CHAPTER 1

HUMAN RIGHTS AND NATION-BUILDING

THE CIVIC STATE VERSUS ETHNO-NATIONALISM

The quest to build a 'culture of human rights' in South Africa after the multi-racial elections of 1994 needs to be understood in the context of a sea-change in global politics, and the rise of human rights as the archetypal language of democratic transition. A revived language of liberal democracy became increasingly prevalent in the mid-1980s, and was accentuated by the demise of the former Soviet Bloc and the rise of ethno-nationalist conflict in the Balkans. Since 1990, nearly all transitions from authoritarian rule have adopted the language of human rights and the political model of constitutionalism,[1] especially in Latin America and the new states of Eastern Europe.[2]

The end of the Cold War and the threat of irredentist nationalism led many intellectuals in Europe from a variety of political traditions to promote human rights and a return to the Enlightenment project. Among them, those as recondite as Jürgen Habermas (1992), as erudite as Julia Kristeva (1993) and as media-friendly as Michael Ignatieff (1993) advocated the establishment of constitutionalist states based upon the rule of law. All converge on the view that nations must not be constituted on the basis of race, ethnicity, language or religion, but should be founded instead on a 'community of equal, rights-bearing citizens, united in patriotic attachment to a shared set of political practices and values' (Ignatieff 1993:3–4). In this formulation, human rights are portrayed as the antithesis of nationalist modes of nation-building.

Habermas made one of the most influential constitutionalist statements of the 1990s in his paper 'Citizenship and National Identity' (1992). Here, he sees political change in Eastern Europe as having restored an older Enlightenment political tradition and recaptured the language of rights. Rights must do a great deal in Habermas' formulations: they underwrite an Aristotelian conception of participatory citizenship; they create a barrier to the totalitarian pretensions of states; and they resolve the awkward relationship between citizenship and nationalism:

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> The meaning of the term 'nation' thus changed from designating a pre-political entity to something that was supposed to play a constitutive role in defining the political identity of the citizen within a democratic polity. The nation of citizens does not derive its identity from some common ethnic and cultural properties, but rather from the praxis of citizens who actively exercise their civil rights. At this juncture, the republican strand of 'citizenship' *completely parts company* with the idea of belonging to a pre-political community integrated on the basis of descent, a shared tradition and a common language [my emphasis]. (1992:3)[3]

Habermas' aim is to recover a republican tradition of rights from the grasp of the nationalist traditions which once seemed to own it. In his formulation, the rule of law and the 'praxis of citizenship' transcend nationalism in its cultural and tradition-bound form. The allure of rights in the post-Cold War era is that they prescribe basic human rights as an antidote to ethnic nationalism. As Ignatieff states: 'According to the civic nationalist creed, what holds society together is not common roots but law' (1993:4). The concrete practice of claiming citizenship rights creates a political culture which displaces ethnic nationalism and deflects the romantic politics of ethnicity, culture, community or tradition.

Constitutionalist discourse among political commentators within South Africa bears a close resemblance to its European counterpart. South African constitutionalists also see democracy as the antithesis of any sort of nationalist project, which is associated solely with the previous apartheid state.[4] Supporters of constitutionalism argue that an overarching moral unity cannot be achieved through cultural symbols since there is no 'ethnic core' in South Africa around which an overarching ethno-nationalism could be built, even if this were desirable. Instead of creating unity and identity out of cultural nationalism, the state should create a culture of rights based upon an inclusive and democratic notion of citizenship.

Some South African writers have gone a step further than their European colleagues by arguing that human rights should not be a form of nation-building at all. They argue that nation-building is not a guarantee of democracy, and they point to the failure of nation-building in other parts of Africa and the checkered history of nationalism in Europe. Instead of nation-building, they encourage the state to build legitimate and representative state institutions which respect fundamental human rights. Rather than attempting to build a nation, the new regime should build a working constitutional democracy so as to replace destructive nationalist sentiments with constitutional

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patriotism to a civic state. Fundamental rights and their protection by state institutions are an alternative to nationalism, but they perform similar functions – by creating national reconciliation and a sense of belonging and unity.[5]

National identity unfolds not through ancient symbols but through the practice of claiming basic rights. As Johan Degenaar wrote: 'In one sense we can still speak of the nation as the congruence of culture and power, but now culture has shifted from a communal culture to a democratic culture' (1990:12). South African constitutionalists were generally quite confident that the constitutionalist state would enjoy legitimacy and this would lead to a civic national identity. Over time, as the Bill of Rights, backed up by the legal system and Constitutional Court, protects citizens in a neutral manner, then a national consciousness and sense of belonging will emerge 'naturally' over time.[6]

Finally, human rights have the capacity to resist the limitation of rights to any one group of people; that is, they are seen as pan-ethnic, and irreducible to forms of ethnic particularism. The individualism of human rights chimes with the Charterist non-racialism professed by the ruling African National Congress[7] which won the 1994 and 1999 elections. Both political philosophies assume South Africa to be a society of individual citizens, not a society of racial communities with group representation and minority rights.

LEGAL IDEOLOGY AND NATION-STATES

My reservations about constitutionalism concern its sociological blindness to the pressures forcing transitional regimes to pursue a program of bureaucratic legitimization. Constitutionalists usually assume that national manifestations of human rights will remain true to their international orthodoxy, but instead human rights are dramatically redefined to suit national political constraints.

In the years following the first multi-racial elections there was a remarkable degree of consensus in elite circles that popular conceptions of democracy could be channeled into building a constitutional state based upon a bill of rights and the power of judicial review. Within this line of thought, there was a worrying unanimity of opinion that a constitutionalist project could be wholly distinct from expressions of 'pre-political' nationalism. Against this view, it will be argued that constitutionalism, state-building and the creation of what is a termed a 'culture of human rights' cannot be separated so easily from classic, communitarian forms of nation-building. Instead, human rights were subjected to the imperatives of nation-building and state formation in the 'New South Africa'.

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Political scientists writing on constitutionalism often operate with a set of over-rigid dichotomies; between nationalism and constitutionalism, between political society and civil society, and between the social processes involved in constructing a 'state of rights' and ethno-nationalist versions of culture. This means that they are often blind to how human rights talk is integrated into the nation-building project. Human rights talk does not, in the earlier phrase of Habermas, 'completely part company' with nationalist understandings of community. To the contrary, human rights talk has become a dominant form of ideological legitimization for new nation-building projects in the context of constitutionalism and procedural liberalism. Nation-building is not an end in itself, but a way to engender the necessary pre-conditions for governance. By contributing to the construction of a new notion of the 'rainbow nation', human rights advance certain pressing imperatives of the post-authoritarian state, namely the legitimization of state institutions and institutional centralization in the context of legal pluralism (which is explored in Part II).

Some constitutionalist conceptions of rights can involve a certain legal fetishism in that they often rely upon a conception of law as pristine and unsullied by surrounding discourses on culture, ethnicity and nationalism. This is apparent in recent debates on the character of judicial decision-making of Constitutional Court judges, between literal approaches aligned with Joseph Raz and interpretive frameworks influenced by Ronald Dworkin. A literal reading of legal texts such as the Constitution, has, for commentators such as Dennis Davis (1998:128), resurrected legal positivism in the South African context.[8] The main advocate of an ordinary-language approach to judicial decision-making, Anton Fagan (1995), draws upon Joseph Raz to say that legal texts are the source of all rules and that judges must do no more than give the text its ordinary meaning. Fagan advocates an apolitical vision of law as made up of universal and timeless principles where law is insulated from societal moralities, since moral reasoning must be guided solely by the moral position inherent in positive rules. Dennis Davis (1998) draws upon Ronald Dworkin to reject eloquently these positivist claims and states a political view of law close to the one being endorsed here:

> My argument is that there is no single meaning within the text and that the limits to meaning are not only imposed by the language chosen to be contained in the text but also in terms of legal and linguistic conventions, themselves informed by politics. Constitutional law is politics by a different means but it remains a form of politics. (p. 142)

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Contrary to the myth of legal neutrality, the law is always a form of politics by other means, as it is normative as well as merely formal, rational and self-referential. Legal meaning is enmeshed in wider value systems, and is caught between other competing normative discourses which are political, cultural, and more often than not, nationalist.[9]

Against a view of law as a value-free process, legal ideology is a form of domination in the Weberian sense which is embedded in historically constituted relations of social inequality. In a legally plural context, as in South Africa where there are many competing justice institutions (such as township courts, armed vigilantes and customary courts), state law is one semi-open system of prescriptive norms backed by a coercive apparatus. If we conceive of law as an ideological system through which power has historically been mediated and exercised, then in a society where power is organized around racial/ethnic and national identities, we can expect rights talk also to be ensnared by culturalist and nationalist discourses. Constitutionalists hoped that a culturally-neutral Bill of Rights would transcend particularistic nationalist ideology, but in practice the reverse is often the case: rights are subordinated to nation-building.

HUMAN RIGHTS IN THE NEGOTIATIONS

In order to understand fully how human rights became enmeshed within a wider South African nation-building project, we have to look at the rise of human rights talk in the peace process between the years 1985 and 1994.[10] During this period, human rights emerged as the unifying language to cement the two main protagonists in the conflict: the ruling National Party (NP)[11] and the African National Congress (ANC). Human rights talk became the language not of principle but of pragmatic compromise, seemingly able to incorporate any moral or ideological position. The ideological promiscuity of human rights talk meant that it was ill-suited to fulfil the role of an immovable bulwark against ethnicity and identity politics. Because of its role in the peace negotiations, human rights talk came to be seen less as the language of incorruptible principles and more as a rhetorical expression of an all-inclusive rainbow nationalism.

By the end of the 1980s, the armed conflict between the anti-apartheid movement and the apartheid regime had reached a stalemate where neither side could annihilate the other. Key ANC leaders realized that a revolutionary victory could only be a pyrrhic one, where there would be little remaining of the country's infrastructure for building a new multiracial society. On the opposite side of the political spectrum, the rigid anti-Communist stance of the NP government began to soften

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after negotiations with the Soviet Union led to the withdrawal of Cuban troops in Angola and to an agreement on Namibian independence. The fall of the Berlin Wall further challenged the National Party elite to revise its ideological commitment to fighting the 'international Communist threat' which had for so long been the mantra to justify state repression. After the Cold War, authoritarian regimes across the South were coming under greater international pressure to liberalize.[12] Tentative talks between the government and opposition began in 1986 and gathered pace until they were formalized in 1991 in the Convention for a Democratic South Africa (CODESA) talks at Kempton Park, outside Johannesburg.

In the negotiations, constitutionalism emerged as the only viable political ethic that could bridge the chasm between seemingly incommensurable political traditions. The writing of the new Constitution at the Multi-Party Negotiating Process in 1993 functioned as a cement between the main actors. Despite the apparent discontinuities between National Party and anti-apartheid political thought, rights talk was indeterminate enough to suit the programs of both the NP and ANC, who came together to form a power-sharing arrangement. The ascendancy of human rights talk thus resulted from its inherent ambiguity, which allowed it to weld together diverse political constituencies. Constitutionalism became the compromise arrangement upon which the ANC and NP could agree a 'sufficient consensus'.[13]

During the negotiations, the NP was forced into significant concessions, notably to shift its position away from group rights to individual rights. Until late 1993, the NP had clung to an ideology of consociationalism which would entrench 'minority rights' through a compulsory coalition government. After the Record of Understanding[14] on 26 September 1992, liberal ideas of constitutionalism began to gain the upper hand over other strategies for power-sharing and 'group rights' for whites. The NP realized that a permanent white minority representation in government was not a realistic goal and the ANC would accept nothing less than a unitary state, full civil rights and majority rule.

The NP turned to a strategy of individual rights with liberal 'checks and balances' to secure the interests of a white minority and protect its economic and social privileges. The prospect of a political order based upon human rights reassured the business elite since they practically demanded a liberal political economy.[15] In the Bill of Rights of the 1993 interim Constitution,[16] classic individual rights (for example, of movement, free expression, and residence) are well entrenched, whereas those concerning socio-economic and welfare rights are weak and muted. The Constitution enshrined the right to private property and placed severe limitations on expropriation and nationalization.

The Left also went through its own Pauline conversion, with the social democratic current gaining preeminence over revolutionaries who had viewed rights with a Stalinist antinomianism.[17] In the late 1980s, many elements within the anti-apartheid movement espoused a 'people's war' in order to create a Soviet-style command economy. Rank and file activists as well as important leaders expressed cynicism towards a Bill of Rights, and Communist Party intellectual Joe Slovo wrote in 1985: 'In the South African context, we cannot restrict the struggle objectives to the bourgeois democratic concept of civil rights or democratic rights'.[18] (*Sechaba*, February)

Activists swung behind the constitutionalist position as the 1992 mass mobilization campaign fizzled out after several months. An awareness of the limitations of mass strategies led many activists in the ANC and South African Communist Party away from the insurrectionary seizure of power, thus marginalizing radicals and reinforcing the impetus for compromise and negotiation. The result, however, would be a very different kind of political order than the objective of popular democracy which many anti-apartheid activists had struggled for in the 1980s. Constitutionalism defines the law-government relationship in a specific way that is distinct from other models, such as straightforward Westminster parliamentary sovereignty. Constitutionalism places significant limitations on the exercise of governmental power, forcing legislation to comply with rules laid down in the Constitution as interpreted and enforced by the Constitutional Court.[19] Section 2 boldly states the supremacy of the Constitution: 'This Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the duties imposed by it must be performed.' However, according to section 74, the National Assembly can amend the Constitution if a bill has a two-thirds majority, and it has done so on numerous occasions since 1996.

The negotiations in 1991–3 leading to the new South African political order were among the most participatory and accountable seen in any recent transition from authoritarian rule. In the CODESA I and II talks, political parties and civil groups were able to intervene in significant ways in order to advance their agenda. The shape of the political system of the new South Africa (that is, the relationship between parliament and the Constitutional Court) and its economic structure (for example, whether private property should be protected in a Bill of Rights) were all hotly debated.

Yet the dilemma of how to deal with politically motivated human rights violations of the apartheid period was not subjected to the same process of democratic dialogue. In particular, the decision to grant amnesty to human rights offenders was eventually decided by an exclusive political deal between the NP and the ANC. The CODESA II

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talks did not address the issue[20] and outside the talks there was very little popular or open political party debate on amnesty. At the end of the Kempton Park negotiations on 17 November 1993, when all other issues were resolved and the interim Constitution was agreed, the question of amnesty was still outstanding. The National Party desperately wanted an amnesty, more so than the liberation movement which was in an advantageous position legally because of the two earlier Indemnity Acts.[21] At that point, Chief NP negotiator Roelf Meyer and ANC representative Cyril Ramaphosa mandated 'Mac' Maharaj (ANC) and Fanie van der Merwe (NP) of the negotiators' technical committee to draft a post-script to the Constitution[22] which would contain an amnesty clause. This occurred outside the official consultative process, in the hiatus between the end of the formal constitutional talks and the Constitution going to parliament in December 1993. NP negotiator Roelf Meyer reflected, 'At that point, there was just agreement that there should be an amnesty. There was a principle of agreement, but no details, apart from the point that both sides be given equal status. Apart from that, we left it up to the technical committee' (Personal interview, 16 February 1999).

The interim Constitution, with its last-minute postscript requiring an amnesty mechanism, went to parliament after 6 December 1993. There was never any open deliberation of the postscript at the plenary session of parliament, since it arose from a closed and secretive deal between the NP and ANC leaderships. Recognizing the exclusive character of the political deal done on amnesty is important as there is a strong moral argument that such an amnesty arrangement can only be entered into by victims themselves or their legitimate representatives and not by others on their behalf and with very little consultation.[23]

The statement on amnesty and reconciliation was criticized by smaller parties such as the Democratic Party, who denounced it as a cover-up pact. Roelf Meyer defends the exclusiveness of this process, saying, 'The Constitution wouldn't have gone through if the amnesty question had gone to other parties and through the consultation process at Kempton Park' (Personal interview, 16 February 1999).

The 1993 Constitution's postscript was titled, appropriately enough, 'National Unity and Reconciliation', as was the act passed in 1995 to establish the Truth and Reconciliation Commission (TRC). The Constitution's postscript explicitly rejected retribution and called for past injustices to be addressed 'on the basis that there is a need for understanding but not for vengeance, a need for reparation but not for retaliation'. The central meaning of 'reconciliation' was an amnesty law, rather than the later formulations advanced by the Truth and Reconciliation Commission. The TRC's motto would be 'Reconciliation Through Truth', not, as it happens, 'Reconciliation Through

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Indemnity', which was more true to the 1993 Constitution's postscript. Early on, the Bill of Rights announced many new rights which could only be abrogated in extenuating circumstances, but the postscript unraveled the Constitution's commitment to human rights. In the postscript, the invocation of human rights did not express the determination to protect individual citizens as much as it did the willingness to sacrifice individuals' right to justice in the name of 'national unity and reconciliation'. The entreaty to human rights talk came to represent the final compromise of the negotiations; that is, amnesty for perpetrators of human rights violations.

After a turbulent negotiations stage, characterized by extremely high levels of political violence, a new Constitution was finally ratified in December 1993, leading to the first non-racial elections in South African history. In April 1994, the elections led to a 'Government of National Unity' (GNU), dominated by the ANC, but including high-ranking NP ministers such as Vice-President F W de Klerk. This limited power-sharing arrangement was to prove unstable and it collapsed in 1996, leaving the ANC to rule alone.

HUMAN RIGHTS, *UBUNTU* AND THE AFRICAN COMMUNITY

> God has given us a great gift, *ubuntu* … *Ubuntu* says I am human only because you are human. If I undermine your humanity, I dehumanize myself. You must do what you can to maintain this great harmony, which is perpetually undermined by resentment, anger, desire for vengeance. That's why African jurisprudence is restorative rather than retributive.
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> Desmond Tutu (Profile: *Mail and Guardian*, 17 March 1996)[24]

After the 1994 elections, the connections between human rights and nation-building became clear in the discourse of the Constitutional Court on reconciliation, restorative justice[25] and 'African jurisprudence'. One African word, *ubuntu*, integrates all these dimensions. *Ubuntu*, a term championed mainly by former Archbishop Tutu, is an expression of community, representing a romanticized vision of 'the rural African community' based upon reciprocity, respect for human dignity, community cohesion and solidarity. After the TRC was established in late 1995, the language of reconciliation and rights talk more generally became synonymous with the term *ubuntu. Ubuntu* became a key political and legal notion in the immediate post-apartheid order. It first appeared in the epilogue of the 1993 interim Constitution in the following famous passage: '… there is a need for understanding but not for vengeance, a need for reparation but not for retaliation, a need for

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ubuntu but not for victimization.' This same passage also appeared in the preamble of the 1995 National Unity and Reconciliation Act which established the Truth and Reconciliation Commission.

The term *ubuntu* also appeared extensively in the first Constitutional Court judgement on the death penalty (the State versus T. Makwanyane and M. Mchunu, 1995 (6) BCLR 605 (CC), hereafter *S v Makwanyane*), particularly in the judgements of Sachs, Mahomed, Mokgoro and Langa.[26] In all of these cases, as in the Tutu quote above, *ubuntu* was used to define 'justice' proper versus revenge; but the subtext instead reinforced the view that 'justice' in the new culture of human rights would not be driven by any desire for vengeance, or even by legally sanctioned retribution.[27] In *S v Makwanyane*, Judge Langa claims that *ubuntu* 'recognizes a person's status as a human being, entitled to unconditional dignity, value and respect …' (224) and sees the concept as 'a commendable attribute which the nation should strive for'. Judge Mokgoro seeks to create a nationally specific South African jurisprudence by referring to *ubuntu* as an indigenous South African value which militates against the death penalty and as a multicultural unifier; as 'a golden thread [which runs] across cultural lines' (307).

Judge Sachs' *S v Makwanyane* judgment relies upon an image of the static, ahistorical and remarkably compassionate African community. According to Sachs, African customary law did not invoke the death penalty except in the case of witchcraft, which Sachs saw as to do with spontaneous religious emotion rather than indigenous law (375–381). The existence of capital punishment in 'African communities', from witch-killing to necklacing in the 1980s, to mob lynchings in the 1990s, is more the product of irrational crowd hysteria than routine customary court justice, according to Sachs.

This interpretation of capital punishment in African communities results from a time-honored tradition in jurisprudence where the jurisdictional boundaries of law are defined by reference to law's opposite. Law excludes certain categories of persons (children, the mentally ill, and, in colonial contexts, slaves) and actions (violence without due process) from its purview. Law is cool, rational, and impartial, therefore the 'wild justice' of political cadres necklacing suspected police informers, of mob burnings of car hijackers, or customary courts killing 'convicted' witches simply are not allowed to be 'law'. *Ubuntu* expresses this rejection of revenge, and is explicitly linked in the TRC final *Report* to restorative justice (Vol.1, pp. 125–128), defined not as punishment but as resulting from reparations for victims and the rehabilitation of perpetrators.

However, there is a further slippage in the use of *ubuntu* that goes beyond simply supporting restorative justice in order to justify amnesty