitional Government for South West Africa, 1986 (2) SA 548 SWA, and Hurley v Minister of Law and Order 1985 (4) SA 709 D

Division cases cited the dicta were obiter. It is submitted that the learned author is correct.

Furthermore, the Law Commission did not indicate why it elected to ignore completely the executive-mindedness of the Appellate Division (as is evidenced in particular during the states of emergency period which was the same period within which the Law Commission was conducting its research). Neither in its provisional report,[235] nor in its subsequent interim report[236] do we find any reference to the watershed Appellate Division case of Omar, or the subsequent Appellate Division cases of Castle NO v MAWU, Minister of Law and Order v Dempsey, Ngqumba v State President, Staatspresident v UDF or Staatspresident v Release Mandela Campaign.[237]

The Law Commission therefore elected to focus upon the optimism expressed by Basson and to ignore the reality of the devastating impact of Omar and subsequent cases.

It should be emphasised at this stage, that these and other criticisms of the Law Commission did not alter the fact that its reports represented an important milestone in the development of human rights inside South Africa. According to van Heerden J. A.,[238] 3000 individuals and

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235 Working Paper 25, supra Table of Cases, at pp xxxi - xxxvii

236 Interim Report, Project 5P, supra Table of Cases, at p 1iv-1iv-1viii

237 Supra, note 180 above

238 Van Heerden, "Die Suid-Afrikaansewetgewing gemeet aan 'n handves van mensregte: TSAR 1990 Vol. 1 pp. 1-10. He was also a chairman of the Law Commission as at August 1991.

organisations were invited to convey their opinions regarding the possible acceptance of a Bill of Rights to the Law Commission. Approximately 600 papers, presentations and commentaries were received. The result was Working Paper 25 which was open for comment and was considered for the Interim Report, Project 58. It would therefore, be too simplistic to belittle the work of the Law Commission as merely the echoes of government policy. Van der Vyver remarked that if it was the intention of the government to have a Bill of Rights that would "perpetuate apartheid under the auspices of human rights ideology", its hopes had been dashed as the Commission:

> has produced an impressive scholarly report which reflects an honest attempt to come to grips with the real demands of human rights protection and to tackle the challenges of implementing a genuine Bill of Rights dispensation in our divided society [239]

According to the then Law Commission chairman, Olivier,[240] the provisional report did not claim the last word on human rights. It continued research and discussion of human rights issues by all South Africans that were of extreme importance and his hope was for the Law Commission to play an on going role in that process.

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239 Van der Vyver J.D., "The Law Commission's Provisional Report on Group and Human Rights", SAJHR, 1989 Vol 5, part 2 editorial at p. vi

240 Interview by J. van der Westhuizen, supra at p. 102

The recognition by the Law Commission that a Bill of Rights was incompatible with a social, legal and political system founded on racial discrimination and institutional sectional privileges[241] was certainly laudable. Wiechers[242] remarked that it was also noticeable that the Law Commission unequivocally dismissed as invalid objections previously raised by the Minister of Justice himself viz: that protection of individual rights would politicise the judiciary, or that protection was not necessary in the South African legal system:

> Notwithstanding any possible criticisms of the Law Commission's working paper, it must be applauded as a pioneering document and as a significant contribution to the advancement of human rights and the constitutional future of South Africa. Perhaps more important it can be said that this report will prove itself to be an indispensable and indeed vital part of the debate on our constitutional future that is presently sweeping the country[243]

In our submission, however, the emphasis by the Law Commission's working paper on human rights protection exclusively within the municipal legal order, was questionable. As it has emerged from our study thus far, municipal legal orders are inadequate to sufficiently guarantee the promotion and protection of fundamental human rights and they cannot exclusively be entrusted with it.

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241 Van der Vyver in SAJHR editorial 1989, supra at p. vi

242 Wiechers M., "The Law Commission's Bill of Right Report : a new dawn for human rights in South Africa?" South Africa International (July 1989) at p. 29

243 ibid at p. 31

We have also established that the claim by the South African Law Commission that human rights were afforded sufficient protection within the confines of the law was not supported by the authorities discussed.

It is submitted that in Rudman, the Appellate Division did not give effect to a fundamental right recognised in South African common law. While this rendered the protection of fundamental human rights in South Africa particularly precarious, it reinforced the general conclusion in this chapter, namely that human rights protection in South Africa could not be entrusted to the municipal order only, and that the South African judiciary had to be enabled to break out of the confines of the national legal system and embrace international human rights norms in their decisions.

3.3 SUMMARY

In this Chapter we have endeavoured to show through case law how the then South African judiciary failed to apply international human rights norms in their decisions. It is submitted that South Africa was not yet a party to International Conventions but its courts could have used the common law.

We also focused on the apartheid legal order to indicate the legal environment within which the then South African judiciary operated, and to assist us in establishing the extent to which the South African judiciary could be influenced by international norms of human rights. We have

attempted to establish in this chapter that there was still considerable distance between South Africa and the human rights standards required by the international human rights instruments. The clear movement away from the apartheid legal order has been noted, and we have expressed the view that the political will towards international human rights protection appeared to be emerging gradually. This view, however, had to be tempered by caution and even suspicion amongst the larger section of the South African population due to the fact that the constitutional structure with the crisis of legitimacy still remained intact.

On the level of public international law, we have established that public international law remained fairly unsettled particularly in the light of the Appellate Division decisions in Nduli and Ebrahim. We therefore, concluded that clarity from the then Appellate Division, but more so from the legislature, was imperative. We have also established that the Partsch articulation of modern public international law of co-operation had yet to find application inside the country.

The overriding conclusion, however, was that in the phase of moving away from its apartheid past, the approach of the South African apartheid legal system was to exclusively rely on its municipal legal order as the vehicle for human rights protection. The South African apartheid legal system had with extreme caution and considerable effect protected itself from the influence of international norms of human rights, both

constitutionally and on the public international level. According to Henkin:[244]

> The development of a national human rights culture depends primarily on internal forces, but an international human rights culture can strongly influence domestic progress. International law generally has managed with reasonable success, thanks to a culture of compliance and to horizontal enforcement; international human rights law is still developing its culture of compliance.

We have also attempted to show through case law the inability of the South African judiciary to act as bulwark in protection of human rights. It is submitted that the legal environment in which they operated was such that they could not order the state to comply with the international human rights law, but at the least, the judiciary was expected to apply the common law principles that were not repealed by Parliament.

The common law as shown in this chapter could not be relied upon as parliament could change it as it pleases.

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244 Henkin, Recuel des cours, Columbia University, 1989, supra at pp 272-3

In the next chapter we will discuss the development of the Constitutional State and its clear break with the past. We will also look at the challenges of reform and transformation in the new dispensation.

We will also refer to the decision of the Constitutional Court and try to find out whether the courts i.e. the Constitutional Court, the High Courts and Magistrate Courts observe and apply the international human rights norms in their deliberations.

CHAPTER 4: THE NEW ORDER AND RECEPTION OF INTERNATIONAL HUMAN RIGHTS NORMS/VALUES

4.0 INTRODUCTION

Having dealt with the old apartheid dispensation in the previous Chapter, this Chapter deals with the situation under the new dispensation. The main thrust of our discussion herein will be the transition to the democratic order as well as acceptance of international human rights norms in the new dispensation.

In this chapter we will also discuss the values that underpin the new state as well as the paradigm shift that has taken place since the advent of the new Constitution. We will also discuss the transition to the constitutional state and the general features of both the interim and the final Constitution. We will also discuss the fundamental changes under the new order. We will show through case law how the international human rights norms have been accepted and applied by the Constitutional Court indicating a clear break with the apartheid past.

4.1 TRANSITION TO A CONSTITUTIONAL STATE : KEY EVENTS 1989 – 1993

After the Soweto riots in 1976, apartheid was never well again; a decade later, there were all the signs that it was falling apart. By the mid-eighties, the conflict between blacks and whites intensified as never before. As state brutalities mounted, so black resistance

hardened and the disenfranchised lost their traditional fear of the system and began defying it with impunity. There was a resurgence of planned defiance of racist laws similar to that of the 1950s, before the onslaught of repressive legislation.[1]

Security laws were flouted with unusual contempt, organisations and persons under restrictive orders flagrantly unrestricted themselves, there were mass occupations of beaches, and black patients charged on government hospitals reserved for whites, demanding to be treated. The extent to which the Government had weakened was demonstrated when the 1989 racial elections, doomed to be the last of its kind, were confronted with an 80% stay-away from work, and the nationalist majority in the House of Assembly was reduced from 80 to 21.

The tension between black and white, which coincided with that between labour and capital, reached its breaking point. By 1989 it was clear that neither the government could hold power through sheer repression, nor could the anti-apartheid forces, deliver freedom to the people through sheer mass mobilisation. The stalemate could have continued indefinitely – state brutality on one hand, and mass matyrdom and sheer anarchy on the other – but for the intervention of international banking interests, which, seeing their investments at risk, called in their loans. For the first time in South African history,

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1 The Codesa File, Negotiating a Non-Racial Democracy in South Africa, 1989 – March 1993, Institute of Black Research Madiba Publishers 1993

business and humanitarian concerns coincided, thereby exploding the apartheid structure that had been long under stress.

Businessmen and academics turned to the ANC for rescue operations, and there began the visits to the banned organisation in exile by prominent South African groups. On 30 September 1987, the ANC reported that it had been approached by an intermediary acting for South African Cabinet Minister to "talk about the possibility of talks" with the Government. There were six more meetings that year between the exiled ANC and South African groups.

As the government realised the need to democratise the political system in response to international demands it turned more and more to the incarcerated Mandela. His prison conditions began to be relaxed. While a ban was placed on the celebration of his 70th birthday, the government turned a blind eye to the publication in the country, of his biography, Higher than Hope, which contained copious extracts from his speeches and letters. The media was also allowed to publish carefully worded statements from him from time to time. He was eventually moved to a private residence at Victor Verster prison, to facilitate his secret meetings with top ranking ministers that had started in 1986. On July 14, 1989, the public was taken into confidence with the surprise announcement that P. W. Botha had met Mandela at Tuynhys. Mandela later reported that it had been a friendly meeting.

P. W. Botha, however, could not but have been put out by Mandela's memorandum which followed the meeting and which reiterated his unchanged political position and called for negotiations between the ANC and the Government to save the country from the continuing violence. He was explicit that the ANC would not concede to the Government's preconditions that it abandon its guerilla offensive, drop its demand for universal adult franchise and break its link with the South African Communist Party.

Though P. W. Botha had taken the bold step of talking to Mandela, his cabinet did not see him as the man who could lead the new political process to negotiations and power-sharing. Accordingly, a month after his historic meeting with Mandela, on July 14, 1989, he was forced out of office in a palace coup and replaced with De Klerk, thus providing Mandela with a more congenial negotiation partner.[2]

One of the first things De Klerk did on assuming office was to lay the basis for South Africa's re-entry into the international order. He made a start with the African states, a bold move, since a commonwealth report held the Nationalist government responsible for the deaths of 1,5 million people and the displacement of four million in neighbouring countries. But the very fact of their power to destabilise made it necessary to talk with the Nationalists, so De Klerk made some gains

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2 The Codesa File, supra, at p. 23

and met with former Presidents Mobutu Sese Seko of Zaire and Kenneth Kaunda of Zambia to discuss the Angolan Peace Accord.

In October 1989, in the face of growing despair that the Nationalists would ever change, and as the disenfranchised tightened their belts for another season of state brutality, De Klerk made his first move towards meaningful reform: he released Walter Sisulu and other life-term political prisoners.

On December 9, 1989, the anti-apartheid forces held a Conference for a Democratic Future (CDF), attended by 4462 delegates, representing 2138 organisations, and through them reputedly 15 million people. The conference adopted the August 1989 Harare Declaration of the Organisation of African Unity (OAU) which called on the South African government to create the necessary climate for negotiations by releasing all political prisoners, unbanning all restricted organisations and persons and removing all troops from the townships. The Declaration laid the basis of the CDF call for a non-racial constituent assembly, representing all the people of South Africa, to draw up a new constitution based on a single parliament and a single universal suffrage.

In January 1990, the ANC in exile announced that it was prepared to suspend hostilities and enter into negotiations with the government on the basis of the Harare Declaration.

The path to negotiations was finally laid in February 1990, when De Klerk made his phenomenal announcement that he was unbanning the ANC, PAC, SACP and other banned organisations, taking steps to release political prisoners who were not also convicted of criminal activities, abolishing security laws that inhibited political freedom, and ending the state of emergency as soon as possible. In the House of Assembly, De Klerk said:

> With the steps the Government has taken, it has proved its good faith and the table is laid for sensible leaders to begin talking about a new dispensation. Among other things, those aims include a new democratic constitution, universal franchise, no domination, equality before an independent judiciary .....

He went on to say that the day's announcement went to the heart of what black leaders, including Mandela, had been advancing over the years as their reason for having resorted to violence. He said further:-

> The allegations has been the government did not wish to talk to them and that they were deprived of their right to normal political activity by the prohibition of their organisations. I wish to say today to those who argued in this manner: the Government

> wishes to talk to all leaders who seek peace. The unconditional lifting of the prohibition in the said organisations places everybody in a position to pursue politics freely.[3]

The ANC opened its South African office in Johannesburg in March 1990 and scheduled its first meeting with the Government for April 11th. The Government named its "talk team" on March 29 and the ANC announced that 19 exiled leaders would be flying in in preparation for the talks. The talks about talks had begun.

The Codesa plenary session opened on December 20, 1991, in Johannesburg in the vast Trade Centre. Delegates from 19 organisations had begun their deliberations watched by a large body of international representatives and an equally large body of media personnel. The proceedings were opened by former Chief Justice Corbett, who somewhat insensitively likened Codesa to the whites only 1908 Convention which had established the racist Union of South Africa.

The late Justice Mahomed, who co-chaired the meeting with Justice Scharbot, referred on the other hand, to the "Malignancy, the obscenity and the cruelty of apartheid and institutionalised racism which has

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3 Hansard, House of Assembly speeches, 1990 at p. 154

separated us, divided us and isolated us from the mainstream of the civilised world."[4]

Mandela and De Klerk finally signed the Accord of Understanding in terms of which the Government undertook to install an interim Government within a specified time-frame. The following events occurred before the signing and implementation of the Interim Constitution of 1993:

1. Conference for a Democratic Future Alternative, February 1990
2. The Harare Declaration, February 1990
3. F. W. De Klerk on Reform, February 1990
4. The Groote-Schuur Minute, May 1990
5. The Saccola Accord, May 1990
6. The Pretoria Minute, August 1990
7. The Harms Commission, November 1990
8. ANC Consultative Conference, December 1990
9. PAC Conference, December 1990
10. The Royal Hotel Minute, February 1991
11. F. W. De. Klerk speech at the Opening of Parliament, March 1991
12. Report of the Working Group under paragraph three of the Pretoria Minute, March 1991

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4 Codesa, First Plenary Session, Volumn II : 21 December 1991

13. ANC Ultimatum to the Government, April 1991

14. National Peace Accord, September 1991

15. ANC National Conference, July 1991

16. Negotiation : A Strategic Perspective, November 1992

17. NEC Resolution on Negotiations and National Reconstruction, February 1993

We will now proceed to the new constitutional order.

4.2 THE NEW CONSTITUTIONAL ORDER

4.2.1 Role of the interim Constitution

As we have pointed out in Chapter 4, before 27 April 1994 constitutional litigation and the effective protection of human rights through the courts were virtually impossible. South Africa's political order was based on the ideology of apartheid and the exclusion of the majority from participation in the political process. The doctrine of parliamentary sovereignty constituted the basis of the constitutional order that made it impossible for the courts to declare Acts of Parliament invalid or to test their content against the constitution. The constitution itself was considered an ordinary Act of Parliament. It had no supreme status and could therefore not provide a yardstick for constitutional review. Parliament itself determined the extent, if any, of individual freedoms. Our common law did provide for some protection of individual rights but legislation dealing with state security resulted in a denial of most universally recognised human rights and freedoms.

The frequent and extensive use of officially proclaimed states of emergency also characterised the former dispensation and together with security legislation provided for wide executive discretionary powers and the ousting of the jurisdiction of the courts[5]. Detention without trial was frequently practised[6].

The Constitution of the Republic of South Africa, Act 200 of 1993 (the interim Constitution), brought about major political and legal changes in South Africa. It resulted from political negotiations in which all South African political actors, including previously banned political movements and imprisoned leaders, participated. That Constitution reflected the agreement in terms of which a new democratic political order was established and a new legal order created[7].

The interim Constitution was formally adopted by the previous Parliament; ensuring the continuity of the South African state. The first democratic elections were conducted in terms of that Constitution and the new Parliament was required to adopt a final constitution. This is the reason why the Constitution of 1993 has been referred to as the interim Constitution. Despite being a transitional constitution, it was

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5 For a general discussion of security legislation, see Dugard J Human Rights and the South African Legal Order (1978) and Matthews AS Freedom, State Security and the Rule of Law (1986).

6 For a general discussion of security legislation, see J Dugard Human Rights and the South African Legal Order (1978) and AS Matthews Freedom, State Security and the Rule of Law (1986).

7 See S v Makwanyane 1995 (3) SA 391 (CC); 195 (6) BCLR 665 (CC) at para.7; Azapo v President of the Republic of South Africa 1996 (4) SA 671 (CC); 1996 (8) BCLR 1015; Ex parte Chairperson of the Constitutional Assembly: in re Certification of the Constitution of the Republic of South Africa 1996 CCT 23/96 (6 September 1996) 1996 (4) SA 744 (CC) (First certification judgment)

nevertheless binding, supreme and fully justiciable. The judgments of South African courts discussed in this chapter were decided in terms of the interim Constitution and cover the period up to the end of 1996. In terms of the justiciability of the Constitution there is no fundamental difference between the interim and 1996 Constitutions. The formulation of certain rights has been changed and some new rights added.

The effect of the Interim Constitution on the South African Legal System can justifiably be described as revolutionary.[8] Basically, the Interim Constitution brought about three fundamental changes:

1. For the first time in South Africa's history, the franchise and associated political and civil rights were accorded to all citizens without racial qualification. The Interim Constitution brought to an end the racially-qualified constitutional order that accompanied three hundred years of colonialism, segregation and apartheid.

2. The doctrine of parliamentary sovereignty was replaced by the doctrine of constitutional supremacy. A Bill of Rights was put into place to safeguard human rights, ending centuries of state sanctioned abuse. The courts were empowered to declare laws and conduct inconsistent with the Bill of Rights and the Constitution invalid.

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8 Azapo V. President of the Republic of South Africa 1996 (4) SA 671 (C.C, para. 1.)

3. The strong central government of the past was replaced by a system of government with federal elements. Significant powers were devolved to the provinces and local government.

The Interim Constitution was a transitional constitution. One of its principal purposes was to set out the procedures for the negotiations and drafting of a final Constitution. Once the 1996 Constitution was adopted the Interim Constitution fell away.

4.2.2 Construction of the 1996 Constitution

The 1996 Constitution is the product of a process which started with the CODESA and Multi-Party negotiations in Kempton Park and which aimed at fundamentally transforming South Africa. This transformation is not complete but has already produced a number of concrete results. A new legal and constitutional order is one of the most important.

The interim constitution was not adopted by a democratically-elected body or through a national referendum. That deficiency has been remedied in the 1996 Constitution. Parliament elected in 1994 also had to serve as a Constitutional Assembly and was required to write a final Constitution for South Africa. In doing so, the Constitutional Assembly was bound by the 34 Constitutional Principles adopted at the Kempton Park negotiations. In order to ensure compliance with these 34 Constitutional Principles, the final constitutional text had to be

certified by the Constitutional Court before it could enter into force.[9]

The Constitutional Assembly completed its work in May 1996 and the first certification hearings before the Constitutional Court were conducted in July. In September the Court gave its judgment.[10] It refused to certify the text. Provisions of the new text relating to provincial powers, local government entrenchment, the Public Service Commission and other matters had to be reformulated in order to comply with the Constitutional Principles. The Constitutional Assembly then reconvened and made several changes to the May text. The new text (of 11 October 1996) was again referred to the Constitutional Court and this time it was found to be consistent with the Constitutional Principles.[11] The two certification judgments of the Court are important decisions for explaining the content of many provisions, including provisions in the Bill of Rights. The Court ruled that the Constitutional Principles may not be revisited again: the Courts interpretation thereof is foundational.

4.2.3 Constitutional Democracy and the Bill of Rights

The 1996 Constitution is a comprehensive document that contains chapters on the various branches of government (including the newly created nine provincial governments), details transitional provisions

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9 Ex parte Chairperson of the Constitutional Assembly: in re Certification of the Constitution of the Republic of South Africa 1996 (First Certification Judgment) 1996 (4) SA 744 (CC) para 13.

10 Exparte Chairperson, supra, at para. 14

11 In re: Certification of the Constitution of the RSA, 1996 (4) SA 744 (CC)

(ensuring the continued application of previous laws and legality of pre-constitutional government action) and specialised areas such as finance, the public service, police and defence.

Chapter 2 contains the Bill of Rights. It lists most universally recognised basic human rights and fundamental freedoms and provides for their enforcement and protection. Chapter 8, on the judicial authority and the administration of justice, deals among other things, with an important institution created by the interim Constitution, the Constitutional Court. This Court has wide powers of review, including the power to strike down unconstitutional legislation. It is ultimately responsible for the protection of fundamental rights and takes the final decision on any matter that requires a judgment on constitutional validity[12].

The main emphasis is therefore on the constitution's supremacy, its justiciability and the content and enforcement of the Bill of Rights. For legal practitioners the courts are the most important instrument for the enforcement of human rights. Ultimately, however, human rights are not enforced through litigation only. The Human Rights Commission, the Public Protector, the Commission for Gender Equality, the Commission for the Promotion and the Protection of the Rights of Cultural, Religious and Linguistic Communities and the Land

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12 Section 167. The constitutional jurisdiction of other courts is also dealt with - see Chapter 8.

Restitution Commission, as well as organisations of civil society, Parliament and all state organs have important roles to play in this regard. Ultimately, it is hoped that a broad-based human rights culture will characterise the new South African society.

Judicial remedies are not the only means available for protecting and enforcing human rights. The new political process, typical of a democratic order, provides for elections, participation, and devolution of central government power. A free press and other media are of particular importance. Open debate provides an essential element in a democracy for exposing infringements of fundamental rights, as do civil society organisations.

International law and international organisations are increasingly important as institutions that promote respect for human rights. South Africa has been welcomed back into the international community and has signed a number of international human rights conventions. It is actively participating in regional and universal international organisations. This dimension is an important new one, especially in the light of the country's former isolation and the antagonism that was often displayed by South African authorities and the courts vis-a-vis international law. Inter-governmental organisations (such as the United Nations or regional ones like the OAU and the European Council) maintain monitoring and adjudicating structures. Complaints may be lodged by other states and in certain instances individual complaints by

affected individuals are possible. Such cases are then decided by supra-national bodies such as the Human Rights Committee of the United Nations. These cases constitute an important source of law and one often consulted when interpreting the Bill of Rights[13]. Non-governmental international organisations (eg Amnesty International) provide for the mobilisation of international opinion and the exposure of human rights abuses.

The operation of the Bill of Rights has to be seen in the broader context of the constitutional arrangement of which it forms part. It is therefore useful to start with a brief discussion of some of the most important features of the Constitution.

4.2.4 THE NATURE OF THE CONSTITUTION

As pointed out heretofore, the old South Africa did not provide for the effective protection of human rights. South African common law did contain some principles protecting individual rights (such as habeas corpus and the interdictum de homine libero exhibendo) but they could be overruled by an Act of Parliament. South Africa has, prior to 1994, not had a supreme constitution. The far-reaching impact of the new Constitution becomes clearer when seen in this historical context. The new dispensation is based on new constitutional principles and values (such as democracy, human rights and constitutionalism); new institutions (such as the new Constitution and the Constitutional Court);

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[13] The basis for this is s 39. – see also Makwanyane's case, supra

and a new approach (open government, access to information, etc.).

The nature of the new order is encapsulated by the notion of the constitutional state[14]. It is the same concept as the German Rechtstaat. It implies that all power must be exercised in terms of the Constitution. The Constitution provides a framework of rules and institutions which determine's how state power has to be exercised, that human rights must be protected and that the courts will rule on the validity of all matters relating to the application of the Constitution. The final judicial pronouncement is binding on the parties concerned and all state organs.

In a formal sense the constitutional state is based on separation of powers; individual human rights (with particular emphasis on equality); protection of the individual through an independent judiciary; the maxim nulla poena sine lege; the idea that all state action must originate in a formal legal source-, accountability; legal certainty and 'predictability' (through inter alia requiring proportionality for state action and prohibiting retroactive legislation) and the existence of formal legal rules. This last requirement involves the participation of a popularly elected legislature in the enactment of legal rules and it lays down that the law should be of general application[15]. Procedural stability and

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14 For further discussion of the meaning of the constitutional state see D van Wyk >Suid Afrika en die regstaatidee= 1980 TSAR 152

15 Van Wyk Persoonlike Status in die Suid-Afrikaanse Publiekreg 1979 72-76; D Basson and H Viljoen Suid-Afrikaanse Staatsreg 2nd ed , supra, at pp. 229-231

protection against arbitrariness are important characteristics of such a system.

In a material sense a constitutional state means that state power is inherently subject to certain higher constitutional values and should be exercised in a manner that will further these values (such as human dignity, freedom and equality). Adherence to the Constitution and these values are preconditions for the exercise of power. The government of the day exercises power on the basis of the Constitution and the law - and not simply because it is 'in power'. In this way open and transparent government is to be achieved. The constitution provides the standards required in order to ensure legality and legitimacy of the actions of state organs.

The Constitution contains the values that direct state action. It is a value-based Constitution and this has implications for its interpretation, as is shown below. The application and interpretation of the Constitution should recognise and give effect to both the formal and material (substantive) qualities and the objectives embodied in this concept.

South African courts have recognised the fundamental changes brought about by the adoption of the concept of the constitutional state. In the South African context it has been stated that:

> In reaction to our past, the concept and values of the constitutional state, of the regstaat', and the constitutional right to equality before the law are deeply foundational to the creation of the 'new order' referred to in the preamble. The detailed enumeration and description in s 33(1)IC of the criteria which must be met before the legislature can limit a right entrenched in Chapter 3 of the [interim] Constitution emphasises the importance, in our constitutional state, of reason and justification when rights are sought to be curtailed. We have moved from a past characterised by much which was arbitrary and unequal in the operation of the law to a present and a future in a constitutional state where State action must be such that is capable of being analysed and justified rationally. The idea of the constitutional state presupposes a system whose operation can be rationally tested against or in terms of the law. Arbitrariness, by its very nature, is dissonant with these core concepts of our new constitutional order. Neither arbitrary action nor laws or rules which are inherently arbitrary or must lead to arbitrary application can, in any real sense, be tested against the precepts or principles of the Constitution[16].

By way of comparison, in Namibia it has been held that:

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16 Per Ackerman J in Makwanyane (supra) at para 156

> in a constitutional state the government is constrained by the Constitution and shall govern only according to its terms, subject to its limitations and only for agreed powers and agreed purposes. But it means much more. It is a wonderfully complex and rich theory of political organisation. It is a composite of different historical practices and philosophical traditions. There are structural limitations and procedural guarantees that limit the exercise of State power[17].

The new Constitution confirms the idea of the constitutional state. The rule of law is mentioned as a basis of the new state[18]. The same idea is inherent in the working of the limitation clause in section 36.

Section 2 of the Constitution provides as follows:

> This Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled.

Section 237 provides that:-

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17 Per Leon AJA in Ex Parte Attorney-General, Namibia: In Re: The Constitutional Relationship between the Attorney-General and the Prosecutor-General 1995 (8) BCLR 1070 at 1078 H

18 Section 1(c)

> All constitutional obligations must be performed diligently and without delay.

The implications of constitutional supremacy were explained as follows by the Constitutional Court:

> The new Constitution establishes a fundamentally different order to that which previously existed. Parliament can no longer claim supreme power; its power is subject to limitations imposed by the Constitution; it is subject in all respects to the provisions of the Constitution and has only the powers vested in it by the Constitution expressly or by necessary implication... The supremacy of the Constitution is reaffirmed in two respects. First, the legislative power is declared to be 'subject to' the Constitution, which emphasises the dominance of the provisions of the Constitution over Parliament's legislative power . . . . and secondly laws have to made 'in accordance with this Constitution'[19]

The whole of the Constitution, and not only Chapter 2, is supreme and justiciable. For example, in Executive Council of the Western Cape Legislature v President of the Republic of South Africa[20] Chaskalson P

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19 Executive Council of the Western Cape Legislature v President of the Republic of South Africa 1995 (4) SA 877 (CC)

20 Executive Council's case, supa, at p.901

pointed out that the power to delegate subordinate legislative functions to other bodies within the framework of a statute did not extend to the delegation of plenary legislative power to another body or the power to amend the Act under which the assignment was made. In essence the Court held that Parliament acted in breach of the principle of separation of powers if it abdicates its legislative powers to another body (in the Western Cape case to the President).

Future constitutional litigation will therefore entail more than the protection of human rights. Besides the relationship between the legislature, the executive and the judiciary, the relationship between the provinces and the central government may turn out to be another contentious area.[21]

The courts, and particularly the Constitutional Court, are the guardians of the Constitution. They are to ensure that the supremacy of the Constitution is respected and upheld. For this purpose the Constitution provides for judicial review of legislative and administrative actions[22].

Judicial review of legislation has to be distinguished from the judicial review of administrative action. The Constitution, and legislation passed in terms thereof, are the only valid enabling sources for executive action. All executive acts will have to comply with the

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21 At page 902 of the Report

22 See further Chapter 8 of the Constitution

provisions of the Constitution and validly passed enabling legislation in order to be valid. The executive 'must uphold, defend and respect the Constitution as the supreme law of the Republic'[23]. The executive may exercise those powers expressly provided for as well as those necessary to perform the expressly granted powers[24]. The Constitutional Court will have the final say in this regard. There can be no other sources, such as the common law prerogatives, available to the executive branch of government[25].

The Constitution and more specifically the rights and freedoms contained in Chapter 2 are, as a rule, self-executing. It means that the Constitution can be relied upon directly. No subsequent legislation by Parliament is required in order to rely on the rights or to enforce them through the courts. The Constitution may be invoked as the source and authority upon which a claimant relies. The self-executing nature of the Constitution flows from the provisions relating to its supremacy. The fact that laws (and executive acts) can be declared unconstitutional and therefore invalid is only possible because the Constitution is the directly applicable norm against which the legality of state action is measured.

Some of the provisions in Chapter 2 contain entitlements which are not formulated as self-executing rights. Examples are the provisions on

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23 Section 83(b) of the Constitution

24 Section 84(i) of the Constitution

25 This is confirmed in the First Certification judgment (supra) para 116

education, housing, health care, food, water, social security and some of the rights of children[26]. Their enjoyment is determined by factors such as the availability of resources. This was decided in Soobramoney V. Minister of Health (KwaZulu-Natal).[27]

The civil and political rights (the so-called first-generation rights) are less difficult to enforce through the courts. Their self-executing nature is, in addition, strengthened by the fact that the remedy sought in instances of their infringement usually consists of an order instructing the state to discontinue its unconstitutional action, entailing for example the amendment of legislation which violates the Constitution. The remedy does not necessitate positive action on the part of the state as is the case with socio-economic rights such as housing or health care.

4.3 WHAT DOES THE BILL OF RIGHTS PROTECT?

Chapter 2 protects the basic human rights and fundamental freedoms of the individual. It also protects political rights such as the freedoms of speech, religion, assembly, association, the right to vote and to stand for political office at all levels and to form political parties. Citizens have the right to enter and leave the Republic.

Procedural rights include access to courts and to information, rights for people involved in criminal proceedings and rights relating to the

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26 See ss 26 and 27 and the discussion in section I.17 >Socio-economic rights= below

27 1998 (1) SA 765 (CC)

administration of justice in general. Egalitarian rights are dealt with in the equality clause. Language and culture are sensitive issues in South African society and are also addressed, as is the basic right to education.

Economic and social rights include the freedom of economic activity, the protection of property, the rights of workers, rights to housing, health care, food, water and social security. Children and the environment are also afforded protection.

These rights and freedoms are not absolute. The limitation clause (s 36) provides the framework for balancing them against the rights of others and the needs of society.

As was pointed out above, the rights cannot all be enforced in the same manner. Human rights are often said to fall in three categories or generations. The first-generation rights are the traditional civil and political rights and freedoms of the individual. They are relatively easy to enforce via the courts - through an order directing the state to stop the infringement. Second-generation rights deal with socio-economic needs such as the right to work, favourable conditions of work, an adequate standard of living, the rights to health, education and social security. These rights are of a different nature because of the positive action required from the state (eg to provide housing). It is therefore often argued that they are not typical human rights and that they are

not even enforceable through the courts[28]. First-generation rights demand the state to refrain from certain actions; second-generation rights want the state to deliver benefits and services. The Constitutional Court has now provided more clarity with respect to this matter, as will be shown below.

A third generation of rights are '...peoples' rights or rights of solidarity ... and include such rights as the right to peace, the right to self-determination, right to control over resources, the right to development, and the right to a clean environment.'[29]

The debate as to the 'true nature' of human rights has been going on for a considerable time. It is now accepted that the three generations of rights cannot be divided into water-tight components. In our society the concern of the majority of people is with improving their socio-economic situation. This is a legitimate concern. Failure to address it will have negative consequences for society in general and also for the protection of first generation rights which some tend to emphasize. In the final analysis the Constitution has to provide a broad, constitutional legal and political framework for addressing the concerns of the whole of society.

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28 For discussion of these arguments see the articles by Haysom, Mureinik and Davis in (1992) 8 SAJHR 451-490

29 Sachs A, "Protecting Human Rights in a new South Africa" SALJ, p. 145

Our Bill of Rights forms part of a written and supreme Constitution that is difficult to amend.[30]

The transformation of South Africa will take considerably more time and effort. Under the interim Constitution a number of important human rights cases were decided and South African courts in general, and the Constitutional Court in particular, have started to develop a new human rights jurisprudence. A permanent Constitution has now been adopted and entered into force in 1997. Fundamental rights are part of the final constitutional arrangement and their application will remain central to the future legal order.

The late Chief Justice Mahomed summed up the new constitutional position as follows in *State* v. Makwanyane:[31]

> All constitutions seek to articulate, with differing degrees of intensity and detail, the shared aspirations of a nation; the values which bind its people, and which discipline its government and its national institutions; the basic premises upon which judicial, legislative and executive power is to be wielded; the constitutional limits and the conditions upon which that power is to be exercised; the national ethos which defines and regulates that exercise; and the moral and ethical

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30 See s 74 of the Constitution

31 1995 (6) BCLR 665 (CC) at paragraphs 262-263 of the report

direction which that nation has identified for its future. In some countries, the Constitution only formalises, in a legal instrument, a historical consensus of values and aspirations evolved incrementally from a stable and unbroken past to accommodate the needs of the future. The South African Constitution is different: It retains from the past only what is defensible and represents a decisive break from, and a ringing rejection of, that part of the past which is disgracefully racist, authoritarian, insular and repressive and a vigorous identification of and commitment to a democratic, universalistic, caring and aspirationally egalitarian ethos, expressly articulated in the Constitution.[32]

The learned Chief Justice continued and said:

> The contrast between the past which it repudiates and the future to which it seeks to commit the nation is stark and dramatic. The past institutionalised and legitimised racism. The Constitution expresses in its preamble the need for a new order in which there is equality between people of all races.
>
> The past was redolent with statutes which assaulted the human dignity of persons on the grounds of race and colour alone; Section 10 constitutionally protects that dignity. The past

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32 At paragraphs 262-263 of the judgment in Makwanyane's case.

permitted, accepted, perpetuated and institutionalised pervasive and manifestly unfair discrimination against women and persons of colour; the preamble and the postamble seek to articulate an ethos which not only rejects its rationale but unmistakenly recognises the clear justification for the reversal of the accumulated legacy of such discrimination.

Such jurisprudential past created what the postamble to the Constitution recognises as a society characterised by strife, conflict, untold suffering and injustice. What the constitution expressly aspires to do is to provide a transition from these grossly unacceptable features of the past to a conspicuously contrasting:

> future founded on the recognition of human rights, democracy and peaceful co-existence and development opportunities for all South Africans, irrespective of colour, race, class, belief or sex.[33]

4.4 INTERPRETATION OF BILL OF RIGHTS

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33 At paragraph 263 of the report

(1) When interpreting the Bill of Rights, a court, tribunal or forum-

(a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom;

(b) must consider international law; and

(c) may consider foreign law.

(2) When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.

(3) The Bill of Rights does not deny the existence of any other rights or freedoms that are recognised or conferred by common law, customary law or legislation, to the extent that they are consistent with the Bill.

Section 39(1) demands an interpretation that promotes the values which underlie an open and democratic society based on freedom and equality. It seems as if the society referred to is not necessarily the present South African society, but an abstract and ideal one. In other words, a construction is required analogous to the *boni mores* (the legal convictions of the community) standard developed in the law of delict. The realities of the South African society will therefore not feature as much in the first stage of the analysis, when the scope of the

right is determined, but may prove to be decisive in the second stage, when the constitutionality of limitations of the right is considered.

Section 39(1) further refers to the use of public international law and foreign law. In Makwanyane[34] the court stated that both binding and non-binding public international law may be used as tools of interpretation-

> International agreements and customary international law provide a framework within which Chapter 3 can be evaluated and understood, and for that purpose decisions of tribunals dealing with comparable instruments, such as the United Nations Committee on Human Rights, the Inter-American Commission on Human Rights, and the European Court of Human Rights, and in appropriate cases, reports of specialised agencies such as the International Labour Organisation may provide guidance as to the correct interpretation of particular provisions.[35]

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34 Supra at paras 36-7

35 The Court reached its conclusion with reference to the work of John Dugard (see footnote 36 of the judgment). According to John Dugard, s 9(1) [s 35(1)IC] does not merely require a court to consider treaties to which South Africa is a party or customary rules that have been accepted by South African courts, but also

a. international conventions, whether general or particular, establishing rules, expressly recognised by the contesting states;
b. international custom, as evidence of a general practice accepted as law;
c. the general principles of law recognised by civilised nations;
d. judicial decisions and the teaching of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

Dugard argues that such a conclusion follows logically from the use of the term >public international law= without qualification in s 35(1)IC and the language of s 116(2)IC. It seems that the sections were meant to be this broad in order to give maximum effect to the otherwise incomplete catalogue of rights entrenched in the Bill of Rights. J Dugard The role of international law in interpreting the Bill of Rights (1994) 101 SAJHR 208

Since the Second World War and the revulsion expressed against the atrocities committed under Nazi Germany, international law has became a major instrument for the protection of human rights. (Examples are the Universal Declaration of Human Rights (1984) UN Covenants on respectively Economic, Social and Cultural Rights and on Civil an Political Rights). The Constitution is international law-friendly. It incorporates public international law as part of the law of the land through s 232[36], and provides for the application of international human rights law when the fundamental rights are to be interpreted. It also flows from the fact that new South African order is to be based on international norms that respect human rights. These norms will be quite useful when interpreting and applying our own Bill of Rights. This pro-international law orientation seems to be a deliberate choice and another of the constitutional values.

What is referred to here is international human rights law in general; it is not only limited to instruments officially binding South Africa. The fact that South Africa is at present party to very few international agreements on human rights is no obstacle to invoking international human rights law for the purposes of section 39(1). Human rights protection in South Africa does not in the first instance depend on our

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36 A considerable part of international human rights law will apply locally in terms of s 232 by virtue of being customary international law. Unlike international agreements, customary international law needs no express parliamentary >approval= in order to become part of the law of the land. Customary international law creates obligations also for states not party to specific conventions. This may include international humanitarian law (jus in bello). This area of public international law may apply to domestic conflicts and public emergencies.

country being party to such agreements. Section 39(1) invokes public international law primarily for the purpose of interpretation of rights and for determining their scope, not for proving their existence.

It should be noted that section 39(1) states that courts shall consider applicable public international law, but may consider foreign law. In fact, until now the Constitutional Court has seldom referred - with the exception of the jurisprudence of the European Convention of Human Rights - to public international law[37]. The references are in any event not as frequent and seemingly as persuasive to the Court as the references to foreign case law.

How will public international law be proved and utilized? South African lawyers will have to become familiar with the discipline in order to be able to argue its content and application. Public international law will have to be treated in the same way as other areas of municipal law. Its original sources such as treaties, custom and general principles will have to be available and known, together with academic commentaries, text books and case law. In addition, the work and publications of certain international organizations will have to be made accessible.

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37 South African courts seldom refer to public international law, even though some forms of public international law (customary law, for example) is according to s 232 of the Constitution part of the law of the land.

The Constitutional Court further held in Makwanyane[38] that comparative bill of rights jurisprudence will be of importance while an indigenous jurisprudence is developed. However, added the Court, foreign case law will not necessarily provide a safe guide to the interpretation of the Bill of Rights. There is no injunction to consider foreign case law. In reality the Constitutional Court's decisions often read like works of comparative constitutional law. Extensive reference is almost always made to the legal positions in especially internationally recognised open and democratic societies based on freedom and equality[39].

4.5 INTERNATIONAL LAW AND INTERNATIONAL AGREEMENTS

(1) The negotiating and signing of all international agreements is the responsibility of the national executive.

(2) An international agreement binds the Republic only after it has been approved by resolution in both the National Assembly and the National Council of Provinces, unless it is an agreement referred to in subsection (3).

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38 Supra at para 37

39 Several Supreme Court judges have cautioned against use of foreign law because of the >different contexts within which other constitutions were drafted, the different social structures and milieu existing in those countries as compared with those in this country, and the different historical backgrounds against which the various constitutions came into being=. Statement from Park-Ross v Director, Office of Serious Offences 1995 (2) SA 148 (C) at 160 H. See also Qozeleni v Minister of Law and Order 1994 (3) SA 625 (E) at 633 F-G; Berf v Prokureur-Generaal van Gauteng 1995 (11) BCLR 1441 (T) at 1446 (E); Shabalala v The Attorney-General of Transvaal 1994 (6) BCLR 85 (t) at 117 E; Potgieter v Kilian 1995 (11) BCLR 1498 (N) at 1514 A.

(3) An international agreement of a technical, administrative or executive nature, or an agreement which does not require either ratification or accession, entered into by the national executive, binds the Republic without approval by the National Assembly and the National Council of Provinces, but must be tabled in the Assembly and the Council within a reasonable time.

(4) Any international agreement becomes law in the Republic when it is enacted into law by national legislation; but a self-executing provision of an agreement that has been approved by Parliament is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament.

(5) The Republic is bound by international agreements which were binding on the Republic when this Constitution took effect.

4.6 CUSTOMARY INTERNATIONAL LAW

Chapter 14 of the Constitution deals with International Law. Customary international law is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament.[40]

4.7 APPLICATION OF INTERNATIONAL LAW

According to R.C. Blake[41] the drafters of the Interim Constitution

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40 Section 232 of the Final Constitution

41 Blake R.c. "The world's Law in One Country: The South African Constitutional Court's use of Public International Law" SALJ 1998 p.668.

obviously wanted international law to play a greater role in South Africa than during apartheid, including the interpretation of Chapter 3, the fundamental rights chapter under the 1C Section 35(1) thereof reads as follows:

> In interpreting the provisions of this chapter a court of law shall promote the values which underlie an open and democratic society based on freedom and equality and shall, where applicable, have regard to public international law applicable to the protection of the rights entrenched in this chapter, and may have regard to comparable foreign case law.

According to the author this requirement would allow Public International Law to have both an immediate and profound effect upon South African case law. A few cases decided under the Interim Constitution used Public International law to interpret provisions of the fundamental rights chapter.[42]

The drafters of the Final Constitution also felt strongly about international law and included Section 39(1) that replaced Section 35(1) of the Interim Constitution.

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42 See Makwanyane's case, supar.

We submit that the author is correct in stating that in relation to international and foreign law Section 39(1) of the Final Constitution both follows and departs from the Interim Constitution. Section 39(1) like Section 35(1), makes comparison with international law mandatory and comparison with foreign law permissive. The Final Constitution, however, used the term 'international law' a broader term than public international law. Further Section 39(1) does not limit the foreign law to be considered to foreign case law as Section 35(1) did, perhaps permitting the comparison of foreign legislation and regulation. Finally, and most importantly, Section 39(1) does not contain the words where applicable as Section 35(1) did.

We agree with the author that the Public Internal law aspects of the Interim Constitution were first widely discussed in S.v. Makwanyane[43].

The court, per Chaskalson P, outlined its initial thoughts on Section 35(1), determining that the court should examine both non-binding as well as binding law as tools of interpretation. The court essentially approved John Dugard's[44] recommendation that it examine the four sources of Public International law recognised by article 38(1) of the Statute of the International Court of Justice, including international convention; international custom; general principles of law recognised by civilised nations; and judicial decisions of various nations and the

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43 1995 (b) BCLR 665 (CC).

44 Dugard, J. "International Human Rights : Rights and Constitutional ism: The New South African Legal Order" SALJ (1994) 191 at 193-4

teachings of the most highly qualified publicists of the various nations. The court also submitted itself to a fifth source: the decisions of certain regional and international tribunals containing interpretations of public international law. Thus the Makwanyane case took a broad view of what public international law it could review under Section 35(1).

However, the Court emphasized in Makwanyane that having regard to public international law did not necessarily mean following it:

> In dealing with comparative law, we must bear in mind that we are required to construe the South African Constitution, and not an international instrument or the constitution of some foreign country, and that this has to be done with due regard to our legal system, our history and circumstances, and the structure and language of our own Constitution. We can derive assistance from public international law and foreign case law, but we are in no way bound to follow it.[45]

In Azapo & Others v. President of the Republic of South Africa[46] however the Court appears to have taken a more flexible approach to

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45 Makwanyane's case, supra, at 701

46 1996 (4) SA 671 (CC)

Section 35(1) than in Makwanyane and other decisions. There, in determining whether Section 20(7) of the Promotion of National Unity and Reconciliation Act 34 of 1995 violated Section 22 of the Interim Constitution and international law, the court downplayed its role. It was decided that the Court was directed only to have regard to public international law if it was applicable to the protection of the rights entrenched in the fundamental rights. The Court failed to examine public international law relating to the granting of amnesty, perhaps, as it implied, because it did not feel public international law was applicable to the determination of the case. Specifically, the Court stated that even if Section 20(7) of the Act violated Section 22 of the Interim Constitution, that violation was justified, because another Interim Constitution section (the epilogue) specifically authorised section 20(7) regardless of public international law itself.

It is submitted the court was correct in its interpretation because the Interim Constitution stated that the court should, where applicable have regard to public international law, thus qualifying the mandatory examination of public international law to situations in which it was applicable. The Final Constitution, however, does not include the words 'where applicable' thus even mandating more strongly that the courts must consider international law.

According to Blake the Constitutional Court has clearly examined three of the five types of public international law the Makwanyane Court

mentioned. The source of most use has been foreign judicial decisions. The next most used source of public international law has been decisions of international and regional tribunals, followed by international conventions (especially human rights conventions) and the writings of noted international scholars. The Court has not yet clearly examined international custom or general principles of law recognised by civilised nations.

The Interim Constitution and Final Constitution both allow, but do not mandate, that South African courts examine foreign judicial decisions. The Constitutional Court has examined a number of foreign decisions, including ones from the highest court of African countries e.g. Zimbabwe, Tanzania, Namibia, Botswana and Lesotho, the United Kingdom and Commonwealth Countries and various other Western countries.

The Court also has examined a number of cases from regional and international tribunals. Decisions of the European Court of Human Rights have also been cited, as well as those of the European Commission of Human Rights and the United Nations Committee on Human Rights. Decisions of the International Court of Justice and the European Court of Justice have also been considered.

The Court has also referred to a number of international conventions, including the European Convention for the Protection of Human Rights

and Fundamental Freedoms, [47] the International Covenant on Civil and Political Rights[48], the Universal Declaration of Human Rights[49], and the African Chamber on Human and Peoples Rights (Banjul Charter). Constitutional negotiators used these instruments extensively in drafting the Bill of Rights[50], so the Courts use of them as interpretative tools is understandable.

The use of international law values by the Constitutional Court as shown above, is a clear case of the acceptance of international human rights norms in the South African legal system. We now proceed to discuss the fundamental changes under the new order.

4.8 FUNDAMENTAL CHANGES UNDER THE NEW ORDER

There have been some significant changes since the adoption of the new Constitution. The international human rights values have been incorporated into the South African legal system. The Constitutional Court has been at the forefront of these major changes. International law has been used in the interpretation of the Constitutional issues brought before the Court. We now proceed to show how the Constitutional Court applied these International Human Rights values in its recent decisions under the headings of Equality, Human Dignity, Socio-Economic Rights, Free Speech/Expression, Right to Life and to Privacy.

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47 Mistry v. Interim National Medical and Dental Council (1998) 7 BCLR

48 ibid. at p.880

49 ibid. at p. 883

50 Makwanyane, supra, at p. 668

4.8.1 Equality

Section 9 of the Constitution deals with this difficult and deeply controversial ideal. There is a constitutional commitment to equality. The Constitution commits the state to the goal of achieving equality. It tells us that the type of society that it wishes to create is one based on equality, dignity and freedom. Section 9, the first right in the Bill of Rights, protects the right to equality. This comprises a guarantee that the law will protect and benefit people equally and a prohibition on unfair discrimination. Equality includes the full and equal enjoyment of rights and freedoms.

The importance of the right to equality in the post-apartheid constitutional order is obvious. The apartheid social and legal system was squarely based on inequality and discrimination. As the Constitutional Court has pointed out, apartheid systematically discriminated against black people in all aspects of social life. Black people were prevented from becoming owners of property or even residing in areas classified as white, which constituted 90 per cent of the land mass of South Africa; senior jobs and access to established schools and universities were denied to them; civil amenities, including transport systems, public parks, libraries and many shops were also closed to black people. Instead, separate and inferior facilities were provided. The deep scars of this appalling policy are still visible in our society[51].

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51 Brink v Kitshoff NO 1996 (4) SA 197 (CC)

The deep scars of decades of systematic racial discrimination can be seen in all the key measures of quality of life in South Africa. White South Africans are significantly healthier and better nourished than their black fellow-citizens. They enjoy relatively high standards of literacy and education[52]. Infant mortality rates and life expectancy among black South Africans are equivalent to those of the poorest nations of the world[53]. Wealth and poverty are notoriously unequally distributed[54].

The legacy of inequality inherited from the past means that the constitutional commitment to equality cannot simply be understood as a commitment to formal equality. It is not sufficient simply to remove racist laws from the books and to ensure that similar laws cannot be enacted in future. That will result in a society that is formally equal but that is radically unequal in every other way. The need to confront this legacy is recognised in the equality clause, particularly in Section 9(2) that permits measures designed to protect or advance persons, or categories of persons disadvantaged by unfair discrimination. In addition, the Constitution protects a list of socio-economic rights which require the state to implement progressive measures to achieve a minimum level of basic goods such as education for all,[55] the right not

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52 World Bank Development Report 1997 (1997)
53 Central Statistical Service RSA Statistics in Brief (1996)
54 Statistics South Africa October Household Survey 1999
55 Section 29(1) of the Constitution

to be refused emergency medical treatment,[56] and the right of a child to basic nutrition, shelter, basic health care services and social services[57].

In S v. Ntuli[58], the Constitutional Court tested the validity of a law that differentiated between, on the one hand, appellants in criminal cases who were not in prison or who were in prison but who had legal representation and, on the other hand, appellants who were in prison and who did not have legal representation. The Court held that this differentiation was a violation of the right to equality before the law and equal protection of the law.

In S v. Rens[59], the Constitutional Court considered the constitutionality of Section 316 of the Criminal Procedure Act, which required those people convicted in a superior court to obtain leave to appeal to a Full Bench or to the Supreme Court of Appeal. The principal challenge to the section was based on an alleged violation of the right of an accused person to appeal. However, the applicant also argued that the requirement of leave to appeal discriminated against those convicted in superior courts because section 309 of the Criminal Procedure Act confers an absolute right of appeal on those convicted in the lower courts. Addressing the differentiation between appeal from the lower and superior courts, the Court held than they were due to differences in the standing and functioning of the courts and that, as long as persons

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56 Section 27(3) of the Constitution
57 Section 28(1)(b) of the Constitution
58 1996 (1) SA 1207 (CC)
59 1996 (1) SA 1218 (CC)

appealing from or to a particular court are there will be some differences.

In Motala v. University of Natal[60] an Indian student who had obtained 5 (five) distinction in matric was refused admission into medical school. The medical school had decided to limit to 40 the number of Indian students admitted to its programme. This was because the poor standards of education available to African students meant that a merit-based entrance programme would result in very few African applicants being accepted into medical school.

It was argued that because the Indian community had also been disadvantaged by apartheid, a measure favouring African students over Indian students amounted to unfair discrimination. The court held that the admission policy was a measure designed to achieve the adequate protection and advancement of a group disadvantaged by unfair discrimination. This judgment is correct because the Apartheid society had a distinct hierarchy of races. Whites were at the top, Africans at the bottom and coloured and Indian communities were situated in between.

A distinction must be drawn between formal and substantive equality. Formal equality means sameness of treatment: the law must treat individuals in the same manner regardless of their circumstances.

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60 1995 (3) BLLC 374 (D)

Substantive equality takes these circumstances into account and requires the law to ensure equality of outcome[61].

In assessing these two approaches in the context of the principles and purposes of the Constitution and the historical burden of inequality that it seeks to overcome, it is clear that a purely formal understanding of equality risks neglecting the deepest commitments of the Constitution[62]. A substantive conception of equality, on the other hand, is supportive of these fundamental values. A purposive approach to constitutional interpretation means that Section 9 must be read as grounded on a substantive conception of equality.

According to the Constitutional Court:

> We need to develop a concept of unfair discrimination which recognises that although a society which affords each human being equal treatment on the basis of equal worth and freedom is our goal, we cannot achieve that goal by insisting upon identical treatment in all circumstances before that goal is achieved. Each case, therefore, will require a careful and thorough understanding of the impact of the discrimination action upon the particular people concerned to determine whether its overall impact is one which

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61 Loenen, T. "The Equality Clause in the South African Constitution. Some Remarks from a Comparative Perspective (1997) 13 SAJHR 410

62 National Coalition for Gay & Lesbian Equality v. Minister of Justice 1999 (1) SA 6 (CC)

> furthers the constitutional goal of equality or not. A classification which is unfair in one context may not necessarily be unfair in a different context[63].

An additional conception of equality is envisaged by the endorsement in Section 9 (2) of the legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination. According to the Constitutional Court this provision recognises a conception of restitutionary equality:

> Particularly in a country such as South Africa, persons belonging to certain categories have suffered considerable unfair discrimination in the past. It is insufficient for the Constitution merely to ensure, through its Bill of Rights, that statutory provisions which have caused such unfair discrimination in the past are eliminated. Past unfair discrimination frequently has on-going negative consequences, the continuation of which is not halted immediately when the initial causes thereof are eliminated, and unless remedied, may continue for a substantial time and even indefinitely. Like justice, equality delayed is equality denied. One could refer to such equality as remedial or restitutionary equality[64].

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63 President of the Republic of South Africa v. Hugo 1997 (H) SA 1 (CC)

64 National Coalition case, supra, at p. 11

In Prinsloo v. Van der Linde[65] the Constitutional Court said:

> In regard to mere differentiation the constitutional state is expected to act in a rational manner. It should not regulate in an arbitrary manner or manifest 'naked preferences' that serve no legitimate governmental purpose, for that would be inconsistent with the rule of law and the fundamental premises of a constitutional state. The purpose of this aspect of equality is, therefore, to ensure that the state is bound to function in a rational manner. Accordingly, before it can be said that mere differentiation infringes on Section 8 (1c) it must be established that there is no rational relationship between the differentiation in question and the government purpose which is proffered to validate it. In the absence of such rational relationship the differentiation would infringe section 8[66].

In National Coalition for Gay and Lesbian Equality v. Minister of Home Affairs[67], Davis J. considered whether provisions of the Aliens Control Act 96 of 1991 that unfairly discriminated on grounds of sexual orientation could be justified. Quoting the remarks of the Constitutional Court in Fraser v. Childrens Court, Pretoria North[68] to the effect that

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65 1997 (3) SA 1012 (CC)
66 Prinsloo's case, supra, at p. 1014
67 1999 (3) SA 173 (CC)
68 1997 (2) SA 261 (CC)

equality lies at the very heart of the Constitution, Davis J observed that in the case of a breach of a foundational value such as equality the respondent's onus of justification would be extremely difficult to discharge[69]. In the absence of any evidence justifying the provisions the court held that the provisions were an unconstitutional violation of the right to equality.

In Lotus River, Orbery, Grassy Park Residents Association v. South Peninsula Municipality[70], Davis J held that rate increases with a differential impact on properties valued at different times constituted racial discrimination which was presumed to be unfair in terms of Section 9 (5), the Court went on to consider whether the discrimination could be justified. As the possible justification of a violation of Section 9 (1), Davis J made the following obiter observation:

> Given the manner in which the Constitutional Court has sought to give meaning to Section 9 (1), the question did arise as to how the differentiation under scrutiny may be wholly irrational but could be saved under the limitation clause. In the light of the finding that respondents conduct is to be assessed under Section 9 (3), this issue does not arise. However, a Court should be extremely cautious before upholding a justification of an act which limits the right to equality,

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69 National Coalition case, supra, at p. 15

70 1999 (2) SA 817 (CC)

particularly as the latter is one of the three values which form the foundation of the Constitution[71].

In Jooste v. Score Supermarkets Trading (Pty) Ltd,[72] the Constitutional Court considered the constitutionality of section 35 (1) of the Compensation for Occupational Injuries and Diseases Act 130 of 1993. The Act places limitations on an employee's common law right to be compensated for injuries occurring at the workplace. Unlike a common law action, a compensation claim in terms of the Act must be lodged within 12 months of the date of the accident and a limit is placed on the amount of compensation payable to the employee. The Constitutional Court held that while the Act did differentiate between employees injured in the course of their employment and other common law personal injury claimants, it did not do so in violation of the Section 9(1) right.

In Pretoria City Council v. Walker[73], the Court considered the distinction between unfair discrimination and discrimination that is not unfair. The Council had jurisdiction over the formerly exclusively white areas of Pretoria (old Pretoria) and over the township of Atteridgeville and Mamelodi. The residents of old Pretoria were mostly white and those of the two townships were mostly black. In old Pretoria ratepayers paid

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71 Lotus River case, supra, at page 831 B-C
72 1999 (2) SA 1 (CC)
73 1998 (2) SA 363 (CC)

consumption – based tariffs for the water and electricity services supplied by the Council. Actual consumption was measured by meters placed in each property. In Atteridgeville and Mamelodi users paid a flat rate per household, no matter how much or how little water or electricity they consumed. Walker, a resident of old Pretoria, complained that the flat rate in Mamelodi and Atteridgeville was lower than the metered rate and this therefore meant that the residents of Old Pretoria were singled out by the Council for legal action to recover arrears owed for services whilst a policy of non-enforcement was followed in respect of Mamelodi and Atteridgeville.

The majority of the Constitutional Court considered the actions of the Council to be indirect discrimination on the listed ground of race. However, the majority went on to hold that the first set of actions that Walker complained of (the flat rate and cross-subsidisation) was not unfair discrimination while the second set (selective recovery of debts) was unfair discrimination.

Unfair discrimination is differentiation that has an unfair impact on its victims. In this regard, the Court first took into account that Walker was white, and therefore belonged to a group that had not been disadvantaged by the racial policies and practices of the past. In an economic sense, his group was neither disadvantaged nor vulnerable, having been benefited rather than adversely affected by discrimination in the past.

In Harksen v. Lane No[74] the constitutional validity of Section 21 of the Insolvency Act 24 of 1936 was at issue. The section provides that on the sequestration of the estate of an insolvent spouse, all the property of the solvent spouse vests in the trustee of the insolvent estate. The trustee may deal with the solvent spouse's property as if it were the property of the sequestrated estate, subject to reclaim his or her property, basically on proof that it is his or her own properly and not the property of the insolvent spouses and any other person who had dealings with the insolvent, imposing a burden on the former group that it does not on the latter. The differentiation arises from certain attributes or characteristics possessed by solvent spouses, namely their usually close relationship with the insolvent spouse and the fact that they usually live together in a common household. These attributes have the potential to de-mean persons in their inherent humanity and dignity and differentiation grounded on these attributes is discrimination.

In National Coalition for Gay and Lesbian Equality v. Minister of Home Affairs[75], supra, provisions of the Aliens Control Act 96 of 1991 were found to constitute unfair discrimination on grounds of sexual orientation and marital status. In essence, the provisions granted spouses of South African citizens a right to an immigration permit. By

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74 1998 (1) sa 300 (cc)
75 2000 (2) SA 1 (CC)

granting a benefit to married people that was not granted to people who were not married or to those who could not marry – same – sex life partners – the Act differentiated between groups of people. This differentiation, the Constitutional Court held, overlapped and intersected on two of the grounds listed in Section 9 (3) – sexual orientation and marital status. The purpose of the immigration provision was to promote and protect a conventional conception of family life. By excluding gay and lesbian couples from the benefit, the legislation was in effect saying that homosexual partnerships did not constitute family life. This perpetuated a number of harmful and hurtful stereotypes about gays and lesbians. The first of these stereotypes is that gay and lesbian relationships are exclusively sexual, with few or none of the family-orientated characteristics of marriages – consortium, companionship, love, affection and support. The second stereotype is that gay and lesbian relationships do not quality as family life because they are incapable of procreating. This is demeaning not only to homosexual couples, but also to heterosexual couples who, for whatever reason, do not have children. The message given out by the legislation, according to the court, was clear:

> The message is that gays and lesbians lack the inherent humanity to have their families and family lives in such same – sex relationships respected or protected. It serves in addition to perpetuate and reinforce existing prejudices and stereotypes. The impact constitutes a gross, blunt, cruel and

> serious invasion of their dignity. The discrimination, based on sexual orientation, is severe because no concern, let alone anything approaching equal concern, is shown for the particular sexual orientation of gays and lesbians[76].

The discrimination was found to be unfair. Nothing could be said in its defence. The protection of family life in conventional relationships is an important objective, but there is no connection between this objective and excluding unconventional relationships from the benefits conferred by the legislation. The legislation was therefore irrational and consequently unjustifiable.

In Larbi-Odam v. MEC for Education (North-West)[77] the Constitutional Court found that a provincial regulation which prevented all non-citizen (and therefore the subcategory of permanent residents) from being appointed into permanent teaching posts, was unfair discrimination. The ground of unfair discrimination in this case was citizenship, or, from the perspective of the appellants non-citizenship. Citizenship though not a listed ground, is suspect because it is based on attributes and characteristics which had the potential to impair the fundamental human dignity of non-citizens hit by the regulation. The court noted that foreigners were a minority in all countries, and have little political muscle and that they were therefore vulnerable to having their interests

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76 National Coalition case, supra, at p. 50

77 1998 (1) SA 745 (CC)

overlooked and their rights to equal concern and respect violated. Second, citizenship was a personal attribute that was difficult to change. In addition the Court noted that the overall imputation seemed to be that because applicants were not citizens of South Africa they were for that reason alone not worthy of filling a permanent post. As for unfairness, the measure was overboard and its impact on non-citizens who were permanent residents could not be justified.

The case of Hoffman v. South African Airways[78] dealt with an airlines policy of not employing HIV-positive persons as cabin attendants. It was argued that the policy amounted to unfair discrimination on the listed ground of disability. The Constitutional Court avoided this argument, preferring to deal with HIV-status discrimination as an analogous ground. The determining factor in deciding whether discrimination is unfair is its impact on the people affected. For people to be denied employment because of their HIV-positive status without regard to their ability to perform the duties of the position from which they have been excluded is a violation of dignity. The Court noted a prevailing prejudice against HIV-positive people. In such a context, any further discrimination against them was a fresh instance of stigmatisation and an assault on their dignity.

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78 2000 (11) BCLR 1235 (CC)

In conclusion we may mention that the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 was passed by Parliament. It was partly brought into operation with effect from 1 September 2000. The Equality Act is an extremely ambitious piece of legislation, aiming at nothing less than the eradication of social and economic inequalities, especially those that are systematic in nature that were generated in our history by colonialism, apartheid and patriarchy, and which brought pain and suffering to the great majority of our people. It hopes to achieve this aim by (1) prohibiting unfair discrimination, (2) providing remedies for the victims of unfair discrimination and (3) by promoting the achievement of substantive equality.

4.8.2 HUMAN DIGNITY

Besides being a foundation for civil rights, the right to dignity is also a basis for a number of political rights, particularly those relating to democratic governance. Respect for individual human dignity entails recognising that all persons are able to make individual choices. This includes the choice of how and by whom they are governed. The relation between human dignity and democratic government has been explained as follows by the Constitutional Court:

> The universality of the franchise is important not only for nationhood and democracy. The vote of each and every citizen is a badge of

> dignity and of personhood. Quite literally, it says that everyone counts[79].

In S v. Williams,[80] the Constitutional Court per Langer DP referring to punishment in general, held that the Constitution required that:

> Measures that assail the dignity and self-esteem of an individual will have to be justified; there is no place for brutal and dehumanising treatment and punishment. The Constitution has allocated to the State and its organs a role as the protectors and guarantors of those rights to ensure that they are available to all. In the process, it sets the State up as a model for society as it endeavour to move away from a violent past. It is therefore reasonable to expect that the State must be foremost in upholding those values which are the guiding light of civilised societies. Respect for human dignity is one such value; acknowledging it includes an acceptance by society that even the vilest criminal remains a human being possessed of common human dignity[81].

In Ferreira v. Levin NO (supra) Ackerman J developed an argument to the effect that, without the proper protection of personal freedom, human dignity was substantially diminished:

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79 S v Makwanyane 1995 (3) SA 391 (CC)
80 1995 (3) SA 632 (CC)
81 ibid at p. 637

> Human dignity cannot be fully valued or respected unless individuals are able to develop their humanity, their humanness, to the full extent of its potential. Each human being is uniquely talented. Part of the dignity of every human being is the fact and awareness of this uniqueness. An individual's human dignity cannot be fully respected or valued unless the individual is permitted to develop his or her unique talents optimally. Human dignity has little value without freedom, human dignity is little more than an abstraction. Freedom and dignity are inseparably linked. To deny people freedom is to deny them their dignity[82].

The right to dignity is at the heart of the right not to be tortured or to be treated or punished in a cruel, inhuman or degrading way[83]. In S v. Makwanyane (supra), Chaskalson P. (as he then was) held, that the right to dignity was one of the relevant factors that had to be taken into account to determine whether a punishment was cruel, inhuman or degrading.

Although the rights are inextricably linked, the right to dignity encompass a great deal more than the prohibition of torture or cruel

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82 1996 (1) SA 984 (CC)

83 Ferreira's case, supra, at p. 669

punishment. These prohibitions are merely clear examples of infringements of the right to dignity.

In National Coalition of Gay and Lesbian Equality v Minister of Justice, Chaskalson P. pointed out that:

> The rights of life and dignity are the most important of all human rights, and the source of all other personal rights in the Bill of Rights. By committing ourselves to a society founded on the recognition of human rights we are required to value these two rights above all others[84].

Human dignity is the source of a person's innate rights to freedom, equality and physical integrity, from which a number of other rights flows. Human dignity accordingly also provides the basis for the right to equality – in as much as every person possesses human dignity in equal measure everyone must be treated as equally worthy of respect.

The idea of equal respect was the basis of the Constitutional Court's decision in National Coalition for Gay and Lesbian Equality v. Minister of Justice[85](supra), that the common law criminalisation of sodomy was a violation of the right to dignity. The court held that it was clear that the constitutional protection of dignity required us to acknowledge the

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84 1999 (1) SA 6 (CC)

85 National Coalition case, supra, at p. 10

value and worth of all individuals as members of our society. Punishing a form of sexual conduct that was identified by the broader society with homosexuals was inconsistent with human dignity:

> Its symbolic effect is to state that in the eyes of our legal system all gay men are criminals. The stigma thus attached to a significant proportion of our population is manifest. But the harm imposed by the criminal law is far more than symbolic. As a result of the criminal offence, gay men are at risk of arrest, prosecution and conviction of the offence of sodomy simply because they seek to engage in sexual conduct which is part of their experience of being human. Just as apartheid legislation rendered the lives of couples of different racial groups perpetually at risk, the sodomy offence builds insecurity and vulnerability into the daily lives of gay men. There can be no doubt that the existence of a law which punishes a form of sexual expression for gay men degrades and devalues gay men in our broader society. As such it is a palpable invasion of their dignity and a breach of Section 10 of the Constitution[86].

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86 National Coalition case, supra, at p. 25

In Prinsloo v. Van der Linde (supra) the Constitutional Court acknowledged the centrality of human dignity to the prohibition of discrimination:

> In our view unfair discrimination principally means treating persons differently in a way which impairs their fundamental dignity as human beings, who are inherently equal in dignity[87].

In President of the Republic of South Africa v. Hugo, the Constitutional Court said:

> At 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. The achievement of such a society in the context of our deeply inegalitarian past will not be easy, but that that is the goal of the Constitution should not be forgotten or overlooked[88].

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87 1997 (3) SA 1012 (CC)

88 1997 (4) SA 1 (CC)

In Christian Education SA v. Minister of Education of the Government of the RSA[89] the Court held that the administration of corporal punishment in schools is also an affront to the dignity of all concerned.

At this stage we may point out that the human rights of equality, dignity and freedom are very important in a constitutional state. We have discussed them to show that the Constitutional Court's decision almost without exception, are based on these values. We now proceed with other rights.

4.8.3 RIGHT TO LIFE

In S v. Makwanyane (supra) the Constitutional Court described the rights to life and dignity as the most important of all human rights, and source of all other personal rights in the Bill of Rights[90]. The Court said by committing ourselves to a society founded on the recognition of human rights we are required to value these two rights above all others. The court cited a decision of the Hungarian Constitutional Court that stressed the absolute nature of the rights to life and dignity. Other rights, the Hungarian Court held, may be limited, and may even be withdrawn and then granted again, but ultimately the absolute limitation of state power is to be found in the preservation of the twin rights of life and dignity.

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89 1999 (9) BCLR 951 (SE)
90 1995 (3) SA 391 (CC)

The entrenchment of the right to life requires the state to take the lead in re-establishing respect for human life and dignity in South Africa. In Makwanyane, Langa J pointed out to South Africa's past, in which the apartheid state demeaned the value of life and human dignity. According to Langa J, the state should be a role model for our society and must demonstrate society's own regard for human life and dignity by refusing to destroy the life and dignity of criminals[91].

The right to life is textually unqualified. In this respect the South African Constitution differs materially from the Constitution of the United States, Canada, Hungary and India, and from international instruments such as the European Convention on Human Rights and the International Covenant on Civil and political Rights. These instruments all qualify the right to life, usually by providing that the right to life may not be deprived arbitrarily or other than in accordance with a sentence of a court of law. In the South African Constitution, the right to life may only be limited in terms of the limitation clause. The unqualified nature of the right to life was referred to by several judges in Makwanyane. The unqualified nature of the right to life was used to support an argument that the right to life is given stronger protection in the South African Constitution than in other constitutions and human rights instruments.

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91 Makwanyane's case, supra, at para 217

In terms of the Choice on Termination of Pregnancy Act 92 of 1996 abortion is permitted on request by a woman during the 12 weeks of her pregnancy, for medical or social reasons in the 13th to 20th week of pregnancy and, after the 20th week, to save the life of the woman or to prevent the foetus being born malformed or injured. Counselling is not obligatory. In Christian Lawyers Association of South Africa v. Minister of Health[92] the Act was challenged in the High Court on the basis that it permitted the termination of life. The High Court rejected the challenge on the basis that the word 'everyone' used in Section 11 to describe the bearers of the right to life, did not include a foetus.

In our view, while the state has an interest in protecting developing life, the question is whether the state has a constitutional duty to protect developing life. The 1996 Constitution explicitly entrenches a right to make decisions concerning reproduction.[93] Besides preventing the prohibition of use of contraceptives, it is difficult to avoid the conclusion that this right was specifically included to secure the right of pregnant women to make a decision to terminate a pregnancy. Secondly, a court would be hesitant to prescribe to the state how it ought to fulfil the duty to protect life. It is submitted that the decision of the Constitutional Court was correct.

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92 1998 (45) SA 630 (D)

93 Section 12(2)(a) of the Constitution

4.8.4 SOCIO-ECONOMIC RIGHTS

The socio-economic rights in the South African Constitution were modelled on those in the International Covenant on Economic, Social and Cultural Rights of 1996. This is clear case where the International Human Rights norms were accepted into the South African Constitution.

The Constitutional Court discussed the nature of socio-economic rights and the problem of their enforcement in the First Certification judgment and responded as follows:

> It is true that the inclusion of socio-economic rights may result in courts making orders which have direct implications for budgetary matters. However, even when a court enforces civil and political rights such as equality, freedom of speech and the right to a fair trial, the order it makes will often have such implications. A court may require the provision of legal aid, or the extension of state benefits to a class of people who formerly were not beneficiaries of such benefits. In our view it cannot be said that by including socio-economic rights within a Bill of Rights, task is conferred upon the courts so different from that ordinarily conferred upon them by a Bill of Rights that it results in a breach of separation of powers.

> Nevertheless, we are of the view that these rights are, at least to some extent, justiciable. As we have stated in the previous paragraph, many of the civil and political right entrenched in the new Constitution will give rise to similar budgetary implications without compromising their justiciability. The fact that socio-economic rights will almost inevitably give rise to such implications does not seem to us to be a bar to their justiciability. At the very minimum, socio-economic rights can be negatively protected from improper invasion. In the light of these considerations, it is our view that the inclusion of socio-economic rights in the New Constitution does not result in a breach of the Constitutional Principles[94].

The Court made two points. First, it questioned the rigidity of the distinction drawn between socio-economic rights and civil and political rights on the basis that the former entail judicial imposition of positive duties on the state while the latter do not. A Court enforcing civil and political rights may on occasion impose positive duties on the state. Secondly, the Court confirmed that the socio-economic rights in the 1996 Constitution are justiciable. As to the extent of their justiciability, the Court indicates that the rights can, at the least, be negatively protected from improper invasion[95]. The language used here makes it clear that negative protection is merely the minimum extent to which

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94 Ex parte Chairperson of the Constitutional Assembly : in re Certification of the constitution of the Republic of South Africa 1996 (First Certification judgement) 1996 (4) SA 744 (CC)

95 Government of the Republic of South Africa v. Grootboom 2000 (11) BCLR (CC)

the rights can be judicially protected and does not exhaust the possibilities of justiciability.

Negative protection is the usual form of judicial protection given to civil and political rights. Applied to socio-economic rights the term means that a court can prevent the state from acting in ways that infringe the socio-economic rights directly. The rights to housing, health care, sufficient food and water, social security and to basic education may therefore not be subjected to what have been termed "deliberate retrogressive measures."[96]

A clear example of a negative violation of the right to housing in the international jurisprudence is the creation of homelessness through the forced eviction of squatters without provision of alternative accommodation.

In Government of the Republic of South Africa v. Grootboom, supra, the Constitutional Court considered the legality of the conduct of a local authority in evicting a group of squatters who had moved onto private land that had been earmarked for low-cost housing. This was, according to the court, a violation of the negative obligation in section 26(1) of the Constitution.

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96 United Nations Committee on Economic, Social and Cultural Rights, General Comment 3 (1990) "The Nature of States Obligation" UN DOC HR1/ GEN /REV 1 at 45 (1994) para 9.

As the Constitutional Court made clear in the Certification decision, negative enforcement is not the only way in which the socio-economic rights are justiciable. The positive elements of the rights must also be enforceable if the rights are to be more than mere sentiments.

4.8.5 FREE SPEECH/EXPRESSION

Freedom of expression is essential to the functioning of a democratic state. For people to make political choices they must have access to information and to different viewpoints. In a democracy, the right to express grievances and to propagate or criticise policies enables people to contribute to peaceful progress and change in society. Freedom of expression lies at the heart of a democracy. It is valuable for many reasons, including its instrumental function as a guarantor of democracy, its implicit recognition and protection of the moral agency of individuals in our society and its facilitation of the search for truth by individuals and society generally. Freedom of expression is recognised as a core value of society, essential to truth, democracy and personal fulfilment[97].

Freedom of expression is therefore closely related to the freedom rights and political rights in the Bill of Rights. The Constitutional Court per O'Regan J stated :

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97 Kauesa v. Minister of Home Affairs 1995 (11) BLLR 1540 (NMS) also Banana v. Attorney-General 1999 (1(BCLR 27 (ZS).

> Freedom of expression is one of a web of mutually supporting rights in the Constitution – it is closely related to freedom of religion, belief and opinion (Sec. 15), the right to dignity (S10), as well as the right to freedom of association (S18), the right to vote and to stand for public office (S19) and the right of assembly (Sec. 17). These right taken together protect the rights of individuals not only individually to form and express opinions, of whatever nature, but to establish associations and groups of like-minded people to foster and propagate such opinions. The rights implicitly recognise the importance, both for a democratic society and for individuals personally, of the ability to form and express opinions, whether individually or collectively, even where those views are controversial. The corollary of the freedom of expression and its related rights is tolerance by society of different views. Tolerance, of course, does not require approbation of a particular view. In essence, it requires the acceptance of the public airing of disagreements and the refusal to silence unpopular views[98].

The court referred to international law and accepted that freedom of expression was one of the core values in society. These rights were

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98 South African National Defence Force Union v. Minister of Defence 1999 (4) SA 469 (CC)

unknown in the previous apartheid state. The courts now applies the international human rights norms in our legal system.

4.8.6 PRIVACY

The first aspect of privacy consists of a right to be left alone when it comes to an individual's body, home and family life. The rationale behind the right is that the state and other people should have nothing to do with an individual's intimate affairs. In legal terms, the right to privacy recognises that every individual is entitled to a sphere of personal autonomy in which the law may not interfere. The sphere of autonomy does not only refer to control over certain physical places, such as the human body or home or private property, but also to certain kinds of decisions such as whether or not to have a sexual relationship with someone.

Didcott J had this reason for protecting privacy in mind when he wrote in Case v. Minister of Safety and Security that:[99]

> What erotic material I may choose to keep within the privacy of my home, and only for my personal use there, is nobody's business but mine. It is certainly not the business of society or state. Any ban imposed on my possession of such material for that solitary purpose invades the personal privacy that

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99 1996 (3) SA 165 (CC)

> Section 13 of the Interim Constitution guarantees that I shall enjoy[100].

In Mistry v. Interim Medical and Dental Council of South Africa, the court stressed, in relation to business undertakings, that the more public the undertaking the more closely regulated, the more attenuated would the right to privacy be and the less intense any possible invasion. The greater potential hazards that a business poses to the public the less an inspection of the business can be considered an invasion of privacy. People involved in such undertakings must be taken to know from the outset that their activities will be monitored[101]. The Court referred to a Canadian judgment where this point was particularly well made:

> The degree of privacy the citizen can reasonably expect may vary significantly depending on the activity that brings him or her into contact with the state. In a modern industrial society, it is generally accepted that many activities in which individuals can engage must nevertheless to a greater or lesser extent be regulated by the state to ensure that the individual's pursuit of his or her self-interest is compatible with the community's interest in the realisation of collective goals and aspirations. In many cases, this regulation must necessarily

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100 1996 (3) SA 165 (CC)
101 1998 (4) SA 1127 (CC).

> involve the inspection of private premises or documents by agents of the state. The restauranteur's compliance with public health regulations, the employer's compliance with employment standards and safety legislation, and the developer's or home-owner's compliance with building codes or zoning regulations can only be tested by inspection, and perhaps unannounced inspection, of their premises. Similarly, compliance with minimum wage, employment equity and human rights legislation can often only be assessed by inspection of the employer's files and records.[102]

However, in a subsequent decision, Investigating Directorate: Serious Economics Offences v. Hyundai Motor Distributors,[103] the Court held that the statements in Bernstein and Mistry, supra, should not be understood to mean that persons no longer retain a right to privacy in the social capacities in which they act. Thus, when people are in their offices, in their cars or on mobile telephones, they still retain a right to be left alone by the state unless certain conditions are met. The point is that the extent of protection may vary, and this factor will play a role when the limitation of the right to privacy is considered.[104]

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102 Per La Forest J in Thomson Newspapers Ltd v. Canada (Director of Investigation and Research, Restrictive Trade Practices Commission) (1990) 47 CRR 1.20.

103 2000 (101) BCLR 1079 (CC)

104 Investigating Directorate case at para 16

We submit that, in modern society, the right to privacy seeks to protect three related concerns and that an individual's subjective expectation of privacy in respect of these three concerns will usually be regarded by society as objectively reasonable. First, the right to privacy seeks to protect certain aspects of one's life in respect of which one is entitled to be left alone: one's body, certain places (such as one's home) and certain relationships (such as marital, sexual or other intimate relationships).

In Bernstein v. Bester NO, Ackermann J stated that the right to privacy is closely related to the concept of identify and the notion of what is necessary to have one's own autonomous identify. Ackermann J added, with reference to European jurisprudence, that the concept of privacy includes the right to establish and maintain relations with other human beings for the fulfilment of one's personality or the ability of a person to relate to him or herself and to be able to relate to others in a meaningful way[105].

In National Coalition of Gay and Lesbian Equality v. Minister of Justice[106], the Constitutional Court considered another aspect of the right to be left alone, that is the right to make decisions concerning sexual relationships. In considering the constitutional validity of the common law offence of sodomy and of various statutory provisions

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105 1996 (2) SA ISI (CC).

106 1999 (1) SA 6 (CC)

based on the offence, the Constitutional Court chose to focus not only on the violation of the right not to be discriminated against on the basis of sexual orientation, but on the rights to privacy and dignity.

The concerns of gay and lesbian persons obviously go much further than a demand that the law should stop at the bedroom door. Cameron J. has pointed to the limitations of the privacy argument in the context of sexual orientation:

> The privacy argument has detrimental effects on the search for a society which is truly non-stigmatizing as far as sexual orientation is concerned. On the one hand, the privacy argument suggests that discrimination against gays and lesbians is confined to prohibiting conduct between adults in the privacy of the bedroom. This is manifestly not so. On the other hand, the privacy argument may subtly reinforce the idea that homosexual intimacy is shameful or improper: that it is tolerable so long as it is confined to the bedroom – but that its implications cannot be countenanced outside. Privacy as a rationale for constitutional protection therefore goes insufficiently far, and has appreciable drawbacks even on its own terms[107].

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107 Cameron, E. "Sexual Orientation and the Constitution: A Test Case for Human Rights" (1993) 110 SALJ 450, 464.

We submit that the right to privacy is also found in other constitutional democracies in the world and that South Africa stands to benefit by the experience of these old democracies. This human right norm has been accepted in the South African legal system.

4.8.7 EVALUATION

We have thus far attempted to show how international human rights norms are being applied into the South African legal system. In our previous chapter, more particularly, Chapter three we have shown how these human rights were trampled upon by the apartheid state. The courts were also powerless to come to the rescue of the individual. Parliament was sovereign and could change the common law as it wished.

We have attempted to show that under the constitutional democracy most of these rights are protected by a Bill of Rights. The Constitution is now supreme and all laws must be consistent with it. It is submitted that rights of citizens are now more protected than before.

We also tried to show that the international human rights norms are now embodied in our law, and that the Constitutional Court has been at the forefront of the battle to develop these norms and make them part of our jurisprudence.

There have been some fundamental changes in our legal order. Some previous offences are now no longer offence e.g. sodomy, abortion etc.

4.8.8 ACCEPTANCE OF INTERNATIONAL HUMAN RIGHTS NORMS IN OTHER COURTS

We have thus far discussed decided cases in the Constitutional Court and how this court has been applying International Human Rights norms in its decisions. We would like to briefly refer to other courts other than the Constitutional Court.

Under the 1996 Constitution there is a Constitutional Court and a Supreme Court of Appeal. The latter court is, in effect, the old Appellate Division with a new name. But unlike the former Appellate Division, the new Supreme Court of Appeal (SCA) is no longer simply a division of the Supreme Court but now a fully-fledged constitutional entity in its own right. Both the Constitutional Court and the Supreme Court of Appeal have Republic-wide jurisdiction. Both are appellate courts. The Constitutional Court hears constitutional appeals while the Supreme Court of Appeal may hear all appeals, including appeals in which both constitutional and non-constitutional issues have been raised.

However, the Constitutional Court has additional non-appeallate jurisdiction: decisions of the High Courts and the Supreme Court of Appeal that declare Acts of Parliament, provincial legislation and

conduct of the President invalid must be referred to the Constitutional Court for confirmation.

The magistrates' courts remain unchanged under the new dispensation, as do other courts created by statute (for example, the Labour Court and the Labour Appeals Court established in terms of the Labour Relations Act 66 of 1995 or the Land Claims Court established in terms of the Restitution of Land Claims Act 22 of 1994.

The Constitution does not itself confer any constitutional jurisdiction on Magistrates' Courts. However, legislation conferring such jurisdiction is authorised, provided it does not purport to confer jurisdiction on a magistrates court to enquire into the validity of any legislation or any conduct of the President. The words "any legislation" include original legislation (Parliamentary, provincial or municipal legislation) as well as all forms of delegated legislation. Magistrates Courts are prohibited from enquiring into or ruling on the constitutionality of any such legislation. This includes challenges to legislation on the grounds that it is in conflict with the Bill of Rights or any provisions of the Constitution.

The question is whether magistrates under the present circumstances will be able to apply international human rights norms in their decisions given their limited jurisdiction. It is submitted that it is impossible unless legislation is changed to confer them with the same jurisdiction

as that of the High Court to invalidate legislation. It must be remembered that the magistrate's courts are courts of first instance and the majority of the people in South Africa use these courts everyday. It will therefore make sense to allow them to interpret the Constitution and make a finding on an invalidity of legislation where necessary. It is further submitted that magistrates cannot be expected to apply human rights norms with their hands tied from behind.

Magistrates, it is respectfully submitted, unlike judges, are treated as civil servants. Their salaries are part of the justice budget, together with the salaries of civil servants. Procedural methods of discipline mean they can be subjected to intimidation. They share the same buildings and transport with prosecutors, and therefore have a close relationship with the state. A similar situation would be unthinkable between judges and members of the Directorate of Public Prosecutions Office.

There are many other regulations and laws governing magistrates which conflict with the Constitution and highlighted the dependence of magistrates on the country's political machinery. These include:

1 The removal and suspension of magistrates without just cause or an inquiry by the magistrate's judicial commission.

2 The cutting of pension benefits without consideration by a compensation commission.

3 A discretionary allocation of state-subsidised vehicles.

4 The Justice Department's Director-General, whose appointment and work is influenced by politicians, has authority to transfer magistrates. He is a member of the commission that considers any representation, and decides on promotions.

5 The Minister of Justice can admonish magistrates and decides on senior promotions.

6 The Department of Justice has a practice which encourages magistrates to complete cases within a specific time constraint, without taking into consideration the language difficulties of crime suspects and witnesses, or the nature of the case being heard. Work speed is a criterion in the evaluation and promotion of magistrates.

It is submitted that there is a vast discrepancy between the High Courts, which are independent, and lower courts, because judges are not subjected to the same disciplinary measures meted out to errant magistrates. It is further submitted that the current structure of the lower courts may contravene international human rights standards.

According to the ministerial spokesman for Department of Justice, Mr Paul Setsetse, the Magistrates Commission is being restructured to make magistrates courts fully independent of the Ministry of Justice.

We submit that because of the abovementioned constraints magistrates could not apply human rights norms in their daily judicial work. It is imperative that the status quo change as magistrates handle large volumes of cases and it is where the majority of the population of South Africa meets with justice for the first time. Legislation will have to be passed to enable these important officials to perform their duties, more particularly, to inquire into the validity of legislation.

4.9 SUMMARY

In this chapter we have discussed the transition to the new order as well as fundamental changes that have taken place since the dawn of the new order, especially as regards acceptance of international human rights norms. We have shown by discussing various decided cases by the Constitutional Court and this Court has been developing human rights norms e.g equality, free expression, human dignity, right to life and privacy. We have focussed on significant developments showing that the courts have accepted international human rights on termination of pregnancy, treatment of offenders equality and freedom from discrimination and sexual orientation cases.

We now proceed to Chapter 5 which deals with a comparative study of different countries where international human rights norms have been accepted and which will also serve as guidance to our courts in applying these human rights norms.

CHAPTER 5: A COMPARATIVE STUDY OF THE ACCEPTANCE OF INTERNATIONAL HUMAN RIGHTS NORMS IN SELECTED COUNTRIES: LESSONS FROM THESE COUNTRIES

5.0 INTRODUCTION

In this chapter, we will focus on experiences of a selected number of countries with respect to the application of international human rights norms in the domestic sphere, and find out what we could learn from them. We will also discuss the European Convention of Human Rights, as State's parties thereto also have a long tradition of applying human rights norms in their deliberations.

The said countries are the United States of America, Great Britain, Denmark and the Netherlands. These countries have been selected because of their longstanding tradition of human rights culture. Our main focus here is to learn from their experiences in handling human rights issues. South Africa is a young democracy and we need to draw on the lessons and experiences of older democracies. Although the European Convention on Human Rights is not a country, it has been included in our discussion as member states have a long standing tradition of applying human rights norms.

5.1 AMERICAN CONSTITUTION: DISCUSSION

We will discuss the American Constitution under the following headings: Constitutionalism, Separation of Powers, Federal Division of Powers and the Bill of Rights.

5.1.1 AMERICAN CONSTITUTIONALISM

The theoretical assumptions of American constitutionalism are different from those of the English version. The American war of independence was fought partly over the long-established constitutional principle that taxation could be levied only with the consent of those who paid it; the colonies rebelled against the obligation to pay taxes to the English government in which they had no representation. After the war's successful outcome, and the constitutional break with England, the need arose for an appropriate legitimating theory of government. This was provided in part by the social contract.[1] The 1787 constitution, which unified the thirteen individual colonies, was the product of a deliberate process of constitution-making. Delegates at the federal convention drafted the constitution on the assumption that they were representatives of the people and that it reflected the popular will. For greater credibility it was approved by the representative bodies in the different colonies. In reality this whole process was biased in terms of class, colour and gender, but the social bias of the framers has not prevented their product from enduring for many generations. The process gave rise to a revolutionary doctrine of constitutionalism, namely that a constituent assembly has the power to create and enact a Constitution and accord it the force of law. This new consciousness was apparent in the opening words of the United States Constitution, 'We the people of these several states ....'.

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1 Harris J. W., Legal Philosophies London: Butterwoths 1980

5.1.2 SEPARATION OF POWERS

In a classic work Vile describes the separation of powers as the most significant constitutional device of the modern era, alongside representative government, for the limitation of state power.[2] The separation of powers principle has traditionally been regarded as the fundamental feature of the American Constitution, and one of its distinctive contributions to the doctrine of constitutionalism. While separation of powers thinking had been evident in the systems of government and political theory of earlier ages, the principle was given more consistent expression in the constitution of 1787. It was also given a coherent theoretical justification, in particular in the Federalist Papers that were published at the time of the constitutional convention. The authors were able to refer to the recent writings of the French commentator Montesquieu, who had argued that the control of state power depended on it being divided among different governmental institutions.[3] The very form and organisation of the American Constitution reflected this emphasis.

Unlike the British system of parliamentary government, the United States Constitution provides for the almost complete separation of the personnel of the legislative and executive branches. Legislative power vests in the Congress. It comprises the House of Representatives, which is popularly elected, and the Senate, which has two representatives from each state. Executive power vests in the President who is directly elected by the people[4]

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2 Vile M. C. J., Constitutionalism and the Separation of Powers Oxford: Clarendon Press (1967)
3 Montesquieu, De l' Esprit des Lois (The Spirit of the Laws) was published in 1794.
4 Craig, P.P. Administrative Law London Sweet & Maxwell, 1983

and retains office for four years, whether or not he has the political support of Congress. No member of the President's cabinet may simultaneously be a member of Congress. Thus not only is there a strict separation of personnel between the institutions, but each has a separate political mandate and neither can remove the other from office. However, Congress can remove the President through impeachment. Judicial power vests in the Supreme Court, the judges of which have permanent tenure, and in other courts established by Congress.

The United States Constitution did not embody the pure theory of separation of powers that had been espoused in the American colonies.[5] It was amalgamated with the doctrine of checks and balances, according to which each branch of government should be subject to some influence and control from the others. In this way none can act completely independently, but requires the support of at least one other branch. While Congress has the primary law-making power, legislation can be vetoed by the President and invalidated by the courts, thereby making them subordinate partners in this constitutional activity. The President and other members of the cabinet have executive power, but some executive actions require approval by the Senate – for example, cabinet appointments and the ratification of treaties – and others are susceptible to invalidation by the courts. In addition the President can be removed by Congress through the impeachment process. The Supreme Court has the highest judicial power but the judges are appointed by the President, with Senatorial approval, and can be impeached by Congress; the Court's

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5 Vile op cit note 2 at p. 18

structure and jurisdiction are subject to the authority of Congress and judges are dependent on the executive to give effect to their decisions. These and other checks and balances are either stipulated by the Constitution or have developed through convention. They ensure that while the exercise of each power is entrusted to one institution, there is scope for minor participation by the other.

The basic structures of separation of powers and checks and balances have remained intact since their incorporation into the United States Constitution. They have given rise to a number of subsidiary constitutional doctrines.[6] In practice, however, they have not always produced a balanced system of government, and over time different institutions, in particular the presidency and the Supreme Court, have usurped powers well beyond their constitutional allocation. Nor should they be seen as politically or socially neutral institutions. The separation of powers doctrine was a reaction against the political experiences in the colonies and the authoritarian nature of English rule, and it continues to be based on a distrust of government; in modern social conditions the restrictions which it imposes on government could favour a vested elite over a disadvantaged majority. However, the separation of powers doctrine remains an important safeguard and protection in the constitutional practice of the United States, and in other systems of government which have adopted it. One of the reasons for its continued relevance is the strong system of judicial review in the United States which allows the courts to invalidate Congressional legislation.

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6 Tribe L.H., American Constitutional Law, Minneola, New York Foundation Press 1978

5.1.3 FEDERAL DIVISION OF POWER

At its simplest, federalism assumes two levels of government within the same constitutional system, each having powers in its own right and affecting directly the citizens.[7] The principle of federalism was not conceived in the American context, but it was first given a juridical basis in the United States Constitution. Its emergence was an inevitable outcome of the desire to create a new central government for some purposes, and at the same time to retain the diversity of local governments for others.[8] Thus, besides defining new national institutions and their powers, the Constitution also ensured the continued existence of the former colonies as political entities by preserving their systems of government, granting them equal representation in the Senate, and making the federal principles in the constitution difficult to amend without their consent. Furthermore, the constitution reserved certain powers for the state governments, and attempted to safeguard them from national encroachment through the same constitutional mechanisms which ensured their existence. Unlike the Westminister system, sovereignty was shared among a number of governmental bodies. While the federal 'balance' between national and state governments has been preserved, in part through the supervision of the courts.

Over time the original federal principles in the American constitution became significantly modified. For two centuries there has been a tension between the

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7 Sawer G., Modern Federalism, Carlton Vic. Pihman 2 ed. 1976.

8 Lees J. D., The Political System of the United States, New York University Press 1987

competing claims of the national and state governments, and each level of government has, at different times, made inroads on the other. However, in general terms, and particularly in the present century, the trend has been for the national jurisdiction to be enlarged at the expense of the states' jurisdiction; the constitutional division of competence has not prevented the central authorities from exercising power in most important areas of government. This is a partial reflection of the growing complexity of modern government and the need for national treatment of economic, developmental, environmental and industrial matters. The states have also become largely dependent on Washington for their financial viability, and can be encouraged into implementing national policies – for example, no smoking in public places – in exchange for needed revenue. This has made the system decidedly less federal in practice,[9] though without eliminating the significance of the federal principle altogether. In so far as constitutionalism emphasises the limitation and division of state authority, the federal principle is an important manifestation of it and has been incorporated into many modern constitutional systems.

5.1.4 BILL OF RIGHTS

The American Bill of Rights provided a further means of limiting and restricting state power, and this institution was an original contribution to constitutional government. At first is operated only in respect of the national government, but later provisions were made applicable to the states as well. In essence the Bill of Rights introduced standards according to which acts of government

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9 Sawer op cit No. 7 at p. 98-108

could be tested and, if they fell short, invalidated. These standards incorporated many of the freedoms and liberties that are associated with the various bills of rights documents and the Rule of Law in the English constitutional system. They now include the freedoms of religion, personal liberty, privacy, property and movement, the principle of equality before the law, the right to a fair trial, and protection from inhumane punishment. Should an American legislature provide for indefinite detention without trial, its actions will be declared invalid by the courts as being in contravention of the Bill of Rights. The notion that certain rights are fundamental and inviolable spread to Western Europe and today a justiciable Bill of Rights is a common feature of documentary Constitutions.[10]

A Bill of Rights is not self-executing and it was to a large extent the Supreme Court which determined how effective the American version would be. In its early history it was not incompatible with various fundamental rights abuses, such as slavery, and until the mid-twentieth century it had little limiting effect on discriminatory practices against blacks. While the Supreme Court never strayed far from majority social opinion, its interpretation of the various rights was crucial to their impact on the state system. In this additional area the judiciary became a focal institution of American constitutionalism. In no other system of government do the Constitution, the Bill of Rights and the judiciary have as prominent a part as they do in the American system.[11]

5.1.5 JUDICIAL REVIEW AND HIGHER LAW

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10 McWhinney E., Constitution Making: Principles, Process, Practices, Toronto: University of Toronto Press 1981

11 Bogdnor V., Constituions in Democratic Politics, Aldershot & Gower, London, 1988

It has been shown that each of the main principles of American constitutionalish – the separation of powers, federalism, and the Bill of Rights – is dependent on the courts for its enforcement. This is part of a wider judicial role in enforcing and upholding the constitution which gave American constitutionalism a greater degree of legalism than had previously been experienced. This characteristic has remained to the present. The function of the courts is referred to as (constitutional) judicial review. However the constitution itself makes no direct reference to the courts' review powers. The Supreme Court asserted the right to review legislation early in the existence of the Constitution in the famous case of Marbury v. Madison,[12] and since then judicial review has developed into a major feature of American constitutionalism. The institution is by no means uncontroversial.

Historically the court has adopted two different approaches to constitutional interpretation. On one hand is the 'original intent' approach in which it purports to be discovering the meaning intended by the framers of the Constitution, and on the other hand are various 'organic' approaches in which the court sees its role as interpreting the Constitution according to the contemporary facts of life. While the early theory behind judicial review held that the courts would concern themselves with legal mattes and leave political issues to the other branches of government, during certain periods, particularly the 1970's, the courts have given decisions on clearly social and political issues such as abortion and the electoral system. Instead of merely 'interpreting' the

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12 Marbury v. Madison (1803) Cranch 137, 1 sup. Rep. 60

Constitution the courts became involved in balancing the competing social interests of the day, and thereby assumed a more 'political' role.[13] They were accused of usurping the main policy-making functions in the constitutional system, and of transforming themselves from an institution which protected the minority to one which obstructed the majority. While charges of judicial activism are not generally made of the Supreme Court of the 1980s, there is a considerable literature concerned with the reconciliation of judicial review with democratic theory.[14] The extreme position is that no review by an unrepresentative court can be reconciled with democracy.

With the backing of the courts' review powers the American Constitution takes on the nature of a higher law. This means that the provisions of the Constitution will prevail over all other legal or political actions of government which are inconsistent with it: they become null and void on the basis that there was no legal authority for them. This may be contrasted with the English doctrine of parliamentary sovereignty: in the English context Acts of Parliament are legally supreme and the constitution is subordinate, while in the American context the Constitution is supreme. Until the Constitution is amended according to the prescribed procedure, its provisions place certain actions altogether beyond the bounds of all branches of government. The notion of the Constitution as higher, or fundamental, law is a prevalent doctrine in modern constitutionalism. Its status as a supreme legal norm is maintained because it is justiciable by the courts.

13 Theberge L.J., The judiciary in a Democratic Society, New York, New York University Press, 1990

14 Tribe L.H., op cit note 6 at p.50

On 8 June 1992 the American government finally ratified the International Covenant of Civil and Political Rights. In his response, the former US President Carter stated that ratification of the International Covenant of Civil and Political Rights provided an excellent opportunity for the US to strengthen civil liberty provisions in domestic legal codes and to affirm international standards, such as treaties, to prevail as the law of the land. It also induced the US government to examine more closely the reasons for the upheaval that had shaken the US in the wake of the Rodney King verdict. Rodney King was a Black-American who had been beaten to death by racist white policemen in the US. An all "white" jury found them not guilty. Carter related the ratification to the "immediate attention" that racial discrimination, police brutality and the inadequate response from the federal government to this problem, and the economic and social marginalisation of African-Americans and other minorities, demand in the US.[15]

President Carter, however, deplored the fact that the USA had not yet ratified several other widely accepted human rights treaties, including the International Covenant on Economic, Social and Cultural Rights. Opposing this second Covenant implied that governments had no obligation to safeguard the rights of their citizens to jobs, education, housing and an adequate standard of living.[16] The other treaties are the American Convention on Human Rights, which Carter signed in May 1977, but which had still not been ratified by the US Congress, the Convention on the Elimination of all Forms of Racial

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15 Carter J., (President from 1977 through 1980), US finally ratifies Human Rights Covenant, Christian Science Monitor (CH) – Monday, June 29, 1992, p. 19

16 ibid t p.20

Discrimination, and the Convention on the Elimination of all Forms of Discrimination against Women. The Convention on Rights of the Child has also not been ratified by the US Congress. In order to explain this "poor record" of the US concerning ratification of human rights treaties, Buergenthal, provides us with a historical context as well as certain legal arguments.[17]

5.2 REASONS FOR NOT RATIFYING HUMAN RIGHT TREATIES

The relevant article in the US Constitution is article VI which, inter alia, provides that "this Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made or which shall be made, under the authority of the United States, shall be the supreme law of the land". This provision has been interpreted by the US courts to mean that federal statutes and the treaties to which the US is a party, have the same normative rank under the Constitution. Should there be a conflict between a federal statute and a self-executing treaty provision, the latter in time prevailed. Furthermore, a treaty provision cannot be given effect as domestic law if it conflicts with the Constitution. Also, as federal law, treaties supersede all state laws and, unless they contain provisions to the contrary, they also "federalised" a subject that may hereafter have been governed by state law.[18]

When World War Two ended and the UN was established, racial discrimination and a variety of other forms of discrimination were either legally

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17 Buergenthal T., "The US and International Human Rights", Human Rights Law Journal, 1988 p. 141-143

18 Missouri v Holland, 252 US 416 (1920)

mandated or not unlawful in the US.[19] Much of the law codifying legal racial discrimination was state law, most of it in the South. The USA was then a nation of racially segregated schools, anti-miscegenation statutes[20], of poll taxes, segregated public services and accommodations.[21] Changing these practices through federal legislation was extremely difficult as the Southern Democrats and the Conservative Republicans formed a solid block in the US Congress to oppose any changes.

The opponents of the legalised racial discrimination then realised that they could utilise the human rights provisions of the UN Charter and the other UN treaties then being drafted, to remove the federal and state laws that Congress was unwilling to repeal.

They were supported by the judiciary in two cases. In Oyama v California[22] the court held that the UN Charter, being a duly ratified treaty of the US, was a federal law that outlawed racial discrimination. The court relied on Articles 55 and 56 of the UN Charter which contain the obligation of member states of the UN "to promote ... universal respect for, and observance of human rights and fundamental freedoms for all without distinction as to race, sex, language or religion".

In 1950 in Sei Fujii v California[23] an intermediate court held that California's Alien Land Law, by discriminating against aliens of Asian origin, was

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19 Buergenthal, ibid, at p.144

20 Their counterparts being the South African Prohibition of Mixed Marriages Act of 1949

21 South African Amenities Act of 1953

22 323 US 633 p. 649-650 and p. 673 (1948)

23 271 p. 2d 481 Cal. Dist. App. (1950)

unenforceable because it violated the human rights provisions of the UN Charter. The Charter, being a treaty ratified by the United States, was equal to a federal statute and thus superseded any inconsistent state legislation. The Supreme Court of California, however, rejected this view and ruled that the human rights provisions of the UN Charter were non-self-executing and as such could not supersede state law unless and until they were implemented by Congressional legislation. The court held that the challenged state law violated the Fourteenth Amendment of the US Constitution and could therefore not be enforced in California.

These decisions produced the "Bricker Amendment" which led to the indifference in the US to international human rights treaties. Recognising the threat to discriminatory state legislation, Senator John W. Bricker contended that if the Fuji case (the lower court's opinion) should eventually be affirmed by the United States Supreme Court, or if the principle announced therein should be sustained, literally thousands of Federal and State laws automatically become invalid. This danger had to be averted, "something had to be done to prevent treaties from having such far-reaching and unintended consequences".[24]

According to Buergenthal[25] the Bricker Amendment had three basic aims, namely:

(a) To make all international agreements non-self-executing under US law;

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24 98 Cong. Rec. 911 (1952), cf, Buergenthal, supra at p. 145

25 Buergenthal, ibid, at pp 145-46

(b) For treaties to be enforced by the courts implementing legislation was required;

(c) To reverse the Supreme Court's decision in Missouri v Holland of 1920, which held that the Tenth Amendment[26] did not limit treaty-making power of the Federal Executive because that power was expressly delegated to the United States; and

(d) To provide expressly that international agreements were subject to those restraints of the Constitution that limited the exercise of all power by the Federal Government.

Bricker's own formulation of his motivation is crystal clear: "My purpose in offering this resolution is to bury the so-called Covenant on human rights so deep that no one holding high public office will ever dare to attempt its resurrection.[27]

Although the Bricker Amendment has been defeated, the compromise offered provided little encouragement The Eisenhower administration stipulated that the US Government "does not intend to become party to any such Covenant (on human rights), or present it as a treaty for consideration by the Senate.[28]

5.3 LEGAL ARGUMENT AGAINST RATIFICATION OF HUMAN RIGHTS TREATIES

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26 The Tenth Amendment to the US Constitution: The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively.

27 Senator Jonh Brick (R –Ohio) 1951, Congressional Record, 82nd Cong. 1st Session, 1951 Vol 97 pp 8, 8263

28 83d Cong. 1st Sess. At p. 825 (1953)

As we have dealt with the substance of these arguments in the course of this study, we will only mention them without further comment:

(i) The subject of human rights is a matter of domestic rather than international jurisdiction, and the US Constitution does not permit the use of treaty-making power to regulate a question which is not a proper subject for international negotiation.

(ii) Many of the rights which these instruments protect are regulated by state rather than federal law. Their ratification by the US would improperly federalise these subjects.

(iii) The human rights treaties conflict with the US Constitution.

International human rights lawyers in the USA have since tried consistently to have the international human rights treaties ratified. We refer briefly to Henkin[29] and Buergenthal.[30]

Henkin[31] recognised that the American Constitution became a leading model for, and principal strand in, international human rights, but argued that international human rights aimed farther:

> While authoritative interpretation of these rights is just beginning to develop, these rights are apparently independent, affirmative values, not merely limitations on government. In the International Covenant on Civil and Political rights, states undertake not only to

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29 Henkin L., "International Human Rights and Rights in the United States", in Human Rights in International Law; Legal and Policy Issues, Theoder Meron (ed) Oxford, 1984, at pp 26-27

30 Buergenthal T., "The US and International Human Rights", supra

31 Henkin L., "International Human Rights and Rights in the United States", supra

> respect, but also "to ensure" those rights, apparently against private, as well as governmental interference.[32]

This argument is elaborating on Henkin's 1979 invitation referred to above.[33] When Henkin then[34] presented his plea for the US to join the international human rights movement, he did so fully aware of the dominant conceptions of rights in that society.

There is resistance to imposing national standards on matters deemed to be local, he said.[35] More so, there is resistance to accepting international standards and international scrutiny on matters that have been for Americans to decide. A deep isolationism continues to motivate many Americans. Human rights in the US, they believe, are alive and well.[36]

According to Henkin, (supra) the USA has nothing to learn, and does not need scrutiny from others, surely not from countries where human rights fare so badly.[37]

Buergenthal[38] is also appreciative of the advances in human rights achieved by the US municipal system. He states that even if the USA were to ratify the human rights treaties, and treat them as law directly applicable by the courts,

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32 ibid, at p. 36
33 Supra, Chapter 5.2 note 23 p. 156
34 Henkin L., supra at pp 54-55
35 ibid, at p. 52
36 Buergenthal T., "The US and International Human Rights", supra at pp 161-162
37 Henkin L., supra at p. 56
38 Buergenthal T., "The US and International Human Rights", supra at pp 161-162

this would have little impact on the USA human rights picture. The relevant domestic law already ensures more rights than its international law counterpart in many respects. It is therefore significant that despite this dynamic municipal system in the USA, Buergenthal still concludes that:

> the failure of the US to ratify these treaties is not excused .... By pointing to the great progress that the country has made in ensuring human rights on the domestic plane. By not adhering to these treaties, the US has intentionally excluded itself from probably the most important international movement of our time.[39]

Apartheid South Africa, with its background of racial discrimination and its consequent resistance to international scrutiny, certainly had common features with the USA. However, if lessons are to be learnt it would be more regarding the failure of the USA to ratify the human rights treaties.[40] This included the eventual ratification of the International Covenant of Civil and Political Rights. The new South Africa has since ratified most of the human rights treaties.

Along with the general relief that the ratification had finally come there was also serious concern that the manner of ratification still reflected an unwillingness to accept the full scope of the international standards of human rights and more particularly so the standards of the International Covenant of

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39 Buergenthal, ibid, at p. 162

40 Buergenthal, ibid, at p. 160

Civil and Political Rights.[41]

On 8 June 1992 the American government finally ratified the International Covenant of Civil and Political Rights. In his response former US President Carter stated that ratification of the International Covenant of Civil and Political Rights provided an excellent opportunity for the US to strengthen civil liberty provisions in domestic legal codes and to affirm international standards, such as treaties, to prevail as the law of the land.

From the Netherlands[42] came a fierce response. Flinterman views the ratification as the USA hiding behind its national constitution and compares this with the Iranian government's report under the International Covenant of Civil and Political Rights where it claimed that in certain circumstances, the Shariah legislation has pre-eminence over provisions of the International Covenant of Civil and Political Rights.[43]

We have already referred to reservations as expressed by President Carter.[44] Looking more closely at the cause of these, the following can be observed:

The USA did not ratify the sister Covenant on Economic, Social and Cultural Rights which President Carter referred above.

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41 Carter J., "UN finally ratifies human rights Covenant", supra also the Congressional Record – Senate, April 2, 1992 at 54784 which contains letters expressing that concern from Amnesty International of America, the United Nations Association of the United States of America, Yale Law School and the University of Florida

42 Flinterman & Reiter, "De Verenigde Staten en net BUPO – Verdrag": de rol van Nederland; in NJB (Nederland Juristenblad), August 1992, No. 29 at pp 935-936

43 Flinterman, ibid, at p. 936

44 Carter, supra, note 88

The USA did not ratify the First Optional Protocol to the International Covenant of Civil and Political Rights and thus excluded the competence of the Human Rights Committee to consider individual complaints against violations of the rights in the International Covenant of Civil and Political Rights.

As one of its declarations, the USA stated that it "declares that the provisions of Article 1 through 27 of the Covenant are not self-executing. The articles contain all the civil and political rights of the Covenant, and the effect of the declaration was that American citizens could not appeal for their application in court.

The long range of reservations, understandings and declarations to the ratification were generally based upon the principle that the USA committed itself to nothing more than what it was already doing. In the case where the protection under the International Covenant of Civil and Political Rights went beyond the American Constitution, the USA did not accept any obligations in this regard.[45]

Although the general approach was one of "ratification", even on those terms, is preferable to no ratification" commentators[46] are specifically concerned about two reservations. One was the reservation regarding article 6 of the International Covenant of Civil and Political Rights concerning the right to life. The reservation envisages the continued practice of the execution of juvenile

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45 Flinterman & Rieter, "De Verenigde Staten en het BUPO-Verdrag, supra at p. 935

46 i.e. Amnesty International USA, supra and Flinterman & Rieter, supra

offenders in the USA. The other reservation was made to article 7 of the International Covenant of Civil and Political Rights, viz: that its "cruel, inhuman and degrading treatment or punishment" would mean the cruel and unusual treatment or punishment prohibited by the fifth, eigth and/or Fourteenth Amendments to the US Constitution. This clearly subjects the treaty law of the International Covenant of Civil and Political Rights to the national constitution.

Amnesty International USA[47] asked whether the reservation to article 6, a non-derogatory right (in terms of article 4(2) of International Covenant of Civil and Political Rights), would not be considered null and void. Flinterman and Rieter[48] were more forthright. Both reservations were not compatible with the "object and purpose" of the International Covenant of Civil and Political Rights and the reservation on article 7 was subjecting the treaty law of the International Covenant of Civil and Political Rights to the national constitution of the USA.

The Dutch commentators[49] contend that the other states parties under the Vienna Convention on the Law of Treaties of 1969 could formally object to the reservations within 12 months after the depositing of the text of ratification. If they failed to do this, the treaty, its reservation included, will enter into force. It was important, however, to keep the USA within the treaty. In order to

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47 The Congressional Record, April 2, 1992 supra

48 Supra at note 92

49 Flinterman, ibid, at p. 40

intensify the effectiveness of its objections, the Dutch government could involve its partners within the European political community.[50]

The authors[51] concluded that the Dutch government should impress upon the USA government that its ratification of the International Covenant of Civil and Political Rights should not be allowed to belittle the international protection and promotion of human rights. The USA government should furthermore be encouraged to ratify the First Optional Protocol.

According to Kaufman and Whiteman,[52] the arguments of the 1950's fostered the perception that human rights treaties were controversial and potentially dangerous. Furthermore, these arguments in 1988 appeared to be the same despite widespread changes in the United States domestic law on human rights, and the ascendancy of human rights in regional and international fora. It would appear in our submission that even after ratification of the International Covenant of Civil and Political Rights, the legacy of the Bricker Amendment still continues.

5.4 INTERNATIONAL HUMAN RIGHTS AND GREAT BRITAIN

In his paradigm of the three countries, Dugard distinguished the UK as the only one that had signed and ratified both the European Convention on Human Rights and the International Covenant of Civil and Political Rights.[53] He then

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50 In this regard, we have seen the US being confronted on the abolition of capital punishment by smaller countries like Portugal, Sweden and the Netherlands at the Copenhagen Conference of CSCE process in 1990.

51 Buergenthal, supra, at p. 60

52 Buergenthal, supra, at p. 335

53 Buergenthal, supra, at p.335

immediately qualified this distinguished position of the UK by indicating that these conventions have not been translated into municipal law in the UK and that therefore they were only binding on the international level. While this distinction is made to keep Dugard's paradigm on the comparable features of the three countries intact, it is our submission that this reluctance of the UK to translate the conventions into municipal law could hardly be held exemplary. The UK has since enacted the Human Rights Act of 1998.[54] The writers refer to the pre-1998 period, which is relevant to this thesis. We need to know what happened before the enactment of the Human Rights Act of 1998.

Drzemczewski refers to the widespread attention of proposals to incorporate the European Convention On Human Rights into UK law in either the form of an Act of Parliament, or by the enactment of an entrenched Bill of Rights.[55] Furthermore, he stipulated that certain eminent personalities in the UK consider that fundamental rights of individuals are adequately ensured against excessive executive and administrative power, and that the incorporation of the Convention could help to redress this imbalance in favour of the individual. Nevertheless, says Drzemezewski, it is undeniable that the convention has had a substantial impact upon the UK.[56] Changes have been made in prison rules; immigration rules have been ameliorated; certain interrogation techniques used with detainees in Northern Ireland have been abandoned; compensation has been paid for various degrees of administrative miscarriages of justice; the Contempt of Court Act 1981 has been enacted to,

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54 UK Act No. 3 of 1998

55 Drzemezewski A.Z., "The European Convention in Domestic Law," supra p. 186

56 Drzemezewski, ibid, p. 186-187

inter alia, comply with the European Court's judgment in The Sunday Times case,[57] and the Mental Health (Amendment) Act was passed by Parliament in 1982 to amend and up-date the Mental Health Act of 1959 in the light of an adverse finding by the European Court of Human Rights in the case of X. v UK.[58]

While this list is indicative of the impact of the Convention upon British domestic law, it should be clear that if the Convention had the status of domestic law, it would not have been necessary for the individual to first exhaust the domestic legal remedies and only then to seek and be provided redress before the Strasbourg organs. The alleged violations would accordingly be adequately and immediately available to him in the domestic legal order.[59] It is therefore not surprising that the UK has been found in violation of the European Convention more that any other signatory and that it has consistently been the subject of more applications for alleged breaches than any other state.[60]

Hampson[61] investigated this assertion in an extensive study. She concluded,[62] inter alia, that the breaches of the Convention were mostly found in cases involving the most vulnerable people, viz: people in the custody of the state, or who have turned to it for help. These cases suggest a "lack of

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57 European Court of Human Rights judgment of 26 April 1979, ser A. No. 30

58 European Court of Human Rights, judgment of 5 November 1981, ser A, No. 46

59 Drzemezewski, supra p. 186

60 The Independent, 30 November 1988, 3 : Survey of activities and statistics, European Commission of Human Rights 1988

61 Hampson J., "The United Kingdom before the European Court of Human Rights", Yearbook of European Law (9) 1989, Oxford 1990 (Claredon Press), at p. 121-173

62 ibid, at p. 173

respect for them as individuals and a lack of protection of their rights, up to the point, in some cases, of physical ill-treatment".

Incorporating the European Convention On Human Rights as such would not, of itself, provide a solution, concludes Hampson.[63] What is needed is a change of attitude on the part not only of the institutions of government, but also of the public at large. The incorporation of the Convention could play an educational role in assisting the public and the institutions to learn to think in terms of rights.

Hampson[64] acknowledged that the UK was not guilty of the gross and systematic violations of human rights found in many other states, but that is hardly relevant because the UK does not ask to be judged by those standards. It has agreed to be judged by western European standards:

> The philosophical gulf revealed between the British and their fellow Europeans is alarming. The issue needs to be addressed as a matter of urgency, not only so as to ensure conformity with the European Convention on Human Rights but also for the sake of the health of the body politic within the United Kingdom.[65]

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63 ibid at p. 174
64 ibid at p. 174
65 ibid at p. 176

In expression of this philosophical gulf, Dutch Constitutional commentator Prakke[66] succinctly stated that in terms of the basic characteristic of fundamental human rights, viz: that it also provided protection against the legislature, it is obvious that in the UK there existed absolutely no fundamental human rights. The sovereignty of parliament which gave unrestricted authority to the "Queen in Parliament" remained untouched by the signing and ratification of the European Convention On Human Rights, the International Covenant of Civil and Political Rights and other human rights treaties. The 1998 Human Rights Act in Great Britain has now corrected this situation.

In the words of Mann[67] the idea that human beings could have enforceable rights against the state which no legislator can destroy, that such rights are capable of being spelled out, defined and enumerated so as to override legislation, that there could be a real Bill of Rights such as first appeared in the Constitutions of the American States in 1776, that there could be judicial review of the constitutional validity of legislation, that idea was as alien to Blackstone as it is to most English lawyers today. This problem has been reversed by the 1998 Human Rights Act in Great Britain.

Mann[68] deemed a judgment of Lord Reid in 1974[69] the death knell of any residual vestige of fundamental rights in modern English law:

66 Prof. Prakke, Het Verenigd Koninkrijk van Groot-Brittanje en Noord-Ierland in Het Staatsrecht van de landen der Europese Gemeenschappen, Prakke en Korfmann (eds) Kluwer, Deventer, 1988 third revised edition at p. 732

67 Mann L., Further Studies in International Law, Clarendon Press, Oxford, 1990 at p. 103

68 ibid

69 Pickin v British Railways Board (1974) A.C. 765, 782

> In earlier times many learned lawyers seemed to have believed that an Act of Parliament could be disregarded in so far as it was contrary to the law of God or the law of nature or natural justice, but since the supremacy of parliament was finally demonstrated by the Revolution of 1688, any such idea has become obsolete.

According to Mann[70] the fact that none of the three Conventions guaranteeing human rights and fundamental laws to which Britain was a party to had been directly incorporated into English law was creating a paradox in three respects:

1. Britain has assumed international obligations, but prima facie did nothing to secure their implementation, and even where their terms are at present being observed, nothing has been done to prevent future inconsistent legislation coming into force and superseding the present law by virtue of the rule posterior derogat legem priori.
2. While this is the position in Britain, it should be remembered that it was in Britain also that the idea of fundamental laws originated and it was from Britain that it spread all over the world.
3. Lastly, it is remarkable that in England the body of intellectual opinion which one would expect to be passionately in favour of fundamental rights and their guarantee by judicial review is hostile to it.

Hewitt[71] went a little further than Mann. Addressing the protection of human rights in the United Kingdom, Hewitt[72] stated that the requirements of the

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70 Pickin case at p. 107

71 Hewitt J., The abuse of Power, Oxford, 1982

72 Hewitt, op. Cit. At pp 231-249

European Convention on Human Rights were not strict, particularly when compared with the Bill of Rights of the United States. Yet the United Kingdom has repeatedly shown itself unable to meet even those standards of the European Convention which the British government in 1951 was willing to adopt.

In the UK, the Convention was not part of domestic law, and although this provision may be used in argument to support a case, no action could be brought simply on the ground that the Convention has been infringed. This failure to incorporate the Convention, says Hewitt,[73] may itself be an infringement of the Convention, which requires "an effective remedy before a national authority for anyone who believes that his or her Convention rights have been breached. This point, comments Hewitt[74] has not yet been decided by the court.

Perhaps, comments Jacobs[75] in 1985, it was the political reality that in seven parties (the UK included) the Convention did not have the status of domestic law, that influenced the European Court on Human Rights to hold against strong opinions to the contrary in the Convention's negotiating history, that the Convention itself imposes no obligation to incorporate the Convention in domestic law. Although article 1 of the European Convention On Human Rights provided that "the High Contracting Parties shall secure to everyone

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73 Hewitt, ibid, at p. 234. Article 13 of the ECHR

74 Hewitt, ibid, at p. 235

75 Jacobs F.S., "The European Convention on Human Rights", in International Enforcement of Human Rights, Rudolf Bernardt & John A. Jolowicz (eds), Reports submitted to the Colloquium of the International Association of Legal Science, Heidelberg 28-30 August 1985, 31-55 at pp 52-53

within their jurisdiction the rights and freedoms defined in Section 1 of this Convention", the Court in Ireland v United Kingdom[76] was not prepared to go further than confining article 1 to "those instances where the Convention has been incorporated into domestic law".

Jacobs[77] refers to the case of Abdulaziz Cabales and Balkandali[78] where the court held that since the Convention did not have the force of law in the UK, the applicants had no remedy available to them and there was thus a breach of Article 13. It therefore, seems possible to argue that a state which has incorporated the Convention will necessarily be in breach of Article 13, and that Article 13 therefore, indirectly requires states to incorporate the Convention.[79] It does have the force of domestic law now.

Jacobs[80] concluded that domestic courts have often taken refuge in the alleged generality and vagueness of the Convention's provisions, and "especially in the United Kingdom", have paid little attention to the Convention jurisprudence.

We can therefore, safely conclude that the UK was not an exemplary role model for countries moving towards a culture of human rights and that old South Africa in particular should not have placed a heavy reliance on that country's human rights record.[81]

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76 Judgment of 18 January 1978 at p.239
77 Jacobs, supra at p. 53
78 ECHR, Series A, No. 94, Judgement of 28 May 1985
79 Jacobs, supra at p. 53
80 ibid, at p. 54
81 ibid, at p. 56

Lastly, it should be noted that the UK like the USA did not ratify the First Optional Protocol to the International Covenant of Civil and Political Rights. The competence of the Human Rights Committee to consider individual complaints against violations of the rights in the International Covenant of Civil and Political Rights is therefore, also excluded. The similarity the UK has with the USA does not only concern the First Optional Protocol. The UK also reflects a similar emphasis upon the municipal legal order as being sufficiently equipped to guarantee fundamental human rights. In discussion of the initial report of the UK before the Human Rights Committee, the UK representative stated that:

> his country's ability to ratify the Covenant, which did not in itself have the force of law in the United Kingdom, had rested upon the fact that the rights recognised in the Covenant were already guaranteed by law, subject to the reservations and derogations which had been made upon signature or ratification.[82]

In the discussion of the second periodic report[83] of the UK, members of the Committee, asked whether there had been any precedent setting judicial decisions regarding the implementation of the Covenant, or cases in which reference had been made to the Covenant. Furthermore, given the fact that there was no written Constitution, and no written Bill of Rights, and that the courts operated on the basis of common law and precedents, whether the UK

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82 GAOR No. 40 (A/33/40) 1978, pp 31-38 at p. 31

83 GAOR, No. 40 (A/40/40), pp 97-114 at p 98-99

was in fact in a position to "ensure" that the Covenant's provisions were given proper effect.

The representative replied that the existence of human rights and individual freedoms were protected by the common law. "Thus it had not been considered necessary to adopt legislation to cover every possible infringement of human rights. However, it had become necessary to enact protective measures and declaratory laws in such areas as race relations, sex discrimination and data protection. Clearly the law and administrative practice were evolving in keeping with the Covenant's principles, and the need to stay abreast of changing circumstances".[84]

The Human Rights Committee, in its general observations,[85] stated, inter alia, that there were still gaps in the implementation of certain articles of the Covenant, and with regard to a comprehensive system of remedies. Also that additional written laws and a statutory Bill of Rights could improve the system of protection of human rights and better define adequate guarantees and remedies.

It is submitted that the abovementioned criticism by writers refers to a period before 1998. In 1998, Great Britain incorporated the Convention into its domestic law. In effect this means British subjects do no longer need to report violations of their human rights in Strasbourg but in the British Courts. While

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84 Gaor, ibid, at p. 142
85 Gaor, ibid, at p. 144

the situation has changed the abovementioned criticisms remain valid with regard to the period before 1998.

5.5 INTERNATIONAL HUMAN RIGHTS UNDER THE EUROPEAN CONVENTION FOR THE PROTECTION OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS

We have referred to the European Convention on Human Rights when discussing the approach of the United Kingdom towards it. Furthermore, as we have indicated in our discussion on the South African legal system, it has been deeply influenced by the legal traditions of the Netherlands and the United Kingdom. The European Convention on Human Rights, insofar as it involves these two countries and its member states in general, is therefore of considerable importance.

The European Convention on Human Rights is considered to be the most effective international system for the protection of human rights.[86] After our evaluation of the restrictive approaches to international human rights by the USA and the UK it becomes imperative to also consider the experience under the European Convention on Human Rights. We will therefore view the Convention in terms of its general development and then briefly consider the experience of two specific countries under the Convention - the Netherlands, which formally incorporated the substantive provisions of the convention in its internal law, and Denmark where the Convention only has the status of international law.

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86 Drzemczewski, supra p. 17-18

5.5.1 The European Convention of Human Rights

The European Convention of Human Rights was based on the Universal Declaration of Human Rights and was drafted and adopted in 1950. The parties to the Convention guaranteed the right to life; freedom from torture, inhumane and degrading treatment; freedom from slavery or forced labour; rights to liberty and security of the person; right to fair administration of justice; prohibition of retroactive offences and penalties; right to an effective remedy before a national authority; freedom from discrimination. Other rights in respect of private and family life, home and correspondence; right to marry and start a family; freedom of thought, conscience and religion; freedom of expression freedom of peaceful assembly and association, including the right to form and to join trade Unions[87]. Economic and social rights were not included in the 1950 Convention but were found in other major human rights instruments of the Council of Europe, namely, the European Social Charter adopted in 1961. The Convention prohibits discrimination in the enjoyment of the rights and freedoms contained in it.

5.5.2 The Protection Machinery under the Convention

The European Commission and the European Court of Human Rights were originally created for the protection of rights covered by the Convention. They shared this task with the Committee of Ministers of the Council of Europe.

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87 Mbao M., Notes on the Summary of Existing System of International Protection of Human Rights p7-11

The Council of Ministers elected the members of the Commission from candidates nominated by national delegations of the Parliamentary Assembly of the Council of Europe. They were all jurists and legal experts. The members of the Court, i.e. one judge for each member state of the Council of Europe, were elected by the Parliamentary Assembly. Both the members of the Commission and the judges of the Court were independent and sat in their individual capacities; they did not represent their states and could not be instructed by their states.

5.5.3 Handling of Complaints by the State or Individuals

The Commission and the Court dealt with the complaints of violations of the Convention. The complaints could be brought by the individuals or by a State. However, most of the complaints came from individuals who were claiming to be victims of violations by their states which had accepted the express declaration of the right of the individuals to bring cases against them

The Commission could refer the case to the European Court of Human Rights for a ruling, assuming the State concerned had accepted the court's compulsory jurisdiction.

In the Court, the Commission presented the case in an impartial and objective way. The applicant could also present the case and appear as a witness. The hearings wee normally in public. The judgments of the Court were always public. The Court could decide whether there had been a breach of the Convention and could award compensation to the complainant. The

implementation of judgments was supervised by the Committee of Ministers and the ultimate sanction for non-compliance could be expulsion from the Council of Europe. If neither the Commission nor the defendant state referred the case to the Court, it was for the Committee of Ministers to decide whether there had been a breach of the Convention.[88]

It has been observed that despite its sophisticated machinery, the former European Court of Human Rights and the Commission remained expensive and time consuming.[89] It therefore depended considerably upon the extent to which its provisions could be invoked before the courts and administrative agencies of the member states. In certain states international treaties once ratified, have the force of law in the municipal legal system and may be identified by the national courts. In these states the Convention provides both domestic and international remedies for an individual who alleges the denial of rights.

A next observation is that, while the Convention has proved to be highly successful and gradually acquired the status of a "constitutional instrument of European public order in the field of human rights", it should also be pointed out that this has not always been the case.[90] The need for a court to supervise the application of the Convention met with considerable opposition.[91] The

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88 Mbao, supra at Note 72.

89 Drzemezewski, supra, p. 18

90 Foltzer, J., "The European Human Rights Convention in domestic law : the impact of Stratsburg case in law in states where direct effect is given to the Convention", in HRLJ, No. 3 (21/3/0/91), p. 65

91 Schermers, G., "The influence of the European Commission of Human Rights", Report on the Conference of the Mordenate College, 22 September 1991 at p. 3

following arguments illustrate the drastic development that the Convention experienced:[92]

(i) The protection of human rights was considered a domestic affair and the fundamental rule of international law at the time was that of non-interference in domestic affairs.

(ii) It would be contrary to the principle of national sovereignty to take binding decisions, possibly overruling decisions of the highest national courts and possibly running contrary to sovereign national policy.

(iii) It would be contrary to the standing of the court to only allow it to make non-binding recommendations.

Despite the opposition against it, the former European Court succeeded in asserting its role as the "prime interpreter of the Convention's provisions", so much so that at present, "there remain hardly any substantive provisions of Convention that have not been the object of a ruling by the Court."[93]

It is submitted therefore, that the difficulties surrounding the African Commission of today, are reflections of an earlier stage of the European Commission. Coming back to the court, we will focus primarily on the study of Polakiewicz and Jacob-Folzer.[94] It is pointed out that, during the last ten years, the impact of rulings by the Court (European Convention on Human Rights), has increased dramatically in several countries. With case law from Strasbourg increasing, domestic courts gradually abandoned their reserved

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92 Schermers, ibid, at p. 98

93 Foltzer, supra at p. 165

94 Polakiewwicz & Jacob-Foltzer, "The European Human Rights Convention in domestic law", Human Rights Law Journal, Vol; 12, No. 3, supra at p. 66

attitude to the Convention. Underscoring this, we briefly refer to the experience of 10 countries.

In France, both the Conseil d'Etat and the Conseil Constitutionnel, finally started to take the Convention into account. The Conseil d'Etat broke with its former practice by giving priority for the first time to an international treaty over municipal law that was enacted after the treaty had been made applicable in France. This decision led to a reappraisal of the status of the Convention by the Court.

In Germany the Convention has the rank of ordinary law only, but its authority has been greatly enhanced by the Federal Constitutional Court in a decision of 26 March 1987. It held that the German Constitution should be interpreted in the light of the European Convention, and that the practice of the Strasbourg court should serve as a supplementary means of interpretation in order to determine the content and scope of the German Fundamental rights.

As regards Belgium, the European Court gave adverse rulings in the Marckx case on the incompatibility of discrimination between illegitimate and legitimate children, concerning articles 8 and 14 of the Convention, and in the Le Compte case on the applicability of article 6. In the Piersack case the Court held that since the appellant's case had not been heard by an "impartial tribunal", Belgium had been guilty of a violation of article b (1) of the Convention, and in the case of De Cubber, on the scope of article 6. While the Belgium Courts initially did not welcome the case law of the European Court, the rulings of the

European Court were subsequently accepted. Their cases offer a particularly rich jurisprudence on the effects of judgments of the International courts in domestic law.

In Austria and Switzerland the two jurisdictions have considered the rights and freedoms guaranteed by the Convention rather frequently. The Austrian Constitutional Court and Swiss Federal Court intensified this tendency, going in some aspects even beyond the practice of the European Court.

Similar observations were made with regard to the Spanish Constitutional Court and the Dutch Supreme Court. Spain has ratified the Convention in 1979 and immediately thereafter the Convention and its interpretation by the European Court served as an important yardstick in the shaping of constitutional law in the newly created democratic society.

The Netherlands is a monistic country with a constitution giving precedence to self-executing treaty provisions over domestic law. The influence of the Convention in the field of human rights is therefore paramount.

Finland, Malta and San Marino have incorporated the Convention, bringing the number of countries where direct effect is given to its provisions, to 18. Malta became the first member state to have introduced a specific procedure for the enforcement of judgments by the European Court, viz. their Section of the European Convention Act of 19 August 1987.

The authors, after a thorough examination of the effect of the European Convention on Human Rights on the domestic law of the various legal systems, arrived at the following conclusions:

1. The interpretation of the Convention given by the European Court has proved to be highly persuasive with regard to national jurisdictions and legislatures. Reference is made to the Soering case where the guiding principles of interpretation are summarised as follows:

> In interpreting the Convention, regard must be had to its special character as a treaty for the collective enforcement of human rights and fundamental freedoms. Thus, the object and purpose of the Convention as an instrument for the protection of individual human beings requires that its provisions be interpreted and applied so as to make its safeguards practical and effective. In addition, any interpretation of the rights and freedoms guaranteed has to be consistent with "the general spirit of the Convention", an instrument designed to maintain and promote the ideals and values of a democratic society.[95]

2. The status of the Convention in the hierarchy of internal norms is the most important factor which determines the impact of Strasbourg case law in domestic law. Reference is made to the constitutional rank of the substantive provisions of the Convention in Austria, which has

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95 Soering case, Judgment of 7/7/1989, Series A. No. 161, pp. 87

contributed largely to the prominent role of European case law there. In countries such as Belgium, Luxembourg, the Netherlands and Switzerland, superiority over prior and subsequent legislation had a similar effect.

Unfortunately, the same situation is not found in France due to probably the "traditionally autonomous attitude" of the French judiciary.

3. The existence of parallel constitutional safeguards against human rights abuses which supplant those of the Convention is viewed as a restraining factor. This is especially so if the existence of such guarantees is coupled with a strong tradition of judicial protection of political and civil rights as in Italy and Germany.

The influence of Strasbourg case law is then of minor importance. The experiences in Germany show, however, that even under these conditions the European Court can become more relevant if the national Constitutional Court is willing to modify its purely domestic view.

4. Ratione Materiae the impact of Strasbourg case law has been most prominent in the field of penal procedure. The practice of the national police, public prosecutors and courts in this highly sensitive area is therefore under strict scrutiny from Strasbourg.

5. The role of municipal courts in assuring effective protection of the rights and freedoms contained in the Convention cannot be overestimated. The possibility to file an application to the European Commission of Human Rights, and to have the case eventually decided by the Court used to be a time consuming exercise which could only be envisaged as a last resort. The procedure has, however, been considerably simplified as a result of amendments made to the procedure in November 1998. It is therefore, to the benefit of the individual who seeks redress if the municipal court can effectively secure the rights guaranteed by the Convention. It is therefore, encouraging, the authors finally concluded, to see that even in the absence of a formal procedure that regulates the relationship between the European Court and national jurisdictions, like the one in Article 177 of the EEC Treaty, we are witnessing the beginning of a dialogue between these different jurisdictions.

5.5.4 Establishment of the Permanent European Court of Human Rights

As a result of the growing number of applications and complaints, the Council of Europe decided to reform the control mechanism under the Convention. In terms of Protocol II which came into force on the 11 November 1998, a permanent court was established which replaced the Commission and the former European Court of Human Rights. The Committee of Ministers no longer takes decisions but only implement the courts' judgments. Article 34 of the Protocol stipulates that both states and individuals will be able to lodge

applications with the court and the new court will assume the role played by the Commission and Court. Its aim is to speed up the procedure. The new court will have as many judges as there are states parties to the Convention. As a result of the disappearance of the Commission the court deals directly with the states[96] and individuals[97]

(a) a committee of three judges;

(b) chambers of seven judges (there will be about five chambers); and

(c) Grand Chamber of seventeen judges.[98]

There are some significant innovations made by the Protocol to the European human rights protection system. Unlike the old system, the new system allows the court to include more than one judge from the same state, elected by the Parliamentary Assembly of the Council. The members of the court are elected for six year terms; they will also be required to retire at the age of seventy. When a communication is submitted to court, it will be examined by a committee of three judges, one of whom will be the judge rapporteur, with due regard to the conditions laid down under the new Article 35. The Committee will then decide on the admissibility or otherwise of the communication.

The Committee's decision is final and if unanimity cannot be achieved, or where the judge rapporteur advises that the application cannot be declared inadmissible, the application will be transmitted to a chamber.

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96 Article 33
97 Article 34
98 Article 27

5.6 INCORPORATION OF HUMAN RIGHTS TREATIES IN THE NETHERLANDS AND IN DENMARK

We would like to consider briefly the preference in the above study for countries that formally incorporated the substantive provisions of the Convention in their internal law, as well as the conclusion that the influence of the Strasbourg case law was less in those countries where the Convention had only the status of international law, i.e. Denmark, Iceland, Norway, Sweden and the United Kingdom.

In the Netherlands, the provisions are formally incorporated whereas in Denmark, they are not. We refer to these two countries to consider the developments that occurred in terms of incorporation.

Dutch commentator Van Dijk[99] reported about a seminar in Copenhagen on "The Status of the European Convention on Human Rights in the Nordic Countries". The main question was whether the system of gradual transformation of the provisions of the Convention into domestic law should be changed to a system of incorporation of the Convention in the domestic legal orders of these Nordic countries. Van Dijk[100] described his surprise at the subsequent conclusion that the formal domestic status of the Convention was not of decisive importance for its effective implementation. Of real importance was the attitude of the judiciary towards the Convention and their opinion

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99 Van Dijk P., "Domestic Status of Human Rights Treaties and the Attitude of the Judiciary" – Netherlands Quarterly Review Vol. 10 1992 at pp. 29-42

100 Van Dijk P., supra. at pp. 631-632

about the division of powers between the legislature and the judiciary. Several speakers argued that both national and international case law indicated that this attitude and this opinion were not predominantly determined by the formal domestic status of the Convention.

We present some of the arguments in order to complement the study of Polakiewicz and Jacob-Foltzer. From Norway, a member of the Supreme Court, Mr Trond Dolva stated that in the dualistic system of Norway international law has in practice a great domestic impact. He submitted that if an assessment were made of the implementation of the Convention in countries with a dualistic system and in those with a monistic system, the outcome might very well be that the two systems are equally appropriate from an international law perspective. Although in favour of incorporation, Dolva found the choice between different systems mainly practical with both having its own advantages.[101]

From Sweden, Mr Hans Corell of the Swedish Ministry of Foreign Affairs, pointed out that the same number and more or less the same kind of complaints were filed in Strasbourg against states with a monist and states with a dualistic system. According to him it might well be that the transformation system, with gradual legislative adjustments in the light of the Strasbourg case law, produced law that was more transparent, more readily available and easier for the general public to understand[102]. We will return to this Nordic view subsequently.

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101 Van Dijk, ibid at pp 632-635

102 Van Dijk, ibid at p. 703-710

On the experience of the Netherlands with human rights treaties, Van Dijk[103] indicated why it may be concluded that the human rights treaties formally have a very strong status in the legal system of the Netherlands.

1. In terms of the legal force of treaties, the Netherlands has ratified most of the human rights treaties.

2. The internal effect of treaties in the legal order of the Netherlands has been expressly regulated in a monistic way in the Dutch Constitution of 1953, and before that, the same applied by virtue of a well-established rule of customary law. In the present Constitution of 1983, Article 93 provides that provisions of treaties and of decisions of international organisations the contents of which may be binding on everyone shall have this binding effect from the time of publication. The words "the contents of which may be binding on everyone" (die naar hun inhoud een ieder kunnen verbinden) are generally understood to refer to the self-executing character which is required for their application by Dutch courts.

3. As to the direct effect of treaties, the Constitution leaves it to the courts to determine whether or not a treaty provision is self-executing. This direct effect of a treaty, says Van Dijk, relates to its susceptibility of receiving judicial enforcement without the necessity of any further implementation or

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103 Van Dijk, ibid at pp. 633-639

execution by an international or national authority. A provision of a treaty which has this character is often called "self-executing".

4. Lastly, on the issue of precedence, Article 94 of the Constitution provides that legal regulations in force within the Netherlands shall not apply if this application would be incompatible with provisions of treaties, or of decisions of international organisations that are binding on everyone. This emphasises the authority of international law because the courts have to give precedence to self-executing treaty provisions over domestic law that is not in conformity with it, be it antecedent or posterior domestic law, and be it statutory law, law enacted by executive or local authorities, or even Constitutional law.

This precedence is based upon the fact that a treaty can be effective only if ultimately it takes precedence over domestic law be it in a monistic or dualistic situation. No matter what its domestic law provides in that respect, a state is internationally responsible if the application of its domestic law results in a violation of the treaty. Article 27 of the Vienna Convention on the Law of Treaties 1969 clearly prohibits the state to invoke its internal law as justification for this violation.

This is the reason why human rights treaties have such strong status within the legal order of the Netherlands. However, Van Dijk,[104] in determining whether this status is also as strong in practice, returns to his initial surprise at the

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104 Van Dijk, ibid at p. 639

conclusion that this practical effect does not depend primarily on the way that the status is regulated in the Constitution, but more so on the attitude of the courts. It then appears through the study of Alkema[105] that despite the strong formal status of human rights treaties, the attitude of the Dutch courts towards the European Convention on Human Rights was one of reticence, and that the role of the legislature on the implementation of human rights treaties had been more prominent than that in the courts.

Van Dijk then quoted Erades on the fact that the court has to function within the context of its domestic system and that this will influence the attitude of the judiciary: [106]

> When a municipal court is confronted with international law, one cannot ignore the fact that such a court is not divorced from its surroundings, that is, from the position established by the Constitution, statute and custom, and that it is affected by matters such as national feelings. Even where personal opinion or feeling affects a judge's decision upon the merits of a case, such opinion does not operate outside the limits of the system in which a judge finds himself[107]

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105 Alkema E.A., "The application of internationally guaranteed human rights in the Municipal Order"; in Essays on the Development of the International Legal Order (edited by Fritz Kalshoven, Pieter Jan Kuyper and Johan G. Lammers), Alphen a/d Rhijn, 1980 at pp 181-198

106 ibid, at p. 639, c.f., L Erades, "International Law and the Netherlands Legal Order", in H.F. van Panhuys e.a. (eds), International Law in the Netherlands, Vol III, Alphen a/d/ Phijn 1980 375-434 at p. 377

107 Alkema E.A., "The application of internationally guaranteed human rights in the municipal order", supra at p. 181

The above emphasis underlines the Nordic approach that the formal status of the Convention is less important than the attitude of the judiciary in that even in a monistic system where the human rights treaties have a strong formal status, the judiciary still has the last word.

The position may even be expanded as vindication for the executive-minded approach of the then South African judiciary. It should be pointed out, however, that this was the position before 1980. Van Dijk refers to a dramatic change in the reticent attitude of the courts to the European Convention On Human Rights. It has become a normal thing for a Dutch lawyer to invoke treaty provisions before a Dutch court, and it is no longer a source of irritation either to the court or the public prosecutor.

From Denmark, the then President of the European Commission on Human Rights, Norgaard has explained that the Danish Constitution does not contain any specific provisions regarding the effect of international law on domestic law.[108] International law must therefore, be transformed into domestic law by a statute or an administrative regulation. In some instances, however, transformation is not necessary when existing Danish law is compared with a treaty and it is found that the domestic law is already in conformity with the treaty obligations undertaken. Should this "norm-control" reveal a conflict with the treaty obligation the treaty is then transformed.

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108 Norgaard C.A., "Danish Problems of Compliance with the Convention – Danish Perspectives of Incorporation of the Convention", in Schermers (ed). "The influence of the European Commission of Human Rights"" supra t pp 65-75

Insofar as this system of norm-control or reformulation of treaties implies the risk of accidentally producing divergences and even clear cut conflicts between domestic law and the treaty, the judiciary steps in to overcome the conflicts. By means of interpretation the courts attempt to bring domestic rules into conformity within treaty obligations. The rule of presumption viz: that Danish law is generally presumed to be in conformity with its international obligation is invoked by the courts to move beyond the limitations of the rules of interpretation.

Norgaard,[109] commented that these rather vague rules of interpretation and presumption cannot secure the conformity between national law and international law obligations in the same way as would the formal incorporation of the international treaty obligation into national law.

As far as the courts are concerned Norgaard[110] explains that the Danish courts have been traditionally reluctant to apply the Convention. For many years it was difficult to substantiate the value of the Convention in court proceedings as a source of law. The change only came in 1989 with the Hauschildt case where the European Court held a violation of article 6 of the Convention where the judges who sentenced the accused were also involved in pre-trial decisions as to his continued detention. Three subsequent Supreme Court decisions indicated that Danish courts of law and other authorities are under

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109 Norgaard, ibid, at p. 66

110 Norgaard, ibid at p. 69

an obligation to base their interpretation of Danish law, to the widest possible extent, upon the European Convention of Human Rights and its practice.

Norgaard[111] also informs us of the changing attitude in Denmark regarding the incorporation of the Convention. In 1989 the Danish Parliament expressed doubts as to whether the Convention could actually be invoked before Danish courts of law. It was also argued that the execution of the Convention and particularly of the case law of the central organs under the Convention would be better secured if the Danish manner of execution be altered, and a separate statute be adopted to make the Convention an integral part of Danish legislation by a real incorporation. A committee was then appointed by parliament to examine the pros and cons of incorporation.

This committee unanimously recommended the incorporation of the Convention into Danish law. They stated that such incorporation would clarify the state of law and that a statute solely designed to codify the practice already established by the Danish courts of law will offer a decisive advantage for the existing state of law by providing an explicit basis for the application of the Convention. The status enjoyed by the Convention in the legal system will furthermore be evident, and against the background of a more thorough knowledge of the Convention, it will also be possible to generate a higher degree of awareness of the Convention principles. The Committee therefore, found that incorporation of the Convention might lead to an "improved legal protection of the individual citizen".

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111 Norgaard, ibid, at pp 69-75

Having viewed developments within the legal orders of the Netherlands and that of Denmark, we can concur with the conclusion of Polakiewicz and Jacob-Foltzer that in countries that formally incorporated the substantive provisions of the Convention in their internal law, the influence of the Strasbourg case law is stronger than in those countries where the Convention has only the status of international law, i.e. Denmark. However, as the Dutch experience clearly emphasises, a strong formal status of human rights treaties without the co-operation of the judiciary is not desirable either.

The argument would therefore be neither, but rather a combination of both formal incorporation and full recognition of the role of domestic courts to ensure the effective protection of fundamental human rights.

5.7 SUMMARY

This chapter focused on the applicability of international human rights norms in selected countries. We tried to find out how these countries accepted international norms of human rights within their domestic municipal legal orders. We also discussed the European Convention for Human Rights. It is submitted that the Convention is not a country but it has been included in this chapter for the sake of completeness.

We have studied the acceptance of the international norms of human rights by other countries, and the difficulties they encountered, e.g. USA and Britain.

The 1998 Human Rights Act in Great Britain has changed the situation dramatically and is now in line with other countries.

We also saw the importance of the Status of the Convention in the hierarchy of internal norms, the importance of municipal courts in assuring the effective protection of the rights and freedoms under the Convention and of particular appeal to South Africa trying to rid itself of its past of human rights violations in the area of security legislation and states of emergency, the advances in the area of penal procedure.

As regards the specific references to the developments in the Netherlands and Denmark, the important conclusion is that the effective promotion and protection of human rights do not depend on either the incorporation of the treaty or its full recognition by domestic courts, but rather upon a combination of both.

It is submitted that while South Africa could not become a party to the European Convention On Human Rights, the experiences of the European Convention On Human Rights are certainly conducive to a better understanding of the dialectic link between public international law and municipal law. It is further submitted that South Africa could benefit from these experiences. Furthermore, the importance of the role and function of the organs established under the International Bill of Rights, particularly the Human Rights Committee, is also brought into clearer perspective.

We further submit that there are important lessons to be learnt from the countries we referred to above. However, South Africa has become a Constitutional state where the Constitution is the supreme law of the land. There has been a clear break with the past and a vigorous commitment to human rights and their values. The citizens of South Africa can approach the South African court for redress should their rights be violated.

In the next Chapter we will be summarising the entire thesis and draw some relevant conclusions of our findings and make some recommendations.

CHAPTER 6: SUMMARY AND CONCLUSIONS

6.0 INTRODUCTION

This thesis has been concerned with the acceptance of international human rights norms in the South African legal system. The main thrust of this thesis has been to find out how international human rights norms could be applied in the South African legal system.

It is evident that South Africa's conversion to human rights occurred at a peculiarly sensitive time in the history of international law of human rights, namely, that of the convergence between the international system of human rights and the domestic municipal legal order.

We have shown how the old South African Government refused to ratify international human rights treaties and the judiciary slavishly rejecting international human rights norms in their interpretation of the law. Instead the courts chose Roman-Dutch law as the applicable law.

We have also shown how a sovereign parliament passed oppressive laws with impunity while the courts were expected to implement these laws.

Our finding has been that it was impossible to apply human rights norms in our legal system while the evil apartheid system was still in place.

As a result of the birth of the new South Africa in 1994 a clean break was made with the past and a new era of human rights culture came into being. International law became part of our law. The Constitution made it clear that in the interpretation of any legislation, international law was to be taken into account. The Constitution became the supreme law of the country.

We have recommended a major transformation of the judiciary because if the judiciary remained reluctant to apply the human rights-friendly Constitution, we would be back to square one.

In our analysis of the then South African legal system, we established that the apartheid legal order had insulated itself at the two levels crucial to the reception of fundamental rights. At the constitutional level the doctrine of parliamentary sovereignty was still at the heart of this system. At the level of public international law, no human rights treaties were ratified and customary international law was recognised only insofar as it did not conflict with statutory law.

The effect of this insulation had been that the fundamental human rights of the South African people could be denied and violated. From a clear rejection of human rights in the past, the apartheid government (1948 – 1994) now accepted the introduction of a Bill of Rights as a fact. We also pointed out that while the two major parties, namely, the National Party and the ANC accepted a Bill of Rights for South Africa as a fact, there

were still numerous areas of disagreement as to the actual content of the Bill of Rights. While the indications were that this point of insulation was opening up, it was in itself no guarantee for the full recognition, promotion and protection of human rights in this country.

As far as the international law component of human rights was concerned, the government showed no indication of effective change. The interesting aspect here, as we have pointed out, was that the anti-apartheid opposition, had no clear proposals in this regard either. From the ANC the signals were that they would be amenable to the international human rights treaties, but from the then available literature, there was no clear indication as to the signing of these treaties.

We therefore had the situation where the rights granted to the South African population at international level, were withheld from them whilst at the national level the introduction of the Bill of Rights was linked to the outcome of the negotiations amongst various political organisations. It is submitted that this situation might have been ascribed to the isolationism of the then government of South Africa and its deep-rooted suspicion of the international community. Furthermore, the emphasis by the legal profession on Roman-Dutch law and the reliance on experiences of the USA and UK, also made its contribution to this intrinsically flawed system.

6.1 RECOMMENDATIONS

1. With regard to the superior courts, namely, the Constitutional Court, the Supreme Court of Appeal and the High Court with its various divisions, there should be a body to which aggrieved parties can complain to, as a result of the behaviour of the judges. It must be remembered that judges are not elected but appointed permanently with the result that they cannot be easily removed once appointed.
2. The Judicial Services Commission be strengthened to hear misconduct cases against judges, especially, with regard to complaints by parties in paragraph 1 hereof.
3. The Minister of Justice is not to be responsible for the appointment of magistrates. This power be taken away from him/her as it is open to abuse.
4. The Magistrate's Commission be restructured and empowered to take over all current powers of the Minister of Justice with regard to the appointment, transfer, promotion and dismissal of magistrates.
5. Magistrates be also appointed from practising attorneys because they are independent. The present practice of appointing prosecutors as magistrates be discontinued as prosecutors are simply public servants and not used to being independent.

6. Entry qualifications to the magistracy be LL.B and no longer diploma or a junior degree.

7. We have recommended that more people of colour also be appointed to the bench. Fast track methods should be used in the training of these officers. In particular, blacks and women should be appointed to the bench.

8. Both judges and magistrates must be trained in the application of international human rights norms so as to sensitise them about the relevance of these norms. Training is important in that we inherited judges who were schooled under the apartheid system that never respected the values underpinning the present Constitution. There should also be a change of mindset.

ANNEXURE A.

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A: INDIVIDUALS

1. The Honourable Justice Jennifer Y Mokgoro: Judge of the Constitutional Court of South Africa.
2. The Honourable Justice Bernard Ngoepe: Judge President of the Transvaal, Provincial Division of the High Court.
3. Adv. B van der Walt: Senior Member of the Pretoria Bar Council.
4. Adv. M Moerane: Senior Counsel at the Natal Bar Counsel.
5. Prof. B. Majola: Director, Legal Resources Centre.
6. Mr P. Setsetse: Department of Justice.
7. Mr Bunsee: Department of Justice.

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1. Lawyers for Human Rights, Pretoria Office: Prof. B.M. Van Wyk.
2. South African Law Commission, Pretoria: Adv. F. Maree.
3. Black Lawyers Association: Adv. Msoupye.
4. Corporate Lawyers Association of South Africa: Attorney L. van Zyl.
5. South African Human Rights Commission: Adv. P. Tlakula.
6. The Magistrate's Commission: Mr L.C. van der Walt.
7. Judicial Service Commission: Adv. J. Botha.
8. General Council of the Bar of South Africa: Adv. I. Semenya.

9. Society of State Advocates and Public Prosecutors: Adv. J. van Schalkwyk.

10. Office of the Public Protector: Mr B. Setshedi.