

INTRODUCTION TO SOUTH AFRICAN CONSTITUTIONAL LAW. THE CONSTITUTION-MAKING PROCESS AND SOME IMPORTANT CONSTITUTIONAL ISSUES

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Durante los días 16 a 23 de febrero del curso académico 2000/2001 y en el marco del convenio institucional de intercambio Sócrates/Erasmus entre las Facultades de Derecho de la Universidad de Murcia y la de Osnabrück (R. F. de Alemania) el joven profesor de ésta última Tonio GAS, entre otras actividades docentes y de atención a nuestros alumnos, impartió la presente Conferencia sobre el nuevo régimen constitucional de Sudáfrica cuya Ley Fundamental representa un enorme esfuerzo para superar la actual división de la sociedad y para consolidar un régimen democrático y respetuoso con los derechos humanos. Es cierto que, en ella, confluyen distintas y aún opuestas tendencias y que, en determinadas materias, podrá ser difícilmente llevada a la práctica pero, en cualquier caso, representa una voluntad constitucional innovadora que comienza a ser conocida, e incluso imitada, en otros ordenamientos.

Constituye por tanto una satisfacción, como tutor de dicho convenio institucional, presentar las reflexiones del investigador Tonio GAS que forman parte de su memoria de tesis doctoral "*Affirmative Action in Südafrika unter Berücksichtigung verfassungsvergleichender Bezüge*" dirigida por el Catedrático de Derecho Público de la Universidad de Osnabrück, Prof. Dr. Albrecht WEBER.

INTRODUCTION

Dealing with the South African Constitution for a quite a long time, I had seen the fruitful influence of constitutions of all around the world, but preparing this lecture, I unfortunately had to learn that the Spanish Constitution is one reference

is never made to. This seems quite astonishing, for Spain, as South Africa, had to undertake a quick transformation from a dictatorial regime to democracy (which, of course, is also true for Germany, the constitution of which proves to be of significant importance for South Africa). Although I unfortunately cannot provide you with any bridge between the Spanish and the South African Constitution, the common experience of the two countries may be illustrated by an anecdote, reported by former President *FW De Klerk* in his autobiography. Visiting several European states in 1990 in order to break out the grip of isolation, he reports the following from Spain:

“Prime Minister Gonzales of Spain provided me with a useful insight into the thought process of revolutionary organizations, which greatly helped me throughout the negotiations. With his own background and experience of resistance, he warned me that I should prepare myself for a great deal of mass action and protest during the negotiations with the ANC. I should also expect that they would say one thing at the negotiating table one day, and something completely contradictory the next day in public. His explanation was that resistance organizations felt that this was the only countermeasure they could use to keep in the playing fields even when confronted with the power of the state.”

What was happened that could lead Gonzales and De Klerk to speak of “negotiations” and what had to be negotiated? In order to understand the constitution-making process in South Africa, one has to go a little bit more back to the historical circumstances preceding what is often called a “negotiated revolution”.

It is difficult to determine when the negotiating process began. In his book “Tomorrow is another Country”, the South African journalist *Allister Sparks* reveals that since 1985, secret meetings between representatives of the Government and the then banned and exiled ANC took place, i.e. at a time when President *PW Botha* was still in power.

As far as human rights movements are concerned, one has of course to go far more back.

I. CONSTITUTIONAL DOCUMENTS BEFORE THE OFFICIAL NEGOTIATING PROCESS

1. THE FREEDOM CHARTER (1955)

The first important document influencing the constitutional negotiation is the Freedom Charter, published in 1955. Although the ANC had a leading role in drafting the Charter, it was not the only organization responsible for it. The Charter was adopted by a “Congress of the People”, consisting of the ANC, the Indian Congress, the Coloured People’s Congress, the (white!) Congress of Democrats and the South African Congress of Trade Unions. Its influence may still be seen in the final constitution.

What makes the Charter so important is that it was already written in a spirit of compromise and reconciliation. Although being largely influenced by a liberation movement being frequently accused to promulgate marxist ideas, it states not only “that South Africa belongs to all who live in it, black and white” (my emphasis), but it also contains a remarkable compromise between communist and liberal ideology. Although a provision for nationalisation was deemed to be necessary to overcome white economic domination (“The mineral wealth beneath the soil, the Banks and monopoly industry shall be transferred to the ownership of the people as a whole”), the Charter also contains the right to equal opportunity as well as other classical 1st generation rights such as the right to free economic activity (“All people shall have equal rights to trade where they choose, to manufacture and to enter all trades, crafts and professions”).

To give two examples for the influence of the Freedom Charter on the Final Constitution (FC), not only states the preamble of the latter that “South Africa belongs to all who live in it”, but also contains some of the so-called 2nd generation rights such as the right to basic education (sec. 29 FC) and basic health care (sec. 27 FC), which can already be found in the freedom charter.

2. OTHER DOCUMENTS AND DISCUSSIONS

Human rights movements are not only to be found within the illegal liberation movements such as the ANC and his allies. In 1960, an expert group published the so-called Molteno Report, named after his chairman. This document emerges from the “legal” white opposition at the time, represented by the Progressive Party which also rejected apartheid, but opted for a liberal solution in the original sense of the word, i.e. focused primarily on individual, 1st generation rights and the power of a free market. Later, I will return to the question whether liberal or liberationist ideologies dominate the South African Bill of Rights and its interpretation.

Since the end of the seventies, the Human Rights discussion also came to the academics. Conferences were organised at the Universities of Cape Town and Pretoria, which are difficult to characterise because of a vast plurality of opinions. It is interesting to see that it was possible to hold these conferences and to express opinions sometimes fundamentally criticising the apartheid regime. However, the author of the book “Human Rights and the South African Legal Order” (1978), Prof. *John Dugard* told me that his deep analysis of the legal apartheid system and its incompatibility with any internationally accepted conception of human rights was threatened to be censored and that the foreword of the “banned” advocate and ANC activist *Albie Sachs* (now Constitutional Court Justice) finally was forbidden to be included into the book.

At the end of the 80s, not only did the ANC present a document called “Constitutional Guidelines for a democratic South Africa”. It seems even more remarkable that some years ago, the South African Law Commission, a

governmental organisation, was mandated by a representative of the apartheid regime, the minister of justice *Coetsee*, to elaborate propositions for an inclusion of human rights in the South African Constitution. Although clearly not dedicated to abolish apartheid, but only to reform it (what in the opinion of many and especially the liberation movements such as the ANC was an absurdity), the first interim report (published in 1989) revealed an open discussion of the various concepts of human rights. The Law Commission presented another interim report in 1991 and a final report in 1994, which were important discussion documents in the negotiation of about the interim and the final Constitution.

Although the role of the ANC was the dominant one in the negotiating process, this historical overview shows that the influence of other forces and even of the government may not be neglected.

However, it was not before 1990 that open negotiations could take place, and for one time, it may be clearly said that this is essentially due to one historical event: *President FW De Klerk's* speech at the opening of parliament on 2 February 1990.

II. THE CONSTITUTIONAL NEGOTIATIONS AND SELECTED ISSUES

1. THE FEASIBILITY OF NEGOTIATIONS

Why was the speech by *De Klerk* so important? It is precisely because of his recognition that *Apartheid cannot be reformed*. It is quite clear that *De Klerk* was aware of announcing the beginning of the end of the old regime and thereby of his own presidency. *Allister Sparks* remembers that when the text of the speech was briefed to the press only 30 minutes before its holding, he and his colleagues were completely confused and he murmured to one of them: "Oh my God, he has done it all."

To "have done it all" meant that *De Klerk* announced not only the unconditioned release of *Nelson Mandela*, but also the unbanning of the ANC, the SACP (South African Communist Party) and other organisations, the release of a further category of ANC prisoners and the lifting of the State of Emergency regulations affecting the media and education. The statement also contained a commitment to "the recognition and protection of the fundamental individual rights which form the constitutional basis of most Western democracies" and to the necessity of all-inclusive constitutional negotiations. This clearly acknowledged that a fundamental political and constitutional change had to take place. The doors for open negotiations were opened.

2. NEGOTIATING THE INTERIM CONSTITUTION (IC)

It was clear that a newly created constitution should be a document of consensus and compromise, not of majoritarian domination (although it was clear

that forthcoming elections would give the ANC a stable majority). Therefore, the negotiations were aimed to include as much political and social groups as possible. In order to achieve this, the Convention for a democratic South Africa (CODESA) was created in 1991. Its first plenary session was attended by nineteen political groups such as the Government, the ANC, the SACP, the opposition parties represented in Parliament. Although the negotiations failed because of too great disparities, the declaration of intent, adopted at the first session, contained some principles which were foundational for both the interim and the final constitution. An important example is the supremacy of the constitution as opposed to the parliamentary sovereignty as imported from Westminster.

When, after a period of stagnation and political violence in 1992, the negotiations were resumed in 1993, the principle of inclusiveness was not abolished, but the two most powerful negotiating parties, the ANC and the NP (National Party) - Government tried to have a better preparation and to reach agreement on several issues by many previous bilateral meetings. It was also argued that transparency had to be improved. The new negotiating platform was deliberately not called CODESA once more, but Multi-party Negotiating Process (MPNP).

The essential work was done in the Commission for the Demarcation of Provinces and in the seven technical committees. The latter continuously elaborated drafting reports and submitted them to the Negotiating Council. Note that it was not only the task to elaborate a new Constitution, but also to guarantee that free and fair elections might be held under the old regime, which might explain some of the Committees tasks such as the repeal of discriminatory legislation and the guarantee of independent media. All the laws providing for free and fair elections had to be enacted by the old parliament! This means that the coming into force of the interim Constitution is not the starting point of the South African Democracy. But I would like now to focus on the most important constitutional issues.

3. THE INTERIM CONSTITUTION

After tough and controversial negotiations, accompanied by political violence, a Constitution was adopted at the end of 1993 and the date of the first free elections was fixed on April 27th in the forthcoming year (on the same day, the Constitution came into force). There are, in my opinion, three very important characteristics which illustrate the compromise between different political and constitutional conceptions.

A) CONSTITUTIONAL LEGITIMACY: INTERIM CONSTITUTION, FINAL CONSTITUTION AND CONSTITUTIONAL PRINCIPLES

It was soon beyond discussion that the 1993 Constitution could only be a

transitional document, making way for the elaboration and adoption of a final constitution. Remember that, even if based on inclusive negotiations, the IC was adopted by the old apartheid parliament and therefore suffered from a lack of legitimacy by the people as a whole. The question was whether the final constitution should be elaborated by a Constitutional Assembly, emerging from the 1994 election results, or whether this should again be done by a multi-party body. As it was clear, that the ANC would obtain a stable majority, it was feared that it would dominate a Constitutional Assembly and that majoritarian rule would lead to a pure “ANC Constitution” instead of a Constitution of the people as a whole. A multi-party body would have been more inclusive, but would have suffered once again from a lack of representativity and therefore have undermined the final constitution’s legitimacy.

The solution for this dilemma was, once again, a compromise: Although a Constitutional Assembly would be installed after the elections in order to draft the final constitution, this assembly was not completely free, but 34 Constitutional Principles were fixed to be binding even for the final constitution. Moreover, the newly created Constitutional Court had to state positively on the compliance of the final constitution with the 34 principles before it could come into force. So the final constitution, although elaborated by a democratically elected body, was bound to some extent by general principles which were established by a non-elected multi-party body and adopted by an apartheid parliament.

I will later return to the content of the principles when I shall speak about the Final Constitution, because the required Constitutional Court certification was denied and the FC had to be amended in order to comply with the Constitutional Principles. But let me first turn to some other important characteristics of the Interim Constitution.

B) FUNDAMENTAL RIGHTS

AA) SCOPE

Both the Interim and the Final Constitution are said to be among the most liberal and modern in the world. This is true insofar that they contain a vast catalogue of fundamental rights, called the Bill of Rights. Some of them are very detailed, such as sec. 25 IC on the rights of detained, arrested and accused persons, particularly because of the violation of these rights by the apartheid regime. Notice has also been taken of the fact that the Bill of Rights goes beyond the classical liberal 1st generation rights, but that it also contains some 2nd generation rights, such as the right to basic education (sec. 32 [a] IC) and the right of children to basic nutrition, basic health and social services (sec. 30 [1] [c] IC). Although the Final Constitution is even more progressive in that sense, it is clear that the IC departs from the classical “nightwatch” liberalism and favours a limited interventionist role

of the state. This may for example be illustrated by the equality provisions. Not only is equality the first fundamental right to be found in the Bill of Rights, but it is also clear that the Constitution commits to a notion of substantive equality, i.e. goes beyond formal equality in the form of identical treatment without regard to the political and social circumstances of the formerly disfavoured and the effects of societal, sometimes unintentional discrimination. This clearly emerges from an affirmative action clause (sec. 8 [3] [a] IC) which states that “This section (the equality clause) shall not preclude measures designed to achieve the adequate protection and advancement of persons or groups or categories of persons disadvantaged by unfair discrimination in order to enable their full and equal enjoyment of all rights and freedoms.” The same commitment may be seen in the Constitutional Principles, e.g. in CP I which states that “The (final) Constitution of South Africa shall provide for ... a democratic system of government committed to achieving equality between men and women and people of all races” (my emphasis).

BB) SOURCES

Furthermore, it is important to realize that the Negotiators could and did benefit from the experience of countries of all around the world as well as of international organisations. To give an example, the above-mentioned affirmative action clause is quite close to sec. 1 (4) of the *International Convention on the Elimination of All Forms of Racial Discrimination*, which states the following:

“Special measures taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals requiring such protection as may be necessary in order to ensure such groups or individuals equal enjoyment or exercise of human rights and fundamental freedoms shall not be deemed racial discrimination, provided, however, that such measures do not, as a consequence, lead to the maintenance of separate rights for different racial groups and that they shall not be continued after the objectives for which they were taken have been achieved.”

For further similarities to international documents, compare for example sec. 11 (2) IC to sec. 3 ECHR (European Convention on Human Rights) and –in the Final Constitution– sec. 31 to sec. 27 ICCPR (International Covenant on Civil and Political Rights) (see annexure)

The most influential national constitutional documents were the German Basic Law (GBL) and the Canadian Charter of Rights and Freedoms, and there are many provisions, especially within the Bill of Rights, which come close to their german or canadian counterparts. For example, the south african equality clause (sec. 8 IC) is clearly influenced by both the german and the canadian equality clause. The wording comes quite closer to sec. 15 CCRF than to the GBL, but some commentators see a significant difference in the fact that in South Africa, the general equality provision in sec. 8 (1) IC is separated from the prohibition of

discrimination in sec. 8 (2) IC, which is not the case in Canada, but also in sec. 3 GBL.

As many German constitutional experts have worked as advisors in the negotiating process, not only some provisions come quite close to their German counterparts, but also some fundamental principles which in Germany have been developed by the courts and academics have been expressly adopted. So, the German theory of *Drittwirkung*, which means indirect horizontal application of the Bill of Rights, is not expressly contained in the GBL, but has become a widely accepted theory on how to deal with fundamental rights in the private sphere. In order to explain what *Drittwirkung* means, you need only to read sec. 35 IC which is an express adoption of the German model:

“In the interpretation of any law and the application and development of the common law and customary law, a court shall have due regard to the spirit, purport and object of this chapter.” (i.e. the Bill of Rights)

That means that fundamental rights primarily bind the state and its organs and not private individuals, but may serve as interpretative guide for the application of law affecting private relationships and therefore bind private individuals in an indirect manner.

Foreign constitutional and international law did not only influence the making of the constitution, but this influence also continues with regard to constitutional interpretation. This is expressly stated by sec. 35 (1) IC which reads as follows:

“In interpreting the provisions of this Chapter (i.e. the Bill of Rights) a court of law shall promote the values which underlie an open and democratic society based on freedom and equality and shall, where applicable, have regard to public international law applicable to the protection of the rights entrenched in this Chapter, and may have due regard to comparable foreign case law.”

The Constitutional Court has frequently made use of this possibility, and especially in the early judgements, when South African precedent cases on human rights issues could not be found, the Court had considerable regard to both foreign and international law and you will find detailed and deep analyses of human rights issues with regard to a large number of countries and international organisations / treaties. (I personally could benefit from some of the CC judgements for preparing my lecture in introduction to the GBL because they sometimes contain very good treatments of German constitutional law in English language.)

C) FEDERALISM

South Africa is a heterogeneous and multi-ethnic country. According to the latest statistics (1996 census), its population is composed of 10.9 % whites, 76.7 % Africans (blacks), 2.6 % Asians (the most of them being Indians) and 8.9 % “Coloureds”, a mixed race, descendants from the Cape’s indigenous people, black slaves from the country’s interior and the first white Dutch settlers. However, the

breakdown by regions is much different from this: The Cape region is still dominated by the Coloureds whereas the large majority of the Zulu are to be found in the Province of KwaZulu-Natal, the only region where they constitute a vast majority within the black community. The Whites are over-represented in the Cape Region and in the Province of Gauteng, where Johannesburg and Pretoria are located.

Considering this, it is easy to understand why the question of the vertical separation of powers was of political importance and very controversially discussed. The ANC opted in favour of a more centralised system which would secure him the maximum of power and control, whereas the white and coloured interest groups, but also the Inkatha Freedom Party (IFP), headed by Zulu Chief *Mangosuthu Buthelezi*, favoured a federal system with much power given to provinces and local entities which would give them the opportunity to strengthen their influence by ruling some of them.

The above-mentioned Commission for the Demarcation of Provinces was appointed in 1993 in order to investigate and propose a regional demarcation commission to investigate and propose a regional demarcation to be regulated by the IC. The commission was provided with a set of criteria, which it then classified into four broad groups, namely economic aspects, geographic coherence, institutional and administrative capacity and socio-cultural issues. The result was the delimitation of nine areas, only two of which correlated with the original provinces of the Union (Free State and KwaZulu-Natal).

It may be clearly said that South Africa has adopted a federal system, albeit far from a confederation of independent states. The relationship between the Provinces and the federal state is defined by a clear delimitation of competences, but there is also an element of co-operative federalism as the Provinces have their say on the national level in the Senate as second house of the newly created bicameral parliament.

Some of the important constitutional provisions concerning the relationship between the provinces and the federal state are the following ones:

- section 1 IC, read with schedule 1 IC established “one sovereign state”, which was however defined in terms of a geographical description of the nine provinces (similar in sec. 1 / 103 FC, but without explicit reference to the territory consisting of the nine provinces);
- The key provisions of sections 126, 144 (2) and Schedule 6 (IC) allocated significant original legislative and executive powers to provincial governments. Section 126 conferred, in a style reminiscent of federalism, prevalent (though not exclusive in absolute terms) competence upon the provincial legislatures in schedule 6, leaving Parliament with overriding competence only for certain defined purposes (FC: sec 104);
- the Constitution afforded provinces a right to an “equitable share of revenue collected nationally” (Section 155 (1) IC / sec. 214 FC), and gave every

province a seat in the Financial and Fiscal Commission (Section 200 (1) (b) IC / sec. 222 (1) (b) FC);

- every province was empowered to adopt its own constitution providing for legislative and executive structures different from those created by the Constitution (Section 160 IC / sec. 142 FC); and
- provincial governments were entrusted with functions regarding provincial policing (Section 124 pp. IC / 103 pp. FC).

Regarding provincial constitutions, it is significant that until now, only the Western Cape Province and the Province of KwaZulu-Natal have elaborated a provincial constitution. These are the only provinces not ruled by the ANC, the first being ruled by the white opposition parties (before 1999: National Party (ruling party in the old regime), since 1999: Democratic Party (right-wing liberals)) and the last by the Inkatha Freedom (Zulu) Party. The necessary CC certification of compliance with the federal constitution has been denied in the latter case. The CC said that “*KwaZulu-Natal is not an independent state and has no original legislative or executive powers. The only legislative and executive powers that it has are those given to it by the Interim Constitution. The major flaw in the KZNC was that it claimed to give powers to the KwaZulu-Natal legislature and executive above and beyond those allowed by the Interim Constitution and in doing so its provisions conflicted with the Interim Constitution.*” The case was decided under the IC, but the principle of compliance with the federal constitution is maintained in the FC. As KwaZulu-Natal has never tried to submit an amended or a completely new version of a draft constitution, the Western Cape Constitution is actually the only provincial constitution into force.

D) GOVERNMENT OF NATIONAL UNITY (GNU)

It is also significant for the transition from consensus to majoritarian rule that the first government was one called Government of National Unity. That meant that also opposition parties had the right to be represented in the Government. Sec. 88 (2) IC declares that “A party holding at least 20 seats (of 400) in the National Assembly and which has decided to participate in the government of national unity, shall be entitled to be allocated one or more of the Cabinet portfolios in proportion to the number of seats held by it in the National Assembly relative to the number of seats held by the other participating parties.”

After the 1994 elections, that meant that the ANC, the IFP and the NP (ruling party of the old regime) have been represented in the Government (see table on next page). In 1996, the NP decided to leave the GNU, because they decided that they could perform better as opposition party.

4. THE FINAL CONSTITUTION

A) *ELABORATION*

The framework for elaborating a final constitution was laid down in the IC. Apart from what has already been said on the subject, it is important to realize that a rigid time frame was contained in sec. 73 (1) IC: “The Constitutional Assembly shall pass the new constitutional text within two years as from the date of the first sitting of the National Assembly under this Constitution.” As this took place 9 May 1994, this had to be done until 8 May 1996, at 24 h. The protocols of the Constitutional Assembly (CA) reveal that the negotiations were held “in the shadow of the clock”. The final vote did not take place before 8 May, and you may read notices as “Business suspended at 21:50 and resumed at 00:25 on 8 May 1996.

The Constitutional Assembly consisted of the two houses of the newly elected Parliament, and of course, the plenary sessions were preceded by the work in many theme committees. In order to highlight transparency, submissions from the public could be made, but as there were a high number of such submissions (about two millions), it is not always clear how the expert groups managed to integrate the will of the people in the negotiations. However, to my mind, it is already of great importance that the people was well informed on the issues under discussion and that the making of the Constitution was thus a subject of vivid political interest.

B) *CERTIFICATION*

As it was previously said, the FC had to obtain a certification of compliance with the Constitutional Principles by the Constitutional Court. This certification was originally denied (1st certification judgement) and the FC had to be amended in order to finally obtain the certification (2nd certification judgement) and to come into force (at 4 February 1997).

The first certification judgement reveals the problematic issues of the original draft of the FC. The Court’s ultimate finding was that the constitutional text cannot be certified as complying fully with the Constitutional Principles. As far as fundamental rights were concerned, only section 23 failed to comply with the provisions of CP XXVIII in that the right of individual employers to engage in collective bargaining is not recognised and protected.

It would take too long to explain in detail which sections did not comply with some of the CPs. Therefore, I only want to give some examples:

- Section 74 (Bills amending the Constitution) did not comply with CP XV in that amendments have to require ‘special procedures involving special majorities’ and the 2/3 majority of the members of the National Assembly (sec. 74 (1) new text, non-certified version) did not contain any special *procedure*); and CP II in that the fundamental rights, freedoms and civil

liberties are not ‘entrenched’ (the protection of the Bill of rights was required to be “stronger” than the protection of other constitutional provisions, which it was not under the non-certified version),

- Some provisions considering the impartiality and independence of institutions such as the Public Protector (ombudsman) (sec. 194 / CP XXIX),
- Sections which impermissibly shielded an ordinary statute from constitutional review,
- Various provisions in Chapter 7 (local government) in that they did not provide a “framework for the structures of local government”, in that they did not provide for “appropriate fiscal powers and functions for local government” and that they did not provide for “appropriate fiscal powers and functions for different categories of local government” (CPs XXIV, XXV and X),
- Some provisions relating to the provinces to the extent that their powers were “substantially less than under the IC” (CP XVIII.2).

In short words, it may be said that the original version of the new text

- contained a more centralist conception of the state,
- its provisions were not safe enough from majoritarian amendments,
- some institutions generally independent such as the ombudsman were not immune from governmental influence.

These three characteristics would of course have helped the majoritarian party on the federal level, the ANC, to enlarge its power and to get rid of some constitutional constraints, and the judgement denying certification is in my opinion merits approval, because it is proof of an independent judiciary which is of crucial political importance for the stability of a political system in which one group has a dominant role and one may fear that pluralism is in danger to be undermined (as for example in other African countries such as Zimbabwe where a liberation movement acceded to power).

C) IMPORTANT ISSUES

AA) LEGISLATIVE COMPETENCES OF THE PROVINCES AND THE FEDERAL STATE

It may be seen from the (first) certification judgement that once again, the question of vertical separation of powers was of significant importance. As it could be feared, the ANC-dominated CA had a more centralist form of state in its mind and thus weakened the power of the provinces and other local entities in favour of the federal state. To give an example, I want to focus on the legislative powers of the Provinces. We have seen the system of “concurrent competences” of the Provinces and the federal state as set out in sec. 126 IC. Sec. 104 FC (1st version) was deemed to replace sec. 126 IC.

Even though a list of exclusive provincial competences has been newly introduced (sch 5), the new text contains the same problem which also occurred in Germany. Considering concurrent legislative powers, there is a presumption of necessity in terms of sec. 146 (4) which might be difficult to displace, especially when the enquiry is whether or not the national legislation was necessary for the maintenance of national security or economic utility. In Germany, the “need for regulation ... because (of) the maintenance of legal or economic utility, especially the maintenance of uniformity or living conditions...” (Art. 72 II Nr. 3 GBL before 1994) served as a blanket clause to justify a federal law and thus turning concurrent legislative powers (to which Art. 72 GBL refers) into de facto exclusive powers of the federation.

The same danger occurred in another provision of the Final Constitution (1st version): an override of provincial by national legislation is made competent in terms of sec. 146(2)(b), where the national legislation provides for uniformity, inter alia, by establishing “frameworks” or “national policies”. By allowing for national legislation to prevail over provincial legislation where “the interests of the country as a whole require” uniformity, and where such uniformity is provided by national legislation which establishes “norms and standards; frameworks; or national policies”, the NT has expanded to some extent the grounds on which provincial legislation can be overridden.

As far as the lists of competences are concerned, the CC noted that the areas being added to the provincial competences are of far less importance than those withdrawn from them. However, the conclusion that CP XVIII.2 was violated could only be torn by considering a multitude of other factors as well.

BB) THE BICAMERAL PARLIAMENT: THE ROLE OF THE NCOP COMPARED TO THE SENATE

In the FC, the former Senate was replaced by a chamber called the National Council of Provinces (NCOP). The representation of the provinces could even be strengthened with regard to the Senate, because the NCOP avoids representation of the political parties instead of the provinces themselves. Under the IC, where Parliament consists of the NA and the Senate, each province is represented in the Senate by ten nominated senators. The power to nominate these senators does not vest in the provincial legislature or its members but in the parties represented in the provincial legislature. Under the FC, the NCOP consists of delegations of ten persons appointed by each of the provincial legislatures. Six of the ten are “permanent” delegates and four are “special” delegates (sec. 60 [1], [2]). The special delegates, but not the permanent delegates, are to be members of the provincial legislature (sec. 61 [3]). Each delegation will be led by the Premier of the province or a member of the provincial legislature designated by the Premier (sec. 60 [3]). A provincial delegation is to be composed in a manner which enables parties in the provincial legislature to be represented in the delegation

proportionately to their support in the provincial legislature (sec. 61 [1]). Voting is by province, each province having one vote, which must be cast in accordance with the authority conferred on the delegation by the province (sec. 65 [1]).

With that system, the NCOP comes closer to the German *Bundesrat* than the Senate, albeit far from being identical.

CC) CO-OPERATIVE GOVERNMENT

In the FC, although power was in some regard shifted from the provincial/local to the national level, the general concept did not substantially change (but the transfer of power was nevertheless of such a degree that the certification was denied). One important notion explicitly introduced in the FC is the notion of co-operative government. The concept of a co-operative federalism comes very close to the one underlying the GBL. That means that the different levels of authority (local / provincial / federal) shall not operate separately in their respective area, each one totally isolated from the others, but that interaction is not only inevitable, but in some cases desirable. This is made clear by sec. 40 (1) which describes co-operative Government not to be stratified necessarily into hierarchical levels, but as consisting of “distinctive, interdependent and interrelated” spheres of government. Sec. 41 entrenches various principles of co-operative government, which, according to *Venter*, may be categorised as follows:

- principles emphasising national unity (sec. 41 [1] [a], 41 [1] [h] FC);
- principles defending areas of competence (sec. 41 [1] [e]-[g] FC);
- principles promoting good government and service to the public (sec. 41 [1] [b]-[d]).

What makes these principles come so close to the German concept is that they do not contain autonomous duties, but that they have to be read together with other constitutional provisions. This may be characterised as *derivative*. To give an example, the duty to “respect the constitutional status, institutions, powers and functions of government in the other spheres” (sec. 41 [1] [e] FC) contains nothing substantial until read together with other constitutional provisions defining what exactly has to be respected. The same may be said on the German notion of *Bundestreue*, although not specifically entrenched in the GBL. But if put together with a substantial provision of the GBL regulating the relationship between different levels of government, the German *Bundestreue* may have the same binding effect as the South African principles, i.e. imposing on the *Bund* or the *Länder* a duty not to undermine the other’s legitimate powers and functions.

DD) FUNDAMENTAL RIGHTS: TOWARDS A MORE EGALITARIAN PERSPECTIVE

As it was also predictable, the ANC considerably influenced the Bill of Rights with his underlying egalitarian, interventionist ideology. Social and economic rights

were much strengthened, resulting for example in detailed provisions guaranteeing the right to housing (sec. 26), health care, food, water and social security (sec. 27), rights of children such as family or parental care and basic nutrition, shelter, basic health care services and social services (sec. 28) and the right to basic education (sec. 29). The egalitarian influence may be seen in the following sections:

sec. 1 (a) declares the achievement of equality (my emphasis) a fundamental value on which the state is founded;

sec. 8 (2) expressly guarantees horizontal application of the Bill of Rights (when “applicable”) and may thus lead to a greater potential to affect private relationships than under the IC (which is, however, contested by some experts claiming that indirect horizontal application under the IC does not differ substantially from direct horizontal application under the FC);

sec. 9 FC - the equality clause – by several reasons: Not only is the list of the suspect classifications enlarged (which is not exhaustive, but discrimination on a listed ground leads to a reversal of onus, i.e. once discrimination being established, the justification has to be made by the alleged discriminator, sec. 9 (5) FC), but the express horizontal application in sec. 9 (4) (“No person may discriminate...”, my emphasis) also underlines the centrality of equality even in the private sphere. In addition, the affirmative action clause changed from a “negative” to a “positive” or inclusive formulation, which makes it clear that affirmative action is not to be seen as an exception to the concept of equality, but as an interpretative guide to a substantive notion of equality.

On the other hand, it was far from clear whether a private property clause should be included in the FC. This may be astonishing, the right to private property being a classical human right recognized in most democracies as well as in international human rights documents. But you have to remember the considerable left-wing trade unionist and communist influence in the ANC. What is seldom known outside South Africa is that the ANC forms an alliance with the SACP (South African Communist Party) und COSATU (Congress of South African Trade Unions), with whom they present a joint list of candidates for the elections. Therefore, 1/3 of all ANC MPs (and that means about 21-22 % in total) are communists (comparing the 1994 and the 1999 elections, the figures do not differ significantly).

Finally, the FC got their property clause already in the non-certified version, but this was the result of harsh negotiations. In fact, inclusion of a property clause was one of the latest questions decided before the above-mentioned deadline. It is not exaggerated if a commentator writes that Sheila Camerer (a negotiator for the NP) defended “her party’s position on the property clause until the last hours before the constitution was approved by parliament.”

Therefore, the Constitution may not be labelled simply as “liberal” or “egalitarian”, but egalitarian views therein have been strengthened.

III. EVALUATION OF THE CONSTITUTION WITH SPECIAL REGARD TO FUNDAMENTAL RIGHTS

Sometimes you may have the impression that the more recent a constitutional document is, the longer the text will be. So it is with the South African Constitution. It is nevertheless clear that in spite of being sometimes labelled one of the best Constitutions in the world, it cannot and should not contain solutions for any problem in society. One example is how the Constitution deals with capital punishment.

1. CAPITAL PUNISHMENT

An example for a well-known problem in constitutional application is that the courts are criticized for going too far in that they assume the role of the legislative power when neglecting judicial self-restraint in constitutional interpretation. This was exactly what happened in South Africa when, in one of the first CC judgements, capital punishment was declared unconstitutional. As in South Africa, there is a strong public support in favour of capital punishment, the negotiators of the IC could not arrive at expressly abolishing it, as did for example France in 1981, Germany in the GBL 1949 (Art. 102 simply reads: „Capital punishment shall be abolished.“) or Spain in sec. 15 of the Spanish Constitution). But they included a provision that „nor shall any person be subject to cruel, inhuman or degrading treatment or punishment“ (sec. 11 (2) IC, similar to sec. 3 ECHR). So, the Court was asked to state on whether capital punishment is „cruel, inhuman or degrading“. In a unanimous judgement of principle, it answered in the affirmative. Although this judgement was sometimes criticized because of the above-mentioned reasons, you have to remember that the Court had no alternative and was obliged to decide on the legality of capital punishment because the negotiating parties were not able to do so. Therefore, the critics were sometimes unjustified.

2. THE ROLE OF THE CC

A) CREATION

For some time, it was far from clear whether a Constitutional Court should be established at all or whether the existing courts and especially the Supreme Court of Appeal should decide in constitutional matters. Even today, some persons claim the CC to be superfluous, but according to the most (and to myself as well), the negotiators were right in establishing the CC. Without wanting to criticize the South African Apartheid judiciary in an unqualified manner, it has nevertheless to be said that in the period of transition, all existing judges have of course been nominated by the apartheid regime and most of them made their judgements in conformity to

the former ideology. Therefore, it was right not only to create a completely new constitutional order, but also to strengthen this order by a newly created body called for its protection and safeguard. The 11 judges were nominated by the President after public interviews in which not only their judicial capacity, but also their personal role in the apartheid regime was harshly examined. This may be criticized as an extreme form of „political correctness“, but due to the historical circumstances, it was in my opinion the best way to guarantee that the new order would not be represented by those being involved in the support of the old one.

The CC had an important role in constitutional application and interpretation, especially in the first years after its creation. This phenomenon may be seen in other recently established democracies as well: The first constitutional judgements are often very long and detailed, deciding cases later called *leading cases*. In a society deeply marked by apartheid ideology and jurisprudence and with no experience in a human rights culture, the CC did its best to develop such a culture by developing an indigenous human rights jurisprudence, sourced in both foreign and international law as well as specific South African Circumstances. A good example for this is the Court's equality jurisprudence.

B) *METHOD OF DECIDING CONSTITUTIONAL ISSUES: THE EQUALITY JURISPRUDENCE*

In the equality analysis as developed by the CC, you may find some important reference to Canadian constitutional law and especially one judgement of the Supreme Court of Canada, namely *Egan v. Canada*. But the CC deliberately chose to adopt the principles of a dissenting vote which already illustrates that it did not uncritically copy the Canadian jurisprudence. Canadian Supreme Court Judge *L'Heureux-Dubé* had a more substantive view on equality than the Court's majority. In determining whether there is „discrimination“ or, as it is called in South Africa, „unfair discrimination“, one has to bear in mind that due to both historical and societal discrimination, there are extreme patterns of inequality, prejudice and stereotyping even in today's South Africa. The following extract from a CC leading case (the same that has been quoted from before) makes clear that the CC does not neglect the special circumstances in South Africa:

“The prohibition on unfair discrimination in the interim Constitution seeks not only to avoid discrimination against people who are members of disadvantaged groups. It seeks more than that. At the heart of the prohibition of unfair discrimination lies a recognition that the purpose of our new constitutional and democratic order is the establishment of a society in which all human beings will be accorded equal dignity and respect regardless of their membership of particular groups. The achievement of such a society in the context of our deeply inegalitarian past will not be easy, but that that is the goal of the Constitution should not be forgotten or overlooked.

...

In order to determine whether the discriminatory provision has impacted on complainants unfairly, various factors must be considered. These would include:

(a) the position of the complainants in society and whether they have suffered in the past from patterns of disadvantage, whether the discrimination in the case under consideration is on a specified ground or not;

(b) the nature of the provision or power and the purpose sought to be achieved by it. If its purpose is manifestly not directed, in the first instance, at impairing the complainants in the manner indicated above, but is aimed at achieving a worthy and important societal goal, such as, for example, the furthering of equality for all, this purpose may, depending on the facts of the particular case, have a significant bearing on the question whether complainants have in fact suffered the impairment in question. In *Hugo*, for example, the purpose of the Presidential Act was to benefit three groups of prisoners, namely, disabled prisoners, young people and mothers of young children, as an act of mercy. The fact that all these groups were regarded as being particularly vulnerable in our society, and that in the case of the disabled and the young mothers, they belonged to groups who had been victims of discrimination in the past, weighed with the Court in concluding that the discrimination was not unfair;

(c) with due regard to (a) and (b) above, and any other relevant factors, the extent to which the discrimination has affected the rights or interests of complainants and whether it has led to an impairment of their fundamental human dignity or constitutes an impairment of a comparably serious nature.“

In Canada, *L'Heureux-Dubé* used a similar (substantive) approach in totally different circumstances. It cannot be said that Canada has to come to grips with a system based on inequality and the denial of fundamental rights to the majority of the people. But according to *L'Heureux-Dubé*, the situation of homosexuals, the group pretending to be discriminated against in the *Egan* case, was marked by oppression and stigmatisation so that they were an extremely „vulnerable“ group and that a law denying ... to them resulted in a denial of their human dignity and constituted discrimination in terms of sec. 15 CCRF (Canadian Charter of Rights and Freedoms). In my opinion this example illustrates very well how the South African CC manages to combine the experience of foreign jurisprudence with a genuine adapting to a unique historical and societal situation, because they adapted the principles of a minority judgement to a situation completely different from the circumstances in the *Egan* case.

c) SOCIO-ECONOMIC RIGHTS: THE SOOBARAMONEY CASE

As it has been said, the FC contains a number of socio-economic rights, i.e. rights which are not simply “repressive” rights but which need positive state intervention. On the other hand, the Constitution also contains classical liberal 1st generation rights and it cannot be said that it entrenches a complete interventionist

ideology in which the state is omnipresent and responsible for anything, thus undermining private autonomy. In such a system, socio-economic rights may only be guaranteed to a certain extent (an absolute “right to work” would only be enforceable if the state was responsible for the organization of the economy, i.e. in a marxist system leaving no place to private initiative). It was therefore interesting to see how the CC would deal with such 2nd generation rights.

The case *Soobramoney v Minister of Health (Kwazulu-Natal)*, CCT32/97 (27 November 1997) illustrates that the fears of those who had ideological reservations on 2nd generation rights have not been justified.

The appellant was a diabetic who suffers from ischaemic heart disease and cerebro-vascular disease. His kidneys failed in 1996 and his condition has been diagnosed as irreversible. He asked to be admitted to the dialysis program of the Addington Hospital (a state hospital). He was informed that he did not qualify for admission.

The CC finally had to consider whether Mr Soobramoney ought to receive dialysis treatment at a state hospital in accordance with the provisions of the Constitution which entitle everyone to have access to health care services provided by the state (s 27). The Court noted that the state has a constitutional obligation within its available resources to provide health care, as well as sufficient food and water and social security. The Court found, however, that the Department of Health in KwaZulu-Natal does not have sufficient funds to cover the cost of services being provided to the public.

Thereby, large discretion was granted to the state in determining the affordability of social grants.

3) CONCLUSION

Although it is beyond discussion that South Africa faces enormous problems, it can be said that the Constitution is proof of an enormous effort to overcome a deeply divided society and to advance a democratic culture and especially a respect for human rights. I personally share the view that it is one of the best, at least one of the most modern constitutions in the world and that it largely managed to benefit from international and foreign experience. For those who adhere to a certain political doctrine such as liberalism, egalitarianism, Marxism etc., the Constitution may be too much an amalgam of various political and philosophical ideologies, revealing its origin of compromise and thus lacking a clear line in certain issues. To others, it may seem too “progressive” in the sense that it contains some guarantees which are still far from being broadly accepted and have only been developed in recent times. But this may also have a prospective effect on the international human rights discussion and development. It may even be said that this has already taken place. So much has been said on the influence of foreign constitutions and international human rights instruments on the South African Constitution, but this

has already transformed into a mutual influence. Take for example the right not to be discriminated against because of the sexual orientation (sec. 9 [3] FC / sec. 8 [2] IC), still being very controversial. Although there have been several judgements considering sexual orientation as a prohibited ground for differentiation, there is, as far as I know, not a single constitution except the south african expressly mentioning sexual orientation as such a ground. But you will find a similar provision in the recently proclaimed Charter of the EU (sec. 21)! My superior, Prof. WEBER, has been told by Hungarian constitutional lawyers that they are very interested in South African Constitutional Law and that they frequently refer to it in their own judgements.