

# THE POLITICS OF TRUTH AND RECONCILIATION IN SOUTH AFRICA

Legitimizing the Post-Apartheid State



Richard A. Wilson

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# THE POLITICS OF TRUTH AND RECONCILIATION IN SOUTH AFRICA

## Legitimizing the Post-Apartheid State

The South African Truth and Reconciliation Commission (TRC) was set up to deal with the human rights violations of apartheid during the years 1960–1994. However, as Wilson shows, the TRC's restorative justice approach to healing the nation did not always serve the needs of communities at a local level. Based on extended anthropological fieldwork, this book illustrates the impact of the TRC in urban African communities in the Johannesburg area. While a religious constituency largely embraced the Commission's religious-redemptive language of reconciliation, Wilson argues that the TRC had little effect on popular ideas of justice as retribution. This provocative study deepens our understanding of post-apartheid South Africa and the use of human rights discourse. It ends on a call for more cautious and realistic expectations about what human rights institutions can achieve in democratizing countries.

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To Thomas, born in the middle of it all.

# THE POLITICS OF TRUTH AND RECONCILIATION IN SOUTH AFRICA

Legitimizing the Post-Apartheid  
State

*Richard A. Wilson*  
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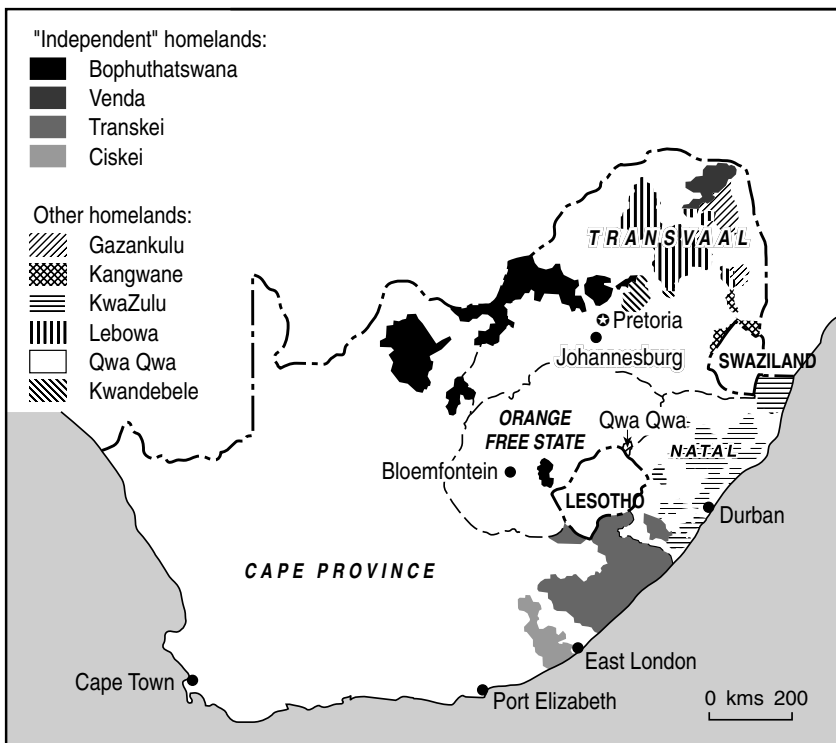
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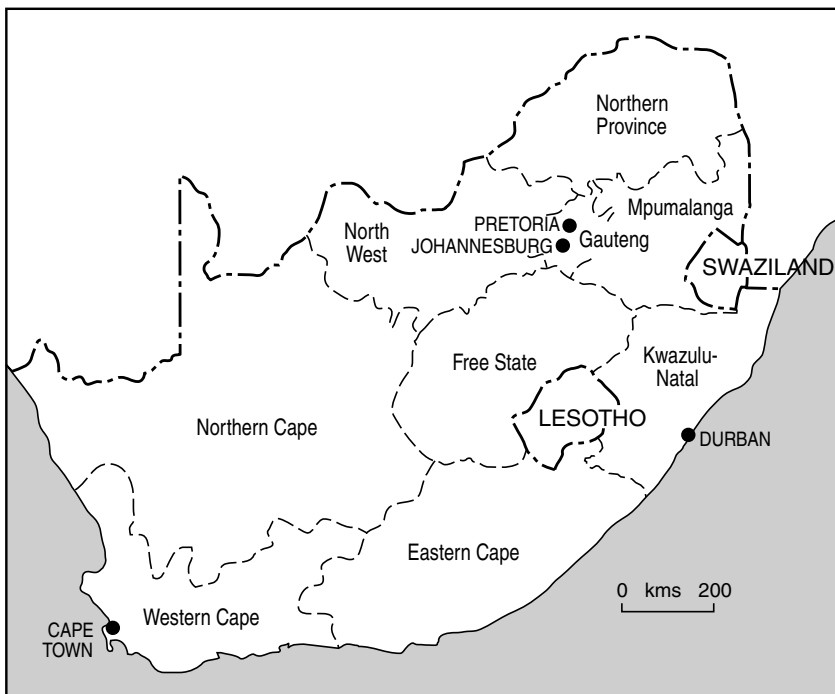
## ACRONYMS AND GLOSSARY

AC	Amnesty Committee of the TRC
ANC	African National Congress
ANCYL	ANC Youth League
AWB	Afrikaner Weerstandsbeweging (Afrikaner Resistance Movement)
AZAPO	Azanian People's Organization
BRAC	Boipatong Residents Against Crime
CODESA	Convention for a Democratic South Africa
COSATU	Congress of South African Trade Unions
CPF	Community Policing Forum
DP	Democratic Party
GNU	Government of National Unity
HRVC	Human Rights Violations Committee of the TRC
HRV Hearings	Human Rights Violations hearings of the TRC
ICC	International Criminal Court
IFP	Inkatha Freedom Party
<i>Imbizo</i>	Meeting or court (Zulu)
Infocomm	Information Management System of the TRC
ISCOR	Iron and Steel Corporation (Vaal)
IU	Investigative Unit of the TRC
<i>Kgotla</i>	Meeting or court (Sesotho); plural <i>lekgotla</i>
<i>Khulumani</i>	'Speak out' Survivor's support group
MDM	Mass Democratic Movement
MK	Umkhonto we Sizwe (ANC armed wing)
MP	Member of Parliament
NCPS	National Crime Prevention Strategy
NGO	Non-governmental organization
NP	National Party
NSMS	National Security Management System
NPA	National Peace Accord
NUMSA	National Union of Mineworkers of South Africa
NURA	National Unity and Reconciliation Act (1995)
PAC	Pan Africanist Congress
PAGAD	People Against Gangsterism and Drugs

RRC	Reparation and Rehabilitation Committee of the TRC
SAIRR	South African Institute of Race Relations
SABC	South African Broadcasting Company
SACC	South African Council of Churches
SACP	South African Communist Party
SADF	South African Defense Force (apartheid)
SANCO	South African National Civics Organization
SANDF	South African National Defense Force (post-apartheid)
SAP	South African Police (apartheid)
SAPS	South African Police Service (post-apartheid)
SDU	Special Defence Unit (ANC)
SPU	Special Protection Unit (IFP)
SSC	State Security Council
STRATCOM	Strategic Communications
TRC	Truth and Reconciliation Commission
<i>Ubuntu</i>	Humanity, personhood, mutuality
UDF	United Democratic Front
ZCC	Zionist Christian Church



**Map 1** Pre-1994 South Africa: The homelands



**Map 2** Post-1994 South Africa: Provinces of the Republic



**Map 3** Johannesburg and the Vaal Region

## PREFACE AND ACKNOWLEDGEMENTS

In democratizing countries of Latin America from the mid-1980s and Eastern Europe from 1989, the language of human rights emerged as a universal panacea to authoritarianism. Human rights were demanded by ordinary citizens massed in the squares of Leipzig or on the streets of Bisho, and they became symptomatic of the kind of 'procedural' liberalism established in post-authoritarian states.<sup>1</sup> Human rights based legislation became a central component in the transformation of repressive institutions and in the establishing of the rule of law after the distortions of authoritarian legality. Each society had to face the question of how to deal with the gross human rights violations of the past, and new institutions and commissions were set up to reaffirm human dignity and to ensure that violations would not occur again. Increasingly, human rights talk was detached from its strictly legal foundations and became a generalized moral and political discourse to speak about power relations between individuals, social groups and states. This broad extension of human rights talk was exacerbated as democratizing regimes with crumbling economies and fractured social orders grasped for unifying metaphors, and human rights talk seemed to provide an ideological adhesive through terms such as 'truth' and 'reconciliation'.

By the 1990s, it was time to take stock and to evaluate critically the role of human rights ideas and institutions in democratic transitions. It became possible to move on from simply extolling human rights to examining what happened when human rights institutions were established in complicated contexts of political compromise, where neither opposing side in a civil war had won an outright military victory, where key perpetrators of the era of repression (from Vice-President F W de Klerk in South Africa to Senator Augusto Pinochet in Chile) still occupied positions of political power and where the former bureaucracies of death (especially the criminal justice system and security forces) were still staffed by personnel from the authoritarian era.

In the literature on democratization, liberal visions of 'democratic consolidation' often adopted a model-building and technicist tone.<sup>2</sup> 'Transitology' attempts to isolate the variables that reinforce or undermine democratic consolidation and build universal mechanistic models

that treat democratization as if it were a matter of correctly arranging pieces of a puzzle. Transition theory in mainstream political science often accepted a minimalist liberal understanding of democracy as indicated by constitutions enshrining individual civil rights, political party competition and periodic elections.

The establishing of a bare functioning minimum is not to be lightly dismissed, as it was an important objective of the struggles of opposition and dissident movements. Yet this book emphasizes a more sociological standpoint which places justice in transition in the context of nation-building and a hegemonic project of state formation. A focus upon how the rule of law is established and maintained must be complemented by an analysis of the concrete ideological and administrative difficulties which new regimes found themselves in. This requires a greater awareness of how new regimes used human rights to re-imagine the nation by constructing new official histories, and how they sought to manufacture legitimacy for key state institutions such as the criminal justice system.

Human rights discourses and institutions in South Africa such as the Truth and Reconciliation Commission, Human Rights Commission and the Commission for Gender Equality are central to creating a new moral and cultural leadership, that is to say, a new hegemony. This new hegemony is initially asserted in relation to accountability of past state crimes and whether to punish and/or pardon previous human rights violations. The study of transitional truth and justice has been too dominated by philosophical discussions abstracted from specific contexts, and we should instead examine how the politics of punishment and the writing of a new official memory are central to state strategies to create a new hegemony in the area of justice and construct the present moment as post-authoritarian when it includes many elements of the past.

In South Africa, human rights talk became ever more compromised as it was dragooned by an emergent bureaucratic elite into the service of nation-building. Ostensibly, the language of rights represented a departure from old ethno-nationalist models of nationalism with their romantic images of blood and land. Post-authoritarian nation-building, in contrast, appealed to civic nationalism as the new basis for moral integration and a redefined conception of nation. Yet this process of nation-building also had its normative injunctions and included elements of moral coercion. The constitution and subsequent legislation deprived victims of their right to justice and retributive justice was defined as 'un-African' by some, such as former Archbishop Desmond Tutu. Human rights became the language of restorative justice and forgiveness of human rights offenders in South Africa, whereas at the same time in international contexts, human rights were developing in just the

opposite (punitive) direction with the creation of an International Criminal Court and the prosecutions brought by the UN war crimes tribunal for the former Yugoslavia and Rwanda.

There were some unintended consequences of the reliance upon human rights talk for nation-building and state centralization. Due to amnesty laws and a lack of prosecutions of human rights offenders, the high expectations expressed in human rights talk by both politicians and citizens were left unfulfilled, as transitional institutions seemed to protect perpetrators more than they fulfilled victims' hopes for justice and reparation. Human rights came not to represent ideal and inviolable principles (such as justice for victims and punishment for offenders), but instead expressed the problematical nature of the elite-pacted political settlement. The new promises of the constitutional order outstretched the capacity of the legal system, as human rights were enshrined in the Constitution that were unrealizable by the majority of impoverished black citizens. Given the yawning gap between human rights ideals and the grim realities of criminal justice delivery, the conditions were ripe for a crisis of legitimacy. Rather than resolving the crisis of legal institutions, human rights talk came to symbolically epitomize the legitimization crisis of post-authoritarian justice. Finally, the place of human rights talk in a project of legal unification and centralization brought them into conflict with local justice institutions and popular legal consciousness in a legally plural setting.

These reflections on human rights institutions in democratization processes urge us to look beyond the formal, legalistic and normative dimensions of human rights, where they will always be a 'good thing'. A sociology or ethnography of rights will look instead at how rights are transformed, deformed, appropriated and resisted by state and societal actors when inserted into a particular historical and political context. This shifts our attention away from the transcendent moral philosophy of rights to a rigorous examination of the history and social life of rights.

This book results from a twelve-month ethnographic study (over a four-year period) inside and outside of one of the main human rights institutions in transitional South Africa – the Truth and Reconciliation Commission (TRC). During this time I was a lecturer and visiting associate in the anthropology department at the University of the Witwatersrand in Johannesburg. My research started in 1995, before the TRC began functioning, and continued into 1996–7, while it was in full swing; it ended in late 1998 after the main regional offices had been closed. I attended three weeks of Human Rights Violations hearings in

Klerksdorp, Tembisa and Kagiso and three weeks of amnesty hearings for Northern Province security policemen in Johannesburg. I interviewed nearly half of all the TRC Commissioners, the TRC executive secretary, and many staff workers, such as lawyers, researchers and investigators. I would also include as 'research' the conference evaluating the TRC which I co-organized with Merle Lipton at the University of Sussex in September 1998, which included a TRC Commissioner, members of the Research Unit and Investigative Unit and a former judge of the Constitutional Court of South Africa.

Much of my research, however, took place outside the TRC process and concentrated on the impact of the TRC on the African townships of the Vaal region to the south of Johannesburg. In the Vaal, I carried out in-depth interviews with over 50 victims of political violence, many of them members of the Khulumani Support Group, as well as local religious personnel, local court officials, political leaders, legal activists and policemen. In the beginning, my contacts were mainly aligned to the African National Congress, but as time went on I actively sought out leaders and ordinary members of minority parties such as the Pan Africanist Congress and the Inkatha Freedom Party. I also tried to glean views from those who were not aligned with any political tradition at all. As for 'perpetrators', it is worth pointing out that some of my 'victim' informants were also implicated in acts of public violence during the apartheid era. Only a few were willing to speak openly about their involvement in such acts, but I did interview three Inkatha Freedom Party members who had been convicted in the courts for their participation in the 1992 Boipatong massacre, as well as a policeman representing amnesty applications from within the Vaal police force, and an Amnesty Committee investigator of the TRC for the Vaal region. Finally, my interviews in the Vaal were complemented by several weeks' archival work in the William Cullen Library, which holds many useful historical records of human rights monitors such as Peace Action and the Independent Board of Inquiry which worked in the Vaal in the late 1980s and early 1990s.

Truth commissions are now standard post-conflict structures set up in over seventeen countries in the last 20 years to investigate unresolved cases arising from past human rights violations.<sup>3</sup> As one strand of the globalization of human rights, they have taken on a transnational validity as one of the main mechanisms for announcing a new democratic order. Truth commissions have fascinated international audiences and led to a voluminous literature acclaiming their promises of truth and restoration, mostly from law, political science and moral philosophy. The South African truth commission, as the largest and most ambitious in scope, is perhaps the zenith of this trajectory, and has attracted

the most attention and discussion so far. The literature evaluating the achievements of truth commissions has mostly been positive and laudatory, claiming these commissions heal the nation by providing therapy for a traumatized national psyche. They break a regime of official denial of atrocities by ending the public silence on violence and violations. They expose the excesses of the previous political order and so discredit it, aiding in democratic consolidation. In Latin America, where disappearances were more widespread, they revealed the fate of the disappeared and led to exhumations of clandestine mass graves.

This book concentrates on the two main functions of the South African Truth and Reconciliation Commission: truth-telling about the apartheid past and the reconciliation of 'the nation'. The TRC Report published in 1998 on the gross human rights violations of a 34-year period provided a valuable starting point for discussions about moral responsibility during that era. However, the TRC's account of the past was constrained by its excessive legalism<sup>4</sup> and positivist methodology, which obstructed the writing of a coherent socio-political history of apartheid.

The TRC worked with many different understandings of reconciliation, but one came to dominate in the dozens of televised Human Rights Violations hearings held around the country. The religious-redemptive vision of reconciliation stressed public confession by victims, and it created meaning for suffering through a narrative of sacrifice for liberation. Finally, it encouraged the forsaking of revenge. Chapters 5 to 8 examine the consequences of the TRC's version of reconciliation for individual victims who appeared at hearings and others outside the TRC process in the African townships of Johannesburg. In many of these urban townships, political strife was ongoing during the period of fieldwork (1995–8), and it was possible to see the effect of the TRC on these conflicts.

At this point the book begins to shift its focus away from the TRC towards the surrounding social context, in order to evaluate the impact of human rights using ethnographic methods. This approach follows in the tradition of legal anthropology, documenting the moralities, discourses and everyday practices of ordinary citizens when they engage in rights processes and institutions. The TRC's language of 'reconciliation' elicited a variety of local responses and most could be placed in three categories: adductive affinities, where local values and human rights overlap and reinforce one another; pragmatic proceduralism, where survivors participate in human rights procedures to pursue their own agendas and without necessarily taking on human rights values; and relational discontinuities, where local actors are resistant to a restorative vision of human rights and assert a more retributive model of justice.

The variety of responses among the main ANC-supporting township constituency of the TRC demonstrates how human rights institutions are caught in a web of centralizing and pluralizing strategies simultaneously. Human rights talk is a contested discourse which draws popular legal consciousness closer to that of the state, while at the same time encountering resistance from localized organizations and moralities which assert the autonomous right to define and enforce justice. One of the main results of my ethnographic inquiries was the centrality of emotions of vengeance in popular legal consciousness and practices of revenge in local justice institutions. Despite the existence of many rarified national institutions dedicated to protecting human rights (not only the TRC, but also the Gender Commission, the Constitutional Court and the Human Rights Commission), enclaves of revenge controlled by militarized youth and punitive elders continued to shape the character of justice in the townships of South Africa. Because it was guided by a religious-redemptive notion of reconciliation, the TRC was never able to engage with, much less transform, these emotions and structures.

Understanding why the TRC struggled to accomplish its stated mission of 'reconciling the nation' requires a historical explanation which locates the TRC in a history of legal pluralism in South Africa in the twentieth century. The work of the TRC was shaped by the history of state attempts to consolidate the administration of justice and attempts by Africans to preserve control over local institutions of justice and social order. The racialized and dual legal system consolidated in the twentieth century led to a fracturing of justice and moralities which endured after the first multi-racial elections in 1994. The persistence of legal pluralism is closely linked to the historical failure to create a South African nation, reminding us of the concrete links between nation-building and state-building.

Instead of succumbing to state attempts at centralization, urban African residents continued to use local justice institutions to create social order in conditions of urbanization, industrialization and mass migration from rural areas. In the new South Africa, human rights talk was inserted into a context of a massive crime wave, profound social and economic inequality and disillusionment with ineffective criminal justice institutions. Human rights thus emerge as part of a pragmatic policy of state-building and centralization of justice in a milieu where state legality is still often perceived by township residents to be external and alien to the 'community'.

An ethnography of human rights evaluates new institutions of the nation-state 'from below' and compels us to understand them from a position of institutional fragmentation and legal pluralism. In concrete

terms, it draws our attention to how human rights institutions and discourses in the 'new South Africa' have often failed to connect with local moralities and justice institutions and thereby transform them. As we come to realize that the new 'culture of human rights' is very thin indeed, we may need to temper celebrations of another seeming triumph for the model of liberal human rights. In a comparative perspective, the new human rights institutions of post-apartheid South Africa are impressive for their ability to shape the public debate on truth and reconciliation. It remains to be seen whether they have altered, over the long term, concrete social practices and discourses of violent conflict, justice and punishment.

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# 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,<sup>1</sup> especially in Latin America and the new states of Eastern Europe.<sup>2</sup>

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:

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)<sup>3</sup>

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.<sup>4</sup> 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

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.<sup>5</sup>

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.<sup>6</sup>

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<sup>7</sup> 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 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’.

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.<sup>8</sup> 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)

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.<sup>9</sup>

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. Constitutionalist 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.<sup>10</sup> During this period, human rights emerged as the unifying language to cement the two main protagonists in the conflict: the ruling National Party (NP)<sup>11</sup> 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

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.<sup>12</sup> 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'.<sup>13</sup>

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<sup>14</sup> 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.<sup>15</sup> In the Bill of Rights of the 1993 interim Constitution,<sup>16</sup> 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.