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Introduction: Towards Understanding South African Constitutionalism

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To Wendy, Colleen and Keith, with love
– P.A.

To Nancy, with love
– S.E.

To the following pathbreaking lawyers who are
no longer with us, but whose lifelong works are
reflected in this volume:

Haywood W. Burns
John Didcott
Shanara Gilbert
Ismail Mahomed
Etienne Mureinik
Godfrey Pitje

The Post-Apartheid Constitutions

Perspectives on South Africa's Basic Law

Edited by
Penelope Andrews
and
Stephen Ellmann

Foreword by
Nelson Mandela



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PENELOPE ANDREWS
STEPHEN ELLMANN

Introduction: Towards Understanding South African Constitutionalism

Penelope Andrews & Stephen Ellmann

After Nelson Mandela's release from prison in 1990, South African leaders from across the political spectrum embarked on an ambitious project of nation building and constitution making. The process was difficult and delicate, driven by the obvious need to accomplish diverse and often contradictory aims. For the framers of the new constitutional order, encoding the desires and aspirations of all South Africans in one document was both a symbolic and substantive precondition for its legitimacy. Constitutions, after all, are generally a measure of a society's faith, but also of its fears. While reflecting the wishes of those who choose to govern – wishes associated with order and control – they must also incorporate the yearning for protection from those who are governed. They must mark the contours of the future while confirming the bitter lessons learned from the past. They must adroitly balance needs and aspirations on the one hand, with practicalities and limitations on the other.

All this South Africa's constitution makers undertook. Their first step, a triumph of democracy achieved at negotiating tables to which no one had been elected, was the Interim Constitution. Born from South Africa's volatile history of repression, violence and discrimination, it was crafted through a protracted process of negotiation and compromise, a process often marred by widespread public disturbance, acrimonious debate and unspeakable violence. It laid out a structure for South Africa's governance to last for five years, from 1994 to 1999, and specified as well the process by which the first elected Parliament, sitting as a Constitutional Assembly, would write a final constitution – a process that ultimately was capped with success in 1996.

This book studies both the processes of negotiation and the results. It began at a conference of the Law & Society Association in mid-1994. At that time, South Africa's Interim Constitution had been in effect for just a few months. The work of writing a final constitution had just begun. As the organisers of a series of panels on the South African constitution, we aimed to bring the important news from South Africa to the attention of North American academics, and we hoped also to contribute to South African thinking the perspectives of a diverse range of observers and participants, black and white, South African and non-South African.

The road from that beginning to this book was longer than we thought it would be at the time. Some papers presented in 1994 were overtaken by events; new papers were written, some by participants in the 1994 meetings and some by other scholars and political actors. The new papers helped make this book what it is now: a commentary on the processes that led, through the Interim Constitution, to the 1996 Constitution, and a study of a number of central issues of human rights and institutional structure under the latter. There are other books on this subject, and rightly so, for the South African Constitution deserves the attention of constitutionalists around the world. But this book is, like the 1994 conference sessions, an effort to bring together a particularly wide and cross-cutting set of views.

We present here the reflections of politicians and academics, participants and observers. Three contributors were themselves leaders of the negotiation process, and on opposite sides: Roelf Meyer and Leon Wessels for the National Party (NP), Cyril Ramaphosa for the African National Congress (ANC). Several others also participated in important ways in the framing of the new constitutions. They include Hassen Ebrahim, Christina Murray, Kate Savage and Dennis Davis. A number have been actively engaged in implementing the new Constitution in governmental positions: to name only those not already mentioned, Nicholas Haysom was counsel to President Mandela, Karthy Govender now serves on the Human Rights Commission, Firoz Cachalia is the majority leader of the Gauteng legislature, and Patric Mtshaulana was a law clerk to Constitutional Court President Arthur Chaskalson during the Court's first years. Others have pressed legal claims from positions outside the government. These include Bongani Majola of the Legal Resources Centre and Sandra Liebenberg of the University of the Western Cape's Community Law Centre. Some writers bring academic perspectives shaped by experience both in South Africa and elsewhere: Penelope Andrews (Australia, the United States and South Africa), and Stephen Ellmann, Diana Gordon, Jonathan Klaaren, Heinz Klug and Stuart Woolman (all with longstanding connections to both South Africa and the United States). One other writer, Carmel Rickard, brings the special insights of a long career covering South African law as a journalist and now as a legal scholar as well.

Listing the authors is not, of course, enough to demonstrate the ways in which their essays add to the study of South Africa's Constitution. This introduction therefore offers an overview, necessarily summary and incomplete, of each author's contribution. We begin with the series of articles that focus primarily on the complex political and judicial processes that produced South Africa's constitutions. Then we turn to a group of articles that look closely at some of the rights that the new constitutions protect, and finally we discuss several articles that focus on the institutions created or reshaped by the new constitutions to protect these rights.

The Processes of Constitution Writing

Intractable conflicts around the world make it clear that South Africa's successful transition from racial oppression to democracy was never inevitable. The initial gulfs between the contesting parties were immense. Trusting personal relationships across the divides of politics did not come automatically, and sometimes did not come at all. The issues that had to be settled required all sides to rethink long-held predispositions – including such fundamental matters as the ANC's opposition to federalism, the NP's insistence on minority vetoes, and both sides' hesitation about unfettered judicial enforcement of a bill of rights. Settlement also required creativity, as the country fashioned transitional mechanisms essentially without precedent anywhere in the world. Meanwhile, violence was always present and the possibility of far worse bloodletting was never far from the surface. How did South Africa do it?

Leon Wessels's essay provides a part of the answer. Here, in an article aptly subtitled 'The Liberation and Confession of an Afrikaner', Wessels tells the story of his own gradual realisation of the injustice of apartheid and the massive changes that would be required to right that wrong. Wessels's story, while in a sense the story of the reformist wing of the National Party, is also uniquely his own. He describes his effort to help a couple whose marriage was illegal under the race laws; the solution, arranged with the Minister of Internal Affairs, was to magically reclassify the 'coloured' wife as white, but Wessels's response was to be 'appalled by the farce'. In one encounter after another, Wessels *listens* to the people he meets, and is moved by what he hears. Yet more than an open heart was required for the transformation that South Africa needed. Wessels, after all, was a politician. He apologised for apartheid at a conference in Oslo and at the same conference staged a handshake with Nelson Mandela as part of an effort to avoid irrevocably losing the audience to Mandela. So, too, the negotiations that ensued were built on remarkable personal encounters – Wessels describes his first meeting with Chris Hani and his swim with Joe Slovo – but also required 'a commitment to negotiate and to be loyal to the constitution-making process', an acceptance of the need for compromise, and the ability to candidly sell those compromises to one's constituency. Yet in the end the story Wessels tells is not one of calculation but of commitment, and this is nowhere expressed more clearly than in his recalling that he decided never again to sing the old national anthem *Die Stem (The Voice of South Africa)*, but that on 26 April 1994 the coming of the new South Africa and the singing of *Nkosi Sikelel' iAfrika* 'allowed me and many other South Africans the freedom to sing *The Voice of South Africa* with emotion and pride'.

Roelf Meyer, writing with Professor Hennie Marais, also tells the story of the negotiations (focusing on the framing of the Interim Constitution) from the National Party side. Meyer and Cyril Ramaphosa developed a relationship of

trust that clearly played a critical part in making agreement possible; Meyer observes that 'it was a necessity that Cyril Ramaphosa and I should trust each other in full. Our view became that there was no problem that we could not resolve'. Again, this does not mean that the government's negotiators were simply yielding to the truths brought home to them by the ANC. Meyer notes the government's tactical coups and failures, and emphasises that the ANC, as well as other parties, made substantial concessions to achieve agreement. He sees the credibility that 'we as Government negotiators achieved' as having made it possible for them to take firm stands in the negotiations, and to [keep] our bargaining power after we had lost all our partners'. Meyer's account also indirectly reveals, however, how crucial and sometimes difficult it must have been for the negotiators who grasped the urgency of change to bring their party with them. He tells us, for instance that it took nine months for him to get the government's consent to the idea of the government of national unity. Similarly, Meyer tells us that a constitutional framework for the Interim Constitution, developed by Professor Francois Venter, became 'the backbone of our negotiations ... The government approved of it, thus it had cabinet status, and I could bind my colleagues to it.' Meyer also comments that his relationship with his 'principal', F W de Klerk, was important to the negotiation process. [While] Meyer does not elaborate on this point Wessels's comment is striking: '[While] we had won the internal arguments and debates at the World Trade Centre negotiations with the assistance of De Klerk, we had not always done so under his leadership.'

Cyril Ramaphosa tells the story of the negotiations through to the adoption of the proposed text of the final Constitution on 8 May 1996. His account is less personal than Meyer's or Wessels's, though he too mentions the 'disarming exchanges' at the first negotiation between the government and the ANC at Groote Schuur in 1990, and the 'smiles and handshakes all round' after the Constitutional Assembly vote on 8 May. Ramaphosa reminds us very firmly of the extent of the divisions between the National Party and the ANC (he also discusses the ANC's dealings with other parties, from the 'ANC's persistence in engaging in bilaterals with the right wing' to the dispute with the Inkatha Freedom Party over international mediation). He sees the government as a very reluctant negotiator, aiming to lock the ANC 'into protracted, fruitless negotiations, while the structures of the ANC on the ground would have been rendered ineffective by the ongoing violence', which itself was 'an orchestrated element of the NP's negotiating strategy'. It is all the more remarkable, in light of this account of the conflicting strategies of the two sides, that the negotiators were able to establish the degree of personal trust that they did. While Ramaphosa emphasises that the ANC set much of the course of the negotiations, he recognises that it also made concessions. It seems, moreover, that making these concessions was not always easy. Ramaphosa acknowledges that '[t]he

lines of communication between negotiators and their constituencies – between the ANC leadership and the membership – were generally poor'. In particular, it appears that the idea of a government of national unity was difficult for both sides to accept. Meyer, as already noted, had trouble selling it to his constituency, while Ramaphosa says that Joe Slovo had 'the unenviable task' of winning ANC support for this and related concessions. Ramaphosa writes that the endorsement of these concessions 'was a brave and far-sighted move for the ANC, preceded by much frank debate and soul searching'. Much the same might well be said of central decisions by the other side.

The negotiators' accounts of personal interaction and strategic clashes underline the question of whether the South African constitutions should be seen, as Hassen Ebrahim puts it, as 'the product of the power of persuasion or the persuasion of power'. Certainly, as Ebrahim makes clear, power was wielded. The parties approached the task of creating an Interim Constitution with the recognition that neither side could simply force its will on the other, but each side, or elements on each side, continued to seek leverage with the means at its disposal. As Ebrahim observes, '[a]lmost every massacre during this period took place either before a postponement in talks or after a major breakthrough'. The Congress of South African Trade Unions (COSATU) pressed its case by 'organising mass action, boycotts, strikes and stay-aways'. And the right wing actually invaded the negotiations at the World Trade Centre. Ebrahim emphasises what Ramaphosa's account implies: that mistrust as well as trust was part of the negotiation process. Indeed, at one point 'Ramaphosa exchanged such harsh words with Meyer that it was feared that a nearly complete agreement would be placed in the balance'. Yet true persuasion was also an important part of the process. As Ebrahim reminds us, Nelson Mandela himself had initiated negotiations from his prison cell. Thabo Mbeki apparently talked the National Party into accepting 'the importance of an interim government to manage the transition', while Roelf Meyer pressed on the ANC an argument that there needed to be an interim constitution as well. Indeed, Ebrahim maintains that 'it is the fact that [the Constitution] represents a comfortable collection of previously intractable political positions that provides it with its vibrant quality'.

As several of the contributors emphasise, there was more to this process than simply an interaction, reasoned or forced, between negotiators. The public was also involved. Christina Murray, for example, recounts the multi-faceted campaign by the Constitutional Assembly (CA) to make all South Africans aware of the constitution-writing process. 'You've made your mark now have your say,' the CA told the country. Many did have their say – more than two million people submitted comments, whether in petitions, technical arguments, or less finely crafted writing that 'captured the aspirations of a young nation on the brink of change'. The CA asserted in a poster that 'The Constitution is being

written by the most important person in the country: You!', but Murray comments that this poster 'might be criticised for being misleading'. She acknowledges that the two million people who commented did not directly shape the Constitution, but she maintains that the campaigns for public input nevertheless had meaning: they 'might' facilitate "ownership" of the Constitution by all South Africans by ensuring that it was not drafted by an isolated political élite, and by fostering an active interest in it in all communities'. At the same time, a 'technical refinement team' paradoxically had the rather controversial task of writing the document in plain English, a process that aimed to deliver to the South African people a Constitution they might more fully own because they could more easily read it. The same team aimed 'to give the text an active and enabling tone rather than a regulatory tone', and scoured the text's language to free it from linguistic gender discrimination.

While the Constitutional Assembly sought to give the public 'ownership' of the new basic law, various groups from civil society – in American parlance, interest groups – sought to place their imprint on particular aspects of the Constitution. For example, the prohibition of unfair discrimination based on sexual orientation may reflect the impact of advocates for gay and lesbian rights. Heinz Klug discusses the influence on the Interim Constitution of women's groups, who successfully prevailed over another civil society group – traditional African leaders – in giving gender equality primacy over the claims of discriminatory tradition. Similarly, as Klug recounts, white and black ethnic groups, in particular conservative Afrikaners and Zulus supporting the Inkatha Freedom Party, also won protections for their claims, notably in the Constitutional Principles attached to the Interim Constitution that obliged the negotiators of the final constitution to respect, or at least entertain, some claims for group self-determination within the new South Africa. Klug also observes that with the transition 'from a non-elected negotiations forum' – responsible for the Interim Constitution – to the elected Constitutional Assembly that wrote the final Constitution, 'the emphasis of participation [shifted] away from mass action or public demonstrations towards a more individualistic, yet equally active, form of participation through discussion meetings and the making of formal submissions to the CA'. In late 1995, he tells us, only 'groups who felt that they were not adequately represented' were demonstrating, although COSATU did return to earlier modes of politics in the last days of April 1996 when it called a national strike on the lockout issue. Whatever the mode of civil society intervention, it remained significant; Ebrahim observes that the last three issues to be resolved in 1996, dealing with the supposed right to lockout, the constitutional protection of property and the right to single-language education, were all 'issues around which the civil society lobby was most vigorous'.

Katharine Savage's essay illuminates these complex interactions. It begins with a detailed outline of the formal Constitutional Assembly structures, as well as a description of the different formats of informal negotiations, multilateral and bilateral. These structures were certainly important – the CA was a much more stable structure than the Convention for a Democratic South Africa, and the informal channels were quite solid as well, so that, as Murray says, '[o]ccasionally one would encounter Ramaphosa himself settled comfortably with a whisky discussing ways of resolving seemingly intractable problems with his National Party counterpart, Roelf Meyer'. But all the experience of successful negotiation, and all the structures, did not suffice to bring the parties in the CA to agreement without crisis in the final days.

Savage focuses on 'three tightly negotiated and highly contested clauses' dealing with education, property and the lockout. Her account emphasises the ANC's newly attained power, and its willingness to use that power; the ANC insisted, for example, that there should be no right to single-language schools, and ultimately extracted the NP's agreement to this as part of the final multi-issue compromise. At the same time, Savage points to the ANC's need for consensus (Murray similarly emphasises that no one wanted to settle the Constitution by referendum instead of negotiation) and illustrates the ANC's willingness to compromise even on some very important questions.

The complexity of the negotiations and the lengths to which the parties were prepared to go to try to find common ground are reflected in Savage's detailed account of negotiations on the property clause. The ANC entered the negotiations over the final Constitution determined to rectify what were seen as excessive concessions made on the issue of a right to property in the Interim Constitution.¹ Savage reports that the ANC carefully 'ensure[d] that the views of the major constituencies lobbying the party were canvassed until hours before the clause was finalised'. But while the ANC resisted a constitutional 'guarantee' of property, in the course of elaborate negotiations it repeatedly offered to accept language obliging the state to 'respect property' or 'the institution of property'. The National Party approached acceptance of similar language in a negotiating draft which it 'marked as a "non-paper"', to which the ANC chose to respond despite its questionable status. In the end, the ANC refused to go further than this, and the National Party drew back from it, preferring no entrenchment of any property right to language, merely requiring respect for the institution of property. Then, ironically, in the final days of negotiations the parties almost deadlocked over a different property issue, namely whether land reform and similar measures could be enacted despite the property provisions agreed upon and without satisfying the usual requirements for limitations on constitutional rights. On this issue, perhaps ultimately a more important one than the choice of language endorsing or not endorsing property rights as such, the ANC yielded, agreeing that land reform limitations on property rights would have

to satisfy the usual test for limiting any right. 'The result,' Savage writes, 'left certain ANC negotiators and advisers who had been integrally involved in negotiations on the clause bitterly unhappy.'

Even these intricate interactions do not reflect the full complexity of the forces shaping South Africa's new Constitutions. The detailed minuet of the negotiations only took place because the parties had chosen, or been driven to the negotiating table in the first place. That was hardly inevitable; the vision of South Africa's leaders, including Nelson Mandela and F W de Klerk, the West's pressure on South Africa's government, and the Communist East's decline as a source of support for the ANC, all contributed to the parties' arrival at the table. There they undertook a somewhat remarkable task, namely to use law to reform South Africa. The negotiators sought to give the South African people ownership of this new basic law, and they profoundly reshaped South Africa's legal system by establishing constitutional supremacy over the legislature and creating a new Constitutional Court. Nevertheless, they maintained some measure of continuity with a system in which, as Martin Chanock has emphasised, law's claims to liberal virtue fitted poorly with its role in a vicious system of subjugation.²

Both the government and the ANC came to the notion of judicially enforceable human rights quite late. Heinz Klug emphasises the extent to which the negotiators were constrained by an international, 'post-cold war hegemony of an American-style constitutionalism'. Klug writes that '[f]or the ANC the shift from a rhetoric of people's power, democratic centralism and state socialist models ... to an embracing of constitutional democracy and a bill of rights was grounded in the movement's ability to draw on its own rights-based tradition'. Dennis Davis is perhaps more sceptical. While observing that for the National Party 'a Bill of Rights became one of the major instruments with which ... [it] sought to achieve a nonracial society with a minimum of transformative potential,' he argues that the ANC initially endorsed judicial enforcement only of traditional, 'first generation' rights and reads leading ANC figures as otherwise aiming at centralised social reconstruction for which judicial intrusion was seen as a potential hindrance.

Davis's scepticism makes the ultimate elaboration and protection of rights in the Constitutions seem all the more remarkable. How did it ever come about? He suggests that the initial impetus towards comprehensive rights protection in the Interim Constitution came not from the politicians but from the members of the 'Technical Committee', who broadly construed their drafting mandate and thereby gave the National Party, already eager to enact as many limits on the new government's power as possible, a 'supreme tactical advantage'. But Davis also emphasises that the NP and ANC found common ground in (somewhat ambiguously) limiting the Bill of Rights to vertical rather than horizontal application, a result that he believes met the NP's desire to insulate

a sphere of private life and privilege from constitutional scrutiny, while also according with ANC desires to have a constitutionally free hand in making socio-economic reforms. The second time around, however, in the negotiations for the final Constitution, the ANC made clear that 'exclusive verticality was a non-starter' and '[b]ecause the political temperature had not been raised on this issue, the legal experts had considerable scope for imposing their own solution'. At the start of April 1996, in a negotiating session at the seaside resort of Arniston, while politicians focused on other issues, Davis reports that two technical advisors, Halton Cheadle and Etienne Mureinik, 'had agreed that the issue of horizontality should be resolved by way of a mediating role for the common law'. This agreement led to the final Constitution's section 8, which makes clear that the Bill of Rights can apply to private relationships and, in Davis's view, directs that this application take place through development of the common law rather than through 'a direct form of horizontality'. Davis sees this provision as potentially revolutionary, but also argues that in the years after its adoption it has had little impact, and concludes with the observation that 'whether the demand for change proves stronger than the tenacity of existing legal traditions will probably determine the extent of the influence of the 1996 Constitution in the reconstitution of South African society'. (Later in this volume, Ellmann offers another analysis of this clause and its potential meaning.)

A reader unfamiliar with South African history might be forgiven for thinking at this point that the South African miracle was the result entirely of political action, mediated by skilful technical advice. Perhaps the most remarkable of the mechanisms South Africa devised for its own transition, however, was its use of the judiciary. The multi-party negotiations that produced the Interim Constitution also produced a set of Constitutional Principles that would bind the drafters of the final Constitution, and an institution, the Constitutional Court, which would have the power to reject a draft that did not comply with those principles. The Constitutional Court, itself a creation of the Interim Constitution, was the first South African court to be chosen after the end of apartheid and the first to exercise without challenge the power to hold acts of other branches of the government unconstitutional. It was also perhaps the first constitutional court anywhere in the world to be granted the power to hold a constitution unconstitutional.

Carmel Rickard tells the story of the Constitutional Court's performance of this duty. To some extent, of course, this story cannot be known, because the deliberations of the Court are confidential. In another respect, this story is already available to every reader of the Constitutional Court's judgements, which state the Court's reasoning and conclusions in detail. But Rickard, who attended the two weeks of oral argument that began on 1 July 1996, is able to tell a part of the story that otherwise (because of the lack of usable official

recordings of the arguments) would be lost to us. This is the story of the justices' public engagement with the issues of certification. As she emphasises, this is a story of justices expressing questions and uncertainties, often in vivid language; it is in marked contrast to the formal story told in the studiedly cool language of the Court's decisions. The justices wrestle with a series of profound questions, including the degree of deference due to the Constitutional Assembly; the problem of interpreting ambiguous constitutional provisions and of binding future courts to adhere to the certification judgement's interpretations; and the task of understanding and respecting the dictates of the 'solemn pact' by which the negotiators of the Interim Constitution bound the Constitutional Assembly. As Rickard also emphasises, however, the certification story is not only a story of the justices' interaction with counsel. The court took extraordinary steps to elicit public comments, and ultimately heard oral argument from one lay person (Mr Beema Naidoo, who argued that Indian languages were not sufficiently protected in the new Constitution). Organised political parties also played a crucial part. The National Party and the Democratic Party voted for the Constitution in the Constitutional Assembly but challenged it in court; this two-front strategy now seems to be accepted practice. The Inkatha Freedom Party and the Conservative Party, each of which had pulled out of the negotiations process, both opted in to the certification litigation.

It might well have been feared that entrusting to a court the authority to hold the Constitution unconstitutional would impose on the justices duties that were essentially political rather than judicial – perhaps most clearly, the task of weighing whether provincial powers in the new Constitution were substantially less than those in the Interim Constitution, a task that consumed a great deal of the court's attention – and that the result would be to delegitimise the Court rather than to legitimise the Constitution. In fact, however, the Constitutional Court, sympathetic as it clearly is to the new order, rejected the first version of the final Constitution. This decision was accepted calmly by the political authorities, who rewrote the draft to meet the Court's specifications. Rickard suggests that the success of the entire process reflected the Court's own 'growing reputation for independence', its welcoming of wide participation in the process, its careful choice of tone in the ultimate judgement, as well as the coverage by the media and the response of the politicians. Using a metaphor offered by the late Ismail Mohamed during the oral argument, she writes that the certification process brought the airplane of the Constitution down 'safely within the lights of the runway'.

Constitutional Rights

The six articles focusing on human rights in the new constitutions offer a window on the achievements and aspirations, but also the possible limitations, of the new basic law. While by no means a survey of all of the important rights

issues now facing South Africa, these articles illuminate several of the most important fields now in development. They address the right to citizenship; the right to equality, in particular with respect to gender; rights to cultural freedom; socioeconomic rights; the applicability of the Bill of Rights to private actors; and free speech rights, in particular in the courts.

Jonathan Klaaren takes up a right that in the United States has been called 'the right to have rights',³ the right to citizenship. In South Africa, the right to citizenship is in a sense less fundamental since, as Klaaren points out, most of the rights in the Bill of Rights are guaranteed to 'everyone' rather than just to citizens. Moreover, citizenship in South Africa has, at long last, been stripped of its apartheid racialised centre. But Klaaren's examination of legal developments around citizenship, and particularly the influence of international human rights norms on this issue in South Africa, leads him to a decidedly mixed assessment of the state of citizenship in the new nation. He emphasises that post-apartheid South Africa has experienced a large-scale migration across its borders, and this demographic shift serves as a backdrop to his legal discussion. Here he notes the Constitutional Court's confirmation of the rights of non-citizens, or at any rate the rights of non-citizens with lawful permanent resident status, in a 1998 decision that struck down as 'discriminatory' regulations of the Department of Education that barred foreigners from permanent employment as teachers in state schools.⁴ He also emphasises the important educational and legal role played by the Human Rights Commission in this area, particularly in connection with refugee rights. But he points out that, despite the Constitution's protection, legislation and regulations contain many distinctions between citizens and non-citizens. Indeed, in the final Constitution, in good part at the instance of the ANC, South Africa restricted to citizens two rights that the Interim Constitution had granted to everyone – the right to reside anywhere in the nation and the right to select an occupation. In the field of popular legal culture, moreover, Klaaren finds grave reason for concern, in the 'contestation of citizenship' playing out on the streets, sometimes violently. He concludes that a concept of 'post-national citizenship' – in which people enjoy rights and duties as people, rather than as members of particular nation-states – 'is both losing ground and losing steam', and more broadly cautions us that '[i]n citizenship as well as beyond, the human rights character of constitutional law cannot be taken for granted'.

Penelope Andrews focuses on equality, certainly one of the central concerns of the new constitutional order, and in particular on women's status and rights in post-1994 South Africa. She draws attention to specific ways in which apartheid ensured the perpetuation of women's subordinate status, while pointing out that traditional institutions and laws also played their part. As she explains, a combination of apartheid (European) and traditional laws and attitudes (African) culminated in a peculiar brand of South African masculinity,

one that surely contributes to the current widespread violence against women. Women have mobilised in response to these conditions, and Andrews discusses the efforts they have made to shape the Constitution so as to remedy these problems, notes the achievements embodied in the constitutional text, and points to the relevance for South African women of the impressive theoretical and organisational strides towards achieving gender equality made by global feminists and activists in the last few decades. At the same time, she points to the enormous resources – economic, legal, political and cultural – that will need to be harnessed in order to overcome the stubborn obstacles to women's emancipation. Although she is ultimately optimistic about the capacity of women to ensure that women's rights are not afforded a secondary place in the national transformation agenda, she believes that women will need to be consistently vigilant about ensuring that their issues remain central to national debates. In this appraisal of a nation embracing equality as a value but struggling to implement it in practice, Andrews's account of gender equality in South Africa surely exemplifies the current struggle for equality on many other fronts as well.

South Africa is a country of great diversity as well as great inequality, and so it faces particularly acutely the task of respecting differences while also ensuring equality and impartial, effective governance. Firoz Cachalia explores these issues in his essay on 'Constitutionalism and Belonging'. Firmly rejecting consociationalism as an ill-conceived and unnecessary reification of group difference, he argues that 'constitutionalism' can establish the sovereignty of a single South African people while also limiting that authority in ways that protect minority rights. He maintains that 'liberal-democratic political institutions provide an attractive normative institutional framework for accommodating our need to belong to a community and for acknowledging diverse cultural identities, without sacrificing the individual interest in autonomy and impartiality'. From this philosophical starting point, Cachalia goes on to analyse the South African Constitution and in particular two cultural rights guarantees, found in sections 30 and 31 of the final Constitution. In general, he calls for a broad understanding of cultural rights, and for a sensitive balancing of those rights against the grounds for limitations upon them. In particular, as he explains in discussing section 31(2), which makes the exercise of cultural rights in conjunction with others (protected by section 31(1)) subject to the other provisions of the Bill of Rights, 'an absolutist, literal reading of section 31(2)' would be a mistake because it 'would in effect ... read section 31(1) out of the Constitution, where there is a conflict between dominant, majoritarian, secular values and religious and cultural ones. Little scope would then remain for any expression of such *difference*'. As he emphasises, the Constitution calls on South Africans 'to reconcile its many competing commitments', a far from simple task, but it has also created a Constitutional

Court with the ultimate responsibility for this function. As such, Cachalia concludes, '[t]he Court is ... not merely a "counter-majoritarian" but a nation-building institution'.

South Africa's divisions, of course, are not merely cultural, and achieving true equality in South Africa requires much more than accepting diversity and barring discrimination. As everyone recognises, the country's vast gulfs of wealth and privilege must also be bridged, and to this end the final Constitution – in an important departure from the Interim Constitution – guarantees a range of socioeconomic rights. What these rights are to mean, however, has been less than clear. Although the Constitutional Court insisted in the certification judgement that these rights were, at least in some respects, justiciable, rather than being merely hortatory declarations – their meaning and enforcement still remained to be developed. Sandra Liebenberg focuses on one enforcement system, the duty of the Human Rights Commission under section 184(3) of the Constitution to 'require relevant organs of state to provide the Commission with information on the measures that they have taken towards the realisation of the rights in the Bill of Rights concerning housing, health care, food, water, social security, education and the environment'. Drawing especially on the understandings developed under the International Covenant on Economic, Social and Cultural Rights – a document that influenced South Africa's own Bill of Rights – she sets out a comprehensive and far-reaching framework for identifying violations of the socio-economic rights, based on the state's duty 'to respect', 'to protect' and 'to promote and fulfil' the rights articulated in the Bill of Rights. Her framework points to many forms of conduct that may constitute violations, including 'arbitrary termination of social security benefits without a fair hearing' – a deprivation of access to social security, and hence a failure to 'respect' this right; the lack of effective legal remedies by which members of relatively powerless groups, such as women, can protect themselves from socio-economic deprivations – a failure to 'protect' access to these rights; and a failure by the state to make 'decisions... based on a principled consideration of the resources required to meet its constitutional commitments as a matter of priority'. The duty to 'progressively' achieve these rights – a failure to 'promote and fulfil' these rights. Utilising the theory and practice of international enforcement, Liebenberg outlines comprehensively the procedural, substantive and participatory steps that need to be in place to give effect to these obligations.⁵

Stephen Ellmann also considers the scope of South Africa's socio-economic rights, but primarily in the context of examining another question: the interpretation of the provisions that extend the Constitution's reach to private actors. One such provision, section 239, defines 'organs of state' – to which the Constitution necessarily applies – in language that potentially encompasses many seemingly private 'functionar[ies] or institution[s]'. Another, section 8(2),

declares in strikingly ambiguous terms that '[a] provision of the Bill of Rights binds a natural or a juristic person if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right'. Ellmann approaches the interpretation of these two clauses in light of American jurisprudence deciding when state action – normally a requirement for the application of the US Constitution – is present. With this jurisprudence in mind, he argues that a number of not-entirely-public institutions do fall under section 239, but that the main work of applying the Constitution to private actors should be done under the rubric of section 8(2). As to 8(2), Ellmann argues that although it clearly makes the Bill of Rights potentially applicable to altogether private actors, the section should be interpreted to include an inquiry into the extent of the connections between the 'private' actor and the state. An actor's connections with the state, Ellmann maintains, help to measure the potential harm that actor can do, the moral responsibility others should feel, and the moral claims to exemption from public duties that the actor may have. These suggestions, he hopes, will assist the South African courts as they undertake to extend the domain of constitutional rights from a focus just on the behaviour of the state to a concern with the behaviour of citizens as well.

Against this background of constitutional innovation, protecting the right of free speech might seem almost routine. But the long-established status of this right in constitutional democracies does not mean its force is spent. On the contrary, as Woolman and Majola demonstrate, the implications of the right of free speech are likely to be felt in many fields of South African life, some of them perhaps unexpected. Writing in light of the massive statutory suppression of speech under apartheid, Woolman and Majola focus on an area of law for which the courts were primarily responsible, the common law of contempt. Referring to a range of cases running up to the late 1980s, they document a disturbing record of courts 'privileg[ing] the interests of the judiciary and other legal institutions over the interests of free speech, fair trials, individual rights and unfettered public discourse'. In 1988, the Appellate Division began to reform this area of law to bring it in line with contemporary jurisprudence elsewhere in the world. Even now, after the adoption of the new Constitution, the authors observe that the law of contempt apparently still criminalises a range of 'expressive conduct', but they take heart from the Constitutional Court's careful and calm handling of the challenge to its own integrity in the SARFU case.⁶ They consider this decision 'a model for how a public institution ought to respond to issues that fall along South Africa's many fault lines. ... [and] for how South African courts should engage the occasional reckless accusations made by litigants'. Finally, the authors outline a constitutional doctrine of contempt. Such a doctrine would not condone disorderly conduct in the court which obviously needs to be curbed, but might well protect reporting about

cases that is now barred by the *sub judice* rule; would surely protect political criticism of the courts that might in the past have been said to 'scandalise the court'; and would require much more attention to the fair trial rights of those individuals who do face charges of contempt.

While these chapters cover many of the most important areas of constitutional rights protection, their value is not primarily as a survey of areas of constitutional law. Rather, they all look at the new Constitution as a work in progress. What the Constitution ultimately means will be a result of the disciplined reflection of the judges charged with interpreting it, but also of the focused advocacy of lawyers, the commitments of political parties and the beliefs of South Africa's people. A constitutional culture is now being built; these essays both report on it and seek to contribute to its preservation and growth.

The Institutions Created by the New Constitutions

The new constitutions themselves recognised the need for institutional protections for the democratic South Africa they sought to create. These took a variety of forms, some familiar to constitutional observers elsewhere and some more novel. The contributors to this section of the book assess several of the most important: the structural allocation of power between the national government and the provinces; the role of the Constitutional Court, and of the lower courts and the police; and the functions of the Human Rights Commission.

Nicholas Haysom focuses his attention on the federal features of South Africa's final Constitution, and sketches the tensions between and possibilities of national and provincial power. His essay begins with an overview of the negotiations around federalism, a debate so hindered by the history of apartheid South Africa's perversion of federalism into the bantustan system that 'the parties agreed to drop the "F" word and to embark on an inquiry into an appropriate system of constitutional government whose objective would be to promote nothing other than good and effective government', government embodying 'accountability, democracy, effectiveness and efficiency, and the capacity to cope with regional and cultural diversity'. Even so, these issues remained intensely contested, and Haysom points out the extensive treatment of the division of power between the national and provincial governments in the Constitutional Principles through which the Interim Constitution bound the drafters of the final Constitution. The Constitutional Court ultimately found the first draft of the final Constitution unacceptable in part on the ground that it had, contrary to the requirement of Principle xviii.2, substantially diminished the powers of the provinces – a conclusion Haysom assesses critically. In any event, the model of cooperative government that was ultimately adopted was predicated on the recognition that different levels of government may have concomitant interests in the same governmental functions. To promote

cooperative federalism the drafters of the final Constitution replaced the Senate with the 'National Council of Provinces' (NCOP) which was designed to engender a more active and independent role for the provinces in the national government's decisions, as opposed to the Senate, which tended merely to reflect and reiterate the policies of the national majority party, the ANC. Haysom recognises that there is room to question whether the NCOP is succeeding in this goal (and whether the provinces are capable of carrying the responsibilities the Constitution envisaged for them), but he concludes by offering a reasonably optimistic prognosis of the functioning of the NCOP which after its first year in operation, appeared to have dealt competently with the tasks before it. 'As the political landscape changes – and it surely will over time – and if the current provincial framework remains intact, the NCOP will come into its own.'

While the allocation of power between the national government and the provinces will, ideally, promote diversity and protect against an overweening central government, the body most important to the protection of rights and the maintenance of limits on power in South Africa may be the Constitutional Court. Patric Mtshaulana's essay reminds us how thoroughly the creation of a Constitutional Court breaks with South Africa's past, with its legacy of parliamentary supremacy and the failure of the judiciary to protect adequately the fundamental rights and freedoms of all South Africans. He believes that '[b]y bestowing on judges the task of guarding and protecting the supremacy of the Constitution, the Constitution has sharpened lawyers' sensitivity towards justice. It will probably redeem the profession from an apathy, resignation and despair that characterised it in the time of Parliamentary sovereignty.' Moreover, Mtshaulana applauds the innovations in the criteria for appointment of Constitutional Court judges, namely that they are no longer drawn exclusively from the ranks of senior counsel – predominantly whites – but can also include attorneys and academics. At the same time, he analyses the role of the Judicial Service Commission (JSC), the body created to promote transparency in the selection and appointment of judges. He suggests that, although the JSC as presently constituted does provide for considerable input from the legal profession, the role of the State President in appointing JSC members should be cut back, to better insure the independence of the judiciary and avoid the politicisation of apartheid days, when the appointment of judges was purely at the discretion of the ruling National Party. He is also concerned that the final Constitution's reworking of the jurisdiction of the Constitutional Court may have undercut minority political parties in Parliament, by restricting their power to present legislation to the Court for 'preventive' review prior to its concrete enforcement. Finally, surveying several of the Constitutional Court's decisions, Mtshaulana discusses the manner in which the Court is developing a constitutional and common law jurisprudence in line with the new constitutional order. He concludes by emphasising that the Constitutional Court

now shares its power of constitutional review with lower courts, and observes that '[t]he effect of this will be to infuse the Constitution into decisions of the courts and to make South Africa a real constitutional democracy'.

Diana Gordon turns our attention from the Constitutional Court to less lofty institutions of law enforcement: the lower courts and the police. As she emphasises, 'the method by which state power is exercised is no less important a measure of democracy than the method by which those in authority are chosen'. Her paper, part of a larger, ongoing study that aims to evaluate the transformation of the police and courts in post-apartheid South Africa, finds that '[p]olice and court reform as of early 1999 can best be characterized as processes of ferment and adaptation'. The judges Gordon interviewed 'all expressed firm commitment to extensive institutional reform; they now all repudiate apartheid and maintain that they had all along been politically neutral, forced simply to "apply the law as it is". But in her most recent interviews, Gordon found some judges sceptical of concrete steps taken to appoint more black judges, and she raises the possibility that the judiciary may become 'more stratified, with lesser cases shifted to lower courts, which will become the training grounds for black lawyers and magistrates'. Meanwhile, the police officers with whom Gordon spoke have also adopted at least 'the vernacular of change', and throughout Gordon's study have 'said they were relieved not to have to be enforcing apartheid any longer and stressed the importance of a shift in emphasis from what they called "control" to what they called "service"'. Gordon emphasises the anxieties and ambivalence police officers expressed, but also finds that 'police monitors and researchers report an impressive amount of effort, particularly in the townships, to develop more mutually trusting and protective relationships'. She also emphasises that South Africa, with its long, though troubled, history of 'traditional, non-state methods for maintaining public safety in many African communities', might be able to develop these 'non-state institutions of community protection ... as exponents of democratic criminal justice'.

One of the many creative features of the South African Constitution is that it does not rely only on courts or police to protect its people's rights. Chapter 9 of the Constitution also establishes a number of governmental institutions whose duty is to promote human rights and monitor the government's performance of its functions. Among these is the Human Rights Commission, and Karthy Govender, one of its members, discusses the HRC's structure and its work in his essay. He begins with an examination of the constitutional protection of the HRC's independence. On this score, he notes that appointments are made on the vote of a majority of the National Assembly, and observes that a special majority requirement (say, a 60 per cent vote) 'would have meant that the candidate enjoys the confidence of more than just the majority party'. He is also troubled by the provision for removal of HRC

members by majority vote of the National Assembly, and argues that courts should stand ready to review removal decisions and that many of the requirements of natural justice should govern the decision making process in order to protect the HRC's independence and impartiality. Similarly, he points out the importance of ensuring that the HRC is directly accountable to Parliament and entitled to defend its budgetary requests before Parliament, rather than being absorbed under the aegis of one of the government's own ministries. He notes that '[t]he executive branch of government, Parliament and the various chapter 9 institutions are in the process of redefining their relationships' on these lines as the result of a recent Constitutional Court decision.⁷ Then Govender turns to the work of the Commission. As he emphasises, the HRC's mandate is extremely broad, but the Commission has identified '[t]hree key areas' on which to focus: racism, social and economic rights, and the administration of justice. He discusses the Commission's work in each of these fields, ranging from its highly controversial examination of media racism to its determined efforts to elicit from government departments the reports on the status of socio-economic rights that the Constitution requires, and concludes that '[t]he Commission engages with the South African society in a holistic manner in order to create a rights conscious culture'.

To be sure, only time will tell whether the institutions meant to safeguard South African democracy succeed in that task. But it is important to understand the protective structures South Africa has put in place, and to appraise both their strengths and their imperfections. The essays in this section thus provide both an historical snapshot of the new systems at work, and a guide for political actors and citizens concerned to make these systems as strong and as protective as they can be.

Conclusion

South Africa's 'rights conscious culture' is still being born and shaped. If American history is any guide, the only certainty may be that South Africa will soon encounter problems and devise solutions that will respond to exigencies the framers did not foresee. If the new Constitution is a success, however, the rights it protects and the institutions it establishes will continue to govern the nation for years, and even generations, to come. It is our hope that this book will help illuminate the genesis of this remarkable new rights culture, candidly identify the problems and challenges that it faces, and assist in its full realisation.

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- 1 Matthew Chaskalson has traced the process that produced the Interim Constitution's property provision in a fascinating article, 'Stumbling Towards Section 28: Negotiations over the Protection of Property Rights in the Interim Constitution,' 1995 (11) SAJHR 222.
- 2 Martin Chanock, 'South Africa: legal formalism and legal culture in a new state,' (unpublished paper, 1998).
- 3 *Trop v. Dulles*, 356 US 86, 101 (1958) (plurality opinion).
- 4 *Larbi-Odam and Others v The Member of the Executive Council for Education (North-West Province) and Another* 1998 (1) SA 745 (CC).
- 5 The Constitutional Court has very recently confirmed that it too views the obligations of the socio-economic rights provisions as substantial and enforceable. See *Government of the Republic of South Africa and Others v Grootboom and Others*, CCT 11/00 (Constitutional Court, 4 October 2000).
- 6 *President of the Republic of South Africa and others v South African Rugby Football Union and others* 1999(4) SA 147 (CC).
- 7 *New National Party of South Africa v Government of the Republic of South Africa*, 1999 (3) SA 191 (CC).