



CONSTITUTIONAL DEVELOPMENT IN SOUTH AFRICA AND HUMAN RIGHTS INSERTION

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Abstract

South Africa's Constitution is the result of remarkably detailed and negotiations that were carried out with an acute awareness of the injustices of the country's non-democratic past. It is the highest law of the land and no other law or government action can supersede it. An interim constitution was first drafted as the country made its transition from apartheid to democracy. Then, in after the April 1994 elections, a new constitution was written in consultation with the public as well as elected public representative. This was approved by the Constitutional Court on 4 December 1996 and took effect on 4 February 1997. It is widely regarded as the most progressive Constitution in the world, with a Bill of Rights second to none. The drafting committee was much influenced by the written constitution of India and Canada. The present Constitution gives a clear picture of the Human Rights of the Peoples of South Africa and respects the citizen in spite of their caste, creed, sex and other rights. They feature in the Preamble with its stated intention of establishing "a society based on democratic values, social justice and fundamental human rights." Among the rights stipulated are those of equality, freedom of expression and association, political and property rights, housing, health care, education, access to information, and access to courts. The present paper is attempted to analyze the Constitutional Development in South Africa with restoring the rights of the people.

Keyword: *South Africa's Constitutional Development, Human Rights, Bill of Rights, Freedom of Life, Apartheid, Equality.*

Introduction

Human rights are the basic rights everyone has, simply because they are human. In South Africa, this list of human rights is contained in the Bill of Rights, Chapter 2 of the South African Constitution, the highest law in the nation that protect the civil, political, and social-economic rights of all people in South Africa. This human right is for every citizen to know their rights and understand their responsibilities as per the Section 32 provides for the right to access to information known as the right to know. This provision is unique among human rights instruments, but are comparable with freedom of information legislation in other countries like Right to Information Act, 2005 of India. The Constitution protects and promotes human rights for all people in South Africa and applies to all law, including the common law, and binds all branches of the government including the national executive, Parliament, the judiciary, provincial governments and municipal councils with other provisions like those prohibiting unfair discrimination, also apply to the actions of private persons.

This is historically true that the South African Prime Minister has written the Preamble of the Universal Declaration of Human Rights in 1948 but the implementation of the Declaration was not considered in South Africa till 1994. When South Africa's Constitution of 1996 came into operation on 4 February 1997, it represented the historical zenith of a focused process of constitution-writing which commenced in December 1991 when the Convention for a Democratic South Africa (CODESA), a national multi-party constellation established to negotiate a shift to inclusive democracy, got underway. 1997 was, however, not the year in which South Africa underwent its profound constitutional and political transition: that occurred on 27 April 1994, when the essential fruits of the negotiating process matured. That was the date when inclusive elections were held for the first time in terms of the—albeit expressly transitional—Constitution of the Republic of South Africa, Act 200 of 1993, which came into operation on that date as the first South African 'supreme law': that is, a constitutional instrument endowed with superior normative effect. There are three founding provisions of the Constitution reaffirm South Africa's determination to build on a bedrock of quality, law and democracy. They are as; non-racialism and non-sexism; supremacy of the Constitution and the rule of law; the provision that lays down South Africa's democratic philosophy by stipulating "universal adult suffrage, a national common voters roll, regular elections and a multi-party system of democratic government, to ensure accountability, responsiveness and openness. It would be noted that the South Africa is the only country of the world which has no breakup in its regular elections."

Human rights are given clear prominence in the Constitution adopted in 1997. In the first chapter of the Constitution, human rights of the people appear in the first of the founding provisions of the Republic of South Africa: "Human dignity, the achievement of equality and the advancement of human rights and freedoms." These are the occupied in 35 Sections of the Chapter. All are taken extremely seriously by the citizens of the country. There must be few places in the world where constitutional rights feature as much in public and private discourse, and there has been no hesitation in testing the provisions and implications of the Bill of Rights in the Constitutional Court. South Africa's first bill of rights was contained in chapter 3



of the transitional constitution of 1993, which was drawn up as part of the negotiations to end apartheid. This 'interim Bill of Rights', which came into force on 27 April 1994 on the date of the first non-racial election, was largely limited to civil and political rights. But the new bills of rights, which became the final Constitution, retained all of these rights and added a number of new positive economic, social and cultural rights.

There are some rights unusually progressive rights have come under particular spotlight, such as the unqualified "Everyone has the right to life," and the inclusion of sexual orientation as one of the ground upon which discrimination is forbidden. Any limitation of rights must be "reasonable and justifiable in an open and democratic society" and must take several factors into consideration. And although Chapter Two also acknowledges the possible need to derogate certain rights under states of emergency, it lists a number of non-derogable rights.

History of Injustice Rule in South Africa

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

South Africa absorbed into the domain of the British Crown in the course of the 19th century. In 1795, Cape Town was annexed by British military and permanently controlled in 1806 as a Crown Colony. In the preparations for unification, the federal option was seriously considered. However, at union in terms of a constitution (the South Africa Act, 1909) adopted by the British Parliament, the colonies became provinces, each with a measure of autonomy but as parts of a unitary state governed in Westminster, fashioned by a national cabinet controlling a sovereign parliament. The boundaries of the provinces related only to their 19th century colonial and republican history, and had no special relation to culture, nationality, economy, or geography.

The South Africa Act contained some entrenched provisions, but could not generally be considered to be a supreme constitution. The Union was formed in a colonialist frame of mind: the black inhabitants, the majority of the population, had no part in the process and were, consistent with British imperial notions of the incapacity of 'uncivilized' people to participate in government, considered to be an administrative problem rather than a constitutional component of the newly established dominion. Atrocities were rampant in everywhere in the country. There were no rights was given to the inhibiting peoples. They were living with dis-honour, dis-respective and inhuman conditions. Brutality was the symbol on the world map. It was continuous in the South Africa till 1994. Nelson Mandela was imprisoned for 27 years for fighting against the brutality.

Constitutional Development and Human Rights

As already it has been stated that the drafting committee of the South African Constitution was very much influenced by the written constitution of the world specially India and Canada. South Africa shares a British colonial legal history for framing the constitution. Until 27 April 1994, 'fundamental rights' was not a concept with which the material South African law functional. Naturally, human rights and the implications of the incorporation of a deep-rooted charter of fundamental rights had by then already been an important pondered point for many years. A supreme constitution and an enforceable catalog of fundamental rights were incompatible with the pre-constitutional system in South Africa. This had not only political grounds, but also systemic reasons: before 1994, South African constitutional law was premised on a tremendous version of parliamentary sovereignty which did not allow for the possibility of the testing of the validity of legislation against a higher norm. The concretization of constitutionally entrenched rights could therefore only begin when the 1993 Constitution came into operation.

The Constitution of South Africa also gives a glimpse of decentralization of the Government which is a very essential tool for human rights diagnosis. Chapters 3 to 7 explain that the country's has a democratic system of government which always flourish to protection and preservation of the human rights of the citizen. The stress on interaction between the national, provincial and local levels through the mechanism of co-operative governance is actively given in the Constitution. Other important characteristics are those generally considered essential to democracy, such as the specification of the manner in which representatives are elected, limitations on terms of office, and the majorities required to pass legislation. The Constitution goes on to deal with the courts and administration of justice, state institutions supporting constitutional



democracy, public administration, security services (defence, police and intelligence), the role of traditional leaders, and finance and everywhere it was given priority to the rights of the people. The final chapter covers general provisions, including international agreements and international law and thereafter adopted important UN Conventions in the country.

It will be noted that the influence of United Nation of America's law and Bill of Rights has had in the development of modern constitutions and charters of rights in many parts of world was dominant at the time of colonialism in the world but there were very few impact on the South Africa's constitution writing process. The influence of the wording of various post-war international human rights declarations and conventions regarding rights is, however, evident and demonstrable in various provisions of the Bill of Rights. Important wordings and mechanisms occurring in the Bill of Rights have been derived directly from the Canadian Charter of Rights and Freedoms of 1982 in writing process of the South Africa's constitution. Consequently, Canadian judicial precedent on rights has, since 1994, had a notable influence upon the interpretation and application of South African fundamental rights, and certain Canadian doctrines and dicta of the Canadian Supreme Court have been received directly into South African law.

The Bill of Rights swathes the whole range of fundamental rights. This is, inter alia, a consequence of the constitution-writing requirement of Constitutional Principle II of the 1993 Constitution of Democratic Republic of South Africa, which demanded that 'everyone shall enjoy all universally accepted fundamental rights, freedoms and civil liberties, which shall be provided for and protected by entrenched and justifiable provisions in the Constitution'. At the time of framing the draft constitution, the emphasis was based on equality which was the slogan for eradication of apartheid law from the country. Section 9 contains strong provisions on legal and social equality. Section 9 is in line with internationally recognized human rights law, but the provision is more detailed than for example in the Universal Declaration of Human Rights. The Section starts with "everyone is equal before the law and has the right to equal protection and benefit of the law". The first sentence of section 9(2) of the constitution is the only provision which gives specific content to equality by providing that it includes 'the full and equal enjoyment of all rights and freedoms.' Section 9(2) furthermore justifies affirmative action 'to promote the achievement of equality'; that is to say, to realize the constitutional value mentioned in section 1. Legislative and other measures that are designed for the protection or development of persons who have been disadvantaged by unfair discrimination must thus be primarily related to the achievement of equality as a value. Today, the fight for equality is given priority by all democratic nations.

The South African edition of positive action in order to provide the equal opportunity differentiated itself from the Anglo-US formal or symmetric model, which accentuates individual rights, and from the European 'equal opportunity' model, where individual interests are also emphasized but remedial steps are allowed as a transitional measure to prevent structural discrimination which was rampant in the South Africa. The South African substantive equality model requires active involvement by the state to counteract the continuation of discrimination like some other country as well as India and Canada. Measures that favor relatively underprivileged groups at the cost of those who are faring relatively well are not regarded as discriminatory, especially because the goal is to bring about a more equal society. The South African affirmative action model is firmly embedded in communitarian and social democratic thinking.

The Republic of South Africa's Constitution has mandated to full freedom of speech. Section 6 of the Constitution states that everyone has the right to use the language and participate in the cultural life as well as social life of his or her choice - though no one may do so in a manner inconsistent with any provision of the Bill of Rights. The Constitution provides for 11 official languages: Afrikaans, English, isiNdebele, isiXhosa, isiZulu, Sepedi, Sesotho, Setswana, siSwati, Tshivenda and Xitsonga. Not only are the 11 official languages named and their uses and right to promotion specified, but specific attention is also paid to the Khoi, Nama and San languages and to sign language. In addition, there is mention of "all languages commonly used by communities in South Africa" and those used for religious purposes. One does not have to know much about the constitutional negotiation method to realise that this kind of inclusive detail is the result of minute consideration of sectional interests. Such attention to detail makes South Africa's Constitution unusually long, although the decision to write it in accessible language has resulted in a document that is easy to read. Section 30 also considers the issue of language in terms of cultural rights, although with restriction. Section 30 states that 'everyone has the right to use the language and to take part in the cultural life of their preference, but no one exercising these rights may do so in a method contradictory with any provision of bill of rights.'

Conclusion

For many years, South Africa human rights groups battled an apartheid government in a hostile political and legal environment. Now the country has a democratic constitution with a sophisticated bill of rights, as well as a new constitutional court, for which a demonstrated commitment to human rights is a prerequisite for appointment. Coming late to democracy,



South Africa was able to draw on the collective wisdom of the democratic countries of the world in creating its Constitution. Having come along a route of struggle and pain, the country took the process deeply to heart - and takes great pride in the result. Despite South Africa's strong constitutional protections for human rights and its relative success at providing basic services, the government continues to struggle to meet demands for economic and social rights. Issues such as unemployment, corruption and threats to freedom of expression remain a concern for many South Africans. Crime against women including rape and domestic violence remains very high. South Africa also largely failed to utilize its membership at the United Nations Human Rights Council to support resolutions that would have helped the promotion and protection of human rights.

The right to life and other Constitutional rights are still denied to many who are black, poor and working class. However, the constitution provides protection for human rights of citizens but the real protection lies in the hearts and minds of ordinary people. The central task of South African government as well as ordinary peoples is therefore to make human rights real for all South Africans. The African community must commit some of their own time, energy and resources to the struggle for human rights in the country and then become again the icon of human rights defenders on the planet.

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