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The South African Experience
in Perspective

Catherine JENKINS
Max DU PLESSIS
(eds.)



Cambridge – Antwerp – Portland

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Cambridge | CB4 0WZ | United Kingdom
Tel.: +44 1223 393 753 | Email: mail@intersentia.co.uk

Distribution for the UK:

NBN International
Airport Business Centre, 10 Thornbury Road
Plymouth, PL6 7 PP
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Tel.: +44 1752 202 301 | Fax: +44 1752 202 331
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Distribution for the USA and Canada:

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920 NE 58th Ave. Suite 300
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USA
Tel.: +1 800 944 6190 (toll free)
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Distribution for Austria:

Neuer Wissenschaftlicher Verlag
Argentinierstraße 42/6
1040 Wien
Austria
Tel.: +43 1 535 61 03 24
Email: office@nwv.at

Distribution for other countries:

Intersentia Publishing nv
Groenstraat 31
2640 Mortsel
Belgium
Tel.: +32 3 680 15 50
Email: mail@intersentia.be

Law, Nation-Building & Transformation: The South African Experience in Perspective

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© 2014 Intersentia
Cambridge – Antwerp – Portland
www.intersentia.com | www.intersentia.co.uk

Artwork on cover: Author Jan Jordaan, title 'Hurt', medium Linocut, 1999.
From the *Universal Declaration of Human Rights – International Print Portfolio*,
Article 5, published by Art for Humanity, South Africa, 1999.

ISBN 978-1-78068-184-9
D/2014/7849/21
NUR 828



British Library Cataloguing in Publication Data. A catalogue record for this book is available from the British Library.

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EDITORS' FOREWORD

In this collection of essays, we bring together the reflections of some of South Africa's leading scholars on a number of aspects of South Africa's transition to democracy and the country's efforts at 'nation-building' since 1994, and set them in comparative and historical perspective with the addition of some international contributions.

Last week, South Africans mourned the passing of former President Nelson Mandela and celebrated his long and remarkable lifetime of struggle, commitment and service. In April 2014, South Africa will mark the elapse of twenty years since its first democratic elections. These significant events in the life of the country and its people are generating both internal and international deliberation on the current state of the nation.

The range of topics included in this volume is deliberately broader than one might conventionally expect to find in a book published in a series on transitional justice. We take the view (as Catherine Jenkins argues in Chapter 1) that the narrower definitions of transitional justice to which we have become accustomed, which focus heavily on accountability for past crimes, are accidents of history, based largely on the origins of the battle against impunity in the relatively wealthy and developed countries of Latin America. In our view, these definitions of transitional justice are inadequate and inappropriate for most African states, in which deep and widespread poverty is a major concern and democratic institutions and processes may never have been firmly rooted. For these countries, the concept of justice in transition must, we suggest, be wider, reflecting the demand for both bread and freedom and the need for extensive reform and institution-building. In the case of South Africa, the constant references in political discourse since 1994 to the need for 'nation-building' and 'transformation' reflect both the enormity of the legacy of apartheid and the daunting scale of the socio-economic undertaking facing post-apartheid South Africa. In the light of South Africa's commitment to a new constitutional dispensation and to legal regulation, we have chosen to give a particular focus to the ways in which law and lawyers have played a role in social and political change since the early 1990s, though the contributions in the volume are not exclusively from scholars with a disciplinary background in law.

In her introductory chapter, Catherine Jenkins first places the South African transition in historical perspective through an examination of the nature of the past from which South Africa is emerging. She then analyses the character of the

post-apartheid project, highlighting and examining the concepts of 'nation-building' and 'transformation' in political discourse and scholarly literature. She turns next to an exploration of the role of law and lawyers in the transition and post-apartheid era. Lastly, she considers some of the ways in which the South African experience challenges us to rethink our ideas on transitional justice.

Chapter 2 is an extended reflection by Gerry Mare on the meanings and value of the concept of 'nation-building' in post-apartheid South Africa, which he critiques as a 'half-hearted and contradictory project'. Mare argues that, while a notion of social community is certainly needed and the question of how South Africans can live together remains key, the notion of 'nation' and the task of 'nation-building' cannot adequately reflect the need for 'a *participative* community, where social cohesion is located in the acceptance of a process and its wider implications', offering the possibility for engagement, contestation, debate and conversation. In Mare's view, the 'notion and deliberate construction of a democratic community needs to be given priority, as part of the on-going project of addressing the immense social divisions of 'race', gender, class, nationality, customs and culture and tradition.' To Mare, the Constitution of 1996 'offered a vision of what would guide us as a community of citizens'; a renewed focus on its provisions would in his view be a salutary exercise.

In Chapter 3, John Daniel, formerly a senior member of the Research Department of the South African Truth and Reconciliation Commission ('the TRC'), offers us a retrospective on the TRC process with the benefit both of his personal, 'insider' experience and of the historical perspective – albeit still short – that is now available. Here, we are in classical transitional justice territory. Daniel makes a strong and passionate case for the TRC process, challenging both the academic and political critiques that have been made of it and arguing that it must be seen as an important part of a wider process of nation-building.

In Chapter 4, by reference to the South African experience, Catherine Albertyn examines whether and how a transition to constitutional democracy can benefit women. After a brief account of women's struggles in the apartheid era, Albertyn discusses the role of feminist lawyers and women's groups in shaping the constitutional text in the early 1990s. She argues that the development of a constitution based on human rights and the primacy of (gender) equality was a profound advance for women, and that women have subsequently been able to harness the language of equality and rights to establish gender equality as a significant indicator of democratic progress and to push for a series of formal advances. Using two case studies – developments in 'culture' and customary law, and the issue of reproductive choice – Albertyn illustrates the extent to which women have been able to use rights to secure progressive ends and shows how the changing political context has shaped, and continues to influence, women's ability to secure and defend rights. She concludes that, although gender equality has been an important part of nation-building and the

construction of a new democracy, rights-based transformation is an on-going project in which progress is not linear. In her view, the continuing challenge for South African women is to expand their engagement with rights in a number of ways, so as to 'embed ideas of women as equal citizens, autonomous beings and moral agents, rather than mothers, victims or tribal subjects, in the public and private spheres.'

Antony Albekker's chapter on Crime, Policing and Nation-Building addresses a subject of major concern to South Africans. It assumes a particular importance in the wake of the police shootings of striking mineworkers at the Lonmin Marikana mine on 16 August 2012. The events at Marikana have been compared with the Sharpeville Massacre of 1960; at the time of writing, they are the subject of a commission of enquiry headed by Judge Ian Farlam. Albekker reflects on the implications of an exhortation to police to shoot to kill criminals, made by former Deputy Minister for Safety and Security, Susan Shabangu, and endorsed by prominent voices – a 'disturbing episode', he observes, in 'a country that knows more than most how lawless policing actually operates, having experienced it for decades'. Albekker considers some possible explanations for the exceptional severity of South Africa's crime problem and suggests that socio-economic factors and the country's history of violence cannot completely account for it. He argues that post-apartheid South Africa is violent in part because the apartheid legal regime emphasised difference, was not founded on equal rights and responsibilities, and resulted in the dehumanisation of the other. Moreover, the police under apartheid offered unequal protection in a fundamentally unjust society. Albekker argues that, in a country in which the idea of law was [under apartheid] treated with extreme cynicism, 'building institutions of the law which take its enforcement seriously would...make a huge contribution to creating a nation out of the debris inherited from apartheid'. In this context, any call for a 'return to the gun' by the police – or any evidence that this is occurring – must be deeply troubling.

Another feature of many divided societies – segregation in education – has had a high profile with civil rights lawyers since the groundbreaking decision of the U.S. Supreme Court in *Brown v Board of Education* in 1954. Overcoming a legacy of educational segregation proved notoriously difficult in the USA and, perhaps unsurprisingly, remains a challenge in South Africa today, where educational opportunity is still strikingly uneven. In Chapter 6, Christina Murray focuses on the constitutional provision concerning the language of education, noting that, in the last days of the negotiation of the 1996 Constitution, this more than any other contentious matter threatened the success of the process. As she observes, 'to the majority of South Africans in 1995, giving constitutional protection to white Afrikaans schools both sustained a language that had been an instrument of oppression and protected privilege.' For the ANC, 'the issue concerned equity and redress', while for the outgoing

National Party, 'protecting Afrikaans in schools was synonymous with the protection of Afrikaner culture'. Murray examines the way in which the cultural claims of Afrikaners were balanced with the imperative of transformation in s. 29 of the Constitution and explores the way in which the settlement has worked 'in the real world of race and scarce resources, multilevel government and community politics.' She situates her discussion against the wider background of the Lijphart/Horowitz debate on constitutional design and conflict management in divided societies.

In Chapter 7, Steve Pete and Max du Plessis argue that despite the pervasive nature of the liberal rights discourse underpinning South Africa's constitutional project, signs of an alternative and more dissonant legal discourse have begun to emerge. This alternative discourse seems to draw inspiration from the critical left and resonates with earlier traditions of radical jurisprudence, in particular the Critical Legal Studies (CLS) movement. During the immediate post-apartheid period, much legal discourse in South Africa focused on the promise, set out in the country's new democratic constitution, of a better life for all South Africans. Pete and Du Plessis note that 'great strides ... have been made in many areas of social life in the country, from the delivery of housing, water and electricity to hundreds of thousands of poor households, to the promotion and protection of the dignity of minority groups, through groundbreaking measures such as the recognition of gay marriages', and that 'in no small part, many of the important advances brought about in pursuance of substantive equality and true dignity for all South Africans have been due to the enlightened and impressive jurisprudence developed by the South African Constitutional Court since 1995.' The authors stress, however, that despite all the achievements of the post-apartheid period, an alternative legal discourse has begun to emerge which is far more critical of South Africa's constitutional project and its prospects for success, and which seems reminiscent of the approach adopted by the CLS movement which was popular during the 1970s and 1980s. Among the broad questions posed by Pete and Du Plessis is whether post-apartheid South Africa, in particular its legal system and new constitutional order, has lived up to the expectations of those who struggled for so long to end the apartheid system. By making use of historical comparisons and subjecting the present South African legal order to analysis through a broad CLS-type lens, the chapter investigates the limits of law in post-apartheid South Africa. The authors ponder whether 'South Africa's democratic constitution, together with the liberal rights discourse which surrounds it, has – at least temporarily – served to pacify grassroots opposition to the gross economic inequalities which continue to bedevil the country'.

The following two chapters by Murray Wesson and Gilbert Marcus and by Theunis Roux focus on the higher courts and judiciary in post-apartheid South Africa. Wesson and Marcus discuss different understandings of the concept of

'transformation' in relation to the judiciary, arguing that it must include, but mean more than, an increase in the numbers of black South Africans on the bench. Roux offers us an analysis of the strategies employed by the South African Constitutional Court – newly created under the Interim Constitution of 1993 – to survive and prosper while at the same time challenging the constitutionality of state action in some critical areas.

Like Pete and du Plessis, Andre van der Walt addresses the issue of legal culture in Chapter 10. He accepts that 'it was always clear that land reform had to be an important part of social and economic transformation' in post-apartheid South Africa. He argues, however, that more attention should be paid to the transformation of land law and not only to land reform in the narrower sense. He emphasises in particular the need to develop the common law to harmonise legal tradition with the new democratic and constitutional order. This, he argues, might facilitate reform. His concern – drawing on the work of Karl Klare on legal culture and Rosemary Coombe on 'background law' – is with the inhibiting effect of the common law tradition, or what he calls 'dogmatic drag', on the efficacy of the land reform process. Van der Walt argues for a more radical approach to the transformation of land law: one which involves developing a new theoretical or philosophical paradigm for thinking about property law, against which all existing common law principles, rules and values must be revisited. He suggests that, rather than construing property rights for those who do not have them or destroying the rights of those who do, weakening the force of land rights in a context-sensitive way and promoting the property interests of the weak and marginalised can make it possible to regulate land conflicts effectively.

In Chapter 11, Roger Southall reviews one of South Africa's important institutions, the Presidency. South Africa has had four Presidents since 1994 – Presidents Mandela, Mbeki, Motlanthe and Zuma. Southall examines in particular the impact – and unintended consequences – of the two-term limit introduced in South Africa's Constitution of 1996 as a check upon the potential for authoritarian rule. He sets his analysis in comparative African perspective.

The issue of freedom of expression in transitional and post-conflict societies is a neglected aspect of the existing scholarly literature, despite its obvious salience. Like many repressive societies, South Africa under apartheid was characterised by a culture of draconian censorship; as Glenn Penfold notes in Chapter 12, 'laws dramatically restricting freedom of expression were an important pillar of apartheid's legal edifice'. He argues that one of the imperatives of South Africa's democratic transition is a need to transform a system of government that was intensely secretive and in which opposition was silenced...to a vibrant democratic system characterised by openness, accountability, tolerance and participation.' The challenge, in his view, for the law of freedom of expression is to promote this democratic transformation, while ensuring that an appropriate balance is maintained between freedom of

expression and other important rights and values.' In his chapter, Penfold explores the treatment of freedom of expression in post-apartheid South Africa, both in relation to the promotion of open and accountable government (which involves the protection of freedom of expression) and in relation to hate speech (which involves a restriction on that freedom).

In the concluding chapter, Peter Slinn places the South African experience in comparative and historical perspective in his review of the different eras of transition in Commonwealth Africa. He deftly analyses the problems associated with the establishment of constitutionalism in other Commonwealth African states. Drawing on that analysis, he suggests some possible lessons for South Africa and concludes that the path ahead is unlikely to be smooth – a view reflected in a number of contributions to this volume and in media reports on the daily struggles in South Africa around such challenges as increasing levels of corruption, continuing and pervasive inequality, high levels of crime, and an (at times) uneasy relationship between the executive and judiciary.

We would like to thank a number of people who helped to make this book possible. We are grateful to the Konrad Adenauer Foundation in South Africa for its generous funding of the workshop which brought contributors together for convivial intellectual debate and reflection at the Pumula Beach Hotel, Umzumbe, KwaZulu-Natal. We would like to thank Dr Werner Boehler for his personal support during his time at the Foundation in Johannesburg. We are grateful to all our contributors for their work and patience and to Prof. John Mubangizi of the University of KwaZulu-Natal for his support for the project. We thank Sarah Hibbin at SOAS, University of London, for her painstaking assistance in checking and correcting the draft manuscript.

Last, but not least, we both want to thank our families for their constant support and understanding; we dedicate this book to them.

London and Durban
December 2013

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