Interpreting a Bill of Rights: the Future Task of a Reformed Judiciary?

1. Introduction: 'Freedom is easy to eat, but difficult to digest'[1]

It is early days to be dogmatic about the political future of South Africa. Much is still uncertain. Violence is still endemic. Political divisions between races and within races are deep and dangerous. At the time of writing, the state of emergency is still in force. The threats to liberty are still manifold and widespread. But two comments may be ventured.

First, at long last the logjam has broken and the white monopoly of political power is soon to end. The enormous boil of frustration and oppression that had built up in the minds and hearts of all democrats is now lanced even if it is not yet healed. This is not the place to discuss or even comment upon the changes that are imminent or the many difficulties and dangers that lie ahead. Suffice it to say that a period of constitution making is inevitable and that some form of rigid constitution is likely to emerge.

Not only does the essential prerequisite for a new constitution exist - 'the people...[wish] to make a fresh start ...[as far as] their system of government was concerned'[2]- but, if all goes well, a compact will be reached between the major actors on the political stage as to how the government of South Africa is to proceed. The parties to that agreement, doubtless achieved through long negotiation and painful compromise, will be unwilling to place their agreement at the mercy of a simple majority in Parliament. This implies a rigid constitution[3] incorporating that compact and some mechanism to guarantee that the compact is not overthrown. The most obvious and common such constitutional guarantor is an independent judiciary, trusted by all, which is charged with that task. Thus the role of the judiciary is likely to be important in the future.

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[1] I have heard this epigram attributed to Rosseau but have been unable to trace it.

[2] Sir Kenneth Wheare, Modern Constitutions, 2nd ed, 1966 at 6.

[3] i.e A constitution that cannot be amended by ordinary legislation, some form of special procedure will be required. See Wheare, op cit, 15-6.

Secondly, it seems clear that opinion in almost all South Africa political movements is accepting the concept of a judicially enforced Bill of Rights.[4] Let us be frank about this: a Bill of Rights protecting fundamental human rights is likely to form part of that compact between the white establishment and the black majority. The protection of fundamental rights in the Bill of Rights may be the factor that will persuade vacillating whites to avoid armageddon and surrender their political position peacefully. On the other hand, much of the motivation behind the black political movements is the desire to protect and enhance the fundamental rights, political and otherwise, of the majority of the population. From the days of the Freedom Charter onward this has been an important goal in black political movements. It seems unlikely - although there are some contrary indications - that the black political movements will be the rock on which the movement towards a Bill of Rights founders.[5] This development too will make the judicial role in the future more important and more prominent.

There remain many difficulties over the adoption of a Bill of Rights in South Africa. For instance, given the decades in which the white government was opposed to any formalized protection of the rights of the majority and was thus opposed to a Bill

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[4]. The Law Commission's Working Paper No 25 on "Group and Human Rights" has made a great contribution to this debate from the point of view of the establishment. This, of course, falls short of an acceptance of this principle by the South African government but that is likely to come. In addition the Harare Declaration, accepted now by the A.N.C., lays down the need for a Bill of Rights in South Africa.

[5] Consider, for instance, the following words of Dr Albie Sachs from his unpublished paper 'Towards a Bill of Rights in a Democratic South Africa' (1988):

> 'The most curious feature about the demand for a Bill of Rights in South Africa is that it comes not from the ranks of the oppressed but from a certain stratum in the ranks of the oppressors. This has the effect of turning the debate on a Bill of Rights inside out. Instead of a Bill of Rights being associated with democratic advance, it is seen as a brake on such; instead of being welcomed by the mass of the population as an instrument of liberation, it is viewed by the majority with total suspicion. Indeed, South Africa must be the only country in the world in which section of the oppressed people have actually constituted an anti-Bill of Rights Committee.'

of Rights,[6] a sudden conversion to the concept is bound to attract the attention of sceptics. The blacks will rightly ask whether this conversion is in good faith. And if the whites insist, or attempt to insist, on the protection of 'group rights' in the Bill of Rights,[7] blacks will be even more sceptical. For this will doubtless be perceived, with some justice, as an attempt to preserve apartheid beyond the demise of white rule.

Moreover, there is the question of the redistribution of wealth. This is a difficult issue. The protection of private property is a proper provision to find in a Bill of Rights; and it is the sort of provision that will sweeten the bitter pill that the surrender of political power will be to the whites. Moreover, the institution of private property adds sustenance and vigour to the other fundamental rights.

On the other hand, the mal-distribution of wealth has been one of the greatest injustices that has marred the face of South Africa. The present distribution of wealth, patterned upon race, cannot survive. The demand by the mass of the hitherto disenfranchised majority for some redistribution of wealth is a problem that will have to be addressed. The urban masses will rightly demand that in a country with the wealth of South Africa their condition should be improved and improved markedly. The land hunger emanating from the homelands is intense and the redistribution of land will have to be on the agenda.

These problems, intense and real as they are, cannot be addressed in this paper. Their resolution must await a future atmosphere of compromise and reconciliation between the major

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[6] See, for instance, the Second Committee of the Constitutional Committee of the President's Council, PC 4/1982. The Minister of Justice endorsed the Committee's rejection of the concept (See H J Coetsee,'Hoekom nie 'n Verklaring van Menseregte nie?' (1984)9 Tydskrif vir Regswetenskap 5). The same Minister of Justice, however, changed his mind somewhat and requested the South African Law Commission (on the 23rd April 1986) 'to investigate and make recommendations on the definition and protection of group rights in the context of the South African constitutional set-up and the possible extention of the existing protection of individual rights' (from para 1.1 of the South African Law Commission's Working Paper 25, Group and Human Rights).

[7] One of the most positive and persuasive aspects of Group and Human Rights is the paper's argument at para 13.1-13.19 (pages 381-388) in favour of the protection of group interests through the mechanism of individual rights. But as far as I know this principle has not yet been accepted by the South African government.

contending parties. This paper's purpose is less ambitious but still important. As we have seen the impending constitutional changes in South Africa are likely to mean an enhancement of the judicial role as protector of the new constitution and the fundamental rights to be enshrined within it. Thus this paper's purpose is to investigate whether and to what extent the present judiciary is equipped to undertake this task and what reforms are necessary to strengthen it in this role.

2 'Valiant for Justice?': The present stature of the judiciary in the field of civil liberties

We must start on a sombre note by considering the present stature and record of the judiciary. It is tempting to take for granted that the judiciary has a relatively poor reputation amongst the population as a whole and has a lamentable record in protecting civil liberties.[8] However, the Law Commission's Working Party on 'Group and Human Rights' in recommending[9] that the enforcement of the Bill of Rights should be placed in the hands of the ordinary judges adopts a curiously naive estimation of the standing of the judiciary. The Working Paper says, for instance, that:

> ' On their way to the bench, the judges of the Supreme Court have been through the mill of practice. They know the aspirations of the ordinary man and woman, and they also understand the interest of the State. By virtue of their experience in practice they can be objective, independent and fearless. The public has a large measure of confidence in the courts it already

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[8] I do not believe that any serious scholar today doubts that this is the position. My own contributions to the assessment of the judiciary will be found in 'The Sleep of Reason: Security Cases before the Appellate Division' (1988)105 SALJ 679 and In Danger for Their Talents: A Study of the Appellate Division of the Supreme Court of South Africa (Cape Town, Juta & Co, 1985) but many other writers have been similarly critical of the judiciary's overall performance in this area. See, to mention only a few examples, Etienne Mureinik, 'Pursuing Principle: The Appellate Division and Review under the State of Emergency' (1989)5 SAJHR 60 or the many contributions (by John Dugard, Andre Rabie, Antony Mathews, Lawrence Baxter, David McQuoid--Mason, Dennis Davis, Graham van der Leeuw and Johann van der Vyver) in 'Focus on Omar' in (1987)3 SAJHR 295-335. Even apologists for the judiciary such as Adrienne van Blerk accept that it 'is undoubtedly true that judicial conservatism can be established...' (in Judge and Be Judged (Cape Town, Juta & Co, 1988) at 163).

[9] at 449.

knows.' [10]

Well what is to be said about this. First, the factual issue. Official sources themselves recognize[11] that the legal system, including the courts, face a crisis of confidence. The simple fact is that much of the population of South Africa perceive the legal system and the courts not as the guarantors of their rights but as being in their essence oppressive.

Moreover, the entire Supreme Court judiciary is drawn from only one minority racial group.[12] The judiciary is overwhelmingly white and well off; the ordinary man or woman in the street in South Africa is overwhelmingly black and poor. If that ordinary man or woman has any contact with the courts at all it will in all probability be through the magistrates' courts over some criminal matter. It is utterly implausible to suggest that a well off advocate who has had a successful commercial practice and in due course is appointed to the bench understands the aspirations of the majority of that population, unless that advocate has made a study of or has a special empathy with the condition of the poor.[13]

The relevant point for our present concerns is this: if the judiciary is offered the opportunity to protect human rights through the enforcement of a Bill of Rights then the judiciary will also have the chance to retrieve their reputation and to play an important role in the construction of a more just South Africa. But the judicial reputation should not be viewed as an asset that will make this important job easier.

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[10] at 449 and the the views implicit at 303-310.

[11] The crisis of legitimacy faced by the South African legal system (including the courts) is widely recognized even by official sources. See the Report of the Commission of Inquiry into the Structure and Functioning of the Courts (RP 78/1983) and the HSRC Report South African Society: Realities and Future Prospects (HSRC 1985). Save for a passing reference to these matters at p 310, the Working Party does not seem to have faced up to this problem.

[12] This must, of course, change; and the sooner the better. But unless judges are dismissed or appointment policies changed drastically the judiciary will be dominated by white males for decades to come.

[13] Of course, advocates involved in public interest law (and others) may indeed acquire the necessary understanding in the course of their work; but few such advocates are appointed to the bench.

There is another closely related aspect to this point: judicial attitudes to the protection of rights threatened by oppressive legislation. Here too I fear that the Working Party takes a rather naive view of the matter. The Working Party says[14] that 'the courts will carefully examine the Act in question and even interpret it strictly so as to curtail the infringement as far as possible.' The Working Party claims that there are numerous cases in which this principle has been laid down. In fact, the cases which the Working Party cites in detail are in fact all provincial division cases.[15] And of the other cases cited in a footnote only two are Appellate Division cases and in both of those the dicta concerned were obiter that belied the actual failure of the courts in those cases to take decisions that advanced liberty.[16]

On the other hand there are numerous cases and numerous studies which are essentially unanswered and which demonstrate how lamentable the performance of the South African judiciary has been in the field of human rights and civil liberties. It cannot be glossed over. In In Danger for Their Talents [17] I asked this question: 'Where...is the defender on legal grounds of Minister of the Interior v Lockhat, Goldberg v Minister of Prisons, or S v Meer, to name but a few? These last-mentioned decisions may give pleasure or relief in government circles, but despair to those concerned about the quality and independence of the Appellate Division.'

That question remains unanswered; and I suggest cannot be

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[14] at 169. The Working Party deals with the approach of the South African courts to the protection of human rights at 168-174. This is frankly a disappointing aspect of the report, since it deals only very superficially with the academic work in this area. Moreover, it omitts from its discussion any attempt to reconcile its view that the judiciary interprets statutes that infringe human rights restrictively with the numerous cases in which the judiciary, particulary the Appellate Division, has done the precise opposite.

[15] The cases are: S v Ramgobin and Others 1985(3) SA 587(N), Akweenda v Cabinet for the Transitional Government for South West Africa and Another 1986(2) SA 548(SWA), and Hurley and another v Minister of Law and Order 1985(4) SA 709(D) (note not the Appellate Division judgment which is far more restrictive).

[16] Publications Control Board v William Heinemann Ltd and Others 1965(4) SA 137(A) and Mandela v Minister of Prisons 1983(1) SA 938(A).

[17] at 234.

answered because the truth is that these decisions and many others are indefensible on legal grounds. These are clear cases in which the Appellate Division has not been alert to protect the rights of individuals; and it is misleading for the Working Party to suggest otherwise.

All this might lead some to believe that the existing judiciary cannot be reformed and that it will have no place in the future South Africa. This is not my view: for practical as well as prudential reasons I consider that a brand new judiciary is unlikely to be created.[18] Thus the real question is how might the existing judiciary be reformed so that it can serve a new non-racial and democratic South Africa well.[19]

Moreover, there are clear indications that many influential judges would welcome the opportunity that a Bill of Rights would give them to vindicate the fundamental rights of the litigants who come before them.[20] So we many begin by considering the attitude of the existing judiciary, especially the Appellate Division, to the interpretation of Bill of Rights. We find that in this area the record of the courts, although open to criticism, is less lamentable than it is in the field of civil liberties in the absence of a Bill of Rights.

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[18] These reasons are discussed in the concluding section of this paper.

[19] This is a question which has not, I believe, been clearly addressed in the flood of writing about a Bill of Rights in South Africa. See, however, M G Cowling, 'Judges and the Protection of Human Rights in South Africa' (1987)3 SAJHR 177 especially 189-195.

[20] See, inter alia, Mr Justice M M Corbett 'Human Rights: the Road Ahead' (1979)96 SALJ 192, Mr Justice Leon 'A Bill of Rights for South Africa' (1986)2 SAJHR 60, J van der Westhuizen 'An interview with the Hon Mr Justice P J J Olivier' (1988)4 SAJHR 99 and Mr Justice G P C Kotze 'Menseregte: Suid--Afrika se dilemma' in J van der Westhuizen and H Viljoen A Bill of Rights for South Africa (Butterworths, Durban, 1988) 1 at 4.

3. Scalpel or sledgehammer?:[21] the attitude of the Appellate Division to the interpretation of Bills of Rights.

Although the present South African constitution does not contain a Bill of Rights,[22] we need not speculate about the attitude of the Appellate Division to their interpretation. The reason for this in both Bophuthatswana[23] and Namibia[24] (then

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[21] In Smith v Attorney-General, Bophuthatswana 1984(1) SA 916(B) where Hiemstra CJ said that in interpreting a Bill of Rights 'the Court has a particular duty as guardian of liberty, but it has to exercise its powers of controlling legislation with a scapel and not with a sledgehammer.'

[22] Although there has never been a Bill of Rights in the South African constitution there were constitutional rights protected by the entrenched clause procedure. During the 1950s great political and judicial battles were aged over these clauses. I discuss these battles in In Danger for Their Talents: A study of the Appellate Division of the Supreme Court of South Africa 1950-1980(Juta & Co,1985) at 61-81. The two matters which were protected under this procedure were the non-racial frachise in the Cape and the equality of English and Afrikaans as official languages. The non-racial franchise has long since gone, but the equality of the two official languages is still protected but this has not been perceived as being under threat for decades. Once political change has come to South Africa the new government may wish to change the status of Afrikaans; and this question may then again become a live issue.

Historically, of course, 'the 1854 constitution of the Orange Free State...guaranteed certain rights and recognized the competence of the courts to review enactments of the Volksraad' (John Dugard, 'Changing attitudes towards a bill of rights in South Africa' in J V van der Westhuizen and H P Viljoen, A Bill of Rights for South Africa (Butterworths, 1988) at 29; and see Leonard Thompson 'Constitutionalism in the South African Republics' 1954 Butterworths SA Law Review 49).

[23] The Bophuthatswana courts have, in general, been cautious about the interpretation of the Bill of Rights. Thus in Smith v Attorney-General, Bophuthatswana 1984(1) SA 196 (B) legislation (which denied in certain circumstances bail to an accused on the mere ipse dixit of the Attorney-General) and which was enacted after the Bill of Rights had come into force was struck down as being in conflict with section 12(3)(b) of the Constitution which guaranteed an bail decision by a judge. However, the court to the opportunity to say clearly that S v Marwane 1982(3) SA 717 (A) (discussed below) would not be followed: 'The Marwane case is a

typical example of over-eager invalidation leaving a large lacuna in a country's legislation...The good was thrown out with the bad although the bad played no part in the relevant decision....A Bill of rights is not a wide-open door to the invalidation of legislation' (at 204B per Hiemstra CJ). No one could accuse the Bophuthatswana courts of being over-eager to invalidate legislation: in S v Chabalala 1986(3) SA 623(B,AD) the court rejected the proposition that the death penalty was an 'inhuman and degrading...punishment' outlawed by section 11 of the Bill of Rights. Since the constitution itself recognized in section 10 the validity of a sentence of death, this result was doubtless inevitable; in Segale v Government of Bophuthatswana and others 1990(1) 435 (B,AD) a post-Bill of Rights law which prohibited meetings of a 'political character' save with the permission of the Minister of Law and Order was upheld as not being in conflict with section 16 which guarateed the 'right to freedom of peaceful assembly and to freedom of association'. In reaching this decision the Bophuthatswana Appellate Division overturned the thoughtfull judgment of Waddington and Kumalo JJ in Segale v Government of Boputhatswana and Others 1987(3) SA 237(B).

[24] With Namibia the pattern has generally been that judgments have upheld the Bill of Rights but have been reversed on appeal to the Appellate Division in South Africa. Under the new Namibian Constitution appeal to the Appellate Division no longer exists (article 78). Most of the Namibian decisions are discussed in the footnotes below. A recent Namibian case, which may be compared with Segale discussed in the previous note is Namibian National Students' Organisation and Others v Speaker of the National Assembly for South West Africa and Others 1990(1) SA 617 (SWA). The National Assembly had enacted the Protection of Fundamental Rights Act 1988 which, notwithstanding its name, outlawed a wide range of acts (including intimidation) associated with the boycotting of classes by students, strikes by workers, and the boycotting businessed or public services. This was struck down, inter alia, because it was in conflict with article 5 of the Bill of Rights guaranteeing 'freedom of expression of opinion, conscience and religious belief, including freedom to seek, recieve and impart information and ideas through the press and other media.' True this right was limited by an obligation

known as South West Africa) Bills of Rights were enacted at a stage at which appeal still lay from their courts to the Appellate Division. This fact has meant that on at least four occasions the interpretation of Bills of Rights[25] has been before the Appellate Division.

Let us consider each of these cases in turn to see what they tell us about judicial attitudes to the interpretation of Bills of Rights.[26] In addition to the insight that such a consideration will provide into the judicial attitudes to this question, it may provide a useful indication of difficulties to avoid when the time comes to draft a new South African constitution.

(i) Previously enacted legislation inconsistent with the Bill of Rights.

Two Appellate Division decisions fall under this head: S v Marwane[27] and Kabinet van die Tussentydse Regering vir Suidwes--Afrika en 'n Ander v Katofa.[28]

The facts of S v Marwane[29] are well known. The accused had been found in Bophuthatswana in possession of a various weapons, including hand grenades. He was charged with various security offences under section 2(1)(c) of the Terrorism Act 1967 and section 21(1) of the General Law Amendment Act 1962 (commonly

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to ensure that 'such expression does not infringe upon the right of others, inpair public order and morals, or constitute a threat to national security', but the Protection of Fundamental Rights Act 1988 went far beyond this limitation.

[25] The cases are S v Marwane 1982(3) SA 717(A), Kabinet van die Tussentydse Regering vir Suidwes-Afrika en 'n ander v Katofa 1987(1) SA 695 (A), Cabinet of the Transitional Government for the Territory of South West Africa v Eins 1988(3) SA 369 (A) and Cabinet for the Territory of South West Afrika v Chikane and another 1989(1) SA 349(A).

[26] My approach will be the same as that which I have adopted on other occasions in considering the decisions of the Appellate Division. For a description of my method see "The Sleep of Reason: Security Cases before the Appellate Division" (1988) 105 SALJ 679 at 680-1.

[27] 1982 (3) SA 717 (A)

[28] 1987 (1) SA 695(A)

[29] supra. I, and many others, have written about Marwane previously. See "Dreams of Liberty" [1983] Cambridge Law Journal 5.

known as the 'Sabotage Act') and a less serious offence under the section 32(1)(b) the Arms and Ammunition Act 1969. There can be little doubt that both the Terrorism Act 1967 and the 'Sabotage Act' were in conflict with the Bophuthatswana Bill of Rights.[30] This can be most clearly seen in the provisions in regard to onus. In certain circumstances the Terrorism Act 1967 required that the accused prove his innocence beyond reasonable doubt and the 'Sabotage Act' required proof of innocence on the preponderance of probabilities.[31] Section 12(7) of the Constitution, however, provides that 'everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law...'. Thus there was a clear and undeniable conflict between the provisions of these acts shifting the onus onto the accused and section 12(7) of the Bophuthatswana Constitution.

Section 93(1) of the Constitution provides as follows: 'Subject to the provisions of this Constitution (a) all laws which immediately prior to the commencement of this Constitution were in operation in any district of Bophuthatswana...shall continue in operation and continue to apply except in so far as such laws are superseded by any applicable law of Bophuthatswana or are amended or repealed by Parliament in terms of this Constitution...' Since the two security statutes were both in force prior to the coming into force of the Constitution, the prosecution argued that they continued to apply by virtue of section 93(1).

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[30] A E A M Thomashausen in 'Human Rights in Southern Africa: the case of Bophuthatswana' (1984)101 SALJ 467 argues that it was 'questionable' (at 470) whether the Terrorism Act 1967 was in fact contrary to the Bill of Rights. He points out that, although the presumption of mens rea contained in section 2(1) of the Terrorism Act 1967 formed the crucial reason why it was held inconsistent with the Bill of Rights, it was not unknown for such presumptions to operate 'on the occurrence of certain well--defined objective acts' (ibid.). But what Thomashausen does not say was that the necessary intent could only be rebutted by proof beyond reasonable doubt and that the occasions on which the presumption operated was not well-defined, but very vague. See the sources mentioned in the following note. In the end, however, it comes down to common sense: the Terrorism Act 1967 is a statute without peer in the Western World. There is scarcely an accepted legal principle that it does not violate: if it was not inconsistent with the Bill of Rights, then that Bill of Rights was simply not worth bothering about: it would be a dead letter.

[31] I have discussed the detail of these provisions in In Danger for Their Talents 132-136 but there are many other accounts. See, for instance, C J R Dugard, Human Rights and the South African Legal Order (Princeton, 1978) at 160ff.

The appellant's counter argument was that regard should be had to the words which commenced section 93(1), viz, 'Subject to the provisions of this Constitution....' These words meant that 'laws in conflict with the Constitution were necessarily to be excluded from the body of existing laws which were to continue in operation.' It was this contention that was accepted by the majority of the court in Marwane. Miller JA[32] held:

> 'Certainly in the field of legislation, the phrase "subject to" has this clear and accepted connotation. Where the legislator wishes to convey that that which is now being enacted is not to prevail in circumstances where it conflicts, or is inconsistent or incompatible, with a specified other enactment, it very frequently, if not invariably qualifies such other enactment by the method of declaring it to be "subject to" the other specified one.'

Thus, since it was clear that there was a conflict between the Constitution and the security statutes, Marwane was acquitted on the two security law charges (although he was sentenced to three and a half years' imprisonment on the lesser arms and ammunition charge).

Marwane is a particulary interesting case. A close analysis of the relevant legislative provisions (in particular the Bophuthatswana Constitution) reveals that while the crucial legal issues remain open to argument, the judgment itself is a clear example of a judicial choice of a policy to uphold rights protected by a Bill of Rights wherever possible.

Consider, for example, the following argument (which formed part of the dissenting minority's judgment) based upon section 7(2) of the Constitution. Section 7(2) reads as follows: 'Any law passed after the date of the coming into operation of the Constitution which is inconsistent with the provisions thereof, shall, to the extent of such inconsistency, be void.' Now this section is forward-looking: it voids only future laws in conflict with the Constitution. Surely, if past laws were also to be voided it would be reasonable to expect some mention of that fact to be made in section 7(2)? Does this not indicate that the framers of the Constitution intended that existing laws would remain valid even if they were inconsistent with the Constitution.

The answer of the majority to this section 7(1) specifically provides that the Constitution is to be the supreme law of

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[32] With whom Jansen JA, Muller JA, Diemont JA, Vijoen JA, Galgut AJA and Van Heerden AJA concurred.

Bophuthatswana and giving full weight to this injunction required that a wide meaning be given to that section. The prosecution's response to this was that section 7(2) must have been intended to qualify section 7(1), which it did by restricting its operation to future laws to the exclusion of past laws.

This argument did not prevail, but the existence of these two conflicting arguments, neither one of which indicates where the other is false, amply indicates the reality of judicial choice in these matters. Not by force of argument, but by weight of numbers did the majority prevail in Marwane.

The simply fact is that the majority in Marwane chose to given an extensive and powerful interpretation to section 93(1) and section 7(1) that ensured that the protection of fundamental rights was given real force and vigour. The majority's statement[33] that a constitutional instrument was sui generis and should be interpreted to give 'full recognition and effect' to fundamental rights and freedoms guaranteed in a constitution is thus the expression of the principle that justifies this choice.

The majority judgment in Marwane has been controversial. Rumpff CJ[34] delivered a strong dissenting judgment and the decision has been subjected to academic criticism.[35] Of more immediate moment to our present enquiry is that Marwane has been distinguished and restricted by the Appellate Division when a similar issue arose on appeal from South West Africa/ Namibia. I refer to the second case to be discussed under this head: Kabinet van die Tussentydse Regering vir Suidwes-Afrika en 'ander v Katofa.[36]

To understand how the question we are interested in arose in Katofa a word or two must be said about the provenance of the

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[33] Based upon the advice of the Privy Council in Minister of Home Affairs and Another v Collins MacDonald Fisher and Another [1980] AC 319 (PC) at 328H where Lord Wilberforce supported 'a generous interpretation avoiding what has been called "the austerity of tabulated legalism", suitable to give individuals the full measure of the fundamental rights and freedom referred to...'.

[34] With whom Rabie JA, Joubert JA and Cillie JA concurred.

[35] See, most prominently, A E A M Thomashausen, "Human Rights in Southern Africa: the Case of Bophuthatswana" (1984) 101 SALJ 467 which critizes Marwane strongly.

[36] 1987(1) SA 695(A).

Bill of Rights under consideration in this case.[37] This Bill of Fundamental Rights and Objectives which is no longer in force[38] formed one stage in the complex process whereby Namibia edged towards the independence that has now been achieved. The Bill of Fundamental Rights and Objectives was adopted by the General Assembly of the Multi-Party Conference of South West Africa/-Namibia. This conference was called together by the leaders of all significant political groupings in Namibia with the exception of SWAPO. The South African State President enacted into it into law (as part of Proclamation R101 of 1985) at the same time as he established the Transitional Government and National Assembly. Although the National Assembly had legislative powers, two other legislative authorities retained powers over Namibia: the South African Parliament and the South African State President. These legislative powers were never limited by the Bill of Fundamental Rights and Objectives, but the powers of the National Assembly were so limited.

Many issues arise in Katofa,[39] but we are concerned with only one: whether section 2 of Proclamation AG 26 of 1978 (SWA) (which provided for detention without trial) was valid in the light of Proclamation R101 of 1985 (which contained in Annexure 1 the Bill of Fundamental Rights and Objectives).[40] Section 34 of Proclamation R101 addressed the question of the continued validity of prior laws in conflict with the Bill of Rights in these words:

> 'Subject to the provisions of this Proclamation or any other law,[41] all laws, including any law made by procla-

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[37] See generally, 'A Bill of Rights as a normative instrument: South West Africa/Namibia 1975-1988' (1988) 21 CILSA 291 especially at 296-303.

[38] Its place has been taken by Chapter Three of the Constitution of the Republic of Namibia entitled 'Fundamental Human Rights and Freedoms'.

[39] I have discussed some of them in 'The Sleep of Reason: Security Cases before the Appellate Division' (1999) 105 SALJ 679 at 689-694.

[40] The nature and history of this Bill of Rights is set out in S M Cleary, 'A Bill of Rights as a normative instrument: South West Africa/ Namibia 1975-1988' (1988) 21 CILSA 291 at 292-305.

[41] The words 'or any other law' have been much disputed in two conflicting Namibian decisions: S v Heita and Others 1987(1) SA 311 (SWA) and S v Angula en Andere 1986(2) SA 540 (SWA). Strydom J held these words were 'slegs 'n verwysing ...na 'n

wet wat, soos die proklamasie, konstitusioneel van aard is en wat die bron vorm waaruit ander wetgewing ontstaan het soos byvoorbeeld Wet 39 of 1968 [the South West Africa Constitution Act]' (at 546D). There is some force in this suggestion for it is undeniable that while Proclamation R101 formed an important step on the path to independence, it was not intended to replace all other constitutional provisions. It does not follow, however, as Strydom J argues (at 546F-H) that Proclamation R101 was subject to all the South African laws (such as the Terrorism Act) which applied in Namibia by virtue of such 'other constitutional laws'. It is perfectly plausible that the State President in making the Proclamation intended to preserve the constitutional statutes but to render all the other inherited statutes subject to the Bill of Rights.

Strydom J, however, went further and interpreted the earlier words 'Subject to the provisions of this proclamation' as meaning 'subject to the provisions of section 36, 37 and 38 of this proclamation'. These sections repealed certain South Africa by name. However, if this were the correct meaning, it seems to me that the words would in effect have become meaningless: since the statutes had been specifically repealed it is plainly not necessary to state in section 34 that they did not continue in force.

Levy J in Heita reached a rather different conclusion as to the meaning of these words. In his view the crucial 'or' should be read conjunctively, ie, meaning 'and' or 'and/or'. Then at the time of the enactment of the proclamation 'there were existing laws which had been amended or affected by "other laws". According to s 34 of the proclamation, all such laws were to continue as amended and to the extent that they were in harmony with the proclamation' (at 325C). While this meaning plainly leaves the Terrorism Act and like measures 'subject to' the Bill of Rights, one might have thought that even in the absence of the words 'or any other law' it would have been obvious that the such laws as were to continue to apply in terms of section 34 would apply in their amended form!

I have read the relevant statutory provisions as well as the judgments in both Heita and Angula with some care and am afraid that I have come to the conclusion that the words are simply perplex: I do not know what was intended by their enactment. However, provided one rejects the most artificial aspects of Strydom J's interpretation (viz, that 'subject to' referred only to sections 36,37,and 38) there is no reason why the Marwane meaning of 'subject to' could not be applied in a straightforward way to render those statutes in conflict with the Bill of Rights inoperative.

mation by the Administrator-General under Proclamation 181 of 1977, which were in force in the territory immediately before the first meeting of the Assembly shall continue in force until repealed or amended by a competent authority.'

Cognate issues had arisen in a number of Namibian cases[42] so this was an important issue: was the intention of Proclamation R101 to start with a clean slate in which full weight was granted to the rights protected in the annexure, or was the intention that the Bill of Rights restricted the future powers of the Assembly, but the entire draconian panoply of South Africa's security laws continued to apply. Given the strong statements in Marwane, and given the general consideration that 'the continued existence of a dual legal order - one permitting human right violations and another proscribing such encroachments - can only serve to undermine the status of the Bill of Rights...'[43] one might have expected that the words 'subject to' would have been interpreted just as they had been in Marwane. This was not to be.

Rabie CJ considered the argument that since article 2 of the Bill of Rights (part of Proclamation R101) outlawed detention without trial and since section 2 of Proclamation AG 26 of 1978 provided for detention without trial it followed that there was in conflict between these two provisions. Which was to prevail? Well it could be argued that since, by section 34, section 2 of Proclamation AG 26 applied only 'subject to' article 2 of the Bill of Rights, it followed that the Bill of Rights prevailed.

However, Rabie CJ rejected this argument. His essential proposition was that the existence of sections 3 (3),[44] 11[45] and

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[42] S v Heita and Others 1987(1) SA 311 (SWA) and S v Angula en Andere 1986(2) SA 540 (SWA). Discussed by Professor Marinus Wiechers in 'Ring Out the Old, Ring in the New' (1987) SAJHR 90.

[43] Wiechers, op cit, 94.

[44] Section 3(3) provided the Assembly was inter alia to have power to amend or repeal laws that had been in force in the territory before the first meeting of the Assembly and which suspended or restricted a fundamental right, and which were concerned with the security of the territory. This power was to be exercised in such a manner to ensure that the fundamental right was restricted to a lesser extent. The existence of this section showed, Rabie CJ argued, that the legislature had presupposed that certain legislation contrary to the Bill of Rights would remain in force after the enactment of Proclamation R101.

19[46] each of which recognized that laws in conflict with the Bill of Rights continued to be valid even after Proclamation R101 came into force, indicated that the words 'subject to' in section 34 did not contain the meaning accorded to the same words in Marwane.[47] They had to have a meaning that would take account of the fact that some prior laws in conflict with the Bill of Rights remained in force even after Proclamation R101 came into force. Consequently, Rabie CJ concluded 'dat die woorde "Behoudens die bepalings van hierdie proklamasie" nie die bepalings van die Handves insluit nie. Die woorde sal op daardie bepalings in die proklamasie waarin wetegewing gewysig of herroep word, nl arts 36,37 en 38, betrekking he'.[48] This meant that the draconian South African security laws continued to apply in Namibia, notwithstanding their clear conflict with the Bill of Rights.

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[45] Section 11 established a standing committee of the Assembly that was charged with the task of considering every law that suspended or restricted a fundamental right and reporting accordingly to the Assembly (this included the power to promote a Bill before the Assembly repealing or making appropriate amendments to the law in question). Once more we clearly here have a mechanism whereby offending laws might be repealed or amended so that they did not conflict with the Bill of Rights and this implies that the legislature intended that certain laws contrary to the Bill of Rights would remain in force until amended.

[46] Section 19 granted to the Cabinet the power to refer to the Supreme Court of South West Africa the question of whether a particular prior law offended against the Bill of Rights or not. And section 19(3) provided that should the court report that the law in question was contrary to the Bill of Rights, then the Cabinet was to ask the appropriate standing committee to report whether the law in question should be repealed or amended. This too showed that prior laws remained in force even after the coming into force of the Proclamation R101.

[47] Rabie CJ did not consider the issue that had so diverted Levy J and Strydom J in their judgments in Heita and Angula viz what the meaning of the words 'or any other law' in section 34 was and whether they helped to decided whether the words 'subject to' bore their Marwane meaning or not.

[48] at 729E. The reference to section 36,37 and 38 is explained above (and criticized) above in the footnotes.

From the above it is clear that there are plausible grounds for Rabie CJ's views. Indeed his reasoning has not previously been questioned. So it is with some trepidation that I set out to argue that Rabie CJ has erred. It seems to me, however, that his reasoning can be challenged on two grounds, one narrow and one broad.

First, the narrow ground: the fact that various sections of the Proclamation R101 recognized that apparently offending laws might be valid after the proclamation came into force does not establish that the Bill of Rights did not prevail over those provisions. Those sections of the Proclamation simply recognized that such laws (other than those specifically mentioned) would be treated as valid until such time as the court declared them void. In other words, a conflict with the Bill of Rights simply rendered the offending law voidable; and sections 3,11, and 19 dealt with naught more than the additional ways in which such voidable laws might be declared void and remedied. It was entirely appropriate that means, other than challenging the invalidity of the law in court when action was taken contrary to the Bill of Rights, should have been provided to remedy offending legislation. After all, there might be no suitable applicant with locus standi to challenge the law in court, yet it is surely in the public interest that offending laws should be repealed or amended.

All that is unusual about these provisions is that legislative means were recognized whereby this might achieved. But this seems to me to be simply practical: given the complexity and uncertainty that surrounds the excision of such offending laws from a legal system, it is sensible that this should be achieved by appropriate legislative action[49] that would resolve uncertainty and establish appropriate procedures for vindication of the rights in question in a way that a judicial declaration of the invalidity might not.

This argument is strengthened by the fact that article 12.9 of the Bill of Rights[50] adopts just such a procedure as is described above. Article 12.9 reads:

> 'Any law in force on and continuing in force after the date on which the provisions of this Bill come into operation, may be submitted by any governmental authority to the Supreme Court for a ruling on the compa-

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[49] Such remedial legislative action must, of course, be in addition to the individual's right to raise the invalidity of the offending law, when action is taken against him in terms of that law.

[50] Not mentioned in the Katofa judgment.

tibility of such law with the Fundamental Rights enumerated in this Bill and if such law has been submitted for a ruling, no proceeding based upon any provision of such law may be instituted under paragraph 7 of this article[51] until the Supreme Court has given its ruling and a period of six months has elapsed after the date of the ruling.'

Now this article plainly recognizes that offending laws may be treated as valid even after the Bill comes into force, but it also contemplates, that notwithstanding such validity, offending laws may none the less be struck down by the courts in appropriate proceedings. Furthermore, it recognizes that it will frequently be sensible to allow the amendments to be made by the legislature by providing a moratorium on individual applications to the courts to allow the executive to ask the courts for an advisory opinion and allowing six months in which remedial action can be taken. Surely, it is undeniable that article 12.9's contemplation of all prior offending laws being subject to testing before the courts for compatibility with the Bill of Rights is inconsistent with Rabie CJ'S interpretation of section 34 of the Proclamation? Surely then article 12.9 indicates that Rabie CJ's strained and empty interpretation of section 34 is incorrect?

The broader point is this: as Levy J makes clear in his judgment in Heita the protection of the fundamental rights of the people of Namibia was 'the golden thread which is woven into the fabric of...proclamation (R101)'.[52] Is it conceivable that the State President in enacting such a proclamation that incorporated a fine and noble Bill of Rights into the law of Namibia actually intended that such horrors as the Terrorism Act 1967[53] and the Internal Security Act 1950[54] should continue in force entirely unabated? If this was in fact the intention of the State President then this implies a measure either of intellectual incoherence remarkable even by the undistinguished standards of that office or simply of profoundly dishonest chicanery that is breathtaking in its scope and contempt for the democratic process. It seems to me that for a court to impute such an intention to the State President would require the clearest

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[51] This article made provision for applications to be made to the Supreme Court 'to enforce the rights conferred under the provisions of this Bill'.

[52] at 319H. Similar remarks are made at numerous other points in his judgment.

[53] At the time actually repealed in South Africa itself!

[54] Also repealed in South Africa.

language; and while some of the words used in section 34 are not clear, the most straightforward and unforced interpretation of the section requires simply the application of Marwane. Had Rabie CJ been in the majority rather than the dissenting minority in Marwane can it be doubted that the decision in Katofa would be different?

(ii) Legislation enacted after the Bill of Rights came into force

Proclamation R101, in addition to enacting the Bill of Rights previously adopted by the Multi-Party Conference, set up a legislature (the National Assembly) for Namibia.[55] This legislature had restricted legislative powers, in particular it lacked power to make any law 'abolishing, diminishing or derogating' from any of the fundamental rights protected in the Bill of Rights.[56]

The interim (or transitional) government's record in protecting human rights has not passed without criticism;[57] and one of its enactments, the Residence of Certain Persons in South West Africa Regulation Act 1985,[58] was to be challenged in two cases which reached the Appellate Division and which will now be discussed.

The first such case was Cabinet of the Transitional Government for the Territory of South West Africa v Eins.[59] Section 9(1) of the Residence Regulation Act provided inter alia[60] that -

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[55] This legislature was not, however, the exclusive legislature for Namibia. The South African Parliament retained its powers to legislate for the territory and the South African State President (who had enacted Proclamation R101 itself) retained his powers to legislate by Proclamation. These legislative authorities were not restricted by the Bill of Rights.

[56] Section 3(2)(b) of Proclamation R101.

[57] See, for instance, David Smuts 'The Interim Government and Human Rights' in Totemeyer, Kandetu and Werner, Namibia in Perspective (Namibian Council of Churches, 1987) at 219ff.

[58] No 33 of 1985 (SWA). For brevity this Act will henceforth be referred to as the Residence Regulation Act.

[59] 1988(3) SA 369(A).

[60] section 9(3) contained a clause ousting the jurisdiction of the courts 'to pronouce upon the validity of an order issued' in terms of section 9(1).

> 'the Cabinet may, if it has reason to believe that (a) any person, excluding any person [born in Namibia or on active military service in Namibia or in the service of the government], endangers or is likely to endanger the security of the territory or its inhabitants or the maintenance of public order; [or] (b) any such person engenders or is likely to engender a feeling of hostility between members of the different population groups of the territory, by notice in the Official Gazette or by notice in writing to the person concerned issue an order prohibiting any such person to be in the territory or, in the case of any such person within the territory, ordering any such person to depart...from the territory....'

The respondent Eins had not been born in Namibia,[61] was not in government service and was not on active service in Namibia. He had been resident in Namibia since 1973. Thus if section 9(1) was valid he had no right to remain in Namibia; the Cabinet could, if the requirements of section 9(1) were complied with, order his removal from the territory. Although the Cabinet chairman made an affidavit in which he said that he had no reason to suppose that Eins was a person who fell within section 9(1), ie he did not threaten the security of the territory or its inhabitants nor did he engender hostility between the different population groups in the territory, Eins persisted in his application for a declaration that section 9 was unconstitutional and invalid for want of compliance with the Bill of Rights. This was granted by the Namibian courts, but the Cabinet's appeal to the Appellate Division was successful.

The appeal succeeded on the ground of the respondent's lack of locus standi. Rabie ACJ argued as follows:[62]

> 'Even if it is assumed in the respondent's favour that s 9 makes a greater inroad into the fundamental rights mentioned in the Bill of Fundamental Rights than the statutory provisions repealed by [the Residence Regulation Act] the respondent cannot, and will not, in fact be affected by this change in the law unless and until the Cabinet should decide to take steps against him

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[61] Eins was born in Germany in 1941. He came to South Africa in 1953 and was a naturalized South African citizen. This should not be taken as indicating a South Africa allegiance rather than a Namibian allegiance: at the time there was no Namibian citizenship.

[62] at 389D-390A.

> under s 9....[There is] no suggestion that he believed, or had any reason to believe or suspect, that the Cabinet contemplated taking any action against him under s 9.....It appears, therefore, that when the respondent brought his application he had no direct or real interest in the matter on which he asked the Court to adjudicate. The position would have been different if he had shown that the respondent intended, or contemplated, taking action against him...He failed, therefore, to show that he had what Van den Heever JA[63] ...described as " 'n aktuele en teenswoordige belang" in the matter, and what he asked the Court to do was, in effect, to make a declaration which would be of mere academic interest as far as he was concerned.'

This conclusion was buttressed by a long consideration of the relevant law of standing in constitutional matters in the United States, Canada, and India. Rabie ACJ's reasoning strikes me as persuasive; it was not unreasonable to ask Eins to wait until there was some reasonable ground for believing that the Cabinet was considering action against him before holding that he had locus standi.

However, in Cabinet for the Territory of South West Africa v Chikane and Another[64] the validity of section 9 arose in the context of its actual exercise against an individual. What had happened was that the Reverend Frank Chikane (the first respondent), a resident of South Africa[65] and General Secretary of the Institute for Contextual Theology, was invited to visit Namibia by the Secretary of the Namibian Council of Churches with a view to the establishment of a similar institute in Namibia. While Chikane was 'checking in' for his flight from Johannesburg to Windhoek, he was served with an order issued by the Cabinet in terms of section 9 excluding him from Namibia. Although an urgent application to have the notice set aside was successful before the Namibian courts, the Cabinet's appeal to the Appellate Division was successful.

Chikane's attack upon the validity of section 9 was

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[63] in Ex parte Mouton and Others 1955(4) SA 460(A) at 464A-B.

[64] 1989(1) SA 349(A).

[65] And also a South African citizen.

primarily[66] based upon articles 3 and 10 of the Bill of Rights. Article 3 guaranteed equality before the law and provided that the government should not 'prejudice ...[or] afford any advantage to any person on the grounds of his ethnic or social origin, sex, race, language, colour, religion or political conviction'. Article 10 guaranteed freedom of movement and residence and in particular provided that 'no citizen shall be arbitrarily deprived of the right to enter the country'.

So, first of all, Chikane argued that section 9 discriminated between two different categories of persons: those liable to be excluded from Namibia and those that could never be lawfully issued with a notice under section 9. This was contrary to the principle of equality enshrined in article 3 and the prohibition on arbitrariness enshrined in article 10. Grosskoff JA pointed out, however, that these articles did not 'forbid reasonable classification for the purposes of legislation'.[67] Indeed, this was not contested by either party. The question was whether the distinction drawn in section 9 rested upon such a reasonable basis or not.

But how could it be determined whether there was such a reasonable basis? Was evidence of the facts on which the distinction rested admissible?[68] Grosskoff JA concluded that there were a number of possible explanations for the distinction drawn in section 9 between government servants, and serving soldiers, on the one hand, and others on the other. Moreover, the distinction between persons born in Namibia and others was also defensible since, in the absence of a Namibian citizenship, birth in the territory could reasonably serve as an approximation to citizen-

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[66] An impressive array range of arguments were marshalled together in support of Chikane's attack on section 9. Only the most important can be dealt with here.

[67] at 363B. This conclusion was once more buttressed by a discussion of a range of comparative material on the interpretation of equality clauses in other constitutitons. See at 363C-364D.

[68] This question was the subject of a long but ultimately inconclusive discussion at 368A-369D. In the end no evidence was led by either party and the issue was decided as if on exception, viz, all disputed issues of act were resolved adversely to the respondents. Grosskoff JA's judgment is open to some criticism on this point. If the disputed issues were to be resolved adversely to the respondent, surely he should have been given an opportunity to lead evidence establishing his version of the facts (and in casu he had not made use of this opportunity). Yet the judge left open the question whether such evidence could be led (at 369A).

ship.[69] It followed that the attack upon section 9 based upon failed.[70]

My overriding impression on reading this case is that one cannot say that the case exhibits the kind of judicial reluctance to come to the aid of the individual affected by executive action that is so prominent in other decisions of the Appellate Division. The arguments are carefully considered, well weighed, and answered. There may be occasions in which Grosskoff JA is less courageous and more cautious than the lover of liberty might desire. But there is no sign of the artificial argument or the ingrained reluctance to find in favour of individual rights that judgments of the Appellate Division so often exhibit.[71]

Overall, with the exception of Rabie CJ's judgment in Katofa, there is little in these cases that exhibits 'the austerity of tabulated legalism' that Marwane laid down is to be avoided. True enough, Katofa was doubtless the most important of the cases that came before the Appellate Division, and the

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[69] The Namibian Constitution's provisions in regard to citizenship is both broader and narrower than the Chikane rough and ready rule of equating birth within the territory to citizenship. Certain persons born in Namibia (eg, the children of foreign diplomats) are not citizens (article 4 (1)(b)) while others, not born in Namibia (eg the spouses of Namibian citizens), are citizens (article 4(2) and (3)).

[70] All the other grounds of attack failed too. Most of these, with respect, were bound to fail. For instance, section 9(3) ousted the jurisdiction of the courts: was this arbitrary and thus contrary to article 4 guaranteeing a right to a fair trial? But, the validity of the notice did not depend upon the validity of section 9(3) and in any event the validity of section 9(3) was severable from the validity of the rest of section 9. Similar arguments were also raised over audi alteram partem. Urgency justified the exclusion of audi alteram partem before the issue of a notice and section 9(1) would be interpeted to include audi alteram partem after the service of the notice rather than hold the section invalid.

[71] Similar problems may arise in the future before the Namibian courts. Article 21 (1)(h)&(i), for instance, provides that 'All persons shall have the right to reside and settle in any part of Namibia [and] leave and return to Namibia.' It is difficult to suppose that the Namibian courts will not follow Chikane and hold that only citizens enjoy these rights. Article 11 on Arrest and Detention, for instance, contains special provisions applicable to illegal immigrants. Presumably, however, the guarantees of fair trial and equality and the like will apply to non-Nambians as well.

Appellate Division failed that test. If given the opportunity of enforcing a Bill of Rights in South Africa as a whole the Appellate Division might also fail to serve the polity well. However, looking at these cases as a whole the record of the Appellate Division is not as poor as it is in the field of civil liberties generally.

4. Can the judiciary be shriven?

The judiciary has not distinguished itself at the task of protecting individual rights as far as the law allows, and that its record at the interpretation of Bills of Rights, although less bleak, is not beyond criticism. Yet a Bill of Rights in some form or another seems to be on the agenda and that Bill of Rights will require enforcement and interpretation. To whom should that task be given?

Those who believe in retribution rather than in reconciliation may be tempted to suggest that a clean sweep of the judiciary should be made. And a fresh judicial structure should be built from scratch. There are some strong arguments in favour of such views, but on balance I think that the judiciary should be reformed and not swept away as the tainted detritus of the apartheid state. Let me give my reasons. They do not depend on any affection for the present order or desire to preserve it even after political power has shifted away from white hands.

The first reason has little to do with fundamental rights. Whatever the future holds for the political structure of South Africa it seems to me that all significant players on the political stage will wish to preserve South Africa as an economically powerful, rapidly industrializing, complex and vibrant state. Now, quite apart from the protection of the fundamental rights of the citizens, such a state requires - indeed, it is essential - a subtle, sophisticated procedure for the settlement of disputes between different commercial organizations, between different branches of government and for the application of the ordinary criminal law.

The mechanism for settling such disputes must be some form of independent judiciary. Such a subtle and sophisticated mechanism already exists in the form of the existing judiciary. The ordinary task of settling commercial disputes, of putting an end to marriages that have failed, and trying common criminals and the like is essential for an ordered complex polity. Now there can be no doubt that, on the whole,[72] the present judiciary carries out these tasks well. In trying ordinary disputes between individuals the South African judiciary is as impartial and as skilled as the judges of any other country. Moreover, given the unique nature of South Africa's common law it is unlikely that any group of persons other than the present judiciary could carry

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[72] There are, inevitably, many deficiencies in the law and the way in which it is administered in these areas. My point is simply that the judiciary is not directly responsible for these deficiencies.

out these tasks in a reformed South Africa.[73] Nothing will be gained from sweeping the judiciary away.

Some will argue that this is all very well but does not detract from the fact that in the field of civil liberties and fundamental rights that the judicial performance has been so poor. Thus while the judiciary should perhaps be preserved to carry out the tasks outlined above, a new judiciary will be need to undertake the task of protecting fundamental rights under the Bill of Rights.[74]

There is weight in these points but on balance I reject them. They amount, in effect, to the creation of a special constitutional court or tribunal to deal with matters touching fundamental rights. Every case tried by such a court will, from the nature of things, be politically sensitive and controversial. Such a court would be continually exposed to political criticism. To be effective it would need to build up a reputation for independence but would find this very difficult since every decision taken by the court would criticized on political grounds. It would have no tradition of independence. It could easily become naught more than a political plaything.

Indeed, it certainly would if the body charged with enforcing the Bill of Rights was answerable to Parliament as Sachs suggests.[75] Whatever body or court is charged with the task of enforcing the Bill of Rights it has to be independent of Parliament. It must be free from political influence, or else it will be worthless.

This is where the existing judiciary comes in. With all its flaws the present judiciary has one significant achievement to

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[73] It is true that the present judiciary could be swept away and other experienced South African lawyers appointed in their place. But this would achieve little other than to deplete the senior ranks of the professions at a time when their skills would be sorely needed.

[74] Sachs, op cit, 21-2 says some interesting about the mechanism for the enforcement of the Bill of Rights. It cannot be left to 'a Small Class of Judges Defending the Interests of a Small Part of the Population'. Sachs argues that the task of enforcing a Bill of Rights should be put into the hands of a Commission (or Commissions) with 'a wide brief, high technical competence and general answerability to Parliament'(at 22). Doubtless such Commissions could undertake useful tasks in ensuring the reform of the police and the army and promoting affirmative action.

[75] loc cit.

its credit: it has preserved its formal independence in difficulty circumstances. This is not an achievement that should be dismissed or denied. Apartheid was a highly controversial legal order. It was enforced through the law by an executive that dominated Parliament and could easily overturn[76] through legislation judicial decisions of which it disapproved. Although the executive never attempted to dismiss judges it was not above tampering with appointments to the bench. In these circumstances the judiciary could easily have declined into the mere plaything of the executive. Many politicians wanted it to be no more than that; some judges seemed to accept this role willingly. But this never actually happened. The ideas of the rule of law, of equality before the law, of courts open to all, of the settlement of disputes by fair trials followed by an independent decision were threatened but never destroyed.

Such independent bodies are difficult to create. Of the existing governmental institutions in South Africa the judiciary, flawed as its record is, has no peer in its independence from politicians. I do not wish to be misunderstood: the record of the judiciary on civil liberties issues has been lamentable. In this respect the judiciary failed the polity to which is owed its highest duty, but an independent judiciary survived.[77] Such a body with a tradition of independence and a reputation for independence is, it seems to me, provided that it is suitably reformed, better suited for the important task of protecting fundamental rights than any fresh body that might be created for the purpose. Moreover, we have noted above the clear signs that influential sections of the judiciary are willing to change their attitude if fortified by a judicially enforceable Bill of Rights.

Finally, it seems to me, if, when political power shifts from white hands to black, a judge's continuation in office is made contingent upon his political suitability to the new government, a very bad precedent would be set. Political conflict will not come to an end with the decline of white political power. There will be occasions in the future in which the judiciary is involved in politically contentious matters and in which the government of the day will change. But if the present judiciary falls with the fall of the white government, then it will be much easier for this to happen again as the political fortunes of governments come and go.

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[76] Indeed, on many occasions it did just that.

[77] Some may argue that only be failing to stand up to the executive on civil liberties could the judiciary preserve its formal independence. I do not accept this but I recognize that there is some justification for such views.

These are the considerations that persuade me that the judiciary should be reformed not abolished. Thus the focus of the debate should shift to how to achieve that reformation. How is an independent, skilled and professional judiciary to be preserved, while at the same time ensuring that that judiciary is dedicated and committed towards the protection of fundamental rights to a far great extent than has hitherto been the case? If this can be achieved the judiciary will be shriven of its past and will be well equipped to take an honourable place in a transformed South Africa.

5 Steps towards the reform of the judiciary

This is a question of which views will differ. So the suggestions that now follow, some obvious some perhaps, more useful, should be considered only the first contribution to the debate.[78]

(i) Widening the composition of the judiciary

First of all, an obvious point. The composition of the judiciary will have to be widened. It is monstrous that, in a multi-racial country, the judiciary should continue to exist of only one race;[79] and this will have to be changed. Some changes will be able to be made immediately. It would be invidious to mention names but there are a number of good lawyers, well suited to a position on the bench, and whose appointment would have the effect of broadening the racial mix of the judiciary. In addition, fresh appointments could be made from the ranks of those who, notwithstanding their obvious suitability, would never for political reasons be considered for appointment by the present South African government.[80]

However, one awkward fact that reformers will have to come to terms with is that if one wishes to preserve an expert judiciary skilled in the Roman-Dutch law, then that judiciary is going to consist in the main of the white males that presently dominate the judiciary.[81]

One further reform that would have the effect, over time, of widening the composition of the judiciary would be not to

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[78] I shall only consider the position of the superior court judiciary. The position of the magistrates' courts is very important and should be separately in depth.

[79] And indeed, very largely, of only one gender.

[80] Or who would never accept an appointment to an unreformed bench.

[81] And this is likely to be so for some time to come.

restrict eligibility for appointment to the Supreme Court to members of the bar. Although this proposal is bound to raise hackles in the profession, candidates with suitable potential for appointment could be found amongst the attorneys profession and at the university law schools.

(ii) Removing political influence from the appointment process

Secondly, we may consider the selection and the appointment of a reformed judiciary. Placing in the hands of the judiciary the power to interpret a bill of rights inevitably changes the judicial role. It places the judiciary far closer to the centre (and sometimes at the very centre) of political controversy.[82]

A consequence of this is that different (and more intense) political pressures will be brought to bear upon judges with this new more politically controversial role; and this has consequences for the appointment and selection of judges. To be blunt: politicians will attempt to ensure that judges sympathetic to their political concerns are appointed to the bench.

Consider, for example, the recent controversy in the United States over the attempted appointment to the Supreme Court of Robert Bork.[83] There is little doubt that here an able jurist was nominated by the President because of Bork's political beliefs, and that that appointment was not confirmed by the Senate because of his political beliefs. There is no reason to suppose that South African politicians (of whatever party) will behave with any greater degree of objectivity than their American counterparts.

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[82] Take, for example, Ex parte Cabinet for the Interim Government of South West Africa: In re Advisory Opinion in terms of s 19(2) of Proc R101 OF 1985(RSA) 1988(2) SA 832(SWA). Here the court decided that the distribution of moneys as assets between the various ethnic 'representative authorities' in Namibia (and which was greatly to the advantage of the white 'representative authority') was contrary to the prohibition in article 3 of the Bill of Rights of discrimination on ethnic grounds. Consequently, the court struck down the relevant legislation. This issue touched the very heart of political conflict in Namibia over the distribution of wealth. The South African State President took steps to avoid the results of this decision. See the South West Africa Legislative and Executive Authority Amendment Proclamation, R73 of 1988.

[83] For a recent account see Simon Lee, Judging Judges, Faber & Faber 1989, 182-194.

In giving its reasons why it rejects the concept of a special constitutional court the Law Commission's Working Paper says that the 'danger that a special or constitutional court will be distrusted as a loaded or political court if a very real one. This can jeopardize the entire administration of justice and undermine the credibility of a bill of rights.'[84] That same danger applies to a court policing a Bill of Rights and not protected from political interference by the executive?

There can be no doubt that if the Supreme Court of South Africa were given greater powers than it presently has to call government to account to the law, then there would be even more political meddling in the appointment process than there is presently.[85] Of course, judges appointed for political reasons may 'bite the hand that feeds them' once the mantle of office descends over them; but it would be unwise to count upon this. In any event obviously political appointments to the courts, even if the judges appointed thereafter behaved in an exemplary manner, would taint the legitimacy of the entire court system.

That there is a danger of political interference is a real one may be shown by reminding the reader that there is in the history of the administration of justice in South Africa a good example of just such meddling in the judiciary when the judiciary sought to give effect to constitutional guarantees. I refer to the Appellate Division Quorum Act No 27 of 1955 and related matters.

It will be recalled that the Appellate Division had twice

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[84] at 449 (para 14.89).

[85] See Mr Justice J M Didcott, Memorandum submittted to the Hoexter Commission printed in (1980)97 SALJ 652 where the learned judge spoke (at 661) "some advocates and attorneys who claim political influence, and visible relish the role of wheeler dealers, boast openly of their successes in securing the appointment or promotion of so-and-so and spoling the prospects of what's his name." One might also mention the controversy surrounding the Mr Justice Rabie's appointment as Acting Chief Justice notwithstanding that the present Chief Justice was present willing and able to accept the office and that Mr Justice Rabie had reached the retirement age. There is much published speculation about the reasons for this harmful event for the administration of justice in South Africa. My own will be found in "The Sleep of Reason: Security Cases before the Appellate Division" (1988) 105 SALJ 679 at 704-705.

struck down as invalid parliamentary enactments[86] which formed part of the government's attempts to remove the coloured voters in the Cape Province from the common voters' roll. Part of the government's response to this was to introduce into parliament The Appellate Division Quorum Bill which provided inter alia that the quorum of the Appellate Division in cases where the validity of an Act of Parliament was contested was to be eleven judges. Since there were only six members of the Appellate Division at the time, it was necessary that at least five new members of the Appellate Division were appointed.

The record now makes clear that these changes were introduced in the teeth of opposition from all the existing Appellate Division judges except for Steyn JA.[87] There was no consultation between the existing judges (or the Chief Justice) on who should be appointed to the unexpected five vacancies on the Appellate Division.[88] Moreover, it is also now clear that while the judges of the Appellate Division and the public at large were quite unaware of what was planned the government was actively interviewing judges for these vacancies. Some very senior and very able judges were overlooked for these appointments (or refused to accept them) and with at least two of the judges eventually appointed there were discussions between them and the then Minister of Justice over their attitude to the Appellate Division decision in the Vote case.[89]

This was perhaps the lowest point in the history of the

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[86] There are many accounts of this sad chapter in the history of the administration of justice in South Africa. I tell the story in In Danger for Their Talents: A study of the Appellate Division of the Supreme Court of South Africa 1950-1980 (Juta & Co 1985) at 13-25 and 61-70.

[87] See In Danger for Their Talents at 15 as well as the appendix to that book where the crucial documents are reproduced.

[88] Some of the Appellate Division learnt of their new colleagues from the radio, others read about them in the newspapers! See In Danger for Their Talents at 22. Presumably the government was too ashamed of their action to give any advance warning.

[89] See In Danger for Their Talents at 23-25. It is now clear that both De Beer and Brink discussed their appointments with the Minister of Justice and whether the correctness of the Vote cases would be questioned before them. The Minister of Justice admitted to Parliament that such discussions took place with De Beer, but denied that they took place in regard to Brink; but other facts make it clear that he was wrong and, to put it at its lowest, he mislead Parliament.

Appellate Division and a tragic day for the administration of justice in South Africa. These events had a permanent and deleterious effect on the reputation of the Appellate Division. Similar events much be avoided in the future. [90]

In these circumstances one can either ensure that clashes do not arise between the judiciary and the other branches of government (this is in large measure the present position where the legislature (which is de facto dominated by the executive) has the final say and may (and does) alter by legislation the effects of judicial decisions of which it does not approve) or one can isolate the judiciary and its appointment process from the other branches of government. Plainly establishment of a judicially enforceable Bill of Rights precludes the first alternative; but then the reformer must face up to the necessity of protecting the appointment process from political influence.

How might his be done? It seems to me that it may be sensible to accept the substance of the suggestion made by Schreiner JA in his comments on the Supreme Court Bill in 1959.[91] He considered that judicial appointments should be in the hands of a committee consisting of the Minister of Justice, the Chief Justice, the Prime Minister, the leader of the Opposition, a representative of the Bar and one from the attorneys' profession. Some minor changes to this committee would seem sensible in the light of today's circumstances. Perhaps a broader range of politicians could be included, judges other than the Chief Justice might serve on the committee (after all the judge-presidents of the various divisions may be better acquainted than the Chief Justice with counsel in that division who would be suitable for appoint-

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[90] An important point that should be stressed is that although the incidents just outlined plainly reflect poorly upon the present government and past members of it, I am not making these points in order to criticize that government. The point is that any politicians faced with the same opportunities to meddle in this way might have done so. My point is that if the judges do actively police a bill of rights, then whatever government is in power - a white, black or a mixed government - and whether that government is formally dedicated to the preservation of human rights or not, those judges will find themselves making decisions of which that government does not approve (and cannot overrule by amending the law through Parliament). In these circumstances, all but the most saintly politicians will be tempted to meddle in the appointment process.

[91] The full memorandum is in the Schreiner Archieve held at the University of the Witwatersrand, but I have written about it in more detail in In Danger for Their Talents at 29-30.

ment to the bench). It would also be wise if the representation from the profession were held ex officio (although it is difficult to know quite what office in the professional associations would be appropriate), as this would insulate these positions from political influence.

This indeed is the crucial point: that, howsoever this committee might be constructed the politician members should preferably not hold executive office (apart from the necessary presence of the Minister of Justice)[92] and that they should not be able to dominate or indeed influence significantly the committee.[93]

(iii) Careful drafting of the Bill of Rights

It is trite that Bills of Rights tend to consist broad general, and often rather grand, statements of principle. Very few principles are entirely absolute and thus judges in interpreting the Bill of Rights will often be able to deny a fundamental right by restricting or limiting that principle. It is, therefore, important to ensure that such opportunities are limited. Hence the need for careful drafting of the Bill of Rights, paying particular attention to the exceptions to the general principles. This is particularly so with the South African judiciary and its fondness for arid literalism. Ultimately such drafting can carry no guarantee of a suitable judicial attitude, but it is surely better to have a Bill of Rights with no ringing and noble phrases about freedom but which actually protects freedom that a Bill of Rights that sounds wonderful but protects nothing. Perhaps the Freedom Charter could be included in the new Bill of Rights as a preamble to indicate in rhetorical terms to the ends to which the Bill of Rights is dedicated.

(iv) The swearing of a new judicial oath

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[92] It may be noted that in the Namibian Constitution the Judicial Service Commission has no members of the executive amongst its members.

[93] Similar provisions are relatively common in rigid Constitutions. The Namibian Constitution, for instance, places the appointment of judges in the hands of the President 'on the recommendation of the Judicial Service Commission' (article 82). That Commission consists of the Chief Justice, a Judge appointed by the President, the Attorney-General and two members of the legal profession nominated by the profession (article 85).

In his Constitutional Fundamentals[94] Professor Sir William Wade's makes a useful suggestion regarding the use of the judicial oath as a means to achieve the entrenchment of a Bill of Rights in the British Constitution notwithstanding the well known theoretical difficulty over binding future Sovereign Parliaments. There is, says Sir William an easy way out: 'if we...wish to adopt a new form of constitution...all that need to be done is to put the judges under oath to enforce it...merely by a change in the judicial oath a new judicial can be created and that is all that is needed'.[95]

Even if some of the judges found that they could not swear the new oath[96] they would not be ejected from the bench. All that would be required would be a special jurisdictional rule in the new constitution. Wherever a question of the interpretation of the Bill of Rights arises then only those judges who had sworn a fresh oath of allegiance to the New Constitution could hear that case.

That oath would have to be carefully phrased and would made particular reference to the Bill of Right and would require the judges to foreswear formalistic and pro-executive interpretations of the legislation in question.[97]

(v) Final Remarks

Such an oath might not have the effect desired. The judiciary might not respond positively to it. There can be no guarantee that the judiciary will rise to the challenge before it. Certainly it failed the polity in the protection of civil liberties during the long dark years of National Party rule.

Perhaps the final task awaiting the reformer is to remind the judiciary first of their noble heritage. And the two occasions in

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[94] Stevens & Co, 1980.

[95] at 37-8.

[96] In practice I imagine that there would be few of these. The political changes in South Africa will in any event transform many judicial attitudes.

[97] Such an oath might read as follows: 'I, A.B., hereby undertake to serve as judge of the Supreme Court of South Africa. I undertake to administer justice without fear or favour to all who may come before me and, in particular, I undertake to uphold the constitution of the Republic of South Africa and to protect and defend wholeheartedly and in full measure the human rights and fundamental freedoms guaranteed in Chapter ...of the Constitution.'

the 1950s on which the Appellate Division challenged on cogent legal grounds the South African government's shameful plan to remove coloured voters from the common voters' roll stands as adequate permanent and eloquent testimony to the existence in South Africa of a powerful vision of the judicial function as the guardian of constitutional rights even where parliament is sovereign. Judges can be more than the 'mere frustrated instruments of unjust laws.' That vision is the corner-stone of the judicial heritage.

But, then secondly, the judiciary must be reminded, and if necessary persuaded, how far short of that heritage they have fallen. Perhaps they will then rise to the occasion and seize the opportunity offered to them by the Bill of Rights to restore legitimacy to the judiciary and the legal system, to curb the arrogant demands of over-powerful executives, and to help to heal the polity.

Christopher Forsyth

BSc LLB (Natal) LLB PhD (Cantab)
Advocate of the Supreme Court of South Africa
Of the Inner Temple, Barrister

Fellow of Robinson College, Proctor of the University of Cambridge

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