

A Review of developments and changes in the world's constitutions

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Abstracts

The constitution is a living document, that being the case, there is a need to increase the understanding of the constitution through systematic research and teaching at various levels. The paper aims to be a catalyst that inspires creative action to claim and advance certain new constitutional rights encapsulated in various world's constitutions. It seeks to raise awareness of new constitutional rights. Most world's constitutions have incorporated constitutional provisions that ensure the entrenched new fundamental human rights. The latest constitutions, including South African Constitution of 1996 are advanced and have included significant number of rights which were left out in the old constitutions. The courts are given the widest possible powers to develop and forge new remedies for protection of constitutional rights and the enforcement of constitutional duties.¹

Key words: the world's constitutions, developments and changes.

1. Introduction

Reference is made to the South African Constitution of 1996 from time to time in this paper. The 1996 Constitution was adopted to be the foundation of South Africa's new democratic society. It aimed to heal the divisions of the past, and establish a society based on democratic values and social justice. While writing the 1996 Constitution in 1995 and 1996, the South African Constitutional Assembly ran an extensive public participation programme aimed at giving ordinary people a voice in the promulgation of the 1996 Constitution. One of the major issues was whether socio-economic rights should

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¹ Choma HJ The environmental rights entered in the constitutions : A critique, *US-China Law Review* at 1 Jan 2008, Volume 5, No.1 (Serial No 38)

be included in the Bill of Rights, along with civil and political rights, as justiciable rights, that is, rights that can be enforced by the courts.²

1.1. The meaning of the term “constitution”

“A ‘constitution’, in the broad sense of the word, refers to a system of fundamental laws or principles whether or not in writing, that operates as a frame works for the government of a nation, society, corporation or other aggregate of individuals”³.

The constitutional law of a nation or particular state consists of the principles and decisions governing the interpretation and operation of the constitution⁴. “In the United States, when the term is applied to the organisation of the Federal and State government, it always refers to a written document. A constitution, in this sense, is further understood to be an enactment by the direct action of the people providing for a form of government, defining or limiting its powers, and creating a fundamental law, which can only be amended in terms of the provisions of the constitution itself⁵”. It has the status of the supreme law, or the *grundnorm*.

One of the underlying themes of governmental power and authority in the American system is that all power is inherent and derived from the people. The United States Constitution is a pact made by the people of the United States to govern themselves. The constitution of the United States, together with the laws and treaties made under its authority is, by express declaration, the supreme law of the land⁶.

² Liebenberg et al *A Resource Book, Socio-Economic Rights in South Africa* 19

³ Weinstein *Summary of American Law*, 105. In *The Attorney-General v Dow* 1994 (6) BCLR 1 at 7B-C (Botswana). Amisshah JP observed that “written constitution is the legislation or pact which establishes the state itself. It points in broad strokes on a large canvass the institutions of that state, allocating powers, defining relationships between the institutions and the people within the jurisdiction of the state, and between the people themselves”.

⁴ Fong, Byrnes and George Edwards, *Hong Kong Bill of Rights: Two years on* at 2.

⁵ Weinstein cited above and Fong also cited above. While the Hon Kong judiciary should be zealous in upholding an individual’s rights and the Hong Kong Bill, it is also necessary to ensure that disputes as to be effect of the Bill are not the Hong Kong Bill, it is also necessary to ensure that disputes as to the effect of the Bill are not allowed to get out of hand.

⁶ Devenish *A Commentary on the South African Constitution* at 36

When comparing other laws of a state to a constitution, it can be said that the constitution, is “primary”, being the command of the sovereign (the people) establishing the governmental “machine” and giving more or less general rules for its operation, i.e *grundnorm*. Statutes, which are enactments promulgated by the legislative authority of a state, are “secondary”, being commands of sovereign relating to the ordinary working of the governmental machine.

2. Historical background of constitutions

Constitutions have a history of more than three hundred years if regarded as the origin of constitutions the “Glorious Revolution of 1688” occurred in Britain⁷. In terms of the written constitutions, it also has undergone more than two hundred years of evolution since the first written constitution, i.e, the Constitution of the United States came out in 1787⁸. In the past two hundred or three hundred years, the human society has gone through earthshaking changes. The bourgeois revolution that swept across the world in the 17th and 18th centuries and overthrew the feudal autocratic system led the human society into a completely new epoch, the capitalist era⁹. The October Socialist Revolution led by Lenin in early twentieth century resulted in the establishment of the first socialist country in the world, which smashed the pattern of the world controlled by the capitalism and ushered in another new era in the history of mankind. Thence, more and more countries, following in the wake of the October Revolution, established the socialist system that claims that the people are the masters of their own countries.

⁷ Zhang Qingfu Development and change in the constitution paper presented: *Conference on trends in contemporary constitutional law University of Hong Kong 13-14 December 1996* see also Devenish, *A Commentary on the South African Constitution* at 44, it is important to note that constitutional principle 2 permitted the Constitutional Assembly, in addition, to supplement the universally accepted fundamental rights with others not universally accepted.

⁸ The phenomenon of conventions of the constitution is a pervasive but not exclusive legacy and tradition of the Westminster paradigm. The conventions are rules of political conduct and morality that are binding on the head of state or monarch and the ministers of state in a system of responsible government inherent in the Westminster exemplar. Devenish *A Commentary on the South African Constitution*.

⁹ Lockhart et al, *Constitutional law cases-comments-Questions* at 29. Robert Bork, *Neutral Principle and some First Amendment Problems*, 47 Ind. LJ 1,2,3 (1971). The model of government embodied in the structure of the constitution may for convenience though perhaps not with total accuracy be called Madisonian.

Constitutions were outcomes of evolution of the human society to a certain stage. With the development of the history of human society, great changes have taken place both in form and content of constitutions. As to the changes in form of constitutions, the constitutions in the majority of the countries are nowadays written ones that mainly take the form of a single code. Statistics show that the majority of the one hundred and fifty constitutions take the form of a single code except that only about one dozen of constitutions consist of the constitutional documents. In addition, the structure of constitutions is much more advanced than before in terms of more clear arrangement of chapters and sections and more succinct language used¹⁰.

Great changes have taken place not only in form of constitutions but also in content of constitutions as a result of the following factors:-

- With the uninterrupted development and progress of human society and the swift growth of national politics, economy and education, scientific and cultural undertakings.
- Constitutions, as basic law of one country, need to reflect the daily increase in the amount of national affairs and the more frequent and complicated international contacts.
- As a result, constitutions changed a great deal in their contents by way of adding new substance to them or modifying the old contents of them.

This article explores the following major change in content of constitutions:-

2.1 The entrenchment of economic system in the constitutions

The economic system and the principles and policy for the development of the national economy have been strengthened in constitutions. The early constitutions used to be silent on economic aspects except for adopting the “principle of no deprivation of private property”. However, with the development of capitalism and the emergence of

¹⁰ Zhang Qingfu Development and change in the constitution paper presented: *Conference on trends in contemporary constitutional law University of Hong Kong 13-14 December 1996* see also Lockhart cited above, at 29 “A Madisonian system is not completely democratic, if by ‘democracy’ we mean completely majoritarian. It assumes that in wide areas of life majorities are entitled to rule for not better reason than that they are majorities. The model has also a counter-majoritarian premise, however, for it assumes there are some areas of life a majority should not control. There are areas properly left to individual freedom and coercion by majority in these aspects of life is tyranny”.

socialism, constitutions, whether capitalist or socialist, have played a more and more role in regulating the national economy, although the economic systems in the capitalist countries are quite different from those carried out in the socialist countries¹¹.

The South African Constitution was adopted to be the foundation of the new, democratic society. It aimed to heal the divisions of the past, and establish a society based on democratic values and social justice. Some socio economic rights were included in the interim Constitution 1993, but many internationally recognized rights were excluded, such as the right to housing and health care¹².

While writing the final Constitution in 1995 and 1996, the Constitutional Assembly ran an extensive public participation programme aimed at giving ordinary people a voice in the final Constitution. One of the major issues was whether socio-economic rights should be included in the Bill of Rights, along with civil and political rights, as justiciable rights (i.e. rights that can be enforced by the courts).

A large number of civil society organizations including human rights and development Non-Governmental Organisations (NGOs), church groups, civics and trade unions, campaigned for the full inclusion of socio-economic rights in the Bill of Rights. The arguments that they made are summed up in the extract from the petition presented to the Constitutional Assembly by fifty five organizations in July 1995.

Socio-economic rights are recognized as human rights in the 1948 Universal Declaration of Human Rights (UDHR) and in a number of other international human rights documents. Human rights are usually divided into groups of rights:-

- Civil and political rights, such as the right, to vote, to a fair trial and freedom of speech, sometimes called “first generation” rights, and

¹¹ Section 26-29 of the South African Constitution 1996. *In re: Certification of the Constitution of the Republic of South Africa* 1996 (4) SA 744; 1996 (10) BCLR 1253 (CC), it was held that, these “socio-economic rights are ‘at least to some extent justiciable’ (i.e. can be protected by courts) and can be negatively protected from improper invasion”.

¹² Housing Act 4 of 1996, Less Formal Township Development Act 113 of 1991, Development Facilitation Act 67 of 1995 and Interim Protection of Informal Land Rights Act 31 of 1996. See also *Grootboom v Oostenberg Municipality* 2000 (3) BCLR 277 (C) For national legislation see, e.g. Health Act 63 of 1977, National Policy for health Act 116 of 1990, Social Assistance Act 59 of 1992 and Unemployment Insurance Act 30 of 1966, see also *Soobramoney v Minister of Health, KwaZulu Natal* 1998 (1) SA 765 (CC), 1997(12) BCLR 1696 (CC)

- Socio-economic rights, such as the right to adequate housing, health care, food, social security and education, sometimes called “second generation” rights¹³.

The United Nations has confirmed many times that economic, social and cultural rights, civil and political rights are equally important. The real life experiences of people show that the two groups of rights cannot be separated. Each depends on the other to be real and meaningful. This close relationship between human rights is described as the “indivisible and interdependence of human rights”.

However, civil and political rights are often treated as “first class rights” and socio-economic rights as “second class rights”. In the legal systems of different countries, civil and political rights have been more strongly protected than social and economic rights. It is more usual for countries with a written constitution to include only civil and political rights in their Bill of Rights (e.g. the United States Constitution)¹⁴.

Even if social and economic rights are included in the constitution, they often cannot be enforced in the courts and are merely meant to be guidelines for the Government. When socio-economic rights are included in a constitution in this way, they are called “directive principle of state policy” (e.g. Namibian, Indian and Irish Constitutions). Sometimes the courts are willing to use the directive principles of State policy to give a more meaningful interpretation to civil and political right.

2.2 The development of education, science and culture in the constitutions

¹³ Section 26 of the 1996 Constitution provides that everyone has the right to have access to adequate housing. In this regard the state is obliged to take reasonable legislative and other measures, within its resources, to achieve the progressive realization of this right, see *Grootboom* cited above. Section 27 of the 1996 Constitution stipulates that everyone has the right to have access to health care service, including productive health care, sufficient food and water social security, including, if they are unable to support themselves and their dependents appropriate social assistance.

¹⁴ Section 38 of the 1996 Constitution addresses the question of *locus standi*. It stipulates that anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights have been infringed or threatened, and the court may grant appropriate relief, including a declaration of right. See *Van Huyssteen NO v Minister of Environmental Affairs and Tourism* 1995(9) BCLR 1191, 1996 1 SA 283 (c).

Education, science and culture and the guiding principles for the development of education, science and culture have been enhanced in constitutions. The early constitutions did not provide for education by laying emphasis on safeguarding the right of the citizens to education, but seldom dealt with scientific or other cultural undertakings. With the development of education, science and culture are more vital to the development of human society. In consequence, constitutions could not overlook the issues relating to education, science and culture. Nowadays modern constitutions do not only safeguard, citizens' rights in respect of education, science and culture, but also explicitly provide for principles and policy of developing educational, scientific and cultural undertakings¹⁵.

Section 29 (1) (a) of the South African Constitution provides that “every one” has the right to basic education. This includes disadvantaged groups, such as women, persons living with disabilities, refugees and children.

The right to basic education in section 29 (1) (b) of the South African Constitution is given very strong protection. It means that the State must take step so that everyone can receive basic education with immediate effect. The right to basic education has been defined in South Africa to mean that all children between seven and fifteen years, or in grade one to grade nine must receive compulsory education¹⁶. Basic education therefore seems to cover grades one to nine. All education from grade nine onwards is further education.

¹⁵ *Matala v University of Natal* 1995 (3) BCLR 374 (D), section 29 of the 1996 Constitution does not require that education be free and compulsory. It therefore, does not preclude the charging of school fees. However, it is clear that no person should be denied a basic education because of a lack of financial resources. In addition, everyone has the right to establish and maintain at their own expense, independent educational institutions that do not discriminate on other bases of race and registered with the state. Gender and age discrimination : A constitutional redress, Sub-Sahara case *The Journal of Malaysian Bar Volum 1* 2007 at 1

¹⁶ South African School Act 84 of 1996. the South African Schools Act provides that the Minister of Education must ensure that enough schools are built for all learners between seven years and fifteen to receive education. This means that the Minister must allocate funding for the building of schools. However, the Act does not mention that the schools that are built should be of an acceptable standard and have proper sanitation, water, electricity desks and other facilities necessary to create a healthy learning environment. See also HJ Choma Gender and Age discrimination : A constitutional redress, Sub-Sahara case *The Journal of Malaysian Bar Volum 1* 2007 at 1

The rights to basic education also mean that one may not be turned away from a school because he/she cannot afford the school fees. The International Covenant on Economic, Social and Cultural Rights (ICESCR) allows for the progressive realization of the right to free and compulsory education. Under international law, the State must therefore work towards not charging school fees or other expenses to children in primary schools.

The right to basic education does not only mean the right to attend school. It also means that the education that one receives at school must be of a certain standard. The South African courts have not yet explained what this standard is or should be. The Universal Declaration of Human Rights provides that education must be “directed to the full development of the human personality and to the strengthening of respect for human rights and fundamental freedoms”. This aim of education is also included in South African’s National Education Policy¹⁷.

International law and the laws of other countries show that public education should play these roles:

- Developing human potential
- Laying a foundation for one to be a good citizen and
- Giving one skills as a learner to be able to compete in the workplace.

While in school, children have a right to have all their other human rights protected. For this reason, section 10 of the South African Schools Act prohibits the use of corporal punishment at schools. The High Court has decided that allowing corporal punishment at school would lead to a violation of the right of children to dignity and not to be treated or punished in a cruel, inhuman and degrading manner¹⁸.

¹⁷ Act 84 of 1996. The South African School Act provides that the Minister of Education must pass standards governing language policy in public schools. The National Education Policy Act also provides that the Minister of Education must set national policy for language in education. Following both these Acts, the Minister of Education passed the norms and standard of language Education Policy in 1997.

¹⁸ *Christian Education South Africa v Minister of Education* 2000 (4) SA 757 (CC), 2000 (10 BCLR 951 (SE). See also HJ Choma The Environmental rights entered in the constitutions : A critique *US-China Law Review* at page 1 of this paper.

2.3 Environmental protection entrenched in the constitutions

Regulating environment protection has been augmented in the constitutions. The constitutional protection of environment dates from the end of the nineteenth century. Before that time, there had been no provisions for environment protection in constitutions. Since fifty's and sixty's of the twenty century, the environment protection has become the focus of the international community. Among other solutions to this global problem, more and more countries have tried to solve the problem by way of constitutions.

Section 24 of the South African Constitution¹⁹ provides that:

- Everyone has the right to an environment that is not harmful to health or well-being, and
- Government must act reasonably to protect the environment by preventing pollution, promoting conservation, and securing sustainable development, while building the economy and society.

One way of making sure that the Government takes reasonable decisions to protect the environment is to make sure that it follows transparent (open) and reasonable procedures. There are two fundamental rights in the South African Constitution to make sure that these things happen²⁰:

- The right of access to information in section 32 of the Constitution, and
- The right to just administrative action in section 33 of the Constitution.

These rights are not absolute and may be limited if the limitation is reasonable and justifiable in a democratic society based on human dignity, equality and freedom. The limitation clause is in section 36 of the South African Constitution.

¹⁹ It is clear that the “environment” is a composite and inclusive notion that consolidates the more specialized phenomenon such as “nature conservation”, “protection”, “pollution” and other cognate concepts. The composite nature of this right is apparent from the fact that a healthy environment is linked in section 24 of the issue of pollution, ecological degradation and conservation.

²⁰ *Wildlife Society of Southern Africa v Minister of Environment Affairs and Tourism of the Republic of South Africa* 1996 (9) BCLR 1221, 1996 3 SA 1095

In *The Director, Mineral Development Gauteng Region and Sasol Mining (Pty) Ltd v Save the Vaal Environment and other*²¹, the High Court of Appeal held that:

- Before a permit is given for mining, government must be prepared to listen to the views of people concerned about potential environmental impact.
- Interested and affected parties must be told about the application for new mining activities and given a chance to raise their objections in writing. If necessary after this, a more formal hearing can take place.
- The kinds of environmental concerns that can be raised include destruction of plants and animals, pollution, loss of jobs and small businesses and property values.
- Government must make sure that development which meet present needs must not compromise the needs of future generations.

Environmental protection in Hong Kong is much talked about in those sectors of the community who care about Hong Kong's rapid rise as a centre for pollution. Medical waste and discarded plastic abound on beaches. National parks look like rubbish tips on a Monday morning. Adulterated fish and other foodstuffs are marketed. Propulsive smells and hazardous noises assault the senses.²² Much of the natural beauty of the territory is being lost in more ways than one²³.

Parliament in Hong Kong has set up a statutory framework and delegated the task of balancing the interests of the community against those of individuals and holding the scales between individuals to the local planning authority. There is the right to object to any proposed grant, provision for appeals and inquiries, and ultimately the minister decides. There is the added safeguard of judicial review.

If a planning authority grants permission for a particular construction or use in its

²¹ 1999(8) BCLR 845, 1997 (4) BCLR 531, the rule *audi alteram partem* applies when application for a mining licence is made to the Director in terms of section 9 of the Act. Such a hearing need not necessarily be a formal one, but interested parties should at least be notified of the application and be given an opportunity to raise their objections in writing. HJ Choma. The Environmental rights entered in the constitutions :A critique. *US-China Law Review* at page 1 of this paper.

²² Jill Cottrell, Recent Developments in the Law of Nuisance, *Environmental Law in Hong Kong: Problems and Prospects*. Until recently, writers on environmental law tended to dismiss the tort of nuisance as a tool for environmental protection. As one writer observed, 'a High Court nuisance action is a source of surprise and nostalgia'. Many ecologists would still regard the common law governing nuisance as fundamentally flawed. See *Khorasandjian v Bush*, *The Times*, Feb 1 1993 Court of Appeals.

²³ Gary N Heibronn: *Environmental Law in Hong Kong*, Papers presented at a series of three *Twilight Seminars* hosted by the Faculty of Law, University of Hong Kong. May 5, May 20, May 31, 1993.

area it is almost certain that some local inhabitants will be prejudiced in the quiet enjoyment of their properties. Can they defeat the scheme simply by bringing an action in nuisance? If not, why not? It has been said, no doubt correctly, that planning permission is not a licence to commit nuisance and that a planning authority, has no jurisdiction to authorize nuisance. However, a planning authority can, through its development plans and decisions, alter the character of a neighbourhood. It may have the effect of rendering innocent activities which, prior to the change, would have been an actionable nuisance²⁴.

2.4 Reinforcement of the international relations in the constitutions

Issues relating to international relations have been reinforced in constitutions. Generally speaking, the constitutions in the eighteenth and nineteenth century put emphasis on the internal affairs and dealt little with foreign affairs as international contacts by then were much restrained by the underdeveloped economy, scientific technology and communication. With high frequency and increasing complications of international contacts and the special experiences in the two world wars, all countries are more and more concerned at the issues resulted from international contacts. Accordingly, constitutions have become an important means used to regulate one country's foreign relations.

Section 39(1) of the South African Constitution provides that South Africa is bound by various international agreements concerning human rights, including the African Charter on Human and Peoples' Rights²⁵. It further provides that when interpreting the Bill of Rights, a court, tribunal or forum, must promote the values that underlie an open and

²⁴ Jill Cottrell, Recent Developments in the Law of Nuisance, *Environmental Law in Hong Kong*, Papers presented at a series of three *Twilight Seminars* hosted by the Faculty of Law, University of Hong Kong, May 5, May 20, May 31, 1993.

²⁵ Centre for Human Rights University of Pretoria: *Good Governance Programme, Socio-Economic Course* 24-28 May 2004, International documents referred to in entrenchment of socio-economic rights, e.g. African Charter on Human and People's Rights, 1981. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1984, Convention on the Elimination of All forms of Discrimination Against Women, 1979, International Convention on Elimination of All forms of Pracial Discrimination, 1966, Convention on the Rights of the Child, 1989 etc.

democratic society based on human dignity, equality, and freedom. It must consider International law and may consider foreign law²⁶.

*HRSAR v Ma Wai Kwan David*²⁷, the Court held that the Basic Law (Hong Kong) is not only a brainchild of an international treaty, the Joint Declaration. It is also a national law of the Provisional Legislative Council (PLC) and the Constitution of the Hong Kong Special Administrative Region (HKSAR). It translates the basic policies enshrined in the Joint Declaration into more practical terms. The essence of these policies is that the current social, economic and legal system in Hong Kong will remain unchanged for fifty years. The purpose of the Basic Law is to ensure that these basic policies are implemented and that there can be continued stability and prosperity for the Hong Kong Special Administrative Region (HKSAR). Continuity after the change of sovereignty is therefore of vital importance. The Basic Law (Hong Kong) has at least three dimensions:

- International
- Domestic
- Constitutional

2.5 The doctrine of separation of power reinforced in the constitutions

Changes in the powers of the Parliament and the executive. In origin, the Parliament had the supremacy over other powers although the principle of separation of three powers was the foundation of the capitalist constitutions. As Dicey, British scholar of constitution, pointed out, “the supremacy of Parliament” is the main characteristic of the British political system²⁸. Notwithstanding, with the speedy development of politics,

²⁶ *In re Certification of the Constitution of the Republic of South Africa Constitution Act, 1996* (10) BCLR 1253 (CC) par 77.

²⁷ (1997) 2HRC 315, (1997) HKLRD 761 (CA). The horrors of the Second World War highlighted the need for some form of action by the world community to prevent another war and widespread violations of human rights. It also showed that domestic legal systems (i.e. legal system of particular countries) are not enough to protect people living in those countries. This led to the creation of United Nations.

²⁸ Dicey *Law of the Constitution* 1959. A written constitution *per se* does not imply rigidity since such a construction can indeed exclude the intervention of the courts. Dicey defined a flexible constitution as “one under which every law of every description can be legally changed with the same ease and in the same manner by one and the same body”, and a rigid constitution is “one under which certain laws generally known as constitutional or fundamental laws cannot be changed in the same manner as ordinary law. GE

economy and scientific technology, more and more intricate affairs, both national and international, need to be handled in a swift and decisive manner. In order to meet such challenge, constitutions have greatly reinforced the executive power by providing for executive direct intervention in parliamentary legislation, the emergency powers and the delegated legislation.

The acclaimed French political philosopher, Montesquieu, in his celebrated book *L'Esprit de Lois* expounded the doctrine of *trias politica*. Montesquieu's thesis was that the separation of executive, legislative and judicial power was a condition precedent liberty. The central thesis of this celebrated doctrine, is that a constitution must provide effective checks and balances in relation to the exercise of state power. An excessive concentration of power in a single organ or person is an invitation for abuse or maladministration.

In *Berstein v Bester No*²⁹, the Constitutional Court, explained in relation to section 22 of the South African interim Constitution³⁰, which dealt with access to the courts, that its purpose was to protect the separation of powers, particularly the separation of the judiciary from other arms of the state in order to protect the individuals. Therefore, its purpose was fundamental to the upholding of the rule of law and of a state premised on the philosophy of constitutionalism by preventing legislatures from converting themselves by acts of legerdemain into 'courts'.

Devenish *Commentary on South African Constitution* at 12. HJ Choma. The Environmental rights entered in the constitutions : A critique *US-China Law Review* at 9 of the paper.

²⁹ 1996 (4) BCLR 449, 1996 2 SA 751(CC) read with Devenish *A Commentary on the south African Constitution* at 13. See also *Executive Council of the Western Cape Legislature v President of the Republic of South Africa* 1995 4 SA 877, 1995 (10) BCLR 1289 (CC).

³⁰ Act of 1993. The second judgment of the Constitutional Court concerning the certification of the new Constitution in which the Court certified that the new Constitution complied with the Constitutional Principles as required by the 1993 Constitution. *In re Certification of the South African Constitution* 1997 92) SA; 1997 (1) BCLR 1 (CC).

2.6 The constitutions improved freedoms and rights of citizens

Freedoms and rights of citizens have been increased in constitutions. First of all, most countries have decreased the minimum age of voters to eighteen years. Second nearly all the countries have magnified the scope of direct election by removing, at least in form, any discrimination against voters such as sex, race, property, education. Third, the rights and freedom protected by constitutions have extended from political and personal ones to the rights and freedoms in respect to social economy, science and culture, such as ownership, right to succession, labour, rest, labour insurance, copyright, invention etc.

Section 7 of the South African Constitution provides that:

- The Bill of Rights is a cornerstone of democracy in South Africa. It enshrines the rights to all people in our country and affirms the democratic values of human dignity, equality and freedom.
- The state must respect, protect, promote and fulfill the rights in the Bill of Rights.
- The rights in the Bill of Rights are subject to the limitations contained or referred to in section 36, or elsewhere in the Bill³¹.

The Bill of Rights and the Basic Law in Hong Kong provides that:

- The rights guaranteed by the Ordinance are many. Some of these rights appear to be granted in absolute terms, while others may be limited by criteria laid down in the Ordinance. The only truly absolute rights are the prohibition against torture, inhuman treatment and slavery or servitude, and imprisonment for failure to fulfill a contract. Some others may seem absolute, but reasonable restrictions on them are allowed (e.g. the right to equality or the presumption of innocent). Others may be restricted to protect national security, public order, public health, morals, or the rights and freedom of others. These are, freedom of movement, freedom to

³¹ Section 10 of the 1996 Constitution declares that everyone has inherent dignity and the right to have their dignity respected and protected. In acutely cleavaged societies and in countries with a lamentable history of racism and colonialism, particularly South Africa, this right, find expression in the epochal Universal Declaration of Human Rights of 1948, and the African Charter on Human and People's Rights of 1981. See also *S v Makwanyane* 1995 (6) BCLR 665, 1995 3 SA 391 (CC)

manifest one's religion or belief, freedom of expression, right of peaceful assembly and freedom of association³².

Continuous improvement in constitution safeguarding mechanism. The earliest written constitutions such as the United States Constitution of 1787 and the French Constitution of 1791 did not say anything on constitution safeguarding. In 1803, the system of judicial review was introduced in the United States³³.

However, only until the twentieth century, did the judges in the United States begin regularly exercise this power to review legislation in order to establish whether it complied with the terms of the Constitution. In contrast to the system of judicial review in the United States, other countries have instituted different mechanisms of safeguarding enforcement of constitutions by way of setting up the constitutional tribunals or constitutional commissions. The establishment of judicial, as opposed to legislative supremacy in the United States has proved to be of profound jurisprudential and political significance for South Africa. Section 1 of the South African Constitution provides for the supremacy of the Constitution and the rule of law.

According to the South African Constitution, the High Courts' power of judicial review of decisions of inferior courts is no longer limited to situations falling within section 24(1) of the High Court Act³⁴, it is determined by the provisions of the Constitution. Therefore the High Court may indeed grant appropriate relief where a decision of an inferior court has the effect of infringing a fundamental right³⁵.

³² Yash Ghai, *The Bill of Rights and the Basic Law: Complementary or Inconsistent? Hong Kong's Bill of Rights: 1991-1994 and Beyond*, editors George Edwards Andrew Byrnes: University of Hong Kong Faculty of Law. The effect of the provisions about restrictions on rights is that they ensure that the government must act reasonably and in good faith, and that the legislature must carefully assess social needs and impose restrictions no wider than strictly necessary to meet these needs. In this way the rules about restrictions ensure efficient but fair administration.

³³ *Marbury v Madison* 5 US (1 Cranch) 137 1803. The Constitution of the United States does not expressly allocate a power of judicial review to the Federal Supreme Court. However, as a result of an epochal decision of Chief Justice Marshall, the United States Supreme Court first assumed the power of declaring congressional legislation invalid in the seminal case of *Marbury* and the authority to declare state legislation repugnant to the United States Constitution in *Fletcher v Pecks* 10 US(6 Cranch) 87 3 LED 162 (1810)

³⁴ 59 of 1959

³⁵ *Makwanyane* cited above.

2.7 Changes in the emergency powers

The theories on the emergency powers mushroomed since the early days of the twentieth century because assorted contradictions, internal or international, had intensified. Those doctrines on the emergency powers influenced drafting of constitutions in many countries. The emergency power gradually became indispensable part of numerous constitutions in order to balance the relation between the duty of the government in maintaining public order and the personal freedom³⁶.

A state of emergency may only be declared, according to section 37 of the South African Constitution, in terms of an Act of parliament. A state of emergency and all conduct taken by virtue of it, is subject to judicial review, as set out in section 37 of the South African Constitution. This is in contrast with the former State President's virtually untrammelled power under the 1983 South African Constitution, which authorized him in terms of the notorious Public Safety Act³⁷ to declare a state of emergency in terms of which, rule by proclamation could and did occur. A state of emergency must be distinguished from a state of national defence which the President may declare in terms of section 203 of the South African Constitution. The latter permits the President to deploy the defence force. The fact that judicial review as well as parliamentary control applies to a declaration of a state of emergency and all conduct taken in terms of it, is intended to guarantee that the abuse of power in such a situation does not occur.

³⁶ Section 202 of the South African Constitution 1996 provides:

- The President as head of the national executive may declare a state of national defence, and must inform Parliament promptly and in appropriate details of
 - the reason for the declaration
 - any place where the defence force is being employed and
 - the number of people involved.

³⁷ 3 of 1953. Section 37 of the South African Constitution 1996 provides that:

- A state of emergency may be declared only in terms of an Act of Parliament, and only when:-
 - the life of the nation is threatened by war, invasion, general insurrection, disorder, natural disaster or other public emergency and
 - the declaration is necessary to restore peace and order. See also Devenish *A Commentary on the South African Constitution* at 163.

2.8 Constitutional confirmation of the status of political parties

The constitutions before the thirty's and Forty's of the twentieth century had no provisions in respect of political parties although the constitutions then did not protect the individual's freedom to association with others. With the development of the system of political parties, political parties played an increasingly important role in administration of one country. As a result, parties by means of the constitutions³⁸, section 19 of the South African Constitution 1996 provides that:-

- Every citizen is free to make political choices, which includes the right:
 - to form a political party
 - to participate in the activities of, and to recruit members for a political party and
 - to campaign for a political party or cause.
- Every adult citizen has the right:
 - to vote in elections for any legislative body in terms of the Constitution and to do so in secret, and
 - to stand for, to public office and, if elected, to hold office.

Conclusion

The constitution is a living document, it embodies fundamental values which are applicable to the issue and which arise as society develops. The meaning of a constitution is not fixed but changes overtime. Especial where a clause in a constitution is open to various interpretations, it is the judge's function to seek out and apply that meaning which most accords with the provisions of the constitution and the circumstances prevailing at the time.

³⁸ Unlike the other rights enumerated in the Bill of Rights, which accrue both to citizens and non-citizens, these rights are confined to the citizens of South Africa. The right to make political choice overlaps to some extent with the right to freedom of thought, belief and opinion. As far as public servants are concerned, section 197(3) stipulates that no employee may be favoured or prejudiced only because such person supports a particular party or cause. See also Devenish, *A Commentary on the South African Constitution* at 62. HJ Choma, The law and its interpretation play a role in the elimination of xenophobia *US-China Law Review* 2008.

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