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Hope and Despair for a New South Africa:  
The Limits of Rights Discourse

Makau wa Mutua*

I. INTRODUCTION

The post-World War II period has been characterized as the Age of Rights, an era during which the human rights movement has come of age.¹ The new South Africa is the first state that is the virtual product of that age and the norms it represents. Indeed, the dramatic rebirth of the South African state, marked by the 1994 democratic elections, has arguably been the most historic event in the human rights movement since its emergence some fifty years ago.² Never has the recreation

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1. Henkin triumphantly declares that "[o]urs is the age of rights. Human rights is the idea of our time, the only political-moral idea that has received universal acceptance." See Louis Henkin, The Age of Rights ix (1990).

of a state been so singularly the product of such focused and relentless advocacy of human rights norms. 3 Opponents of other overtly repressive political systems also deployed human rights discourse and imagery, but unlike their South African counterparts, they primarily emphasized a narrower conception of political participation rights. 4 In 1990, when Nelson Mandela was released after almost three decades in prison, the push for political change in South Africa had become an international human rights project. This occurred despite some Western governments' previous support for the apartheid regime and opposition to the African National Congress (ANC), the predominantly black anti-apartheid political organization. 5

3. Primarily because of the policy of apartheid (the legal system of enforced racial segregation officially instituted by the Nationalist Party (NP) in 1948) South Africa attracted intense international scrutiny and condemnation from the United Nations, regional bodies such as the Organization of African Unity (OAU), human rights nongovernmental organizations, and governments. Most of the criticism was expressed in the human rights idiom and addressed paradigmatic human rights norms such as political participation; the rights to speech, assembly, and association; the freedom from torture; equal protection and non-discrimination; and the denial of economic, social, and cultural rights. Within South Africa itself, a myriad of political and civil society organizations waged a protracted struggle for the guarantee and protection of these rights. See Brian Bunting, The Rise of the South African Reich 54–68 (1986) (discussing the genesis of apartheid in the policies of Nazi Germany, and their influence on the Afrikaner political elite, many of whom sided with Hitler). The United Nations passed numerous resolutions and set up a number of committees to work against apartheid in South Africa. See United Nations Action in the Field of Human Rights at 59–80, U.N. Doc. ST/HR/2/Rev.2 (1983). See also Nelson Mandela, Long Walk to Freedom (Abacus 1994); Leonard Thompson, A History of South Africa (1990).

4. Struggles to open up one-party dictatorships in Eastern Europe, Africa, Latin America, Asia, and the former Soviet Union primarily sought political democracy, defined narrowly as the creation of governments through competitive multiparty elections. Despotic restrictions on expressive rights and the sole control of political power by a party or a political elite was seen as the evil that the exercise of political participation rights would cure. In these regions, quite often advocacy for the respect of human rights focused exclusively on political participation rights, whereas in the context of South Africa, the corpus of human rights was material for battle against the state. See generally Samuel Huntington, The Third Wave: Democratization in the Late Twentieth Century (1991) (discussing political transitions from repressive one-party regimes to political democracies from the 1970s to the 1990s). See also Gregory H. Fox, Right to Political Participation in International Law, 17 Yale J. Int’l L. 539 (1992) (reporting the development of the right to political participation); Thomas Franck, The Emerging Right to Democratic Governance, 86 Am. J. Int’l L. 46 (1992) (arguing that democratic governance has evolved from moral prescription to an international legal obligation); Henry J. Steiner, Political Participation as a Human Right, 1 Harv. Hum. Rts. Y.B. 77 (1988).

The construction of the post-apartheid state represents the first deliberate and calculated effort in history to craft a human rights state—a polity that is primarily animated by human rights norms. South Africa was the first state to be reborn after the universal acceptance, at least rhetorically, of human rights ideals by states of all the major cultural and political traditions.

Numerous Western donor agencies, governments, foundations, international nongovernmental organizations (INGOs), including human rights groups and development organizations, have flocked to South Africa to assist the state's democratic experiment. Internally, human rights have dominated virtually every aspect of the re-creation of the state, as evidenced by the panoply of rights enumerated in the new Constitution adopted by the Constitutional Assembly in May 1996.


7. In expressing this "universality," Henkin notes that "[h]uman rights are enshrined in the constitutions of virtually every one of today's [late 1980s] 170 states—old states and new; religious, secular, and atheist; Western and Eastern; democratic, authoritarian, and totalitarian; market economy, socialist, and mixed; rich and poor . . . ." See HENKIN, supra note 2, at ix.

8. A number of countries have committed funds and other resources to assist South Africa in its transition. Some of these are: Denmark in the establishment of the Commission for Gender Equality; the Netherlands, Sweden, Britain, and Canada in reforming the police; Britain in the integration of the various liberation armies and the South African Defence Force (SADF) into one national force; Denmark in the prevention and monitoring of violence in the prisons; Denmark, the United States, Sweden, and Canada in the reform of the administration of justice; the European Union, Denmark, and Sweden in supporting the Truth and Reconciliation Commission. In addition, some U.N. agencies, such as the United Nations Development Programme, and some Western philanthropies, such as the New York-based Ford Foundation, are involved in supporting various governmental and nongovernmental efforts. See United Nations High Commissioner for Human Rights, Centre for Human Rights, Programme of Technical Cooperation in the Field of Human Rights, Report of the Needs Assessment Mission to South Africa (6-25 May 1996) at 51-54 (1996) [hereinafter UN Needs Assessment Report]. In addition, Canada is assisting in the retraining of Magistrates, and Belgium is funding the Legal Resources Center (LRC), a leading nongovernmental organization, and the Center for Applied Legal Studies (CALS) at the University of Witwatersrand. Telephone Interview with Professor Shadrack Gutto, Deputy Director, CALS, in New York, New York (Dec. 4, 1996).

9. The permanent Constitution will replace the Interim Constitution negotiated primarily by the ANC and the NP and adopted by the formerly all-white Parliament in 1993. On September 6, 1996, the Constitutional Court, the authority empowered to certify the new Constitution,
and signed by President Nelson Mandela into law on December 10, 1996. In addition to the traditional structures that protect human rights—such as the separation of powers, judicial independence, and an accountable executive—the Constitution establishes multiple overlapping human rights bodies under the title "state institutions supporting constitutional democracy."  

The new constitutional order draws extensively from international law, including human rights law. It provides that international agreements, which include human rights treaties, and international customary law are binding law unless they contradict the Constitution or other laws passed by Parliament. The new state has ratified two major international human rights instruments, Convention for the Elimination of All Forms of Discrimination Against Women (CEDAW) and the Convention on the Rights of the Child. The government has also signed, but not yet ratified, four other major human rights treaties: the ICCPR, the ICESCR, the International Convention on the Elimination of All Forms of Racial Discrimination, and the Convention referred the text back to the Constitutional Assembly for reconsideration. On December 4, 1996, the Constitutional Court finally certified the text. See Certification of the Amended Text of the Constitution of the Republic of South Africa, 1996 (4) SA 744 (CC) (Case 37/96, Dec. 4, 1996) (visited Feb. 20, 1997) <http://www.law.wits.ac.za/judgments/cerc2.txt>. See also Mandela signs new South African Constitution, AGENCIE FRANcE PREss, Dec. 10, 1996, available in LEXIS, News Library, Currents File. The new Constitution does not differ substantially from the interim one although it adds to and strengthens institutions created to promote and protect human rights and further illuminates economic and social rights. The Constitution has a strong bill of rights (S. Afr. Const. (1996 Constitution) ch. 2) that in all probability protects the widest range of rights of any constitution in the entire world. Its equal protection clause prohibits discrimination on almost all conceivable grounds, including sexual orientation as well as race, gender, sex, pregnancy, marital status, ethnic or social origin, color, age, disability, religion, conscience, belief, culture, language, and birth. See S. Afr. Const. (1996 Constitution) ch. 2, § 9(3).

10. President Mandela signed the Constitution on International Human Rights Day—December 10—before a huge crowd in Sharpeville, scene of the massacre of sixty-nine blacks in 1960 by the apartheid security forces. See Chris Erasmus, South Africans Embrace Rights of a New Constitution, USA TODAY, Dec. 11, 1996, at A4. It is interesting to note that President Mandela signed the new Constitution into law on the 48th anniversary of the United Nations Declaration on Human Rights, which was adopted in 1948, the year apartheid became official policy in South Africa, Mandela Signs new South African Constitution, supra note 9.

11. The most important of these include the Human Rights Commission, the Public Protector, the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities, the Commission for Gender Equality, and the Electoral Commission. See S. Afr. Const. (1996 Constitution) ch. 9, § 181(1).


Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment. This reliance by the new state on human rights norms is well put in a United Nations report:

The Constitution, itself, consciously and explicitly draws from international human rights law. The Bill of Rights resulted from careful analysis of international and comparative law, in light of specific South African needs. International human rights norms are frequently referred to. Courts are required by the Constitution to consider international law in the interpretation of the Bill of Rights. Moreover, the overall importance of human rights and the rule of law within the new Constitutional system is demonstrated by provisions for Constitutional review and the important reliance which the Constitution places on powerful, independent “human rights” commissions, all of which is new in South Africa.

The modern state is the primary guarantor of human rights, while it is simultaneously the target of the international human rights law prescribing the standard of treatment of individuals by their governments. In fact, the state is the raison d’être for the development of human rights law. In this sense, the state is the antithesis of human rights; the one exists to combat the other in a struggle for the supremacy over society. Paradoxically, human rights norms are codified by states although they are meant to contain and control state power. The “good” state controls its despotic proclivities by internalizing human

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18. Since the functional modern state almost exclusively commands the means and instruments of organized violence, the jurisprudence of rights arose as a counterweight to the omnipotent state. See generally Robert M. Cover, Obligation: A Jewish Jurisprudence of the Social Order, 5 J. L. & RELIGION 65 (1987). But human rights law is not only about its “vertical” implementation to restrain the state or require it to take positive action; bodies are also devoted to the “horizontal” application of its norms to the “private” realms between individuals and communities. Examples of the latter would relate to women’s rights and inter-religious realms. For views on human rights and religious traditions, see RELIGIOUS HUMAN RIGHTS IN GLOBAL PERSPECTIVE: LEGAL PERSPECTIVES (Johan D. van der Vyver & John Witte, Jr. eds., 1996); RELIGIOUS HUMAN RIGHTS IN GLOBAL PERSPECTIVE: RELIGIOUS PERSPECTIVES (John Witte Jr. & Johan D. van der Vyver eds., 1996).
The "bad" state rejects the authority of human rights norms and jealously guards its sovereignty from popular control. While tension between the state and human rights discourse can be mitigated, it cannot be eliminated.

This Article critically explores several significant interrelated tensions manifested in the reconstruction of the South African state. This inquiry questions the viability of deploying the human rights idiom as the catalyst for a new state, one that is animated by, and has respect for, human rights norms. In particular, this Article evaluates the use of human rights ideals as a tool for the transformation of the abysmal legacy of apartheid. In reaction to the policies of its predecessor, the new South African state explicitly recognizes equal protection norms as its foundation. Thus, the most important feature of the post-apartheid state is its virtually exclusive reliance on rights discourse as the engine of change. Without a doubt, the creators of the new South African state have also relied on other discourses such as international diplomacy, negotiation, and a variety of other secondary approaches. But it is the contention of this Article that the rights discourse has been the predominant medium for change. Although it is too early to say with total certainty what the exact difficulties of employing the rights discourse in South Africa are, many of the pitfalls of that medium are identified and explored in this Article. Time will only further underscore these limitations.

While rights discourse had the power to galvanize the oppressed and garner the sympathy of some segments of the middle and upper classes during the struggle against official apartheid, the Mandela government's near total dependence on rights discourse as the tool for the transformation of the legacy of apartheid is a mistake. First, the double-edged nature of rights language has already become evident in South Africa. The new constitutional rights framework has frozen the hierarchies of apartheid by preserving the social and economic status quo. As aptly put by Ibrahim Gassama:

Disenchantment echoes the critique of rights discourse's double-edged quality: rights can be deployed to protect the powerful and the status quo just as easily as they can be wielded to advance the interests of the weak and excluded. The power of this observation should be increasingly apparent to rights activists in South Africa. It is not altogether sur-

19. In reality, of course, the state does not charitably and of its own volition choose to be "good"; the nongovernmental and private sectors, sometimes referred to as civil society, limit its power and determine the normative content of its operational philosophy and guiding principles. For a discussion on the relationship between the state and civil society, see generally Civil Society and the State (John Keane ed., 1988).
prising that even as the attainment of political participation rights by blacks in South Africa is celebrated, rights-rhetoric is being successfully deployed to protect the economic status quo—the private property rights—of the white minority in the country.20

If the experience of the United States, one of the “models” on which the new South Africa drew, is any guide, rights language has more often than not protected the property interests of the wealthy and the powerful.21 This Article argues that the rights framework adopted by the Mandela government protects existing social arrangements because it is traditional and conservative. Except for largely cosmetic effects, there is little possibility that the particular conceptualization of rights in the new South Africa will alter the patterns of power, wealth, and privilege established under apartheid. Unfortunately, South Africa has fallen victim to all the pitfalls of rights discourse.22

Analyses of the new South Africa support this pessimistic outlook. For instance, the Reconstruction and Development Programme (RDP)—the ANC’s blueprint for reform—decried the rights abuses under apartheid and vowed that racial, gender, and other inequalities fostered under apartheid would be eliminated under an ANC democratic government.23 However, except for high rights rhetoric, the RDP never identified concrete measures and policies to correct the legacy of apartheid, and in April 1996, the Mandela government virtually terminated the RDP when it dropped the Programme from cabinet status. Moreover, the apartheid bureaucracy has been left intact through the guarantee of tenure for judges and magistrates, civil servants, law enforcement officials, and defense. Even more disturbing, the government has failed to institute a meaningful land reform program; virtually all land remains in white hands although the few blacks with access to funds

21. See Morton J. Horwitz, Rights, 23 Harv. C.R.-C.L. L. Rev. 295, 404-06 (1988). Rights can only become beneficial to the poor and the weak if they are grounded on ideals of substantive equality and radical economic and social arrangements that alter existing hierarchies. Id.
can now purchase land on the free market. Finally, the position of women, especially black women, remains marginal. Although a predominantly black government is ostensibly in power, and blacks have been granted abstract legal entitlements, many blacks remain in the same station they occupied under apartheid: excluded and at the margins.

Part II closely examines the evolution of the rights framework that has dominated the foundation and creation of the new state. It explores the content and formulation of the rights that predominate the construction of the new constitutional order and points to some of the tensions inherent in that project. Part III probes the prospects for the success of transformation using the rights discourse in several critical sectors of the South African society and questions the long term prospects for the transformation of apartheid's economic and social norms and structures. Part IV concludes by questioning the assumption, which seems to be widely shared among South Africans and foreigners alike and underlies the entire reconstructionist project, that South Africa cannot only be transformed into a state that respects human rights, but that it can also become a human rights state.

The success of this reconstructionist project is an essential precondition—not a guarantee by any means—for the realization of a human rights state. This Article distinguishes between a state that formally respects human rights, as do most political democracies, and a human rights state. The former were initially constructed primarily as sovereign political structures whose main purpose was the exercise of authority and the maintenance of law and order for the benefit of limited segments of the population. Over the last two centuries, many of these states have progressively embraced political democracy and with it the formal obligation to respect many civil and political

24. This particular reference indicates civil and political rights, not economic, social, and cultural rights. In most democracies, where the human rights corpus principally draws most of its philosophical roots and development, human rights were effectively narrowed to civil and political rights. Although economic, social, and cultural rights are formally part of that corpus, they belong to a "lower" rank of rights. See Philip Alston, The Committee on Economic, Social and Cultural Rights, in The United Nations and Human Rights 473, 490 (Philip Alston ed., 1992).

25. To date, South Africa has had the best opportunity to create such a state. Other states, such as Western democracies where the idea of individual rights was first born under liberalism, were not initially created as human rights states although they now embody many human rights norms in their constitutional and legal frameworks. A human rights state would not simply constitutionally guarantee civil and political rights while relegating economic and social rights to the precarious welfare state. Instead, in a true human rights state, all rights would be made constitutionally effective and practically realizable and enforceable. South Africa could have attempted to erase the inequities of apartheid by collapsing this traditional dichotomy.

26. Only within the last century have European states committed to formal political democracy with universal adult suffrage. See e.g., Thomas E. Mackie & Richard Rose, The International Almanac of Electoral History (3d rev. ed. 1991).
A human rights state, by contrast, is a term coined here to describe an aspiration—an ideal state that would be constructed from close adherence to the prescriptions of the human rights corpus. Although a human rights state is theoretically possible given the framework of human rights law, it remains a fiction at present, not having been accomplished anywhere.

If realized, a South African human rights state would be the first of its kind. Unlike other states that have progressively assimilated a subset of human rights norms, the South African state is deliberately being constructed into a political edifice of human rights norms and structures. But is it possible to construct a state that defies the essence of statism and statehood, a polity that abandons the protection of entrenched economic and political interests, and transforms social and economic arrangements for the excluded, through the rights medium? Is it feasible to re-create a deeply distorted society primarily by employing the human rights framework that is fundamentally anti-statist in its mission to curb arbitrary or excessive state power? Is it possible to do this without a cataclysmic social and political revolution in which the norms and classes of the ancien regime are categorically defeated? Or, is the South African experiment doomed to fail with the realization that at best a state can only assimilate human rights norms, and ratify existing inequities? The conclusion of this Article discusses this dilemma and some of the limitations of the human rights project.

II. THE ANC STRATEGY: A CONSTITUTIONAL RIGHTS FRAMEWORK

A. A Snapshot of Apartheid

South Africa, Africa's fourth largest country in area, occupies a large portion of the southern tip of the continent with a population estimated in 1995 at 41,465,000. Of this number, according to the notorious apartheid racial categories, black Africans made up 76%, whites 12.8%, Coloreds 8.5%, and Asians 2.6%. Although white domination of what is today South Africa goes back several centuries, it was not until 1948 that apartheid became the official ideology of the state. In that year, the Nationalist Party (NP), the Afrikaner

27. See Franck, supra note 4, at 49.
29. These racial classifications were an essential part of the apartheid system, which distinguished four main racial categories—whites, blacks, Coloreds, and Indians—and determined what rights members of a particular category could enjoy. Id. See also UN Needs Assessment Report, supra note 8, at 5. "Colored" is a complex category but it generally grouped South Africans of mixed (African, European, and Asian) ancestry.
political flagship, won the primarily all-white election and thereafter used state institutions to give preferential treatment to whites, primarily Afrikaners, in virtually all areas of political, social, and economic life. Conversely, most non-white races, particularly blacks, were progressively stripped of whatever basic rights they retained.

Apartheid, literally "apartness" in Afrikaans, was animated completely by racial biases and classifications. Thompson has identified four ideas that composed its core:

First, the population of South Africa comprised four "racial groups"—White, Colored, Indian, and Africans—each with its own inherent culture. Second, Whites, as the civilized race, were entitled to have absolute control over the state. Third, White interests should prevail over black interests; the state was not obliged to provide equal facilities for the subordinate races. Fourth, the white racial group formed a single nation, with Afrikaans- and English-speaking components, while Africans belonged to several (eventually ten) distinct nations or potential nations—a formula that made the white nation the largest in the country.

A plethora of laws, regulations, and policies were instrumental in the realization of the apartheid state. In the post-1948 period, the most important of these were: the Population Registration Act of 1950, under which everyone was classified according to a "race"; the Immorality Act and the Prohibition of Mixed Marriages Act, which proscribed interracial sex, marriage, and other forms of intimate contact; the Group Areas Act, which segregated racial groups in different areas, and the Promotion of the Bantu Self-government Act, which solidified the basis for black homelands or bantustans; and the Sepa-

30. Thompson describes how the Afrikaners used the state to ram through perverted "affirmative action" programs for themselves after they captured the state in 1948. THOMPSON, supra note 5, at 188.
31. Id. at 187-220.
32. Id. at 190.
35. See, e.g., Group Areas Act 41 of 1950. Pass laws required blacks to carry passes authorizing them to be in "white" areas. Homelands were established by the Promotion of the Bantu Self-Government Act 46 of 1959. The ten "ethnic" black homelands were Lebowa, Qwa-qwa, Bophuthatswana, KwaZulu, KaNgwane, Ciskei, Transkei, Gazankulu, Venda, and KwaNdebele. By 1981, four of these homelands—Bophuthatswana, Ciskei, Transkei, and Venda—accepted "independence" from Pretoria, effectively divesting their African populations of South African citizenship. No state, except South Africa, recognized the homelands as "independent." For more discussion of South Africa's homelands, see Henry J. Richardson, Self-determination, International Law and the South Africa Bantuatan Policy, 17 COLUM. J. TRANSNAT'L L. 185 (1978); John Dugard, South Africa's "Independent" Homelands: An Exercise in Denationalization, 10 DENY. J. INT'L L. &
rate Amenities Act, under which the segregation of public facilities—parks, beaches, schools, and public transportation, among others—was cloaked in the color of law.\textsuperscript{36}

The "official" and systematic dispossession of Africans of their lands\textsuperscript{37} dates back to the Native Land Act of 1913\textsuperscript{38} and the Development Native Trust and Land Act of 1936.\textsuperscript{39} By 1992, eighty-seven percent of all land had been alienated for the exclusive occupation of, and ownership by, whites.\textsuperscript{40}

African resistance to white oppression and domination goes back several centuries. In this century, the resistance has been spearheaded by the ANC, which was founded by Africans in 1912 to fight for equality.\textsuperscript{41} From the Defiance Campaign\textsuperscript{42} of the early 1950s to the proclamation of the Freedom Charter\textsuperscript{43} in 1955 and the formation in 1961 of the Umkhonto we Sizwe (Spear of the Nation), the military wing of the ANC, the apartheid regime was on notice that resistance would not only increase but become violent.\textsuperscript{44}
In order to preserve the status quo in the face of determined and mounting challenge, the apartheid state enacted security laws designed to close off all remaining avenues of dissent.\textsuperscript{45} This arsenal of legislation eliminated all due process principles and made it possible for the state to arrest, detain, torture, imprison, ban, and kill its opponents with impunity. Some of the more notorious laws included the Prohibition of Interdicts Act of 1956, which denied blacks access to courts to challenge the implementation of apartheid policies;\textsuperscript{46} the Suppression of Communism Act of 1950;\textsuperscript{47} the Terrorism Act;\textsuperscript{48} and the General Law Amendment Act.\textsuperscript{49} States of emergency and forced removals heightened the trauma of the black community.\textsuperscript{50}

The devastating consequences of these policies have been manifested in virtually every statistical category on blacks and other non-white communities. In 1991, the latest year for which figures are available, incomes for a black household averaged a meager US$3,614, as compared with US$21,707 for a white household.\textsuperscript{51} Fifty percent of blacks are unemployed, and the life expectancy for blacks is eleven years less than for whites.\textsuperscript{52} Fifty percent of all blacks, but only two percent of whites, live below the poverty line.\textsuperscript{53} Prior to 1990, the state in its education budget spent eleven times more money on each white pupil than on each black pupil; by 1994, the state still spent four times as much for the education of a white as for a black child.\textsuperscript{54} Only eleven

\textsuperscript{45} A senior American pioneer of human rights scholarship has described apartheid as a "complex set of practices of domination and subjection, intensely hierarchized and sustained by the whole apparatus of the state, which affects the distribution of all values." See \textit{Myres S. McDougal et al., Human Rights and World Public Order} 523 (1980).

\textsuperscript{46} \textit{Human Rights for South Africans} 57 (Mike Robertson ed., 1991).

\textsuperscript{47} Suppression of Communism Act 44 of 1950.

\textsuperscript{48} Terrorism Act 83 of 1967.

\textsuperscript{49} General Law Amendment Act 76 of 1962.

\textsuperscript{50} For more information on states of emergency and other human rights violations, see \textit{Lawyers Committee for Human Rights, The War Against Children} (1986); \textit{Lawyers Committee for Human Rights, Crisis in Crossroads} (1988); \textit{Africa Watch, The Killings in South Africa: The Role of the Security Forces and the Response of the State} (1991) [hereinafter \textit{The Killings in South Africa}].


\textsuperscript{52} \textit{UN Needs Assessment Report}, supra note 8, at 6.


\textsuperscript{54} See Shepherd, supra note 40, at 40.
percent of blacks graduate from high school as compared with seventy percent of whites. The pass rate for matriculation in 1994 was ninety-seven percent for white students and less than fifty percent for black students. These lopsided figures are reproduced in every sector of the society: in the economy, administration of justice, land ownership, infant mortality, civil service, the private sector, media, defense, police and security services, and the professions. In effect, South Africa is deeply divided by the two nations within its borders: one developed and white, the other underdeveloped and mostly black.

Such is the legacy that the new South African state, under the direction of the African National Congress, undertook to transform after handily winning the first democratic all-race elections in April 1994. This enormous challenge requires the state to use its resources, power, and prestige to raise the standard of living of black South Africans and other non-whites. Such change cannot be accomplished without major economic reforms and dramatic policy shifts to stimulate further economic growth and the development of physical and human resources. The bureaucracy will have to be transformed to serve the community that it was created to repress and subjugate. Above all, mechanisms for the redistribution of South Africa's resources—particularly land—will have to be devised. So far, the South African state has opted for the rights idiom to mediate between the violent and savage apartheid past, the tenuous present, and an uncertain future.

B. The Evolution of a Rights Approach

The ANC, despite being banned by the apartheid regime in 1960, has been guided for most of its life by a commitment to peaceful change. However, in 1961 the ANC decided to resort to armed struggle, because of the legacy of the apartheid regime.
The ANC's commitment, since its foundation, to the language of rights as a strategy for change was reiterated by the explicit focus on human rights in the Freedom Charter in 1955. After its formation in 1912, the ANC initially made deputations to authorities but later escalated its protest to peaceful civil disobedience campaigns. In any event, the ANC pursued nonviolent, "constitutional" avenues to reform until the 1960s. Mandela's own words underscore the ANC's commitment to the ideals of liberalism:

The Atlantic Charter of 1941, signed by Roosevelt and Churchill, reaffirmed faith in the dignity of each human being and propagated a host of democratic principles. Some in the West saw the Charter as empty promises, but not those of us in Africa. Inspired by the Atlantic Charter and the fight of the Allies against tyranny and oppression, the ANC created its own Charter, called the African Claims, which called for full citizenship for all Africans, the right to buy land, and the repeal of discriminatory legislation.

As the apartheid state became more repressive and unresponsive to peaceful protest, this commitment to nonviolence and multi-racialism came under increasing attack within the ANC. In 1959, Robert Sobukwe and a number of other ANC members who considered the ANC too passive broke away and formed the Pan Africanist Congress. The resistance methods promoted by the militant PAC, which included confrontation with the police, resulted in the 1960 Sharpeville massacre.

Eventually, Mandela and other leading figures in the ANC were either imprisoned or exiled. The ANC then established its principal offices in the black-ruled neighboring states of Zambia and Tanzania.

ANC towards armed struggle. Notwithstanding the ANC's public position before 1961, he believed that "non-violence was a tactic that should be abandoned when it no longer worked." Mandela, supra note 3, at 322. He argued his view, which prevailed over the organization's tradition, thus:

'The state had given us no alternative to violence. I said it was wrong and immoral to subject our people to armed attacks by the state without offering them some kind of alternative. I mentioned again that people on their own had taken up arms. Violence would begin whether we initiated it or not. Would it not be better to guide this violence ourselves, according to principles where we saved lives by attacking symbols of oppression, and not people? If we did not take the lead now, I said, we would soon be latecomers and followers to a movement that we did not control.

Id.

64. See Mandela, supra note 3, at 110.
65. Selby, supra note 63, at 250-55.
66. Id. See also supra note 44.
from where it directed its diplomatic and military campaigns against apartheid South Africa.\(^6\) Thereafter, the ANC pursued the dual track of mass protests supplemented by occasional military attacks on symbols of the apartheid state.\(^6\) Nevertheless, more of the organization's energies and resources were spent on diplomacy, peaceful mass protests by its proxies inside the country, and other non-violent methods of resistance than on military efforts.\(^7\) It was during this period—the 1960s to the 1980s—that the ANC matured into a sophisticated political organization capable of capturing state power. From its bases in several African capitals and Western cities, as well as the United Nations and the Organization of African Unity, the ANC developed into the single most important voice for democracy in South Africa. Within South Africa itself, it was a synonym for majority rule.

Towards the end of the 1980s, as the possibility for majority rule in South Africa seemed less remote, the ANC further clarified its commitment to a democratic, rule-of-law state by outlining its vision of a constitution for a new South Africa.\(^7\) The outline emphasized the indispensability of a Bill of Rights and called for equal protection and nondiscrimination on a broad range of grounds such as gender, race, and creed.\(^7\) It also provided for affirmative action to remedy the wrongs of apartheid.\(^7\)

The ANC further concretized these guidelines in a 1990 document devoted exclusively to a Bill of Rights for South Africa.\(^7\) In 1992, the ANC produced a revised draft Bill of Rights based on the 1990 preliminary document.\(^7\) While the Bill did not substantially depart

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68. See COMMONWEALTH SECRETARIAT, MISSION TO SOUTH AFRICA: THE COMMONWEALTH REPORT 85–89 (1986).
69. Id.
70. Id.
72. The Constitutional Guidelines provided that: “The constitution shall include a Bill of Rights based on the Freedom Charter. Such a Bill of Rights shall guarantee the fundamental human rights of all citizens irrespective of race, colour, or creed, and shall provide appropriate mechanisms for their enforcement.” Id. at 237.
73. The affirmative action clause of the Constitutional Guidelines provided that: “The state and all social institutions shall be under a constitutional duty to take active steps to eradicate, speedily, the economic and social inequalities produced by racial discrimination.” Id. With regard to the status of women, it provided that: “Women shall have equal rights in all spheres of public and private life and the state shall take affirmative action to eliminate inequalities and discrimination between the sexes.” Id. at 258.
from either the Guidelines or the 1990 document, the draft Bill of Rights did protect the right to own private property\(^7\) and prohibit discrimination on the basis of sexual orientation.\(^7\) Significantly, the Bill skirted the issue of land ownership: it proscribed forced removals without a court order, to which blacks had been routinely subject under apartheid, and also reassured whites who feared similar treatment from administrative action under an ANC government.\(^7\) It provided for a lands claim tribunal to decide on questions of restoration for those blacks who had suffered forced removals and compensation for white beneficiaries of the removals.\(^7\) Only two percent of land, however, was affected by forced removals. The status of more than eighty percent of all land that was reserved for whites was left unresolved in spite of the repeal of certain racist laws as domestic and international pressure brought the apartheid state to its knees.\(^8\) These developments underscored the commitment of the ANC to a rights approach in negotiations for ostensible solutions to the South African crisis. Absent the military defeat of the apartheid regime and the ability to dictate the terms of the transformation, an approach that respected the rights of whites appeared to be the only viable option.

C. The Interim Constitution: A Creature of Compromise

Two ANC documents\(^8\) outlined a comprehensive constitutional philosophy and formed the basis for the organization’s positions at the Convention for a Democratic South Africa (CODESA). This multi-party forum, convened by the government in 1991 to negotiate the nature and character of a new South African state,\(^8\) was dominated by

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76. The draft Bill provided, in part, that:

All South Africans shall, without discrimination, have the right to undisturbed enjoyment of their personal possessions, and, individually, in association or through lawfully constituted bodies, be entitled to acquire, hold or dispose of property. Id. at 226. The Bill also conditioned the taking of property on the public interest and just compensation. Id.

77. The language stated that “[d]iscrimination on the grounds of gender, single parenthood, legitimacy of birth or sexual orientation shall be unlawful.” Id. at 222.

78. It provided for a tribunal to restore land acquired through forced removals subject to compensation for the landowners. Id. at 224–25.

79. Id. at 222.


81. These are: ANC CONSTITUTIONAL COMMITTEE, WHAT IS A CONSTITUTION? (1990); ANC CONSTITUTIONAL COMMITTEE, CONSTITUTIONAL PRINCIPLES AND STRUCTURES FOR A DEMOCRATIC SOUTH AFRICA (1991). See Wing, supra note 6, at 359.

82. CODESA was boycotted by the extreme right wing white group Afrikaanse Weerstand
the two dominant political organizations, the ANC and the NP, both of which sought to advance and protect the interests of their constituencies. The ANC, confident that it would win the imminent democratic elections, wanted a strong unitary state to reverse the injustices of apartheid; the NP, on the other hand, sought to "protect white minority rights, and to ensure that the future black government will have less power than the previous white regime." Because the ANC did not militarily defeat the apartheid state and instead had to negotiate with a formidable adversary in control of vast economic resources and deadly military and security apparatuses, it was forced to strike debilitating compromises in a number of key areas. The resulting Interim Constitution, approved by the all-white Parliament in December 1993, bears the marks of those historic compromises.

The Interim Constitution is a transitional document, aspects of which are designed to last until April 30, 1999, the adoption of a permanent constitution notwithstanding. Perhaps the most important compromise of the Interim Constitution is the provision of a power-sharing arrangement to "mitigate" the power of the black majority in the democratic state during the transitional period. Under this arrangement, the Government of National Unity (GNU), formed after the 1994 elections, was composed of the ANC, the NP, and the Inkatha Freedom Party (IFP). The GNU acts as a restraint against the ANC and "reassures" whites, who mainly voted for the NP, and IFP supporters that their interests will be safeguarded. Its practical effect has been to constrain the ANC from pushing through some important measures.

Bantu (AWB) and two left-leaning black groups, the PAC and the Azanian Peoples Organization. The PAC charged that the ANC was selling out to the NP government. Philippa Garson, The PAC Enters the Fray, AFRICA REP., Nov.-Dec. 1992, at 19.


84. Wing, supra note 6, at 366.

85. S. AFR. CONST. (Interim Constitution, Act 200 of 1993). It came into force on April 27, 1994, the first day of the 1994 elections. Id. ch. 15, § 251(1).

86. See id sched. 4, Principle XXXII. The Constitutional Principles enumerated in this section must be met by the 1996 CONSTITUTION, which will replace the S. AFR. CONST. (Interim Constitution, Act 200 of 1993). See id. ch. 5, § 71(a).


88. The Constitution provided that any party with at least 20 seats in the National Assembly or 5% of the vote was entitled to one or more cabinet posts in proportion to the seats it held in the National Assembly. In addition, every party that holds at least 80 seats in the National Assembly or 20% of the vote is entitled to designate an Executive Vice President from among the members of the National Assembly. Members of the National Assembly and Senate are determined through proportional representation, a principle that allows minority parties a voice in the legislative process. See S. AFR. CONST. (Interim Constitution, Act 200 of 1993) ch. 4, § 40(1) and § 48(1).

89. Both the Interim Constitution and the 1996 Constitution require the President to consult
The Interim Constitution attempts to guarantee the entire gamut of human rights within the unitary state. The most significant of these measures is the Bill of Rights—which also guarantees the right to own property—and the creation of a Constitutional Court. The Constitutional Court, which was proposed by the ANC, has jurisdiction as the court of final instance in all questions of interpretation of the Interim Constitution, violations of the Bill of Rights, and the constitutionality of national and provincial laws, as well as administrative and executive acts. It can exercise judicial review, a power that the previous Supreme Court lacked under the parliamentary supremacy model of apartheid, whereby the courts had no right to pronounce on the constitutionality of acts of Parliament. The Constitutional Court alone had the power to certify that the permanent Constitution, adopted by the Constitutional Assembly on May 8, 1996, complied with the thirty-four Constitutional Principles laid down in the Interim Constitution. Without this certification the new Constitution could not become law.


90. The Bill of Rights is entitled “fundamental rights” and draws heavily from the ICCPR and the ICESCR. The rights protected include the traditional civil and political rights as well as nontraditional rights such as the rights to a healthy environment, education, and language and culture. Also protected are children’s rights, labor rights, and the unqualified right to life. See S. Afr. CONST. (Interim Constitution, Act 200 of 1993). For other analyses on the South African Bill of Rights, see also RIGHTS AND CONSTITUTIONALISM: THE NEW SOUTH AFRICAN LEGAL ORDER (David van Wyk et al. eds., 1994); I.M. RAUTENBACH, GENERAL PROVISIONS OF THE SOUTH AFRICAN BILL OF RIGHTS (1995).

91. The property clause was hotly contested because of the exclusion of blacks from economic life by apartheid and the total control by whites of virtually all economic resources. As it stands, the clause caters to both groups, although white property-owners have cause to celebrate its wording. It protects the right of every person to acquire property and to dispose of it and prohibits expropriation without compensation. This language permits blacks to acquire property, a right Africans were generally denied during apartheid, but it also protects white property-owners. In any case, the mere right to own property is of little consequence to a segment of the population that has few or no resources to acquire property in the first place. See S. Afr. CONST. (Interim Constitution, Act 200 of 1993) ch. 3, § 28.

92. Id. ch. 7, § 98. The Constitutional Court is composed of a president and ten other judges who are appointed by the State President for a nonrenewable seven-year term. Id. ch. 7, § 99. Most of the judges of the current Constitutional Court have strong reputations as human rights lawyers and scholars.

93. Id. ch. 7, § 98(2).

94. Sachs, Areas of Agreement and Disagreement, supra note 40, at 15. See also L.W.H. Ackermann, CONSTITUTIONAL PROTECTION OF HUMAN RIGHTS: JUDICIAL REVIEW, 21 COLUM. HUM. RTS. L. REV. 59 (1989) (discussing the need for judicial review, which was nonexistent in apartheid South Africa, in a post-apartheid state). See Wing, supra note 6, at 359.

95. See S. Afr. CONST. (Interim Constitution, Act 200 of 1993) ch. 5, §§ 71, 73–74. The new Constitution could not have come into force unless it was certified by the Constitutional Court. Id. § 71(2).
The Constitutional Principles lay at the heart of the constitution-making process because they represent the core of the “solemn pact,” the covenant reached primarily between the ANC and the NP on the powers and functions of the new democratic state. The principles put the likely ANC-dominated future government in an iron box, taking away its ability to transform South Africa according to its vision. For the NP, the principles constituted a shield for the protection of the white minority and its privilege from the possible redistributive inclinations of a black-led government. In other words, the principles were the essential link between the past and the present; through them the old order would ensure its survival. For the ANC, which ascended to power through persuasion as opposed to the defeat of its adversary, rejection of the principles would likely have delayed the transition or compounded the crisis of governance then destabilizing South Africa. The establishment was willing to transfer some powers to an ANC government so long as the resulting state would have substantially inferior powers compared with those of its predecessors.

While constitutional certification has no precedent, it is not difficult to see why both the ANC and the NP agreed to it. For the ANC, the certifying authority would be the Constitutional Court, which it had created and which would be sympathetic to it. For the NP, the certification made sure that an ANC-dominated Constitutional Assembly could not write the constitution it desired. Consequently, the final constitution would reflect the compromise reached in 1993, effectively curbing the power of the ANC to create a completely new political and constitutional dispensation. It seems that the NP got the better of the deal as it was protected against the will of the majority to substantially transform the state. What is more disturbing, however, is that CODESA, the unelected multiparty forum that produced the Interim Constitution, crafted a document that the Constitutional Assembly, the first national democratically elected body in South Africa, could not substantially alter. In a sense, the validity of the 1996 Constitution rests on the all-white Parliament that approved the Interim Constitution, and the Constitutional Court, which is an appointed body. The Constitutional Assembly, the body actually representing the will of all South Africans, essentially rubber-stamped prior political choices, despite projecting the perception that it was making a new constitution.

The Interim Constitution created watchdog institutions with broad mandates to promote and protect rights and to exercise oversight and scrutiny over state institutions, public officials, and society at large.96

96. Id. ch. 8.
These independent commissions are: the Human Rights Commission (HRC), given the broadest mandate and intended to be the leading human rights body; the Public Protector, or Ombud; the Commission on Gender Equality, designed to promote equality between the sexes and to advise the legislature on laws that affect the status of women; and the Commission on the Restitution of Land Rights. Both the Constitutional Court and the Appellate Division of the Supreme Court have important human rights functions in that they determine the constitutionality of government acts, policies, and omissions. Other commissions of import to human rights issues are: the Truth and Reconciliation Commission (TRC), which is mandated to investigate and publish the abuses of the apartheid era; the Independent Electoral Commission (IEC), which organized, administered, and monitored the 1994 elections; the Commission on the Restitution of Land Rights, which is a central organ in the government's land reform program; and the Auditor-General. In the 1996 Constitution, the ANC bowed to pressure from right-wing Afrikaners and permitted a provision for the establishment of the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities, a body intended to "protect" minority rights. The 1996 Constitution also established an Independent Authority to Regulate Broadcasting. Only the HRC, the Public Protector, the TRC, the Auditor-General, and the permanent

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100. Id. §§ 122-23. See also The Restitution of Land Rights Act 22 of 1994.
101. Id. §§ 98 and 101.
102. The TRC is based on the final clause of the Interim Constitution, which calls for a mechanism to address human rights abuses during the apartheid era. See also The Promotion of National Unity and Reconciliation Act 34 of 1995. For a brief description of the history, purpose, structure, and mandate of the Truth Commission, see Ministry of Justice (Justice in Transition), Truth and Reconciliation Commission (1995).
105. Id. ch. 12, §§ 191-194.
106. S. Afr. Const. (1996 Constitution) ch. 11, § 181(1)(c) and ch. 12, §§ 185-186. It was ironic that Afrikaners, who had either denied or marginalized the cultural and linguistic rights of blacks and other non-white minorities, would seek protection for similar rights under the new Constitution. Although Afrikaners are a numerical minority, they still overwhelmingly command important institutions in the new state and the economic sector.
107. This body is "intended to regulate broadcasting in the public interest, and to ensure fairness and a diversity of views broadly representing South African society." Id. ch. 12, § 192. See also Independent Broadcasting Authority Act 153 of 1993; Independent Media Commission Act 148 of 1993. Both sought to increase fairness in the media prior to the 1994 elections.
Election Commission are now established and operational. The 1996 Constitution broadens the mandates of most of these commissions and further clarifies their roles and functions.

In general, the Interim Constitution attempts to strike a delicate balance among all the tensions in South Africa as it seeks to create an inclusive but fair state. But on many key issues, the Interim Constitution's positions dance precariously on the political precipice. For example, the Constitution glosses over the contradiction between federalism and a unitary state, and, as a result, fails to satisfy the IFP's autonomy demands. The Interim Constitution's protection of group rights through the protection of language rights, for instance, does not translate into political power by entrenched regional interests such as the IFP. Elsewhere, in its push to "reconcile" and "reconstruct" South African society, the Interim Constitution treads water on the explosive issues of land reform and security of tenure for the largely Afrikaner bureaucracy.

Were it not for the legacy of apartheid, the Interim Constitution's rights orientation would have been largely beneficial to individuals and communities. Under the circumstances, however, the rights approach gives no more than formal and abstract rights to blacks and other non-whites. For white beneficiaries of apartheid, by contrast, the rights-based state, with its independent courts and multiple rights commissions and watchdogs, is a golden opportunity to protect most of their privileges and legitimize the results of apartheid.

D. The 1996 Constitution: A Normative Continuum

The new Constitution, which was adopted by the Constitutional Assembly on May 8, 1996, could only come into force after it was

108. The final clause of the Interim Constitution is entitled "National Unity and Reconciliation," and emphasizes the need for magnanimously addressing past human rights violations to build a foundation for a secure and fair society.

109. Public officials, who are mostly Afrikaner, were guaranteed security of tenure, a fact that has made it difficult to restructure and transform the bureaucracy and create a representative civil service. See S. Afr. Const. (Interim Constitution, Act 200 of 1993) ch. 15, §§ 229-250. Specifically, see id., § 236(2), which guarantees continued employment to persons employed in a public service or department of state prior to April 27, 1994, the date of entry into force of the Interim Constitution.

110. Id. ch. 5, § 73(1). The Constitutional Assembly had to pass a new constitution by May 9, 1996, two years from the first sitting of the National Assembly under the Interim Constitution, or the President would dissolve Parliament and call a new election. Id. § 73(9). The new Constitution is a result of extensive negotiations, particularly between the ANC and the NP, and widespread public hearings and a national media campaign. As a result of these thorough consultations, the more than 1.7 million submissions entered by the public were summarized and made available to the Constitutional Assembly. Similarly, the progress of the constitution-making process and analyses of issues were frequently and regularly presented to the public through the print and broadcast media and the internet. See UN Needs Assessment Report, supra note 8, at 8.
certified by the Constitutional Court,111 assented to by the President, and then promulgated.112 Some provisions of the 1996 Constitution came into effect on February 4, 1997, a date set by the President by proclamation.113 Once in force, the new Constitution will repeal most of the Interim Constitution unless otherwise provided for in either the Interim or the new Constitution. The provisions of the Interim Constitution relating to a government of national unity will remain in force until April 30, 1999.114 The focus on a rights approach to resolving South Africa's problems will not change.

The 1996 Constitution elaborates and adds certain rights, such as the right to property, and broadens the mandates of human rights institutions. Of the "State Institutions Supporting Constitutional Democracy,"115 the HRC is given the broadest mandate. Unlike other commissions that are created to address particular human rights issues, the HRC's powers are wide-ranging and subsume those of other commissions. It has broad powers to promote respect for human rights through educational campaigns and the monitoring of human rights conditions,116 and to protect human rights through investigations,117 reports, and suits118 that it may initiate.119 More important, the new Constitution gives the HRC the power to monitor the state’s compliance with particular economic and social rights contained in the Bill of Rights.120


114. For example, S. AFR. CONST. (Interim Constitution, Act 200 of 1993) sched. 4, Principle XXXII is incorporated in S. AFR. CONST. (1996 Constitution) Annexure B. The same arrangement of a multi-party government of unity applies to provincial governments, which will continue to be governed by the rules of national unity. See S. AFR. CONST. (1996 Constitution) Annexure C.

115. This is the title (and the name given to independent human rights commissions and other watchdogs) of the chapter providing for human rights institutions in the S. AFR. CONST. (1996 Constitution) ch. 9, §§ 181-194.

116. Id. ch. 9, § 184(1).

117. The HRC has the power to compel testimony, search premises, and subpoena witnesses. See Human Rights Commission Act 54 of 1994 §§ 9, 10.

118. Id. § 7(1)(e).

119. S. AFR. CONST. (1996 Constitution) ch. 9, § 184(2).

120. These are the rights to housing, health care, food, water, social security, education, and
The HRC's broad mandate, the vastness of South Africa, and its complex and deep-rooted human rights problems pose serious challenges to the institution. Since opening its Johannesburg offices in March 1996, the HRC's five full-time members and its small staff of ten have been absorbed in concretely defining the Commission's place in the democratization process and determining its priorities and principal areas of focus. The Commission risks marginalizing itself and undermining the public's confidence in it, if it emphasizes its promotional functions at the expense of actively investigating abuses, exposing violations, and seeking redress for them. The educational role will be best served by an activist and confrontational Commission.

More challenging, however, is the Commission's constitutional mandate to monitor the state's realization of social and economic rights. The problems in this area are compounded by the government's lack of adequate resources and an absence of clear normative standards in the human rights corpus. Like the ICESCR, the principle human rights treaty in the field of economic and social rights, the South African Constitution gives little guidance on the content of such rights or the speed with which they must be respected. The Constitution opts for the language of gradualism, of "progressive realization." The Commission will need to harness whatever jurisprudence exists internationally, contextualize it for South Africa, and develop normative criteria with which to assess the progress made by the state. The process may ultimately provide some valuable lessons for the international community in this field.

121. The HRC was inaugurated on October 2, 1995 and opened its offices in Johannesburg in March 1996. Its 11 commissioners, 4 of whom are part-time, have been appointed to seven-year terms. The HRC's 1996/1997 budget of R6.436 million will rise to R12.745 million in 1997/1998, while its staff is expected to grow to 40 employees. UN Needs Assessment Report, supra note 8, at 35.

122. As Alston has clearly stated, both national and international human rights law have done little to give content to the norms of economic, social, and cultural rights:

By contrast [to the ICCPR], the range of rights recognized in the other Covenant [ICESCR] was, with the exception of labor-related rights, considerably in advance of most national legislation. Indeed, this is still the case today so that international lawyers seeking enlightenment as to the meaning of rights such as those pertaining to food, education, health care, clothing, and shelter will find little direct guidance in national law.

Alston, supra note 24, at 490.

123. For South Africa, the language of the Constitution requires, for example, that "[t]he state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realization of each of these rights [that is, rights to health care, food, water, and social security]," S. Afr. Const. (1996 Constitution) ch. 2, § 27. This language echoes the phrasing of the ICESCR, which requires each state to take steps "to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the Covenant," ICESCR, supra note 2, at 49.
The Human Rights Commission must also sort out its relationship with the other commissions focused on discrete areas of human rights to avoid redundancy. While there is little overlap with the Public Protector who is essentially concerned with official maladministration, potential conflict and tension between the HRC and the Commission for Gender Equality, and the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities (CRLCC) appears inevitable.

In September 1996, the Constitutional Court refused to certify the draft text of the 1996 Constitution, holding that it failed to meet the requirements of a number of the Constitutional Principles of the Interim Constitution. In particular, according to the Constitutional Court, the 1996 Constitution did not guarantee the right of employers to collective bargaining; impermissibly shielded a number of statutes from constitutional review; failed to require “special procedures involving special majorities” for constitutional amendments; did not entrench the Bill of Rights; did not provide adequately for the independence and impartiality of the Public Protector, the Public Service Commission, and the Auditor-General; failed to specify that the powers and functions of the Public Service Commission could impinge on legitimate provincial autonomy; did not provide a framework for the structures, and the fiscal powers and functions for local government, and the formal legislative procedures that they should follow;

124. S. Afr. Const. (1996 Constitution) ch. 9, § 182 (1). Selby Baqwa, the present Public Protector, was appointed on October 1, 1995 for a nonrenewable seven-year term. UN Needs Assessment Report, supra note 8, at 38.
126. Id. ch. 9, § 185.
130. Section 74 of the 1996 draft text of the Constitution violated Constitutional Principle XV. Id.
131. Section 74 of the 1996 draft text of the Constitution violated Constitutional Principle II by failing to entrench the Bill of Rights. Id.
132. Sections 194 and 196 of the 1996 draft text of the Constitution violated Constitutional Principle XXIX. Id.
133. Section 196 of the 1996 draft text of the Constitution could violate Constitutional Principle XX. Id.
134. Chapter 7 of the S. Afr. Const. (1996 Constitution), which deals exclusively with local government, violated Constitutional Principles XXIV, XXV, and X. Id.
and provided the provinces with "substantially less and inferior" powers and functions than those required by the Interim Constitution.\textsuperscript{135} The grounds for non-certification are important in that they indicate attempts by the ANC to alter or modify the Interim Constitution and, more specifically, the Constitutional Principles. In other words, the Constitutional Court objected to those provisions that it perceived as a departure from the 1993 settlement. A number of its objections addressed the contentious issue of the division of powers between the center and the provinces, a key question on the nature of the post-apartheid state. More important, those objections give an indication of the policy choices and directions that the ANC government may push for in the future as it consolidates its power.

The Constitutional Court emphasized that the 1996 Constitution did not contain substantial flaws. To the contrary, the Court found that the Constitution complied with most of the Constitutional Principles. It said:

\begin{quote}
We wish to conclude this judgment with two observations. The first is to reiterate that the CA [Constitutional Assembly] has drafted a constitutional text which complies with the overwhelming majority of the requirements of the CPs [Constitutional Principles]. The second is that the instances of non-compliance [sic] which we have listed in the preceding paragraph, although singly and collectively important, should present no significant obstacle to the formulation of a text which complies fully with those requirements.\textsuperscript{136}
\end{quote}

President Mandela welcomed the Court's opinion, noting that the Court had clarified some issues that were vaguely formulated by the Constitutional Principles.\textsuperscript{137} He expressed confidence that the Constitutional Assembly would quickly finalize the Constitution and bring it into full conformity with the Constitutional Principles.\textsuperscript{138} Although most political parties welcomed the judgment, an impression was created that the Court wanted a different balance of power between the provinces and the center.\textsuperscript{139} Some reports suggested that the Court's

\textsuperscript{135} Section 229 of the 1996 draft text of the Constitution violated Constitutional Principle XVIII. \textit{Id.}


\textsuperscript{137} OFFICE OF THE PRESIDENT, \textsc{President Mandela On the Constitutional Court Judgement} (Sept. 9, 1996).

\textsuperscript{138} Id.

\textsuperscript{139} Interview with Professor Shadrack Gutto, Deputy Director, CALS, in New York, New York (Dec. 4, 1996). This view is supported by the Constitutional Court's rejection of the draft 1996 Constitution because of its strong centralizing thrust, a key objection of the IFP. \textit{See} R.W.
rejection of the draft 1996 Constitution played into Buthelezi's hands and his demands for more provincial autonomy.140

On October 11, 1996, the Constitutional Assembly voted overwhelmingly to adopt a revised draft of the 1996 Constitution.141 The Constitutional Assembly adopted the new text by a vote of 369-1, with only eight abstentions.142 Buthelezi's Inkatha Freedom Party boycotted the vote (it had also boycotted the initial drafting process) claiming that its wishes for more provincial autonomy and international mediation had not been accepted.143 The white separatist Freedom Front abstained because it could not accept all the provisions of the new text.144 The final text of the 1996 Constitution was certified by the Constitutional Court on December 4, 1996, and signed into law by President Mandela on December 10, 1996.

The 1996 Constitution consolidates and further clarifies the rights enumerated in, and required by, the Interim Constitution. The rights-oriented rhetoric of the Interim Constitution is affirmed and enhanced in a number of areas in the permanent Constitution. The 1996 Constitution, building on the Interim Constitution, does not permit limitations to the Bill of Rights except those permissible in an "open and democratic society"145 and provides a list of nonderogable rights in states of emergency.146 The rights and powers of certain institutions are enhanced in the new Constitution. While the National Assembly and its powers remain substantially the same as before, the Senate is transformed into the National Council Provinces (NCP).147 Although the National Assembly remains the main legislative body, the NCP is given almost equal legislative power: it can amend and reject most proposed laws, and this includes laws pertinent to provincial jurisdiction.148 Regarding the right to self-determination by communities, the

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142. Id.
143. Id.
144. Id.
145. S. AFR. CONST. (Interim Constitution, Act 200 of 1993) ch. 4, § 36(1). This is the same language used in the ICCPR. See ICCPR, supra note 2, art. 21.
146. These include human dignity and life, for which derogation is entirely prohibited, and others, including freedom and security of the person, to which some degree of derogation is permitted. S. AFR. CONST. (1996 Constitution) ch. 2, § 37(5)(c).
147. Id. ch. 4, § 60.
148. Id. ch. 4, §§ 74, 75, and 76. Note that the provinces remain the same although some are renamed. The nine provinces now are: Eastern Cape, Free State, KwaZulu-Natal, Mpumalanga, Northern Cape, Northern Province, North West, and Western Cape. Id. ch. 6, § 106.
Constitution rejects secession and only allows the exercise of self-determination within the framework of the unitary state. The 1996 Constitution relies, like its predecessor, on the grant of formal guarantees and expressions of rights by the state and its institutions to form the basic foundation for the transformation of the legacies of apartheid.

III. RIGHTS AGAINST THE WRONGS OF APARTHEID

A. The ANC and a Gradualist Approach to Change

The ANC, South Africa's premier reformist organization during apartheid, sought political reform and majority rule with a view to transforming the political and economic structures of apartheid. From its earliest days, the ANC emphasized a rights-based approach to reform, a strategy that in all likelihood is incapable of transforming the abysmal legacy of apartheid. But the struggle for equality and the right to political participation, the two prominent pillars that supported resistance to apartheid South Africa, were not pursued by the ANC and other reform-minded groups as ends in themselves. Rather, emphasis on these preeminent norms of the human rights movement was a strategy to affect the foundations of a state that excluded blacks from the economic mainstream. The struggle against apartheid was not waged so that blacks could boast of abstract political rights. It was waged so that blacks could have equal access to economic resources. Majoritarian democratic rule constrained by particular notions of property rights does not necessarily lead to the economic empowerment of the majority. The challenge of the ANC-dominated government is to achieve economic empowerment of the black majority within a human rights state that protects economic rights.

149. Id. ch. 14, § 235. The new Constitution extends to provincial authorities essentially the same concurrent and exclusive legislative competencies as before. Id. Schedules 4 and 5.

150. For example, India, the world's largest democracy, also boasts the largest number of illiterate people. See Myron Weiner, The Child and the State in India: Child Labor and Education Policy in Comparative Perspective 3 (1991). With a population of 935,744,000, India has a per capita income of US $290. See Encyclopedia Britannica, supra note 28, at 628.

151. As put by one South African intellectual:

In the context of South Africa, the majority of whose people have inherited extreme levels of poverty, malnutrition, and political, social, and economic deprivations, democracy means much more than the right to vote in a multiparty system. It means the ability of the new government to satisfy the basic educational, social, and economic needs of the victims of oppression in a manner that will significantly narrow the gap between white affluence and mass [black] poverty.

Economic transformation is a daunting challenge because international support for the anti-apartheid movement, especially in the West, was not driven by the desire to combat economic inequality; its main focus was extending the right of political participation to black South Africans.\(^\text{152}\) Indeed, the economic programs of the ANC that emphasized black economic empowerment in a democratic post-apartheid state through the nationalization of key economic sectors drew hostility from most Western countries as well as the apartheid regime.\(^\text{153}\) The ANC's economic rhetoric softened over the years as the possibility of capturing state power increased.\(^\text{154}\) In fact, Nelson Mandela himself assured the government in secret talks in 1988 that the ANC supported a more even distribution of resources rather than wholesale nationalization, although he cautioned nationalization might be necessary in certain sectors of the economy.\(^\text{155}\)

Just prior to the 1994 elections, the ANC issued the Reconstruction and Development Programme (RDP), the key platform and vision for the society that the ANC intended to create.\(^\text{156}\) After the elections and the triumph of the ANC, the RDP became the official policy under which each government ministry was to create a strategy for reform.\(^\text{157}\) As a result, White Papers discussing and analyzing proposals for reform have been produced for most sectors.\(^\text{158}\) Briefly, the RDP reform must adhere to six basic principles: an integrated and sustainable program; a people-driven process; peace and security for all; nation-building; the link between reconstruction and development; and the democratization of South Africa.\(^\text{159}\) The five programs of the RDP are: meeting basic needs; developing human resources; building the economy; democratizing the state and society; and implementing the RDP.\(^\text{160}\)

\(^{152}\) See Gassama, supra note 20, at 1531.

\(^{153}\) The Freedom Charter advocated the restoration of the country's wealth to all South Africans and the transfer of mineral wealth, banks, and other industrial monopolies to ownership by the people. See THE FREEDOM CHARTER, supra note 43, at 250. The United States was for a long time bitterly opposed to the ANC, which it deemed communist and a surrogate of the Soviet Union during the Cold War. President Reagan commended Pretoria's repressive practices, which he saw as the regime's right to maintain law and order against "terrorists" [ANC]. He harshly attacked the alliance between the ANC and the South African Communist Party (SACP) and the support of the two by the Soviet Union. See MICHAEL CLOUGH, FREE AT LAST?: U.S. POLICY TOWARD AFRICA AND THE END OF THE COLD WAR 106 (1992).

\(^{154}\) Gassama, supra note 20, at 1533–34.

\(^{155}\) MANDELA, supra note 3, at 642.

\(^{156}\) See RECONSTRUCTION AND DEVELOPMENT PROGRAMME, supra note 23.

\(^{157}\) UN Needs Assessment Report, supra note 8, at 7.

\(^{158}\) Id.

\(^{159}\) See RECONSTRUCTION AND DEVELOPMENT PROGRAMME, supra note 23, at 4–7.

\(^{160}\) Id. at 7–13.
On the face of it, and as a broad statement of intent, the RDP's prose is seductive. The devil, however, is in more than just the details. Although the RDP decries the legacy of apartheid—racial and gender inequalities, the exclusion of blacks and other non-whites from most sectors of society, the total control of the economy by the white minority, and incredible poverty among blacks—it has few practical measures by which to restore the humanity of the victims of apartheid. For example, in the section on building the economy, the RDP states the obvious—that the ANC is committed to democracy, participation, and development and that the ANC is:

[c]onvinced that neither a commandist central planning system nor an unfettered free market system can provide adequate solutions to the problems confronting us. Reconstruction and development will be achieved through the leading and enabling role of the state, a thriving sector, and active involvement by all sectors of civil society which in combination will lead to sustainable growth.  

The RDP lists among the goals of the reconstruction of the economy the following: the elimination of poverty and discrimination, the reduction of economic imbalances between regions, and the development of human resources. Even though the RDP mentions the transfer of resources from the central government to the rural areas as one possible method for alleviating rural powerlessness among blacks, there are no concrete suggestions about where such funding should come from. This romantic approach—stating egalitarian goals and vague objectives—without directly and concretely identifying how industries or sectors have to be transformed, from where the resources for that transformation will be seized, and how white privilege will be curtailed, permeate the RDP and undermine its credibility.

In April 1996, in a move that could be read as a sign of the ANC's retreat from this minimalist program of reform, the RDP ministerial office was dissolved and transferred to the offices of the Deputy President and the Ministry of Finance. Whatever the initial intent of the authors of the RDP, the actual document appears to have been sharply understated to reassure foreign investors, creditor nations and agencies,

161. Id. at 78–79.
162. Id. at 79.
163. Id. at 84.
164. UN Needs Assessment Report, supra note 8, at 7. A cabinet member in the government gave the RDP clout, profile, and independence, and established it as an important point of reference to which all state institutions could address their concerns. The cancellation of the cabinet post downgrades the RDP and reduces its visibility and urgency.
and the powerful white minority, as part of the ANC strategy to capture state power through the elections.\textsuperscript{165} What Gassama calls the "conservative, pro-business, anti-redistributive direction"\textsuperscript{166} of the government enjoys the support of most white captains of industry in South Africa, the one group whose privileges have not only been protected but increased.\textsuperscript{167} It is ironic that a democratic South African state would have considerably less power than the apartheid state ever had to transform society, even though the new state seeks to create a fair and just society, whereas its predecessor used its power to do precisely the opposite.\textsuperscript{168}

\textbf{B. Land Reform: Why the Struggle Was Waged}

Whites own eighty-seven percent of the country's total surface area,\textsuperscript{169} even though they constitute only fifteen percent of the population of South Africa.\textsuperscript{170} Blacks were prohibited from owning land until 1991 when the Land Act of 1936, which reserved most land for whites, was repealed.\textsuperscript{171} Millions of Africans were divested of South African citizenship and many more were confined in the homelands.\textsuperscript{172} It is

\textsuperscript{165.} Gassama has articulated this point well:
In the course of the negotiations [CODESA] and during the electoral campaign, the ANC in fact devoted considerable energy toward reassuring South African and international investors and financial institutions about its socio-economic plans. The ANC made it clear that it would not take any radical steps to change the economic conditions it would inherit. To some extent then, economic inequalities were ratified or legitimated by the very process of negotiations and the subsequent elections. The South African civil service, the foreign service, the police, the military, and the business sector are still dominated by the very people who presided over or prospered under apartheid, their jobs and privileges protected under the new arrangement. See Gassama, \textit{supra} note 20, at 1531-32.

\textsuperscript{166.} \textit{Id.} at 1533.


\textsuperscript{168.} The nature of the displacement of the apartheid state and the transitional arrangements agreed to by the ANC made sure to leave intact economic disparities between blacks and whites. According to a noted South African political analyst:

Much of the new constitution [Interim Constitution] was devoted to assuring the white minority that the tables would not be turned on them in a regime of vengeance. It promised cabinet seats to minority parties for the first five years, and it protected the jobs and pensions of white soldiers, police and civil servants.

See Allister Sparks, \textit{TOMORROW IS ANOTHER COUNTRY} 194 (1995).

\textsuperscript{169.} Sachs, \textit{ADVANCING HUMAN RIGHTS IN SOUTH AFRICA}, \textit{supra} note 40, at 70, 72.

\textsuperscript{170.} \textit{ENCYCLOPEDIA BRITANNICA}, \textit{supra} note 28, at 716.


\textsuperscript{172.} \textit{GREEN PAPER ON LAND}, \textit{supra} note 37, at 9.
important to remember that blacks did not fight for democracy so that whites could continue to own eighty-seven percent of the land. These statistics, together with the politics of exclusion and discrimination, were the reasons for the anti-apartheid struggle. It is not possible to address the demands of the black majority and create a state that respects the gamut of human rights without correcting the gross imbalances and injustices related to land.

Recognizing this fact, the RDP notes that "[a]partheid pushed millions of black South Africans into overcrowded and impoverished reserves, homelands and townships" and calls for a land reform program to be the central plank of rural development. The RDP emphasizes that the abolition of apartheid laws denying blacks rights to land accomplishes little since only a minuscule number of blacks can afford land on the open market. Thus the RDP advocates a land reform program with two components: land restitution and land redistribution. This philosophy was the basis for the measures and programs outlined in the government's policy proposals on land reform.

These proposals and policies must, however, be construed subject to the property clause in the Bill of Rights of the new Constitution. The inclusion of the right to property in the Bill of Rights makes it sacrosanct and virtually inviolable. However, the right primarily serves to protect the interests of white property and landowners, the authors and beneficiaries of apartheid.

Land redistribution is supposed to benefit the rural and urban poor by providing them with an array of tenure arrangements. As clearly stated in the RDP and restated in ANC-government policy, however, no radical land reform program is contemplated. The land redistribution component is based on the principle of "willing-buyer-willing-seller" without direct government involvement except as a facilitator to provide financial assistance. Households with an income of less than R1,500 are eligible for a government grant of up to R15,000 to purchase rights in land. The government hopes that these voluntary transactions will suffice. It does not contemplate expropriation, which it regards "[a]s an instrument of last resort where urgent land needs cannot be met for various reasons, through voluntary market transac-

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174. Id. at 20.
175. Id.
176. See generally GREEN PAPER ON LAND, supra note 37.
178. Id. § 36(1).
179. GREEN PAPER ON LAND, supra note 37, at iii. Land redistribution is also intended to benefit "farm workers, labour tenants, women, and entrepreneurs." Id.
180. Id. at 25.
181. Id. at 52–53.
tions.” In any case, the Constitution severely restricts expropriation, which can only be done for public purposes and in the public interest and must be justly and adequately compensated.

Land restitution aims to restore land and provide other remedies to individuals who were dispossessed of their lands through past racially discriminatory laws and practices. Restitution covers cases of forced removals since June 19, 1913, when the Natives Lands Act was passed, but it affects only about two percent of the land. Under the scheme, individuals with claims can apply to the Commission on the Restitution of Land, which investigates claims and mediates between the parties. If an agreement does not result from mediation, the Commission refers claims to the Land Claims Court for adjudication. Claimants must apply to the Commission by May 1, 1998, and both the Commission and the Court have five years to process all claims. Court orders must be implemented within ten years of the creation of the Court. The state bears the burden of compensating the landowners against whom a successful restitution claim has been lodged. As of March 31, 1996, 7095 claims had been lodged with the Commission throughout South Africa. It is too early to gauge the success of the restitution scheme, although a handful of claims have been settled.

182. Id. at 25. Under the Provision of Certain Land for Settlement Act 126 of 1993, the government estimates that 13,500 families will obtain land for rural settlement. Id. at 4.

183. S. Afr. Const. (1996 Constitution) ch. 2, § 25. Wing notes that the costs of the just compensation requirement impede redistribution. In Zimbabwe, a decade after independence, the government had managed to resettle only one-third of 160,000 families who had been promised land at independence. Wing, supra note 6, at 358.

184. GREEN PAPER ON LAND, supra note 37, at iii. It is estimated that 3.5 million people, mostly black, were removed from their lands between 1960 and 1980. Id. at 9.

185. Id. at 20. Other laws used to remove blacks from their lands include the Black Administration Act of 1927, the Development Trust and Land Act of 1936, the Group Areas Acts of 1950, 1957, and 1966, and the Black Resettlement Act of 1954. Id. at 36.


187. The Land Claims Court, which is also created under the Restitution of Land Rights Act of 1994, was sworn in on March 20, 1996. GREEN PAPER ON LAND, supra note 37, at 20. See also COMMISSION ON RESTITUTION OF LAND RIGHTS, supra note 186, at 2.

188. GREEN PAPER ON LAND, supra note 37, at 34.

189. Id.

190. Id. at 39. The state also compensates claimants where restoration of land is not possible or would be inappropriate. Id. at 38. For the constitutional requirements for compensation where expropriation has taken place, see S. Afr. Const. (Interim Constitution, Act 200 of 1993) ch. 3, § 28(3); S. Afr. Const. (1996 Constitution) ch. 2, § 25.

191. COMMISSION ON RESTITUTION OF LAND RIGHTS, supra note 186, at 10.

192. See Glynnis Underhill, Square Deal for My Lady Cavendish . . . ., SATURDAY WEEKEND
Land tenure reform aims to clarify, strengthen, and secure the land rights of individuals, families, and groups who live at the margins of society. Those affected would include labor tenants, squatters, and black farmworkers on "white" land who live at the mercy of landowners. This scheme, by ratifying marginal "land rights," gives legal sanction and legitimizes historically repressive, abusive, and exploitative relationships under which blacks have toiled for whites.

In sum, the land reform program is a far cry from a device for the empowerment of blacks. Except for tinkering at the margins, it leaves most of the land in the hands of whites and the few blacks able to purchase land on the free market. The one scheme that seems promising is the restitution program, although it will affect only a small number of people.

Even the government has tabulated a long list of constraints limiting land reform: limited resources and other budgetary priorities; constraints imposed by the Constitution; and organizational, institutional, and resource limitations of the state. The government's exclusive reliance on the rights idiom and legal and bureaucratic processes is too slow, conservative, and unlikely to yield any major changes even in the long term. Many in the black community are too poor or unfamiliar with complex legal processes to take advantage of them. Finally, the ANC government is either stretched too thin or is wholly reliant on an untrustworthy bureaucracy—the authors and enforcers of apartheid—who are loathe to unravel their handiwork. These variables make the land reform program a disappointment.

C. Federalism and Regional Autonomy

The ANC sees a strong central state as essential for the reversal of the inequities of apartheid. In contrast, the NP and entrenched white interests sought a post-apartheid state structured with diminished powers and without the ability to fundamentally affect the distribution

ARGUS, May 18/19, 1996; REGIONAL OFFICE OF THE COMMISSION ON RESTITUTION OF LAND RIGHTS (NORTHERN & WESTERN CAPE), MONTHLY REPORT FOR THE MONTH OF APRIL 1996, at 2 (reporting that two claims, involving 200–600 families, had been settled and awaited court validation) (on file with author).

193. GREEN PAPER ON LAND, supra note 37, at 43.

194. The Land Reform (Labour Tenant) Act of 1996 seeks to address this problem.

195. Shadrack Gutto has written that the land reform program does not historically depart from other market-oriented land reform programs in Kenya and Zimbabwe, which eventually confirmed the status quo and failed to alleviate the problem of the poor and the landless. Gutto argues that the challenge for South Africa is finding a middle road between state ownership of land, as happened in Mozambique, and the market, as happened in Kenya, without surrendering to either. See SHADRACK GUTTO, PROPERTY AND LAND REFORM: CONSTITUTIONAL AND JURIS-PRUDENTIAL PERSPECTIVES 59–67 (1995).

196. GREEN PAPER ON LAND, supra note 37, at 2.
of wealth in South Africa. As a result of these positions, the question of whether South Africa would become a federal state, and the nature of the balance of power between the provinces and the center, were particularly contentious issues in the negotiations for a new Constitution. The NP and the IFP favored a federal structure as a bulwark against a strong central state, an arrangement that would have left enormous power in the hands of local officials, undercutting the ability of the center to promulgate and implement cross-cutting policies to alleviate economic disparities between blacks and whites.198 Not surprisingly, the ANC sought a strong central state with little power in the provinces. The compromise in the Interim Constitution, an apparent contradiction, combines elements of federalism with the features of a strong centralized state.

At the central level, the power of the ANC is diluted by the power-sharing arrangement of the GNU and the structure and powers of the two houses of Parliament. Although F.W. de Klerk had pushed for an ethnically based upper house, the Senate is instead composed of members appointed by the provincial legislatures in accordance with the principle of proportional representation. This gives the provinces an important forum to protect and advance region-specific interests, and their powers are further augmented by the limitations on the ability of the Parliament to alter or erode the nature and power of provincial authorities.

Laws affecting the “boundaries or the exercise or performance of the powers and functions of the provinces” must be passed by both houses of Parliament.201 Furthermore, no law can be passed to affect the powers or functions of a province unless, in addition to being passed separately by both houses, it is also approved by the majority of the senators of the province.202 Any constitutional amendment must be adopted by a two-thirds majority of the National Assembly and the Senate.203 Significantly, the Parliament cannot amend the constitu-

197. The Interim Constitution abolished the homelands and created nine provinces: Eastern Cape, Eastern Transvaal, Natal, Northern Cape, Northern Transvaal, North-West, Orange Free State, Pretoria-Witwatersrand-Vereeniging (PWV), and Western Cape. S. Afr. Const. (Interim Constitution, Act 200 of 1993) ch. 9, § 124.
198. See Mallaby, supra note 171, at 130–32.
199. Although it was predicted that the ANC would overwhelmingly win the 1994 elections and form the next government, it failed to capture the two-thirds majority required to unilaterally amend the Constitution and pass other laws. Its total tally of the vote was just under 63%. See Laurence, supra note 58, at 18.
200. See Wing, supra note 6, at 366. For a discussion of the positions of various groups on the federal and other models of state structure at CODESA, see Ziyad Motala, Constitutional Options for a Democratic South Africa: A Comparative Perspective 164–204 (1994).
202. Id.
203. Id. ch. 4, § 61(1).
tional provisions on the legislative jurisdiction and the executive powers of the provinces unless the amendment is passed separately by a two-thirds majority of each house.\textsuperscript{204} Any constitutional amendment affecting the boundaries or the legislative and executive jurisdictions of a province are invalid unless they are consented to by the provincial legislature in question.\textsuperscript{205}

The power allocated to the provinces creates a system that resembles a federal structure, although it is a far cry from the autonomous or semi-autonomous units of federal states.\textsuperscript{206} Provincial legislatures have concurrent competence with the Parliament in a vast array of areas: agriculture; cultural affairs; casinos, racing, gambling and wagering; education at all levels except university education; environment; health services; housing; nature conservation except national parks, national botanical gardens and marine resources; provincial public media; public transport; regional planning and development; road traffic regulation; roads; trade and industrial promotion; traditional authorities; urban and rural development; and welfare services.\textsuperscript{207} They also have limited concurrent jurisdiction on language policy,\textsuperscript{208} local government,\textsuperscript{209} and the police force.\textsuperscript{210}

Political control of provincial governments is critical to all constituencies as they attempt either to keep the privileges of the past, as the NP hopes to do, or to fundamentally alter the character of the state and social relations, as the ANC has vowed to do. It is certainly crucial to the survival of Chief Mangosuthu Buthelezi and the structures that he controls through the IFP in KwaZulu-Natal. Provincial power is perhaps more important to minority parties, such as the NP and IFP, because it provides them with a sure political foothold in the absence of the clout to substantially affect policy at the center. The IFP has been particularly vocal in its demand for a federal state.\textsuperscript{212} Except for

\begin{itemize}
\item \textsuperscript{204} Id. ch. 4, § 62(2), ch. 9, §§ 126, 144.
\item \textsuperscript{205} Id. ch. 4, § 62(2).
\item \textsuperscript{206} Id. ch. 9 (specifying in great detail the powers and obligations of provincial authorities).
\item \textsuperscript{207} Id. ch. 9, § 126.
\item \textsuperscript{208} Id. sched. 6.
\item \textsuperscript{209} Provincial authorities can create language policy and regulate the use of official languages within the provinces subject to the Constitution, which designates eleven official languages, which must be developed and enjoyed equally. See id. ch. 1, § 3(5).
\item \textsuperscript{210} This power must be exercised subject to the Constitution, which provides for the establishment, powers, functions, and structures of local government. See id. ch. 10, §§ 176–180.
\item \textsuperscript{211} The policing powers of the provinces are subject to the constitutional provisions spelling out the powers, structure, and leadership of the South African Police Service. See id. ch. 10, §§ 214–223.
\item \textsuperscript{212} See Mangosuthu Buthelezi, \textit{A Crossroad in South African History and Western Policies Towards South Africa}, BROWN J. WORLD AFF., Winter 1994, at 231, 236. In February 1995, the IFP walked out of the Constitutional Assembly, criticizing the ANC's failure to submit contested constitutional issues to international mediation. Its demands for greater regional autonomy were unmet and the Constitutional Assembly went on to approve the 1996 Constitution on May 8,
the NP, no other major political organizations in South Africa now advocate the concept. The extremist Afrikaner Volksfront's (AVF) call for the creation of a "volkstaat," a white Boer state, has not been supported by most Afrikaners.\(^{213}\) For his part, Buthelezi has argued the case for federalism thus: "The very nature of South Africa requires different governments for different regions with full political autonomous powers."\(^{214}\) In language amounting to a declaration of war, Buthelezi has emphasized his commitment for a federal solution:

[Our goals for a federal state] . . . are based on the very essence of minority rights protection. For instance, if any region, such as it could be the case for KwaZulu-Natal, because of its social and historical peculiarity, diversity, and common destiny, seeks special autonomy and self-determination within the parameters of a federal system, no majority opposed to such an idea should be entitled to drag that region into a unitary state.\(^{215}\)

The IFP's insistence on a federal state is linked to the romanticization by the Zulu people of their history and traditions and the territory of KwaZulu-Natal, coupled with the person of Chief Buthelezi and his political acumen. He has been particularly effective in manipulating images of Zulu nationalism, a fact that combined with his command of political thuggery and violence has made him a difficult figure to ignore.\(^{216}\) Buthelezi's position poses a serious dilemma for the ANC because of the tensions it creates between the professed goal of the new state to respect human rights—including the group rights of ethnic, religious, and other political minorities\(^ {217}\)—while at the same time attempting to create a strong central state to reverse the legacy of apartheid.


\(^{214}\) Buthelezi, supra note 212, at 236. For a discussion of experimentation with federalism in Africa, see generally Motala, supra note 200. Motala rejects the federal option for South Africa because he believes that the model in Africa has only fostered ethnic conflict leading to state collapse. Id. at 84-90. Instead, he proposes a unitary, non-federal state with strong guarantees for civil and political rights. Id. at 90-100.

\(^{215}\) Buthelezi, supra note 212, at 236. The Zulu people, most of whom live in KwaZulu-Natal, are the single largest nation in South Africa at 22% of the black population and 16.7% of the total population. The Xhosa are a close second at 18% of the black population and 13.7% of the total population. Encyclopedia Britannica, supra note 28, at 716.


\(^{217}\) Although minority groups seeking autonomy from a central state are usually defined as ethnic, racial, religious, or linguistic, a distinct group that holds a particular political position, such as the IFP, could be characterized as a minority in the South African setting even though Zulus are the single largest group in the country.
Three types of approaches for addressing minority demands—power-sharing arrangements, personal laws, and territorial autonomy—are unlikely to appeal to both the ANC and IFP. The first consists of power-sharing arrangements that give the "aggrieved" minority a share of real power through some form of political participation or economic opportunity. Such a scheme might entitle the minority to elect a certain number of legislators to the national legislature through the use of an exclusive bloc voting roll. To give substance to such an entitlement, those legislators might also be constitutionally permitted to veto decisions of the majority affecting, for example, language, religion, or education. Although the Interim Constitution entitled both the NP and the IFP representation in the cabinet and a deputy presidency, both the NP and the IFP have charged that they lack real power within the cabinet. The NP has pulled out of the GNU and the IFP has threatened to follow suit.

A second means of addressing minority demands would give a minority political control of a region. The central thrust of this scheme is devolution of powers or the creation of a federal structure that allows the periphery substantial autonomy from the center. As Steiner notes, "[h]ow extensive those powers are—regional elective government, command of local police, control over natural resources, management of local schools—depends upon the bargain reached between a minority and other political forces in the society." Provincial powers in South Africa extend to some of these areas and include the constitutional recognition and establishment of structures for traditional authorities, however, Buthelezi has not been satisfied by these arrangements. In September 1996, South Africa's Constitutional Court

219. Id.
220. Id. at 1541-42. Other mechanisms for enhancing the voice of minorities may include consultation by the government before major programs are decided upon and the designation of a certain number of "minority posts" within the judiciary, the cabinet, or security and defense forces. Id. at 1542.
221. Of the 27 cabinet posts, the NP was allocated 6, even though it withdrew from the GNU in May 1996. S. African NP Ministers Vacate Office, XINHUA NEWS AGENCY, June 28, 1996, available in LEXIS, News Library, Curnws File. The NP charged that the "new constitution does not allow for formal power sharing in the executive branch of the government in the future." Id.
222. The IFP received three cabinet posts, including Buthelezi who was appointed as Minister of Home Affairs. Allan Seccombe, S. Africa's Inkatha Considers Quitting Coalition, REUTERS, July 2, 1996, available in LEXIS, News Library, Curnws File.
224. The Interim Constitution did provide for provincial governments, specifying their structure, jurisdiction, and powers. S. AFR. CONST. (Interim Constitution, Act 200 of 1993) ch. 9.
225. See Steiner, supra note 218, at 1542.
226. Id.
227. The Constitution recognizes traditional authorities and indigenous [African] law. It also provides for the establishment of a House of Traditional Leaders in every province where there
declined to certify the provincial constitution of KwaZulu-Natal because that constitution sought to give the provincial government original legislative and executive power that only an independent sovereign state could have.\textsuperscript{228}

A final approach or scheme allows a community to be governed by personal law distinctive to it. The case of Moslems in India is the most prominent example.\textsuperscript{229} This scheme would not mollify Buthelezi, however, because it only affects the "internal" norms governing the province and not the political space that he would enjoy from the center.

Buthelezi and the IFP, the "aggrieved" parties, reject the current provincial arrangement as inadequate and insist on negotiations to create a federal state. The tension between Buthelezi and the IFP, on the one hand, and the ANC government, on the other, threatens to remain one of the main human rights challenges for the new South Africa. To resolve it, the state would have to reconcile the IFP's demand for some form of self-determination and its push for a unitary state, a resolution that seems remote for now.

\textbf{D. Women and the New South Africa}

The transformation of South African society must include the implementation of women's rights and the substantial liberation of women. Black African women, who comprise 36.3\% of the entire population, have historically occupied the most vulnerable position in society.\textsuperscript{230} As articulated by Wing and Carvalho:

South Africa needs a vision of equality that gives particularized attention to the needs of black women, who have endured unequal treatment because of their race and gender. Black women are in the unique position of being the least equal of all groups in South Africa. They have been oppressed

\begin{footnotesize}
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\item[228.] The Kwazulu-Natal legislature passed its constitution on March 15, 1996 and forwarded it to the Constitutional Court for certification under the provisions of the Interim Constitution. S. Afr. Const. (Interim Constitution, Act 200 of 1993) ch. 11. These provisions should have strengthened Buthelezi's hand in KwaZulu-Natal, which has a formidable traditional structure and ethos. Part of Buthelezi's problem, however, is his inability to command all the traditional structures in the province because of the struggle between him and Goodwill Zwelathini, the Zulu king who is sympathetic to the ANC. Gumisai Mutume, \textit{Rivalry Sows Killing Fields}, \textit{INTER PRESS SERVICE}, Aug. 30, 1995, \textit{available in LEXIS, News Library, Curnws File}.
\item[229.] Steiner, \textit{supra} note 218, at 1542.
\item[230.] See Adrien K. Wing & Bunice P. de Carvalho, \textit{Black South African Women: Toward Equal Rights}, 8 Harv. Hum. Rts. J. 57, 58 (1993). According to 1980 figures, white women made up 7.8\% of the population, while the Colored and Indian women constituted 4.6\% and 1.3\%, respectively. \textit{Id}.
\end{itemize}
\end{footnotesize}
by whites on the basis of race, and they have been oppressed by men, both black and white, on the basis of gender.231

Under apartheid, that is until 1994, the negative consequences of all the discriminatory and exclusionary laws and policies that governed all blacks, male and female, were more acute for black women in all sectors of society. Black women were usually employed in the least skilled and lowest paid jobs of the agricultural and service areas.232 Black women were also the least educated, generally lacked health care, and were subjected to rapes and domestic violence in large numbers.233

In addition to the dehumanizing policies and practices of the apartheid state, the apartheid legal system ratified many of the discriminatory norms of African law—referred to generally as customary law—and legitimized the patriarchy prevalent in many African societies. Even before the formal institution of apartheid, the state had created a dual legal system under which Africans were governed by special courts bound by customary law.234 The status of customary courts took on a more ominous posture in 1970 when the state required that all blacks live in a homeland of their culture and language.235 Under the homelands ploy, the apartheid state would use black puppets to preserve and perpetuate apartheid on behalf of Pretoria.

Repressive pro-apartheid homeland leaders ruled abusively and perverted many positive aspects of customary law in their zealotry to retain power.236 Although custom is an inherently dynamic phenomenon, these political arrangements favored the conservatism of customary law and tended to freeze its gender biases.237 In some African communities, the worst of the patriarchy of customary law was manifested in its treatment of women as minors or at least as possessing

231. Id.
232. Id. at 67–69. For example, the estimated 1 million black women who worked as “domestics” in white homes were not guaranteed minimum wages, maternity benefits, maximum work hours, or job security. Id. at 68.
237. Id. See also Wing & Carvalho, supra note 230, at 63–65.
inferior claims to those of men in matters related to marriage, guardianship, succession, contractual power, and property rights.238

This is a legacy that the ANC has long vowed to change.239 The ANC recognized women's rights as early as 1943 when it granted them full membership and voting rights and established the ANC Women's League.240 In 1955, the Freedom Charter, which became the organization's guiding document, required equal protection and rights without regard to sex.241 The Interim Constitution's equal protection clause prohibits discrimination on the basis of gender, sex, and sexual orientation.242 Although the clause binds all state organs, it is silent on its effect on private parties.243 The Interim Constitution allows discrimination with reason, or fair discrimination, that is, affirmative action measures to alleviate the effects of past discrimination.244 The Interim and 1996 Constitutions provide for the establishment for a Commission on Gender Equality to advance the status of women.245 In 1995, the government ratified the Convention on the Elimination of All Forms of Discrimination Against Women.246

These positive steps, while an admirable starting point, are complicated by several problems. First, for the new constitutional provisions to be meaningful, the approach of state organs and officials who have traditionally discriminated against women must be transformed. This attitudinal paradigm shift must be widespread—in employment, education, health care, and law enforcement. The expenditure of enormous government resources to create programs targeted specifically at women will also be necessary.247 Secondly, the constitutional provisions, which

239. The RDP has boldly stated that gender equity and the elevation of the status of women must be one of the central goals of the post-apartheid state:

   Ensuring gender equity is another central component in the overall democratization of our society. The RDP envisages special attention being paid to the empowerment of women in general, and of black, rural women in particular. There must be representation of women in all institutions, councils and commissions, and gender issues must be included in the terms of reference of these bodies.

240. UN Needs Assessment Report, supra note 8, at 10.
243. Id. § 7(1).
244. Id. § 8(3)(a).
247. See Wing & Carvalho, supra note 230, at 80–85. In contrast to the apartheid regimes of the past, women are beginning to play more meaningful and visible roles in public life, although much remains to be done. The ANC promise of creating a non-sexist society received a boost from the 1994 elections. Almost one-third of all members of the National Assembly are women. Eighteen of the 90 members of the Senate (National Council of Provinces) are women, and a
were a result of bargaining between various parties, including traditional leaders and the ANC, leave open some questions regarding customary law. Customary law is recognized by both Constitutions subject to their provisions. The Constitutions do not, however, explicitly clarify the fate of customs that conflict with the equal protection clause. 248 This may delay the reform of customary law to bring it into conformity with the new constitutional norms. 249

E. The Status and Orientation of Post-Apartheid Courts

A peculiarity of South African bureaucracy is the bifurcation of key state sectorial organs into the “ministry,” the political arm of government, and the “department,” the executing or implementing arm. 250 This distinction is tailor-made for bipolarity and resistance to reform. The ministry is headed by a member of the cabinet who is supported by a small cast of advisors, while the department is run by a director-general and is made up of civil servants who are supposed to carry out the policies of the ministry. 251 A further geographic division complicates the situation: the ministry literally shuttles between Cape Town, the legislative seat of government, and Pretoria, the political capital, where the departments are based. 252 Furthermore, in South Africa today, the ministries are mostly headed by ANC members 253 while the departments are staffed by appointees of the apartheid era, mostly Afrikaner bureaucrats who were responsible for implementing apartheid policies. Nowhere has this tension been more poignant than in efforts to reform the administration of justice.

woman is the Speaker of the National Assembly. The ANC set a 50% goal for female candidates in the 1995 November local elections. But there are currently only 3 women in the 28-member Cabinet, and there is not a single woman premier in any of the 9 provinces. U.S. DEPARTMENT OF STATE, COUNTRY REPORT ON HUMAN RIGHTS PRACTICES FOR 1995 at 245 (1996). In March 1996, Deputy President Thabo Mbeki announced the creation of an Office on the Status of Women, to be located in his office. That office will coordinate and liaise with Gender Desks to be located in every Department. UN Needs Assessment Report, supra note 8, at 11.


249. Care should be taken, however, not to engage in the wholesale demonization of African [customary] law as is popular in the West, where commentators primarily highlight only those elements that conflict with equal protection norms. As Justice Mokgoro has noted:

Dispute resolution in traditional African courts gives full recognition to the idea that the public trial is only a minor phase in the progress of a dispute. The aims and procedures in these courts revolve around mediation or arbitration and reconciliation as opposed to adjudication with a win-or-lose result as in western courts.

Mokgoro, supra note 236, at 75.

250. UN Needs Assessment Report, supra note 8, at 9.

251. Id.

252. Id.

253. With the exception of the IFP, which still holds three seats in the cabinet.
South Africa has inherited from apartheid a judiciary organized into two tiers: magistrate courts and the high courts. The high courts were composed of judges and comprised the Supreme Court of Appeal and the Supreme Courts. Judges were appointed by the State President from the ranks of qualified and experienced lawyers, while magistrates were appointed by the Director-General of the Department of Justice through his delegated power by the Minister of Justice. To qualify for appointment as a judge, one had to have practiced law as an advocate before the Supreme Court for at least ten years, a requirement that raises the "pool problem" and excludes many blacks. Magistrates, who need not have law degrees, have primarily been appointed from the ranks of public prosecutors.

These arrangements, structures, and requirements produced a judiciary that was overwhelmingly white and pro-apartheid in a country where most of the defendants are black. Almost all judges, and most of the magistrates, are white.

In 1993, 99% of all judges were white and male. The figures for magistrates were not much better. The numbers for women, who

254. UN Needs Assessment Report, supra note 8, at 29.
255. In the apartheid era, all judges were appointed by the State President, usually in consultation with the Judge President (in the case of provincial divisions of the Supreme Court) and the Chief Justice (in the case of the Supreme Court of Appeal), although the consultative element grew out of practice and was not required by the Supreme Court Act. See David McQuoid-Mason, Transformation of the Personnel of the Judiciary, in Reshaping the Structures of Justice, supra note 236, at 101, 104.
257. Fernandez, supra note 256, at 118.
258. The legal profession in South Africa is split into advocates and attorneys: only the former can appear before the Supreme Court and would be eligible for appointment as judges. Attorneys can only appear before the Magistrates' Courts. Only 10% of advocates are black; 90% are white. See McQuoid-Mason, supra note 235, at 106.
259. The magistracy is further divided into two classes: the regular or district magistrates, who are at the bottom of the ladder, and regional magistrates, who unlike their colleagues must have a law degree. See Fernandez, supra note 256, at 117-18.
260. As noted by Justice Arthur Chaskalson, the President of the Constitutional Court:
There are approximately [as of 1993] 150 judges appointed to the various divisions of the Supreme Court in South Africa. Apart from Judge Mahamed [Ismail] and Judge van den Heever they are all white men. If we add the judges appointed to the courts of Transkei, Bophutatswana, Venda, and Ciskei ("independent" black homelands) another name can be added to the list of exceptions, Judge Kumalo, but the list of white men would grow even longer. There can be no doubt that the profile of the judiciary needs to be changed . . . .
Arthur Chaskalson, Reshaping the Structures of Justice for a Democratic South Africa, in Reshaping the Structures of Justice, supra note 236, at 13, 14.
261. McQuoid-Mason, supra note 255, at 106.
262. In 1990, all 144 regional magistrates (in South Africa but excluding the 4 "independent" homelands) were white, while 807 of the 820 district magistrates were white. Three were Colored, 10 Indian, and not a single one was African. Id. at 107.
were virtually all white, were better at 15%, or 176 women out of a total of 1173 magistrates in 1992. By 1994, the numbers of blacks had risen somewhat following the incorporation of the homelands back into South Africa, but over 90% of all regional magistrates remained white, and only 4% were women. The importance of the magistrates courts cannot be overestimated: they handle over 95% of all criminal and civil matters.

Under the previous regime, the structure, rules, and organization of the judiciary—including appointment, retirement, dismissals, discharge, and discipline—were designed to serve the executive and its apartheid policies. This hierarchy was fortified by the doctrine of parliamentary supremacy under which the judiciary could not question the constitutionality of laws passed by the rubber-stamp apartheid Parliament. Magistrates enjoyed less latitude than judges. As civil servants they could not question administrative orders, as that could have been construed as misconduct, and were subject to administrative discipline.

In 1993, as its days drew to a close, the apartheid regime sought to protect the magistracy from reformulation by an ANC government. The apartheid Parliament passed the Magistrates Act to govern the appointment and the administration of the magistracy. The Act governs the welfare of the magistracy including appointment, promotion, training, and discharge. Under the Act, magistrates are now appointed by the Minister for Justice on the recommendation of the Magistrates Commission appointed by the State President. The Commission has eleven members who are appointed for renewable five-year terms; five of the members are drawn from the magistracy, one from the Department of Justice, and the rest from various law-related institutions, a ratio that gives the old guard a majority. More important, however, is the removal and insulation of the magistracy from the civil service and the Ministry of Justice by this law.

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263. Id.
264. Nine hundred eighty-seven of 1511 magistrates were white; 474, most of them from the former homelands, were African; 26 were Coloreds; and 24 were Indian. See Lovell Fernandez & Tseliso Thipanyane, Administration of Justice in South Africa: Magistrates and Their Courts 27 (1995) (on file with the author).
265. Id. at 28–29.
266. Fernandez, supra note 256, at 116.
267. Id. at 119. As former prosecutors themselves, magistrates are inclined to side with the police or exhibit little functional independence from the executive in general. See UN Needs Assessment Report, supra note 8, at 29.
269. Id. §§ 2, 4.
270. Id. § 3(1). See also Fernandez, supra note 256, at 120; UN Needs Assessment Report, supra note 8, at 30.
271. Although the Minister for Justice still makes the regulations respecting the conditions
The trouble with this new law, as indeed with the host of other enactments passed through Parliament at record speed over the past three years, is that it reflects a desperate bid by the National Party to preserve the status quo in the administration of justice. It forms part of the panoply of laws that the Government has been sneaking in through the back door...

Phineas Mojapelo, then President of the Black Lawyers' Association, called the Magistrates Act an attempt by the apartheid regime "to privatize the magistracy." In effect, since the apartheid regime knew that it would no longer be there to ensure the enforcement of apartheid laws and policies, it cleverly sought to guarantee the survival of its norms by granting the apartheid magistracy judicial independence, something it had never allowed in its heyday. That guarantee was sealed by the affirmation of the security of tenure for all magistrates who were employed when the law came into force. According to the new law, magistrates can only be removed with the approval of the Parliament.

The organization and administration of the magistracy under the Magistrates Act preserves almost intact the apartheid system of the administration of justice—since ninety-five percent of all legal matters are handled in the magistrates court—and makes it extremely difficult for Dullah Omar, the Minister for Justice, and an internationally acclaimed human rights lawyer, to implement his policies to transform the magistracy. First, he cannot dismiss apartheid magistrates and

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ophenomenon, functions, powers, and duties of the magistrates, most key decisions are taken by the Magistrates Commission, which was appointed by President De Klerk. See Fernandez, supra note 256, at 120.

272. Id.

273. Id.

274. Magistrates Act, supra note 268, § 18.

275. Fernandez, supra note 256, at 120. The retention of the apartheid judiciary defeats one of the key requirements of reform. As noted by Masemola:

The South African revolution will be incomplete if it leaves the present judiciary in place because it is invidiously intertwined with the present state. Conversely, under the ANC Guidelines, the judiciary shall be restructured since it is seen as an instrument of apartheid. Additionally, the present practice of maintaining a largely white judiciary shall, as one point of the restructuring, be terminated.


276. Dullah Omar, an advocate, formerly directed the Community Law Centre at the University of the Western Cape, which played a leading role in the formulation of the new constitutional order in South Africa. See COMMUNITY LAW CENTRE, 1995 ANNUAL REPORT 5 (1995). As the
replace them with more progressive and representative personnel. Second, even when slots open up for the appointment of new magistrates, the old guard outnumbers the reformist members of the Magistrates Commission. Most significant, the transformative posture of Omar and his key advisors in the Ministry of Justice are at loggerheads with the apartheid culture, ethos, and personnel of the Department of Justice, the agency responsible for implementing the Ministry's policies. It is difficult to see how many of the reforms envisioned by the Ministry of Justice will materialize without the repeal of the Magistrates Act.

Another peculiarity of the new South Africa, which has affected the attention paid to the reform of the magistracy, is the focus of public debate on the high courts although they handle only a mere five percent of all legal matters. Presumably, the high courts are more "important" than the magistrates courts because they are the guardians of the new constitutional order. Effectively, the new Constitution retains the historically bifurcated judiciary, paying little attention to the magistracy, which it basically leaves to the Parliament to regulate. In contrast, it provides in some detail for the functions and powers of high courts and terms of service of judges. It also establishes and spells out the composition and powers of the Judicial Service Commission (JSC), the body responsible for the welfare of the high courts. Judges are appointed by the President in consultation with or at the recom-

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277 Interview with Dullah Omar, Minister of Justice, in Cape Town, South Africa (May 17, 1996).

278 Only the high courts (High Courts, Supreme Court of Appeal, and the Constitutional Court) may "enquire into or rule on the constitutionality of any legislation or any conduct of the President." S. AFR. CONST. (1996 Constitution) ch. 8, § 170. The structure of the judiciary in South Africa is as follows: the Constitutional Court sits at the pinnacle, and directly under it is the Supreme Court of Appeal (formerly the appellate division of the Supreme Court). The High Courts, formerly the Supreme Courts, come next, and at the bottom of the ladder are the Magistrates Courts. Id. § 166.
mendation of the JSC, whose seventeen members are drawn from a wide cross-section of the legal profession.279

Except for the Constitutional Court, whose creation at the insistence of the ANC should be seen as a deliberate attempt to set the agenda for legal reform at the top, the high courts are almost entirely composed of apartheid era judges.280 The security of tenure for these judges, together with the criteria and tradition of appointing judges from among senior advocates, are a major impediment to the transformation of the courts and the inclusion of women, blacks, and other non-whites in the judiciary.281 Furthermore, the bifurcated judiciary—governed by two different commissions and different laws, rules, and expectations—only perpetuates the mediocrity of the magistracy and indefinitely postpones the reform of the judiciary as a whole.282 These structures and rules have the potential to reduce to ashes the RDP's central hopes: a legal system that is accessible, affordable, and legitimate; legal processes and institutions that employ simplified language and court procedure; and the recognition and harmonization of community283 and customary (tribunals governed by African law) courts.284

F. Humanizing the Instruments of Coercion

The South African security forces, in particular the South African Police (SAP) and the South African Defence Forces (SADF), were the central organs that protected, defended, sustained, and secured the

279. Id. §§ 174, 178. The JSC is sharply different from the Magistrates Commission, which is dominated by apartheid era officials connected to the Department of Justice. In contrast, the JSC, which is a creation of the ANC-led government, is regarded as progressive and committed to the reform of the judiciary. UN Needs Assessment Report, supra note 8, at 31.

280. True to its billing, the Constitutional Court, which is composed of many of the most prominent human rights lawyers in South Africa, is quickly earning a well-deserved reputation as a human rights court. In just its second decision, the Constitutional Court abolished the death penalty, a long term goal of the ANC, by declaring the punishment unconstitutional. State v. Makwanyane & Mchunu, 1995 (3) SALR 391 (CC). In September 1995, the Court also declared invalid a section of a local elections law adopted by the ANC government. Other rulings have limited the use of coerced confessions by the police, banned corporal punishment in the criminal justice system, upheld the right to state-funded counsel, and guaranteed access to police records. U.S. DEPARTMENT OF STATE, supra note 247, at 241-48.

281. In November 1996, the Ministry of Justice started a joint project with human rights NGOs, bar associations, and human rights programs at universities for the further education of lawyers from historically black universities who have been traditionally excluded from major commercial practice. Telephone interview with Shadrack Gutto, Deputy Director, Center for Applied Legal Studies (CALS) at the University of Witswatersrand, in New York, New York (Dec. 4, 1996).

282. In November 1996, the Ministry of Justice was studying proposals for creating a unitary judiciary by integrating the Magistracy and the higher courts. Id.

283. Community courts are unofficial tribunals that were formed in black areas—to fill the vacuum left by the illegitimacy of the apartheid courts—beginning in the 1960s to adjudicate disputes. See Mokgoro, supra note 236, at 76-78.

284. RECONSTRUCTION AND DEVELOPMENT PROGRAMME, supra note 23, at 124.
apartheid state. In the 1980s, as the international isolation of South Africa hardened and domestic opposition shook the state to its foundations, the civilian leadership virtually turned over the control of the country to the security forces. As a United Nations report politely puts it:

Their [the security forces] reason for being was Apartheid and their brutality is a matter of public record. More than 800 people were killed by police during the emergency years of the mid-1980s. Torture was rampant and deaths in police custody remain a problem even today. In addition, the security forces—both police and military—developed a culture of deception in which claims of respect for the rule of law masked torture, covert action, and forces of destabilization.

In the apartheid era, the SADF took on repressive policing functions in black townships and the homelands, where it was responsible for orchestrating, among other things, the so-called “black-on-black” violence, as was prevalent in KwaZulu-Natal. Yet it is these very instruments of coercion, which have been reared on the most virulent forms of racism and a culture of death and destruction, secrecy, and unaccountability, that the democratically elected, civilian, ANC-led government must rely on to govern the country and to create a human rights state. Their transformation is critical because they can easily either end the democratic experiment or effectively stymie it by their numbers and the weapons at their disposal.

The process of reforming the security forces and unifying them is already under way. As a priority, the RDP called for all the security forces to be placed “firmly under civilian control” through ministries “answerable to Parliament.” It requires that the security forces “[u]phold the democratic constitution, they must be non-partisan, and they must be bound by clear codes of conduct.” It calls for the South African Police Service to “[b]e transformed, with special attention to repre-

285. These forces were the “agents of oppression.” Id. at 120. See also BASIL DAVIDSON, AFRICA IN HISTORY 341-51 (1992).
286. This reliance on the security forces is put succinctly by Shezi:
Feeling the loss of political initiative and control, the state resorted to the intensification of repression. Increasingly, the control of the state shifted to the security bureaucrats—a tightly knit security bureaucratic infrastructure led by the top echelons of the South African Defence Force, South African Police, and the National Intelligence Service, who assumed a significant political role of the state, especially under P.W. Botha in the 1980s.

Shezi, supra note 151, at 193 (citations omitted).
287. UN Needs Assessment Report, supra note 8, at 14.
288. RECONSTRUCTION AND DEVELOPMENT PROGRAMME, supra note 23, at 124.
289. Id.
sentivity, and gender and human rights sensitivity."²⁹⁰ It states that "[t]he defence and the police and intelligence services must be transformed from being agents of oppression into effective servants of the community."²⁹¹ The 1996 Constitution, echoing the letter and the spirit of the Interim Constitution, establishes civilian control over the defense and police forces and defines their primary missions.²⁹² The cabinet member responsible heads a constitutionally mandated civilian secretariat for each of the forces.²⁹³ The security forces retain their positions of power and influence, but "[a]re answerable to civilian leadership to a far greater degree than under the former government."²⁹⁴

The slightly renamed South African Police Service (SAPS) is an amalgam of some eleven different police forces, many of them from the former homelands.²⁹⁵ As of 1996, the total police force had a strength of 140,000 officers.²⁹⁶ The renamed South African National Defence Force (SANDF) had a total of 100,000 members: 65,000 from the old SADF; 20,000 from Umkhonto We Sizwe, the ANC's military wing; 6000 from the Azanian People's Liberation Army (APLA), the military wing of the PAC; and 9000 from the forces of the former homelands.²⁹⁷ While the process of creating single forces from these different groups is challenging, it should help broaden the demographic composition and political outlook of security forces. To increase community participation and enhance local oversight over the police, the Interim Constitution provided for community policing forums attached to police stations across the country.²⁹⁸ These measures may serve to broaden and democratize the views of security forces, although the mentality and training for repression are deeply ingrained. It remains to be seen whether the forces of repression can be transformed—without massive layoffs and compulsory early retirements to clean house and infuse new blood—to support the construction of a human rights state.

²⁹⁰ Id.
²⁹¹ Id. at 120.
²⁹⁴ U.S. Department of State, supra note 247, at 241.
²⁹⁶ UN Needs Assessment Report, supra note 8, at 14.
²⁹⁷ U.S. Department of State, supra note 247, at 241.
²⁹⁸ S. Afr. Const. (Interim Constitution, Act 200 of 1993) ch. 14, § 221. This could be a double-edged sword. Local property owners, working in cahoots with the police, could use this tool to privatize apartheid or entrench practices of exclusion and discrimination on any number of grounds.
Theoretically, the norms being deployed for the construction of the new South African state are the exact opposite of the founding principles of the apartheid state. The latter was explicitly based on the superiority of the peoples of European descent over those of African and other non-white ancestries, while the former deliberately has rejected outright these doctrines. The reborn state declared that only the human rights idiom will be the principal framework for its construction. In many respects, the new South Africa is living proof of Henkin’s assertion of the preeminence of human rights over other contradictory philosophies and traditions. The Interim and 1996 Constitutions are human rights manifestos that seek to assure individuals, primarily, and groups secondarily, that the new state is a radical departure from its predatory predecessor. It is no wonder that a state born in the late twentieth century out of the struggle for equality would adopt the rights framework as its dominant organizing principle. What is doubtful, however, is the ability of the South African state, and the possibility for any state, to overcome such a dreadful legacy of human rights abuses primarily through the rights idiom.

In virtually all their provisions, both the Interim and the 1996 Constitutions create space between the individual and groups, on the one hand, and the state, on the other. Great care is taken where institutions of the state are provided for to make sure that their powers to invade the individual or groups and the so-called private sphere are limited, accountable, and transparent. The Constitution in this case is not only an attempt to reduce the power of the sovereign but to make its exercise a matter of conscience for the individual official and the government agency in question.

299. Henkin notes that the idea of human rights has “commanded universal nominal acceptance, not (as in the past) the divine right of kings or the omnipotent state, not the inferiority of races or women, not even socialism.” See Henkin, supra note 1, at 9-10.

300. As noted by Cyril Ramaphosa, the Secretary General of the ANC, one of the key founders of the new state and a major force during the negotiations to end apartheid, the ANC long knew that it wanted a human rights constitution:

The Constitution must enshrine human rights. South Africa under successive National Party governments (including the present government) has a history of violations of human rights. Our long suffering tells us that we need to end the phenomenon of gross violation of human rights. The ANC does not seek to replace one kind of domination with another. We do not want reverse violation of human rights. That is why the ANC insists upon the incorporation within the context of a new constitution of a bill of rights which contains the universally and internationally recognized human rights enshrined in various United Nations documents and instruments.


301. The high courts, headed by the Constitutional Court, are placed at the ready to pounce on legislation or any government conduct or action that violates human rights norms. The human
Does this use of, reliance on, and faith in human rights ideals and norms give the new state the ability to transform the legacy of apartheid, and therefore create a human rights culture in a human rights state? Are rights a sufficient medium for transforming deeply rooted social, economic, and especially racial inequalities? Does the strategy by the ANC—the negotiated settlement that left intact white control of the economy—of first accepting the political kingdom as a prelude to economic empowerment for blacks make sense in the long run? Or did the ANC capture the government and lose the power?

As this Article has sought to demonstrate, the ANC reconstructionist project's assumption that rights will transform the state and society is fraught with theoretical and practical difficulties. The major difficulties relate to the nature of that post-apartheid settlement. First, while it was absolutely necessary to employ rights discourse to energize the anti-apartheid movement, it is important for the ANC to realize that the rhetoric of rights is a double-edged sword: it can be used both as a weapon and as a shield. Since 1994, all groups in South Africa—the wealthy and the powerful, the poor and the excluded, and even those who in the past blatantly violated the rights of others—have found either refuge or empowerment in the language of rights. As contradictory as their motives and intentions are, all these groups seek to protect or advance their interests through the medium of rights. It is a testament to the indeterminacy of this discourse that all these competing interests feel that the new constitutional order will protect them against each other and help them vindicate their goals.302

Nowhere is the use of the rights language more poignant than in the protection of property interests in the Constitution, in the preservation of rights and privileges of the apartheid security forces, judiciary, and bureaucracy, and in the various so-called reform programs relating to land and other resources. The protection of these interests through the new constitutional order in effect binds the ANC and robs it of any ability to carry out major reforms. In the case of South Africa, the democratic, rule of law, rights-based state has ironically turned out to be an instrument for the preservation of the privileges and the ill-gotten gains of the white minority. The state has become a stamp of approval for an unjust and unfair society. It is clear that a state that is unable, in the first place, to overcome these basic problems cannot become a human rights institution.

rights commissions, which are independent watchdog agencies, supplement the role of the courts in supporting the new constitutional order.

There is no question that the ANC government's commitment to the creation of a just and fair society is genuine. For the first time ever, it has introduced to South Africa freedoms that many of the country's citizens could only dream about. That accomplishment is historical, and it has not been the intention of this Article to trivialize it or the enormous sacrifices that were made in its pursuit. Nevertheless, the goals of the ANC are not served by analyses that pretend not to see the conundrum of the rights idiom. Without doubt, rights discourse was indispensable as a strategy for energizing the anti-apartheid movement. But rights rhetoric cannot and should not be the primary, and in this the case the only, instrument for the transformation of apartheid's legacies. At the very least, rights discourse must be one of several tools, policies, and approaches deployed to alter the institutional features of the apartheid state. As Karl Klare aptly noted:

Rights discourse does not and probably cannot provide us with the criteria for deciding between conflicting claims of right. In order to resolve rights conflicts, it is necessary to step outside the discourse. One must appeal to more concrete and therefore more controversial analyses of the relevant social and institutional contexts than rights discourse offers; and one must develop and elaborate conceptions of and intuitions about human freedom and self-determination by reference to which one seeks to assess rights claims and resolve rights conflicts.303

This malleability of the rights discourse has cut against the interests of those excluded by apartheid. In the current unabashedly pro-capitalist and anti-redistributive international climate, rights language in South Africa has taken on the color of oppression in that it primarily has left undisturbed the economic hierarchies of apartheid. Blacks are being asked to embrace the promise of the new "color-blind" market arrangements in the hope that trickles at the edges will someday turn into rivulets. That is what is wrong with the transitional blueprint. Instead, the ANC government could pursue other policy options and measures, the limiting injunctions of the new constitutional order notwithstanding, to start the meaningful rectification of social and economic distortions. Thus, the ANC government may want to explore approaches that limit the property rights of the beneficiaries of apartheid and fashion policies whose thrust is the alleviation of the most egregious disparities in South Africa. Resort to people-centered conceptions of development, as opposed to the current rights-oriented,

market-driven approach, may have a better chance of reaching those who have been completely excluded. It seems obvious that substantial land reform, the reconstruction of the bureaucracy, and the reorganization of the economy are three key areas where the ANC government will have to carry out reform if it hopes to meet the expectations of blacks and other excluded groups.

It appears highly unlikely that the new South Africa, which has been ushered in with great fanfare and overwhelming international goodwill, will meet the reasonable expectations of the long excluded black majority. The deployment of the rights idiom as the principle medium for transformation will in all likelihood fail to reverse the deep-seated legacies of apartheid. Blacks must continue to wait—although it is not clear for how much longer—before they can genuinely capture state power and use it in addition to the rights language to better their lot.