

## BOOK REVIEW NOTES

### THE QUEST FOR CONSTITUTIONALISM IN SOUTH AFRICA<sup>1</sup>

MARIANNA MURAVYEVA,

National Research University (Higher School of Economics)  
(Moscow, Russia)

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South Africa has gone a very long way from apartheid to a rule-of-law state thanks to being a frontier of transformative constitutionalism. Starting with an interim constitution of 1993, it made its way to the 1996 Constitution of the Republic of South Africa, that signified new constitutionalism whose aim was to pursue ‘a better life for all’. This road to democracy, social justice, equality was not an easy one for South Africans and it is still much in progress, but they have managed to achieve some democracy in its transition. Whether the path South African society is navigating will lead the country and its people to the full accomplishment of this social project is the aim the reviewed volume seeks to achieve.

Hugh Corder, a Professor of Public Law at the University of Cape Town, Veronica Federico, a Senior Research Fellow at the Department of Public Law of the University of Florence, and Romano Orrù, a Professor of Public Comparative Law at the University of Teramo, have pulled together an impressive volume of chapters providing an in-depth analysis of the development of the legal system and of the implications of the Constitution for the social configuration of power. Five parts of the volume respectively focus on the structure of the state (part I), rights, equality and the courts

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<sup>1</sup> Reviewed book: Corder Hugh, Veronica Federico, and Romano Orrù (eds.) *The Quest for Constitutionalism: South Africa Since 1994* (Ashgate Publishing, Ltd. 2014).

(part II), citizenship, political rights and the party system (part III), transformative constitutionalism (part IV) and South Africa in context, including BRICS (part V). The editors use the framework of transformative constitutionalism to tackle the issues of South African constitutionalism which they see as a social project. Using Habermasian interpretation, the editors see such elements as individual rights, private autonomy and citizen's capacity to exercise their equal right of political participation as its essential element. Their understanding of transformative constitutionalism is based on Klare's definition, that reads as 'a long-term project of constitutional enactment, interpretation, and enforcement committed to transforming a country's political and social institutions and power relationships in a democratic, participatory, and egalitarian direction.'<sup>2</sup> Therefore, the focus of the book is to analyze the impact of laws and the salience of their existence and (non)enforcement for South Africa to situate the importance of legal phenomenon in the broader context of the socio-political, economic and cultural democratization process (p. 2). In this light, South African constitutionalism is viewed as innovative; it is offering a model of transition from a heavy legacy of apartheid to a democratic state.

Each chapter in the volume contributes to unveiling deeper historical, political, social, cultural, and economic reasons for the constitutional practices and their real impact on deconstructing and reconstructing social ties in transforming society (p. 7). The majority of authors in the volume are South African scholars with a presence of international experts. Each of them contributes to one specific aspect of South African constitutional development; taken together they represent how the Constitution works. In this review, I am going to collect all pieces of the puzzle called South African transformative constitutionalism to show how the volume works to create a bigger picture of constitutional practices.

South Africa's post-apartheid transition started with its re-unification as a country and as a people. Under apartheid, it was segmented and based on two different principles: the typical division of the country along geographical lines (into provinces and municipalities with different degree of power) and based on ethno-racial principle, creating different communities of individuals with their own forms of government and differentiated rights and duties. Re-unification came with contradictory notion of decentralization that created what in her chapter Veronica Federico called quasi-federal structure of the state (chapter 1) together with the new system of government, described by Romano Orrù as the quasi-parliamentarianism in his chapter (chapter 2). Decentralization was necessary to take into account the interests of the provinces, therefore, it included the possibility for provinces to adopt provincial constitutions, that resulted in much debate around effectiveness of such governance. It matched much heated debate on the local government described by

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<sup>2</sup> Karl E. Klare, *Legal culture and transformative constitutionalism*, 14 *South African J. on Human Rights* 146–188 (1998).

Francois Venter (chapter 4): while local government received a prominent placement in the new Constitutions and, what is more important, in provincial constitutions, the whole constitutional system ended to be a fairly sophisticated hybrid system, creating a complex mixture of opposite centrifugal and centripetal forces. Provincial constitutions were there to ensure that socio-economic and political inequalities were to be bridged so they acted as subsidiary-like autonomy because they thoroughly depended on national and provincial oversight and financing.

Quasi-federalism functioned alongside quasi-parliamentarianism, which was a result of an attempt to create a constitutional mechanism providing for egalitarian equality. As Romano Orrù notes, the new form of government outlined in the Constitution does not fit traditional models. Similar to the federal structure, it ended up to be a hybrid between parliamentary and presidential forms of government that put the principle of the separation of powers in somewhat difficult position. South Africa chose to have a strong president's office (elected indirectly) together with a substantial role of a prime minister, making them both responsible for executive power thus weakening the parliamentary institutions in the situation of a dominant party. Sanele Sibanda in his chapter on the separation of powers (chapter 3) suggests to focus on the institutional understanding of Parliament as a national forum that provides space to advocate for, register and record diverse views from different parliamentary and extra-parliamentary forces as they seek to influence matters before the Parliament instead of traditional inquiry into the relationships between the Parliament and the executive. Using this approach, he argues, the Parliament cease to be 'weak' or 'ineffective' but emerges as an institution for consolidation thus performing its most important function, even in the situation of the ANC's dominance as a prevailing political party.

The volume pays most of its attention to rights and their enforcement as a part of its attitude to constitutionalism as a social justice project. Emerging from the system of formal inequality and discrimination, South African judiciary have been making an enormous effort to rebalance the inequalities of the past and to recognize the intrinsic human dignity of every person. However, the current situation in terms of public mistrust in the judiciary creates a feeling of their failure. As Morne Olivier explains (chapter 5) this is due to the government looking at the judiciary as a co-partner in the pursuit of transformation, which creates interdependence between the institutions, while in order for the judiciary to perform its mandate, it requires independence from the government. Somehow, socio-economic rights due to profound impoverishment of the population and major inequalities became the locus of the rights debate in South Africa. The Grotboom case of 2000 that dealt with the right to access housing for everyone highlighted the secondary nature of socio-economic rights, but prompted the Constitutional Court to recognize that both civil and political rights and social and economic rights are inter-related and

mutually supported.<sup>3</sup> Linda Stewart in her chapter, however, criticizes depoliticizing socio-economic rights, which happens due to judicial deference and the progressive technicization and proceduralization of needs-talk. In her opinion, the way the adjudication goes, the judges manage to avoid talking about issues of poverty as political issues reducing them to simple matters of everyday unfortunate situations of an individual in question. The same happens with HIV-positive people living in the situation of an officially recognized HIV epidemics in Africa as Mark Heywood and Tim Fish Hodgson show in their chapter (8). At the same time, the Constitution and South African law have done a lot to provide access to medical treatment, health-care services via ensuring right to dignity and privacy and lifting a stigma from the HIV-positive people. The right to dignity is also central to the 'moral citizenship' as Justice Edwin Cameron underlines in his chapter (7) stating that it acts as a fundamental value as well. In his opinion, the role of dignity is evidenced most strikingly in the jurisprudence on the equality of gays and lesbians (p. 102). Cameron highlights that the post-1994 jurisprudence sought to affirm each individual's intrinsic worth, regardless of social station or public disapproval that allowed to recognize same-sex partnerships, adoptions and, most recently, marriages. The Constitutional Court pointed out (para 59) that it is inappropriate to entrench a particular family form as the social and legal norm, given the constantly changing nature of familial formation (p. 103). Thus dignity became central to ensure equality.

The relevance of political rights and right to vote for a democratic state is a commonplace, but all South Africans have enjoyed these rights only since 1994. The right to vote occupies a special place in the framework of the Bill of Rights and, as Francesca Romana Dau illustrates in her chapter (10), the constitutional judges have pushed towards a wide enfranchisement rather than disenfranchisement as an instrument of nation-building (p. 151). However, South Africa chose to follow 'one person, one vote' principle thus building the nation on the basis of formal equality rather than on substantive equality. It became evident in the analysis of information rights, which are crucial in the structuring of the public sphere (chapter 11). Iain Currie shows that the debate on the Protection of State Information Bill (2008–2010) underlined the conflict between freedom of information and state security. It also mobilized a wide range of civil society organizations to defend the right of access to information and to prevent the state making a broader regulation of state secrets. It also put a dominant party – the African National Congress – in a position of contradicting their own promises and values. The political outcome resulted in what Roger Southall in his chapter calls the 'contradictions of party dominance' (p. 166), explaining that the ANC became a victim of its own dominance as its electoral hegemony lies in its legacy as a liberation movement, but being a ruling party, not all of its actions have been consistent with what their voters perceive as liberal.

<sup>3</sup> Albie Sachs, *The judicial enforcement of socio-economic rights: The Grootboom case*, 56(1) *Current Legal Problems* 579–601 (2003).

The ANC has been also at the heart of the transformative constitutionalism, that is, those reform processes that made South Africa so exemplary. In Hugh Corder's review of constitutional reforms in South African history, all the political challenges of quasi-federalism and quasi-parliamentarianism become evident, especially in relation to the rule-of-law. However, it is other reforms that really transformed South African society: indigenous customary law, land reform and green economy reform. Tom Bennett explores the nature of what he calls a 'programmatic reform' (p. 203), that is supposed to bridge the gap between social classes and is marked by culture and ethnicity. It is what happened with customary law in South Africa: state law-making agencies began to acknowledge the differences between official and living laws recognizing that such principles as *ubuntu* (a complex concept denoting compassion, humanity and right-minded behaviour) could be a part of common law and jurisprudence. Thinking about the indigenous population brings a tremendous constitutional concern about land, as Nic Olivier, Nico Olivier and Clara Williams show in their chapter (15). Since 1994 the land was supposed to be redistributed but, as authors assert, it has failed due to a variety of reasons, including the status of property rights and ownership under the Constitution, betterment claims and right to food. The closely related issue of natural resources and environmental rights also highlights the difficulties of implementation good and sustainable policies in the situation of economic transformation as Tumai Murombo shows in chapter 16.

South Africa has made an impressive progress in its international standing. It is the EU's largest trading partner in Africa. South Africa's becoming the 'S' in the BRICS in 2011 makes even clearer the importance of the country in the international arena as Lucia Scaffardi discusses in chapter 19. She points out that the BRICS countries do not simply reform trade and the economics, they change the principles of law. Instead of following the strict EU example that requires new member states strongly to review their constitutional and legal systems, the BRICS group has seen using what may be described as 'soft policy transfer' (p. 248). The BRICS countries use 'legal borrowings' as a result of the decisions taken in the inter-governmental sessions, which bridges the systems and have overall positive impact on the respective legal systems. Scaffardi suggests that the BRICS creates 'global law' by not abandoning their sovereignty or homogenizing their economic systems, instead they create a new concept of a multi-center inter-state order. Following this line of reasoning, Andrea Lolloni shows the impact of South-African jurisprudence on other societies facing the same problems and vice versa, when the South African judges were allowed to use foreign law in interpreting the Bill of Rights and the Constitution. It provided a fruitful dialogue between the South-African system and other legal systems such as Canadian or Israeli. Overall, this import/export jurisprudence became a stimulating framework for further development.

This volume provides a lot of comparative reflections for Russian legal scholars. South African case offers an alternative model solution for constitutional problems,

a variety of theoretical attitudes to the separation of powers and federalism, socio-economic rights and social justice. Russia often faces the same dilemmas as South Africa: the separation of powers does not work as it is supposed according to classic models or Russian parliament is caught in the dominance of the single party and is perceived as ineffective. Furthermore, depoliticization of socio-economic rights leads to exactly the same results as in South Africa: their enforcement does not contribute to the socio-economic transformation in terms of facilitating meaningful public reasoning and dialogue in the form of political discourse and participation but rather provides for formal enforcement leaving a variety of social groups (such as, for example, HIV positive people) unprotected. At the same time, South-African analysis provides a very balanced view of legal reforms, its failures and achievements, that allows to build a progressive dialogue between scholars and experts to their mutual benefit, something that Russian scholarship often lacks.

#### **Information about the author**

**Marianna Muravyeva (Moscow, Russia)** – Professor, National Research University (Higher School of Economics) (3 Bol'shoy Trekhsvyatitel'skiy pereulok, 101000, Moscow, Russian Federation; e-mail: muravyevam@gmail.com).