

2016

Book Review: The Quest for Consitutionalism: South Africa Since 1994

Penelope Andrews

New York Law School, penelope.andrews@nyls.edu

Follow this and additional works at: https://digitalcommons.nyls.edu/fac_other_pubs

Recommended Citation

Andrews, Penelope, "Book Review: The Quest for Consitutionalism: South Africa Since 1994" (2016). *Other Publications*. 455.
https://digitalcommons.nyls.edu/fac_other_pubs/455

This Article is brought to you for free and open access by the Faculty Scholarship at DigitalCommons@NYLS. It has been accepted for inclusion in Other Publications by an authorized administrator of DigitalCommons@NYLS.

BOOK REVIEWS

The Quest for Constitutionalism: South Africa since 1994. By Hugh Corder, Veronica Federico & Romano Orru (eds). Routledge. 2014. pp 296. £95.00 (hard cover).

The 21st year of South Africa's constitutional democracy, 2015, was a memorable year in South African political history. The year was reminiscent of events that took place in South Africa in 1976 and 1980. In 1976, high school students in South Africa embarked on a series of protests against the learning of Afrikaans in schools, and the protests soon spread to the whole country and across all sectors of society. Similarly in 1980 South African students, under the banner of 'Liberation first, Education later', took to the streets to protest a range of apartheid-related issues, and widespread student protests signalled heightened levels of political discontent.

The protests in 2015 brought to the fore the extent to which the constitutional promise of transformation and social justice remains unfulfilled for the majority of South Africans. Although there had been hundreds of protests in South Africa in the past decade, mostly localised and focused on the issues of service delivery and employment, 2015 marked a pivotal phase in the 21st year of South Africa's constitutional democracy. The protests moved to South Africa's educational institutions, especially the elite institutions such as the University of Cape Town, the University of the Witwatersrand and Stellenbosch University, with students joining their demands to those of campus workers, especially around the issue of outsourcing. Beginning with the #Rhodes Must Fall campaign at the University of Cape Town, and culminating in the #Fees Must Fall movement, the very nature of the constitutional transition, including the text of the document itself, has come under severe strain (see Vuyisile Msila 'Fees Must Fall is just the start of the change' *Mail and Guardian*, 21 January 2016). A common refrain from the protesters was that the architects of the South African Constitution had 'sold out' and that the Constitution was not valid.

It is within this context that the publication of a collection of essays titled *The Quest for Constitutionalism: South Africa since 1994*, edited by noted administrative and constitutional law scholar, Hugh Corder and his Italian co-authors, Veronica Federico & Romano Orru, with an elegant foreword by Albie Sachs, is particularly timely. Reviewing this thoughtful, engaging and critical collection of essays at this moment in South African legal and political history provides a much-needed opportunity for reflection.

This is an important volume that makes a noteworthy contribution to the ongoing debates about the aspirational possibilities of South Africa's much-admired Constitution and Bill of Rights, as well as the state of South Africa's constitutional democracy. Logically organised into five parts, the book provides original analysis of the structure of the South African state, the substantive rights and the role of the courts, citizenship, political rights and the party system, transformative constitutionalism, including indigenous law,

land reform and sustainable development, and the South African constitutional framework in a global context.

As the editors point out in the introduction to the volume, the purpose of each chapter is to unveil 'a segment of the complex general picture' and to dig 'beneath the surface of the constitutional and legal provisions and practice' to 'understand the deeper historical, political, social, cultural and economic reasons for them' (at 7). The contributors in their various chapters seek to examine the underlying reasons for adopting the substance and text of the constitution, and their 'real impact' in 'transforming society' (at 15).

Part One, entitled 'The structure of the state', involves four chapters on quasi-federalism, quasi-parliamentarianism, Parliament, and the separation of powers and local government. In her chapter on South Africa's quasi-federalism, Veronica Federico provides a good discussion on the particular structure of South Africa's quasi-federal system and the role of provincial governments (at 15). The legacy of apartheid is evident in the weak institutional capacity of most of the provincial governments, particularly those that incorporated the former apartheid-era bantustans. This situation challenges the sustainability of a workable constitutional democracy in those provinces, especially as they relate to questions of public accountability and service delivery.

Referring to the 'hybridization of existing constitutional models in order to craft original solutions', Romano Orru examines South African quasi-parliamentarianism to suggest that the doctrine of separation of powers is 'unreliable' because of the contingent and contested nature of both presidential and parliamentary powers. He argues therefore that the checks and balances in the constitution are key to understanding the operation of this hybrid system and its possibilities for pursuing democracy, especially in the face of a dominant ruling party, as the African National Congress has been in the past two decades.

Sanele Sibanda continues the focus by examining the operation of the separation of powers between the legislature and the executive in the face of a dominant ANC since 1994. He concludes that despite such dominance, an array of factors, including the role of non-parliamentary oppositional forces, have effectively curbed the ANC-dominated Parliament from exercising 'unbridled uses of power and flagrant unaccountability' (at 39). Ironically, the events surrounding the private residence of President Jacob Zuma at Nkandla, including the 2016 case before the Constitutional Court (*Economic Freedom Fighters v Speaker of the National Assembly & others; Democratic Alliance v Speaker of the National Assembly & others* 2016 (3) SA 580 (CC)) suggest that Parliament has in effect not exercised its authority of accountability over the executive.

In his chapter on local government, Francois Venter examines the 'precarious balance' that exists between the 'subsidiarity-like autonomy' of local government and its dependence on financing and oversight from provincial and national government (at 53).

Part Two, entitled 'Rights, equality and the courts', contains five chapters on the contested role and status of the judiciary, socio-economic rights, the

right to dignity, the right to health and administrative justice. Morné Olivier considers the place of the judiciary in the post-1994 constitutional arrangement. He argues that in order for the judiciary to carry out the transformative goals contained in the Constitution, it should be in dialogue with, but independent from government, and not in a relationship of interdependence, as some in the ruling party might suggest (at 70). Linda Stewart provides a critical analysis of the Constitutional Court's 'reasonableness' approach, arguing that social and economic rights are political in nature, and that the approach of the court undermines the development of more transformative interpretations (at 80). Through the lens of an 'inclusive moral citizenship', Edwin Cameron provides a thoughtful analysis of the central place of dignity in South Africa's constitution, and its scope for the protection of a range of groups and individuals, including sexual minorities (at 95). Mark Heywood & Tim Hodgson explore the profound impact of the Constitution, especially the rights to dignity and equality, on the struggle of those living with HIV Aids (at 111). Analysing administrative justice, Cora Hoexter is not sanguine about the fact that the culture of justification envisioned in the new constitutional framework is taking root in South Africa (at 127). Although the Constitution incorporates a transformative approach to administrative justice, she notes that 'endemic corruption and non-compliance with court orders' have essentially placed the 'entire constitutional project at risk' (at 136).

Part Three, entitled 'Citizenship, political rights and the party system', focuses on the right to vote, the ruling party dominance and freedom of information. Francesca Dau explores the procedural and substantive aspects of the right to vote (at 143), while Roger Southall ponders the 'contradictions' of ANC party dominance and what it bodes for democracy in South Africa, suggesting that the party's popularity may erode as it fails to deliver on the promises of the Constitution (at 156). Of course, freedom of information is crucial to South Africans exercising their political rights as well as accessing social and economic rights, as Iain Currie argues (at 169).

Part Four, entitled 'Transformative constitutionalism', provides a historical perspective on constitutional reform, the position of indigenous customary law, land reform and environmental and sustainable development issues. Hugh Corder's analysis of South Africa's constitutional framework for the past century, with an emphasis on the post-1994 constitutions (at 181), provides the context for the four chapters in this part. Although Corder concludes that at this stage there is little room for pessimism about the rule of law in South Africa, 'a good dose of vigilance would not go amiss' (at 191). Tom Bennett also considers the historical status and role of indigenous customary law in South Africa's national framework, recognizing the complexity of incorporation in the new constitutional framework (at 194). Nic Olivier and his co-authors Nico Olivier & Clara Williams examine the land reform process in historical perspective as well as whether the constitutional goals of land reform have been achieved (at 208). In his chapter on environmental issues and the constitution (at 226), Tumai Murombo points

to the difficulties of environmental regulation in a 'social, economic, cultural and political atmosphere replete with intractable contradictions and ideological conflicts' (at 234). He points out that despite the constitutional right and the efforts of the courts to give meaning to environmental rights and sustainable development, practical steps and the meaning of sustainable development remain 'elusive'.

Part Five, entitled 'South Africa in context', provides a wide lens through which to examine South Africa's role in BRICS and South Africa's constitutional project in a global context. In her chapter on BRICS, Lucia Scaffardi examines the legal impact of this economic co-operation and how economic imperatives may influence the law and legal processes of the five countries that make up BRICS (Brazil, Russia, India, China, South Africa) (at 242). Exploring the transnational references to domestic constitutional provisions, Andrea Lollini looks at the influence of foreign jurisprudence on the evolution of South Africa's constitutional interpretation, as well as the latter's influence globally (at 253). She concludes that the Constitutional Court's decisions are increasingly becoming 'a source of inspiration for other constitutional cultures'.

Running throughout the authors' contributions, and implicit and explicit in their analyses, are several well-founded assumptions. The first is that the architects of the constitutional project suspected that the constitutional path adopted was going to be difficult, contested and not linear, and they were mostly right in this regard. Their second assumption is that a democratic culture in South Africa is evolving, but the emergence and growth of such a culture has been surprisingly slow. The third is that the promises of the Constitution embodied in the Bill of Rights are still largely unfulfilled, that South Africa remains a society deeply divided along racial lines, and that economic inequalities have persisted. The fourth assumption is that the institutions mandated by the Constitution to promote and implement the rights embedded in the Constitution are not as effective as had been planned. They observe that the dominance of the African National Congress, the ruling party, has impacted decisively on the shape and tenor of the constitutional democracy in its first twenty years. The final assumption is that the South African Constitution, especially the Bill of Rights and its transformative possibilities, has captured the global imagination, and is likely to continue to have a profound impact on the global project of constitutional democracy. Consistently they point out how the South African Constitution continues to be described by notable constitutional experts as one that is admirable, innovative and worthy of emulation (see e.g. Karl E Klare 'Legal culture and transformative constitutionalism' (1998) 14 *SAJHR* 146 and Penelope Andrews *From Cape Town to Kabul: Rethinking Strategies for Pursuing Women's Human Rights* (2012), both of which outline the transformative possibilities of the South African Constitution).

As is the case with an edited volume of this nature, some sections are uneven with respect to quantity and quality of content. In addition, there are always areas of knowledge that could be included, while there are areas of

repetition. So, for example, the final part could easily have included a chapter on the impact of the Constitution, especially the Bill of Rights, on South Africa's foreign policy. Some may argue that vulnerable groups, such as the LGBTQI community, or the disabled, were not given adequate consideration.

Despite these inevitable criticisms of a collection of essays, this book is a must-read. Many of the contributors to the work are leading experts and highly regarded in their fields, and their chapters reflect that expertise. The breadth and depth of coverage of the issues, the clear and compelling insights and thoughtful analysis, and the timeliness of the volume, makes it an essential collection for legal scholars, particularly constitutional-law scholars, as well as scholars of politics and public policy. Lawyers, judges and policy makers too would benefit from the insights contained in its pages.

PENELOPE ANDREWS

University of Cape Town

International Economic Law and African Development. Edited by Laurence Boule, Emmanuel T Laryea & Franciska Sucker (eds). Siberink. 2014. xiii and pp 226. Price: R280.00 (soft cover).

International Economic Law ('IEL') and African development is a topic worthy of extensive investigation. IEL is a vast field, and the association between IEL and African development makes it vaster still. *IEL and African Development* is not a tome, however. It is also not a compendious treatment of the subject. It is a relatively slim volume of ten chapters, each of which considers a particular issue that is relevant, though to varying degrees, to the broad subject of IEL and African development. Each individual chapter, as a stand-alone piece, is interesting and informative. Collected in book form, the whole is somewhat less than the sum of its parts. The title of the book creates an expectation that remains unfulfilled, for the chapters do not cohere into a systematic treatment of IEL as it relates to African development. A change in title, perhaps to the more prosaic but also more accurate 'Selected Topics in IEL and African Development', would ensure that the promise inherent in the title does not create false expectation and disappointment amongst its prospective readers.

The book is the product of the second African International Economic Law Network ('AfIELN') Conference, held at the University of Witwatersrand in March 2013. The book is a compilation of the conference proceedings, and as such reflects the specific research interests of the thirteen contributors. The majority of the contributors are, in the words of the editors, 'empathic non-Africans' (at vi), while five chapters have been authored or co-authored by contributors who were born and raised in Africa, although all no longer reside in Africa. I mention this because intellectual flight is one of the developmental challenges facing Africa, and the brain drain associated with emigration and the movement of persons is also relevant to the theme of IEL and African development.