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The Constitution of South Africa

Context and History

Introduction: A Constitution in Context – History – Political Context – Conclusion: Context, Continuity and the Problem of Path Dependency

I. INTRODUCTION: A CONSTITUTION IN CONTEXT

MORE THAN A decade into South Africa's constitutional experiment, many scholars have discussed possible interpretations of different clauses of the 1996 Constitution and analysed the Constitutional Court's decisions. Others have examined the political, philosophical and legal concepts that underpin its text. This book will provide another perspective by attempting to locate an understanding of the 1996 Constitution within the context of the many political, social and economic struggles that South Africa's first democratic government inherited. This book will pursue a contextual analysis of the 1996 Constitution by identifying a number of issues that have dominated the first 15 years of the new South Africa. While many of these issues have been identified as legacies of colonialism and apartheid, a number of important new issues have come to dominate social and legal relations in South Africa since 1994.

Instead of organising this study around each of these issues, however, the book will take up these issues intermittently in the context of a discussion of different constitutional provisions and institutions. I will use these issues to illustrate the role the Constitution has played, or failed to play, in addressing these questions. At a different level of abstraction,

I will also explore the relationship between the specific domestic issues that the Constitution attempts to address and the impact of globalisation—both actual economic globalisation and the longer-term and possibly more enduring process of legal globalisation—on the creation and development of the Constitution. In regard to this latter concern, I will explore the idea of legal continuity, as a form of path dependency, in the building and functioning of constitutional institutions in post-apartheid South Africa. The issues I have chosen to highlight, as a means to contextualise the Constitution, incorporate five general themes: the legacies of colonialism and apartheid; pervasive social problems, such as crime, gender relations and HIV/AIDS; legal pluralism; aspiration for a rights-based culture; and democratic governance. Each of these categories covers a number of specific issues, and will enable a general discussion of the ways in which the Constitution—through its creation of institutions, allocation of power, and proclamation of rights—attempts to address the past and construct a future society that transcends the often desperate, violent, unequal and unforgiving realities of the present.

South Africa's 1996 Constitution is heralded as the extraordinary achievement of the democratic transition that formally began in early 1990. In this sense, it is both a cherished product of that transition and a national plan or aspirational guide that attempts to address the past. It provides a roadmap for the construction of institutions, policies and frameworks within which South Africans will continue to struggle for their various visions of a brighter future. A contextual analysis will focus first on the issues that may be identified, in part, as legacies of colonialism and apartheid. I will explore these issues in discussions of how the Constitution, through the institutions it has generated, has addressed questions of inequality and violence. Inequality is manifested not only in the growing economic disparities that have outlived the apartheid era, but it exists most specifically in the unequal distribution of land ownership, which is a direct legacy of colonialism and apartheid, as well as in the extraordinary levels of unemployment and underemployment that rob nearly 40 per cent of economically active adults of the chance of a dignified life. The other major legacy, which is closely related to economic disparity, is the legacy of violence and lack of accountability that mark the ongoing levels of criminal activity in South African society. While the Truth and Reconciliation Commission was designed to address the legacy of past impunity, the Constitution continues to be buffeted by the high levels of violence and impunity that have characterised South African life.

The second category of issues involves the pervasive social problems that have either continued into the post-apartheid era or have arisen anew since 1990. Three particular issues stand out and serve to illustrate these questions for the Constitution: The first is a legacy of violence and crime that has dominated social life since the diminishment of political violence which followed the first democratic election in 1994. The second legacy is the high incidence of rape and domestic violence that pervade gender relations. While the Constitution and post-apartheid laws have sought to guarantee and promote gender equality, conditions for women have, by many measures, continued to decline. This reality is evident in the impact of the HIV/AIDS pandemic, which provides the third focus for discussing and evaluating how civil society has mobilised the Constitution to address a pervasive social problem despite the long failure of government to address the issue.

Legal pluralism—the recognition in the Constitution that South Africa has more than one legitimate source for basic legal rules and concepts—provides the third category of issues for discussion. This legal diversity is reflected in the Constitution's recognition of both the common law and indigenous law as co-equal sources of rules while simultaneously subjecting both these sources of law to the Constitution itself. This legal pluralism raises issues for both the creation of national identity as well as the institutional tension it creates among different sources of political and legal power in different localities and among different segments of the population. While the government has been committed to the creation of a single nation, 'united in its diversity', the very recognition of legal diversity raises questions about the dominance of any particular vision of the Constitution or the rights guaranteed in the Bill of Rights. Institutionally, the creation of houses of traditional leaders has both offered recognition to indigenous forms of governance and injected new vibrancy into forms of ethnic identity that are expected to be subsumed into the nation. This tension has been further exacerbated by the process of mass urbanisation that has followed the demise of apartheid and the failure of rural development that has resulted in parts of rural South Africa facing the dual burdens of HIV/AIDS and abject poverty.

Aspiration for a rights-based culture, which stands at the core of the Constitution, provides the fourth source of issues that will form the context for understanding the role of the Constitution in South Africa. From its inception, the struggle for national liberation in South Africa was characterised by claims of rights. As one of the enduring struggles for

human rights over the course of the twentieth century, the struggle against apartheid and racism epitomised the global movement towards decolonisation and equality within the United Nations human rights system. The introduction of a fully formed Bill of Rights came quicker than the African National Congress (ANC) anticipated; the party argued initially that the interim Constitution should include only those rights essential to ensuring a free and fair election. However, once the committee negotiating this aspect of the interim Constitution proposed a fully formed Bill of Rights, it was impossible for the ANC to resist it without betraying the human rights claims of the anti-apartheid movement. Instead, the ANC would later push for the expansion of rights to include a range of socio-economic rights that were central to its constituencies' demands. The 1996 Constitution's Bill of Rights thus represents the highest aspirations of the global human rights movement, a set of rights—including political, civil, socio-economic and cultural—that are indivisible and enforceable.

The inclusion of such an extensive set of constitutional rights does, however, raise questions about their effective status in the political and judicial context of the new South Africa. Unlike earlier bills of rights—such as those included in the first 10 Amendments to the US Constitution, which are assumed to reflect the existing rights held by the citizens of the polity—there is no assumption that all South Africans presently enjoy the vast range of rights included in the Bill of Rights. Instead, it is assumed that the state and society are working towards the effective realisation of these rights. To this extent the Bill of Rights is aspirational. Yet, these rights are also fully justiciable and thus the courts are required to review the practices of government, and in some cases private parties, to ensure that these rights are being protected. It is this dual feature of the South African Bill of Rights that provides the contextual framework within which the government and civil society both seek to justify their programmes and claims, while the courts—and the Constitutional Court in particular—have sought to balance the problems of effective governance, reasonable government programmes and the claims of those who continue to strive towards the realisation of those human rights guaranteed in the Constitution.

The Constitutional Court has identified three core human values as central to the Bill of Rights: dignity, equality and freedom. As Justice Kate O'Regan argued in the Constitutional Court's first major opinion:

> [r]espect for the dignity of all human beings is particularly important in South Africa. For apartheid was a denial of a common humanity. Black people were refused respect and dignity and thereby the dignity of all South Africans was diminished. The new Constitution rejects this past and affirms the equal worth of all South Africans. Thus recognition and protection of human dignity is the touchstone of the new political order and is fundamental to the new Constitution.[1]

This placing of rights at the centre of the post-apartheid project is daily challenged by the contextual realities of the new South Africa, where exposure to violence, poverty and government incapacity continue to shape the lives of the majority of the country's inhabitants.

The question of democratic governance forms the fifth and final category of issues that provides the contextual background for this book. The national liberation struggle in South Africa was at its core a struggle for democracy, which came to fruition with the 1994 election and the establishment of Nelson Mandela's government as the country's first truly democratically elected government. The 1996 Constitution's embrace of a supreme Constitution and a Constitutional Court with the power to 'make the final decision whether an Act of Parliament, a provincial Act or conduct of the President is constitutional',[2] means that South Africa is committed to a system of democratic constitutionalism in which the democratic will is enveloped within and constrained by the national pre-commitments outlined in the Constitution. This is the contextual reality that has given rise to increasing tensions and debates over the role of the judiciary in the new South Africa as well as raising concerns over the relationship between the government, whose choices and programmes are bound by the limits of the Constitution, and the ANC, the dominant political party, which has increasingly taken a turn towards populism. Simultaneously, the sheer weight of public need and a lack of experienced and qualified public officials have challenged the administrative capacity of the government. Despite the government's budgetary success over the first decade of democracy and its increased funding of social welfare programmes, the challenges of crime, unemployment and a rampant HIV/AIDS pandemic continue to frustrate government hopes of social and economic progress. The re-emergence of corruption and conflicts

[1] *S v Makwanyane* 1995 (3) SA 391, para 329.

[2] Constitution of the Republic of South Africa Act 108 of 1996 [hereinafter 1996 Constitution] s 167(5).

over access to government tenders as a significant source of economic gain and social mobility has only exacerbated the already daunting problems of democratic participation and governance. These issues are particularly troublesome at the local level, where delivery of government services must occur, and where the interaction of the whole array of law—from the common law through to indigenous law and traditional authority—comes into play.

II. HISTORY

South Africa's constitutional democracy has been more than a decade in the making. Despite the continuing burden of the legacies of colonialism and apartheid, the country's commitment to constitutionalism has provided remarkable stability in times of dramatic change. With the adoption of the 1993 interim Constitution the history of constitutionalism in South Africa could be summarised as the rise and fall of parliamentary sovereignty. However, the last decade has added an extraordinary chapter in which the government and opposition have accepted—and civil society has relied upon—the constitutional framework to resolve continuing political and social conflict. While constitutional law was a peripheral part of law in the colonial and apartheid eras, since the achievement of democracy in 1994, the Constitution, and its interpretation by the Constitutional Court in particular, has become a central pillar of South African law.

South Africa's Constitution is the product of a legal revolution unleashed by the democratic transition from apartheid.[3] Adopted by the Constitutional Assembly in 1996, Nelson Mandela promulgated the Constitution into law at Sharpeville on 10 December 1996; it went into effect on 4 February 1997. Since the creation in 1910 of the Union of South Africa, by an Act of the British Parliament, the country has had three other constitutions, in 1961, 1983 and 1993. The 1996 Constitution is, however, the first one adopted by a democratically constituted body representing all South Africans. Not only is this democratic South Africa's founding Constitution, but it also marks the shift, together with the 1993 interim Constitution, from parliamentary sovereignty to constitutional supremacy, thus fundamentally changing the role of the judiciary and the significance of the Constitution. While there are significant continuities

[3] See A Lewis, 'Revolution by Law', *New York Times* (13 January 1995) A15.

between the 1993 interim Constitution and the 1996 final Constitution, there are also important differences. These include such innovations as the idea of co-operative government and the explicit inclusion of socio-economic rights in the bill of rights, that mark the unique character of this Constitution as the crowning achievement of South Africa's democratic transition.

The hegemony of Parliament—supported by the doctrine of parliamentary sovereignty—was short-lived, compared to pre-colonial and colonial forms of governance based on participation by status-defined subjects or imperial command. Yet it was the rise and dominance of parliamentary sovereignty that shaped South Africa's modern constitutional history. The introduction of constitutional review, which empowered the judiciary to review democratically enacted legislation, was, in this context, a very new development. The democratic government has been required to reverse many decisions, including such sensitive and difficult issues as the HIV/AIDS pandemic and the national housing shortage, as well as proclaiming the duty of government to assist property owners whose lands have been occupied by homeless people. Yet, despite these reversals, the government and country remain proud of their internationally acclaimed Constitution.

Assertions of democratic authority by elected officials unhappy with particular judicial decisions are not unknown. But in stark contrast to the past, the judiciary—particularly former Chief Justice Chaskalson and his successor Chief Justice Langa—has vocally reminded the country of the value of the court's independence and of its duty to uphold the supremacy of the Constitution. In response, the government has publicly recognised the authority of the judiciary to interpret the Constitution and the importance of its independence. Even the opposition parties—which threaten at election time that the ANC government is intent on amending the Constitution to weaken individual rights—claim the Constitution. Consensus on the adoption of a justiciable Constitution, as one of the defining features of a democratic South Africa, may still be understood, in part, as a response to the historical experience of parliamentary sovereignty in the apartheid era. Yet a new layer of experience in which conflicts are mediated through litigation and fairly restrained judicial practice, is providing additional roots for democratic constitutionalism in today's South Africa.

A. Pre-democratic Constitutionalism

Historical legacies and legal continuity continue to have important effects on South Africa's constitutional order. In order to understand these effects it is necessary to review the constitutional history of South Africa prior to the democratic transition. From the seventeenth century onward a number of centrally governed polities, or states, emerged and existed for different lengths of time in the territory that is now South Africa. Most prominent of these was the Zulu Kingdom, whose armies dominated the northeastern parts of the area until late in the nineteenth century. Although these various entities—including the Griqua and Boer Republics, as well as other African polities—exhibited a variety of different forms of governance, it was the steady advance of British colonial power that eventually brought these different communities under a single political authority. Colonial power also provided the impetus for the political process that led the white settlers in the four British colonies—the Cape, Orange Free State, Transvaal and Natal—to agree to form the Union of South Africa in 1910.

i. Colonial Constitutionalism and the 'Bifurcated' State

Formally, the South Africa Act of 1909 brought together four settler colonies into a single Union of South Africa, but in effect it created a bifurcated state.[4] On the one hand, the Union Constitution granted parliamentary democracy to the white minority. On the other hand, it subjugated the majority of black South Africans to autocratic administrative rule. When they were excluded from the National Convention, black leaders protested against the refusal to extend the Cape franchise to the former Boer Republics,[5] but these leaders were rebuffed as not being representative of African society. Instead, African society was presented as essentially 'traditional', to be governed separately by chiefs in a system of

[4] See, A Ashforth, *The Politics of Official Discourse in Twentieth-Century South Africa* (Oxford, Clarendon Press, 1990) 34; see also Mamood Mamdani, *Citizen and Subject: Contemporary Africa and the Legacy of Late Colonialism* (Princeton, NJ, Princeton University Press, 1990).

[5] With the establishment of representative government in the Cape Colony in 1853 the right to vote was granted to every man, over the age of 21, who was a British subject and owned property—in land or buildings—worth at least £25, or who received an annual salary of at least £50 per year. While very few black men had either the property or salary to meet these requirements, there was no formal racial restriction in the Cape franchise.

feudal hierarchy with the Governor-General in Council at its apex. This division of the polity into two separate spheres reflected the fundamentally colonial character of South African legal culture in which 'professed legalism with its accompanying rhetoric of justice', coexisted with the 'racist abuse of power by the state'.[6]

The creation of 'differential spheres of citizenship for 'European' and 'Native' populations within one territory'[7] was reflected in section 147 of the South Africa Act of 1909. While the bulk of the South Africa Act dealt with the powers of a government, to be essentially representative of white male adults,[8] section 147 stated that '[t]he control and administration of native affairs . . . throughout the Union shall vest in the Governor-General in Council'. The connection between the exercise of authority over 'natives' and land was also made explicit by section 147, which stated that the executive (the Governor-General in Council):

> shall exercise all special powers in regard to native administration hitherto vested in the Governors of the Colonies or exercised by them as Supreme chiefs, and any lands vested in the Governor . . . for the purposes of reserves, for native locations shall vest in the Governor-General in Council, who shall exercise all special powers in relation to such reserves as may hitherto have been exercisable by any such Governor.

In essence, then, the constitutional order created by the South Africa Act—and replicated in every constitutional reform until the end of apartheid—was an essentially colonial order 'of a special type' in which the 'white' state was simultaneously a pseudo-democratic system based on a Westminster-style parliamentary system and also an authoritarian order in which the majority of the country's inhabitants lived under a classical system of colonial 'indirect rule' and the exercise of autocratic administrative authority by 'colonial authorities' in the form initially of the Governor-General in Council and later, under the Republic of South Africa Constitution Act of 1961, the State President.

[6] M Chanock, *South African Legal Culture 1902–1936: Fear, Favour and Prejudice* (Cambridge, Cambridge University Press, 2001) 22.

[7] Ashforth *The Politics of Official Discourse*, above n 4, 37.

[8] See South Africa Act 1909 (9 Edw 7, c 9) s 34(i), in which the quota of representatives from each province is to be 'obtained by dividing the total number of European male adults in the Union . . . by the total number of members'.

ii. Parliamentary Sovereignty

By 1806, when the British occupied and imposed their public law on the Cape, the principle of parliamentary sovereignty—that Parliament could 'do everything that is not naturally impossible'—had come to dominate English law.[9] Although the notion that judicial review over Parliament's legislative authority—mandated by some fundamental law of reason and justice—was not unknown in English jurisprudence,[10] by the time self-government was granted to the Cape and Natal, legislative supremacy was the defining feature of British parliamentarianism.[11] Despite the dominance of English constitutionalism in the Cape and Natal, the Boer Republics established in the mid-nineteenth century sought alternative sources of constitutionalism. Drafters of the Orange Free State Constitution of 1854, for example, turned to the Constitution of the United States of America, amongst other sources, and adopted rigid rules of amendment and guaranteed rights of peaceful assembly, petition, property and equality before the law.[12] Although the 1854 Constitution did not explicitly provide for judicial review or a Supreme Court, a court was established by legislation in 1876 and its power of judicial review was 'accepted as an inherent feature of the Constitution'.[13]

Despite the formal recognition of constitutional review in the Orange Free State, judicial review of legislation was applied in only one case. In this case, *Cassim and Solomon v The State*,[14] the High Court of the Orange Free State reviewed a law of 1890, which prohibited 'Asians' from settling in the State without the permission of the president.[15] Challenged on the grounds that it violated the constitutional guarantee of equality before the law, the court upheld the legislation, arguing that the constitutional guarantee had to be 'read in accordance with the *mores* of the Voortrekkers'.[16]

[9] Blackstone's *Commentaries in the Laws of England*, 4th edn (London, 1876) vol 1 p 129.

[10] See decision of Sir Edward Coke in *Dr Bonham's* case, 8 Co Rep 113b, 77 ER 646 (CP 1610); and R Pound, *The Development of Constitutional Guarantees of Liberty* (New Haven, Yale University Press, 1957).

[11] See J Dugard, *Human Rights and the South African Legal Order* (Princeton, NJ, Princeton University Press, 1978) 14–18.

[12] See HR Hahlo and E Kahn, *The Union of South Africa: The Development of its Laws and Constitution* (London, Stevens, 1960) 72–83 and Dugard, *Human Rights* 18–19.

[13] Dugard, *Human Right*s, above n 11, 19.

[14] *Cassim and Solomon v The State* (1892) 9 *Cape Law Journal* 58.

[15] Hahlo and Kahn, *The Union of South Africa*, above n 12, 108–09.

[16] Dugard, *Human Rights*, above n 11, 19.

Thus, even this early experiment with constitutionalism was tainted with the distinctions of racial citizenship that came to dominate later constitutional law and practice.

The attempt in 1892, by Chief Justice JG Kotze in the High Court of the South African Republic, to review the constitutionality of legislation was grounded in the Constitution's formulation of legislative power being granted by the people.[17] With repeated references to the United States Supreme Court's reasoning in *Marbury v Madison,* Chief Justice Kotze argued that as sovereignty vested in the people of the Republic and not the legislature (*Volksraad*), it was the court's duty to strike down legislation incompatible with the fundamental law of the Constitution (*Grondwet*).[18] This attempt to exercise the power of constitutional review in *Brown v Leyds NO*,[19] however, threw the state into crisis as President Kruger secured an emergency resolution of the legislature declaring that 'the judges had not and never had had the testing right'.[20] As the crisis deepened, President Kruger dismissed the Chief Justice. At the swearing-in ceremony of the new Chief Justice, he warned the judges not to follow the devil's way, as 'the testing right is a principle of the devil', which the devil had introduced into paradise to test God's word.[21]

Although the Union Constitution of 1909 followed the English tradition of adopting parliamentary sovereignty, the legislature was not completely free of external restraints. Until passage of the Statute of Westminster by the British Parliament in 1931, the Colonial Laws Validity Act of 1865 continued in theory to restrict the sovereignty of the Union Parliament. Even after the Dominium Parliaments received their independence from Britain, the South African Parliament remained bound, at least procedurally, by the entrenched clauses of the 1910 Union Constitution. While the significance of entrenchment was weakened by the removal of African voters from the common voters roll in 1936,[22] it was the constitutional struggle over the removal of 'coloured' voters that

[17] See Hahlo and Kahn, *The Union of South Africa*, above n 12, 91

[18] Dugard, *Human Rights*, above n 11, 21. See *Brown v Leyds NO* (1897) 4 Off Rep 17.

[19] *Brown v Leyds NO*, above n 17.

[20] Hahlo and Kahn, *The Union of South Africa*, above n 12, 108–09.

[21] Dugard, *Human Rights*, above n 11, 24.

[22] Native Representation Act 12 of 1936. While the Act was challenged in *Ndlwana v Hofmeyr NO & others*, 1937 AD 229, the courts refused to intervene.

secured Parliament's dominance over the Constitution.[23] The survival of the entrenched language clause, guaranteeing the equality of English and Afrikaans, was more a symbolic restraint than an effective constitutional entrenchment. In effect, equal language rights relied more on a political consensus among whites.

The rise of parliamentary sovereignty, over even the limited entrenchment of the Cape franchise, was finally secured with the adoption of the 1961 Republican Constitution.[24] From the passage of the South Africa Amendment Act in 1958,[25] which provided that '[n]o court of law shall be competent to enquire into or to pronounce upon the validity of any law passed by Parliament' other than those effecting the surviving language clause, government was determined to secure the primacy of parliamentary sovereignty. Prime Minister Verwoerd rejected calls for the adoption of an entrenched bill of rights by the Natal Provincial Council, stating that it would be unthinkable as 'no suggestion was made as to how rights could be effectively guaranteed without sacrificing the sovereignty of Parliament'.[26] Section 59 of the 1961 Republican Constitution specifically incorporated the language of the South Africa Amendment Act, thus constitutionalising the courts' exclusion from substantive review and explicitly limiting any judicial review over substantive legislative enactments to those effecting the language clause guaranteeing the equality of English and Afrikaans. As if to emphasise this ascendance, s 59(1) stated that 'Parliament shall be the sovereign legislative authority in and over the Republic, and shall have full power to make laws for the peace, order and good government of the Republic'.

Despite these obviously substantive criteria for the passage of legitimate laws and their earlier resistance, the courts recognised that the will of a racially exclusive Parliament was to be paramount. The crude logic of this unrestrained conception of parliamentary sovereignty is summed up in an earlier decision of the Appellate Division in *Sachs v Minister of Justice; Diamond v Minister of Justice*, in which Acting Chief Justice Stratford stated that

[23] The Separate Representation of Voters Act 46 of 1951, was challenged in *Minister of the Interior v Harris* 1952 (4) SA 769 (A). See also Dugard, *Human Rights*, above n 10, 30–31.

[24] Republic of South Africa Constitution Act 32 of 1961.

[25] South Africa Act Amendment Act 1 of 1958.

[26] E Kahn, *The New Constitution*, being a supplement to The Union of South Africa, above n 12, (London, Stevens, 1962) 2.

> arguments are sometimes advanced which do seem to me to ignore the plain principle that Parliament may make any encroachment it chooses upon the life, liberty or property of any individual subject to its sway, and that it is the function of the courts of law to enforce its will.[27]

This doctrine's impact on human rights and its 'debasement of the South African legal system' are now part of the history of apartheid.[28]

iii. Reformed Apartheid's 1983 'Tricameral' Constitution

In the face of increasing internal resistance and international isolation, the South African government looked in the late 1970s to the political reincorporation of the Indian and coloured communities as a means of broadening its social base. The outcome of this policy shift was the adoption of the 1983 Constitution, which extended the franchise to 'Indians' and 'coloureds' in a tricameral legislature with its jurisdiction distributed according to a vague distinction between 'own' and 'general' affairs. Two mechanisms ensured, however, that power remained safely in the hands of the dominant white party. First, the running of government was effectively centralised under an executive state president with extraordinary powers in both the executive and legislative arenas. Second, all significant decisions within the legislature—such as the election of the president—would be automatically resolved by the 4:2:1 ratio of white, coloured and Indian representatives, which ensured that even if the 'Indian' and 'coloured' Houses of Parliament voted in unison, the will of the 'white' House would prevail. The exclusion of the African majority from this scheme and resistance from within the targeted Indian and coloured communities meant that the 1983 Constitution was practically stillborn. The escalation of resistance and rebellion that began in late 1984 and led to the imposition of repeated states of emergency from mid-1985 sealed its fate.

B. Legal Continuity and Historical Legacies

The origins of the 1996 Constitution are embedded in South Africa's political transition. When political negotiations began in public in early

[27] *Sachs v Minister of Justice* 1934 AD 11, 37.
[28] See Dugard, *Human Rights*, above n 11, 36.

1990 the different political parties and movements in South Africa held different assumptions about how to create and structure a post-apartheid state. On the one hand, the apartheid government was committed to remaining in control of the transition to democracy. It continued for some time to argue that the future political dispensation should protect the interests of minorities—conceived in ethnic and racial terms—by means of guaranteed participation at all levels of government with the necessary powers, including veto rights, to protect their perceived interests. On the other hand, the ANC and its allies in the liberation movement demanded the establishment of an interim government and insisted that a future Constitution be the product of a democratically elected Constituent Assembly. Other parties and sectors within the society made different claims, including an editorial in the main Sunday newspaper, the *Sunday Times*, which called for a slightly modified replica of the US Constitution and the demand by the Inkatha Freedom Party (IFP) that a new Constitution be produced by an 'independent' panel of experts and adopted by a simple majority in a national referendum. In pursuing their various objectives the parties offered different rationales, which drew on both philosophical and historical arguments and were influenced by—or attempted to align with—the emerging post-Cold War international political culture of democratic constitutionalism.

The resolution of these debates was embedded in the politics of struggle and violent confrontation that continued throughout the first phase of South Africa's political transition. In addition, key elements of these debates had a profound impact on the process, structure and content of the 1996 Constitution. Perhaps most significantly, the debate over legal continuity on the one hand, and the need to address the historical legacies of colonialism and apartheid on the other hand, had a profound influence on the final product. Implicit in the Harare Declaration—the document adopted by the liberation committee of the Organisation of African Unity in 1988 as the basic preconditions for South Africa's re-admittance into the international community—was the assumption that there would be a radical break with the old regime. This process was similar to other negotiated processes of decolonisation, where an interim government would take power and supervise the emergence of a post-apartheid democratic government. This, after all, was what had happened in the transition to democracy in Zimbabwe. There the British sent Lord Soames to assume control of the government in Harare, from the Ian Smith/Abel Muzorewa regime, and to prepare the country for democratic elections.

The leadership of the ANC, supported by street demonstrations and other forms of mass action, continued to demand that an interim government be created as the first step in a democratic transition. Yet a number of lawyers and activists in the ANC began to question whether an interim government—with Mandela at the helm but with little power to address the legacies of apartheid and no clear date set for democratic elections—would not, in fact, allow the old regime, through its effective control of state institutions, to continue to control the pace and form of the transition to democracy.

The idea of legal continuity played an understated yet significant role in this debate. While liberation movement politicians and the general population saw no difficulty in making a clean break with the past, the lawyers (even within the liberation movement) soon grasped the significance of the regime's demand that there be legal continuity within the existing legal framework. This was a clear attempt to assert control over the transition by arguing that any new legal dispensation would have to be legally adopted by the existing institutions of the apartheid state, including the tricameral constitution that had been soundly rejected by the majority of South Africans since its adoption in 1983. On the other hand, it was clear to the lawyers that economic and political stability during the transition required some recognition of existing legal rights and duties. Thus, they recognised the need for some form of legal continuity in the democratic transition. In fact, on closer examination, it is clear that despite popular notions that the act of decolonisation involved a legal break with the past, the formal transfer of power on decolonisation often included agreements to recognise all existing law until such time as the new government made the requisite statutory amendments that would change the law. Exceptions to this include those countries in which there was a genuine revolutionary overthrow of the ancien regime, such as the 1917 Revolution in Russia, or the assumption of power by the Front for the Liberation of Mozambique (FRELIMO) in neighbouring Mozambique in 1974. Legal continuity could not be avoided; however, the implications of this principle and agreement on how it should be implemented remained an important aspect of the ongoing negotiations.

Two different aspects of the transition highlight the nature of the debate over legal continuity. First, there was the question of how a future Constitution would be created and adopted, a problem often framed in debates over Constitution-making as a distinction between 'constituted power' (*pouvoir constitué)* and 'constituent power' (*pouvoir constituant*).

Second, many activists and lawyers in the liberation movement began to argue that the need for legal continuity could not be used to set the legacies of apartheid in stone, particularly the existing allocation of land rights, which had been racially determined by law since the enactment of the 1913 Land Act, and which had resulted in the forcible dispossession of millions of black landholders. It was the need to resolve these tensions that led to the parties eventually embracing a two-stage democratic transition. This solution involved the adoption of a negotiated interim Constitution, which would itself provide for both a democratically elected government and a process through which a legitimate constituent body would produce a final Constitution.

While the outcome of negotiations produced a path for the opposing parties to preserve legal continuity and to begin to address the legacies of apartheid, any history of the negotiations must reflect both the ongoing violent confrontations that characterised this period as well as the various attempts by different parties to force through their own interpretations of agreements or even to override the negotiations and impose their own outcomes. The parties agreed in principle at the first formal negotiations for a new political dispensation, the Convention for a Democratic South Africa (CODESA) in December 1991, that there would be a united South Africa. However, they continued to hold diametrically opposed visions of the implications of this principle right up to the weeks prior to the first democratic elections in April 1994. For the apartheid regime and its various allies, those areas of South Africa that had been granted 'independence' as part of the 'homeland' policy, would have to agree to become part of the new South Africa. The ANC and its allies noted, however, that these entities had never achieved international recognition and that the right to self-determination belonged to all South Africans within the internationally recognised boundaries of the Union of South Africa that had been formed in 1910.

In a similar fashion, the debate over the legacy of apartheid became focused, in this early period, on one major issue: the question of land. The struggle against forced removals had in the last years of apartheid evolved into a return-to-the-land movement in which communities not only resisted their forcible removal from their lands but also began to claim rights of return. This struggle was characterised by active community resistance and the use of law and negotiations by progressive lawyers aligned with these communities. Sensitive to increasing global condemnation, the regime declared a moratorium on further forced removals in

the late 1980s, yet continued to try to force communities to agree to resettlement. In the early 1990s this policy evolved into an attempt by the regime to 'resolve' the land question before a democratic government could take office. In 1991, the regime formally repealed the 1913 Land Acts and attempted to provide limited compensation or alternative land as a means to settle ongoing conflicts that threatened to undermine its claim that any new legal order must guarantee the existing rights of all property holders. Legal continuity here threatened to consolidate the unjust distributions of colonialism and apartheid and thus provided the grounds upon which the very notion of legal continuity could be challenged. It was only with the acceptance of the principle of restitution of lands that had been lost due to racially discriminatory law, by all sides in the negotiations, that it became possible to accept that there could be both legal continuity and some redress of the legacies of apartheid. Restitution of land, limited to land lost in the period between 1913 and 1994, was a major compromise for the liberation movement, but also provided the avenue through which a legally legitimate demand for redress could continue to be made in the ongoing Constitution-making process.

III. POLITICAL CONTEXT

While historical context is key to understanding the legal and social landscape into which the new Constitution was born, it is also important to outline the political context that gave rise to the new constitutional dispensation. Despite an extraordinary history of early state-building among indigenous and colonial communities—from the rise of the Zulu Kingdom in the nineteenth century to the formation of a secession of Griqua and Boer states in which excluded and Creole communities within colonial society formed their own political communities beyond the authority of the dominant colonising power—the history of twentieth-century South Africa presents a relatively stable set of significant political groupings. From the creation of the Union of South Africa in 1910, in which the newly defeated Boer Republics of the Free State and the South African Republic or Transvaal and the two former British colonies of Natal and the Cape were brought together under a Constitution passed by the British Parliament, only a few political parties and movements have dominated the political arena. Although each of these represents a fairly complex political history of it own, the main political forces that engaged

in the protracted conflict that shaped South Africa in the twentieth century represented a few distinct social forces: African nationalism, Afrikaner nationalism and parties who to a greater or lesser extent represented capital and labour.

The oldest African nationalist party on the continent is the ANC, formed as the South African Native National Congress in 1912 to unite Africans and oppose both the racially discriminatory clauses of the 1910 Union Constitution as well as the impending restrictions on land ownership contained in what would become the 1913 Land Act. While the ANC would in its early years send delegations to London and petition for inclusion in the political system, it was slowly transformed into an active opposition, making increasing demands for democratic rights and then adopting tactics of passive resistance to government policies in the 1950s. After the government banned the ANC and the breakaway Pan Africanist Congress in 1960, the liberation movements took up arms and organised in exile to challenge the government's apartheid policies. Although the arrest and imprisonment of Nelson Mandela and the leaders of the ANC's armed wing, Umkhonto we Sizwe, disrupted the armed campaign, the ANC was able to recover and to lead the struggle against apartheid in a close alliance with the South African Communist Party. Taking advantage of the Soweto student uprising in 1976, the ANC was reinvigorated by thousands of youth who had grown up in the Black Consciousness movement of the early 1970s, and as a result, the ANC emerged as the dominant force of black opposition to the apartheid regime.

Adopting tactics of mass mobilisation and ungovernability in the 1980s, the ANC brought increasing pressure on the government and, despite growing violence, initiated negotiations with business and government as the Cold War drew to an end. The release of Nelson Mandela and the repeal of the banning of the ANC, among other black political groups in February 1990, marked the beginning of South Africa's political transition from apartheid. Since its victory in the 1994 election, the ANC has been the dominant political force in South Africa, winning increasingly large percentages in each democratic election despite increasing internal tensions within its alliance with the Communist Party and the Congress of South African Trade Unions. The victory of Jacob Zuma over President Thabo Mbeki at the ANC's national conference in December 2007—and the subsequent removal of Mbeki from office—led to a struggle for the soul of the ANC and a dramatic split in the waning months of 2008. While the new split-away party, named the Congress

of the People (COPE), is competing for the historic legacy of the ANC, the ANC's control of government and status as the party of liberation seems to guarantee its electoral advantage into the 2009 national elections and beyond. However, this fracturing of the ANC might reduce the party's overwhelming dominance of post-apartheid politics and provide space for the emergence of a more dynamic democracy in South Africa.

The second major political force in South Africa's twentieth-century history was Afrikaner nationalism, which became embodied in the emergence and political dominance of the National Party over the state in the period between 1948 and 1994. While the antecedents of Afrikaner nationalism may be traced to the Boer Republics and the construction of a racially based alliance between white labour and organised agricultural interests, the key issue of the 1948 election was the so-called 'colour question'. Jan Smut's ruling United Party 'fought the 1948 election on the mildly reformist but ambiguous proposals of the Native Laws Commission . . . for the "parallel" development of white and black interests',[29] a policy that sought to control black labour but recognised the inevitability of African urbanisation. In contrast, the National Party advocated for 'apartheid', promising to expel Africans from the cities and to ensure that black labour 'be admitted to the urban areas only as temporary employees obliged to return to their homes after the expiry of their employment'.[30] While the National Party did not win a majority of votes, the electoral systems weighting in favour of rural votes—by as much as 30 per cent—as a result of a constitutional compromise in the 1910 Union Constitution, gave the nationalist alliance, the National Party and the Afrikaner Party, a slim majority in Parliament. Founded in 1914, the National Party first ruled South Africa as part of a 'pact' government with the Labour Party from 1924–34. However, the reconstructed National Party of 1948 was imbued with a new ideological vision that brought together a redefined Afrikaner nationalism in the form of 'Christian-nationalism', with an explicitly racist vision of 'apartheid' and a commitment to 'anti-communism' that drew on the mounting tensions of the Cold War.

While the Apartheid regime was forced over time to modify its initial vision of apartheid, including adoption of the idea of 'separate

[29] D O'Meara, *Forty Lost Years: The Apartheid State and the Politics of the National Party, 1948–1994* (Randburg, South Africa, Ravan Press; Athens: Ohio University Press, 1996) 32.

[30] Sauer Report, quoted in O'Meara, *Forty Lost Years* 35.

development' in response to decolonisation across Africa, the fundamental premise of apartheid—that power should be used to secure the future of the Afrikaner nation—remained intact until the end. As it struggled to implement its vision, the apartheid regime embraced both racial and ethnic categories and attempted to balkanise the country through the creation of ten tribal 'homelands', four of which were granted 'independence'. At the same time, the apartheid regime constructed a system of laws that dictated, on the basis of race, every aspect of the lives of South Africa's inhabitants. The effect was to exclude the vast majority of people from living productive lives.The individual, communal and social consequences of the apartheid system would lead in time to its recognition as a crime against humanity. Despite begin forced into negotiations that led to the demise of the apartheid system, the National Party continued to deny that its policies were intended to cause the harm that apartheid inflicted on its victims. And while support for the party dissolved in the new South Africa, its leadership remained committed to obtaining some access to political power. With the collapse of its vision of a consociational dispensation in which groups would retain a political veto over issues affecting them, the National Party accepted the idea of a Government of National Unity (GNU) in which they expected to retain significant political power. When Mandela's government failed to accord former President FW de Klerk the authority he expected as Deputy President, the National Party withdrew from the GNU. After losing even more support at the polls in 2004 and then failing in its attempt to form an anti-ANC alliance, the National Party negotiated for its leadership to be integrated into the government; the party formally joined the ANC and dissolved itself in 2007.

No other political parties achieved the same levels of public support and power as the ANC and the National Party in twentieth-century South Africa. However, a number of smaller parties have played significant public roles, including the small, white parliamentary opposition; the Communist Party; right-wing splits from the National Party; and finally the IFP, which emerged out of Inkatha YaKwaZulu, a Zulu cultural movement that was first formed in the 1920s and revived by Chief Gatsha Buthelezi as head of the KwaZulu 'homeland' administration in 1975. When it was first revived, using the colours and uniform of the passive resistance or 'Defiance Campaign' volunteers of the ANC in the 1950s, there was an assumption that Chief Buthelezi's refusal to accept 'independence' for the KwaZulu 'homeland' and the revival of Inkatha

indicated some relationship with the banned ANC. Although there was some contact between Gatsha Buthelezi and Oliver Tambo, the leader of the ANC in exile, strategic differences over the armed struggle, economic sanctions and the emergence of the United Democratic Front—a legal front for the anti-apartheid movement formed in opposition to the 1983 'tricameral' Constitution—led to increasingly violent conflict between the IFP and UDF/ANC supporters. While this conflict was most brutal in the rural areas and towns of Natal, leaving more than 15,000 dead from the early 1980s until after the 1994 election, the inclusion of Buthelezi in the GNU and the acceptance by the ANC that the IFP would form the first post-apartheid administration in the province of KwaZulu-Natal brought an end to the violence. With an ANC electoral victory in KwaZulu-Natal in 2004 the IFP faced increasing internal fragmentation, leaving it now, more than ever, a regional party.

IV. CONCLUSION: CONTEXT, CONTINUITY AND THE PROBLEM OF PATH DEPENDENCY

A contextual understanding of South Africa's Constitution must be rooted in a perspective that recognises the impact of history as well as the effect of present conditions on the building of a constitutional democracy since 1994. While the history of colonialism, apartheid and exploitation have left a legacy of social and economic depravity, the experience of resistance, democratic struggle and institutional state capacity provided grounds for hope as the society came together in the aftermath and glow of the 1994 elections. The South African context is thus laden with inherent contradictions and alternate sources of hope and pessimism. Legal continuity provided a sense of institutional stability and a source of continuing tension as the new society inherited the distribution of accumulated legal rights and injustices. South African law, in particular, represents both the old and the new in this process of transformation. Just as the 1996 Constitution contains the hopes and aspirations of the majority of South Africans, the embrace of constitutionalism and the rule of law means that the processes for fulfilling these dreams will be shaped by the encrusted processes and encumbered resources that make up the South African legal tradition.

Already there is a debate over whether the democratic transition was in some way determined by a path dependency rooted in the depth of legal

tradition in the country.[31] Notions of legal continuity and theories of path dependency—as well as the practices and traditions of the legal profession—may account, in part, for the role of law in South African society. Yet it is important to understand the law and the Constitution as parts of a broader historical and social context. Although the prevalence of lawyers in senior political positions may explain some of those leaders' trust in legal solutions, it is important that our understanding of the role of law does not ignore the extraordinary history of social and political struggle, both domestic and global, that led to and forced through the dramatic social and political changes that characterise the democratic transition in South Africa. It is precisely these social realities that continue to provide the context for the South African Constitution.

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