

CONSTITUTIONAL TRIUMPHS, CONSTITUTIONAL DISAPPOINTMENTS

The 1996 South African Constitution was promulgated on December 18, 1996 and came into effect on February 4, 1997. Its aspirational provisions promised to transform South Africa's economy and society along non-racial and egalitarian lines. Following the twentieth anniversary of its enactment, this book co-edited by Rosalind Dixon and Theunis Roux examines the triumphs and disappointments of the Constitution. It explains the arguments in favor of the Constitution's being replaced with a more authentically African document, untainted by the necessity to compromise with ruling interests predominant at the end of apartheid. Others believe it remains a landmark attempt to create a society based on social, economic, and political rights for all citizens, and that its true implementation has yet to be achieved. This book considers whether the problems South Africa now faces are of Constitutional design or implementation, and analyzes the Constitution's external influence on constitutionalism in other parts of the world.

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Frontmatter
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Constitutional Triumphs, Constitutional Disappointments

A CRITICAL ASSESSMENT OF THE 1996
SOUTH AFRICAN CONSTITUTION'S LOCAL
AND INTERNATIONAL INFLUENCE

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Contents

<i>Contributors</i>	<i>page</i> vii
<i>Foreword</i>	ix
Professor Frank I. Michelman	
1 Introduction	1
<i>Rosalind Dixon and Theunis Roux</i>	
2 Mission in Progress: Toward an Assessment of South Africa's Constitution at Twenty	25
<i>Catherine O'Regan</i>	
3 The Performance of Socio-economic Rights in the South African Constitution	45
<i>David Bilchitz</i>	
4 Proceduralism's Promise: The Constitutional Court, Social and Economic Rights and Democracy	88
<i>Steven Friedman</i>	
5 Corruption, the Rule of Law and the Role of Independent Institutions	108
<i>Heinz Klug</i>	
6 Violence against Women in South Africa: Constitutional Responses and Opportunities	141
<i>Beth Goldblatt</i>	
7 Toward Reparative Transformation: Revisiting the Impact of Violence Against Women in a Post-TRC South Africa	174
<i>Andrea Durbach</i>	

8	The Constitutional Goal of Transforming Education: The South African Constitutional Court in Comparative Perspective	199
	<i>Julie C. Suk</i>	
9	Race, Inclusiveness and Transformation of Legal Education in South Africa	223
	<i>Penelope Andrews</i>	
10	The Contribution of the South African Constitution to Kenya's Constitution	252
	<i>Jill Cottrell Ghai and Yash Ghai</i>	
11	Multi-Stage Constitution-Making: From South Africa to Chile?	294
	<i>Joel Colón-Ríos</i>	
12	A Cure for Coups: The South African Influence on Fijian Constitutionalism	312
	<i>Coel Kirkby</i>	
13	Policing Democracy: The Influence of South Africa's Postapartheid Security Arrangements on Police Oversight under Kenya's 2010 Constitution	341
	<i>Richard Stacey</i>	
14	The Diffusion of South African-Style Institutions? A Study in Comparative Constitutionalism	359
	<i>Charles Fombad</i>	
15	Constitutionalism, Legitimacy, and Public Order: A South African Case Study	388
	<i>Aziz Z. Huq</i>	
16	South African Social Rights Jurisprudence and the Global Canon: A Revisionist View	406
	<i>David Landau</i>	
	<i>Index</i>	429

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Foreword

That the South African Constitution is a compromise document located within the context of the triumphalist ascendancy of a global liberal legal ideology at the end of the twentieth century does not detract from its transformative potential. To discount this possibility and what it has meant for South Africans is almost to ignore the potency of rights and dignity.

Penelope Andrews (Chapter 9, p. 246)

These words from Penelope Andrews' contribution to the collection that follows are ones that sound, to my ear, a keynote for the whole. Dean Andrews' clear-eyed placement of the Constitution in suspense between the ideological and the universal, combined with her refusal even then to let go the liberal hope of transformation-through-constitution, are hallmarks, as I see them, of this book.

A "constitution," as that term figures throughout the collection, is a *basic, legal, scriptural* production. "Scripture" means the constitution is a publicly identified corpus of canonically worded prescriptive sentences, laid down in advance and fixed until duly amended. "Legal" means these sentences carry the status and force of law within an institutional complex where specialized authorities decide on questions of application and compliance and hand out declarative and other sanctions for noncompliance. "Basic" means these scriptural legal sentences set institutional and procedural protocols and conditions for the generation and validity of any further law for the country whose constitution they compose, and for the conduct of legal administration therein.

Now, it is not strictly necessary that any society at any time has in place a "constitution" of the basic legal scriptural type. Modes of social ordering we call customary, which apparently can succeed under favorable conditions,

do not. The idea of any well-ordered society's need for a basic legal scripture, upon which to found and conduct a lawful and regular process of government, is not itself a human universal but rather belongs to an historically particular body of ideas, that of modern liberal constitutionalism. Every reference in this book to South Africa's "Constitution" enters into that tradition, at least to the point of assuming a space in that country's affairs for a basic legal scripture and perceiving the Constitution in the light of a text designed to fill that space.

There can be no doubting the accuracy or aptness of that perception. It was perhaps overdetermined, by sundry causes, that South Africa should have put into place a constitution of that type at the time of transition away from the apartheid regime. First, the old order had had in force its own basic-legal-scriptural constitution, and any effective displacement of that order by a successor may have seemed more or less inevitably to involve a displacement and replacement of *its* constitution by a new one. Second, aims for a mainly peaceful succession of regimes required some space or platform for a negotiation of terms, which a constitution of that type would have seemed perfectly designed to supply. Third, the transition took place within that very ascendancy of liberal legal ideology to which Dean Andrews adverts, at a historical high-water moment of widespread enthusiasm for (these words from the editors) "liberal constitutionalism as the internationally preferred political system," and of course the leaders of the transition could not have proceeded without due regard to the opinions of mankind.

Fourth, it seems that prevailing forces within the ANC itself may have formed (as suggested below by Jill Cottrell Ghai and Yash Ghai) their own considered, value-based preference for a "liberal-democratic constitution." But then please note that "liberal-democratic" carries us beyond the broad idea of a government chartered by a scriptural basic law. That term takes us into the more detailed structural space of institutional checks and balances, and furthermore into the substantive-value space – as the new South African Constitution announces right off the bat – of the redemption of human dignity, "the achievement of equality," "non-racialism," "non-sexism," and in general "the advancement of human rights and freedoms." However notably "post"-liberal and transformative the South African instrument doubtless also is, that instrument is instantly and easily – and very noticeably so by the authors here – placed safely within bounds of the broadly speaking liberal tradition of constitutional democracy.

Expressly or tacitly, every contributing author to this book accepts and embraces this very salient fact about the Constitution of the Republic of

South Africa 1996. None shows inclination to regard it as possibly a historic misstep for the country. Elsewhere one reads doubts or denials that any possible practice of liberal constitutionalism, no matter how relatively or professedly left-leaning, could possibly have led a country under the conditions of South Africa toward the transformative ends declared by the South African version. Sceptics worry that transformative ends are already at the start defeated by a constitutionalistic instinct to limit and contain – as opposed to empower and obligate – the state; or that they are blocked by a liberal priority to insulate from social responsibility a “private sphere,” or a liberal propensity to fall back on proceduralistic (hence inevitably compromised) responses to intractable social conflicts; or that an African cultural *milieu* is out of joint with liberal elevations of subjective entitlement over associative obligation and of contestation over consensus as the medium of joint decision, or even with the very notion of a “law” distinct from other social norms and segregated therefrom into specialized institutional authorities and discourses.

Some of the work here reports with concern such dim views of the prospects in South Africa for what the editors call a “constitutionally led” transformation of society. None that I could see finally buys into them. Taken as a group or taken one by one, these chapters report a mix of achievements and shortfalls, and so also a mix of signs both attractive and aversive for onlookers in countries seeking to learn from South African trailblazing. The lesson-topics range through stages of a constitution’s life history, from the processes of its birthing, to its main structural components, to the wordings of its clauses, to the applicative works of courts engaged in value-filling, doctrinal construction on the footprint laid by the text, to the manner of engagement with the constitution by state officials and agencies, and the responses of civil-society actors, educators, and sectors of the populace at large.

The proportions of commendation and critique vary from chapter to chapter, but they all, so far as one can read, share with Justice O’Regan a reluctance to conclude that grievous shortfalls in achievement to date of the Constitution’s social-transformative aims are rightly attributable to the “constitutional framework” itself. Rather, these papers conduct their critical appraisals against – as the editors say – the backdrop of a “universal” set of “understandings of a constitution’s role in promoting democracy, the rule of law, and substantive equality, security, and freedom for all citizens.” The authors engage in a kind mid-course stock-taking, in a search they all apparently continue to support, for apt and workable specifications, in South African conditions, of that set of understandings. They look for corrections

of course accomplishable within the bounds of the broadly liberal constitutionalist idea and without upsetting the South African transformative constitutional applecart. So far as appears in these pages, their faith remains (I draw here on again on words of Penelope Andrews with which I began) in the transformative potential of a pursuit of “rights and dignity” by the means of law, which the Constitution, under stress, continues in their view – and in mine – to represent.

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