

PERSPECTIVES

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South Africa's New Constitution: Will It Last?

After forty-five years as an international pariah, South Africa has finally emerged from its isolation. For the West, the moral imperative to disinvest has been replaced by one to reinvest and rebuild. South Africa is suddenly being billed as one of the hottest new markets in the world. Foreign investment is starting to flow back into the country from the stagnant economies of the first world at a rate not seen since the gold boom of the late 1970s. More cautious business people, however, are wondering how to read the tea leaves.

In order to make an educated guess whether the new South Africa will be a stable, democratic, free-market economy with appropriate protections for private property and friendly to employers, an understanding of South Africa's new constitution, the forces that have shaped it, and the likely impact of its sunset provisions is the best place to start. The Constitution of the Republic South Africa¹ is a 200-page document written in the two official languages of the old regime, English and Afrikaans.² It resulted from an improbable deal between a government

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1. Act. No. 200 of 1993 [hereinafter CONST.].

2. Afrikaans is a language that evolved from Dutch. It is closer to Flemish than to any other language.

that negotiated itself out of power and a former twenty-seven-year captive of that government. Like any compromise, it includes window-dressing provisions that are calculated to help both parties save face. Like any settlement, who is the winner and who is the loser is not clear.

Structurally, the Constitution contemplates a unitary state with elements of federalism. It has a bill of "entrenched fundamental rights" that are all subject to limitations that can be enacted without obtaining the majority required for a constitutional amendment. It stringently protects private property while at the same time providing for reparations to the dispossessed black majority. Possibly the Constitution's most troubling provision is that it expressly requires that it shall be replaced by a new constitution within two years of the historic April 1994 elections. This obligation raises serious questions about how lasting the Constitution's impact will be in the new South Africa.

This article explores the background forces behind the new Constitution, the provisions of the new Constitution itself, and the likely impact of the Constitution's two-year sunset provision. Part I examines the background to the Constitution and the players who negotiated it. Part II focuses on the essential infrastructure of the new state, and the composition and powers of Parliament and the provincial assemblies. Part III reviews the Constitution's requirement that Parliament draft yet another constitution within two years and considers whether the new constitution will be radically different from the existing one. Part IV examines the bill of rights and whether the new South Africa can rely on it. Finally, Part V analyzes the composition of the new constitutional courts and their ability to protect the democratic principles enunciated in the new Constitution.

I. The Background to the Constitution

The events that preceded the dramatic enactment of the new Constitution and South Africa's first multiracial elections require little introduction. However, a summary of the constitutional background helps in understanding some of the more unusual provisions of the Constitution.

A. THE PRE-1994 SOUTH AFRICAN CONSTITUTION³

South Africa obtained its first constitution in 1910 when the British Parliament passed the Act of Union, thereby uniting four of Great Britain's sub-Saharan colonies into a self-governing—or practically independent—entity consisting of four provinces: the Cape Province, Natal, the Orange Free State,

3. South Africa's original constitution, the South Africa Act of 1909, was enacted by the British Parliament. In 1961, when South Africa withdrew from the British Commonwealth, this statute was replaced by the Republic of South Africa Constitution Act No. 32 of 1961. This act was subsequently modified by the Republic of South Africa Constitution Act No. 110 of 1983. Although this last act was amended a number of times, its essential provisions remained operative until the passage of the new Constitution in 1994.

and the Transvaal. South Africa eventually became a republic when it resigned from the British Commonwealth in 1960 in order to preempt its expulsion from that body.

South Africa's original constitution was a unitary one that provided for a British Westminster-style Parliament consisting of a house of assembly and a senate whose laws were initially subject to the *pro forma* approval of a governor general. As a matter of parliamentary convention, however, the governor general's veto of any legislation would have been a gross breach of protocol.

In 1960, when South Africa left the Commonwealth, the president was substituted for the governor general. At first, the president of South Africa was only a figurehead; the real executive power was vested in the prime minister, the leader of the majority party in Parliament. Subsequently, during the premiership of P.W. Botha, the office of prime minister was phased out and the president became the true head of the executive. All original legislative and executive authority was vested respectively in Parliament and the prime minister—and eventually in the president—with delegated legislative and executive authority vested in the provincial legislatures and administrators.

With two exceptions, described below in more detail, South Africa's original constitution was subject to amendment by a simple majority of each house of Parliament, just like any other piece of legislation. The basic concept, which was borrowed from the English law, was that Parliament was sovereign. Thus, even if Parliament declared that the earth was flat or that the moon was made out of cheese, the courts had no right to second-guess it. Consistent with this philosophy, the courts had no power to review or reverse most acts of Parliament. There were, however, several entrenched provisions in the original constitution that could only be amended by a two-thirds majority of both houses of Parliament sitting jointly. The courts had the power to review acts of Parliament that purported to modify, amend, or repeal any of these entrenched sections.

One of the entrenched provisions guaranteed black people in the Cape Province a "qualified franchise" based upon educational and financial qualifications. This provision was always unpopular in the all-white legislature and in the late 1930s was easily repealed by the appropriate two-thirds majority.

Another entrenched provision that guaranteed a similar qualified franchise for the mixed-race (Colored) voters of the Cape Province was finally repealed after a series of disingenuous maneuvers by the newly elected Nationalist Party in the early 1950s. At first, the Nationalist government purported to repeal the offending entrenched provision by a simple majority of both houses of Parliament, relying on the fiction that, because Parliament was supreme, it could repeal its own constitution in the same way that it had enacted it—by simple majority. Almost immediately the Appellate Division of the Supreme Court, the functional equivalent of the U.S. Supreme Court, struck down this amendment as invalid. Parliament responded by passing the High Court of Parliament Act, which established

Parliament as the highest court of appeal in the land with the right to reverse any decision of the Appellate Division. When the Appellate Division reacted by striking down the High Court of Parliament Act as a sham, the Nationalists enlarged the Senate, thus ensuring that they could obtain the appropriate two-thirds majority when the two houses of Parliament, the Assembly and the Senate, sat jointly. As an extra precaution they packed the Appellate Division with sympathetic appointees who readily approved the constitutional amendment.

The other entrenched provision provided for parity of the two official languages, English and Afrikaans. This provision remained in the original constitution until the enactment of the new Constitution, which now provides for no less than eleven official languages.⁴

Throughout the apartheid years a number of South African lawyers—and even judges—publicly and privately lamented the underlying positivist judicial philosophy of South Africa's founding fathers. Many members of the legal community believed that the rule of law might have been preserved in South Africa if South Africa's courts had had the power to review and strike down arbitrary or inequitable Acts of Parliament. These lawyers admired the liberal, activist decisions that emanated from the U.S. Supreme Court in the 1960s and the 1970s. This pent-up longing of many lawyers for an American-style constitution that guaranteed the rule of law greatly influenced the drafters of the new Constitution.

B. THE TENSION BETWEEN FEDERALISM AND PARLIAMENTARY SOVEREIGNTY

The official legal opposition in the white Parliament of the 1980s was the Progressive Federal Party, which subsequently changed its name to the Democratic Party. This party's political philosophy was very similar to that of the Democratic Party of the United States. The Democratic Party strongly espoused a federal system of government because it believed that the checks and balances inherent in a federal system would offer the most protection for minorities.

By contrast, at least until the constitutional talks began, the ruling Nationalist Party favored keeping the unitary Westminster-style constitution that had always helped it maintain its grasp on the country. The Nationalists envisioned that the separate homelands conceived by apartheid would be self-governing independent states with no political, as opposed to economic, ties to South Africa.

C. THE INFLUENTIAL PLAYERS AND NONPLAYERS IN THE CONSTITUTIONAL TALKS

From 1948 until April 1994, South Africa was ruled by the Nationalist Party. Until three years ago this party had an almost unanimously Afrikaans-speaking

4. CONST. ch. 1, § 3(1).

constituency. The Nationalist Party devised the policy—and first coined the term—“apartheid.” Essentially, apartheid resulted in the complete segregation of all of South Africa’s ethnic and tribal groups in separate but equal traditional homelands. Each tribe had its own homeland, independent from the rest of South Africa. Every black person was a citizen of a rural homeland and was permitted to work in the more industrialized urban areas, reserved for whites, only on sufferances, like aliens with temporary work permits. Black, Colored, and Indian people were all barred from owning businesses or property in white areas, and white people were theoretically enjoined from doing business and owning property in the group areas of other ethnic groups.

Constitutional talks started after F.W. De Klerk, a lawyer who until then had led a conservative faction of the Nationalist Party, was appointed as president. One of his first acts was to release Nelson Mandela and legalize Mandela’s political party, the African National Congress (ANC) as well as the South African Communist Party. As the talks progressed, De Klerk lost some of his more conservative Afrikaner constituents and picked up support from more liberal English-speaking white industrialists, businesspeople, financiers, and professionals, who all desperately wanted to end the restrictive economic policies of apartheid and reopen trade with the outside world.

The other major player in the negotiations was the president of the ANC, Nelson Mandela, who is now the first black president of South Africa. Born in the rural Transkei, Mandela is a member of the Xhosa aristocracy. He is also a lawyer. After twenty-seven years in prison, he emerged as the revered leader of a populist movement with solid support from the major black trade unions, the majority of urban blacks, the Xhosa tribe and many of the other smaller tribes, black intellectuals and professionals, and the South African Communist Party. At the time when Mandela stepped out of Pollsmoor Prison on his historic walk to freedom, the ANC espoused a strong revolutionary ideology that many believed encompassed a policy of nationalizing South Africa’s gold mines, banks, and insurance companies. Mandela forswore this policy more than two years ago after the collapse of the Soviet Union.

Another important figure in the constitutional talks was Cyril Ramophosa, the general secretary of the ANC and the ANC’s chief negotiator at the talks. Ramophosa first rose to prominence when he organized South Africa’s many black mineworkers into trade unions. After the April 1994 election, Ramophosa, to everyone’s surprise, was not nominated to the office of Deputy President and elected not to serve in the so-called government of national unity. Instead, in a move reminiscent of the actions of Polish leader Lech Walesa, he chose to continue with his grass-roots work as general secretary of the ANC.

Zulu chief Mangosuthu Buthelezi, best characterized as a “nonplayer,” also was a significant influence on the talks. Buthelezi is a member of the Zulu royal family and a relative of the Zulu King, Goodwill Zwelithini. In his younger years, Buthelezi was a supporter of Zulu Chief Albert Luthuli, a past president

of the ANC and a Nobel Peace Prize laureate. After the ANC was banned, Buthelezi formed the Inkatha Freedom Party. This party was completely tribal in its orientation, exhorting the Zulu Nation to remember the glory days of its militaristic past.

During the pre-De Klerk years, the Zulu, South Africa's largest black tribe, were allocated the homeland of KwaZulu in the northern Natal Province. Buthelezi had no trouble capturing a massive majority in the homeland legislature. However, Buthelezi steadfastly refused to accept the South African Government's invitation to declare KwaZulu's independence from South Africa. He maintained that, if the Zulu did so, they would forfeit their right to the wealth of South Africa. Before De Klerk's accession Buthelezi also paid lip service to the concept of nonviolent protest, claiming that the various black movements could not possibly displace the white government by force of arms. Inkatha has a strong pro-capitalist orientation.

Buthelezi reacted to the constitutional talks by declining to participate in them. Ironically, having refused to accept independence, he now maintained that the Zulus should be permitted to withdraw from South Africa completely or that, at the very least, South Africa should have an American-style federal constitution.

Other homeland leaders, such as Lucas Mangope, the Chief Minister of Bophuthatswana, had previously opted for and been granted independence from South Africa. These leaders also refused to participate in the constitutional talks, insisting that they be permitted to retain their independence or that, at a minimum, South Africa come up with a federal constitution. The ANC dealt with this problem by engineering spontaneous uprisings in homelands such as Bophuthatswana and Ciskei shortly before the April elections.

The other participant in the talks was Konstans Viljoen, a retired general. Viljoen assumed the mantle of leadership of the white right wing and the Freedom Alliance, an improbable coalition that included Inkatha, a number of white right-wing parties, and some of the homeland leaders. Viljoen urged that the Constitution provide for an independent white homeland in the northern part of what was then the Transvaal Province.

D. THE PRIMARY TENSIONS REFLECTED IN THE NEW CONSTITUTION

Given the players in the constitutional drama and the events that preceded it, it is not surprising that the primary tensions in the Constitution were between: (a) federalists and proponents of a unitary state; and (b) concern on the part of the haves to protect their property rights, the populist socialist ideology of the ANC, and the ANC's own desire to present to the world a stable democratic society friendly to investment. Another powerful force in shaping the Constitution was the will of all parties to ensure that the civil wrongs of the past would never again be repeated.

II. The Constitutional Framework

The basic constitutional framework of the new South Africa is a unitary state with nine provinces,⁵ compared to the original four provinces and several homelands. All of the so-called black homelands have now been reabsorbed into South Africa, with or without the agreement of the homeland sovereigns.

Each province is to have an elected provincial legislature and a provincial premier who will replace the old provincial administrator.⁶ The premier will be elected by the members of the provincial legislature.⁷ Each province is to have a laundry list of specific powers that, from a practical point of view, are not significantly different from the modern powers of the states in the United States. These powers encompass agriculture, education, housing, health services, roads, welfare services, casinos, the environment, and nature conservation.⁸ Although local police powers are vested in the provinces, each provincial police force is under the overall supervision of a national police commissioner and is part of the national police force.⁹

The provincial legislatures and the national Parliament will have concurrent competence to make laws.¹⁰ Acts of Parliament shall prevail over provincial laws with respect to the matters to be regulated by the provinces. This superiority only extends to national matters that cannot be regulated effectively by provincial legislatures because they require coordinated uniform laws and lawful "standards that apply generally throughout [South Africa]," such as laws necessary to protect the environment or to determine national economic policy.¹¹ Generally, Parliament may preempt the provincial legislature every time it deems it in the interests of the nation to do so.

The sovereign body is Parliament, which consists of a National Assembly with four hundred members and a Senate with ninety members.¹² The Senate and the National Assembly are collectively referred to as Parliament.¹³

Executive authority is vested in a president, who will be elected for a five-year period by a joint sitting of both houses of Parliament, unless the Parliament that elected the president is dissolved sooner.¹⁴ Parties with a certain number of seats in the National Assembly will be entitled to nominate an executive deputy presi-

5. The provinces are: Natal, Northern Cape, Northern Transvaal, North-West, Eastern Cape, Eastern Transvaal, Orange Free State, Pretoria-Witwatersrand-Vereeniging, and Western Cape. *Id.* sched. 1, pt. I.

6. *Id.* ch. 9, §§ 125, 145.

7. *Id.* ch. 9, §§ 144, 145.

8. *Id.* ch. 9, § 126(1) (read together with sched. 6).

9. *Id.* §§ 214-228 and sched. 6.

10. *Id.* ch. 9, § 126(1).

11. *Id.* ch. 9, § 126.

12. *Id.* ch. 4, §§ 36, 40(1), 48(1).

13. *Id.* § 36.

14. *Id.* ch. 6, §§ 75, 77.

dent and a proportional number of cabinet ministers, although the president shall have the power to determine the specific portfolios to be allocated to the respective participating parties in the Cabinet.¹⁵ The intention is that “[t]he Cabinet shall function in a manner which gives consideration to the consensus-seeking spirit underlying the concept of a government of national unity as well as the need for effective government.”¹⁶ Thus, the president does not have to have consensus, although he or she should try to obtain it. In the final analysis, the president alone has veto power over bills.

This so-called government of national unity is a remarkably bold concept with little precedent in other democracies. The incorporation of this concept into the South African Constitution is made all the more remarkable by the fact that it is probably not compatible with the Westminster concept of a cabinet, in which the members assume joint collective responsibility for all decisions made by the cabinet. Under the Westminster concept, a cabinet member who is unwilling to accept such responsibility for a material decision made by the cabinet is bound to resign. By contrast, in a government of national unity, different parties are represented in the cabinet and dissent must necessarily arise concerning the appropriateness of certain cabinet decisions.

Despite the contradiction between the concept of a constitutionally mandated government of national unity and the Westminster doctrine of collective responsibility, the Constitution attempts to straddle both forms of executive government by expressly providing that “all members of the Cabinet shall . . . be accountable collectively for the performance of the functions of the national government and for its policies.”¹⁷ How could the leaders of the Nationalist opposition possibly accept collective responsibility for cabinet decisions calculated to give effect to deep-rooted ANC policies? The answer remains to be seen.

The tension between the unity requirements of the Constitution and the constitutional experience of the cabinet members nominated from the ranks of the Nationalist Party has become increasingly apparent as the honeymoon of the new South Africa has worn off. Within three months of the election, the Nationalist Party leadership had to publicly deny a newspaper report that the Nationalist Party was contemplating withdrawal from the government of national unity because its voice was being ignored. While the concept of a government of national unity seemed more attractive to the Nationalists in theory at the time of the talks, in reality it appears to be of more assistance to the ruling party. Instead of giving the opposition party a chance to participate effectively in executive decisions, a government of national unity seems to isolate opposition party leadership from

15. *Id.* §§ 82, 84.

16. *Id.* ch. 6, § 89(2).

17. *Id.* § 92(1).

its grass roots supporters, who can never be certain whether their leaders betrayed them during a secret cabinet session.

Each province elects ten members to the Senate.¹⁸ Two hundred seats in the National Assembly are specifically allocated on a per-province basis, each province having a defined number of seats.¹⁹ The other 200 seats are national seats allocated to the respective political parties on a prorata basis according to the number of votes that each party garners in the election.²⁰ All candidates for political office must be nominated by the political party to which that candidate belongs.²¹ Any member of the Assembly or the Senate who resigns from the party that nominated that member must vacate the seat.²² In short, the structure is calculated to ensure that all political parties maintain tight control over their rank and file.

The tension between proponents of a unitary state and those advocating a federal system similar to that of the United States was the greatest sticking point in the constitutional talks and nearly broke up the negotiations on more than one occasion. The ANC opposed giving significant powers to the regions because it believed that this would only perpetuate concepts of ethnic separatism and would give the ANC little leeway for effective socioeconomic reforms. Ironically, despite his party's past vehement opposition to federalism, De Klerk recognized that the best protection for the white minority—and especially its property rights—lay in a federal constitution where constitutional amendments required the support of all regions, including those in which minority groups held the greatest power. De Klerk's view received support from ethnic chiefs such as Buthelezi and Mangope, the now-deposed chief minister of Bophuthatswana. The legislation eventually resulted in a unitary state divided into nine provinces. However, review of the powers of the provinces and the form of protections afforded their existing status reveals strong elements of federalism in the unitary Constitution.

Ordinary bills will pass by a simple majority of each house and will require the assent of the president.²³ Constitutional amendments will require a two-thirds majority of both houses of Parliament sitting jointly as well as the president's assent.²⁴ The Constitution is silent as to what happens if the president withholds consent to a bill or constitutional amendment, although this seems unlikely given that the president is elected by a majority of the members of Parliament.

18. *Id.* ch. 4, § 48.

19. *Id.* sched. 3, § 2(a).

20. *Id.* § 2(b).

21. *Id.* sched. 2, § 1.

22. *Id.* ch. 4, § 43(b).

23. *Id.* § 59.

24. *Id.* § 62.

III. The Interim Nature of the New Constitution— Will It Sunset within Two Years?

A. HOW THE SUNSET PROVISIONS WORK

Although the Constitution cannot be amended without a two-thirds majority of both houses of Parliament sitting jointly, this Constitution is intended to be an interim measure only. One of the most important duties of the newly elected Parliament is to meet in a Constitutional Assembly, consisting of both houses of Parliament sitting jointly, for the purpose of drafting a new constitution.²⁵ If another constitution is not approved within two years of the first sitting of the Constitutional Assembly, the new Parliament will be dissolved and elections will again be held.²⁶

When one realizes that the new Parliament is charged with drafting yet another constitution, one must ask what is wrong with the latest one? Apparently, the ANC insisted that the new constitution could not be final and binding unless it had been discussed and debated in a democratically elected Constitutional Assembly. Mandela's motivation for insisting on this requirement is unclear. Perhaps the Constitution had to appear to be subject to renegotiation in order for Mandela to satisfy his constituents that they had not been short-changed by a group of self-appointed political leaders who had not yet been elected by the people. Or, possibly, Mandela wanted to give himself as much leeway as possible to legislate the structure of the new social order. Whatever the motivation, the right to renegotiate the new constitution may be more apparent than real because the procedure to obtain passage of the new constitution is so complex.

For the purpose of redrafting the new constitution after the election, the Senate and the House of Assembly, that is, Parliament, will sit jointly as a Constitutional Assembly.²⁷ One of the first acts of the Constitutional Assembly is to appoint an independent panel of five South African citizens "being recognised constitutional experts, not being members of Parliament or any other legislature and not holding office in any political party" to advise the Constitutional Assembly and to perform the important function of refereeing any new constitution that fails to obtain the approval of an appropriate two-thirds majority.²⁸ The panel of constitutional experts is to be appointed by a majority of at least two-thirds of the Constitutional Assembly.²⁹ If the requisite majority cannot be obtained, the panel of experts will consist of nominees of each party that holds at least forty seats in the Constitutional Assembly.³⁰

25. *Id.* ch. 5, § 68(1).

26. *Id.* § 68.

27. *Id.*

28. *Id.* § 72(2).

29. *Id.* ch. 5, § 72(3).

30. *Id.*

The Constitutional Assembly must pass a new constitution within two years from the date of its first sitting.³¹ A majority of at least two-thirds of all of the members of the Constitutional Assembly is required to pass the new constitution. However, any portion of the new constitution that relates to the boundaries, powers, and functions of the provinces will not be considered passed by the Constitutional Assembly unless approved by a majority of two-thirds of the members of the Senate.³² The reason for this exception is that all senators are elected on a per province basis and are likely, therefore, to guard the powers and privileges of the provincial regions.

If the Constitutional Assembly cannot pass a new constitution by the required two-thirds majority, but proposes a text supported by a simple majority, the draft will then be referred to the panel of constitutional experts for their consideration.³³ If the panel unanimously approves the proposed draft, it may then be referred back to the Constitutional Assembly for the Assembly to vote again on the proposed constitution.³⁴ Should the draft constitution not receive the unanimous approval of the panel of constitutional experts within thirty days after it is submitted to the panel, or should the new constitution receive the panel's approval, but thereafter fail to secure a two-thirds majority in the Constitutional Assembly, it becomes subject to a national referendum. In this national referendum, in which the electorate will be asked whether they accept or reject the new text, the new constitution then must be approved by 60 percent of the votes cast.³⁵ If this 60 percent majority cannot be obtained, Parliament will be dissolved and a new Parliament elected.³⁶ The new Parliament will then have to go back to the drawing board and produce yet another constitution supported by a 60 percent—not 66 percent—majority within one year.³⁷

Contrary to its expectations, the ANC failed to secure a two-thirds majority in South Africa's first multiracial election held in April 1994, obtaining approximately 61 percent of the vote. The Nationalist Party, which obtained little more than 20 percent of the votes, did not obtain enough votes to block the passage of a new constitution without the support of all of the other minority parties. Inkatha, the third largest political party, succeeded in obtaining approximately 10 percent of the votes. Accordingly, Inkatha could be pivotal in the passage of a new constitution; with Inkatha support, the ANC could afford to ignore the Nationalist Party. Even without the support of the Nationalists or Inkatha, conceivably the ANC could obtain the required 60 percent majority if the constitution it proposes goes to a referendum of the people.

31. *Id.* § 73(1).

32. *Id.* § 73(2).

33. *Id.* § 73(3).

34. *Id.* § 73(4).

35. *Id.* § 73(6).

36. *Id.* § 73(9).

37. *Id.* § 73(10).

Given the results of the election, the requirement that the new Parliament obtain passage of a new constitution within two years or face dissolution is likely to produce some interesting and unexpected political maneuvers. If no consensus can be reached, one solution to the problem simply may be for the parties to eliminate the sunset provision altogether by amending the existing Constitution.

B. THE CORE PROVISIONS OF THE CONSTITUTION

Whatever the form of the new constitution passed by the Constitutional Assembly, it must comply with the provisions of schedule 4 of the present Constitution. Schedule 4 contains thirty-three provisions that will form the core of the new constitution. These provisions are an effort to ensure that any new constitution passed will conform to certain basic democratic standards.

The fundamental principle is that any new constitution for South Africa should provide for the establishment of "one sovereign state, a common South African citizenship and a democratic system of government committed to achieving equality between men and women and people of all races."³⁸ Here, we see a bold statement that South Africa has learned what is probably the primary lesson of its past. Section II of schedule 4 provides that "[e]veryone shall enjoy all universally accepted fundamental rights, freedoms and civil liberties, which shall be provided for and protected by entrenched and justiciable provisions in the Constitution, which shall be drafted after having given due consideration to [among other things] the fundamental rights contained in Chapter 3 of this Constitution."³⁹

Section III of schedule 4 repeats that "[t]he Constitution shall prohibit racial, gender and all other forms of discrimination and shall promote racial and gender equality and national unity." Although this requirement is implicit in section II of schedule 4, which incorporates all provisions of the bill of rights,⁴⁰ the parties plainly believed—with good reason—that it must again be spelled out.

Section V of schedule 4 again reaffirms the principle of equality set forth in the bill of rights⁴¹ by providing that

"[t]he legal system shall ensure the equality of all before the law and an equitable legal process. Equality before the law includes laws, programmes or activities that have as their object the amelioration of the conditions of the disadvantaged, including those disadvantaged on the grounds of race, colour or gender."

This provision could also be a mandate for affirmative action or for social reform.

Section VI of schedule 4 provides that there will continue to be separation of powers and "appropriate checks and balances to ensure accountability, responsiveness and openness." Section VIII of schedule 4 requires that "[t]here shall be representative government embracing multi-party democracy, regular elections,

38. *Id.* sched. 4, § I.

39. See discussion of the bill of rights *infra* part IV.

40. CONST. ch. 3, § 8(2); see discussion *infra* part IV.

41. CONST. ch. 3, § 8(1); see discussion *infra* part IV.

universal adult suffrage, a common voters' roll, and, in general, proportional representation." The concept of a common voters' roll contemplates that all citizens of South Africa vote in the same election for the same seats. This system contrasts with the type of voting system that existed under apartheid, where separate races had separate voter's rolls: mixed-race people had to vote for the Colored House of Parliament; Indian people had to vote for the Indian House of Parliament; and black people had to vote for their respective homeland governments.

Sections IX to XXV of schedule 4 essentially provide for the perpetuation of the overall legislative, executive, judicial, and provincial structure created in the existing Constitution. Section XXVI of schedule 4 provides that "[e]ach level of government shall have a constitutional right to an equitable share of revenue collected nationally so as to ensure that provinces and local governments are able to provide basic services and execute the functions allocated to them." This provision is extremely interesting. If it had been enacted into the U.S. Constitution, it might help such revenue-producing states as California, Texas, New York, and Florida to obtain a greater proportion of available federal funds. Section XXVIII reiterates "the right of employers and employees to join and form employer organisations and trade unions and to engage in collective bargaining,"⁴² and that "every person shall have the right to fair labour practices." While these rights are also among the fundamental rights to be enacted pursuant to section II of schedule 4, the ANC thought them so important that it insisted that the obligation to perpetuate them in any new constitution be separately spelled out.

Section XVIII of schedule 4 provides that any amendments to the constitution that purport to modify the powers, boundaries, functions, or institutions of the provinces shall, in addition to any other procedures specified in the constitution for constitutional amendments, require the approval of a special majority of the legislatures of the provinces. Alternatively, if such a chamber exists by then, a two-thirds majority of a chamber of Parliament composed of provincial representatives will suffice. If the amendment concerns specific provinces only, the approval of such provinces is required. This provision ensures that the existing provincial structure is not modified by a two-thirds majority of Parliament or by a referendum of the nation as a whole unless any impairment of provincial rights is also approved by the newly elected regional provincial delegates. This provision was intended to offer consolation to the many federalists who negotiated the Constitution from the ANC.

C. WILL THE EXISTING CONSTITUTION REALLY CHANGE?

The sunset provisions of the Constitution are undesirable because they create uncertainty and a sense of impermanence at a time when South Africans are just

42. Compare with CONST. ch. 3, § 27; see discussion *infra* part IV.

beginning to accept the legitimacy of the new Constitution. While it was the ANC that insisted that the present Constitution have only a temporary existence, it may well be the ANC, the unquestioned winner of the elections and champion of the new status quo, that will stand to lose the most in subsequent constitutional deliberations. As the ANC becomes more comfortable with its ability to manipulate the existing system, the ANC may become the strongest advocate of extending the operation of the present Constitution without the need to enter into another debilitating constitutional debate. Moreover, the nation, including the ANC's own supporters, may have lost its stomach for more constitutional deliberations, at least for the time being.

Even if a residual desire to make changes remains, schedule 4 to the Constitution acts as a brake on radical change by requiring that, even if a new constitution is drafted, the core of the existing constitutional framework, including the provisions of the bill of rights, be embodied in the new constitution. By limiting future constitutional options, schedule 4 also reduces the attractiveness of trying to legislate significant substantive changes. Accordingly, it is not likely that the next constitution, if there is one, will be substantively different from the existing one.

IV. The Bill of Rights

The Constitution contains a bill of fundamental rights of which any democracy could be proud. It effectively adopts most of the constitutional rights embodied in the U.S. Bill of Rights as well as certain others in an effort to ensure that South Africa's past is never again repeated.

A. ANALYSIS OF THE BILL OF RIGHTS

1. *Equality before the Law*

Given South Africa's past history, not surprisingly the first right listed is that of equality.⁴³ Every person "shall have the right to equality before the law and to equal protection of the law."⁴⁴ Indeed, "[n]o person shall be unfairly discriminated against, directly or indirectly, and, without derogating from the generality of this provision, on one or more of the following grounds in particular: race, gender, sex, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture or language."⁴⁵

This remarkable laundry list of protected classes sums up the most essential credo of the new South Africa. It extends the highest protection to almost every vulnerable group of people and ensures that the covenant of equal protection is

43. CONST. ch. 3, § 8(1).

44. Compare with the Fourteenth Amendment to the U.S. Constitution, which provides for "equal protection of the laws."

45. CONST. ch. 3, § 8(2).

extended beyond the relatively narrow confines of race, national origin, and (to a limited extent) gender set by the U.S. Supreme Court.

2. *Privacy*

The Constitution also expressly recognizes a right to "personal privacy, which shall include the right not to be subject to searches of his or her person, home or property, the seizure of private possessions or the violation of private communications."⁴⁶ The way in which the right to privacy is specifically enunciated, that is, as encompassing those types of protections contemplated by the Fourth Amendment to the U.S. Constitution, may have the effect of limiting it. Given that the framers of the South African Constitution were probably well acquainted with the controversy in the United States surrounding *Roe v. Wade* and its progeny, and given South Africa's history of moral conservatism, the South African courts may not uphold a woman's right to an abortion based on this constitutional provision.

3. *Personal Freedoms*

The Constitution recognizes the rights to freedom of religion, freedom of expression, freedom of assembly, freedom of association, and freedom of movement.⁴⁷ Section 21 of the Constitution expressly gives every citizen the right "to form, to participate in the activities of and to recruit members for a political party; . . . to campaign for a political party or cause; and . . . freely to make political choices." Given South Africa's past history, the drafters of the Constitution not surprisingly felt the need to be so explicit. It remains to be seen, however, whether this provision is truly broad enough or explicit enough to bar the proscription of *any* political party or way of thinking that may be perceived as a threat to the national security of the state.

4. *Citizenship and Freedom of Economic Activity*

The Constitution expressly provides that everyone shall have the right "freely to choose his or her place of residence anywhere in the national territory."⁴⁸ Further "[e]very citizen shall have the right to enter, remain in and leave the Republic, and no citizen shall without justification be deprived of his or her citizenship."⁴⁹ Such express provisions were necessary because apartheid had limited the rights of many people to go where they wanted to go in the national territory and purported to deprive many black South Africans of their citizenship, replacing it with citizenship in various homelands, some of which those victims of apartheid had never seen.

46. *Id.* § 13.

47. *Id.* §§ 14-18.

48. *Id.* § 19.

49. *Id.* § 20.

Section 26 of the Constitution gives “[e]very person . . . the right freely to engage in economic activity and to pursue a livelihood anywhere in the national territory.” Until two years ago the Group Areas Act⁵⁰ officially required all races to confine their economic activities to markets in areas designated for their own ethnic groups. Section 26 is designed to ensure that this discrimination will never happen again.

5. *Access to Government Information*

Section 23 of the Constitution guarantees access to information and entitles every citizen to written reasons for any administrative action. Again, this provision is a reaction to the historic arbitrariness of the South African government, which until now has not been required to give reasons for its administrative actions. In a recent decision, delivered by the well-respected Witwatersrand Local Division of the Supreme Court of South Africa, the court relied on section 23 to justify the right of a plaintiff, who had sued the minister of safety and security for wrongful arrest and detention, to obtain production of the entire police docket, except for those portions that might be privileged.⁵¹ This decision marks a significant departure from prior South African legal thinking that had enshrouded police dockets in a halo of unwarranted secrecy.

6. *Due Process and the Nonexistence of the Jury*

Section 25(1) of the Constitution details the rights of every detainee:

to be informed promptly in a language which he or she understands of the reason for his or her detention; . . . to be detained under conditions consonant with human dignity, which shall include at least the provision of adequate nutrition, reading material and medical treatment at state expense; . . . to consult with a legal practitioner of his or her choice, to be informed of this right promptly and, where substantial injustice would otherwise result, to be provided with the services of a legal practitioner by the state; . . . to be given the opportunity to communicate with, and to be visited by, his or her spouse or partner, next-of-kin, religious counsellor and a medical practitioner of his or her choice; and . . . to challenge the lawfulness of his or her detention in person before a court of law and to be released if such detention is unlawful.

The unusual detail of these provisions is a reaction to South Africa’s past history of detaining suspected political offenders for indefinite periods of time without trial, adequate reading or writing materials, or access to their lawyers, personal physicians, or families.

Section 25(3) of the Constitution concerns the right of “accused” persons in a criminal case to a fair trial and explicitly details what this right means. A fair trial includes the right “to a public trial before an ordinary court of law within a reasonable time after having been charged,” the right to be presumed innocent,

50. Group Areas Act No. 36 of 1966.

51. *Khala v. Minister of Safety and Security*, Case No. 33562192 (Witwatersrand Local Division, July 25, 1994) (by Myburgh, J.) (unreported).

and the right "to remain silent during plea proceedings or trial and not to testify during trial."

The right to remain silent during plea proceedings is specifically spelled out because the Criminal Procedure Act⁵² gave an accused person an opportunity to furnish an explanation of their plea at the plea stage, which often occurred before legal representation had been provided. Under this provision, uneducated and unrepresented criminal defendants would frequently make statements very damaging to their defense because they believed that when the magistrate offered them the opportunity to make such a statement, they were required to respond. Moreover, it was not uncommon for judicial officers to draw an implicit adverse inference from an arrested person's failure to give a pretrial explanation of plea. Presumably, the explicit reservation of a right to remain silent during plea proceedings will be interpreted as requiring the magistrate to ensure that an accused person understands that a statement is not mandated, and that no adverse inference may be drawn from the failure to make such a statement.

The Constitution recognizes an accused person's right to legal representation at state expense only where "substantial injustice would otherwise result."⁵³ Prior to the enactment of the Constitution, criminal defendants were generally provided access to pro deo (pro bono) counsel only in capital cases. Although in practice access to pro deo counsel was never denied in capital cases, an indigent accused had no *right* to such representation. Accordingly, in capital cases, pursuant to the new Constitution, legal representation seems certain to be provided at state expense. Whether a South African court will conclude that the absence of legal representation results in injustice in any case where an accused person faces the prospect of a substantial prison sentence remains to be seen.

Section 22 of the Constitution guarantees access to the courts in civil disputes. Nevertheless, the Constitution does not afford any criminal defendant or party to a civil suit the right to a jury trial. South African law had permitted jury trials in civil and criminal litigation until the 1960s when juries were abolished. The appallingly inequitable decisions of the all-white juries of the apartheid years, particularly in cases that had racial overtones, have led South Africans of all colors and occupations to have an inherent distrust of juries. It seems unlikely that this provision will change in the near future.

7. *Children's Rights*

Section 30 of the Constitution provides that "[e]very child shall have the right . . . to a name and nationality as from birth; . . . to parental care; . . . to security, basic nutrition and basic health and social services; . . . not to be subject to neglect or abuse; and . . . not to be subject to exploitative labour practices." The first enumerated right—to a name and nationality as from birth—ensures

52. No. 51 of 1977.

53. CONST. ch. 3, § 25(3)(e).

that all persons born on South African soil are, and shall remain, South African citizens. The other provisions of this section take an unusually courageous stand, particularly given South Africa's current weak economic condition. This section mirrors the egalitarian orientation of the ANC and its concern to ensure that the poor are protected.

8. *The Environment*

Section 29 of the Constitution gives "[e]very person . . . the right to an environment which is not detrimental to his or her health or well-being." The meaning of this provision is not absolutely clear and it will no doubt give rise to some interesting issues of interpretation. What is an environment that is detrimental to well-being? What will be the rights of citizens finding themselves in environments detrimental to their health or well-being? Does this section obligate the government to take care of the environment? Does it bind individuals or only government institutions? What is the remedy—tearing down the nuisance or providing compensation to permit the citizen to move to a more satisfactory environment?

9. *Property Rights and the Reparation Provisions*

Section 28 of the Constitution provides that "[e]very person shall have the right to acquire and hold rights in property and, to the extent that the nature of the rights permits, to dispose of such rights." Throughout most of the rule of the old regime, all population groups were limited to owning properties in their respective designated areas and, for a large portion of that period, black people were not permitted to own any property at all. Accordingly, section 28 is another "never again" provision. Section 28 also forbids the deprivation of rights in property except according to law, but allows the government eminent domain rights upon payment of compensation to be agreed upon or to be determined by a court of law.

The fundamental rights enumerated in section 28 are in part limited by the restitution rights conferred on the victims of apartheid under section 121 of the Constitution. Section 121 provides for restitution of land rights to a person or community dispossessed of such rights at any time after a date to be fixed by South Africa's first multiracial Parliament, provided that no deprivation of land rights earlier than June 19, 1913, may be reversed. Restitution can only occur if the "dispossession was effected under or for the purpose of furthering the object of a law which would have been inconsistent with the prohibition of racial discrimination."⁵⁴ Thus, black, Indian, and Colored people who were forcibly removed from their land in the darkest days of apartheid will be permitted to obtain restitution from the government in limited circumstances.

54. *Id.* § 121(2)(b).

The restitution contemplated is restricted to restoration of confiscated land. Such restoration may occur where the land is in the possession of the state and the state certifies that restoration "of the right in question is feasible,"⁵⁵ or where the land is "in the possession of a private owner and the state certifies that the acquisition of such land by the state is feasible."⁵⁶

Any restitution is subject to court supervision. The court may not order restitution

unless it is just and equitable to do so, taking into account all relevant factors, including the history of the dispossession, the hardship caused, the use to which the property is being put, the history of its acquisition by the owner, the interests of the owner and others affected by any expropriation, and the interests of the dispossessed.⁵⁷

Moreover, no expropriation of privately held land may occur unless the owner receives reasonable compensation.⁵⁸

The restitution rights are carefully juxtaposed against the property rights of the present owners of the land and are also subject to significant limitations. First, the requirement that these restitutions cannot occur unless the state certifies that the restoration is feasible gives the state considerable discretion to refuse certification where, for example, the state does not have the money to pay just compensation. Second, the court has the discretion to refuse to permit the expropriation, even where it is feasible and reasonable compensation is offered. Third, no existing owner of land may be dispossessed to effect restitution unless such owner receives adequate compensation as determined by the court. In short, while the ANC successfully negotiated some leverage to accomplish land reform, this reform will probably not be significant.

10. *Language, Cultural Affiliations, and Education*

Every person shall have the right to "use the language and to participate in the cultural life of his or her choice."⁵⁹ Never again will individuals be forced to live and associate with specific population groups because of an accident of birth.

Every person shall have the right to:

basic education and to equal access to educational institutions; . . . to instruction in the language of his or her choice where this is reasonably practicable; and . . . to establish, where practicable, educational institutions based on a common culture, language or religion, provided that there shall be no discrimination on the ground of race.⁶⁰

In 1976 the black ghetto of Soweto burst into flames after the Nationalist government tried to force black children to learn through the medium of Afrikaans,

55. *Id.* § 123(1)(a).

56. *Id.* § 123(1)(b).

57. *Id.* § 123(2).

58. *Id.*

59. *Id.* ch. 3, § 31.

60. *Id.* § 32.

viewed as the language of the oppressor. Accordingly, this provision probably had as much support from the ANC negotiators as it did from the Afrikaans representatives who were anxious to protect their own language and culture.

Section 32, however, is ambiguous because it is not clear whether it obligates the state to provide these types of educational institutions, or whether it simply permits every cultural, linguistic, or religious group to choose its own form of education without government subsidy. If the government is required to provide educational institutions to people of different religions, the Constitution probably does not separate church and state in the way in which such separation is understood in the United States.

11. *Labor Rights*

One of the most interesting constitutional provisions is section 27, which deals with labor rights. It provides that every person:

shall have the right to fair labour practices. . . . Workers shall have the right to form and join trade unions, and employers shall have the right to form and join employers' organisations. . . . Workers and employers shall have the right to organise and bargain collectively. . . . Workers shall have the right to strike, and employers shall have the right to lock out.⁶¹

This provision, more than any other, is included in deference to the ANC's dependence upon organized labor.

Section 27 is simply a summary of the basic collective bargaining rights of employees and employers more fully enumerated in the existing Industrial Relations Act,⁶² which—strangely enough—is itself an enactment of the right-wing pre-De Klerk Nationalist regime. This Act's concepts of unfair labor practices and methods of industrial arbitration and mediation are not significantly different from the provisions of the National Labor Relations Act of the United States. Moreover, the Act itself is quite symmetrical; it affords collective bargaining rights not only to employees but also to employers. In short, there is nothing radical in section 27. Section 27, however, is unusual in that it defines the rights of labor to organize, to strike, and to lock out, and the right of employees and employers to bargain collectively as fundamental rights. In this respect it goes far beyond the U.S. Constitution.

Even in a state of emergency⁶³ or declaration of martial law, the right to free labor practices, the right of workers to form and join trade unions, and the right of employers to form and join employers' organizations may not be suspended. However, the right to bargain collectively, the right to strike, and the right to lock out may be suspended.⁶⁴ This ability to limit the right to strike and lock out

61. *Id.* § 27.

62. Labour Relations Act No. 28 of 1956.

63. *See infra* part IV.B.

64. CONST. ch. 3, § 34(4).

in a state of emergency is a provision that the ANC probably quite shrewdly allowed the Nationalists to "insist" on including in the Constitution because the ANC knew, better than anybody else, how dangerous a strike can be to a government faced with insurrection or civil strife.

B. LIMITATIONS ON THE ENTRENCHED PROVISIONS OF THE BILL OF RIGHTS AND DECLARATIONS OF MARTIAL LAW

Incredibly, after this careful liturgy of fundamental rights, section 33 of the Constitution declares that the so-called fundamental rights entrenched by the Constitution "may be limited by law of general application, provided that such limitation . . . shall be permissible only to the extent that it is . . . reasonable; and . . . justifiable in an open and democratic society based on freedom and equality; and . . . shall not negate the essential content of the right in question."

In an effort to confine this limitation, section 33 states that any limitation on a short list of selected entrenched rights such as the right to human dignity, to freedom and security of one's person, to freedom of religion, and the right not to be subjected to servitude or forced labor, may only be encroached upon where the limitation is also "necessary." Even more surprising, section 33 stands in marked contrast to section 62 of the Constitution, which requires that any bill amending the Constitution be adopted by a majority of at least two-thirds of *all* members of both houses of Parliament sitting jointly. Accordingly, while other provisions of the Constitution require a two-thirds majority to be amended, the entrenched fundamental rights can be limited so long as the limitation is "reasonable" and in some cases "necessary."

Section 33 has already been interpreted by the courts in *Khala v. Minister of Safety and Security*.⁶⁵ In *Khala* the court concluded that, but for the provisions of section 33, a suspect in a criminal investigation would be entitled to access to *all* of the police docket in a civil litigation claim for damages for wrongful arrest and unlawful detention. However, section 33 limits this right of access where it is reasonable and justifiable in an open and democratic society based on freedom and equality, and where it does not negate the essential content of the right in question. The court held that the burden of establishing that a limitation on a fundamental right was reasonable and justifiable rests with the persons seeking to limit the right.

The *Khala* court also held that the right of the prosecution—or the police—to assert the common law doctrine of police privilege, including the right not to disclose the identity of a police informant and not to disclose documents and communications prepared or obtained for the purpose of pending litigation, is reasonable and justifiable and does not negate the essential right of access to official information enjoyed by members of the public generally. Section 33 does

65. See *Khala*, *supra* note 51.

not, however, permit the prosecution to withhold *all* of the contents of a police docket as was asserted by the minister of safety and security. Rather this section permits only the withholding of properly privileged portions of the police docket. In order to claim the privilege, the police must provide a privilege log in the same manner as any other litigant.

In reaching its conclusion, the court looked at how democratic societies such as the United States, the United Kingdom, Canada, Australia, and New Zealand dealt with the concept of police privilege and whether they recognized it in their law. Presumably, if these jurisdictions did not recognize a related privilege, the South African court would not have recognized the privilege as a ground for withholding access to all of the police docket.

That great weight was placed upon the decisions of these democratic countries offers some comfort as to what types of limitations the courts will permit on the South African bill of rights in the future. However, it is possible that in a different climate, such as one that might prevail in five or ten years after the initial euphoria of democracy has faded, the court may conclude that some inroad on a fundamental right is permissible because of a perceived political or ideological threat to the safety of the state. With the prior regime, the ideological threat that might have been used to distinguish South Africa's position from those of other democracies might have been the state of emergency created by the communist threat. In the case of the new ANC government, justification might someday be sought in some unusual right-wing threat that arguably does not exist in the more established democracies.

The entrenched fundamental rights may also be suspended in a state of emergency, that is, a declaration of martial law.⁶⁶ In this connection, the statute is very specific about when a state of emergency can be declared, how it can be declared, and what will be the rights of detainees in a state of emergency. Martial law may be declared only under an Act of Parliament for a period not to exceed twenty-one days, unless it is extended for a period of not longer than three months, or for consecutive periods of not longer than three months at a time, by regulation of the National Assembly adopted by a majority of at least two-thirds of all of its members.⁶⁷ In other words, the same parliamentary procedure is necessary to extend a state of emergency beyond twenty-one days as is required to amend the Constitution.

Moreover, certain fundamental rights cannot be abridged even in a state of emergency, for example, the right to be protected from unfair discrimination; the right to life, human dignity, not to be subjected to torture of any kind, and not to be subjected to servitude or forced labor; the right to freedom of religion; and the right to organize in labor unions and employer organizations. Essentially,

66. CONST. ch. 3, § 34.

67. *Id.* § 34(2).

the Constitution protects the right to be treated or—in the case of martial law, mistreated—equally before the law.

Section 34 also provides that detainees held during a state of emergency shall have the right: (a) to appear in court in person; (b) to have access to and be represented by legal counsel of their choice; (c) to make representations against their continued detention; (d) to have access to legal representatives of their choice; (e) and to have access to medical practitioner of their choice.⁶⁸ Section 34 also prohibits the indemnification of the state or of any “persons acting under its authority for unlawful actions” performed during the state of emergency.⁶⁹

These very specific limitations on the right to declare a state of emergency are a reaction to the indefinite states of emergencies proclaimed by Prime Minister Vorster in 1976 and President Botha in 1985. During that period, hundreds of people were detained for months on end without access to legal representation, members of their family, or doctors of their own choice. Habeas corpus rights were suspended and police were indemnified from almost any action allegedly performed in furtherance of the state of emergency.

C. INTERPLAY BETWEEN THE BILL OF RIGHTS AND THE “SUNSET” PROVISIONS OF THE CONSTITUTION

Another possible threat to the bill of rights is the requirement that the Constitution be amended within two years. Although any new constitution is required to give “due consideration to . . . the fundamental rights” contained in the bill of rights,⁷⁰ the existing Constitution stops short of requiring that *all* provisions of the bill of rights be incorporated and entrenched into any new constitution. Nevertheless, it seems unlikely that a new constitution will significantly change the existing bill of rights.

V. The Constitutional Court

When the new Constitution was enacted, South African courts had almost no power to review or reverse acts of Parliament on any constitutional ground other than that they violated the parity of the then official languages, English and Afrikaans.⁷¹ South African courts, however, did have a limited power to review delegated or subordinate legislation—that is, the legislation of a provincial assembly or executive body—and were permitted to review the validity of an executive act or order. By contrast, the new Constitution creates a new, separate Constitu-

68. *Id.* § 34(6)(d)-(f).

69. *Id.* § 34(5)(b).

70. *Id.* sched. 4, § II.

71. Indeed, South African courts have not reversed any act of Parliament since the late 1950s when the Appellate Division of the Supreme Court struck down the High Court of Parliament Act. See *supra* part I.A.

tional Court that has jurisdiction "of final instance over all matters relating to the interpretation, protection and enforcement of the provisions of [the] Constitution."⁷² The Constitutional Court shall have sole jurisdiction to determine the constitutionality of an act of the national Parliament or any bill before it; sole jurisdiction over any dispute of a constitutional nature between the organs of the national government; and sole jurisdiction to determine which questions fall within its jurisdiction.⁷³

At the same time, the existing Supreme Court of South Africa also will have jurisdiction over "alleged . . . or threatened" violations of any fundamental right contained in the bill of rights; the constitutionality of any executive or administrative act; the constitutionality of any local or provincial legislation; and disputes between provincial governments, local governments, or between local and provincial governments.⁷⁴ The Supreme Court also has jurisdiction to determine whether matters fall within its jurisdiction. All appeals concerning constitutional matters that originate in the Supreme Court shall be appealed to the Constitutional Court, not to the appellate division.⁷⁵

Given the importance of the Constitutional Court, it is obviously crucial that the members of the Constitutional Court be appointed in such a way as to assure their independence. In this connection, the Constitution provides for an elaborate system of checks and balances in the appointment process.

The Constitutional Court is to consist of a president and ten other judges appointed by the president of South Africa.⁷⁶ Unless a new constitution provides differently, the judges of the Constitutional Court are to be appointed for a nonrenewable period of seven years, not for life.⁷⁷ Any member of the Constitutional Court must already be a judge or have sufficient training and experience to qualify for appointment as a judge.⁷⁸ Four judges of the Constitutional Court are to be appointed from among the existing judges of the Supreme Court by the president of South Africa in consultation with the cabinet and the existing chief justice of the Supreme Court.⁷⁹ The president of South Africa, in consultation with the appointed president of the Constitutional Court and with the cabinet, shall appoint the other six judges from a group of nominees submitted by a Judicial Services Commission.⁸⁰

The Judicial Service Commission itself is a complex body. The Commission shall consist of the chief justice of South Africa; the president of the Constitutional

72. CONST. ch. 7, § 98(2).

73. *Id.* § 98.

74. *Id.* § 101(3).

75. *Id.* § 101(5).

76. *Id.* § 98(1).

77. *Id.* § 99(1).

78. *Id.* § 99(2).

79. *Id.* § 99(3).

80. *Id.* § 99(4)-(5).

Court; one judge president—that is, the chief justice of a province—designated by all of the judges president; the minister responsible for the administration of justice; two practicing advocates—barristers—designated by the advocates' profession; two practicing attorneys—solicitors—designated by the attorneys' profession; one professor of law designated by the deans of all the law faculties at South African universities; four senators designated by the Senate by resolution adopted by a majority of at least two-thirds of all of its members; and four persons, two of whom shall be practicing attorneys or advocates designated by the president in consultation with the cabinet.⁸¹

The composition of the Judicial Service Commission indicates that the Commission will not be able to agree upon nominations to the Constitutional Court unless the nominees are highly respected lawyers whose impartiality is unquestioned. Indeed, the whole confirmation process is so complex that, within six months of the election, no constitutional court had been appointed.

VI. Conclusion

The South African Constitution represents an attempt to right the wrongs of the past and move forward. It has a well-considered, well-drafted bill of rights that promises a brave new world to all of South Africa's citizens whatever their race, gender, sex, ethnic or social origin, color, sexual orientation, age, disability, religion, conscience, belief, culture, or language. Its strong provisions protect traditional capitalist values, such as private property, while at the same time offering significant protections for organized labor. It also holds out the possibility of reparations for those members of South Africa's black, Colored, and Indian communities who were forcibly dispossessed of their land in the darkest days of apartheid.

Unfortunately, the Constitution suffers from certain flaws. The requirement that the Constitution be rewritten within two years upon pain of dissolution of Parliament, although not likely to produce substantial changes, creates uncertainty and a sense of impermanence that needlessly detracts from the aura of legitimacy of the new sovereign. Second, the concept that the fundamental rights embodied in the Constitution can be limited by an Act of Parliament passed by a simple majority of Parliament under certain broadly defined—and vague—circumstances could pose a serious threat to these rights once the euphoria of the new South Africa subsides. Third, the unitary provincial elements of the Constitution make it easier to effect significant changes to the bill of rights that might not be possible in a more overtly federal structure.

Whatever the new Constitution's weaknesses, lawyers in the established democracies should avoid viewing it with too much cynicism. The experience of the United Kingdom shows that even where there is no formal constitution, the

81. *Id.* § 105.

conscience of the people is probably the ultimate guardian of democracy. When one considers how far the warring South African parties have come in creating the South African Constitution—without any outside intervention—and how peacefully the elections were accomplished, there may be more than enough goodwill to go around. Even if there is not, a concerted and prolonged campaign of disingenuous political maneuvering would be needed to tear down the democratic structure created in the new Constitution.