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## Introduction

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The 1990s were a time of great global optimism about the possibilities of constitutionally limited democratic government. The dominant belief among Western commentators at the time was that the end of the Cold War presented a unique opportunity to entrench liberal constitutionalism as the internationally preferred political system. By learning from past experience, it was thought, constitutions could be designed not only to persuade reluctant authoritarian rulers to hand over power, but also to institutionalize democratic government in the countries concerned. If the 1990s represented the high point of the third wave of democracy, liberal constitutionalism was seen as its principal vehicle.<sup>1</sup>

The 1996 South African Constitution was in many ways at the center of this enterprise. Following the contribution made by South Africa's liberation struggle to the global human rights movement, there was extensive international involvement in the drafting and conceptualization of the constitutional text.<sup>2</sup> On its enactment, the Constitution was hailed as a remarkable document, with numerous state-of-the-art provisions. While addressed to the uniquely South African situation, the Constitution was also looked on as an experiment of sorts in translating lessons learned from past experience, through the medium of constitutional design, into social and political practice. The African National Congress (ANC), with its proud tradition of democratic

<sup>1</sup> On the wave of liberal-democratic constitution-making after the end of the Cold War and the optimism attached to constitutional courts as democratic stabilizers, see S. Issacharoff, *Fragile Democracies: Contested Power in the Era of Constitutional Courts* (Cambridge: Cambridge University Press, 2015).

<sup>2</sup> The seminal study of this phenomenon remains H. Klug, *Constituting Democracy: Law, Globalism and South Africa's Political Reconstruction* (Cambridge: Cambridge University Press, 2000).

struggle and stated commitment to human rights,<sup>3</sup> was seen as the ideal custodian of this project. The Constitutional Court in turn, with its widely admired judges, seemed ideally placed to breathe life into the constitutional text and in so doing contribute to international understanding of the transformative possibilities of judicially enforced constitutional rights.

Twenty years later, many of these hopes have been realized, but others have not. The Constitutional Court, for its part, has arguably surpassed expectations. Its decisions on the right to housing,<sup>4</sup> same-sex marriage,<sup>5</sup> and HIV/AIDS treatment<sup>6</sup> have demonstrated how a sympathetic group of judges, backed by a well-crafted constitution, can assist civil society groups in driving meaningful social change, even in the face of a reluctant ruling elite. At the same time, the 1996 Constitution has served as a model for constitutional revival on the African continent and beyond. In countries as diverse as Kenya, Tunisia, and Nepal, there has been a renewed commitment to constitutionalism, in part because of the demonstration effect of the South African experience.

The picture is not uniformly rosy, however. To the extent that poverty, gender violence, and political corruption remain deeply entrenched, the South African experience also points to the limits of judicially enforced constitutional rights. While a peaceful fifth democratic election has been held, significant problems of corruption and clientelism have emerged.<sup>7</sup> Within South Africa, the Constitutional Court has been criticized for failing to do enough to realize the transformative possibilities of the 1996 Constitution.<sup>8</sup> A separate line of criticism concerns the Court's democratic rights jurisprudence, and its alleged failure to check the pathologies attendant on the ANC's political

<sup>3</sup> On the ANC's human rights tradition, see T. Roux, *The Politics of Principle: The First South African Constitutional Court, 1995–2005* (Cambridge: Cambridge University Press, 2013) 152–61. For a more pessimistic account of the ANC's paradoxical emancipatory and authoritarian tendencies, see R. Southall, *Liberation Movements in Power: Party and State in Southern Africa* (Woodbridge: James Currey, 2013).

<sup>4</sup> *Government of the Republic of South Africa v. Grootboom* (2001) 1 SA 46 (CC) (*Grootboom*).

<sup>5</sup> *Minister of Home Affairs v. Fourie* (2006) 1 SA 524 (CC).

<sup>6</sup> *Minister of Health v. Treatment Action Campaign (No 2)* (2002) 5 SA 721 (CC).

<sup>7</sup> For an early study of the link between corruption and democratization, see T. Lodge, "Political corruption in South Africa" (1998) 97 *African Affairs* 157. For a coruscating account of the present situation, see R. W. Johnson, *How Long Will South Africa Survive? The Crisis Continues* (Johannesburg: Jonathan Ball, 2015).

<sup>8</sup> The seminal text here is K. E. Klare, "Legal culture and transformative constitutionalism" (1998) 12 *South African Journal on Human Rights* 146–88. For an updated version of the same critique, see D. M. Davis and K. E. Klare, "Transformative constitutionalism and the common and customary law" (2010) 26 *South African Journal on Human Rights* 403–509.

dominance.<sup>9</sup> While the Court could not have been expected to build a thriving multi-party democracy all on its own, it might have done more, the argument goes, to open out South Africa's democracy to greater political competition.

All of this makes it an opportune time to reflect on South Africa's post-1996 constitutionalist experience and the lessons it has to teach. According to Zachary Elkins and his coauthors, the average lifespan of a constitution is roughly nineteen years.<sup>10</sup> This, as Justice O'Regan notes in Chapter 2, also makes the twenty-year mark of a constitution a natural time to reflect on its achievements, and limitations: if it has endured, this fact itself may be considered a mark of relative success. Yet the degree to which it has endured in substance, or realized its substantive goals, remains open to evaluation. Two decades, one might also suggest, is roughly the minimum time necessary to assess substantive compliance or implementation of this kind. What, then at the local level, are some of the explanations for South Africa's successes and failures? To the extent that the 1996 Constitution has not delivered on its promises, how much of this is down to constitutional-design features and how much to the way the Constitution has been used, both by the judiciary and by civil society groups? And what, reflecting on these issues, does the South African experience have to teach about what liberal constitutionalism has to offer in the current global climate? For democrats in other countries, is the central lesson that constitutionally led social change is powerless in the face of larger global forces? Or is it that concessions made to drive democratization forward in the course of constitutional negotiations exact a heavy price on social transformation possibilities thereafter?

These questions are all the more pressing in the current global climate. In the twenty years since 1996, much of the shine has come off the global democratization movement. The third wave appears, if not to have been turned back, at least to have halted. On the one hand, the failure of the Arab Spring has revealed some of the perils of democratization in circumstances of deeply entrenched ethnic or religious/secular division. On the other hand, the economic crisis in the West has seen other models of governance emerging and proving attractive, from China's one-party-state capitalist model to Russia's socially conservative nationalism. Consequently, countries democratizing now, like Myanmar, do not have just one model from which to choose. Rather, the triumphalism of the immediate post-Cold War period has been

<sup>9</sup> See S. Issacharoff, "The democratic risk to democratic constitutions" (2014) 5 *Constitutional Court Review* 1.

<sup>10</sup> Z. Elkins, T. Ginsburg, and J. Melton, *The Endurance of National Constitutions* (Cambridge: Cambridge University Press, 2009) 2.

replaced by a choice between rival options. While there has been no returning to the starkly opposed ideologies and political models of the Cold War, there is a sense in which liberal constitutionalism is now not the only game in town: other models of governance are available and provide potentially more viable routes to national economic growth and social stability.

### 1.1. CRITERIA FOR ASSESSING PERFORMANCE

The success of the South African constitutional project, this discussion suggests, may be assessed from two broad perspectives. First, the question is whether the goal of rights-based social transformation has been achieved: to the extent that the 1996 South African Constitution imagined a constitutionally led transformation “toward a more democratic and caring society,”<sup>11</sup> has that situation come to pass? Second, the question is whether the South African constitutional project has in turn contributed to international understanding of, and support for, liberal constitutionalism as a political system and mode of governance: to what extent have other countries drawn on the South African experience, either as a positive or as a negative model, and does that experience as things now stand give cause for confidence in the transformative possibilities of liberal constitutionalism?

Both of these perspectives obviously have multiple dimensions and pose several methodological challenges. As to the first broad perspective, the initial distinction to make is between issues of constitutional design and implementation. To the extent that there are doubts about whether the 1996 Constitution’s transformative vision is being realized, is the underlying problem one of design, in the sense that insufficient thought at the time of constitution-making was given to the context within which, and the institutions through which, the Constitution would be implemented? Or is the underlying problem one of practice – of a failure on the part of those charged with the Constitution’s implementation to do their jobs properly? If design is at least part of problem, was it really a case of insufficient thought or was it rather a problem of political constraint – of the compromises that needed to be made to drive the transition to democracy forward detracting from the purity of the design process? Or perhaps it was neither a lack of adequate thinking nor a function of political constraint, but simply the fact that constitutional design is an imperfect science?

<sup>11</sup> Klare, “Legal culture and transformative constitutionalism” 149.

On the side of implementation, what institutions were chiefly responsible for the realization of the 1996 Constitution's vision? The purpose-built Constitutional Court was clearly a leading player, but how much power did it really wield and what sort of relationship was it appropriate for it to forge with the political branches? To what extent have the African National Congress's internal ructions contributed to deficiencies in implementation and might the Constitutional Court and other institutions protecting constitutional democracy have done more to prevent this from happening? Outside the formal institutions of state, have civil society organizations, public impact litigators, and public intellectuals (including legal academics) done enough to assist constitutional institutions in performing their functions?

Turning to the second broad perspective – the contribution the South African constitutional project has made to international understanding of the possibilities of liberal constitutionalism – what evidence is there of positive or negative learning, and how enduring, sustained and mutually beneficial has that learning been? Clearly, it is one thing to point to instances where South African constitutional institutions have been copied or doctrinal approaches followed, and another to discern a real shift in international understanding. In an early contribution to the debate, for example, Cass Sunstein wrote that, through its decision in *Grootboom*,<sup>12</sup> the South African Constitutional Court “has provided the most convincing rebuttal yet to those who have claimed ... that judicial protection of socio-economic rights could not possibly be a good idea.”<sup>13</sup> That comment suggests, not just that the decision was right as a matter of South African constitutional law, but also that it had a demonstration effect – that in fulfilling, to a certain extent, the 1996 Constitution's promise of meaningful socio-economic rights enforcement the *Grootboom* decision at the same time taught the Court's international audience something about the transformative possibilities of this set of rights.

Beyond building international understanding, what substantive contribution has the South African constitutional experience made to constitutional design and practice in other countries, and has this made a discernible difference to the quality of life in those countries? Here, the lines of causal influence may be difficult to follow. Constitutional text and institutional arrangements are clearly copied across borders for a variety of reasons. Some of those reasons say very little if anything about the *merits* of the South African constitutional model: some forms of borrowing are extremely “shallow” or isomorphic. They

<sup>12</sup> *Government of the Republic of South Africa v. Grootboom*.

<sup>13</sup> C. Sunstein, “Social and Economic Rights? Lessons from South Africa” (1999) 11 *Constitutional Forum* 123–32 at 132.

take the form of reflex impulses toward the borrowing of ideas from certain countries, within certain constitutional communities, without proper attention to how those choices have operated in a particular jurisdiction, and why, and thus how those lessons might actually translate to a different constitutional context.<sup>14</sup> Or they may reflect the immediate needs of constitutional drafters, faced with time and resource constraints, to find some kind of plausible model for borrowing or adaptation, and little serious engagement with the actual history, meaning or impact of foreign constitutional models.

Other forms of borrowing, however, may be more considered and deliberate, and reflect more detailed engagement with, and thought about, the actual advantages or experiences of a foreign constitutional system. This may be true, for instance, of certain forms of borrowing by foreign constitutional judges, or even by drafters – where there is some mechanism (such as an individual drafter with knowledge or experience in multiple jurisdictions, or credible international organization) for informing drafters about the actual practice and impact, not just form, of various foreign constitutional choices. “Deep” borrowing of this kind is also itself a potential source of validation of the success of a country’s constitutional arrangements: it reflects the judgment of many foreign minds (i.e., foreign judges, legislators or constitution drafters) about the merits of a particular set of foreign constitutional arrangements. There is, as Posner and Sunstein point out,<sup>15</sup> also clearly independent epistemic value to this kind of judgment of “many minds.” In the South African context, it may also provide a useful additional means of assessing the relative success, or failure, of the South African constitutional model – based on the degree to which it has, or has not, been emulated elsewhere.

It is, of course, important to note an asymmetry in the degree to which “borrowing” and “non-borrowing” of the South African model is informative in this context. Providing it is sufficiently deep, borrowing of the South African constitutional model will almost always provide some *prima facie* evidence of both local and foreign judgments about the relative success of the model. (If the internal assessment is negative, this will generally also affect how the model is perceived by *informed* outsiders.) Nonborrowing, however, need not reflect any negative judgment about the relative success of the South African model, on its own terms. Often, it may simply reflect that constitutional

<sup>14</sup> See, e.g., L. Pritchett, M. Woolcock, and M. Andrews (2010) “Capability Traps? The Mechanisms of Persistent Implementation Failure” (*CGD Working Article 234*, Washington, DC: Center for Global Development) 2 (available at [www.cgdev.org/content/publications/detail/1424651](http://www.cgdev.org/content/publications/detail/1424651)) (accessed date November 20, 2017).

<sup>15</sup> See, e.g., E. A. Posner and C. R. Sunstein, “The law of other states” (2006) 59 *Stanford Law Review* 131–79.

decision-makers in other countries do not have sufficient knowledge of the South African model to allow meaningful borrowing. Or it may reflect an internal battle, within a country, about how best to define its new relationship with a former colonial or occupying power – in some cases, there might still be a pragmatic desire to retain links and benefit from technical and legal assistance from such a power, but in others, there may be a desire to affirm a more distinctive independent identity. In other cases, the nonborrowing of the South African model by a foreign constitutional actor may reflect a considered judgment by foreign decision-makers that their own social, economic, and political conditions or challenges are quite different to those facing South African constitutionalists, and thus ones that demand a quite different constitutional response. By itself, such a conclusion also does little to suggest that the South African constitutional model has been a failure, for South Africa, or a country facing similar social, political, and economic challenges.

A final interesting and important complication to this picture is the way in which foreign ideas have continued to travel to South Africa, beyond the initial drafting of the 1996 Constitution, in ways that have shaped its constitutional jurisprudence and broader constitutional discourse. Penny Andrews, for instance, in her contribution to this book on race and the transformation of higher education under the Constitution, notes the challenges posed by the ongoing influence of US discourses on race: whatever its relevance for the United States, she suggests that the “Black Lives Matter” campaign has a quite different resonance in South Africa, where there is a black majority grappling with how best to guide the transformation of institutions within its own political control. Indeed, at times, she suggests, the ongoing influence of US discourse can be damaging to the sense of possibility and agency South Africans have in seeking to create a path toward greater racial and economic transformation.

In addressing these questions, this book contributes to a growing literature on assessing constitutional performance, but does so in a way that makes a distinctive contribution to that literature – one that focuses less on producing measurable indicators of performance and more on assessing the value of comparative constitutional law as a repository for knowledge on how to improve constitutional performance. In their introduction to a recent collection, for example, Tom Ginsburg and Aziz Huq developed the idea of “external” and “internal” criteria for assessing constitutional performance – i.e., criteria that are general or universalizable across some or all countries, and those which are more specific to particular constitutional settings. They further offer four distinct criteria for assessing external constitutional performance: first, the idea of constitutions as sources of “legitimacy”; second, the idea of constitutions as mechanisms for channeling political conflict; third,

the idea of constitutions as mechanisms for reducing principal-agent problems, or limiting agency costs, in a representative democracy, by increasing the responsiveness of government actors to citizen preferences, or self-serving political behavior; and fourth, the idea of constitutions being used to create structures to address the provision of public goods which cannot be provided by citizens alone, or to solve “collective action” problems.<sup>16</sup>

Two important qualifications, however, should be made to this framework. First, while clearly offering a valuable list of criteria for judging constitutional performance, Ginsburg and Huq do not purport to offer a *complete* or exhaustive set of external criteria. Rather, they identify four important criteria that they believe almost all constitutional scholars could endorse, regardless of their particular legal or political philosophy, which can thus provide a useful starting point for ongoing debates and scholarship on the question of constitutional performance. Second, the notion of “internal” and “external” criteria for judgment offered by Ginsburg and Huq should be understood in an appropriately interrelated, interdependent way.

Of course, at its broadest, the idea of “legitimacy” that Ginsburg and Huq endorse *could* potentially be understood to encompass almost all aspects of democratic constitutional performance – i.e., whether or not a constitution creates the conditions for democratic decision-making, respects and promotes substantive freedom, and equality for all citizens, including via the provision of certain minimum goods to all citizens, and creates a state capable of ensuring the individual and collective security of citizens. One of the difficulties with criteria of this kind, however, is that they are extremely difficult to apply in any kind of “objective” way, or in a way that lends itself to agreement among observers about the relevant criteria for judgment. Their application also clearly depends on quite thick, detailed engagement with facts on the ground in a particular jurisdiction, in ways that make it difficult for any outside observer to assess performance.<sup>17</sup> Indeed, this is one reason why John Rawls, in *Political Liberalism*, argued that our criteria for assessing the legitimacy of a liberal political order should be somewhat thinner, and more focused on criteria that allow for “transparent” judgments by outsiders.<sup>18</sup>

<sup>16</sup> T. Ginsburg and A. Huq, “What can constitutions do? The Afghan case” (2014) 24 *Journal of Democracy* 116–30. See also discussion in T. Ginsburg and A. Huq, *Assessing the Performance of South Africa’s Constitution* (International IDEA, 2016).

<sup>17</sup> On outsider interpretation compare R. Dixon and V. Jackson, “Constitutions inside out: outsider interventions in domestic constitutional contests” (2013) 38 *Wake Forest Law Review* 149–209.

<sup>18</sup> J. Rawls, *Political Liberalism* (New York, NY: Columbia University Press, 1993).

Ginsburg, in particular, has also been a lead contributor to attempts to assess constitutional performance from this kind of external viewpoint. This itself suggests that the idea of legitimacy in the Ginsburg and Huq framework should be understood in a more limited, sociological way – i.e., whether a constitution is in fact accepted by a democratic population, or national citizenry, as legitimate, not whether it can be judged substantively legitimate based on some more freestanding conceptual criteria.<sup>19</sup>

The contributions to this book seek to grapple with ideas about constitutional performance that are at once both narrower and broader than those identified by Ginsburg and Huq. Together, the contributions to the book address four broad themes: (i) questions of democratic constitutionalism and constitution-making; (ii) the rule of law, corruption, and accountability; (iii) gender justice; and (iv) race, poverty, and social and economic transformation. In this sense, the focus of this book is distinctly narrower than the contributions to Ginsburg and Huq's volume on *Assessing Constitutional Performance*. It covers a narrower range of themes, while still deploying some of the same external criteria for assessment. The process by which constitutions are enacted, for instance, can clearly affect their sociological legitimacy. How constitutions address questions of corruption and accountability will also be integrally bound up with their ability to address agency costs, or prevent self-dealing by political actors. Addressing gender violence, through adequate policing, prosecution, situational crime prevention, and historical redress, also necessarily involves the creation of public goods, in ways that constitutions may help realize. The same goes for social rights: often, social rights involve the delivery of basic services, which are quintessential public goods.

The focus of the book, however, is also in important ways broader than the framework provided by Ginsburg and Huq. How constitutions are adopted can affect their substantive democratic legitimacy, not just their sociological legitimacy. Whether or not constitutions meet the basic needs of citizens is also a question of fundamental equality and distributive justice, not just the provision of “public goods.” Constitutions – and constitutional judicial review by courts – can also play an important role in ensuring that democratic political processes are in fact responsive to these kinds of needs, not simply to majoritarian preferences, or the ideas of democratic responsiveness captured by the principal-agent metaphor.<sup>20</sup> By focusing on questions of this kind, this

<sup>19</sup> Compare R. H. Fallon, “Legitimacy and the Constitution” (2005) 118 *Harvard Law Review* 1787–853.

<sup>20</sup> Compare R. Dixon, “The Core Case for Weak-form Review” (Working Paper, April 2016).

book hopes to contribute to the project of *broadening*, as well as employing, the range of external criteria for assessment offered by Ginsburg and Huq.

Implicit in almost all the contributions to this book is an understanding that it is important to approach the idea of “internal” and “external” criteria for assessment in an appropriately nuanced and interdependent way. Internal criteria for assessment will themselves be notoriously difficult to identify in any meaningful or objective way: as US critics of both “originalism” and “purposive” interpretation have long argued, there is often profound disagreement among the drafters of a democratic constitutional document about underlying purposes or objectives, in ways that make it difficult to identify any truly shared purposes beyond the compromise reflected in the constitutional text itself.<sup>21</sup> Where such purposes are identified, they are inevitably shaped by certain external interpretive practices, which make it impossible to identify a meaningful shared legislative “purpose” in some more objective sense.<sup>22</sup>

Moreover, there is a clear danger to viewing any such “internal” purposes in isolation, without attention to their broader global or external context. Take an extreme hypothetical example: if a constitution seeks to achieve *no* meaningful change in social, economic, and political arrangements, it will almost certainly be judged a “success” on purely internal criteria. Because the constitution does not seek to create social, economic, or political change, even the total absence of such change in a society plagued by social and economic inequality cannot be counted as a sign of failure. Similarly, if change does occur, even without direct constitutional pressure, this will also be fully consistent with the idea of constitutional “success” – because the constitution does not purport to *prevent* such change, only to avoid mandating it. But to judge such a constitution as truly “successful,” in such circumstances, is clearly to make a judgment that deprives the concept of any meaningful content. Rather, for internal criteria for judgment to be useful or meaningful, those criteria must themselves be reasonable when viewed from an external standpoint: if a constitution, for instance, is enacted against a backdrop of relatively stable democratic traditions, and meaningful protections for liberty and equality for all, it will be reasonable for it to have quite modest “reactive” or preservation-oriented goals.<sup>23</sup>

<sup>21</sup> See, e.g., F. H. Easterbrook, “Pragmatism’s role in interpretation” (2008) 31 *Harvard Journal of Law and Public Policy* 901–6. Compare T. Ginsburg and R. Dixon, “The South African Constitutional Court and socio-economic rights as insurance swaps” (2011) 4 *Constitutional Court Review* 1–9.

<sup>22</sup> Compare, e.g., S. Breyer, *Active Liberty: Interpreting Our Democratic Constitution* (New York, NY: Knopf Doubleday, 2007).

<sup>23</sup> See, e.g., B. Ackerman, *We the People: Foundations* (Cambridge, MA: Belknap Press, 1991). See also Klare, “Legal culture and transformative constitutionalism” and M. Hailbronner,