

## Chapter 2

# Constitutional History

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## 2.1 The potemkin constitution<sup>1</sup>

There ought to be, behind the door of every happy contented man, some one standing with a hammer continually reminding him with a tap that there are unhappy people; that however happy he may be, life will show him her laws sooner or later — disease, poverty, losses, and no one will see or hear, just as how he neither hears, nor sees others.

Anton Chekhov 'Gooseberries'

Everyone loves a winner. And who would have been churlish enough a year ago to contend that the first 13 years of South Africa's experiment in constitutional democracy was anything but an unadulterated success — especially when viewed against the conflagrations that consumed Bosnia, Rwanda, the Congo, Sudan and Somalia.

On the home front, power passed peacefully from Mandela to Mbeki. The economy grew at 5% a year and a black middle class equal in size and in power to the white middle class arose and suggested that the fundamentals of a bourgeois social democracy had been put in place.

Against this background, the AIDS denialism of the Mbeki regime — its Punch and Judy-like fights with the Treatment Action Campaign — left one shaking one's head. The disaster on the other side of the Limpopo could easily be blamed on an aging dictator with a bad moustache. The ANC's election as party leader of an alleged

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<sup>1</sup> See Stu Woolman 'The Potemkin Constitution' *Without Prejudice* (December 2008).

rapist, a politician charged with being 'on the take', and a public figure who begins populist rallies with intimations about how to take care of the moffies in KZN could be dismissed with deft analyses about how those groups sidelined by Mbeki formed a coalition of self-interest to secure Zuma's party presidency and how democratic politics can actually occur within one-party dominated states. The lights flickering on and off in 2008 could be seen as the price we paid for some very good years, the very bad management of Eskom and petrol rising to almost \$150 per barrel (at the time of writing).

But what of the fires that rage, currently, in townships across South Africa. Pat answers about xenophobia do not explain the murderous intent of our fellow citizens. Instead, a scratching of the surface reveals a far more compelling explanation for our current internecine battles.

As recent historiographers of the early 20th century pogroms in the Ukraine discovered, the mass murders of Jews were not, primarily, orchestrated by the Czar, the State, the police or the Cossacks, or motivated by such classic anti-semitic fictions as 'The Protocols of the Elders of Zion'.<sup>2</sup> For the most part these continuous outbursts of violence, after the death of the Czar, were the unfortunate responses of large groups of Russians and Ukrainians, who, having moved to the cities from rural environments, found themselves without work, adequate shelter or food. These internal immigrants discovered that outsiders — like the small number of Jews allowed to live in various cities — had access to the scarce resources they so

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desired. The absence of a strong state, the presence of a political vacuum left by the death of the Czar and high levels of social anxiety created the conditions for the pogroms that left some 30,000 dead. Sigmund Freud, reflecting upon these murders and other similar social conflagrations, attributed their occurrence to what he described as 'the narcissism of minor difference'.

Freud's theory of the 'narcissism of minor difference' holds that under conditions of instability, people project their anxiety onto others. These 'others' become the ostensible source of the uncertainty — despite the fact that these 'others' bear no responsibility for the current political or economic dynamics of a country, region or city. The us/them dynamic reinforces the identification of individuals with the group and turns the group into a safe harbour or a laager: and it allows these same individuals to turn their rage at their conditions outward toward 'others'. As Freud wrote in *Civilization and Its Discontents*:

It is always possible to bind together a considerable number of people in love, so long as there are other people left over to receive the manifestations of their aggressiveness. I once discussed the phenomenon that it is precisely communities with adjoining territories, and related to each other as well, that are engaged in constant feuds and in ridiculing each other — like the Spaniards and the Portuguese, for instance, the North Germans and the South Germans, the English and the Scots and so on. I gave this phenomenon the name of the narcissism of minor differences".<sup>3</sup>

Relatively recent events in Rwanda bear out the new historiography and the somewhat older Freudian insights. Rwanda's genocide does not reflect a well-conceived orchestration of state-sponsored violence: a political vacuum — created

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2 See Paul Brass (ed) *Riots and Pogroms* (1996); Johan Klier & Shlomo Lambroza (eds) *Pogroms: Anti-Jewish Violence in Modern Russian History* (1992).

by assassinations and the inability of Hutus and Tutsis to arrive at a long-term power sharing arrangement — fed the social anxiety created by too many people forced to make a subsistence living on too little land. The massacre of 800,000 Rwandans by young, male, often unemployed, machete-carrying fellow Rwandans offers a prototypical example of how a weak state incapable of delivering basic services to the majority of its citizens could allow a handful of antagonists to initiate a mass murder.

The ethnic cleansing and genocide in Bosnia and in Nazi Germany bear a strong family resemblance. Yugoslavia, after Tito's death, had little to hold its loose federation of regions together. With the fall of communism in 1989 — and all the uncertainty that the fall brought to many parts of Eastern Europe — Franjo Tudjman in Croatia and Slobodan Milosevic in Serbia were able to exploit the political vacuum and the social anxiety left by Tito's departure and the absence of a workable democratic constitutional federalist state. The result — aside from the fragmentation of Yugoslavia into some seven autonomous states —

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was a set of wars, marked by the genocide of Bosnian Serbs. When Michael Ignatieff asked several of the Croatian combatants what this Yugoslavian civil war was all about, he was told: 'They smoke different cigarettes than we do'.<sup>4</sup> Do the conditions out of which the Holocaust arose look so very different? Germany's Weimar Republic was weak. Unemployment rose from 25% before the depression to almost 50% after the depression. Hitler's ability to convince his fellow Germans that the cause of the Reich's rot lay with the assimilation of and miscegenation with non-Aryans — namely the Jews — was rather easy. He had an audience ripe for the taking. And he made it all the easier by using Keynesian economics to drastically reduce unemployment in the 1930s and further convince his fellow Germans that a new Judenfrei Reich would make *all* of their problems go away.

We are by no means suggesting that the new South Africa bears all — or even many — of the hallmarks of the Ukraine, Rwanda, Czarist Russia, Nazi Germany and the former Yugoslavia. And that is why we have begun our account of South Africa's history by describing our Final Constitution as a Potemkin Constitution. Potemkin, despite the unfortunate idiom attached to his name, did, in fact build a large number of very *real* villages and ports throughout the Crimea. He has, however, been remembered most for papering over the backwardness of various towns that the Czarina Catherine — and her entourage of foreign guests — would view during a visit through Russia.

We have a Potemkin Constitution because, as we shall see, many of our new institutions and new constitutional doctrines are very *real* and a marvel to behold. At the same time, the root causes of the riots of 2008 can be traced to a failure — over

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3 Sigmund Freud *Civilization and Its Discontents* (1929) 117. See also Sigmund Freud *The Taboo of Virginity* (1918); Sigmund Freud *Group Psychology and the Analysis of the Ego* (1921); AG Burstein 'Ethnic Violence and the Narcissism of Minor Differences' (1999) 3 (Manuscript on file with authors) (One might go so far as to claim that the 'in-group exists [solely] by virtue of a denied egoism and a deflected suspicion; the out-group by virtue of the innate suspicion displaced toward it and rationalized on the basis of difference, however minor.') Cf Pal Kostlo 'The "Narcissism of Minor Differences" Theory: Can It Explain Ethnic Conflict?' *Filozofijaidrustutvo* (2007).

4 Michael Ignatieff *The Warrior's Honor* (1997) (Offers analysis of Bosnian and Rwandan genocides).

the past 14 years — to translate the promise of South Africa's liberation into a substantially better life for the majority of South Africans.<sup>5</sup>

We have managed in 14 years to produce a robust commitment to the rule of law within our court system.<sup>6</sup> Shaik, Zuma, Basson have all paid — in part at least — for their sins in courts of law. We have managed in 14 years to establish a commitment in our courts to the recognition of the dignity and the equality of all

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South Africans.<sup>7</sup> Same-sex life partners do not simply enjoy the ability to conduct their 'private affairs' as they wish.<sup>8</sup> They have now been granted the right to form civil unions that place them on an equal legal footing with opposite-sex life partners.<sup>9</sup> We have managed in 14 years to deepen and enrich our notion of democracy. Our democracy is no longer limited to the exercise of the franchise by all citizens every 5 years.<sup>10</sup> It now ensures that citizens are able to participate in various democratic processes that directly affect them.<sup>11</sup>

But this success in building some of the more formal structures of our constitutional order has not been mirrored by an equal degree of success in rectifying wrongs in other domains of our polity. Our HIV/AIDS morbidity and

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- 5 Finance Minister Trevor Manuel recently conceded that xenophobic violence had exposed the government's failure to spread economic gains to the poor. See *Financial Times* (31 May 2008). In his interview, Manuel admitted that the government's inability to deliver basic services lay behind these deadly riots: 'If you have millions of young people who feel so excluded from all that is good in society, then sometimes this takes a form of actions against others.'
- 6 See Frank Michelman 'The Rule of Law, Legality and the Supremacy of the Constitution' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson and M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2005) Chapter 11; *Ex Parte President of the Republic of South Africa: In re Pharmaceutical Manufacturers Association of South Africa* 2000 (2) SA 674 (CC), 2000 (3) BCLR 241 (CC) ('Pharmaceutical Manufacturers'); *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council* 1999 (1) SA 374 (CC), 1998 (12) BCLR 1458 (CC) ('Fedsure').
- 7 See Stu Woolman 'Dignity' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2005) Chapter 36; Cathi Albertyn & Beth Goldblatt 'Equality' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, July 2007) Chapter 35.
- 8 See *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 (1) SA 6 (CC), 1998 (12) BCLR 1517 (CC).
- 9 See *Minister of Home Affairs v Fourie & Another; Lesbian and Gay Equality Project & Others v Minister of Home Affairs* 2006 (1) SA 524 (CC), 2006 (3) BCLR 355 (CC).
- 10 See *August & Another v Electoral Commission & Others* 1999 (3) SA 1 (CC), 1999 (4) BCLR 363 (CC); *New National Party of SA v Government of the RSA & Others* 1999 (3) SA 191 (CC), 1999 (5) BCLR 489 (CC); *Democratic Party v Government of the RSA & Others* 1999 (3) SA 254 (CC), 1999 (6) BCLR 607 (CC).
- 11 See Theunis Roux 'Democracy' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, July 2006) Chapter 10; *Doctors for Life International v Speaker of the National Assembly & Others* 2006 (6) SA 416 (CC), 2006 (12) BCLR 1399 (CC); *Matatiele Municipality & Others v President of South Africa & Others* 2007 (6) SA 477 (CC), 2007 (1) BCLR 47 (CC).

mortality rates for women and children have risen: the same rates have fallen in our poorer neighboring states.<sup>12</sup> Our housing policy — and its predilection for little stands with white picket fences — has not made a significant dent in the backlog that exists for affordable housing.<sup>13</sup> We have yet to see a comprehensive food policy programme that would prevent some 40% of our country from experiencing hunger every year.<sup>14</sup> We are on the verge of having a second lost generation of learners because schools have not been built and our teachers have not been adequately trained.<sup>15</sup>

And so we have, at this historical moment, a Potemkin Constitution.

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That said, we do not have an apartheid Constitution. Our Final Constitution's entrenchment of the rule of law, the right to dignity and various forms of direct, participatory and representative democracy reflects the manner in which we have overcome (some of) the depredations of apartheid.

We shall spend the initial part of this chapter acknowledging that past and explaining, at least obliquely, how the depredations of apartheid — the absence of any semblance of the rule of law, the refusal to recognize the dignity of most of South Africa's denizens, and the wholesale denial of basic democratic rights to 87% of the population — are mirrored by the transformation brought about by the Interim Constitution and the Final Constitution. We shall then move from the period that has been identified as both 'Colonial Politics and Apartheid' and 'The Struggle for Liberation' into the period known rightly as 'The Road to Democracy'. In this penultimate section of the chapter, we shall traverse the constitutional negotiations that brought us both democratic constitutions, the certification judgments that officially stamped the Final Constitution as our basic law, the amendments that have shifted the content of our basic law, and an amendment bill that potentially threatens the independence of the institution — the judiciary — vouchsafed with protecting the basic law. In 'The Consolidation of Constitutional Democracy', we end with an acknowledgement of the basic constitutional doctrines that mark the break between the old order and the new, some ruminations as to whether that break is sufficiently radical for the centre to hold, and whether one can expect much more than a formal break from the basic text that animates this treatise.

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12 See UNAIDS *Epidemiological Fact Sheet on HIV/AIDS and STIs* (South Africa 2006), available at <http://www.unaids.org>; DT Jamison, RG Feachem, MW Makgoba, ER Bos, FK Baingana, KJ Hofman & KO Rogo (eds) *Disease and Mortality in Sub-Saharan Africa* (2nd Edition, 2006); Stu Woolman & Courtenay Sprague 'Aspen Pharmacare: Providing Affordable Generic Pharmaceuticals to Treat HIV/AIDS and Tuberculosis' in R Hamann, S Woolman & C Sprague (eds) *The Business of Sustainable Development in Africa: Human Rights, Public-Private Partnerships, and New Business Models* (2008) Case 13.

13 See Kirsty McLean 'Housing' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2005) Chapter 55. See also K Rust 'No Shortcuts: South Africa's Progress in Implementing its Housing Policy, 1994—2002' (Unpublished paper prepared for the Institute for Housing of South Africa, 2003, on file with the authors); National Department of Housing *Breaking New Ground: The Comprehensive Plan for the Creation of Sustainable Settlements* (2004) 4.

14 See Danie Brand 'Food' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, February 2005) Chapter 56C.

15 See Brahm Fleisch *Primary Education in Crisis* (2007).

## 2.2 Colonial politics and apartheid

### (a) Sasikhona (We Were Always Here) <sup>16</sup>

South African political history did not begin, as many an outdated legal text might have us believe, in 1652. This portion of southern Africa had long been home to many autonomous communities. Many of these communities — though no longer fully autonomous — continue to form an important part of South Africa's political fabric.

Indeed, one might want to start this section again. There was, in truth, no 'South Africa' prior to the Union of South Africa in 1910. And so even the presence of Europeans, with their history of trading posts, incursions in-land, wars of conquest and a three-century long period of colonialism, often gets filtered by legal historians looking back in time through the distorted political lens of the rather recent construct known as the 'Republic of South Africa'.

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What then can be said? Studies in anthropology clearly demonstrate that

[t]he region was not demarcated ecologically or culturally. There were two main zones, an arid western one, occupied by Khoisan-speaking hunters and herders [the San were the hunters, the Khoi the herders], and an eastern one, occupied largely by Bantu-speaking agro-pastoralists, but there were further significant differences between the Nguni-speaking peoples of the eastern coastal region and the Sotho-Tswana of the Highveld.<sup>17</sup>

Still, as Adam Kuper notes, Bantu, Nguni and Sotho-Tswana communities possessed a strong linguistic family resemblance and shared a wide array of values, beliefs, rituals and institutions.<sup>18</sup> These values, beliefs, rituals and institutions continue to inform everyday South African life.

One of the primary concepts that continues to animate everyday South African life — at least at the level of rhetoric — is 'ubuntu'. 'Ubuntu', an express grundnorm of the Interim Constitution,<sup>19</sup> and an implicit commitment of the Final Constitution,<sup>20</sup> captures, according to Chief Justice Pius Langa:

a culture which places some emphasis on communality and on the interdependence of the members of a community. It recognises a person's status as a human being, entitled to unconditional respect, dignity, value and acceptance from the members of the community such a person happens to be part of. It also entails the converse, however. The person has a corresponding duty to give the same respect, dignity, value and

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16 Of course, this proposition too is untrue — no matter what the language (Xhosa, rather San or English). All existing human populations are a function of treks back and forth across the globe over the last 200,000 years. What a significant cohort of physical anthropologists and geneticists currently seem to agree upon is that the same mitochondrial DNA — shared by all of humanity — can be traced back to approximately '2,000 to 10,000 Africans who lived around 190,000 years ago'. Stephen Oppenheimer *Out of Africa's Eden: The Peopling of the World* (2003) 46 citing Rebecca Cann et al 'Mitochondrial DNA and Human Evolution' (1987) 325 *Nature* 31; E Watson et al 'Mitochondrial Footprints for Human Expansions in Africa' (1997) 61 *American Journal of Human Genetics* 691; M Richards and V Macauley (2001) 68 *American Journal of Human Genetics* 1315.

17 Adam Kuper 'Review: Carolyn Hamilton's *The Mfecane Aftermath: Reconstructive Debates in Southern African History*' (1997) 38 *Current Anthropology* (1997) 471.

18 *Ibid.*

acceptance to each member of that community. More importantly, it regulates the exercise of rights by the emphasis it lays on sharing and co-responsibility and the mutual enjoyment of rights by all.<sup>21</sup>

However, as unique and widespread as the cultural artifact 'ubuntu' may be to southern Africa,<sup>22</sup> it does not radically distinguish the relationship between individuals and the communities in southern African thought from non-African cultural conceptions of the relationship between members of a given society. Hillel's tripartite injunction — 'If I am not for myself, then who will be for me? If I

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am not for others who am I? If not now, when? — is grounded in a particularly strong sense of political solidarity (well over 2000 years old) in the Hebraic tradition. A person who answers to the demands of such a call is a 'mensch'. That *Yiddish* word 'mensch' maps pretty closely onto its linguistic *German* cousin 'Menschlichkeit'. Both terms represent, at bottom, the goal of every human being to rise above her passions and, in every moral transaction, to attempt to turn herself, as the *American* writer Henry James wrote, into a person 'upon whom nothing is lost'.<sup>23</sup>

Our point is not to displace 'ubuntu' as a core South African value. Instead we take our more nuanced lead from Marius Pieterse. Pieterse describes *The Gorillas in the Mist* view of 'ubuntu' and African jurisprudence as clouded by the wishful thinking that 'pre-colonial African society contain[ed] numerous well-hidden "truths" which, once prospected and polished, would enrich the dull worldview of the West with their unsophisticated [and truly authentic] wisdom.'<sup>24</sup> This notion, he continues, 'fails to overcome the ideological bias' — the kind of noble savage/fallenness cleavage associated with Rousseau<sup>25</sup> — and actually stands 'in the way of meaningful

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19 The post-amble of the Interim Constitution Act 200 of 1993 ('IC') reads, in pertinent part, as follows: 'This Constitution provides a historic bridge between the past of a deeply divided society characterised by strife, conflict, untold suffering and injustice, and a future founded on the recognition of human rights, democracy and peaceful co-existence and development opportunities for all South Africans, irrespective of colour, race, class, belief or sex. . . . These can now be addressed on the basis that there is a need for understanding but not for vengeance, a need for reparation but not for retaliation, a need for *ubuntu* but not for victimization.' (Emphasis added.)

20 See *Hoffman v South African Airways* 2001 (1) SA 1 (CC), 2000 (11) BCLR 1211 (CC) at para 38 (According to Justice Ngcobo: 'People living with HIV must be treated with compassion and understanding. We must show ubuntu towards them.')

21 See *S v Makwanyane* 1995 (3) SA 391 (CC), 1995 (6) BCLR 665 (CC), 1995 (2) SACR 1 (CC) ('*Makwanyane*') at paras 224-225.

22 Marius Pieterse notes that most of the pre-colonial African communities still resident in South Africa have a phrase that mirrors 'ubuntu': in Xhosa, the same general commitments are reflected in the maxim 'Umuntu ngumuntu ngabantu' or in the Sotho saying 'Motho ke motho ba batho ba bangwe'. M Pieterse "'Traditional" African Jurisprudence' in C Roederer & D Moellendorf (eds) *Jurisprudence* (2004) 438, 441.

23 See Henry James *The Art of the Novel* (1907) 149.

24 Pieterse (*supra*) at 339.

25 Jean-Jacques Rousseau *The Social Contract* (1762) 1 ('Everything is good in leaving the hands of the Creator of Things; everything degenerates in the hands of man.')



engagement with African society' and those long standing conceptions of morality and politics that 'still reverberate through contemporary African society'.<sup>26</sup>

The point of this initial digression is manifestly not to diminish the historical claims of various communities to the land that has come to be known as South Africa.<sup>27</sup> It is, in fact, designed to recognize those claims — but at the same time bracket them. For claims about 'who was already here', invariably begs the question of what one seeks to resolve with questions about time — 'already' (or 'first') — and space — 'here' — and blocks, as Pieterse notes, any genuinely charitable attempt to understand the moral universe occupied by others.<sup>28</sup>

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## **(b) (Im)Modest Beginnings of European Involvement in South Africa**

South Africa's recorded history begins in 1652 — that is to say its European history. During that year the Dutch East India Company ('DEI'), with a party consisting of three ships, arrived at what is now Cape Town. The company's intention was not to establish a colony. They merely meant to create a way-station — a simple refreshment outpost for ships to resupply their basic stocks during their voyages from Europe to the Orient and back.<sup>29</sup>

Indeed, with its eye always on the bottom line, the DEI ordered Jan van Riebeeck, the station commander, to have limited engagement with the local inhabitants.<sup>30</sup> Van Riebeeck was permitted to grow fruit and vegetables and to barter with the Khoisan population of the Cape to purchase animals.<sup>31</sup> A hedge planted around the

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- 26 Pieterse (supra) at 339–440. See also Elsje Bonthuys 'Accommodating Gender, Race, Culture and Religion: Outside Legal Subjectivity' (2002) 18 *SAJHR* 41, 45 ('By their adherence to a somehow purer, authentic lifestyle, residents of the third world compensate sophisticated westerners for their loss of authenticity.')
- 27 It is, ultimately, unimportant that the San were here first — several millennia before the Khoikhoi. See Martin Hall *The Changing Past: Farmers, Kings, and Traders in southern Africa 200–1860* (1987). What matters is that the Khoisan are treated with equal respect and equal concern within the political community within which we all must live: South Africa.
- 28 As Donald Davidson writes: 'Charity is forced on us; whether we like it or not, if we want to understand others, we must count them right in most matters.' Donald Davidson *Inquiries into Truth and Interpretation* (1984) 197 as cited in Frank Michelman 'On The Uses of Interpretive "Charity": Some Notes From Abroad on Application, Avoidance, Equality, and Objective Unconstitutionality' (2008) 1 *Constitutional Court Review* 1. In addition, the pre-colonial/post-colonial split diminishes, argues Makau wa Mutua, the contribution of Africans (of all hues) to the project of human rights on the continent and to constitutional democracy in South Africa. Makau wa Matua 'The Banjul Charter and the African Cultural Fingerprint: An Evaluation of the Language of Duties' (1994) 35 *Virginia Journal of International Law* 339, 346–359. We make the same argument later on about the relationship between the Freedom Charter and the Final Constitution.
- 29 See Frank Welsh *A History of South Africa* (1998) 25; Allister Sparks *The Mind of South Africa* (2003) 35.
- 30 See Sparks (supra) at 35. The Dutch East India Company had had less than stellar success in the establishment of various colonies. It was, therefore, less inclined to duplicate those follies in the Cape. See Welsh (supra) at 25.
- 31 See Sparks (supra) at 35.

settlement marked the limits of intended European settlement in Africa.<sup>32</sup> The governance structures of the Cape were equally modest. Executive, legislative and judicial authority vested in a DEI Council of Policy.<sup>33</sup>

The Company's disengagement with the world beyond the hedges ensured that the first European settlers objectified the native populations of South Africa and reduced them to mere instruments in DEI's trade policies.<sup>34</sup> Thus began the next three and a half centuries of disenfranchisement of South Africa's denizens.<sup>35</sup>

Had the Dutch East India Company succeeded at limiting Cape Town to a fuel stop, history may well have taken a different tack. However, the DEI's concern for the bottom line required van Riebeeck to retrench a number of his employees. These employees moved beyond the hedges and remained in the Cape as farmers.

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### (c) The Expansion of European Involvement in South Africa

In fact, these employees, and the other Europeans that followed them, moved well beyond the hedges. Over the next 250 years, these employees, their descendants, migrants and the indigenous population of South Africa witnessed — and took part in — a series of convulsive events, each marking a distinctive period in the colonial era.

Even the first venture of 'free burghers' beyond the Dutch East Indies' hedge became a source of conflict. The Khoikhoi launched the 'first war of resistance'.<sup>36</sup> The Khoikhoi lost — but took their grievances and cattle elsewhere, namely to land settled by other indigenous communities. A domino effect followed. New wars were waged between communities vying for the same territory. As Allister Sparks notes, the Khoikhoi conflict established South Africa's overriding political principles for the next three centuries:

Thus was established the right of conquest and a tradition that the land was the White South African's for the taking. It was the first act in a long process of land dispossession

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32 Sparks (supra) at xv. Rijkloof van Graan, a visiting commissioner of the Dutch East India Company, suggested the construction of a canal which would separate the settlement from the rest of the African continent. The Dutch East India Company rejected this suggestion.

33 Welsh (supra) at 25.

34 See Stu Woolman 'Dignity' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2005) Chapter 36. Dignity requires the recognition of the individual as an end-in-herself, and does not tolerate the treatment of others as mere instruments for the realization of the objectives of others. And yet, from the earliest arrival of European settlers, South Africa's history has been marked by legal conventions designed to turn black South Africans into mere instruments for white colonial control. For example, the notorious restrictions of black land ownership occasioned by the Land Act 27 of 1913 were designed to redeploy black labor from farm to mines — without any regard for the needs of the workers, their families or their communities.

35 As George Devenish writes, 'the arrival of the Dutch settlers [signalled] a brutal policy of hegemony and inequality between the whites and people of colour that was to endure for nearly 350 years.' George Devenish *Commentary on the South African Constitution* (1999) 551.

36 Sparks (supra) at 36.

that combined with slavery and cheap labour to create the institutions and the habits of apartheid society.<sup>37</sup>

The 'Afrikaner' peace lasted about 150 years. In 1795, the British annexed the Cape Colony. The English — some two centuries ahead of the Afrikaners in politics, in industry and the making of war — initially crushed both Afrikaner and African communities. Moreover, their later discovery of gold and diamonds enabled them 'to launch the continent's only industrial revolution and build its most powerful economy.'<sup>38</sup>

The real result was perpetual war — not peace. The British invasion and the sealing off of the boarder of the Eastern Cape had a much larger domino effect than the Dutch East India Company-Khoikhoi conflict of a century past. Thirty years of war resulted in conflicts between virtually every population group in South Africa. When the dust had settled two important facts were indisputable: the Afrikaners had resettled some '1000 miles to the north and . . . black Africans had been dispossessed of 90% of their land.'<sup>39</sup> In sum, the British invasion led to the establishment of English colonies in the Cape and Natal; the peripatetic trek of the Afrikaners to the north culminated in the eventual creation of the two Boer republics in the Orange Free State and the South African Republic; and wars amongst indigenous population led to the consolidation of a Zulu nation of some 7 million people in Natal. So, by the mid-nineteenth century, we had two colonies, two republics, and a self-governing, not as yet defeated, African kingdom.

The situation remained much the same until the late 1880s.<sup>40</sup> The gold and diamonds of Johannesburg and Kimberly proved too great an attraction to the

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English — as did the seductive prospect of greater wealth in Rhodesia. Only the Orange Free State and the Transvaal stood in the way. The Anglo-Boer war, over diamonds and gold, began in earnest in 1899.

#### **(d) The English Model and the Roman-Dutch Tradition**

The introduction of Roman-Dutch law in South Africa followed hot on the heels of the arrival of the Dutch East India Company. Roman-Dutch law — rooted in Roman law, German custom and Dutch practice — was implemented by the company throughout the region.<sup>41</sup>

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37 Ibid.

38 Ibid at 43.

39 Ibid at 48.

40 Welsh (supra) at 274. Of course, in the interim, the British managed: to conduct a disastrous series of battles with the Zulus; to fail to prevent an equaling damaging war with the Xhosa; to receive the short end of a battle with the Transvaal; and to outrage the Orange Free State through their unilateral annexation of diamond mines. Ibid.

41 See John Dugard *Human Rights and the South African Legal Order* (1978) 9; Adam Ashforth *The Politics of Official Discourse in Twentieth-Century South Africa* (1990) 34.

By 1806, the British had occupied and imposed their public law on the Cape. At the time, the notion that Parliament could 'do everything that is not naturally impossible' was the dominant political doctrine in English law. (English courts retained some sense of 'natural justice'. This sensibility, and a commitment to ensuring that Parliament played by the rules Parliament itself articulated, constituted the full extent of judicial review under English law.<sup>42</sup>) By the time some measure of self-government was granted to the Cape and Natal, parliamentary supremacy was the defining feature of British politics.<sup>43</sup>

The dominance of British legal institutions — parliamentary sovereignty and the common law — in the Cape and Natal did not displace the Roman-Dutch tradition. Indeed, the Roman-Dutch tradition remains an influential feature of South African law today. Of course, as Martin Chanock notes, both systems of law addressed challenges prevalent in Europe and were not 'developed in response to contemporary needs and conflicts' in southern Africa.<sup>44</sup>

After the Anglo-Boer War at the beginning of the 20th century, one of the two systems had to give. And the British had won the war. Great Britain's Westminster System remained the departure point for South African politics from the creation of the Union of South Africa in 1909 through the country's liberation in 1994.<sup>45</sup> As Gretchen Carpenter writes:

Parliament was composed of members elected on the basis of territorial representation in single-member constituencies; the government was in the hands of a Cabinet of ministers, who were Members of Parliament, belonging to the majority party of Parliament and responsible to Parliament; the most important figure in the government was the Prime Minister, who was the leader of the majority party in Parliament; the State President was a figure-head cast in the mould of the British monarch; conventions played a major role in determining the relationships between the various organs of government; the party system operated in a manner similar to that encountered in Britain; the principles of parliamentary sovereignty and separation of powers were adhered to in the same measure as in Britain,

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with some adaptations; evolutionary development was a feature of the system; and South Africa had a unitary and not a federal system of government.<sup>46</sup>

## (e) The Early Failure of Judicial Review in South Africa

42 See *Dr Bonham's Case* 8 Co Rep 113b, 77 ER 646 (CP 1610)(Sir Edward Coke); Roscoe Pound *The Development of Constitutional Guarantees of Liberty* (1957).

43 See Dugard (*supra*) at 14-18.

44 Martin Chanock *The Making of South African Legal Culture 1902-1936: Fear, Favour and Prejudice* (2001) 155.

45 See David Dyzenhaus *Hard Cases in Wicked Legal Systems* (1991) 35.

46 Gretchen Carpenter *Introduction to South African Constitutional Law* (1987) 80. The 1983 Constitution, which attempted to co-opt Indian and Coloured voters, 'combined the state President and Prime Minister into one office, created a tri-cameral parliament, and mandated a multi-party governing cabinet rather than a winner-take-all system.' *Ibid* at 81. However, given that the 1983 Constitution left all the hallmarks of white minority executive rule in place, it is hard to characterize the 1983 Constitution, as Carpenter does, as a significant break from the Westminster System.

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 turned to the Constitution of the United States of America and adopted rigid rules of amendment and guaranteed rights of peaceful assembly, petition, property, and equality before the law.<sup>47</sup> Although the 1854 Constitution did not explicitly provide for judicial review or a Supreme Court, such a court was established by legislation in 1876 and its power of judicial review was 'accepted as an inherent feature of the Constitution'.<sup>48</sup>

The attempt by Chief Justice JG Kotze in the High Court of the South African Republic ('ZAR') to actually assert the power of judicial review did not meet with much success. In a judgment replete with references to US Chief Justice Marshall's reasoning in *Marbury v Madison*, Kotze CJ argued that as sovereignty vested in the people of the Republic and not the *Volksraad*, the court had a duty to strike down legislation incompatible with the *Grondwet*.<sup>49</sup>

Kotze's decision triggered a firestorm within the executive of the ZAR. ZAR President Paul Kruger's declared that the 'testing right' was an 'invention of the devil'.<sup>50</sup> After the *Volksraad* adopted legislation denying the court's power of judicial review, President Kruger dismissed the Chief Justice. While Kotze was supported by judges on the Orange Free State Bench, important members of the Cape Bench and the Johannesburg Bar, such as Sir Henry de Villiers and Jan Smuts, supported President Kruger's assertion of legislative supremacy.<sup>51</sup>

Despite the formal recognition of constitutional review in the Orange Free State and its assertion by the Chief Justice of the South African Republic, the court undertook judicial review of legislation in but one case. In *Cassim and Solomon v The State*, the High Court of the Orange Free State reviewed a law of 1890 that prohibited 'Asians' from settling in the state without the permission of the President. The legislation was challenged on the grounds that it violated the constitutional guarantee of equality before the law. The High Court upheld the

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legislation on the grounds that the constitutional guarantee had to be 'read in accordance with the *mores* of the Voortrekkers'.<sup>52</sup> Thus even this early experiment

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47 See HR Hahlo & Ellison Kahn *South Africa: The Development of its Laws and Constitution* (1960) 72-83.

48 *Marburg v Madison* 5 US 137 (1803)(Though not the first exercise of judicial review in the United States, *Marbury v Madison* is viewed as the ur-text for the assertion of such powers in other constitutional democracies.)

49 *Brown v Leyds NO* (1897) 4 Off Rep 17.

50 See Dugard (supra) at 22.

51 Ibid at 23. See also Hahlo & Kahn (supra) at 107-110.

52 Dugard (supra) at 19.

with constitutionalism bore the taint of racism that would later be enshrined in South African constitutional law.<sup>53</sup>

## **(f) The Formation of the Union**

After the fragile peace at the end of the Anglo-Boer War in 1902, negotiations began to unite the two former British colonies and the two former Boer Republics.<sup>54</sup> In 1908, the South African National Convention met to discuss this thorny issue and the even thornier 'Native Question'.<sup>55</sup>

The convention ended in 1909 with the creation of the Union of South Africa. The Union laid the foundations for the modern South African state: for the first time, a single territorial entity was called South Africa; and we, today, share those same borders.

The Union was a product of intense compromise. The parties to the 'National Convention' were in basic agreement on the need for white political unity in order to resolve economic tensions between the former colonies and the Boer Republics.<sup>56</sup> Further agreement was finally achieved on the equal official status of English and Dutch (later Afrikaans). Despite Judge Kotze's public plea before a meeting of the Convention for a rigid Constitution with a Bill of Rights, s 152 of the South Africa Act empowered Parliament to 'repeal or alter any of the provisions of this Act' by a simple majority in both Houses.<sup>57</sup> This provision was subject to a number of entrenchment procedures.

The thorniest of issues turned on race. At the time of the Union, the Cape had made provision for a qualified non-white franchise. Indeed, the franchise was open to all 'civilised' men.<sup>58</sup> The Republics were fundamentally opposed to allowing any non-white franchise and the Transvaal maintained a strict colour bar. The Cape's proposal was that the qualified franchise be extended throughout the Union. Not surprisingly, the Afrikaans states threatened to leave the convention. The two sides compromised: the Cape non-white franchise would be maintained

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53 See John Hund 'A Bill of Rights for South Africa' (1989) 34 *American Journal of Jurisprudence* 23 (Hund contends that the grounds for the rejection of the notion of a sovereign Bill of Rights — in the Boer Republics — lay in a Calvinist view of the proper place of an individual — namely a subordinate role — within an essentially authoritarian state.)

54 DJ Brand 'Constitutional Reform — The South African Process' (2002-2003) 33 *Cumberland Law Review* 1, 3.

55 Ibid.

56 The argument for political unity as the most efficient means of realizing economic progress was initially formulated by members of Lord Milner's 'Kindergarten'. It was given the imprimatur of approval by the High Commissioner, Lord Selborne, in 1907 ('Selborne Memorandum'). See Lord Selbourne 'A Review of the Present Mutual Relations of the British South Africa Colonies' (1907) Cd 3564. See also Leonard Thompson 'The Compromise of Union' in M Wilson & L Thompson (eds) *The Oxford History of South Africa Vol II* (1975) 347.

57 See Dugard (supra) at 26.

58 Ibid at 20. Natal shared with the Cape the notion that voting should be extended to all civilised men. However, its property ownership qualification effectively ensured that the existing cohort of 'civilized' men contained virtually no non-white voters.

— but would not be extended beyond the Cape. The parties then subjected this arrangement to entrenched procedures that would not be easy to repeal.<sup>59</sup>

The concessions made by the British administration regarding the voting rights of non-white citizens represented a massive betrayal of the majority of South Africa's population. As George Devenish notes, during the nineteenth century, the Cape Constitution was the most liberal Constitution in the British Empire and, by percentage, more non-white voters enjoyed the franchise in the Cape than did working class voters in Britain.<sup>60</sup>

South Africa, however, was still a colony. Thus, South Africa's first constitution was in fact a product of the British Parliament.<sup>61</sup> The South Africa Act.<sup>62</sup> Until the passing of the Statute of Westminster in 1931, any product of the colony's legislature was subject to the Colonial Laws Validity Act. The Act provided for the invalidation of South African law by the British government.

At the heart of the creation of modern South Africa lay racial exclusion. The Convention was entirely white. This level of exclusivity did not however extend to the effects of the Convention. Black South Africa — although subject to the dictates of a legislature — had no voice, no representation in that legislature. As Iain Currie and Johan de Waal note, the Union, from its very inception violated one of Albert Dicey's essential preconditions for the rule of law.<sup>63</sup> South Africa's Parliament could not, in Diceyan terms, legislate validly for the majority of its citizens: the governed were not subject to the same rules as the governors.<sup>64</sup>

## **(g) Construction of a Bifurcated, Racist State**

### **(i) The South African Native Affairs Commission**

The immediate origins of bifurcation are to be found in the process of unification. The process gained momentum after the establishment of the South African

Native Affairs Commission ('Lagden Commission') and a pan-South African Customs Union in 1903.<sup>65</sup> Although the recognition of African territories and land holdings came out of the interaction of independent African communities and expanding colonialism,<sup>66</sup> the Inter-Colonial Customs Conference of 1903 elevated this recognition into a principle of governance: 'the reservation by the state of land for the exclusive use and benefit of natives involves special obligations on their part to

59 Section 35 of the South Africa Act 1909 (9 Edw 7, c 9). The first proposal would have required a two-thirds majority of each House of Parliament. The final compromise was weaker — a two-thirds vote of both Houses sitting together. See Hahlo & Kahn (supra) at 122.

60 Devenish (supra) at 554.

61 The Union adopted the Westminster model. Parliament was bicameral. A senate formed the upper house and held the lion's share of power

62 See Brand (supra) at 3.

63 Iain Currie & Johan de Waal (eds) *The Bill of Rights Handbook* (5th Edition, 2005) 3. Albert Dicey *Introduction to the Study of the Law of the Constitution* (10th Edition, 1959) 171.

the state'.<sup>67</sup> Appointed 'with the object of arriving at a common understanding' in the formulation of native policy, the Lagden Commission's Report adopted the principle of 'special obligations' and developed a vision of a future South African federation based on the territorial segregation of black and white as a permanent mandatory feature of public life.<sup>68</sup>

While the Commission's endorsement of territorial separation merely coincided with the establishment of segregated 'locations' for urban Africans by the governments of all four colonies, it also gave approval to the established Shepstonian practice of creating 'native reserves'. The Lagden Commission found in this reservation of land, and the 'special obligations' arising out of it, a principled basis for political segregation. The Commission first identifies 'natives' as having 'distinct rights' to the reserved lands as the 'ancestral lands held by their forefathers'. These tenure rights are then characterized as amounting to a form of group ownership under which the 'Tribal Chief' administers the land in trust for the people.

Finally, the chiefs are said to have transferred their sovereign rights — including their powers of administration over communal lands — to the Crown through a process of 'peaceful annexation'. Having received all the rights and obligations previously possessed by the chief as sovereign, the Crown then had the duty to administer the affairs of 'natives' according to traditional forms of governance — 'tribalism'. The Commission described this 'tribal system' as follows: '[like] father exercises authority within his family . . . so the Chief rules the tribe and guides its Destinies'. This description left no doubt as to the degree of autocracy envisaged by the Commission. Instead of merely acknowledging a plurality of systems of governance, the Commission placed authority in the hands of the white

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64 Black voters were removed from the common voters roll by the Representation of Natives Act 12 of 1936. The Act provided Africans with indirect representation in Parliament via a 'Natives Representative Council'. The Council, in turn, possessed only limited advisory abilities. Dyzenhaus *Hard Cases* (supra) at 38. The Act, which was passed in accordance with the entrenched procedures of section 35 of the South Africa Act, was seen by some of its opponents in Parliament as a departure from passing laws that at least can claim to be aimed at improving and 'uplifting' the African population. Ibid. In challenging the validity of the Act, the appellant in *Ndlwana v Hofmeyr NO* somewhat counter-intuitively argued that as a consequence of the passage of the Statute of Westminster in 1931, the Union Parliament was no longer bound by the entrenched clauses of the South Africa Act. 1937 AD 229 (The Statute of Westminster empowered the Union Parliament to pass laws in conflict with Imperial laws.) In rejecting this argument, the court, *per* Stratford ACJ, held that an Act of Parliament cannot be questioned as 'Parliament, composed of its three constituent elements, can adopt any procedure it thinks fit; the procedure expressed or implied in the South Africa Act, in so far as Courts of Law are concerned, [are] at the mercy of Parliament like everything else'. Ibid at 238. Indirect representation of Africans in Parliament was finally abolished on 30 June 1960 as a consequence of apartheid policy and the Promotion of Bantu Self-Government Act 46 of 1959. See Hahlo & Kahn (supra) at 165.

65 See Rodney Davenport *South Africa: A Modern History* (1977) 147-169.

66 See Rodney Davenport & KS Hunt (eds) *The Right to Land* (1974) 1-30.

67 South African Inter-Colonial Customs Conference 1903, Cd 1640, *Minutes* 'Native Question' at para 1.

68 Davenport *South Africa* (supra) at 152.



administration which, according to the Commission, was obliged to govern the 'natives' 'as a nation in its nonage'.<sup>69</sup>

The creation of 'differential spheres of citizenship for "European" and "Native" populations within one territory' was reflected in s 147 of the South Africa Act of 1909.<sup>70</sup> While the bulk of the South Africa Act dealt with the powers of a government, to be essentially representative of white male adults, s 147 stated

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that '[t]he control and administration of native affairs . . . throughout the Union shall vest in the Governor-General in Council'.<sup>71</sup> The connection between the exercise of authority over 'natives' and the exercise of authority over land was made explicit in s 147. It 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.

## **(ii) The Racial Construction of Citizenship**

The history of the franchise and the fragmentation of voting rights provide the two most important keys to unlocking the construction of citizenship in South Africa. While immigration law encouraged the expansion of a 'European' community, it was the constant manipulation of voting rights that determined the character of South African citizenship and the constitutional order. In part, it was the cleavages between the two main segments of the white population, those of English decent and those of Dutch decent, which drove the racialization of political power and the marginalization of Africans. The English — in efforts to appease the defeated Afrikaners immediately after the war, to minimize discontent when the depression hit Afrikaaner semi-skilled workers particularly hard and to ensure that a significant portion of all white South Africans might be enriched by a South African economy built on cheap African labor — systematically stripped black South Africans of all meaningful political power.

## **(h) The Rise of Apartheid: Harris I, Harris II & Collins**

South Africa, like Britain, emerged from the Second World War with its wartime leader facing re-election. Jan Smuts, like Winston Churchill, failed to be re-elected.

In the 1948 general election, South African politics lurched sharply to the right. The Nationalist Party obtained a mandate to govern based largely on a platform of radically institutionalised racial segregation.

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69 Adam Ashforth *The Politics of Official Discourse* (1990) 37.

70 Ibid.

71 See South Africa Act 1909 s 34(i)(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 . . .')

The question of the limits of judicial review over Parliamentary action arose soon after the election of the Nationalist Party. In 1951, Parliament passed the Separate Representation of Voter's Act.<sup>72</sup> The Act purported to extinguish what

little remained of the non-white vote. The Act was challenged in *Harris v Minister of the Interior*.<sup>73</sup> The National Party's slender majority in Parliament was to prove to be the Act's undoing. The Act had been passed in both Houses, sitting separately, and by a mere simple majority. Because the Act had failed to secure the special majorities required by the South Africa Act, the Appellate Division upheld the challenge and declared the Act invalid.

The Appellate Division's decision in *Harris I* was not based on the substantive content of the law or its manifest unfairness. It did not invoke, as *Brown v Leyds* had done, reasoning such as that employed in *Marbury v Madison*. It struck down the Act on purely procedural grounds.<sup>74</sup>

In response, Parliament passed the High Court of Parliament Act.<sup>75</sup> The Act granted Parliament the power to sit as a court and to review any judgment made by any court which declared any piece of legislation to be invalid.<sup>76</sup> The High Court of Parliament Act met a fate identical to the Separate Representation of Voter's Act. In *Harris II*, the Appellate Division found that the legislation ran afoul of section 152 of the South Africa Act.<sup>77</sup>

Despite increased support for the National Party ('NP') in the 1956 general elections, the government still could not muster the votes needed to meet the demands of section 35 of the South Africa Act. The government finally arrived at a solution to its problem. It increased the size of the Senate, the upper House of Parliament.<sup>78</sup> Parliament then increased the quorum requirement in the Appellate Division.<sup>79</sup> Having packed the Senate with the numbers necessary to ensure the proper passage of the legislation, the government could rest assured that a similarly loyal bench would uphold the Act.

The South Africa Amendment Act<sup>80</sup> achieved two important objectives for the government. First, it reinstated the 1951 Separation of Voter's Roll Act. Second, it

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72 Act 46 of 1951.

73 1952 (2) SA 428 (A) ('*Harris I*').

74 See Erwin Griswold 'The Demise of the High Court of Parliament Act' (1953) *Harvard Law Review* 564.

75 Act 35 of 1953.

76 Act 35 of 1952.

77 *Minister of the Interior v Harris* 1952 (4) SA 769 (A) ('*Harris II*').

78 The Senate Act 53 of 1955.

79 The Appellate Division Quorum Act 27 of 1955.

landed the *coup de grace* on the courts: it excluded the power of judicial review from the exercise of legislative power. The Act 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'. The hegemony of Parliament was now well entrenched. Although a challenge was brought to the Act in *Collins v Minister of the Interior*, the Appellate division rubber stamped the legislation.<sup>81</sup>

### **(i) Apartheid and the Republic<sup>82</sup>**

It is important to constantly recall, as we trawl through the law, David Dyzenhaus' words about the lived experience of apartheid:

The ordinary day-to-day operation of the apartheid machine inflicted huge suffering on the majority of South Africa's population. In the cause of white supremacy, people were forcibly removed from their homes, their land was taken away from them, family members were separated from one another, they were stripped of their citizenship and consigned to dustbowl ruled by dictatorial puppets, and they were explicitly told that they should have just those rights and just that amount of education that would fit them into an economic system run for the exclusive benefit of the white majority. . . . Apartheid inflicted violence on all those who were its victims of its racist laws. That violence was 'ordinary' only in that it was part of the fabric of daily existence. There were also the 'extraordinary' violence of apartheid — the beatings, torture and murder (sometimes amounting to massacre) which the security forces dealt out to political opponents of the ordinary violence.<sup>83</sup>

### **(i) Denationalization of black South Africans**

After all South Africans of colour were officially disenfranchised, three acts in the early 1950s put in place the remaining foundations of apartheid. The Population Registration Act required all South Africans to register — and be classified — as either 'white', 'coloured', 'Indian' or 'Bantu'.<sup>84</sup> The Abolition of Passes and Coordination of Documents Act required all black South African males to carry

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80 Act 1 of 1958.

81 *Collins v Minister of the Interior* 1957 (1) SA 552 (A) ('Collins').

82 As the commitment to apartheid increased, the country's political isolation grew. South Africa was suspended from the Commonwealth. In response, white South African's held a referendum to gauge whether South Africa should end its relationship with Britain and become a Republic. On 31 May 1961, the Republic of South Africa came into being. The advent of the Republic did not bring any substantial constitutional or political change. The South African parliament adopted its own constitution. The Constitution of the Republic of South Africa Act 32 of 1961. The 1961 Constitution enshrined parliamentary sovereignty and limited powers of judicial review.

83 David Dyzenhaus *Judging the Judges, Judging Ourselves: Truth, Reconciliation and the Apartheid Legal Order* (1998) 6.

84 Act 30 of 1950. Interestingly, the definition of European in colonial Natal was constructed primarily around the threefold distinction between indigenous Africans, indentured Indians, and other members of colonial society. For example, prison regulations classified prisoners into three groups, Africans, Indians and Europeans, but the definition of Europeans was unusual in that it included 'all persons of European descent, Eurasians . . . American Negroes, French Creoles and West Indians'. Albie Sachs *Justice in South Africa* (1973) 89.

passes.<sup>85</sup> In 1956, the law was amended to embrace black South African women as well. Finally, the Natives Laws Amendment Act allowed Africans to live in white communities only if they were born there, they had lived there for fifteen years continuously, or they had been continuously employed by the same employer for at least ten years.<sup>86</sup>

Given these severe restrictions on black South African participation in South African political life, the government felt obliged to provide some distorted form of political rights to black South Africans. This recognition, combined with the process of decolonization which was sweeping through Africa in the late 1950s, led the apartheid government to produce a scheme which sought to extend franchise rights to the African majority — but only within geographically small, fragmented entities: Bantustans. The logic behind this scheme was the eventual denationalization of the majority of black South Africans and their reconstitution as foreign citizens exercising full political rights outside of the South African constitutional framework. Such Bantustans — the American equivalent of reservations for Native Americans — allowed the cheap African labour force to remain stable — and available — while moving excess workers and their families to fictional homelands 'run' by African leaders controlled by the apartheid state.

## **(ii) Apartheid and the creation of Bantustans**

The Promotion of Bantu Self-Government Act established this scheme.<sup>87</sup> The Union Constitution described these fictional homelands as oases of 'tribal' governance in which Africans could exercise their own unique political aspirations. The apartheid regime referred to this racist, ghettoization of South Africa as the policy of 'separate development'.<sup>88</sup>

This Orwellian language was backed up by action: pass laws and forced removals led to the creation of four notionally 'independent' bantustans and the balkanization of the country.<sup>89</sup> The Transkei Constitution Act initiated the process contemplated by the Bantu Self-Government Act.<sup>90</sup> The Black States Constitution Act continued the process of ghettoization: in a Goebbals-like turn of phrase, the government compared this process 'in form and timing . . . to African decolonization'.<sup>91</sup> Rejected by the majority of South Africans and the international community as a violation of every black South African's right to self-determination, 'separate development'

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85 Act 67 of 1952.

86 Act 54 of 1952.

87 See Heinz Klug 'Self-Determination and the Struggle Against Apartheid' (1990) 8 *Wisconsin International LJ* 251, 294-295.

88 Act 46 of 1959.

89 See, generally, HJ Richardson 'Self-Determination, International Law and the South African Bantustan Policy' (1978) 17 *Columbia Journal of Transnational Law* 185; DA Basson & HP Viljoen *South African Constitutional Law* (2nd Edition, 1991) 307-318.

90 For an early critique of the policy of separate development and the idea of bantustan development, see Govan Mbeki *South Africa: The Peasants' Revolt* (2nd Edition, 1984) 73-94.

became a process of denationalization in which the citizenship of black South Africans was re-imagined as foreign citizenship regardless of an individual's place of birth or preference.<sup>92</sup> Ultimately, the

lack of economic infrastructure in the homelands and the refusal of African leaders to participate in this denationalization scheme led to its demise.<sup>93</sup>

### (iii) Apartheid and the Silencing of Opposition

From the 1920s onward, the South African government enacted repressive law after repressive law in a largely successful effort to stifle dissent.<sup>94</sup> The promulgation of anti-expression legislation accelerated dramatically after the National Party took power in 1948. The National Party launched its campaign to eviscerate the freedom to dissent — through expression, association and assembly — with the Suppression of Communism Act ('SCA').<sup>95</sup> SCA s 9 allowed the Minister of Justice to prohibit a gathering or an assembly whenever there was, in his opinion, reason to believe that the objects of communism would be furthered at such a gathering.<sup>96</sup> A few years later the government — in response to the ANC's 1952

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91 Act 48 of 1963. See WJ Hosten, AB Edwards, C Nathan & F Bosman *Introduction to South African Law and Legal Theory* (1983) 665-678.

92 See M Vorster, M Wiechers, D van Vuuren & G Barrie *The Constitutions of Transkei, Bophuthatswana, Venda and Ciskei* (1985) 15 (Authors compare the process of 'separate development' under apartheid with the process of decolonization that the British implemented throughout Africa. They show how the South African government attempted to legitimize separate development by following the British decolonization model in form, if not in substance.)

93 Dyzenhaus *Hard Cases* (supra) at 41.

94 Gilbert Marcus and Derek Spitz lay out a selective, but nowhere near exhaustive, regime of statutory provisions that blocked freedom of expression under apartheid: the Public Safety Act 3 of 1953; the Riotous Assemblies Act 17 of 1956; the Defense Act 44 of 1957; the Police Act 7 of 1958; the Post Office Act 44 of 1958; the Trespass Act 6 of 1956; the Correctional Services Act 8 of 1959; the Trademarks Act 62 of 1963; the Armaments Development and Production Act 57 of 1968; the Petroleum Products Act 120 of 1977; the Copyright Act 98 of 1978; the National Key Points Act 102 of 1980; the Intimidation Act 72 of 1982; the Internal Security Act 74 of 1982; the Protection of Information Act 84 of 1982; the Nuclear Energy Act 92 of 1982; the Regulation of Gatherings Act 205 of 1993. See Gilbert Marcus & Derek Spitz 'Freedom of Expression' in M Chaskalson, J Kentridge, J Klaaren, G Marcus, D Spitz & S Woolman (eds) *Constitutional Law of South Africa* (1st Edition, RS2, 1998) Chapter 20, 20-4. See also Anthony Mathews *Law, Order and Liberty in South Africa* (1971) 240-2, 249-50; John Dugard *Human Rights and the South African Legal Order* (1978) 186-91.

95 Act 44 of 1950. The Act was later incorporated into the Internal Security Act 74 of 1982.

96 The Minister could, in terms of SCA ss 9 and 5 (which applied to listed persons), give notice to a person prohibiting him from attending any gathering. The provisions gave rise to a number of court cases that turned on the definition of the word 'gathering'. See, eg, *S v Meer en 'n Ander* 1981 (4) SA 604 (A), 606 (Court accepts premise of the statute — namely that the threat of communism, breakdowns in the security of the State, and the maintenance of public order were real enough to justify radical restrictions on gatherings. Having accepted the premise, the court then articulates a taxonomy of gatherings in which prohibited 'social gatherings' does not 'include the family . . . activities of the restricted person.') See also C Forsyth *In Danger for Their Talents* (1985) 148-67; Dugard (supra) at 162-3. The bench's blinkered world-view and its efforts to compartmentalize law and politics meant apartheid era judges could, with a straight face, state that:

defiance campaign — passed the Criminal Law Amendment Act ('CLAA').<sup>97</sup> The CLAA increased penalties for crimes committed in the context of political protest.<sup>98</sup>

More serious limitations upon political dissent followed the enactment of a new Riotous Assemblies Act in 1956.<sup>99</sup> Open opposition to the government met with further restrictions in the 1960s and 1970s.<sup>100</sup> By the late 1970s it became almost impossible to obtain permission to protest, to assemble, or to speak out against the tyranny of apartheid.<sup>101</sup> Attempts at reform in the early 1980s failed.<sup>102</sup> In the mid-1980s, as South Africa's political crisis deepened, and it appeared that the law on freedom of speech and conduct could get no worse, the government responded by issuing extremely restrictive 'emergency' regulations under the Public Safety Act.<sup>103</sup>

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[F]reedom of speech and freedom of assembly are part of the democratic right of every citizen of the Republic, and Parliament guards these rights jealously for they are part of the very foundation upon which Parliament rests. Free assembly is a most important right for it is generally only organized public opinion that carries weight and it is extremely difficult to organize it if there is no right of public assembly.

*S v Turrel* 1973 (1) SA 248 (C), 256 (Magistrate's prohibition of a meeting in terms of Riotous Assemblies Acts s 2(1) reversed on grounds that the order did not identify the meeting at issue with sufficient clarity.) See also *S v Budlender & Another* 1973 (1) SA 264 (C). For more on the repression of expression under apartheid, see Dario Milo, Glenn Penfold & Anthony Stein 'Freedom of Expression' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, June 2008) Chapter 42. See also S Woolman 'Freedom of Assembly' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, February 2005) Chapter 43.

97 Act 8 of 1953.

98 The Internal Security Act was designed to achieve a similar result. Act 74 of 1982 ss 58 and 59. See Ackermann (*supra*) at 164–168. The judiciary, on occasion, saw a political motive as an aggravating factor in sentencing. See Edwin Cameron 'Civil Disobedience and Passive Resistance' in Hugh Corder (ed) *Essays on Law and Social Practice in South Africa* (1988) 219, 231.

99 Act 17 of 1956. Initially, the Act allowed the Minister of Justice to prohibit any public gathering in order to maintain public peace or to prevent the engendering of racial hostility. However, the 1974 amendments to the Act extended the Minister's prohibitory powers to private gatherings. See Riotous Assemblies Amendment Act 30 of 1974 s 2(1). The Riotous Assemblies Act, s 17, states that a person commits the crime of incitement to public violence if the natural and probable consequences of his act, conduct, speech or publication would be the commission of public violence by others. At the time of writing, the Act was, at least partially, still in force.

100 The General Law Further Amendment Act required that assemblies receive both the local authority's consent and the approval of a magistrate in the district in which the assembly was to take place. Act 92 of 1970 s 15. See Dugard (*supra*) at 187. Under the Internal Security Acts of 1976 and 1982, the Minister issued annually a notice that declared outdoor gatherings illegal — save for *bona fide* sporting and religious purposes — unless permission was, at least partially, obtained from a magistrate.

101 See Hugh Corder & Dennis Davis 'A Long March — Administrative Law in the Appellate Division' (1988) 4 *SAJHR* 281, 289.

102 Not only did the Rabie Commission fail to deliver the hoped for reform, it could be argued that it led to an even more repressive regime of laws. See, eg, Internal Security Act 74 of 1982. For a comprehensive analysis of such repressive statutes, see Mathews (*supra*) at 52–56, 139–147; Ackermann (*supra*) at 149–168.

#### (iv) Sharpeville, 1960 and Soweto, 1976<sup>104</sup>

Although official apartheid lasted almost 50 years, two events stand out in the battle against the NP's racist, minority regime: the Sharpeville massacre of 1960 and the Soweto uprising of 1976.

Early on in 1960, the ANC planned to launch a campaign of protests against pass laws. The PAC decided to pre-empt the ANC by launching its own campaign ten days earlier. On March 21, some 7,000 people marched to the police station in Sharpeville.<sup>105</sup> The plan — reminiscent of Ghandi's own campaign — was to make themselves subject to arrest for not carrying their pass books.

The police and the military first responded with fighter planes designed to intimidate the crowd into dispersing. When that tactic failed, the police set up a column of armored vehicles and began to fire upon the crowd.<sup>106</sup> The Truth and Reconciliation Commission noted the ruthless manner of this state-sponsored violence and found 'a degree of deliberation in the decision to open fire'.<sup>107</sup> It further found that the majority killed and wounded were shot in the back.<sup>108</sup> Sixty-nine were left dead.

The domestic response was immediate. Demonstrations, protest marches, strikes, and riots around the country led to the imposition of a state of emergency on 30 May 1960. The international response was almost as immediate — the United Nations and the British Commonwealth condemned the actions.<sup>109</sup> South Africa

103 Act 3 of 1953. Regulation 7(1), Proclamation 109 of 1986 issued in terms of the Public Safety Act, held that '[t]he . . . Commissioner may for the purpose of the safety of the public . . . issue orders . . . (bA) whereby any particular gathering, or any gathering of a particular nature, class or kind, is prohibited at any place or in any area specified in the order.' A few challenges to the assembly regulations were successful. See, eg, *Natal Newspapers (Pty) Ltd v State President of the Republic of South Africa* 1986 (4) SA 1109 (N)(Court struck down Regulation 7(1)(d)). The majority were not. See, eg, *Van der Westhuizen NO v United Democratic Front* 1989 (2) SA 242 (A) (Court upheld regulation 7(1)(bA).) See Etienne Mureinik 'Pursuing Principle: The Appellate Division and Review under the State of Emergency' (1989) 5 *SAJHR* 60; Deon Basson 'Judicial Activism in a State of Emergency: An Examination of Recent Decisions of the South African Courts' (1987) 3 *SAJHR* 28; Michael Kidd 'Meetings and the Emergency Regulations' (1989) 5 *SAJHR* 471. See also John Dugard, Nicholas Haysom & Gilbert Marcus *The Last Years of Apartheid: Civil Liberties in South Africa* (1992).

104 See, generally, Allister Sparks *The Mind of South Africa* (1990).

105 Chris Nicholson 'Nothing Really Gets Better: Reflections on 25 years between Sharpeville and Uitenhage' (1986) 8 *Human Rights Quarterly* 511, 512.

106 Ibid at 513.

107 *Truth and Reconciliation Commission of South Africa Report, Volume 3, Chapter 6*, (1998) 531-537.

108 Ibid.

109 United Nations Security Council Resolution 134 (April 1960). See also Geoffrey Robertson *Crimes against Humanity* (2006) 46.

would not be viewed as the independent Republic it would soon become: the world came to view it as the racist, fascist, pariah state it had long been.

The Soweto Uprising took a somewhat different form. But its effects were equally devastating and substantially longer lasting.

Although the roots of the uprising can be traced back to the Eiselin Report of 1949 — which led to the elimination of mission schools and a radical diminution in state aid for black South African schools — the immediate cause of this massacre was the imposition of Afrikaans on black learners.<sup>110</sup> On June 16, 1976, thousands of black students walked from their schools to Orlando Stadium to protest against this new policy. Again, the organizers of the march had called for peaceful action. The police response — to the throwing of stones and other minimal provocations — was to open fire on the students.<sup>111</sup>

While the number of deaths ran to some 500, the real effect of the Soweto

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Uprising was the radicalization of a new generation of South Africans.<sup>112</sup> The lesson many students drew was that violence could only be met with violence. Schools became no-go zones and Umkhonto we Sizwe — the ANC's armed wing — found itself the beneficiary of a new group of willing and able volunteers.<sup>113</sup>

### **(v) States of Emergency<sup>114</sup>**

Under PW Botha's security state in the 1980s, and in the face of the United Democratic Front's efforts to make the country ungovernable, the last years of apartheid rule in South Africa took place in a relatively constant state of emergency.

The State of Emergency declared on 20 July 1985 gave the State President virtually unlimited powers to undermine the resistance to apartheid.<sup>115</sup> He could rule by fiat — the Constitution, for what it was worth, was largely a dead letter. So stringent, so abusive, so inhumane were the security state's efforts that thousands of people were jailed and hundreds 'disappeared'. (The fate of the many disappeared would only be revealed a decade later through the work of the Truth and Reconciliation Commission.) So paranoid and ruthless was PW Botha's regime that possessing documents deemed a 'threat' to state security, advising a person to 'stay away from work' or revealing the names of persons arrested under the State of Emergency became criminal offences.

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110 John Venter *Youth Day: June 16* (2007) 8.

111 Nicholson (supra) at 515.

112 Thomas Blair 'The Use & Effectiveness of Economic Sanctions against Nations that Violate Human Rights: Can the United States Force Reform on South Africa' (1986) 4 *New York Law School Human Rights Annual* 511, 512.

113 George Devenish 'South Africa from Pre-colonial Times to Democracy' (2005) 3 *TSAR* 547, 565.

114 See, generally, Stephen Ellmann *In a Time of Trouble: Law and Liberty in South Africa's State of Emergency* (1992).

115 Devenish (supra) at 565.



In 1986, the State of Emergency — initially limited to areas of unrest — was extended to the entire country.<sup>116</sup> It had the reverse of its intended effect: it only further galvanized the opposition. By 1989, Botha had met Mandela and begun to sketch the lineaments of a peaceful transfer of power.<sup>117</sup> A year later, under a new State President, FW de Klerk, the state of emergency was lifted, Mandela was released from 27 years of incarceration, anti-apartheid groups were unbanned, the press was granted greater freedom and the death penalty was suspended.

## (vi) 1983 Constitution and the Endgame of Apartheid

The balkanisation of South Africa, under the Bantustan 'states', created additional, unanticipated problems. The white minority government had now created a distorted form of black suffrage in these 'homelands'. It had left unresolved the question as to why two other 'populations' lacked voting power.

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But the decision in the early 1980s to grant Indian and coloured voters a limited form of the franchise had nothing at all to do with efforts to make South Africa a formally more equal polity. It was, in short, merely an extension of the divide and conquer strategy that drove apartheid politics.<sup>118</sup>

Thus, in 1983, the South African Parliament passed the 1983 South African Constitution ('the Tricameral Constitution'). The 1983 Constitution created three houses of Parliament: the House of Delegates (for Indians), the House of Representatives (for Coloureds) and the House of Assembly (for Whites).<sup>119</sup> However, in no sense was this new institution meant to put these three 'population' groups on an equal footing. (A Department of Information publication released at the time to publicise the new constitution talks, again in 'big lie language', described the 1983 Constitution as a 'sustained effort by various governments to arrive at satisfactory constitutional solutions for South Africa'.<sup>120</sup>

On its face, each group was given the mandate of governing their own affairs. Matters of 'common concern' would be decided by all three houses.<sup>121</sup> However, to ensure that political power remained in white hands on matters of common concern, voting was weighted in terms of a 4:2:1 ratio. The Assembly's votes counted four

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116 See *Bloem v State President* 1986 (4) SA 1064 (O)(Upholding validity of state of emergency.) See also Edwin Cameron 'Judicial Enforcement of Apartheid Propaganda' (1987) 3 *SAJHR* 223.

117 Peter Bouckaert 'The Negotiated Revolution: South Africa's Transition to Multiracial Democracy' (1995) 33 *Stanford Journal of International Law* 375, 386. Botha had approached Mandela as early as 1985 — offering emancipation in return for a cessation of armed violence. Mandela famously replied: 'Only Free men, not prisoners, can negotiate.'

118 See Currie & De Waal (supra) at 4; Hugh Corder 'Towards a South African Constitution' (1994) 57 *Modern Law Review* 491, 495.

119 For more on the Tricameral Parliament, see John Dugard 'Racism and Repression in South Africa: The Two Faces of Apartheid' (1989) 2 *Harvard Human Rights Law Journal* 97, 98.

120 Department of Foreign Affairs and Information *Constitutional Guidelines: A New Dispensation for White, Coloureds and Indians* (1983)('Constitutional Guidelines') 1.

121 *Ibid* at 5.

times the Representatives' votes counted twice. The Delegates' votes counted once only. The ratio ensured that a unified House of Assembly could not be overruled by the other 2 Houses.<sup>122</sup>

At any rate, the political pressures of the anti-apartheid movement resulted in a significant departure from the Westminster system. The 1983 Constitution created a State President. The State President was a much needed product of the times. Under the new Constitution, he could expect Parliament and cabinet to rubber-stamp his decisions. He also enjoyed the power to declare states of emergency that would enable him to further consolidate power in the Executive and act to suppress all threats to the white, minority regime.<sup>123</sup>

## 2.3 The liberation movements: the struggle for freedom

It is difficult to say whether there is, as yet, a victor's account of South African history. Many would say we are still on that long walk to freedom.

However, a desiccated historical account of this country's law that failed to consider the role of the liberation movements in shaping the current constitutional landscape would have the perverse effect of emphasizing the actions of those persons in power for the better part of the last few centuries: South Africa's

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white minority. This section recognizes that the law is more than that which appears in a government gazette. Law — good and bad, enforced and unenforceable — reflects the lived experience of a country's inhabitants.

### (a) Gandhi, Pass Laws & Satayagraha<sup>124</sup>

In 1760, the Cape introduced pass laws to regulate the movement of slaves. Pass laws soon became a fashionable way of segregating South Africa — at work, at home and in public. Mahatma Gandhi, a lawyer of Indian extraction arrived, in 1893, to conduct business in Pretoria.<sup>125</sup> He did not find the pass laws attractive or amusing. Soon after purchasing a first class train ticket from Durban, he was forcibly ejected from a train carriage reserved for whites only.<sup>126</sup> Finding himself in jail, and the conditions of Indians in South Africa intolerable, Gandhi led an Indian movement to have the pass laws withdrawn (for Indians).<sup>127</sup> When various forms of pressure failed, for example, pass burning, he created a new form of resistance: *Satayagraha*. This peaceful, non-violent form of firm, passive resistance forced the British — who were

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122 John van der Vyver 'The 1983 Constitution: An Exercise in Consociationalism?' (1986) 2 *SAJHR* 341.

123 See Dugard 'Two Faces' (supra) at 980.

124 See, generally, Mohandas Gandhi *Satayagraha in South Africa* (1928).

125 John Leubsdorf 'Ghandi's Legal Ethics' 51 *Rutgers Law Review* (1998) 923, 924.

126 See Charles DiSalvo 'Ghandi: The Spirituality and Politcs of Suffering' (1997) *Oklahoma City University Law Review* 51, 53.

127 See Shuba Ghosh 'Ghandi and the Life of Law' (2003) 53 *Syracuse Law Review* 1273.

hell bent on maintaining control of the country through guns, not butter — to reveal the brutal nature of their power.<sup>128</sup>

Shortly after his release from that ignominious stay in jail, Gandhi founded the Natal Indian Congress. The primary purpose of his new endeavor was to teach Indians how to effectively use *Satayagraha*. And that they did.

In 1906, Gandhi announced that he would return to jail before he obeyed another Anti-Asian law. In addition to various peaceful protests, Gandhi led strikes in the mines and on the plantations — as well as a march from Natal to the Transvaal to protest the racist Anti-Asian measures put in place by the Immigration Act. He paid for his resistance and was jailed on numerous occasions.<sup>129</sup>

But he ultimately succeeded: at least by some lights. In 1914, the relatively new Union government conceded to a number of important demands: the recognition of Indian marriages and the abolition of the poll tax.

Ghandi remembers the course of his life in terms of that first fateful trip from Natal to the Traansvaal:

I recall particularly one experience that changed the course of my life. Seven days after I had arrived in South Africa the client who had taken me there asked me to go to Pretoria from Durban. It was not an easy journey. On the train I had a first-class ticket, but not a bed ticket. At Maritzburg, when the beds were issued, the guard came and turned me out. The train steamed away leaving me shivering in cold. Now the creative experience comes there. I was afraid for my very life. I entered the dark waiting room. There was a white man in the

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room. I was afraid of him. What was my duty; I asked my self. Should I go back to India, or should I go forward, with God as my helper and face whatever was in store for me? I decided to stay and suffer. My active non-violence began from that day.<sup>130</sup>

Others take a somewhat dimmer view of Ghandi's contributions. According to Les Switzer, Gandhi saw *Satayagraha* as little more than a means of protest — and securing reform — on behalf of the Indian in South Africa.<sup>131</sup> Indeed, his language regarding black South Africans was in keeping with the times. He called black South Africans lazy and indolent, and did not, it would appear, make similar efforts to win other South Africans of colour the limited emancipation he secured for Indian South Africans.<sup>132</sup> That said, he did secure such victories in South Africa and quite consciously employed them in India's successful fight for independence.<sup>133</sup>

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128 See DiSalvo (supra) at 54.

129 See Leubsdorf (supra) at 924.

130 'Gandhi in South Africa' available at <http://www.encounter.co.za/article/112.html> (accessed on 24 June 2008).

131 Les Switzer *South Africa's Alternative Press: Voices of Protest and Resistance, 1880s-1960s* (1997).

132 See David Machlowit 'Ghandi: Lawyer to Legend' (1983) 69 *American Bar Association Journal* 370.

133 It would, likewise, be an act of conscious amnesia to forget that Martin Luther King successfully employed Satayagraha in the civil rights movement in the United States some 50 years later.

## **(b) The African National Congress, the Pan Africanist Congress and Black Consciousness**

The African National Congress ('ANC') was formed officially on 8 January 1912.<sup>134</sup> Tribal authorities, people's representatives, church organizations and other prominent individuals — such as John Dube, Pixley ka Isaka Seme and Sol Plaatjie — formed the ANC in order to create an institution that defended the rights and freedoms of all black South Africans.<sup>135</sup>

The ANC has a long, complicated history of resistance to white political rule. No short précis of its activities can do it justice. We will therefore confine our account to some of the more important events it orchestrated.

It initiated, in June 1952, and with the assistance of other anti-apartheid movements, the Defiance Campaign. The campaign employed Gandhi's passive resistance techniques against the legal restrictions imposed upon all non-white South Africans. The campaign had limited success — and new laws restricting public protest made passive resistance a less effective means of combating apartheid.

The ANC then helped to engineer the Freedom Charter, again in conjunction with other opponents of apartheid. This document, as we note below, laid the foundation for many of the rights, the freedoms and the democratic institutions we find in the Final Constitution.

The ANC leadership underwent enormous sacrifice in the name of freedom. While many of its leading members were acquitted five years after the first Treason Trial began in 1956, the subsequent Rivonia Trial resulted in the conviction

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and life imprisonment of Nelson Mandela, Walter Sisulu and many of the other top leaders of the ANC.<sup>136</sup>

Perhaps the ANC's most important pre-liberation decision followed the Sharpeville massacre. The ANC concluded that Gandhi's *Satayagraha* would never be an effective means of ending apartheid. The ANC's military wing, Umkhonto we Sizwe ('MK'), was charged with using various forms of violence to sabotage the apartheid state.<sup>137</sup>

In the 1970s and 1980s, the ANC leadership in exile upped the ante. It decided, under Oliver Tambo's leadership, to target for assassination members of the apartheid government and the secret police, and to destroy important assets in the military-industrial complex. The ANC's military attacks convinced many black South Africans that something could be done and the white minority government that they had meaningful opposition when it came to the use of force. The apartheid state's

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134 Thomas Karis 'South African Liberation: The Communist Factor' (1987) 65 *Foreign Affairs* 267.

135 Saki Mako Zamce 'The ANC and the Transformation of South Africa' (1995) 2 *Brown Journal of World Affairs* 241.

136 See George Bizo 'The Abrogation and Restoration of the Rule of Law and Judicial Independence in South Africa' (1998) 11 *Revue Quebecoise de Droit Internationale* 155, 157.

137 See Bizo (supra) at 157. See also John Dugard 'Soldiers or Terrorists: The ANC & The SADF Compared' (1995) 45 *SAJHR* 221.

decision to further increase its repressive actions only reinforced the commitment of ANC MK cadres and their United Democratic Front brethren. And it was this commitment through the 1980s that led the apartheid state to concede that it had no option but to cede power to the majority of South Africa's citizens.

It seems ironic then, at this juncture of the narrative, to note that the reason the Pan Africanist Congress ('PAC') split from the ANC in 1959 was that the ANC was thought to be too accommodationist. The PAC, under the leadership of Robert Sobukwe, emphasized mass action and the view that African liberation in South Africa could not be secured with the assistance of Indian, coloured or white members. Although far less of a threat than the ANC — at the time of its formation — the aforementioned two strands of thought had two identifiable consequences. The first was the Sharpsville massacre: a direct function of the PAC's desire to pip the ANC to the post in terms of confrontational mass action. The second was an unintended consequence: the ideology of Black Consciousness.

Although the founding of Black Consciousness ('BC') is generally credited to Steve Biko — its political pedigree cannot be denied.<sup>138</sup> Like the PAC, BC held that genuine liberation of black South Africans could not occur within multiracial institutions, parties or movements. Biko sets out the basis for this view in *I Write What I Like*:

Black Consciousness is in essence the realization by the black man of the need to rally together with his brothers the cause of their operation — the blackness of their skin — and to operate as a group in order to rid themselves of the shackles that bind them to perpetual

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servitude. It seeks to demonstrate the lie that black is an aberration from the 'normal', which is white . . . . It seeks to infuse the black community with a new-found pride in themselves, their efforts, their value systems . . . . The interrelationship between the consciousness of the [black] self and [BC's] emancipatory programme is of paramount importance. Blacks no longer seek to reform the system because so doing implies acceptance of the major points around which the system revolves. . . . Blacks are out to completely transform the system and make of it what they wish. Such an undertaking can only be realized in an atmosphere where people are convinced of the truth inherent in their stand. . . . With this background in mind we are forced, therefore, to believe that it is a case of haves against have-nots, where whites have been deliberately made haves and blacks have-nots. There is . . . no worker in the classic sense among whites in South Africa, for even the most down-trodden white worker still has a lot to lose if the system is changed. He is protected by several laws against the competition at work from the majority. He has a vote and he uses it to return the Nationalist Government to power because he sees them as the only people who, through job reservation laws, are bent on looking after his interests against competition with the 'Natives'. The overall analysis, based upon the Hegelian theory of dialectic materialism, is as follows. That since the thesis is a white racism there can only be one valid antithesis, ie, a solid black unity to counterbalance the scale. If South Africa is to be a land where black and white live together in harmony without fear of group exploitation, it is only when the two opposites have interplayed and produced a viable synthesis of ideas and a *modus vivendi*. We can never wage any struggle without offering a strong counterpoint to the white races that permeate out society so effectively.<sup>139</sup>

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138 For a discussion of the affect of Black Consciousness on South African Christian establishment, see Peter Walsh 'Church vs State in South Africa: the Christian Institute and the Resurgence of African Nationalism' (1977) *Journal of Church & State* 457.

139 Steve Biko *I Write What I Like* (1978) 53-55.

As we shall see below, the African National Congress offers in the Freedom Charter a compelling non-racial, but still radical, view of a post-apartheid South Africa. But as we suggest near the end of this chapter, that radical view can be revised — and reiterated — in terms of the standard bourgeois social democratic discourse of modern constitutional law. Biko's BC challenge offered no such accommodation. Whites would — in his view of a Hegelian/Marxist dialectic — be compelled to renounce their current ideology and privilege for some unknown set of institutions that recognized neither capital nor race as singularly important attributes.<sup>140</sup> It is little wonder that the apartheid state saw Steve Biko as a greater threat than everyone's 'hero' — the incarcerated Nelson Mandela. And it is little wonder that the apartheid state engineered his death, while in police custody, in September 1977.<sup>141</sup>

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### (c) The Freedom Charter of 1955

Despite the hegemony of parliamentary sovereignty, the advocacy of human rights from within South Africa's anti-apartheid movement and from social movements outside South Africa kept the notion of inalienable rights alive. Two documents stand out from amongst the others. The ANC's *African Claims in South Africa* reformulated the Atlantic Charter's principles of freedom and democracy from the perspective of Africans in South Africa. Adopted by the ANC on 16 December 1945, this 'Bill of Rights . . . made the revolutionary claim of one man one vote, of equal justice in the courts, freedom of land ownership, of residence and of movement . . . claimed freedom of the press, and demanded equal opportunity in training and in work'.<sup>142</sup> The Freedom Charter, adopted at Kliptown on 26 June 1955 by the Congress of the People, is the second important expression of the aspiration of the majority of South Africans for a charter of rights.<sup>143</sup>

Much is made of the uniqueness and progressiveness of South Africa's Final Constitution. However, that Constitution has a history, and an important part of that history is the adoption of the Freedom Charter. Even the most cursory inspection of the Charter's language reveals the debt our Final Constitution owes to this founding document of the liberation movements in South Africa:

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140 Johan Froneman 'Democracy, Constitutional Interpretation and the African Renaissance' (2001) 12 *Stellenbosch Law Review* 10, 21.

141 As Kevin Hopkins notes, the murder of Steve Biko was the tipping point for the international community. After his death, South Africa lost the support of France, Britain and the United States. See Kevin Hopkins 'Assessing the Worlds Response to Apartheid: A Historical Account of International Law and its part in the South African Transformation' (2002) 10 *Miami International and Comparative Law Review* 241, 254. For an account of the medical attention received by Biko, see also Lawrence Baxter 'The Abdication of Responsibility: the Role of Doctors in the uitenhage Unrest' (1985) 1 *SAJHR* 151, 152.

142 Michael Benson *The African Patriots: The Story of the African National Congress of South Africa* (1963) 117.

143 See Raymond Suttner & Jeremy Cronin *30 Years of the Freedom Charter* (1986). The Congress of the People was launched by the Congress Alliance in 1954 not as a single event but as a series of discussions culminating in the adoption of the Freedom Charter. Professor ZK Mathews, who proposed the Congress of the People, called for 'a gathering to which ordinary people will come, sent there by the people. Their task will be to draw up a blueprint for the free South Africa of the future.' Raymond Suttner *The Freedom Charter: The People's Charter in the Nineteen-Eighties* (1984).

**We, the People of South Africa, declare for all our country and the world to know:** that South Africa belongs to all who live in it, black and white, and that no government can justly claim authority unless it is based on the will of all the people; that our people have been robbed of their birthright to land, liberty and peace by a form of government founded on injustice and inequality; that our country will never be prosperous or free until all our people live in brotherhood, enjoying equal rights and opportunities; that only a democratic state, based on the will of all the people, can secure to all their birthright without distinction of colour, race, sex or belief; And therefore, we, the people of South Africa, black and white together equals, countrymen and brothers adopt this Freedom Charter; And we pledge ourselves to strive together, sparing neither strength nor courage, until the democratic changes here set out have been won.

**The People Shall Govern!** Every man and woman shall have the right to vote for and to stand as a candidate for all bodies which make laws; All people shall be entitled to take part in the administration of the country; The rights of the people shall be the same, regardless of race, colour or sex; All bodies of minority rule, advisory boards, councils and authorities shall be replaced by democratic organs of self-government.

**All National Groups Shall have Equal Rights!** There shall be equal status in the bodies of state, in the courts and in the schools for all national groups and races; All people shall have equal right to use their own languages, and to develop their own folk culture and customs; All national groups shall be protected by law against insults to their race and national pride; The preaching and practice of national, race or colour discrimination and contempt shall be a punishable crime; All apartheid laws and practices shall be set aside.

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**The People Shall Share in the Country's Wealth!** The national wealth of our country, the heritage of South Africans, shall be restored to the people; The mineral wealth beneath the soil, the Banks and monopoly industry shall be transferred to the ownership of the people as a whole; All other industry and trade shall be controlled to assist the wellbeing of the people; All people shall have equal rights to trade where they choose, to manufacture and to enter all trades, crafts and professions.

**The Land Shall be Shared Among Those Who Work It!** Restrictions of land ownership on a racial basis shall be ended, and all the land re-divided amongst those who work it to banish famine and land hunger; The state shall help the peasants with implements, seed, tractors and dams to save the soil and assist the tillers; Freedom of movement shall be guaranteed to all who work on the land; All shall have the right to occupy land wherever they choose; People shall not be robbed of their cattle, and forced labour and farm prisons shall be abolished.

**All Shall be Equal Before the Law!** No-one shall be imprisoned, deported or restricted without a fair trial; No-one shall be condemned by the order of any Government official; The courts shall be representative of all the people; Imprisonment shall be only for serious crimes against the people, and shall aim at re-education, not vengeance; The police force and army shall be open to all on an equal basis and shall be the helpers and protectors of the people; All laws which discriminate on grounds of race, colour or belief shall be repealed.

**All Shall Enjoy Equal Human Rights!** The law shall guarantee to all their right to speak, to organise, to meet together, to publish, to preach, to worship and to educate their children; The privacy of the house from police raids shall be protected by law; All shall be free to travel without restriction from countryside to town, from province to province, and from South Africa abroad; Pass Laws, permits and all other laws restricting these freedoms shall be abolished.

**There Shall be Work and Security!** All who work shall be free to form trade unions, to elect their officers and to make wage agreements with their employers; The state shall recognise the right and duty of all to work, and to draw full unemployment

benefits; Men and women of all races shall receive equal pay for equal work; There shall be a forty-hour working week, a national minimum wage, paid annual leave, and sick leave for all workers, and maternity leave on full pay for all working mothers; Miners, domestic workers, farm workers and civil servants shall have the same rights as all others who work; Child labour, compound labour, the tot system and contract labour shall be abolished.

**The Doors of Learning and Culture Shall be Opened!** The government shall discover, develop and encourage national talent for the enhancement of our cultural life; All the cultural treasures of mankind shall be open to all, by free exchange of books, ideas and contact with other lands; The aim of education shall be to teach the youth to love their people and their culture, to honour human brotherhood, liberty and peace; Education shall be free, compulsory, universal and equal for all children; Higher education and technical training shall be opened to all by means of state allowances and scholarships awarded on the basis of merit; Adult illiteracy shall be ended by a mass state education plan; Teachers shall have all the rights of other citizens; The colour bar in cultural life, in sport and in education shall be abolished.

**There Shall be Houses, Security and Comfort!** All people shall have the right to live where they choose, be decently housed, and to bring up their families in comfort and security; Unused housing space to be made available to the people; Rent and prices shall be lowered, food plentiful and no-one shall go hungry; A preventive health scheme shall be run by the state; Free medical care and hospitalisation shall be provided for all, with special care for mothers and young children; Slums shall be demolished, and new suburbs built where all have transport, roads, lighting, playing fields, creches and social centres; The aged, the orphans, the disabled and the sick shall be cared for by the state; Rest, leisure and recreation shall be the right of all; Fenced locations and ghettos shall be abolished, and laws which break up families shall be repealed.

**There Shall be Peace and Friendship!** South Africa shall be a fully independent state which respects the rights and sovereignty of all nations; South Africa shall strive to maintain world

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peace and the settlement of all international disputes by negotiation — not war; Peace and friendship amongst all our people shall be secured by upholding the equal rights, opportunities and status of all; The people of the protectorates Basutoland, Bechuanaland and Swaziland shall be free to decide for themselves their own future; The right of all peoples of Africa to independence and self-government shall be recognised, and shall be the basis of close co-operation. Let all people who love their people and their country now say, as we say here: **These freedoms we will fight for, side by side, throughout our lives, until we have won our liberty**

Aspirational as this document may have been, it resonates profoundly with the document that animates the rest of this four volume treatise. The Freedom Charter, like the Final Constitution, commits itself to a non-racial society (FC s 1), multiparty democracy (FC ss 1 and 19), equality before the law (FC s 9), the universal franchise (FC ss 1 and 20), a redistribution of basic goods and land (FC ss 25, 26 and 27), freedom of trade, occupation and profession (FC s 22), prohibitions on slavery, servitude and forced labour (FC s 13), equal access to education (FC s 29), freedom from public and private violence (FC s 12) and freedom of movement and residence (FC ss 20 and 21). The obvious connections between these two documents gives the lie to the claim that the Final Constitution represents an imposition of western thought on an African society.

#### **(d) The Rivonia Trial**



The Rivonia Trial took place during 1963 and 1964. Ten members of the African National Congress — including Nelson Mandela, Walter Sisulu, Govan Mbeki and Rusty Bernstein — were tried for 221 acts of sabotage. Eight of the accused were found guilty. Only Rusty Bernstein was acquitted.

The state first requested the imposition of the death penalty. However, world-wide protests and skilled legal maneuvers by the defence resulted in sentences of life imprisonment.<sup>144</sup> As the ANC archives note:

There was no surprise in the fact that Mandela, Sisulu, Mbeki, Motsoaledi, Mlangeni, and Goldberg were found guilty on all four counts. The defense had hoped that Mhlaba, Kathrada, and Bernstein might escape conviction because of the skimpiness of evidence that they were parties to the conspiracy, although undoubtedly they could be prosecuted on other charges. But Mhlaba too was found guilty on all counts, and Kathrada, on one charge of conspiracy. Bernstein, however, was found not guilty. He was rearrested, released on bail, and placed under house arrest. Later he fled the country.<sup>145</sup>

Mandela's conviction took on greater and greater metaphoric dimensions as the years of his imprisonment ticked by. Year after year, 'Free Mandela' became an ever more popular slogan for the anti-apartheid movement. His 27 years of

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incarceration — and the martyrdom that inevitably followed such a lengthy imprisonment — can blur the meaning and the integrity and the motivations behind Mandela's actions and his willingness to give up his life for the cause of South Africa's freedom. Mandela's own words, at the Rivonia Trial, offer the best possible account of his politics, and the man behind the liberation of South Africa:

The structure and organization of early African societies in this country . . . greatly influenced the evolution of my political outlook. The land, the main source of production, belonged to the whole tribe . . . . There were no classes, no rich or poor and no exploitation of man by man. . . . There was much in such a society that was . . . insecure . . . and it certainly would not live up to the demands of the present epoch. But in such a society lay the seeds of revolutionary democracy in which none shall be held in slavery or servitude, and in which poverty, want and insecurity shall be no more. This is the history which . . . inspires . . . our struggle. . . . I would say that the whole life of any thinking African in this country drives him continuously to conflict between his conscience on the one hand and the law on the other. Recently, in Britain, . . . Bertrand Russell, probably the most respected philosopher of the western world, was sentenced and convicted for precisely the type of activities for which I stand before you today — for following his conscience in defiance of the law, as a protest against the nuclear weapons being pursued by his own government. He could do no other than to oppose the law and suffer the consequences for it. Nor can I. Nor can many Africans in this country. The law as it is applied, the law as it is written and designed by the Nationalist government is a law which, in our view, is immoral, unjust and intolerable. . . . I was made, by the law, a criminal, not because of what I had done, but because of what I stood for, because of what I thought, because of my conscience. . . . [T]here comes a

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144 The defense was led by Bram Fischer, the distinguished Afrikaner lawyer. He was assisted by Harry Schwarz, Joel Joffe, Arthur Chaskalson, George Bizos and Harold Hanson. Arthur Chaskalson and George Bizos would play, as we note below, an especially significant role in the ongoing legal fight against apartheid. And, of course, Arthur Chaskalson would go on to become the first President of the Constitutional Court, and then still later, Chief Justice of South Africa. See Bizos (*supra*) at 158. See also Stephen Ellmann 'To Live Outside the Law, You Must be Honest': Brahm Fischer & the Meaning of Integrity' (2001) 17 *SAJHR* 451.

145 *The Rivonia Trial* (2008), available at [www.anc.org.za/show.php?\\_anccdocs/history/trials/toward\\_robben\\_island.html](http://www.anc.org.za/show.php?_anccdocs/history/trials/toward_robben_island.html) (accessed on 24 June 2008).

time, as it came in my life, when a man is denied the right to live a normal life, when he can only live the life of an outlaw because the government has so decreed to use the law to impose a state of outlawry upon him. I was driven to this situation, and I do not regret the decisions that I did take. Other people will be driven in the same way in this country . . . to follow my course, of that I am certain.<sup>146</sup>

### **(e) The United Democratic Front**

Formed in 1983, the United Democratic Front ('UDF') was an incredibly broad non-racial coalition of about 700 civic, church, student and worker organisations.<sup>147</sup> At its height, the UDF could claim some 3 million members. They were not underground: they were a visible — and intentionally disturbing — part of South African life.

The UDF was initially inspired by the new 'insult' of the 1983 Constitution and its Tricameral Parliament.<sup>148</sup> But the UDF was not brought into being to 'protest' just another apartheid institution. The genius of the UDF's strategy lay in its plan to make South Africa ungovernable. The UDF's strikes, rent boycotts, school

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protests and other forms of non-compliance — along with continued external and internal pressure by the liberation movements — were so successful that State President PW Botha felt it necessary to declare a state of emergency.<sup>149</sup> The state of emergency — as we have seen — failed because the UDF — and such leaders as Archbishop Tutu, Reverend Alan Boesak, Albertina Sisulu and Helen Joseph — maintained multiple forms of pressure on the state.<sup>150</sup> In the end, the UDF can be credited with pressing the government into negotiations and bringing down the apartheid state.

It is also worth noting that the UDF retains a role of prominence in current South African politics. The trade unions — such as the National Union of Mineworkers and the Congress of South African Trade Unions ('COSATU') — provided not only the muscle for the UDF movement, but also much of its brains. COSATU — part of the tripartite alliance that governs South Africa (with the ANC and the much smaller Communist Party) — has ensured that leftist politics have remained an important feature of South African discourse.

### **(f) Lawyers, Human Rights and the Rule of Law**

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146 Nelson Mandela *Long Walk to Freedom* (1995) 329-332.

147 See Karis (supra) at 269; Bernard Magubane 'The Current Situation in South Africa: A Sociological Perspective' (1987) 5 *Journal of Law & Religion* 473; Thomas Karis 'Revolution in the Making: Black Politics in South Africa' (1984) 62 *Foreign Affairs* 378.

148 Implementation of the tricameral Parliament was met with 90 000 students and 90 000 miners going on strike. See Grayling Williams 'In Support of Azania: Divestiture of Public Pension Funds as One Answer to US Private Investment in South Africa' (1984) 9 *Black Law Journal* 167, 184.

149 See Magubane (supra) at 490.

150 Cora Hoexter 'Emergency Law' (1990) *South African Human Rights Yearbook* 110; Jerome Barrett & Anne Motlins 'South Africa Trade Unions: A historical Account, 1970-1990' (1990) 131 *Monthly Labour Review* 25. See also *Van Der Westhuizen NO v United Democratic Front* 1989 (2) SA 242 (A).

As we have already seen, the National Party government was quite adept at manipulating the institutions of government in order to realize its grand plan of apartheid. And as *Harris I*, *Harris II* and *Collins* ultimately reflect, the judiciary was no match for the coordinate branches. Indeed, as Richard Abel notes, it became commonplace for the security police to brief magistrates and prosecutors on how they should impose both the law and its sanctions.<sup>151</sup>

But that does not mean lawyers — and some judges — had no role to play in the fight against apartheid. Lawyers such as Arthur Chaskalson, George Bizos, Sydney Kentridge, John Dugard, Geoffrey Budlender, Halton Cheadle, Nicholas Haysom and Gilbert Marcus found ways to exploit gaps in apartheid law in the service of justice and with the aim of destabilizing the apartheid legal system. Judges such as Ismail Mohamed, Laurie Ackermann, Richard Goldstone, John Didcott and Johan Kriegler used the judiciary's ostensible commitment to the rule of law to advance human rights under apartheid — if only at the margins.<sup>152</sup>

Lawyers had always been part of the struggle. Gandhi had gone to the bar. Mandela and Sisulu were attorneys. Brahm Fischer was an advocate. But they were first and foremost members of the struggle: they were not lawyers' lawyers.

After *Collins*, one might have thought the space for constitutional lawyers rather limited. With parliamentary sovereignty deeply entrenched and the judiciary

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packed with apartheid state apparatchiks, only persons with incredible imagination and intestinal fortitude could conceive and create the legal institutions required to challenge the State in the courtroom.

John Dugard, then dean of the the University of the Witwatersrand's School of Law, recognized the immediate need to create progressive and effective legal NGOs in the wake of Steve Biko's murder: 'At that time the reputation of the South African legal system sunk to its lowest level and there was a manifest need for the creation of institutions . . . to work for justice and equality through law.'<sup>153</sup> John Dugard and Felicia Kentridge — along with colleagues from US based foundations such as the Carnegie Corporation — contrived a scheme that brought about the realization of two of South Africa's most important — and still vibrant — public interest litigation units: the Centre for the Applied Legal Studies (CALs) and the Legal Resources Centre (LRC). Dugard did not promise, nor did his funders expect, the sky. Early on, he wrote to his funders a blunt assessment of what law could and could not do under the apartheid regime: 'If a Centre [CALs] and a [public interest law] firm [LRC] are established they will not bring about radical change of the kind prompted [in the United States] by *Brown v Board of Education*.'<sup>154</sup> Nonetheless, as Rosenfeld,

151 See Richard Abel *Politics by Other Means: Law in the Struggle Against Apartheid, 1980-1994* (1995) 17-18 (Abel recalls an instance in which the security police briefed Durban magistrates and prosecutors — at the behest of the Chief Magistrate.)

152 See Richard Goldstone *Do Judges Speak Out?* (1993). See also Stephen Ellmann *In Time of Trouble: Law and Liberty in South Africa's State of Emergency* (1992).

153 Patricia Rosenfeld, Courtenay Sprague & Heather McKay 'Ethical Dimensions of International Grantmaking: Drawing the Line in a Borderless World' (2004) 11 *The Journal of Leadership and Organizational Studies* 48, 58.

154 *Ibid.*

Sprague and McKay note, Dugard 'stressed that the Centre would conduct research into socially relevant areas and reform of the law, and . . . knit together a group of lawyers who would use the law to contribute to a more just legal order', while the LRC would run cases that exploited 'the interstices of the apartheid legal structure'.<sup>155</sup>

CALS and the LRC — fully-funded and well-staffed by such luminaries as Sydney Kentridge, Arthur Chaskalson, Geoff Budlender, Edwin Cameron and Gilbert Marcus — litigated cases that ran the entire gamut of issues raised by apartheid's cruel injunctions: 'forced removals, censorship, homeland policies, detention without trial, unfair labor practices, housing, citizenship, and bus tariffs.'<sup>156</sup> Adapting some of the tactics successfully employed by the ACLU and the NAACP to a harsher South African reality, the LRC and CALS won such critical cases as *Wendy Orr v the State*,<sup>157</sup> *Komani v Bantu Affairs Administration Board, Peninsula Area 1980*<sup>158</sup> and *Rikhoto v East Rand Administration*

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*Board*.<sup>159</sup> Both Abel and Sprague conclude that these 'cases contributed to the gradual dismantling of apartheid laws regulating movement and torture, and became part of the process of chipping away at the edifice of apartheid policies.'<sup>160</sup> More importantly, notes the LRC's former national director, Geoff Budlender: 'What can . . . be said without fear of successful contradiction is that the public interest law movement in South Africa made a significant contribution to the movement for democracy in South Africa.'<sup>161</sup>

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155 Ibid. See also Wilmot James 'Concluding Remarks' in WG James (ed) *The State of Apartheid* (1987) 197–198 as quoted in Patricia Rosenfield, Courtenay Sprague & Heather McKay 'Ethical Dimensions of International Grantmaking: Drawing the Line in a Borderless World' (2004) 11 *The Journal of Leadership and Organizational Studies* 48, 58 (James observed the need for the LRC and CALS in these terms: '[T]he army and police now have learned how to kill civilians regularly and get away with it. . . . This is the modern racial machine of apartheid, which derives its logic from the desire to oppress the majority of the populace.')

156 Rosenfield, Sprague & McKay (supra) at 59.

157 *Wendy Orr & Other v Minister of Law and Order & Others* Case No 2507/85 (South Eastern Cape, Local Division, 1985)(Court acknowledged both torture and abuse of political detainees.)

158 *Komani v Bantu Affairs Administration Board, Peninsula Area 1980* (4) SA 448 (A)(Court granted requested improvements to system of 'influx control'.)

159 *Rikhoto v East Rand Administration Board 1983* (4) SA 278 (W)(Court held regulations unlawfully restricted the freedom of movement of black South Africans.)

160 See Abel (supra) at 23–65 (In his chapter, 'Carving Loopholes in the Pass Laws', Abel offers detailed accounts of the outcomes in *Komani*, *Rikhoto* and *Orr*); Courtenay Sprague 'The Carnegie Corporation, Public Interest Law, and Apartheid South Africa' Foundations of Globalization Conference, University of Manchester (6-7 November 2003)(Manuscript on file with authors.)

161 Geoff Budlender 'The Development of the Public Interest Law Movement in South Africa' *Symposium on Public Interest Law in Eastern Europe and Russia* (June 29 to July 8, 1997) available at <http://www.pili.org/en/dmdocuments/durbanb1.pdf> (accessed on 24 June 2008) as cited in Rosenfield, Sprague & McKay (supra) at 60.

## 2.4 The road to democracy: private meetings, negotiations, referenda and an assassination

### (a) Meetings in the 1980s, Here and Abroad<sup>162</sup>

Neither the regular states of emergency, nor the MK's armed resistance had brought South Africa any closer to a resolution of its simmering civil war. Behind the scenes, important changes were afoot.

In the Soviet Union, a bastion of ANC support, some officials suggested that the ANC might do well to concede 'collective rights and group guarantees in a post-apartheid constitution'.<sup>163</sup> While Soviet officials quickly backed away from such a position, the point was clear: the aim was no longer the over-throw of the white minority state, but a negotiated settlement that would bring about a black, democratically-elected government.

The ANC's private position had already changed several years earlier. In 1986, the ANC's President, Oliver Tambo set out the conditions under which the ANC — and other liberation movements — would be prepared to begin negotiations: (1) the release of 'Nelson Mandela and all other political prisoners'; (2) the unbanning of the ANC and other political organizations'; (3) the lifting of the 'state of emergency then in force' and (4) the scrapping of laws central to the maintenance of apartheid.<sup>164</sup> The armed struggle would continue, however, until such conditions had been met.

The NP likewise recognized that it could no longer rule through force on behalf of a white minority. President FW de Klerk secured substantial support, in a 1989 referendum, to begin negotiations. He released major ANC officials

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held prisoner since the Rivonia Trial and initiated quiet talks with Nelson Mandela regarding the future shape of South Africa and the logistics necessary for a peaceful transfer of political power.<sup>165</sup>

Of course, these changes occurred against a broader political backdrop. South Africa had long been viewed as a pariah state in the West — and the anti-apartheid movement had only increased pressure on the West to stop propping up this racist regime. And while Mikhail Gorbachev might not have known that perestroika would lead to the falling of the Berlin Wall and the end of communism in the Soviet Union, the ANC knew it could no longer count on unequivocal military or political support from governments on the left.<sup>166</sup> Thus, when on 2 February 1990, FW de Klerk

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162 See, generally, Geoffrey Heald 'Learning Amongst Enemies: A Phenomenological Study of the South African Negotiations from 1985 to 1988' (PhD, Witwatersrand, 2006).

163 Allister Sparks *The Mind of South Africa* (2007) 369.

164 *Ibid* at 372.

165 See Peter Bouckaert 'The Negotiated Revolution' (1997) 33 *Stanford Journal of International Law* 375, 385; Hugh Corder 'Towards a South African Constitution' (1994) 57 *Modern Law Review* 491, 494.

166 See Corder (*supra*) at 494.

announced that liberation organisations were to be unbanned and political prisoners were to be released — including Nelson Mandela, nine days later, on 11 February 1990 — the international community could hardly be said to be surprised.

### **(b) ANC Initiatives and Initiatives from Apartheid Institutions**

In 1988, the ANC published the *Constitutional Guidelines for a Democratic South Africa*, the ANC's first public expression of its desire to work toward a negotiated settlement in South Africa.<sup>167</sup> In this declaration, the ANC committed itself to the adoption of a justiciable Bill of Rights and to constitutionalism generally. In August of 1989, the *Harare Declaration* was adopted by the Organization of African Unity. The *Harare Declaration* set forth several conditions that the apartheid government must fulfill before serious negotiations could begin: the lifting of restrictions on political activity, the legalization of all political organizations, and the release of all political prisoners. This declaration was later adopted by the Non-Aligned Movement and the United Nations' General Assembly.

The adoption of bills of rights in the Ciskei and Bophuthatswana bantustans in the 1980s provided South African courts with their first meaningful experiments with constitutional review. While the courts began to demonstrate a greater willingness to implement these documents after 1990, many of the early decisions provide an extremely incoherent account of the standards to be applied in constitutional interpretation.<sup>168</sup>

The South African government initiated its own halting steps in the direction of constitutionalism in April 1986.<sup>169</sup> The Minister of Justice announced that he had

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requested the South African Law Commission 'to investigate and make recommendations regarding the definition and protection of group [rights] . . . and the possible extension of the existing rights protection of individual rights'.<sup>170</sup> The Law Commission subsequently issued a working paper in March 1989 and an Interim Report on Group and Human Rights in August 1991 that engaged even the most hostile elements of the extreme right wing in a debate on a bill of rights and constitutionalism.<sup>171</sup>

### **(c) CODESA and the Multi-Party Negotiating Forum**

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167 See Adrienne van Blerk 'Critical Legal Studies in South Africa' (1996) 113 *SALJ* 86, 93 (ANC was adamant that any Bill of Rights be rooted to the Freedom Charter.) See also Cyril Ramaphosa 'A Constitutional Framework for a New South Africa' (1992) 28 *Stanford Journal of International Law* 23.

168 See John Hund 'A Bill of Rights for South Africa; 3 (1989) 34 *American Journal of Jurisprudence* 23.

169 See Cyril Ramaphosa 'Negotiating a New Nation: Reflections on the Development of South Africa's Constitution' in P Andrews & S Ellmann (eds) *Post-Apartheid Constitutions: Perspectives on South Africa's Basic Law* (2001) 71, 75.

170 Leonard Thompson 'The Compromise of Union' in M Wilson & L Thompson (eds) *The Oxford History of South Africa* Vol II (1975) 252.

171 *Ibid.*

The immediate challenge — after the unbanning — was to bring together all parties interested in negotiating a road map to peace in South Africa. The Congress for a Democratic South Africa ('CODESA') commenced on 20 December 1991. However, it died soon after in 1992.<sup>172</sup> Despite CODESA's problems, the white electorate, in a referendum held on 17 March 1992, conclusively endorsed the efforts of the de Klerk government to continue with constitutional negotiations aimed at establishing a multi-party democracy based on a universal franchise.<sup>173</sup>

Before detailing the processes and the negotiations that led to the successful adoption of an Interim Constitution in 1993 and the holding of the first truly democratic elections on 27 April 1994, it is important to understand the general philosophical aims of the three major parties: the African National Congress, the National Party, and the Inkatha Freedom Party. It is likewise essential to understand the major compromises that allowed the second round of negotiations to succeed.

The ANC's primary goal was to have a constitution — written by a democratically elected assembly — that would create a government of majority rule with as few restraints as possible on its legislative power.<sup>174</sup> Although the ANC was generally successful in this aim, the NP's steadfast insistence on some form of interim government and an initial power-sharing scheme ultimately kept the desired goal of unfettered majority rule from being realized.

The NP, facing the political realities of universal suffrage, argued that the new constitutional order must devolve power to provinces and local governments and

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thereby place substantial restrictions on the power of the national government. It initially tried to block the idea of a Final Constitution written by a democratically elected assembly. It favoured an extended transitional government and a power-sharing mechanism that would allow the NP to gradually relinquish control and maximize its ability to influence and to restrain the new government.<sup>175</sup> During negotiations, the NP argued that all participating parties should have equal voice in the process. That would, of course, have given undue weight to minority interests. That argument it lost. However, as the negotiation process continued, the NP — with its authority and its resources as government — took the lead as the opposition party to the ANC. Its emphasis on 'collective political rights' — rejected outright by

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172 Ackerman (supra) at 635. The death of CODESA was brought about by a deadlock over the percentages necessary for ratification of the Final Constitution by the democratically elected Parliament. The ANC thought two-thirds of the Constitutional Assembly a sufficient amount to secure the Basic Law's legitimacy. The NP naturally wanted the requirement set somewhat higher: 75%. Currie and de Waal (supra) at 5.

173 Brand (supra) at 7; Currie and de Waal (supra) at 5. The need for a referendum was necessitated by the loss of a by-election in which the NP lost support in favour of a more extreme right wing party. See Bouckaert (supra) at 391. 68.7% of the white electorate threw their weight behind a continued process of negotiation.

174 See Heinz Klug *Constituting Democracy: Law, Globalism and South Africa's Political Reconstruction* (2001). See also Heinz Klug 'Participating in the Design: Constitution-Making in South Africa' in Andrews & Ellmann (supra) at 136; Heinz Klug 'Constitutional Law: Towards a New Constitutional Order' 1993 *Annual Survey of South African Law* 19-28.

175 See Klug 'Participating in the Design' (supra) at 137-138.

the ANC — shifted to the standard constitutional protections for individuals generally found in a justiciable Bill of Rights.<sup>176</sup>

The IFP, not surprisingly, argued strenuously for a form of federal government that afforded regional governments maximum autonomy. It proposed express limits on the central government's powers (powers it rightly assumed would be wielded by an ANC-led government). As for the eventual adoption of the Final Constitution, 'the IFP argued that since the purpose of a justiciable constitution and a bill of rights is to protect minorities from the tyranny of the majority, the minorities to be protected must give their assent to the particular framework.'<sup>177</sup> This logic would have effectively given minor parties — prior to any elections testing their popular strength — a veto over the text of the Final Constitution. The IFP decided that regular walkouts were an appropriate strategy for securing its ends. The incipient threat of civil war in Natal enabled the IFP to secure many of its aims for regional power without remaining present during constitutional talks.

The ANC and the NP were, despite the IFP's absence, able to arrive at a compromise that largely ended the impasse. The two parties agreed to a 5 year, democratically-elected interim government charged with writing the Final Constitution. Both sides lost things for which they had long pressed. The ANC accepted a limited power-sharing arrangement.<sup>178</sup> The NP gave up its demands for a mandatory coalition government and a rotating presidency.

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However, the most critical concession — by both sides — involved the creation of a set of Constitutional Principles that would be included as a schedule within the negotiated Interim Constitution. The purpose of these 34 principles was to place meaningful constraints on the ANC's ability to draft the Final Constitution. This concession provided both the NP (and the largely absent IFP) with some assurance that they would not be rendered entirely powerless — after universal franchise elections in 1994 — during the process of shaping the Final Constitution. The ANC was placated by three distinct processes. First, the Interim Constitution would go into effect after the first multi-racial elections and parties would be proportionally represented in Parliament. Second, the newly elected representatives in both Houses of Parliament would sit as a Constitutional Assembly and be required to produce the text of a Final Constitution within two years. Third, an independent Constitutional Court, staffed largely by the ANC's preferred appointees, would have the power to

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176 See Katherine Savage 'Negotiating South Africa's New Constitution: An Overview of the Key Players and the Negotiation Process' in Andrews & Ellmann (supra) at 164, 165.

177 Heinz Klug 'Participating in the Design' (supra) at 139.

178 The final agreement regarding power-sharing called for representation in Cabinet for parties gaining over 5% of the vote, a deputy-presidency for each party receiving more than 20% of the vote, and guaranteed consultation on policy matters. In an attempt to appease the NP, IFP, and Freedom Alliance, the ANC allowed for a more federalized system of government that granted increased powers to regional governments. While the NP was pleased with this compromise, the IFP and the Freedom Alliance continued their boycott of the negotiations. However, both parties decided, at the very last moment, to take part in the elections. To be precise, it was only after the Interim Constitution was amended a second time to entrench the constitutional status of the Zulu King in KwaZulu/Natal, that the IFP agreed — within days of the poll — to enter the electoral process. See Denise Atkinson 'Brokering a Miracle? The Multiparty Negotiating Forum' in S Friedman & D Atkinson (eds) *South African Review 7: The Small Miracle, South Africa's Negotiated Settlement* (1994) 13-43.



ensure that the Final Constitution — as drafted by the democratically elected Constitutional Assembly — satisfied the 34 Constitutional Principles.

Why did the Multi-Party Negotiating Forum ('MPNF') succeed where CODESA had failed? Social upheaval, mass action, and escalating violence had placed considerable pressure on the ANC and the NP to alight upon a viable solution.<sup>179</sup> But it would be a mistake to underestimate the importance of Nelson Mandela's impeccable sense of politics and timing.

On 10 April 1993, Chris Hanu — the Secretary-General of the SACP and one of the leaders of ANC's armed resistance — was assassinated. His death could easily have precipitated uncontrollable violence. Instead, Mandela directed this moment of grief, anger, anxiety and uncertainty towards the completion of the Interim Constitution and the setting of a firm date for the first universal democratic elections. Within three months, the Interim Constitution was nailed down and elections were set for 27 April 1994.<sup>180</sup>

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#### **(d) The Elections of 27 April 1994**

The first nation-wide, multiracial democratic elections were held from 26 to 29 April 1994. They took place in a surprisingly peaceful, if not ebullient, environment. Almost twenty million South Africans — an estimated 86% of the electorate — cast their ballots. The election results gave the ANC 252 seats, the NP 82 seats and the IFP 43 seats. No other party had more than 9 seats. In total, seven political parties were represented in Parliament (and thus the Constitutional Assembly.) (The IFP

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179 The Negotiation Planning Conference, the committee which planned the MPNF, tried to construct a negotiation process more conducive to building consensus among the parties. Like CODESA, the ultimate decision-making authority of the MPNF was held in a plenary session in which delegates from each represented political party were present. While decision-making within the process remained tied to the 'sufficient consensus' formula of CODESA, the momentum of the negotiations, and the realization, even among those parties who had resisted participation in CODESA — the PAC and the CP — that there was no longer any alternative to a negotiated solution, kept the process on track. The new process provided for a Negotiating Council to ratify proposals from technical committees which were charged with the clarification of various constitutional issues. These technical committees, dominated by academics and lawyers steeped in the rhetoric of liberal democratic constitutional discourse, facilitated the emergence of clear alternatives for the two parties. These technical committee members did not, of course, set the boundaries for the Interim Constitution. What they succeeded in doing, however, was to harmonize subtle differences in position and to put the provisions of the Interim Constitution in language to which the two prime movers could agree. This new technical language was then submitted to all the political parties as a basis for multilateral negotiation and agreement. See Hassan Ebrahim *The Soul of a Nation* (1998) 98.

180 The consequences of the exhaustive, technical and multi-lateral negotiation process are evident in text of the Interim Constitution (and in many respects, the Final Constitution). This process led to the inclusion of rights and provisions unique to the South African political transition: the right to economic activity (IC s 26); and the employer's right to lock out workers in the context of collective bargaining (IC s 27(5)); the explicit recognition of sexual orientation among the grounds upon which unfair discrimination is prohibited (IC s 8(2)); a specific provision guaranteeing and protecting programmes designed to enable full and equal enjoyment of rights by historically disadvantaged groups (IC s 8(3)(a)); and the right to restitution of dispossessed land rights (IC s 8(3)(b)). Another consequence of the protracted negotiations was the unavoidable tension between the guarantee of open and accountable government (IC ss 23 and 24) and the guarantee of existing civil service positions to bureaucrats whose training and professional culture had been opposed to openness, to transparency and to accountability (IC s 236(2)). See, generally, Lourens du Plessis & Hugh Corder *Understanding South Africa's Transitional Bill of Rights* (1995) 13.

withdrew from the Constitutional Assembly in 1995.<sup>181</sup>) The ANC, with 63.7% of the Constitutional Assembly delegates, was but several votes short of the two-thirds majority needed to pass the Final Constitution.<sup>182</sup> That said, the ANC also understood that no constitution would possess the requisite political legitimacy needed for a basic law unless it was the product of a consensus between most of the parties in the Constitutional Assembly.

## 2.5 The interim constitution, the constitutional assembly, 34 constitutional principles and the certification of the final constitution

### (a) The Drafting of the Final Constitution

The Interim Constitution — Act 200 of 1993 — created the conditions necessary to hold democratic elections and to administer a newly-democratic South Africa.<sup>183</sup> As we noted above, once elected, the representative parliament was to wear a second hat — that of the Constitutional Assembly. The Constitutional Assembly was charged with drafting a Final Constitution that complied with the 34 principles set out in Schedule 4 of the Interim Constitution.<sup>184</sup> The newly formed Constitutional Court was given the unprecedented authority to determine whether the Constitutional Assembly had satisfied this task.<sup>185</sup>

Within the Constitutional Assembly, the drafting process was delegated to six theme committees.<sup>186</sup> The theme committees would identify a major issue, invite

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the public to submit thoughts and proposals, and hold workshops with the various groups that would be affected by the issue.<sup>187</sup> The theme committees also consulted political experts — both from South Africa and from abroad — to better understand the complexities of the issue.<sup>188</sup>

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181 Savage (supra) at 164.

182 Ebrahim (supra) at 189.

183 *Ex Parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa, 1996* 1996 (4) SA 744 (CC), 1996 (10) BCLR 1253 (CC) ('*First Certification Judgment*') at para 13.

184 IC Schedule 4.

185 IC s 68(1). The Constitutional Assembly had to produce a final constitution within two years of its first sitting. IC s 73(1).

186 Christina Murray 'Negotiating Beyond Deadlock: From the Constitutional Assembly to the Court' in P Andrews and S Ellmann (eds) *The Post-Apartheid Constitutions: Perspectives on South Africa's Basic Law* (2001) 103, 113.

187 Ebrahim (supra) at 189

188 See Savage (supra) at 166.

This multi-committee structure soon proved overly-cumbersome. The Constitutional Assembly supplanted it with a group of about forty politicians. They combined the work of the six theme committees and wrote the initial text of the Final Constitution.<sup>189</sup>

This switch from the six committees to the one committee diminished, to a certain degree, the transparency of the process. Moreover, as the text took shape, the outstanding issues became more and more controversial. Private, bi-lateral negotiations between the ANC and the NP became increasingly commonplace as the deadline of 8 May 1996 drew near.<sup>190</sup> When the assembly was seemingly at an impasse, the chair — Cyril Ramaphosa — would often temporarily adjourn the meeting. He would then summon the chief negotiators for the ANC and the NP to work out a solution to the impasse. This tactic often proved successful.<sup>191</sup> As Savage notes: '[T]hese private . . . meetings . . . accounted for much of the progress made on the bulk of [the] chapters.'<sup>192</sup>

The certification requirement both shaped and drove the negotiations.<sup>193</sup> Many of the parties involved — including both the ANC and NP — allowed provisions into the draft text while they simultaneously planned to challenge them during certification. This process allowed disagreements over some issues, like labour relations, to be deferred.<sup>194</sup> The certification process also allowed groups outside the Constitutional Assembly to become more involved in the crafting of the Final Constitution by hiring counsel to draft written briefs and to present oral arguments in the Constitutional Court. Moreover, as power shifted to the new democratic institutions, and the constitution-drafting process took place in full view of the public, members of the Constitutional Assembly found themselves subject to greater pressures from their constituencies.<sup>195</sup>

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189 Ibid.

190 Ibid at 169.

191 See Murray (supra) at 113.

192 See Savage (supra) at 171.

193 A set of intricate tie-breaking procedures — which would kick in if other processes failed — could have led to the dissolution of the Parliament, a new general election and, ultimately, a public referendum. Such conditions provided further inducement to compromise (especially on the part of the NP).

194 See Murray (supra) at 119.

195 The degree of public exposure to and participation in the constitution-drafting process is probably without historical precedent. Hundreds of public meetings were held to advertise the drafting of the Final Constitution and to invite public participation in the process. The Constitutional Assembly published its own monthly newsletter, *Constitutional Talk*, to publicize events related to the development of the Final Constitution. In addition to extensive television and radio coverage, the evolution of the Final Constitution from first draft to final product could be followed on a daily basis on the internet site of the Constitutional Assembly.

Collectively, these conditions produced several results that distinguished the drafting of the Final Constitution from the drafting of the Interim Constitution. Whereas the parties at CODESA and the MPNF had felt obliged to draw the Inkatha Freedom Party into the negotiated constitutional settlement, no such imperative existed in the Constitutional Assembly. When the IFP walked-out from the Constitutional Assembly, the remaining parties simply went about the task of drafting the constitution. Given the established parameters of the 34 principles and the ANC's clear electoral dominance, far fewer incentives existed for the ANC to accommodate IFP concerns.

In respect of almost all the controversial clauses, the consensus ultimately reached tended to favour the ANC. So while the property clause (FC s 25) might appear less expansive than IC s 28, its compromises are largely offset by a comprehensive package of land rights. With regard to labor rights, the ANC succeeded in making the right to economic activity even more attenuated than it had been in the Interim Constitution and having the right to lock out entirely removed. The unexpectedly contentious right to education in a mother tongue in public schools was worked out on the day before the draft of the Final Constitution draft was due. The ANC would simply not allow the state to be subject to an absolute obligation to fund culturally exclusive schools.<sup>196</sup>

The National Party briefly contemplated a confrontation with the ANC over three issues: property, lock-outs and cultural schools. However, the dynamics of the new constitution-drafting process left it no option but to back down. It faced the prospect of a referendum in the event of a failure by the Constitutional Assembly to pass a new constitutional text by a two-thirds majority.<sup>197</sup> On 8 May 1996, 87 per cent of the members of the Constitutional Assembly voted in favour of a new constitutional text. The missing 13 per cent represented the IFP members who had walked out, the Vryheidsfront members who had abstained (largely with respect to issues surrounding cultural schools), and the two African Christian Democratic Party members who voted against the text on religious doctrinal grounds.

Following its adoption by the Constitutional Assembly, the new constitutional text was submitted to the Constitutional Court. All political parties represented in the Constitutional Assembly — other than the ANC and the PAC — lodged objections with the Constitutional Court. In addition, 84 private parties objected. The political parties and 27 private parties were given the right to make oral submissions to the Court in a certification hearing which lasted nine days.<sup>198</sup>

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On 6 September 1996, the Constitutional Court delivered its unanimous judgment. It refused to certify the initial text of the Final Constitution. And yet the response to this rebuke was mild to say the least. The Constitutional Assembly effected the necessary amendments to the draft — in answer to the Constitutional

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196 See Savage (supra) at 176. See also Brahm Fleish & Stu Woolman 'On the Constitutionality of Single Medium Public Schools' (2007) 23 *SAJHR* 34. The ANC's victory led to the FF's abstention from voting on the text of Final Constitution.

197 IC s 73(6)

198 *First Certification Judgment* (supra) at paras 24–25. A schedule of all of the objectors — and the clauses to which they objected — appears as Annexure 3 to the judgment.

Court's findings — on 11 October 1996.<sup>199</sup> This revised text was, in turn, submitted to the Constitutional Court. On 4 December 1996, the amended text was certified.

## **(b) Law, Politics and the First Certification Judgment**

The Constitutional Court's finding that the initial text of the Final Constitution was unacceptable, despite its adoption by eighty-six percent of the democratically-elected Constitutional Assembly, was an extraordinary assertion of the power of judicial review. Having a judicial body declare a constitution 'unconstitutional' was without precedent, and the uniqueness and potential perils of such a determination were not lost upon the Court. The Constitutional Court was careful to point out in its unanimous opinion, that 'in general and in respect of the overwhelming majority of its provisions', the Constitutional Assembly had met the predetermined requirements of the Constitutional Principles.<sup>200</sup>

### **(i) Law and Politics**

The Interim Constitution offered little guidance to the Constitutional Court as to how it should determine whether the new text was in accord with the 34 Constitutional Principles.<sup>201</sup> The Constitutional Court therefore went to great lengths to explain its methodology. The Court claimed that its function was strictly legal, not political. In other words, it had a 'judicial not a political mandate',<sup>202</sup> that 'the wisdom or correctness' of the new text of the Final Constitution was left to the Constitutional Assembly,<sup>203</sup> and that it had 'no power, . . . and no right to express any view on the political choices made by the (Constitutional Assembly) in drafting the (New Text).'<sup>204</sup>

In strictly logical terms, an infinite number of texts could have satisfied the requirements of the 34 principles. The Court's role was not to select its preferred text from amongst the infinite number of potentially certifiable texts. Its role was limited to ensuring that the Constitutional Assembly had selected a compliant text.

In justifying this legal, as opposed to political, approach, the Court emphasized that the Interim Constitution created a 'solemn pact' between the negotiating parties to create a Final Constitution that adhered to the specified Constitutional Principles. To honour that pact, the Court stressed that despite the overwhelming support for the new text in the democratically elected assembly, it must send the

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constitutional text back for further revision. The Court's patient — 400 page — clause by clause expatiation of the new text reflected a nuanced and politically

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199 Currie and De Waal (supra) at 6.

200 *First Certification Judgment* (supra) at para 31.

201 See Ziyad Motala and Cyril Ramaphosa, *Constitutional Law: Analysis and Cases* (1998) 11.

202 *First Certification Judgment* (supra) at para 27.

203 *Ibid* at para 39.

204 *Ibid* at para 27.

sensitive response: one largely devoid of 'technical rigidity'.<sup>205</sup> By focusing strictly on the text of the CPs and their relationship to the new text, the Court undertook every conceivable effort to demonstrate that its decisions were not an exercise of political judgment, but simply the application of careful analytic legal reasoning.

Once the Final Constitution was certified, the certification was final and non-reviewable. This aspect of the certification process made the interpretive techniques of the Constitutional Court all the more important. It was clear then, and remains clear now, that more than one reasonable interpretation of a constitutional provision could have been given. In such instances, the Court utilized an interpretive technique 'designed to facilitate certification' and 'to avoid interpretations which would prevent certification'.<sup>206</sup>

This methodology creates several interpretative difficulties. First, the commitment to *stare decisis* and precedent means that all future decisions by any court that interpreted a provision of the Final Constitution must interpret that provision in a manner consistent with interpretation offered by the Constitutional Court in *First Certification Judgment*. Second, as we discuss below, the Court did not always analyze the meaning of the new text as it was intended by the Constitutional Assembly: it actually placed its own gloss on several provisions of the new text that were susceptible to multiple interpretations. Thus, despite its initial claims that its judgment was purely legal and in no way political, the Court did adopt interpretations of the new text that clearly reflected a preferred political reading of the new text.

## **(ii) The Grounds for Non-Certification: Institutional Concerns, the Rule of Law, Constitutionalism**

The Constitutional Court rejected the new text on nine discrete grounds.<sup>207</sup> An analysis of the *First Certification Judgment* reveals an interesting pattern. The local

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government issues upon which certification was refused clearly failed to comply with the applicable constitutional principles. Excise taxes were simply not appropriate vehicles for local government financing. Furthermore, the scanty provisions of Chapter 7 of the new text could hardly be said to amount to a framework for the 'structures and powers of local government'. The collective bargaining provision in the new text also left little scope for certification.

However, in respect of all the other grounds for refusing certification, the Court could have rather easily gone the other way.<sup>208</sup> That it chose to reject the

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clauses in question is significant. All of them, to a greater or lesser extent, interfered or threatened to interfere with institutions and mechanisms designed to protect the rule of law and the project of constitutional democracy. The *First Certification Judgment* ensured that it would be more difficult to amend the Final Constitution, and the Bill of Rights in particular, that there would be greater independence for the Public Protector, Public Service Commission and Auditor General, and that no specific pieces of legislation could be placed beyond constitutional scrutiny. Even the

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205 *First Certification Judgment* (supra) at para 36.

206 Matthew Chaskalson & Dennis Davis 'Constitutionalism, the Rule of Law, and the First Certification Judgment' (1997) 13 SAJHR 430, 433-434.

question of reduced provincial powers, which was the most politically controversial topic canvassed at the certification hearings and which takes up almost half of the judgment, was ultimately cast as a question of judicial power and independence. The judgment was constructed in such a manner so as to make clear to the Constitutional Assembly that all it had to do to clear these various hurdles was to follow the dictates of the *First Certification Judgment*.

The *First Certification Judgment* reflects to a large degree how the Constitutional Court was able to assert its own views about the signal features of a constitutional democracy. That assertion demonstrates, in turn, the institutional confidence the Constitutional Court secured in its first eighteen months of operation and the degree

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207 The nine elements identified in the first certification judgment as failing to comply with certain constitutional principles were: (1) Section 23 of the new text conferred a right to engage in collective bargaining on employers' associations but not on individual employers. The court held that Principle XXVIII required that individual employers should have a constitutional right to engage in collective bargaining. *First Certification Judgment* (supra) at para 69. (2) Section 74 of the new text provided for the amendment of the Constitution by a two-thirds majority of the National Assembly. This, the court stated, failed to comply with Principle XV, which required special procedures as well as special majorities for the passing of amendments to the Constitution. Ibid at paras 152-6 It also failed to comply with Principle II because it did not entrench the Bill of Rights by giving its provisions greater protection from amendment than was given to the rest of the Constitution. Ibid at paras 157-9. (3) Section 194 of the new text provided for the removal of the Public Protector and the Auditor General on the grounds of misconduct, incapacity or incompetence, if a committee composed proportionally of all the members of the National Assembly made a finding to that effect which was confirmed by a formal resolution of the National Assembly. This was held to infringe Principle XXIX in that it failed adequately to safeguard the independence of the Public Protector and Auditor General. Ibid at paras 163-5. (4) Section 196 of the new text provided for a Public Service Commission, but did not specify its functions and powers. This was held to be in contravention of Principle XXIX, a tacit requirement of which was the existence of an independent and impartial Public Service Commission. The court held that it could not certify the capacity of the Public Service Commission to exercise its powers independently unless those powers were entrenched in the Constitution itself. Ibid at para 176. It also held that an analysis of the powers of the Public Service Commission over provincial administrations was necessary for an evaluation of compliance with Principles XVIII.2 and XX, which concerned the powers and autonomy of the provinces. As s 196 of the new text neither provided for provincial service commissions nor placed any express limits on the powers of the Public Service Commission over provincial administrations, it was not possible to certify that Principles XVIII.2 and XX had been complied with. Ibid at para 177. (5) Section 229(1) of the new text gave local government a constitutionally entrenched power to raise excise taxes. It was held that this included the power to impose taxes which were inappropriate for municipalities. This contravened Principle XXV, which required the provision of 'appropriate fiscal powers and functions for different categories of local government'. Ibid at paras 303-5. (6) Section 241(1) of the text purported to place the Labour Relations Act (Act 66 of 1995) beyond constitutional scrutiny, but did not incorporate the provisions of the Act into the Constitution. This was held to be impermissible because Principle IV required the Constitution to be supreme and Principles II and VII required that the Bill of Rights be justiciable and enforceable. Ibid at para 149. (7) Clause 22(1)(b) of Schedule 6 of the new text similarly contravened Principle IV because it purported to place the Promotion of National Unity and Reconciliation Act 34 of 1995 beyond constitutional scrutiny. Ibid at para 150. (8) Chapter 7 of the new text dealt with local government. It infringed a number of principles. It created no 'framework for the structures' of local government. Ibid at paras 300-301. It did not differentiate between categories of local government. Ibid at paras 300-301. Finally, it failed to set out formal legislative procedures which had to be followed by local government. Ibid at para 301. (9) The Constitutional Court also held that Principle XVIII.2 was not satisfied by the new text because the powers and functions given to the provinces were substantially less than or inferior to those which the provinces enjoyed under the interim Constitution. Principle XVIII.2 is examined in paras 306-481. The Court summarizes its views on non-compliance with the principle at paras 471-481. The finding of the court with respect to Principle XVIII.2 was very narrowly stated. It identified a reduction of provincial powers in the areas of policing, education, local government, and traditional leadership, but stated that this alone would not contravene Principle XVIII.2. The Court wrote: 'Seen in the context of the totality of provincial power, the curtailment of these four aspects of the Interim Constitution schedule 6 powers would not in our view be sufficient in themselves to lead to the conclusion that the powers of the provinces taken as a whole are substantially less than or substantially inferior to the powers vested in them under the Interim Constitution.' Ibid at para 479. It was only when this reduction of power over specific matters was

to which constitutionalism and the rule of law had been accepted by most South African political actors by the end of 1996. The fact that none of the political parties questioned the legitimacy either of the certification process itself or of the particular decisions taken by the Constitutional Court during the certification process offers quite a positive, if implicit, commentary on the new democracy's commitment to its constitutional principles.

### (c) The Amended Text and the Second Certification Judgment

As the Constitutional Court anticipated at the conclusion of its non-certification opinion, the rejected provisions of the new text of the Final Constitution did not cause any major complications in the negotiating process. After the Court's opinion was handed down, the Constitutional Assembly was quickly recalled in order to pass an amended text that satisfied the Constitutional Principles. Although, in theory, the entire constitution-making process could have been reopened,<sup>209</sup> the major parties confined themselves to amendments designed to overcome the concerns expressed by the Constitutional Court in the *First Certification Judgment*. On 4 December 1997 the amended text received the stamp of approval of the Constitutional Court in the *Second Certification Judgment*.<sup>210</sup> The amended text was promulgated by the President on 18 December 1996 and took effect as the Final Constitution on 4 February 1997.

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## 2.6 The consolidation of constitutional democracy

### (a) Constitutional Amendments

The Final Constitution has been amended thirteen times since its inception. Most of the amendments have been administrative in nature: changing the wording of the presidential oath;<sup>211</sup> setting forth more detailed procedures for financial legislation and administration;<sup>212</sup> changing municipal districts;<sup>213</sup> and extending the terms of

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combined with the greater scope for national legislation to override conflicting provincial legislation that the court concluded that the overall reduction of provincial powers was substantial. In particular, the Court expressed concern at clause 146(4) of the new text, which would have created a presumption that national legislation passed by the National Council of Provinces prevailed over conflicting provincial legislation.

208 See further Chaskalson & Davis (*supra*) at 430.

209 Once the court had refused to certify the original text as a whole the Constitutional Assembly was not bound to retain those elements of the text which had passed the scrutiny of the Constitutional Court.

210 *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Amended Text of the Constitution of the Republic of South Africa, 1996 1997 (2) SA 97 (CC), 1997 (1) BCLR 1 (CC).*

211 Constitution First Amendment Act of 1997 (previously referred to as Act 5 of 1997).

212 Constitution First Amendment Act of 2001 (previously referred to as Act 34 of 2001).

213 Constitution First Amendment Act of 1998 (previously referred to as Act 87 of 1998).



Constitutional Court judges.<sup>214</sup> The exceptions — as discussed elsewhere in this treatise<sup>215</sup>— are amendments 8,<sup>216</sup> 9<sup>217</sup> and 10<sup>218</sup>. These amendments govern legislative floor-crossing at the municipal, the provincial, and the national level, respectively. However, even these amendments — which appeared to threaten the continued existence of minority parties — have proved relatively inconsequential.<sup>219</sup>

Taken together, the first thirteen amendments have not materially altered the Final Constitution. Thus, despite its considerable majorities in the national legislature, the ANC has not, as yet, used its legislative power to enact major changes to the negotiated peace settlement reflected in our Interim Constitution and our

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Final Constitution. This state of affairs has enabled the political institutions established in 1994 — though still fragile — to consolidate the underlying commitment to the formal and the substantive transformation of South African society.

### **(b) The Proposed and Mothballed 14th Amendment Bill**

Perhaps the only amendment bill that has generated genuine concern over the solidification of our constitutional democracy has been the Constitution of the

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214 Constitution First Amendment Act of 1999 (previously referred to as Act 3 of 1999).

215 See Glenda Fick 'Elections' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, June 2004) Chapter 29.

216 Constitution Eighth Amendment Act of 2002 (previously referred to as Act 18 of 2002)(Municipal floor-crossing).

217 Constitution Ninth Amendment Act of 2002 (previously referred to as Act 21 of 2002)(NCOP floor-crossing).

218 Constitution Tenth Amendment Act of 2003 (previously referred to as Act 2 of 2003)(National assembly and provincial legislature floor-crossing).

219 The Final Constitution' provides for representative democracy primarily in terms of the proportional representation of persons who appear on party lists. FC s 46(1)(d). This principle was somewhat weakened by the eleventh and twelfth amendments. The amendments seek to add some flexibility to representation in Parliament and in provincial legislatures by allowing elected officials to 'cross the floor' to another party and still keep their seat. The system essentially works as follows. If a political party has ten seats in the National Assembly and one of its members wishes to join another political, then her seat is transferred from one political party to the other party (the 10% rule). One party therefore loses a seat in Parliament and the other party gains the seat. Formally, floor-crossing appears incompatible with the notion of proportional representation. Voters in a proportional representation system choose a party, not an individual. However, the Constitutional Court, when faced with a challenge to both the legislation and the amendments that underpin floor-crossing, demurred. On their rather thin conception of democracy — as enshrined in various provisions of the Final Constitution — the occasional window for floor-crossing did not undermine the basic commitment to multi-party democracy based upon proportional representation. See *United Democratic Movement v President of the Republic of South* 2003 (1) SA 495 (CC), 2002 (11) BCLR 1179 (CC). For a critique of this thin conception of representative democracy, and for a more robust account of what democracy means in our Final Constitution, see Theunis Roux 'Democracy' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, July 2006) Chapter 10.

Republic of South Africa Fourteenth Amendment Bill.<sup>220</sup> The Bill proposed: a division of 'judicial' and 'administrative' functions in the court system that would give the executive substantial control over the activities of the judiciary; the prohibition on adjudicating on laws before they commence; and the executive appointment of judges-president and of acting judicial leadership. Both the judiciary and the legal fraternity expressed their deep disapproval over what they considered to be a significant encroachment upon the judiciary's independence.<sup>221</sup> (The Bill also proposed the creation of a unitary court system in which the Constitutional Court would sit at the apex. This proposal did not elicit much criticism: indeed a Supreme Court of Appeal judge, Carole Lewis, expressly endorsed this move.<sup>222</sup>)

Judicial independence is grounded FC s 165: 'Courts are independent and subject only to the Constitution and to law.' Since the Final Constitution came into effect, the Constitutional Court has sought, in any number of different ways, to insulate the judiciary from the hurly burly of democratic politics. In particular, it has attempted to create a judiciary that possesses nearly unfettered control over its budgeting and personnel decisions.<sup>223</sup>

The threat of the Bill flows from placing the administration of the courts under the Minister of Justice and Constitutional Development, removing the court's jurisdiction to decide matters regarding the suspension of an act of Parliament prior to its commencement (the so-called 'ouster clause') and diminishing the decision-making power of the Chief Justice and the Judicial Services Commission. As Cathi Albertyn notes:

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The central problem is that the amendment does not take account of the fact that our evolving model of judicial independence, in line with the Constitution and international trends, is moving away from the system of close executive administration practiced under apartheid. This evolving model envisages at least partial judicial control, if not full autonomy, over finances and administration. In this context, a constitutional amendment that confers authority on the Minister alone for 'the administration and budget of all courts', without qualification, is a regressive move.<sup>224</sup>

The Amendment — Albertyn and others contend — would reverse the trend of the last decade toward an increasingly independent judiciary and bring about 'a pattern

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220 *Government Gazette* 28334 GN 2023 (14 December 2005).

221 See Cathi Albertyn 'Judicial Independence and the Constitution Fourteenth Amendment Bill' (2006) 22 *SAJHR* 126. (Albertyn notes: 'At a Colloquium organized by the General Council of the Bar on 17 February 2006, the former Chief Justice, Arthur Chaskalson and the current Chief Justice, Pius Langa, both expressed their concerns with provisions that restricted the evolving model of judicial independence. On the same day, veteran human rights lawyer, George Bizos SC made a public speech condemning the Bills. 'Judiciary under threat, Bizos says' *Business Day* (20 February 2006).)

222 See Carole Lewis 'Reaching the Pinnacle: Principles, Policies and People for a Single Apex Court in South Africa' (2005) 21 *SAJHR* 509 (On the role of the Constitutional Court as the apex court and the rationalisation of the system of appeals.)

223 See Albertyn (*supra*) at 131. See also *S v Van Rooyen* 2002 (5) SA 246 (CC), 2002 (8) BCLR 810 (CC) at para 75 (Court describes the evolutionary steps taken over the previous decade to establish the independence of the judiciary.)

224 Albertyn (*supra*) at 136.

of creeping executive power at the expense of the judiciary.<sup>1225</sup> The ouster clause, while of limited practical effect, would represent a symbolic erosion of the Court's ability to provide a check on Parliament's power.<sup>226</sup> In the end, the executive backed down. And while it is too early to say that the battle is over,<sup>227</sup> the shelving of this Bill points to the further consolidation of our constitutional democracy.

### **(c) Dignity, Democracy, and Legality and the Potemkin Constitution**

In this last section, we want to offer some final observations about our Potemkin Constitution. Fourteen years after political liberation, we have little doubt about the dramatic legal changes that have been brought about by the new constitutional order. Our commitment to dignity demands that we no longer treat individuals as mere means; democracy means that everyone can exercise the franchise; and legality principle means that the State must behave in a rational manner when it chooses to act or when it fails to react.<sup>228</sup> We have overcome the meanest, cruelest features of the apartheid state.

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225 Ibid at 132.

226 Ibid at 137.

227 See Theunis Roux 'A Thinkpiece on the 14 Amendment Bill' *Seminar on the Constitution Fourteenth Amendment Bill, 2005* (University of Cape Town, 2005)(Manuscript on file with authors)(Notes that executives in constitutional democracies always attempt to influence, if not control, the behaviour of the judiciary. Thus, while the Bill may not be sound, it does not constitute as radical a departure from international practice as some might suggest.)

228 Albert Dicey identified three essential features of the rule of law or the doctrine of legality. Albert Dicey *Introduction to the Study of the Law of the Constitution* (1959, 10th Edition) 187. Dicey claimed that the rule of law was present where, firstly, absolute supremacy of law existed — and not the mere exercise of arbitrary power. Secondly, the courts must administer a system in which all ordinary laws treat all persons equally. Thirdly, Dicey believed that constitutional law necessarily required the protection of individual rights. We prefer John Finnis' account. As John Finnis somewhat cheekily puts it, 'the Rule of Law' is 'the name commonly given to the state of affairs in which a legal system is legally in good shape'. John Finnis *Natural Law and Natural Rights* (1980) 270. Here are some of the features of a legal system in good shape:

- (i) its rules are prospective, not retroactive, and (ii) are not in any other way impossible to comply with; . . . (iii) its rules are promulgated, (iv) clear, and coherent one with another; . . .
- (v) its rules are sufficiently stable to allow people to be guided by their knowledge of the content of rules; . . . (vi) the making of decrees and orders applicable to relatively limited situations is guided by rules that are promulgated, clear, stable, and relatively general; and . . .
- (vii) those people who have authority to make, administer and apply the rules in an official capacity (a) are accountable for their compliance with rules applicable to their performance and (b) do actually administer the law consistently and in accordance with its tenor.

Ibid at 270—271. For more on the 'rule of law', see Stu Woolman & Henk Botha 'Limitations' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, July 2006) Chapter 34. Finnis' description of the rule of law coheres with Woolman and Botha's account of the formal features of law of general application (for the purposes of limitations analysis.) It is worth stopping a moment to interrogate Finnis' first remark a little more closely. The rule of law, he says, describes a legal system 'legally' 'in good shape'. Finnis is being neither funny nor tautological. What he means is that in an age such as ours, where the ideals of legality and the Rule of Law . . . enjoy[s] an ideological popularity, . . . conspirators against the common good will regularly seek to gain and hold power through an adherence to constitutional and legal forms which is not the less 'scrupulous' for being tactically motivated, insincere and temporary. Thus, the Rule of Law does not guarantee every aspect of the common good and sometimes it does not even secure the substance of the common good.

Although the aforementioned commitments to dignity, democracy and legality can be given radical substantive content, it is, perhaps, in the nature of peaceful, negotiated constitutional transformations that these constitutional commitments have remained, for the moment, largely formal. Neither the African National Congress nor the majority of black South Africans have opted for the radical change proffered by Steve Biko. And, in the current climate of globalized, state-enforced capitalism — in which, ironically, notionally communist China may well be the best example — radical transformations of the kind envisaged by Biko may well be impossible. But that does not mean that the denial of the promise of liberation to a majority of South Africans may not have radical consequences. Recent riots over scarce resources augur ill. The failure of government to address the root causes of such discontent likewise causes one to wonder whether the centre will hold.

That said, this book is a book about the content of South African constitutional law. And in so far as the purposes — and the narrow vision — of this book are concerned, the centre has indeed held.<sup>229</sup>

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Finnis (supra) at 274. In sum, a commitment to the rule of law is a necessary but insufficient condition for a just or a fair society. As Finnis observes, regimes that are exploitative or ideologically fanatical or some mixture of the two could submit themselves to the constraints imposed by the rule of law if it served the realization of their narrow conception of the good. Indeed, both Stephen Ellmann and David Dyzenhaus argue persuasively that South Africa under apartheid was an exploitative and ideologically fanatical regime committed to the rule of law. Stephen Ellmann *In a Time of Trouble: Law and Security in South Africa's State of Emergency* (1992); David Dyzenhaus *Hard Cases in Wicked Legal Systems: South African Law from the Perspective of Legal Philosophy* (1991). Why would a fanatic or an ideologue bother? Because by abiding by the rule of law, the ideologue can disguise his malignant intent. That said, while the rule of law did constrain the South African state — and even allowed for a cramped conception of human rights — few would allow that it was fair or just. What was missing was any real commitment to individual dignity and the sense that the purpose of the state was to enable all persons to 'constitute themselves in community'. Finnis (supra) at 274. It should come then as no surprise that the two most important — and somewhat novel — constitutional doctrines developed by the Constitutional Court in its first decade of operation turn on a robust and substantive conception of the rule of law and an account of dignity that makes it a grundnorm for the Final Constitution. See Frank Michelman 'The Rule of Law, Legality and the Supremacy of the Constitution' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, February 2005) Chapter 11; Stu Woolman 'Dignity' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2005) Chapter 36. Quite unlike the regime of law authorized by apartheid, the new dispensation recognizes that its legitimacy is conditional upon the state's commitment to act for the 'general' welfare and to treat all individuals as worthy of equal concern and respect.

229 See Stu Woolman 'The Potemkin Constitution' *Without Prejudice* (December 2008).