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Rule Under Apartheid and the Fledgling Democracy in Post-Apartheid South Africa: The Role of the Judiciary

Justice Tholakele H. Madala*

I. Introduction

Chairperson, Dean of the University of North Carolina School of Law, eminent professors, distinguished guests and participants, ladies and gentlemen. Let me start by apologising most profusely for my inability to be with you on this great occasion. But I must thank the organisers of the North Carolina Journal of International Law and Commercial Regulation for having invited me to participate in this auspicious symposium, Apartheid to Democracy in South Africa. I trust that I shall be able to honour another invitation on another day.

I wish to pay particular tribute to my old friend, Professor Ken Broun, and to congratulate him for his sterling book, *Black Lawyers, White Courts,* the culmination of his many years of association with the underprivileged black lawyers of South Africa and his unwavering support of their cause. Ken Broun and James Ferguson were among the first American attorneys from the National Institute of Trial Advocacy to introduce and train black lawyers in South Africa in the NITA method of trial advocacy in 1986 during Mr. Pitje’s time. Those were times of intense domination by the regime and intense resistance by the oppressed

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* Justice of the Constitutional Court of South Africa. Justice Madala matriculated in 1956 at St. John’s College in Umata. He took up law in 1972 at the University of Natal (Pietermaritzburg). He took silk in 1993 and was elevated to the Bench in the Eastern Cape in 1994 becoming the first black judge in the Eastern Cape and the fourth black judge to be so appointed in South Africa.


2 Godfrey Pitje was, in his time, a prominent lawyer and a protagonist of human rights. He was a member of the Black Lawyers’ Association who was committed to resisting apartheid, racism, and injustice. For further discussion of Godfrey Pitje’s life, see BROUN, *id.* at 1-29.
majority. At great risk to himself, Ken braved those difficult times and travelled to South Africa to help his black brothers and sisters in the law. Ken taught all over South Africa. Does he not deserve huge applause? We are proud of you, Ken.

As I sat pondering over what I should say to this august gathering, many thoughts hurtled through my mind as memory after memory came to the forefront, each one demanding expression. I finally settled on the judiciary’s role during the apartheid era and the ground it has covered under the new democratic dispensation.

II. Apartheid: A Historical Background

John Attanasio, writing in the *Southern Methodist University Law Journal*, made the observation that “South Africa has achieved what few commentators thought was possible—a peaceful revolution from an authoritarian, apartheid regime to an egalitarian, democratic government. Fifteen years ago, few would have dared to imagine such a peaceful revolution possible. Predictions abounded of large-scale fighting and even civil war.”

Our history bears testimony to appalling abuses of human rights. The law defined and enforced apartheid. Despite the world’s continuing censure, the state managed to sustain this abhorrent regime through all of its arms. South Africa and the international community have chronicled apartheid’s practice and effects. If inequality, authoritarianism, and repression pervaded the past, the aspiration of the future is based on a society committed to equality, freedom, and democracy—indeed, a new South Africa.

Under apartheid prior to 1994, we, as black South Africans, had undergone fifty years of an oppressive system whose basic characteristics were disempowerment, disenfranchisement, repressive laws, and unprecedented violations of human rights resulting in untold suffering for the great majority of our population. Apartheid affected the black population socially, politically, and economically. It was a complex set of practices aimed at the domination and subjugation in differing degrees of

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3 Dean and William Hawley Atwell Professor of Constitutional Law, Southern Methodist University School of Law.

the African, the Coloured, and the Indian.

Prior to the first democratic elections, the government granted only small categories of African and so-called "Coloured" persons the vote. By 1956, however, the government, through a series of constitutional amendments, granted only whites the right to vote. By 1970, the elected Parliament had neither direct nor indirect representation of African or Coloured South Africans. In effect the majority of the country's citizens, African, Coloured, and Indian persons, were not involved in the running of the country. The legal system was engineered to cater to the white minority, which made laws for itself and for others, with the latter having no say in the system's development. This system enabled the minority to follow a policy of white supremacy the legal system maintained and enforced. To this end, the government introduced a plethora of laws stifling political dissent. Under these laws, the State

5 See, e.g., § 35(1) of South African Act of 1909 (repealed 1983 & 1993) (confirming limited grant of franchise to all male persons, regardless of race, who possessed property valued at seventy-five pounds or who had earned not less than fifty pounds during the previous twelve months and who could write down their name, address, and occupation). The Act, which established the Union of South Africa in 1910, entrenched the voting rights of some 20,000 African and Coloured voters in the Cape Province, a number representing approximately fifteen percent of all parliamentary voters in that region. ALBIE SACHS, JUSTICE IN SOUTH AFRICA 164 (1973). A special section of the Act provided that no one be removed from the voters' roll on account of race with the exception that such action could be authorized by a law passed by two-thirds of the House of Assembly and the Senate sitting together. Id. In 1936, African voters were removed from the rolls by the requisite majority and were placed on a special roll that entitled them to elect three white persons to the House of Assembly and four white persons to the Senate. Id. The House and the Senate, at this time, had a total of nearly two hundred members. Id. In 1956, Coloured voters were placed on a separate voters' roll that entitled them to elect three white persons to the House of Assembly. Id. This time the necessary two-thirds majority of the House and the Senate was obtained after a long constitutional battle that culminated in the reconstitution and enlargement of the Senate. Id. In 1959, African representation in Parliament was totally abolished; the same fate befell Coloured persons in 1968. Id.

6 SACHS, supra note 5, at 164.

7 Id.

8 See, e.g., § 1(1)(d) of Suppression of Communism Act 44 of 1950 (repealed 1991) (defining "communism" as any activity "which aims at the encouragement of feelings of hostility between the European and non-European races of the Union"); § 1(1)(b) (defining "communism" as activity "which aims at bringing about any political, industrial, social, or commercial change within the Union by the promotion of disturbance or disorder"); The Internal Security Act 74 of 1982 (institutionalising detention of political dissidents and defining broadly political crimes, such as subversion,
President was given power to declare states of emergency and to make regulations in the interest of public safety. These regulations included granting indemnity to members of the state and members of the security forces for their conduct. The states of emergency permitted detention without trial of persons for periods from 90 to 180 days.

The apartheid regime indeed touched every aspect of life—land ownership, education, employment, freedom of speech to include political activity).

9 See Public Safety Act 3 of 1953 (repealed 1995). This Act gave the State President power to declare a state of emergency, which he did on numerous occasions beginning in 1985. Id. Regulations promulgated under the Act provided for extensive powers of arrest and detention without trial; they also substantially curbed the dissemination of information about the state of unrest in South Africa. Id.; see, e.g., Proc R109, in GG9877 of 12 June 1986.


11 § 17 of General Law Amendment 37 of 1963 (repealed 1982) (providing for a ninety-day detention without trial). Section 17 was passed following an upsurge of “terrorist” activities of Pogo, the militant wing of the banned Pan African Congress. Id.; see also § 12B of Suppression of Communism Act 44 of 1950 (repealed 1991) (providing for a 180-day detention period without trial where the detainee was a potential state witness and not, as under the ninety-day detention period, an accused defendant); § 6 of Terrorism Act 83 of 1967 (repealed 1982 & 1996) (including provisions legalizing indefinite detention without trial for interrogation purposes). But cf. §§ 19(1)(a)bis, 10sex of Suppression of Communism Act 44 of 1950 (repealed 1991) (providing for preventative detention).

12 See, e.g., Natives Land Act 27 of 1913 (repealed 1991); Native Trust and Land Act 18 of 1936 (repealed 1991) (effectively making it impossible for members of the African community, by far a racial majority in South Africa, to own land in some eighty-seven percent of the country). The curtailment of the freedom to own property was bolstered by other legislation, including the Asiatic Land Tenure and Indian Representation Act 28 of 1946, (repealed 1991), the Group Areas Act 41 of 1950 (repealed 1957), and the Black (Urban) Areas Consolidation Act 25 of 1945 (repealed 1986). Africans were initially referred to in statutes as “Natives.” This term was later changed to “Bantu,” and eventually to “Blacks.” The short titles of the statutes reflect the name used to refer to Africans at the time the statute was promulgated.

13 The system of Bantu education was initiated during the 1950s and enacted into law by the Bantu Education Act 47 of 1953 (repealed 1979), the Indians Education Act 61 of 1965, 3 BSRSA pt. 8 (2000), the Coloured Persons Education Act 47 of 1963, 3 BSRSA pt. 8 (2000), and the Extension of University Education Act 45 of 1959 (repealed 1988).

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and association,\textsuperscript{15} judicial administration, residence and accommodation,\textsuperscript{16} and even marriage.\textsuperscript{17} The system had deleterious effects on the black majority and on the minority groups of colour. It imposed obligations and burdens on them, which, apart from being discriminatory, were without any obvious justification. In the period before the advent of the new democratic order, it is common cause, in the words of my erstwhile brother, Chief Justice Mahomed, that,

[for decades South African history has been dominated by a deep conflict between a minority that reserved for itself all control over the political instruments of the state and a majority who sought to resist that domination. Fundamental human rights became a major casualty of this conflict as laws designed to

\textsuperscript{15} See, e.g., § 15 of Internal Security Act 74 of 1982 (repealed 1991) (requiring registration of all newspapers and, for those newspapers which the Minister of Law and Order believes may be banned pursuant to § 5, a large deposit); § 47(2) of Publications Act 42 of 1974 (repealed 1996); § 29 of Black Administration Act 38 of 1927 (repealed 1993). The infringement of these fundamental freedoms included restrictions on black persons' ability to organise politically. See § 2 of Suppression of Communism Act 44 of 1950 (repealed 1991); § 1 of Unlawful Organisations Act 34 of 1960 (repealed 1982) (empowering the State President to outlaw organizations in the interest of the safety of the public or the maintenance of public order), and § 4(1) of Internal Security Act 74 of 1982 (repealed 1996) (empowering the Minister of Law and Order to proscribe an organization that, among other things, "engages in activities which endanger the security of the State or the maintenance of law and order").

\textsuperscript{16} See, e.g., Group Areas Act 41 of 1950 (repealed 1957) (restricting residence in urban areas on the grounds of race); see also Proc R293, in GG66373 of 16 November 1962 in terms of the Native Administration Act 38 of 1927, 6 BSRSA pt. 28 (2000) (making provision for the establishment of a special kind of township by the Minister of Bantu Administration and development for African citizens in areas of land held by the "South African Native Trust"). Even a cursory reading of the Proclamation conveys the demeaning and racist nature of the system of which it was a part. \textit{Id.} Provision was made for the "Ethnic Character of [the] Population of Township[s]." \textit{Id.} Limited forms of tenure were created by way of "deeds of grant" and "certificate[s] of occupation of a letting unit for residential purposes." \textit{Id.} (emphasis added). The tenure was a precarious one and could be cancelled by the township "manager" in the event, amongst others, of the holder of the right "ceasing to be in the opinion of the manager a fit and proper person to reside in the township." \textit{Id.} There were also detailed provisions relating to trading and other activities in the townships and to their control. \textit{Id.} For further details, see DVB Behuising, Ltd. v. N.W. Provincial Gov't & Another, 2000 (4) BCLR 347 (CC).

\textsuperscript{17} See, e.g., Prohibition of Mixed Marriages Act 55 of 1949 (repealed 1985) (forbidding marriage between a European and non-European and providing that any such marriage is void).
counter the effectiveness of such resistance met the resistance of those punished by their denial. The conflict deepened with the increased sophistication of the economy, the rapid acceleration of knowledge and education and the ever increasing hostility of an international community steadily outraged by the inconsistency which had become manifest between its own articulated ideals after the Second World War and the official practices which had become institutionalised in South Africa through laws enacted to give them sanction and teeth by a Parliament elected only by a privileged minority. The result was a debilitating war of internal political dissension and confrontation, massive expressions of labour militancy, perennial student unrest, punishing international economic isolation, widespread dislocation in crucial areas of national endeavour, accelerated levels of armed conflict and a dangerous combination of anxiety, frustration and anger among expanding proportions of the populace. The legitimacy of law itself was deeply wounded as the country hemorrhaged dangerously in the face of this tragic conflict, which had begun to traumatise the entire nation.  

The rule of law was among the greatest and most serious casualties of apartheid. The practice of the law and fundamental human rights were on one side of the system. A decline in the moral fibre of society and a collapse of social values were on the other side. The system created a society in which the majority came to regard the courts, judges, and the administration of justice with suspicion and anger. In the eyes of the oppressed, the system came to represent an enforcement of injustice and a denial of protection. Society reached a stage where it was ready to defy and disobey the law and, in fact, did so.

The judiciary, in general, was unable to resolve the impasse. It did not have the option to review and reverse unjust laws; rather, the courts and all the other institutions had to implement and administer such laws. In the nature of things, because that power had not been consented to or mandated by the great majority of the people over which it was exercised, rule had to be by force; thus, draconian laws and measures were unleashed on the people. The government carried out forced removals of whole communities,

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detentions without trial, and solitary confinements. The government used strict security measures and other practices to make people disappear; many were killed in police custody. Certain measures rendered the security forces, the police, and the army unaccountable, to a large degree, to anyone. Consequently, these groups were at large to commit atrocities on an unprecedented scale.

III. Apartheid and Black South African Lawyers

Ken’s book provides examples of how black legal practitioners in South Africa struggled under the stranglehold of the apartheid regime. The incident involving Lewis Skweyiya stands out in my mind. Subsequent to a political trial in the Transkei, where his clients were acquitted, two security policemen, who told him that he was to be detained under the security laws, accosted him. He was sure there had been some mistake, so he asked to phone the chief of the Security Police. However, the official responsible for his arrest had gone away for the weekend and could not be reached. Skweyiya and his clients were taken away in a van because the magistrate ordered their removal from the court and their transportation to the South African border where they were left, despite their acquittal. “My clients were feeling sorry for me. ‘Oh, we’re sorry, we’re so sorry.’ That I also can’t forget.”

Skweyiya was in detention for eleven days and was released because of pressure from the bar council and other complaints. “I was quite convinced that it was malicious detention.” That was Skweyiya’s only detention, but he was hounded incessantly with threatening calls from anonymous individuals whom he suspected were from the Security Police. The callers would say, “What has happened to [Griffiths] Mxenge is going to happen to you.”

I often faced the same kind of harassment from the Security Police. I use the case of the death of Sabata Dalindyebo, King of the Tembus, to serve as an example. King Dalindyebo had died in Zambia, and his body was brought back to the Transkei for burial. The Dalindyebo family approached me to bring an urgent application preventing the burial from taking place in the Transkei

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19 BROWN, supra note 2, at 138.
20 Id.
21 Id.
because it meant laying the king to rest in ground not reserved for royalty. The urgency of the application was such that we had initiated proceedings at 12:00 a.m. and were intending to move the application at 4:00 a.m. Therefore, in the early hours of the morning, I had twenty-odd people in chambers. This group, including Winnie Madikizela-Mandela and various members of the Dalindyebo family, was instrumental in drafting the necessary documents. Because there was a state of emergency in the Transkei, we were all required to carry permits authorising us to be in my chambers at that time. The Security Police stationed a van outside the window and watched every move we made. They harassed every person entering or leaving the building.

IV. The Judiciary’s Role in the Apartheid Regime

The judiciary tended to shy away from commenting critically on apartheid and its legal consequences in their judgments although there were many opportunities for them to do so. Perhaps they were not going to rock the boat; perhaps they considered it inappropriate; perhaps they considered themselves bound to apply the law as they found it. But on occasion, they went so far as to sanction discrimination in their courthouses even in the absence of laws compelling them to do so, as is demonstrated by an incident involving Godfrey Pitje. While Pitje was serving as an article clerk with Mandela & Tambo, Tambo gave Pitje a file concerning the case of a Coloured man in Boksburg who was trading without a license and had been arrested. Unbeknownst to Pitje, Tambo had previously appeared for this man and had been asked to take a segregated table and chair in the Boksburg magistrate’s court. He had declined. When the magistrate insisted, Tambo withdrew from the matter, but not before asking for postponement so that the accused could get himself another lawyer. That lawyer was to be Pitje.

I got to Boksburg and the prosecutor, who didn’t even have the courtesy to look at me, told me that my case was . . . being handled by the senior public prosecutor, which surprised me. This was really a minor case. . . . I moved from him towards the door to go and find the senior public prosecutor. At the door, I was accosted by a court interpreter who drew my attention to the small table and chair at the door. In not so many words, he was trying to say to me, “Please don’t kick up any fuss. Go over to
that table and let’s finish with this case.” I hardly had the time to answer him, when the senior public prosecutor walked in, oppressively, to take his position in the courtroom. At the same time, the magistrate walked in and I moved from where I was to the defence desk—to the regular defence desk, a long table across the room. I positioned myself right in the middle of the table. The magistrate then said, “Get away from there.” And I said, “Why?”

Pitje was summarily convicted of contempt by the magistrate and was sentenced to a five pound fine or ten days imprisonment. He went to the cells rather than pay the fine. The High Court, as well as the Appellate Division, dismissed his appeal. In the latter case, Chief Justice Steyn held that the order of the magistrate was a competent one. He reasoned that a magistrate...is in control of his court-room and of the proceedings therein. Matters incidental to such proceedings, if they are not regulated by law, are largely within his discretion. The only ground on which the exercise of that discretion and the legal competence of the order might in this instance be called in question, would be unreasonableness arising from alleged inequality in the treatment of practitioners equally entitled to practise in the magistrate’s court. But from the record it is clear that a practitioner would in every way be as well seated at the one table as at the other, and that he could not possibly have been hampered in the slightest in the conduct of his case by having to use a particular table. Although I accept that no action was taken under the 1953 Act, the fact that such action could have been taken is not entirely irrelevant. It shows that the distinction drawn by the provision of separate tables in this magistrate’s court, is of a nature sanctioned by the Legislature, and makes it more difficult to attack the validity of the magistrate’s order on the ground of unreasonableness.

22 BROWN, supra note 2, at 12.
23 Id.
24 Id.
25 Id.
26 Id. at 14.
27 Id. at 13-14 (quoting R. v Pitje, 1960 (4) SALR 709, 710 (A)). This case is commented on in K. Govender & T.A. Woker, Race and Social Rights, in Race and the Law in South Africa 233 (A.J. Rycroft et al. eds., 1987). In Bangindawo v. Head of the
Judicial officers often regarded these apartheid laws and practices as “normal law.” Those who did regard the laws as unacceptable did not consider it their place to comment on the laws’ character. The absence of compassion from these judgements drew very clearly the disjuncture between justice and humanity and the law and justice. Another example of this disjuncture is a situation that happened to Justice Poswa, an advocate of the High Court who was involved in a number of significant human rights cases. He was charged with contempt while appearing in the Kimberly magistrate’s court on behalf of five persons charged with acts of terrorism. About seven months into the trial, during the cross-examination of a state witness, a dispute arose between Poswa and the prosecutor. Justice Poswa was convicted of contempt, amongst other things, for directly addressing the prosecutor in the following terms: “The last thing my learned friend is going to do here is to run my life. You don’t run my life, Mr. Prosecutor... [W]ith respect I’m not going to let my learned friend to come and make insinuations in this court.”

The charge was also upheld on the strength of the following interchange:

Mr. Poswa: Any investigation done for me on my behalf by my learned friend [the prosecutor] I would tear into pieces....

Court: Mr. Poswa, I am not interested in your trust in the prosecutor or not and let us get this clear. I have warned both counsel about it already before (Intervention).

Mr. Poswa: You have not warned him, your worship, just now.

Court: I have warned both, Mr. Poswa, and you will not shout back at me. You are looking to be fined for contempt of court. You are contemptuous the whole morning every time I am speaking, Mr.

Nyanda Regional Authority, Justice Madlanga cited the case as an example of the hardships—practical, emotional, and otherwise—brought about by the abhorrent apartheid regime. 1998 (3) SALR 262, 268 (TK).

28 BROUN, supra note 2, at 175.


30 Id.

31 Id. at 215-16.
Poswa, and this is a final warning.\textsuperscript{32}

On appeal, the court confirmed the conviction on the basis that an isolated incident would not justify summary action for contempt; however, such an incident could justify such action when seen against the background of previous similar incidents. Justice Poswa articulated his perspective on the incident during his interview before the Judicial Services Commission for appointment to the Constitutional Court.\textsuperscript{33} When asked to respond to the contention that he had ultimately been convicted because he was "a person of temper,"\textsuperscript{34} he responded:

\begin{quote}
[T]he case you are referring to, the magistrate concerned many who subsequently sat before him for an hour or two or a day, surprised that I did not end up in the lunatic asylum, because of that individual . . . [When] people in the Western Cape [were] appearing before him he would say read \textit{S. v. Poswa}. And you must watch out. I . . . survived that kind of case and finally, on that the judgment in that case . . . none of the acts quoted by him, individually amounted to contempt of court . . . I would not have been convicted today of that case in view of the present law on contempt of court.\textsuperscript{35}
\end{quote}

The systematic enforcement of racism through the law severely impaired the dignity, freedom, and equality of the masses. The law remained the main mechanism for the perpetration of human rights violations. Almost all legislation was enforced through criminal prosecution. Ironically, the effect of this type of enforcement was to reduce the stigma that usually attaches to arrest and prosecution. Cases were heard most often in the lower courts; those that did reach the higher courts were treated without comment on the unacceptable character of the law.

The South African judiciary accepted allegations of torture, consisting of mental and physical abuse, with only muted protest. The courts did little to protect the so-called offenders and exercised no discretion when receiving the police and district

\textsuperscript{32} \textit{Id.} at 218. The full exchange appears in the judgment of the court on appeal. \textit{Id.} at 215-19.

\textsuperscript{33} Interview with Justice Poswa, Constitutional Court of South Africa, \textit{at} http://www.concourt.gov.za/interviews/poswa.html (Oct. 5, 1994).

\textsuperscript{34} \textit{Id.}

\textsuperscript{35} \textit{Id.}
surgeons' evidence. These hearings often took no account of the accused's fundamental right to a fair trial. In addition, families remained uninformed of the detentions and deaths of their loved ones.

There were often situations in which criminalized conduct was not entirely reprehensible when evaluated against democratic and human rights standards. In such cases, it would have been possible for judicial officers to express their repugnance for unfair laws in their reasons for imposing criminal sanctions, on the grounds of injustice resulting from racism or a denial of fundamental human rights. In *S. v. Thamaga*, for instance, a black man convicted of raping a young black girl was sentenced to four years imprisonment. On the previous day, a black man convicted of raping a young white girl was sentenced to ten years imprisonment. Judge Hiemstra explained that the reason for the disparity in sentences was not attributable to race but to the differences in social standing between the rapists and the victims and the fact that the white girl was a virgin. Indeed, it has been widely argued that race played a factor in sentencing during apartheid. At times, the judges' cultural biases were just as apparent. In *S. v. Mokonto*, the court, in rejecting a self-defense plea, held that the accused's belief in witchcraft could not be regarded as reasonable in considering the unlawfulness of his conduct. Judge of Appeal Holmes stated that the "common law of South Africa in regard to murder and self-defence reflects the thinking of Western civilisation . . . . To hold otherwise would be to plunge the law backward into the Dark Ages."

In 1997, the Truth and Reconciliation Commission (TRC) invited judges to submit their statements on the role of the

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36 1972 (2) PH, H143 (W).


38 1971 (2) SALR 319 (A).

39 Id. at 324.
judiciary in contributing to the violation or protection of human rights under the old regime. Inviting the judiciary to play this role was necessary in light of the Commission's noble aims of acknowledging oppression, understanding people's concerns, improving judicial processes, and reconciling old adversaries. The judiciary acknowledged these aims and felt that their submissions would assist in building a responsive and competent system that would protect human rights in the future. The judiciary's submissions dealt with the law's role in giving effect to apartheid, stifling political dissent, and fostering institutional racism within the legal system. Their testimony also shared the creative legal strategies that organisations and individuals opposed to apartheid used to thwart the system.

Although it is true that some members of the judiciary did their best in a bad system to protect human rights, it was a humbling experience for the members of the judiciary to give their testimonies to the TRC. Many members are in fact great jurists and adjudicators, a fact borne out by their work and contributions in other areas of law not directly involving apartheid and human rights. It is my fervent wish that the existing bench and that of the future will be enhanced and developed through proactive involvement in human rights developments on a global scale.

Today, the chroniclers of reality have reported voluminously on the judiciary's violations of very basic human rights. Many feel that judges had the power to render the indefinite periods of detention nugatory by refusing to accept as creditworthy any evidence procured during such periods of detention. Others have responded more drastically and have suggested that judges who felt the moral injustice of apartheid ought to have resigned. The realistic view is that isolated resignations would have made little or no impact on the system. It was better that the few members of the bench who were sensitive to objectionable state conduct remained as a source of some hope to the accused.

Before the 1994 elections and the advent of a new democratic order, the effective protection of human rights through the courts was virtually impossible in South Africa. Under the cloak of Parliamentary sovereignty, there was no constitutional machinery

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to check the dictatorial, arbitrary, and draconian legislation passed by a Parliament which itself, seemingly, was above the law. In that time, when those few members of the bench affected by the prevailing conditions dared to make any comment, they did so with the greatest diplomacy and tact. Their words are still inspirational today. I quote my erstwhile brother, the late Justice Didcott, who served on the Constitutional Court’s bench. In 1979, he said: “Parliament has the power to pass the statutes it likes, and there is nothing the courts can do about that. The result is law. But that is not always the same as justice. The only way that Parliament can ever make legislation just is by making just legislation.”

Thus, at the end of the apartheid era, it became important that some credible body be vested with the power to blow the whistle when the parameters of a constitutional covenant were transgressed. Without such power that covenant would have no teeth. The body armed with such power could not be the alleged transgressor itself. It could not be the state agency accused of the transgression. In a credible democracy such an agency could only be the judiciary. The judiciary alone would have the final power to decide whether the impugned enactment or provision had transgressed the constitutional guarantee.

V. The Emergence of Democracy

With the demise of apartheid, a democratic order with all the attributes that clothe human beings with dignity emerged. One can therefore understand the euphoria that ushered in the interim and final constitutions, which, among other unique features, made special provision for a Bill of Rights.

On February 4, 1997, the Constitution of the Republic of South Africa came into force, proclaiming itself as our nation’s highest law. In the Preamble and the founding provisions, we

41 In re Dube, 1979 (3) SALR 820 (N).
42 Id. at 821 n.35.
46 Id. ch. I.
committed ourselves to healing the divisions of the past, to establishing a society based on democratic values, to restoring human dignity and social justice, and to advancing fundamental human rights.

That, after all, was what the struggle was all about. The majority of South African citizens had always sought and desired to enter South African institutional life as free and equal citizens. They had always clamoured for enfranchisement. They had sought and pleaded for equality before the law and for equal protection under the law. They had sought and clamoured to participate equally in South Africa’s free enterprise system. They had sought to enjoy equally with other citizens freedom of expression, association, movement, and residence, as well as other freedoms. Above all, they had sought equal opportunity.

The task facing South Africa’s evolving judiciary is challenging and difficult, both constitutionally and jurisprudentially. The judiciary’s charge in our new constitutional democracy is not only to monitor the conduct of the legislature and the executive, but, most importantly, to guard against the violation of human rights. The manner in which judges and practitioners discharge this responsibility will have important and far-reaching implications for the transformation process and for the type of society we will have in the future. The Constitution exhorts the judiciary to bring all aspects of our law in line with our new constitutional values, and it gives the judiciary extensive powers to do so.\footnote{id. ch. II, § 39, ch. VIII, § 165-72.} This allows the courts unusual latitude within which to develop the law.

The interim and final constitutions created several independent mechanisms. One of these, the Judicial Services Commission, was specifically established to protect the independence of the judiciary.\footnote{id. ch. VIII, § 178.} The Constitution’s drafters recognised that the judiciary had to be kept independent if the rule of law was to be paramount in South Africa.\footnote{id. ch. VIII, § 165(2). In South Africa, judges are not elected or re-elected by popular ballot.} The principle of parliamentary sovereignty was based on the theory that the legislative function is ultimately determined by the will of the people in a majoritarian
democracy. The judiciary had been constrained by that principle, but now the extent of that constraint is being debated. Judges on the benches of the High Courts of South Africa are especially aware of the need to nurture and encourage a universal respect for the rule of law. To curb the escalating violence in the country and the response of vigilantism, lawmakers and lawgivers need to ensure that paths of law and justice run sufficiently close together to gain legitimacy in the eyes of the people. Only an independent and impartial judiciary can achieve these goals.

It can also be accepted that on a substantial number of occasions, judges ought to have, and could have, adopted statutory interpretations that would have favoured the protection of fundamental rights. Dugard concluded that positivism played too strong a role in the application of the law in South Africa. Legal scholars and judges too readily accepted the legitimacy of a law without first critically analysing it.

The final Constitution makes an emphatic distinction between the various arms of government. By its express direction, both the Constitutional Court and the High Courts have the power to decide on the constitutional validity of any parliamentary or provincial bill. Decisions by the High Court on the validity of acts are, however, subject to confirmation by the Constitutional Court. Therefore, the South African Parliament no longer has the ultimate say on the validity of laws passed by it. This power of judicial review is an invaluable tool in the promotion of human rights and the protection of human norms.

In the period before the constitutional democracy, the Minister of Justice appointed judges on the recommendation of the Chief Justice or of the judge-president of the relevant division. The selection process was a confidential one, thus allowing for the handpicking of candidates whose beliefs were sympathetic, or at

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50 Compare Minister of Law & Order v. Hurley, 1986 (3) SALR 568 (A), where the then Appellate Division reinterpreted a clause which was previously interpreted to oust the jurisdiction of the courts to inquire into the lawfulness of the conduct of officials in terms of a regulation.


52 Id.


54 Id. ch. VIII, § 172(2).
least not overtly opposed to the government of the day. The protection of human rights became the victim of the selection process.

The candidates were drawn primarily from the ranks of senior counsel. Prior to the 1990s, South African judges were predominantly white males. Among their ranks were two white female judges. Prior to that time no black judges were selected, although African magistrates were occasionally found in the rural areas and homelands. These magistrates had little influence on the legal culture and the administration of justice. This imbalance was perpetuated by the denial of amenities and education to Africans. As a result, there were very few African persons in the law schools, the legal profession, and the bar from which the bench was drawn. In addition, the study of law was almost exclusively reserved for the white male minority. Apart from strict quota systems based on ethnicity, the law schools and seats of learning were the preserve of the relatively wealthy. The small number of African lawyers exacerbated the problem of the lack of legal representation for the large number of accused blacks passing through the legal system on a daily basis. As argued previously, it was not uncommon for the accused black to be treated in a racist fashion.

The Judicial Services Commission has acknowledged the dire need for a bench that represents a cross-section of South African society. The demographic composition of the bench does not presently represent such a cross-section, and it is a problem that we need to address with a sense of urgency if the judicial system is to attain legitimacy. The courts cannot remain aloof from the pursuit of national goals; indeed, it is their duty to promote those ideals that constitute the cornerstone of the Constitution.


56 As of January 1994, the two female judges were Justice L. van den Heever and Justice H.M. Traverso.

57 This undermines the legitimacy of the courts in the eyes of the people, including those who were victims of the unjust legal systems of the past. Acknowledging this factor is a prerequisite for the discharge of the present and future responsibilities to achieve constitutional goals of democracy, human dignity, freedom, and equality. When that imbalance is corrected, the role of the judiciary in promoting and protecting human rights will be significant.
Under the final Constitution, the appointment process is both transparent and independent. In keeping with the oath taken by all members of the judiciary, judges have pledged to obey, observe, uphold, and maintain the Constitution and all other laws of the Republic. Judges are further bound by a solemn promise to always devote themselves to the well-being of the republic and its entire people. Under the new dispensation, although the President confirms the appointment of judges, this is done only via a consultative process between the Judicial Services Commission and the leaders of parties represented in the National Assembly.

Section 1 of the final Constitution provides as follows:

The republic of South Africa is one, sovereign, democratic state founded on the following values:

(1) Human dignity, the achievement of equality and the advancement of human rights and freedoms.

(2) Non-racialism and non-sexism.

(3) Supremacy of the constitution and the rule of law.

(4) Universal adult suffrage, a national common voters roll, regular elections and a multiparty system of democratic government, to ensure accountability, responsiveness and openness.

The advancement of human rights is a core value upon which sovereign South Africa is founded. The Constitution's drafters relied heavily on standard international human rights documents, including the Universal Declaration of Human Rights, the European Convention of Human Rights, the International Covenant on Civil and Political Rights, the African Charter on Human and Peoples' Rights, and the American Convention on

58 S. AFR. CONST. CH. VIII, § 174(8), sched. 2 (1996).
59 Id. ch. VIII, § 174.
60 Id. ch. 1, § 1.
Human Rights. The interim Constitution went further than the standard international documents: it included the rights to demonstrate and present petitions, the right to a healthy environment, and the right of access to education, including instruction in the language of one’s choice.

Not all the rights in the Bill of Rights are absolute. They are subject to a general limitations clause. The Constitutional Court has adopted a two-stage analysis in determining whether or not a protected right has been violated. The first stage involves interpreting the right by exploring its substantive content. If a violation is found, the court moves on to the limitation enquiry. In examining any limitations of fundamental rights, the court is obliged to ensure that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality, and freedom. When adjudicating on matters involving human rights, the courts are also obliged to give regard to international human rights law and comparative foreign case law. It might well be that today’s South African bench so zealously protects and promotes human rights as a reaction to the apartheid regime. I like to believe, however, that the vigour of the judiciary in South Africa is only a tiny constituent of the hopes and beliefs of my brothers and sisters on an ever-shrinking globe.

As a further means of promoting and protecting human rights, the final Constitution contains a rather unusual provision which allows direct access to the Constitutional Court in cases where the ordinary procedures do not help litigants and where adjudication

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67 Id. ch. III, § 29.
68 Id. ch. III, § 32.
69 Id.
71 S. v. Makwanyane, 1995 (3) SALR 391, 435 (CC).
73 See Zuma, 1995 (2) SALR at 654.
75 Id. § 39(1)(b)(c).
of the issues is of pressing urgency and public importance. The rationale for this rule’s creation is not limited to expediency. Rather, the rule was created so that access to justice is not denied as it was in the past where ordinary people could not reach the courts because they were too remote and too costly. Already in the first two years of its existence, a quarter of the cases the Constitutional Court decided involved issues of direct access.

The very first direct access case before the Constitutional Court involved the validity of a section of the South African Criminal Procedure Act that dealt with confessions. The Court granted the litigants direct access because the interests of justice demanded that a binding decision on the validity of the particular section be given urgently. The Court has refused direct access, however, where there is no pressing need for a definite and final decision on a constitutional issue. The Court has also stated that it will only decide cases referred to it if the issues in a case are dispositive to the case. The Court will not decide a case in the abstract where the constitutional issues are peripheral.

The bench’s attitude in interpreting the Bill of Rights can best be summed up by the words of my brother, Justice Albie Sachs. He said, “[W]e should not engage in purely formal or academic analysis, nor simply restrict ourselves to ad hoc technicism, but rather focus on what has been called the synergetic relation between the values underlying the guarantees of fundamental rights and the circumstances of the particular case.”

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76 Id. § 167(6)(a), (b).
77 E.g., Bessegerlik v. Minister of Trade, Indus., & Tourism, 1996 (4) SALR 33 (CC); Brink v. Kitshoff NO, 1996 (4) SALR 197 (CC); Exec. Council, W. Cape Leg. v. Pres. of the Rep. of S. Afr., 1995 (4) SALR 977 (CC); Ferreira v. Levin NO, 1996 (1) SALR 984 (CC); S. v. Mbatia, 1996 (2) SALR 464 (CC); Zuma, 1995 (2) SALR at 642.
78 Zuma, 1995 (2) SALR at 642.
79 Id. at 646; § 217(1)(b)(ii) of Criminal Procedure Act 51 of 1977, 5 BSRSA pt. 26 (2000).
80 Zuma, 1995 (2) SALR at 646.
81 See Luitingh v. Minister of Defence, 1996 (2) SALR 909, 913 (CC).
82 Id.
83 S. v. Bequinot, 1997 (2) SALR 887, 895-96 (CC).
84 Justice, Constitutional Court of South Africa.
has thus far been very cautious as it walks the tightrope between social, political, and economic realities and an overly idealistic application of the Bill of Rights. Its caution can be seen in those decisions where it has declined to make a ruling on punitive damages,\(^8\) and where it has struck down an impugned section by suspending an order of invalidity for a stipulated period to enable the legislature to remedy that provision.\(^7\) In the *Ntuli* case, where the legislature failed, for lack of resources, to carry out the order of the Court within the time period allowed, the Court rapped the legislature on the knuckles by refusing to extend the time period.\(^8\)

The Court has deliberately employed a generous approach to the interpretation of the Constitution. It hails its Constitution as a dynamic and living instrument and refuses to interpret it in a narrow and legalistic way, especially where such an interpretation would deny persons the benefits of the Bill of Rights.\(^9\) We do not lose sight of the role of our history in the interpretive process. Justice O’Regan stated in *Brink v. Kitshoff NO*:\(^9\)

> Our history is of particular relevance to the concept of equality. The policy of apartheid, in law and in fact, systematically discriminated against black people in all aspects of social life. . . . The deep scars of this appalling programme are still visible in our society. It is in the light of that history and the enduring legacy that it bequeathed that the equality clause needs to be interpreted.\(^9\)

\(^8\) Fose v. Minister of Safety & Sec., 1997 (3) SALR 786 (CC) (declining to hold that punitive damages in claim of assault by South African police are “appropriate” relief under § 7(4)(a) of the South African Constitution).


\(^8\) *Ntuli*, 1996 (1) SALR at 1217.

\(^9\) S. v. Mhlungu, 1995 (3) SALR 867 (CC) (ordering that a South African constitutional provision denying application of the Constitution to matters pending before its promulgation was not to be interpreted as precluding criminal defendant’s constitutional rights). In *Mhlungu*, the Court found that a literal interpretation of the provision “would deny a substantial group of people the equal protection of fundamental rights . . . .” *Id.* at 884.

\(^9\) 1996 (4) SALR 197 (CC).

\(^9\) *Id.* at 217.
Our interpretive process is shaped by our history but not limited by it. It is a response to our past and to our future and a process that we envision will grow and mature to meet the challenges of an evolving South Africa, and indeed, an evolving world.

The Judicial Services Commission recognises the need for orientation programmes to assist judges to avoid race and gender stereotypes, which can lead to injustices. The Commission also encourages both local and international discourse between members of the bench. These orientation and continuing education programmes are being established for both judges and magistrates to assist them in the role they will play in the new constitutional order and in promoting human rights norms. Those concerned with the preservation of the law are continually contributing to its development by bringing new ideas to bear on old problems.

Chief Justice Mohamed, in his welcoming address to the Eleventh Commonwealth Magistrates’ and Judges’ Association Triennial Conference in Cape Town, described at least six areas that jurists need to identify and effectively debate. The areas identified by my learned brother are crucial for all societies wishing to foster and develop a culture of human rights, and they are especially apt for developing countries throughout the world. They may be summed up as follows: (1) demystifying the substance of the law, language, and processes of judicial adjudication; (2) ensuring that the tribunals of justice are accessible and user-friendly to the common citizen; (3) creating efficiency in the delivery of justice—a review of the formalities and procedures which impede or unnecessarily clog a court’s capacity; (4) facilitating access to transnational jurisprudential insight and cross-pollination of ideas; (5) fostering of a symbiotic relationship between law and justice, which is crucial to the legitimacy of the law (this would entail jealous protection of judicial independence in the pursuit of the objectives against all illegitimate invasions); and in my opinion, most importantly, (6) developing, through active debate and interaction between all levels of society and government, an ethos of constitutional justice and a vibrant legal culture that is moulded within the psyche of the people and within the soul of the nation.

The judicial community in South Africa has already taken its first steps towards realising these goals. Many of the members of the bench wondered whether they would falter under the
responsibility of their role as purveyors, protectors, and promoters of the ideals espoused in the Constitution. Happily, they have borne this charge with a sense of honour and commitment that bodes well for the active promotion and protection of human rights.