

The Admission and Enrolment of Foreign Legal Practitioners in South Africa under the *Legal Practice Act*: International Trade Law and Constitutional Perspectives

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Abstract

Globalisation requires ever closer co-operation between legal professionals hailing from different national jurisdictions. This interactive global environment has fostered growing international training and mobility among legal practitioners and the internationalisation of legal education. Increasing numbers of law students get trained in other countries as part of their undergraduate degrees or even come to foreign shores to obtain law degrees. Many students hailing from other African countries study towards LLB degrees at South African universities. Major commercial law firms ensure that they can offer in-house expertise on major foreign legal systems and co-operate with partner firms in other parts of the globe.

The *General Agreement on Trade in Services* (GATS), to which South Africa is a party, is a multilateral agreement focusing on the liberalisation of trade in services amongst member countries. Services under the GATS system include legal services. The commitments made by South Africa under this agreement require that South Africa allows foreign legal practitioners to establish a commercial presence or be transferred to South Africa. The Bill of Rights entrenched in Chapter 2 of the *South African Constitution* guarantees fundamental rights including the right to equality and freedom of trade, occupation and profession. With the coming into force of the new *Legal Practice Act* 28 of 2014, which provides a legislative framework for regulating the affairs of legal practitioners, including their admission and enrolment, it is necessary to assess the extent to which the Act complies with the GATS rules and the *South African Constitution*.

This paper examines the new *Legal Practice Act* 28 of 2014, and examines whether the Act addresses the conflicts that have always existed between the regulation of the legal profession and the admission of legal practitioners in South Africa with South Africa's commitments under the GATS system. Using the doctrinal legal method, it analyses and evaluates the rules governing the admission of foreign attorneys in South Africa from two perspectives. First, it considers them in the light of the international law obligations of the country and second it evaluates whether or not they comply with the *South African Constitution*, and more specifically with the Bill of Rights entrenched in the *South African Constitution*. While the new legislation may assist in ensuring the compliance of South Africa with the relevant GATS rules, it will depend on the regulations which still have to be promulgated to what extent the new legal framework will achieve the full compliance of South Africa with all relevant GATS rules.

The paper concludes with recommendations for the reform of the *Legal Practice Act*. It argues that while the requirement to be a South African permanent resident in order to qualify for admission as an attorney may be justifiable in terms of GATS and in terms of South African constitutional law, it is not in South Africa's best interest to retain it. Consequently, the paper calls for the repeal of the permanent residence requirement for admission as an attorney in the country.

Keywords

Affirmative action; minority group; multi layered disadvantage; situation sensitive; designated groups; equality; employment equity.

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1 Introduction

Economic globalisation is defined as "[t]he closer integration of the countries and the peoples of the world"¹ through the—

irrevocable integration of markets, nation states and technologies ... in a way that is enabling individuals, corporations and nation states to reach around the world further, faster, deeper and cheaper than ever before".²

It is the gradual integration of national economies into one borderless economy encompassing free international trade and unrestricted foreign direct investment.³ It points to a wide expansion and intensification of existing linkages and interconnections between states, regions and societies in general, characterised by strong economic interdependence.⁴ This interactive global environment has fostered growing international training and mobility among legal practitioners, and also the internationalisation of legal education. In this context legal firms have developed a global focus by increasing their international presence in order to cater for the global needs of their clientele. As globalisation takes root, the demand for foreign legal services from businesses and organisations involved in international trade is also on the rise.

Rendering adequate legal advice on matters involving multiple jurisdictions has become an essential feature of modern legal practice, and is required to enhance the global competitiveness of the country. Major commercial law firms ensure that they can offer in-house expertise on major foreign legal systems and co-operate with partner firms in other parts of the globe, and recruit legal practitioners who are qualified to practise in multiple jurisdictions. South African law firms which operate globally as well as international law firms with branches in South Africa benefit equally when legal practitioners with international legal training and qualifications

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¹ See Stiglitz *Globalization and its Discontents* 9.

² Friedman *Lexus and the Olive Tree* 9.

³ Van den Bossche *Law and Policy of the World Trade Organisation* 4. There is accelerated trade and investment flow, the diffusion of new technologies, the expansion of capital markets, the integration of financial markets and the internationalisation of the means of production followed by services such as banking, law and finance. See Fazio *Harmonisation of International Commercial Law* 1; Shumba *Harmonising Regional Trade Law* 25.

⁴ See Fazio *Harmonisation of International Commercial Law* 1.

practise in the country. The international mobility of qualified legal practitioners also contributes to intellectual cross-pollination and the enrichment of jurisprudence. Legal concepts get scrutinised through the perspectives of diverse legal traditions and the constitutionally mandated consideration of foreign law in constitutional interpretation⁵ is fostered through the inclusion of non-South African lawyers in the profession. Overall, this intellectual *métissage*⁶ contributes to legal innovation, which is urgently required in a period of rapidly evolving technology and constantly emerging new societal challenges.

In spite of all the arguments in favour of allowing suitably qualified foreign attorneys to practise here, South Africa has so far adopted a restrictive approach to their admission.⁷ With the coming into force of the new *Legal Practice Act* 28 of 2014, which provides a legislative framework for regulating the affairs of legal practitioners, including their admission and enrolment, it is necessary to analyse whether the Act substantially changes this position. The extent to which the Act complies with the rules of the *General Agreement on Trade in Services* (GATS),⁸ to which South Africa is a party, needs to be assessed. Under the previous legal dispensation provided for under mainly the *Attorneys Act* 53 of 1979 and the *Admission of Advocates Act* 74 of 1964, a plethora of possible violations of South Africa's GATS commitments had been observed and pointed out⁹. Furthermore, possible violations of the Bill of Rights entrenched in Chapter 2 of the *South African Constitution*, which sets out fundamental rights including the right to equality¹⁰ and freedom of trade, occupation and profession,¹¹ have to be evaluated. In the analysis of the *Legal Practice Act*, the relevant rules of interpretation have to be considered. Section 39(2)(b) of the *Constitution* makes international law directly relevant to the interpretation of the Bill of Rights as it enjoins South African courts to consider international law when interpreting the Bill of Rights. Section 233 of the *Constitution* obliges courts to prefer any reasonable interpretation of legislation that is compatible with international law over any alternative interpretation that is inconsistent with it.

This paper examines the new *Legal Practice Act* 28 of 2014, and seeks to ascertain whether the Act addresses the conflicts that have always existed between the regulation of the legal profession and admission of legal

⁵ Section 39(1)(c) of the *Constitution of the Republic of South Africa*, 1996.

⁶ Literally meaning "mix".

⁷ See LSSA date unknown <http://bit.ly/1U2L8tr> for a summary of the legal position under the *Attorneys Act* 53 of 1979.

⁸ *General Agreement on Trade in Services* (1995) (hereinafter GATS).

⁹ Cronjé 2013 <http://bit.ly/1NU9UQ6>.

¹⁰ Section 9 of the *Constitution*.

¹¹ Section 22 of the *Constitution*.

practitioners in South Africa with South Africa's commitments under the GATS system. Using the doctrinal legal method, it analyses and evaluates the rules governing the admission of foreign practitioners - either attorneys or advocates - in South Africa from two perspectives. First, it considers them in the light of the international legal obligations of the country and second it evaluates whether they comply with the *South African Constitution*, and more specifically with the Bill of Rights entrenched in the *South African Constitution*. It concludes with recommendations for the reform of the *Legal Practice Act*.

2 Legal service market access rules, GATS and the admission of legal practitioners

At the centre of the current phenomenon of economic globalisation is the World Trade Organisation (WTO), an international organisation which was created to facilitate international trade. The WTO creates a platform for addressing the challenges of international trade whilst exploring the opportunities that present themselves. It oversees the implementation, administration and operation of the agreements covered by it and provides a forum for negotiations and for settling disputes.¹² One of the agreements under the WTO system is the GATS.

GATS is a comprehensive multilateral agreement under the auspices of the WTO and a result of the Uruguay round of negotiations, that deals specifically with the liberalisation of trade in services amongst member states.¹³ It endeavours to create a credible and reliable system of international trade rules, to ensure the fair and equitable treatment of all participants, to stimulate economic activity through guaranteed policy bindings, and to promote trade and development through progressive liberalisation.¹⁴ GATS therefore establishes a basic set of rules for world trade in services, a clear set of obligations for each member country and a legal structure for ensuring that those obligations are observed.

The GATS is the first instrument regulating global trade in services.¹⁵ Trade in services has become an integral part of global economic

¹² Articles III(1), (2) and (3) of the *Marrakesh Agreement Establishing the World Trade Organization* (1994). Also see Van den Bossche *Law and Policy of the World Trade Organisation* 87-93. Also see Dillon 1995 *Mich J Int'l L* 360.

¹³ During the Uruguay Round of Multilateral Trade Negotiations, the United States threatened to abandon the GATT if trade in services was not placed on the negotiating table (*Minutes of Meeting GATT Doc C/M/194* (1985) 16).

¹⁴ See WTO 2015 <http://bit.ly/1VmU6aa>.

¹⁵ During the Uruguay Round of Multilateral Trade Negotiations, the United States threatened to abandon the GATT if trade in services was not placed on the negotiating table (*Minutes of Meeting GATT Doc C/M/194* (1985) 16).

development. International trade in services currently amounts to well over two trillion US dollars, which is about 20 per cent of total world trade.¹⁶ Professional services, including legal services, are an important part of GATS negotiations. The US dollar value of world commercial services exports in 2013 was \$4.6 trillion; implying growth of 6% over 2012. World import of commercial services grew at 4% and reached \$4.3 trillion during 2013.¹⁷

South Africa became a member of the WTO in 1994. In *Progress Office Machines CC v South African Revenue Services*, the Supreme Court of Appeal confirmed that the "WTO Agreement was approved by Parliament on 6 April 1995 and is thus binding on the Republic in international law".¹⁸ Under GATS which is part of the WTO Agreement, South Africa, like any other GATS member, is bound to specify in its schedule of commitments the terms, limitations and conditions on market access;¹⁹ the conditions and qualifications on national treatment;²⁰ where appropriate, the time-frames for implementation of such commitments; and the date of entry into force.²¹ Once a member state has undertaken liberalisation commitments in a specific services sector, it is under an obligation not to maintain or introduce discriminatory and/or quantitative measures unless such a measure has been listed in the member state's schedule of specific commitments.

Article I of GATS defines trade in services as the supply of a service from the territory of one member into the territory of any other member (cross-border supply (Model 1)),²² or in the territory of one member to the service consumer of any other member (Consumption abroad (Model 2)),²³ or by a service supplier of one member through commercial presence in the territory of any other member (Commercial presence (Model 3)),²⁴ or by a

¹⁶ See WTO 2015 <http://bit.ly/1VmU6aa>.

¹⁷ See WTO 2014 <http://bit.ly/27WtpxS>.

¹⁸ *Progress Office Machines CC v South African Revenue Services* 2007 4 All SA 1358 (SCA) 1362 para 6.

¹⁹ GATS Article XVI.

²⁰ GATS Article XVII.

²¹ GATS Article XX.

²² Cross-border supply (Mode 1) is trade that takes place from the territory of one Member into that of another without the movement of the service provider, eg legal plans sent by internet or wire or satellite etc. Also see Hoekman and Mattoo *International Trade* 116.

²³ Consumption abroad (Mode 2) is services consumed or purchased by nationals of a Member in the territory of another Member where these services are supplied, eg tourism, where the consumer travels to another country to consume the service. Also see Hoekman and Mattoo *International Trade* 116.

²⁴ Commercial presence (Mode 3) is any type of business or professional establishment, including branches and representative offices, eg direct investment in the host country. Also see Hoekman and Mattoo *International Trade* 116.

service supplier of one member through the presence of natural persons in the territory of any other member State (Movement of natural persons (Model 4)).²⁵ As per statistical approximation of the WTO, service supplies in various Modes ie cross-border supply (Mode 1), consumption abroad (Mode 2), commercial presence (Mode 3), and movement of natural persons (Mode 4) account for 35%, 10-15%, 50%, and 1-2% respectively of the total commercial services flows in the world.²⁶ South Africa has made commitments under modes 3 and 4.²⁷

The GATS definition of trade in services draws legal services into its ambit. In that context, GATS has an impact on the regulatory framework which governs the admission of legal practitioners in member states.²⁸ With the advent of globalisation, laws and legal systems have undergone significant transformation that has an impact on the provision of legal services globally. Apparently new areas such as public international law, regional law, international trade law, finance law, environmental law, internet law, procurement law, transnational justice, international criminal law and development law have developed and adopted a transnational character. There are now legal and transnational dimensions in global issues such as international crime, terrorism, migration, poverty, intellectual property and environment etc. For this reason legal practitioners invariably have to look beyond the municipal law of the jurisdiction in which they practise.²⁹

Legal services refer to legal advisory and representation services, legal or juridical procedures, and the drawing up of legal instruments or documentation. The work of drawing up legal instruments or documentation covers a group of related services in the form of fees for trademark and patent registration and maintenance fees on patents. Lawyers provide legal advice, represent clients, prepare contracts and other legal documents, and may act as executors or trustees in estate matters. In simple terms, the GATS modes of supply regulate issues in

²⁵ Movement of a natural person (Mode 4) is the temporary presence of natural persons in a market for the purpose of supplying services, eg a professional or employee of a service provider. Also see Hoekman and Mattoo *International Trade* 116.

²⁶ See WTO 2014 <http://bit.ly/24cYMzQ>.

²⁷ See South Africa's commitments at WTO 2015 <http://bit.ly/1TGtPis>.

²⁸ In the WTO's *Services Sectoral Classification List* (1991) "legal services" is classified as "professional services" under the "business service's" sector. This entry corresponds with the *Central Product Classification (CPC) 861 of the UNCPC* (1991) and is subdivided and defined in different categories. The classification and definition of legal services in the Provisional CPC has evolved over time. The Provisional CPC has been revised three times with the most recent revision, CPC Version 2, being completed in 2008.

²⁹ See Gupta and Sengupta 2011 *Korea U L Rev* 73.

countries allowing foreign law firms to deal with clients in their market from across the border; or citizens to travel abroad to visit the legal practitioner; or foreign lawyers establishing a law firm in a member state; or lawyers entering the member state in person to do business.

Under GATS, member states are enjoined to adhere to certain obligations:

- not to discriminate among foreign service providers by offering more favourable treatment to service providers of any one country. Members are permitted to maintain existing measures which contravene the MFN obligation, but any exceptions must be clearly stated in the member's MFN exemption list;³⁰
- not to take measures to discriminate between domestic and foreign service providers;³¹
- not to take measures which are defined in the GATS as restricting market access e.g. quotas, economic needs tests, requirements for certain types of legal entities, and maximum foreign shareholding limits;³²
- to administer domestic regulations in a reasonable, objective and impartial manner;³³ and,
- to make public all measures which pertain to the GATS.³⁴ In the event that a member fails to carry out its obligations or specific commitments under the GATS, other members have recourse to the WTO's dispute settlement mechanism.

The admission of foreign legal practitioners entails the presence of natural persons in South Africa for the purposes of the delivery of legal services.³⁵ For this reason, the issue of the admission of foreign legal practitioners falls squarely within the scope of application of GATS. However, it also

³⁰ Most-Favoured Nation (MFN) treatment obligation under GATS Article II.

³¹ National Treatment commitment under GATS Article XVII. Any measure which violates the national treatment obligation must be clearly inscribed in the Member's schedule of commitments.

³² Market access commitment under GATS Article XVI.

³³ Domestic regulation obligation under GATS Article VI. Qualifications and licensing requirements and technical standards must be based on objective and transparent criteria, and not more burdensome than necessary to ensure the quality of the service.

³⁴ Transparency obligations require that the WTO must be notified of any relevant changes to government policies, regulations or administrative guidelines which significantly affect the trade in services covered by the specific commitments under the Agreement. Also, members must establish enquiry points and respond promptly to requests for information on their regulatory regimes.

³⁵ GATS Article XXVIII(k).

has a bearing on the supply of legal services through commercial presence. Commercial presence is defined by GATS as:

any type of business or professional establishment, including through the constitution, acquisition or maintenance of a juridical person, or the creation or maintenance of a branch or a representative office, within the territory of a Member for the purpose of supplying a service.³⁶

It is submitted that the scope of "commercial presence" encompasses the professional establishment of an admitted legal practitioner from a GATS member state in another GATS member state for the purpose of supplying a professional legal service.

A major consequence of South Africa's specific commitments is that it has, *inter alia*, to ensure that regulatory measures, including admission, are administered in a reasonable, objective, and impartial manner³⁷. Furthermore, in the absence of the relevant discipline contemplated in GATS Article VI(4), it has to ensure that it does not apply licensing and qualification requirements that nullify or impair its specific commitments in a manner which does not comply with the following criteria:

[that qualification requirements are] based on objective and transparent criteria, such as competence and the ability to supply the service; (b) are not more burdensome than necessary to ensure the quality of the service; (c) in the case of licensing procedures, not in themselves a restriction on the supply of the service could not reasonably have been expected of that Member at the time the specific commitments in those sectors were made. ... (d) could not reasonably have been expected of that Member at the time the specific commitments in those sectors were made.³⁸

Furthermore, it is obliged to "provide for adequate procedures to verify the competence of professionals of any other member state".³⁹

3 South African law governing the admission of attorneys

Prior to the coming into effect of the *Legal Practice Act* 28 of 2014 (the Act), law societies in South Africa, which are the bodies controlling the admission of persons into the profession, adhered to the so-called "re-qualification policy" in respect of the admission of non-South African attorneys hailing from foreign jurisdictions who wished to practise in South Africa. This policy was legislated through the now repealed⁴⁰ *Attorneys*

³⁶ GATS Article XXVIII(d) .

³⁷ GATS Article VI(1).

³⁸ GATS Article VI(5).

³⁹ GATS Article VI(6).

⁴⁰ Section 119 of the *Attorneys Act* 53 of 1979.

Act⁴¹. In terms of section 15(1)(b)(iii) of the *Attorneys Act* it was in principle necessary that one holds a South African LLB degree in order to be admitted to practise as an attorney in South Africa. Furthermore, the said statute made permanent residency or citizenship by naturalisation as well as the passing of the South African Attorney's Admission Examination prerequisites to the admission as an attorney in South Africa. However, there were certain exceptions to this rule. Firstly, the *Attorneys Act* itself relaxed admission requirements with regard to candidates coming from certain designated countries. In terms of section 13(1) of the defunct *Attorneys Act* certain candidates from countries which had been designated by regulations promulgated under the *Attorneys Act* did not have to serve as candidate attorneys and could be exempted from the need to obtain a South African LLB degree as well as from the need to sit for the South African Attorneys admission examination. Such regulations had been promulgated with respect to candidates hailing *inter alia* from Zimbabwe and Namibia.⁴² Other isolated relaxations of admission requirements to the South African legal profession under the *Attorneys Act* were the designations of Nigeria⁴³ and the Kingdom of Swaziland⁴⁴ as countries whose nationals might enter into contracts of articles of clerkship for a period of two years, provided that their LLB degrees had been certified to be equivalent to the South African LLB qualification by a South African university. With regard to certain candidates from the above countries, the residency, degree and admission requirements had been further relaxed in terms of other provisions of the *Attorneys Act*. Furthermore, admitted attorneys from the Kingdom of Lesotho were able to apply for admission to practise in South Africa under section 17 of the *Attorneys Act*.⁴⁵ Secondly, in terms of the now moribund *Recognition of Foreign Legal Qualifications and Practice Act*⁴⁶ persons of South African origin who were expatriated pursuant to circumstances related to the apartheid system in South Africa and who had obtained legal qualifications while living in exile before 1994 were able to gain admission to the South African attorney's profession without having to re-qualify in South Africa. This legislation was repealed after its purpose had been satisfied.

The *Legal Practice Act*, which was been promulgated in 2014, aims to provide, among other things, for a legislative framework for the transformation and restructuring of the legal profession in line with constitutional imperatives, so as to facilitate and enhance the development

⁴¹ *Attorneys Act* 53 of 1979.

⁴² GN R588 in GG 14719 of 2 April 1993.

⁴³ GN 1410 in GG 21927 of 22 December 2000.

⁴⁴ GN R334 in GG 24991 of 28 February 2003.

⁴⁵ GN R1350 in GG 11979 of 30 June 1989 and GN R 1813 of 1 October 1993.

⁴⁶ *Recognition of Foreign Legal Qualifications and Practice Act* 114 of 1993.

of an independent legal profession that broadly reflects the diversity and demographics of the country; to provide for the establishment, powers and functions of a single South African Legal Practice Council and Provincial Councils in order to regulate the affairs of legal practitioners and to set norms and standards; and to provide for the admission and enrolment of legal practitioners.⁴⁷

The admission and enrolment of attorneys is now governed by section 24 of the Act. Under the Act a person may practise as a legal practitioner only if he or she is admitted and enrolled to practise as such in terms of this Act. The High Court is directed to admit an applicant who satisfies the court that s/he is duly qualified, is a South African citizen or a permanent resident, is a fit and proper person to be so admitted, and has served a copy of the application on the Council, containing the information as determined in the rules within the time period determined in the rules.⁴⁸

A person is duly qualified if s/he fulfils the requirements of section 26 of the Act, which stipulates that to be admitted and enrolled as a legal practitioner, a person must have either satisfied all the requirements for the LLB degree obtained at any university registered in South Africa, or alternatively have satisfied all the requirements for a law degree obtained in a foreign country, which is equivalent to the LLB degree and recognised by the South African Qualifications Authority established by the *National Qualifications Framework Act, 2008* (Act No 67 of 2008). Furthermore, the person must also have undergone all the practical vocational training requirements as a candidate legal practitioner prescribed by the Minister and passed a competency-based examination or assessment for candidate legal practitioners as may be determined in the rules.⁴⁹

The Minister may, in consultation with the Minister of Trade and Industry and after consultation with the Council, and having regard to any relevant international commitments of the Government of the Republic, make regulations in respect of admission and enrolment to determine the right of foreign legal practitioners to appear in courts in the Republic and to practise as legal practitioners in the Republic; or may give effect to any mutual recognition agreement to which the Republic is a party, regulating the provision of legal services by foreign legal practitioners, or the admission and enrolment of foreign legal practitioners.⁵⁰

⁴⁷ Long title of the Act.

⁴⁸ Section 24 of the *Legal Practice Act 28 of 2014*.

⁴⁹ Section 26 of the *Legal Practice Act 28 of 2014*.

⁵⁰ Section 24(3) of the *Legal Practice Act 28 of 2014*.

4 Compliance of South African attorneys' admission law with GATS rules

It has been rightly suggested that the so-called "re-qualification policy" as it was implemented through the *Attorney's Act* contravened South Africa's obligations under Article VI(5) in that the requirement to obtain a South African LLB degree was more burdensome than necessary to ensure the quality of the provision of legal services in South Africa, and that it could not have been reasonably expected of South Africa at the time when the commitment in the legal sector was made.⁵¹ The result of the incoherent relaxation of admission requirements was that nationals of various countries were being afforded preferential treatment compared with candidates from other GATS member states. This was problematic in the light of South Africa's obligation to accord all other GATS member states "Most Favoured Nation" treatment. The repealed *Recognition of Foreign Qualifications Act* could also not be easily reconciled with South Africa's obligations under GATS. It is an example of discriminatory legislation which was arguably justified by sound policy objectives, even though it could have been brought in line with South Africa's GATS obligations if corresponding MFN exemptions had been notified when South Africa signed GATS in 1994.

However, the *Legal Practice Act* introduces a new regime for the admission of legal practitioners in South Africa. The Act repeals the various instruments that used to regulate this area. The question now is how many of these potential GATS violations have resolved under the new *Legal Practice Act*? It has to be determined whether the new Act resolves the GATS compliance concerns raised under the previous regime.

South Africa has made certain specific commitments with regard to legal services. It committed itself to applying the "Market Access" and "National Treatment" provisions of GATS without limitation with respect to commercial presence, ie the establishment of a permanent business presence in South Africa. Furthermore, it committed itself to apply the "Market Access" provisions of GATS with respect to natural persons in South Africa provided such persons are intra-company transferees.⁵²

⁵¹ Cronjé 2013 <http://bit.ly/1NU9UQ6>.

⁵² South Africa's schedule of specific commitments defines them to include professionals – natural persons who are engaged, as part of a services contract negotiated by a juridical person of another member in the activity at a professional level in a profession set out in Part II (this includes legal services, since they are set out in said Part II), provided such persons possess the necessary academic credentials and professional qualifications which have been duly recognised, where appropriate, by the professional association in South Africa.

The country made no commitments under Modes 1 and 2 and is therefore not prohibited from limiting or restricting the cross-border supply of legal services into the country or the consumption of legal services abroad. Cross-border trade typically covers situations where clients receive legal services from abroad via the postal or telecommunications devices. No market access or national treatment commitments were undertaken on the cross-border supply and the consumption abroad of legal services. South Africa can therefore maintain or introduce restrictions on cross-border trade in legal services, if they are applied in a non-discriminatory manner to all WTO members.

South Africa's full liberalisation commitment on the establishment of a commercial presence by foreign law firms prohibits it from maintaining or introducing conditions on market access and national treatment. A foreign legal firm has the right to establish a practice in South Africa to provide legal advisory services on domestic, foreign and international law and legal representation services concerning domestic law. These firms are allowed to transfer professional staff under Mode 4 to South Africa for a limited period of time. South Africa made commitments on the temporary movement of service suppliers in the horizontal section of its schedule of specific commitments. The relevant commitments grant market access and national treatment to persons who are engaged in the provision of legal services. In other words, foreign legal firms may establish a commercial presence in South Africa and transfer personnel, including professional staff members, to work as legal practitioners for a period of up to three years, provided they possess the necessary academic and professional qualifications which have been recognised by the professional body in South Africa.⁵³

The *Legal Practice Act* confers powers on the Minister to regulate the market access of foreign legal practitioners into the country in consultation with the Minister of Trade and Industry and after consultation with the Council, and having regard to any relevant international commitments of the Government of the Republic.⁵⁴ No regulations have been promulgated under this section yet. However, these regulations should be GATS compliant whenever they are made, in order to meet South Africa's specific commitments on legal services. It is encouraging that this section makes mention of South Africa's "international commitments". There is no doubt that this provision recognises the need to adopt GATS-compliant regulations on foreign legal practitioners.

⁵³ Cronjé 2013 <http://bit.ly/1NU9UQ6>.

⁵⁴ Section 24(3) of the *Legal Practice Act* 28 of 2014.

It is encouraging to note that the system of the unilateral recognition of WTO members' academic qualifications under the previous regime has been dropped under the new Act. The Act now makes provision for the conclusion of mutual recognition agreements. Preferential trade agreements and mutual recognition agreements are allowed under GATS. However, they must meet the conditions of GATS Articles V and VII respectively. They must be notified to the WTO and are subject to scrutiny. Although South Africa has not made any GATS commitments on the cross-border supply of legal services, the special treatment provided to certain foreign lawyers might constitute a violation of the MFN treatment obligation under GATS Article II. South Africa will need to obtain a waiver from the WTO to maintain the measure for a limited period of time. If not, any WTO member may invoke dispute settlement proceedings against it to seek the withdrawal of the inconsistent measure.

The retention of the permanent residence requirement is problematic in the light of South Africa's GATS obligations. It is difficult for non-nationals to obtain South African permanent resident status or citizenship by naturalisation. In this context the requirement discriminates against foreigners in favour of citizens. The permanent residence and local qualification requirements could constitute national treatment limitations under GATS Article XVII but are allowed under the GATS. These should be entered into the country's GATS schedule of specific commitments. This would require the modification of the country's schedule of specific commitments and, if requested by an affected member, the negotiation of compensatory adjustments.⁵⁵

However, under the *Legal Practice Act* the academic qualification requirement for the admission and enrolment of foreign legal practitioners has been brought in line with South Africa's GATS commitments. It is envisaged under the *Legal Practice Act* that recognition of other countries' qualifications will no longer occur unilaterally, since any person that has satisfied all the requirements for a law degree obtained in a foreign country which is equivalent to the South African LLB degree needs only that fact to be recognised by the South African Qualifications Authority (SAQA) established by the *National Qualifications Framework Act, 2008* (Act No 67 of 2008).⁵⁶ The evaluation of foreign qualifications by SAQA appears to be a transparent and fair regulation that departs from the

⁵⁵ Cronjé 2013 <http://bit.ly/1NU9UQ6>.

⁵⁶ Cronjé 2013 <http://bit.ly/1NU9UQ6>.

national treatment and most favoured nation concerns of the previous regime.⁵⁷

5 Constitutionalality of South African law governing the admission of legal practitioners

It has been argued above that the South African law pertaining to the admission of attorneys is problematic in view of the country's international obligations specifically with regard to the permanent residency requirement. This in itself, however, does not mean that the relevant legal rules could be challenged in a South African court. The GATS agreement constitutes an international agreement which is binding on the Republic of South Africa. However, a breach of this agreement can in principle only be invoked by another state in the relevant Dispute Settlement Body established under the framework of the World Trade Organisation in terms of the Dispute Settlement Understanding. In terms of section 231(4) of the *South African Constitution*, international agreements become law in South Africa only once they are enacted into domestic law.

An argument raised in a South African court challenging the provisions of the Attorneys Admission legislation could be based on the Bill of Rights, which is entrenched in the country's supreme *Constitution*.⁵⁸ Indeed, the argument that the legal regime which was entrenched under the now repealed *Attorneys Act* concerning the admission of attorneys hailing from other countries in South Africa infringes the Bill of Rights, namely the equality clause, was made in the application for admission by Pattaya Tangkuampien,⁵⁹ a Thai national who was at the time of the application not a permanent resident of South Africa. The matter was never decided on the merits because Pattaya Tangkuampien was later admitted pursuant to her obtaining permanent residence. The core legal issue in this matter was whether the permanent residence requirement infringes the constitutional protection of equality.

⁵⁷ On the evaluation of foreign qualification, GATS Article VII(5) provides that where appropriate that recognition of qualifications should be based on common international standards and criteria for the recognition and practice of the relevant services, trades and professions. For example, the International Bar Association developed and adopted guidelines contained in its *General Principles for the Establishment and Regulation of Foreign Lawyers* (1998) and *Standards and Criteria for Recognition of the Professional Qualifications of Lawyers* (2001).

⁵⁸ *Constitution of the Republic of South Africa*, 1996. The supremacy of the *Constitution* is entrenched in Section 2: "This Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled."

⁵⁹ *Pattaya Tangkuampien v Law Society of South Africa* (CPD) (unreported) case number 897/07.

In terms of section 9(1) everyone is equal before the law and everyone is afforded equal protection and benefit of the law. The Constitutional Court used the following test in *Harksen v Lane*⁶⁰ to determine whether a law infringes section 9(1):

Does the provision differentiate between people or categories of people? If so, does the differentiation bear a rational connection to a legitimate government purpose? If it does not, then there is a violation of section 8(1). Even if it does bear a rational connection, it might nevertheless amount to discrimination.⁶¹

The admission rules for attorneys differentiate between categories of people; namely, between those who are either citizens or permanent residents of the Republic of South Africa on the one hand and those who do not fall into those categories on the other hand. Consequently, it is necessary to determine whether this differentiation bears a rational connection to a rational government purpose. In the affidavits filed in the *Tangkuampien* matter the South African Minister of Justice argued that the purpose of the differentiation would be the protection of the South African public and advancing the administration of justice, whereas the Law Society of South Africa argued that the purpose of the admission requirement would be to facilitate the assessment of whether a person is a fit and proper person suitable to practise as an attorney or not.

The Constitutional Court pronounced that

it is clear that the only purpose of the rationality review is an inquiry into whether the differentiation is arbitrary or irrational, or manifests naked preference and it is irrelevant to this enquiry whether the scheme chosen by the legislature could be improved in one respect or another.

The relevant enquiry in this respect is whether the differentiation is rationally connected to a legitimate government purpose at the time when the differentiation is taking place. The concept of a legitimate government purpose is wide, and it is submitted that it cannot be denied that the exclusion of non-permanent residents from the profession bears a rational connection to both stated purposes.

This was confirmed by the Constitutional Court's decision in *Union of Refugee Women v Director: Private Security Industry Authority*.⁶² This case concerned an application for judicial review of a decision by the Director: Security Industry Authority and the relevant appeal committee to refuse the application of twelve refugees for registration as security

⁶⁰ *Harksen v Lane* 1998 1 SA 300 (CC).

⁶¹ *Harksen v Lane* 1998 1 SA 300 (CC) para 53.

⁶² *Union of Refugee Women v Director: Private Security Industry Authority* 2007 4 SA 395 (CC).

service providers in terms of the *Private Security Industry Regulation Act*.⁶³

The appeal to the Constitutional Court *inter alia* challenged the constitutional validity of section 23(1)(a) of the *Private Security Industry Regulation Act*. This provision requires any safety and security provider to be a citizen of or permanent resident in South Africa. Section 23(6) of this Act provides that "despite the provision of ss (1) and (2), the authority may on good cause shown and on grounds which are not in conflict with the purpose of the Act and the objects of the authority, register any applicant as a security service provider".

The court observed that the private security industry is a particular environment and "at stake is the safety and security of the public at large". It referred to the stated purpose of the *Security Industry Act*, which is to

achieve and maintain a trustworthy private security industry which acts in terms of the principles contained in the Constitution and other applicable law, and is capable of ensuring that there is greater safety and security in the country

and held that

the differentiation between citizens and permanent residents on the one hand, and all other foreigners on the other, [therefore] has a rational foundation and serves a legitimate government purpose.

Of course, this is not the end of the enquiry. Section 9 of the *Constitution* prohibits discrimination. The Constitutional Court had to consider alleged discrimination relating to citizenship both in *Larbi-Ordam v Member of the Executive Council for Education (North-West Province)*⁶⁴ and in the *Refugee Women* case.⁶⁵ It will be beneficial to consider those cases in detail as the legal principles laid down by the Constitutional Court in those matters provide valuable guidance for the determination of the issue at hand.

The test to determine unfair discrimination has been set out in *Harksen*:

- (b) Does the differentiation amount to unfair discrimination? This requires a two stage analysis:
 - (i) Firstly, does the differentiation amount to "discrimination"? If it is on a specified ground, then discrimination will have been established. If it is not on a specified ground, then whether or

⁶³ *Private Security Industry Regulation Act* 56 of 2001.

⁶⁴ *Larbi-Ordam v Member of the Executive Council for Education (North-West Province)* 1998 1 SA 745 (CC).

⁶⁵ *Union of Refugee Women v Director: Private Security Industry Authority* 2007 4 SA 395 (CC).

not there is discrimination will depend upon whether, objectively, the ground is based on attributes and characteristics which have the potential to impair the fundamental human dignity of persons as human beings or to affect them adversely in a comparably serious manner.

- (ii) If the differentiation amounts to "discrimination", does it amount to "unfair discrimination"? If it has been found to have been on a specified ground, then unfairness will be presumed. If on an unspecified ground, unfairness will have to be established by the complainant. The test of unfairness focuses primarily on the impact of the discrimination on the complainant and others in his or her situation. If, at the end of this stage of the enquiry, the differentiation is found not to be unfair, then there will be no violation of section 8(2).
- (c) If the discrimination is found to be unfair then a determination will have to be made as to whether the provision can be justified under the limitations clause (section 33 of the interim Constitution).⁶⁶

It goes without saying that citizenship is not one of the listed grounds of discrimination stipulated in section 9(3) of the *Constitution*. The first issue which needs to be determined is whether differentiation between citizens or permanent residents of the Republic of South Africa on the one hand and those who do not fall into those categories on the other hand amounts to discrimination on a unspecified ground.

Larbi-Ordam concerned the plight of educators who were not South African citizens. They had been employed as teachers in the North-West province on a temporary basis. The Member of the Executive Council for Education of the North-West Province issued notices to the teachers purporting to terminate their employment. The underlying rationale was that the positions were to be made available to teachers who are South African citizens. Consequently, the positions were advertised.

The Constitutional Court considered the constitutional validity of regulation 2(2) of the Regulations Regarding the Terms and Conditions of Employment of Educators.⁶⁷ According to this regulation, only South African citizens qualify for permanent employment as teachers. The Constitutional Court held that "the differentiating ground of citizenship in regulation 2(2) is based on attributes and characteristics which have the potential to impair the fundamental human dignity of non-citizens hit by the regulation".

However, the court drew a distinction between permanent residents and temporary residents when it considered the question of whether or not the

⁶⁶ *Harksen v Lane* 1998 1 SA 300 (CC) para 53.

⁶⁷ GN 1743 in GG 16814 of 13 November 1995.

discrimination is unfair. It emphasised that permanent residents will generally be entitled to citizenship. It held that

regulation 2(2) constitutes unfair discrimination against permanent residents, because they are excluded from employment opportunities even though they have been admitted into the country permanently.

Lastly, the court determined that the unfair discrimination could not be justified in terms of the limitation clause of the interim *Constitution*.

In the *Refugee Women* matter the question of whether or not there was unfair discrimination against the refugees arose. It had been alleged by the applicants that the differentiation between two classes of non-citizens, namely permanent residents and refugees, amounted to unfair discrimination. The majority of the court reasoned that it was not necessary to decide whether the impugned section discriminated against refugees. It reasoned that even if section 23(1)(a) of the *Security Industry Regulation Act* would constitute discrimination, such discrimination would not be unfair:

The scheme is for a limited fixed period; it is not a blanket ban on employment in general but is narrowly tailored to the purpose of screening entrants to the security industry, it is flexible and has the capacity to let in any foreigner when it is appropriate and to avoid any hardship against a foreigner.⁶⁸

In the light of the jurisprudence considered above, it is submitted that South African jurisprudence has consistently upheld legislation which differentiates between citizens and permanent residents on the one hand and temporary residents on the other. Conversely, the Constitutional Court has consistently taken issue with legislative schemes which discriminate between permanent residents and citizens. For example, the employment relationship of teachers who were permanent residents but not citizens was protected by the Constitutional Court in *Larbi-Odam*,⁶⁹ and the Constitutional Court required the South African State in *Khosa v Minister of Social Development; Malaule v Minister of Social Development*⁷⁰ to extend the right of access to social security, which was previously only afforded to citizens, to permanent residents. On the other hand, the court did not take issue with the differentiation between permanent and temporary residents in the *Refugee Women* decision.

⁶⁸ *Union of Refugee Women v Director: Private Security Industry Authority* 2007 4 SA 395 (CC) para 67.

⁶⁹ *Larbi-Ordam v Member of the Executive Council for Education (North-West Province)* 1998 1 SA 745 (CC).

⁷⁰ *Khosa v Minister of Social Development; Malaule v Minister of Social Development* 2004 6 SA 505 (CC).

The consideration of foreign cases, which is in terms of section 39(1)(c) of the *Constitution* an appropriate method of interpretation of the South African Bill of Rights, yields no other result. The celebrated Canadian case of *Andrews v Law Society of British Columbia*⁷¹ supports the finding as well. This case concerned the application of a British citizen who had been admitted for permanent residence to Canada, for admission as an attorney in Canada. The court held that

A rule which bars an entire class of persons from certain forms of employment, solely on the grounds of a lack of citizenship status and without consideration of educational and professional qualifications or the other attributes or merits of individuals in the group, would, [in my view] infringe equality rights.⁷²

This ruling confirms the ratio of the various decisions by the South African Constitutional Court; namely, differentiation between citizens and permanent residents does generally amount to unfair discrimination whereas differentiation between permanent residents and temporary residents is generally condoned. In the rare instances where a different approach is taken, for example in the minority judgment in *Refugee Women*, which was delivered by Mokgoro J and O'Regan J, the reasoning is often based on the similarity between the group of non-permanent residents which is being discriminated against and the group of permanent residents. This was one of the core considerations which motivated the dissent of Mokgoro J and O'Regan J.

6 Comparative perspective

A comparative perspective shows that many countries provide avenues allowing qualifying legal practitioners to practise in their jurisdictions. In the United States one notable example is New York, which permits qualifying foreign legal practitioners to take the prestigious New York Bar Exam.⁷³ The Rules of the Court of Appeals for the Admission of Attorneys and Counsellors at Law⁷⁴ set out the requirements which must be met to qualify for sitting the New York Bar examination. Substantive requirements relate to legal education, but access is eased by a "cure" provision⁷⁵ which allows certain deficiencies relating to the substantive legal education or duration requirements to be cured by obtaining a qualifying US LLM degree. In Singapore it is possible for foreign legal practitioners to obtain a

⁷¹ *Andrews v Law Society of British Columbia* 1989 1 SCR 143.

⁷² *Andrews v Law Society of British Columbia* 1989 1 SCR 143, 147.

⁷³ New York State Board of Law Examiners date unknown <http://bit.ly/1shu0dh>.

⁷⁴ *Rules of the Court of Appeals for the Admission of Attorneys and Counsellors at Law* 22 NYCRR 520.6.

⁷⁵ *Rules of the Court of Appeals for the Admission of Attorneys and Counsellors at Law* 22 NYCRR 520.6(b)(1)(ii) and (b)(2).

full practice licence where the person has two or more years of relevant experience and successfully sits the Singapore Bar Examination.⁷⁶ Citizenship or permanent residency requirements are limited to those with less experience. Further and more interestingly, many South African LLB graduates who went on to qualify as South African legal practitioners are currently practising throughout the Commonwealth, Australia, New Zealand, Northern America and some countries in the European Union, on the basis that they were admitted in South Africa. However, for foreign nationals who obtain the South African LLB, becoming a South African permanent resident or citizenship still remains a clear stumbling block to admission which South African admitted practitioners do not face in these highlighted jurisdictions.

In the European Union the principle of mutual recognition applies to professional training and it is generally possible to practise law in other jurisdictions than the home jurisdiction. In terms of the European Community law,⁷⁷ member States are required to recognise the qualification obtained in other member States. Lawyers must in principle be permitted to practise in the member State on the same conditions which apply to own nationals. However, provision is made for aptitude testing and adaption periods.

7 Conclusion

The *Legal Practice Act* reforms the legal regime governing the admissions and enrolment of legal practitioners in South Africa and may assist in ensuring South Africa's compliance with the relevant GATS rules. Changes in the recognition of foreign LLB qualifications and their further evaluation by a general qualifications authority are welcome developments. Also, the Act makes provision for regulations by the Minister concerning the admission and enrolment of foreign legal practitioners. Of course, the devil is always in the detail. However, it is encouraging that the Act already draws the Minister's attention to the need to take into account South Africa's international law commitments, which invariably include GATS obligations and commitments. In that case, therefore, the Minister is hereby implored to ensure that the regulations on the admission and enrolment of foreign legal practitioners are guided by the standards set out under the GATS. It is disappointing, however, that the residence requirements criticised for their National Treatment and

⁷⁶ *Singapore Legal Profession (Qualified Persons) Rules* R 15 in terms of *Singapore Legal Profession Act* (Chapter 161, s 2(2)).

⁷⁷ *Council Directive 89/48/EEC* (1988) on a general system for the recognition of higher education diplomas awarded on completion of professional education and training of at least three years' duration as amended.

Market Access concerns have been retained under the new regime. Although they do not necessarily violate South Africa's GATS commitments, these requirements hinder GATS' overall bid to liberalise the trade in services, and should therefore be reviewed. In this context, therefore, despite the efforts made to bring about reform, South Africa's requirements for the admission and enrolments of legal practitioners continue to fall short of its GATS commitments. Also, until regulations for the admission and enrolment of foreign legal practitioners are promulgated by the Minister in line with the Act, South Africa will continue to resort under the current rules, which have raised GATS concerns. More importantly, once promulgated these regulations will need to be reviewed and evaluated in line with South Africa's GATS commitments.

The issue of admission for legal practice remains a pressing issue for non-South African permanent residents and non-South African citizens. It is professionally draining, especially for those who come to South Africa to acquire their LLB degrees, undergo vocational training, and eventually have to seek alternative work because they cannot be admitted as legal practitioners. Although the new *Legal Practice Act* addresses some of the GATS compliance issues that arose under the previous dispensation, the retention of the residence requirement still works against the liberalisation of trade. In the end, neither foreign nationals nor South Africans can fully benefit from the removing of barriers to trade in services that the GATS seeks to promote. From a policy perspective, South Africa needs to lead the way in the region and the continent on the liberalisation of trade in legal services. Minimal compliance with the ideals of trade openness does not support South Africa's leadership role on the continent. There is no legal obligation on South Africa to open admission and enrolment as legal practitioners to foreign nationals as long as it complies with GATS and the *Constitution*. However, it is submitted that this discrimination, though arguably constitutional, remains somewhat arbitrary and inconsiderate to individual cases, in some instances, and against the spirit of the reduction or elimination of the adverse effects on trade in services of measures as a means of providing effective market access. The Minister, as directed in section 24(3) of the Act, may make regulations with these realities in mind.

We argue that South Africa should follow the example of jurisdictions which allow foreign legal practitioners to practise provided specific legal training and experience requirements are met and aptitude or professional examinations are successfully completed. It may also be in the best interest of the Southern African Development Community to consider following the example set by the European Union by introducing the principle of mutual recognition with regards to professional qualifications.

Although the South African government may find ways of circumventing its international law obligations regarding the admission of foreign legal practitioners, it certainly does not necessarily mean that the new system under the Act is in South Africa's best interest. Equally, the fact that an argument for discrimination cannot be sustained does not mean that the legal argument favours the retention of the permanent residency requirement.

Firstly, it must be recognised that because of South African's economic position on the African continent, many foreign nationals from South Africa's trading partners come to South Africa and attain all the necessary legal qualifications except that they will be denied the right to register as legal practitioners simply because of the protectionist attitude of the law profession in South Africa. Worryingly, law graduates are forced to divert from their core profession simply because they cannot be registered as attorneys. The trouble does not end there as some of these graduates might not even be eligible to enter into practice in the home countries because the South African LLB might not qualify them to be admitted as legal practitioners. This is not only unfair on the graduates but also results in scarce African resources being wasted by educating legal professionals who are ultimately not allowed to practise and apply their knowledge and skills.

Secondly, South Africa's neighbours have opened the doors of their professions to South Africans. This has allowed South Africans to enrich the legal professions in other countries without getting the same benefits in return. There are various instances where South African advocates such as George Bizos have represented clients in courts outside South Africa, a case in point being *S v Tsvangirai*,⁷⁸ a popular Zimbabwean trial where South African advocates were solicited to defend the Zimbabwe opposition leader in a treason matter. Such benevolence on the part of these jurisdictions needs to be reciprocated by South Africa. Consequently, calls by these countries for South Africa to open its doors make diplomatic sense. Besides, no one can deny the cross-pollination of ideas that enrich these jurisdictions, which South Africa does not get.

Thirdly, since section 39(1) of the *Constitution* enjoins South African courts to consider foreign law, would it not be of greater effect if the same foreign law could be argued in our courts by the more knowledgeable foreign lawyers practising in that jurisdiction? Perhaps it would be a more valuable practical approach to foreign law in line with the *Constitution*.

⁷⁸ *S v Tsvangirai* 2004 ZWHHC 169 (15 October 2004).

Lastly, from an international trade and investment perspective, it should be more attractive for foreign investors if they were to know that if they would need legal assistance in South Africa, they could bring from their own jurisdictions or even hire from anywhere in the world the best lawyers of their choice rather than being confined to local South African practitioners. For these reasons, we agree with the resolution of the 2005 Conference of the Southern African Development Community (SADC) Lawyers Association that governments should be lobbied "to take appropriate legislative and administrative measures to allow lawyers to practice in SADC jurisdictions other than their own countries".⁷⁹ In our view, South Africa now needs to realise that "it's time to open legal doors"⁸⁰ and should remove the permanent residence requirement for admission as an attorney in the country. We propose that amendments to the 2014 *Legal Practice Act* to this effect should be made as soon as possible.

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List of Abbreviations

CPC	Central Product Classification
GATT	General Agreement on Trade and Tariffs
GATS	General Agreement on Trade in Services
ILM	International Legal Materials
Korea U L Rev	Korea University Law Review
LSSA	Law Society of South Africa
MFN	Most-Favoured Nation
Mich J Int'l L	Michigan Journal of International Law
SADC	Southern African Development Community
SAQA	South African Qualifications Authority
UNCPC	United Nations Provisional Central Product Classification
WTO	World Trade Organisation