EDITOR'S NOTE

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Chips all in. If you can find a better single volume on South African constitutional law in any South African law journal, then I will buy you a bottle of your favourite scotch. I'm not playing with house money.

Can you sight a finer constellation of legal theorists than those authors ruminating on the virtues and vices of many, though not all, of the constitutional democracies that have sprouted up in the last quarter century? In symposium one – *Constitutional Courts as Hedges against Democratic Authoritarianism* – *NYU's* Sam Issacharoff trots the globe in search of the answer and finds that very similar, very significant, yet at the time unexpected, perils await countries that undertake 'Democratic Risks to Democratic Transitions'. In a reply that is not quite a reply, *UNSW*'s Theunis Roux takes stock of the past two decades of South African democratic rights jurisprudence and arrives at his own conclusions, through a process of induction, about the extent to which constitutional courts can operate as hedges. His *New South Wales* compatriot, Martin Krygier, then flies us business class at a higher level of elevation and asks us whether we have not gotten ahead of ourselves in his response: 'What about the Rule of Law?' We can't help but get ahead of ourselves in heady times, not even dewy wide-eyed pragmatists such as Martin and I. His answer is that since we almost always allow desire to outstrip reality, we should be prepared, when those 20 years of endorphins wear off, to ask two questions: Is this really what we signed up for? Have we laid down the solid foundations of a just, well-ordered society: the rule of law and a truly civil, civil society?

The three articles that follow do our jurisprudence justice in three very different ways. Deputy Chief Justice Dikgang Moseneke (in 'Courage of Principle') ponders our situation not long after the Marikana Massacre. On this 30th Anniversary of her assassination, he asks us what liberation movement leader Ruth First would make of where we, collectively, are, and what grade she might be inclined to give South Africa's current political institutions and its broader society. In this bracing but balanced critique, the Deputy Chief Justice imagines that she'd give credit where it is due, but would hold back a final mark until such a time as we've made good on the uncompromising promises of the Freedom Charter. The subsequent article returns us to the role that law *qua* law plays in producing a just, well-ordered society. As only *UCT*'s Anton Fagan can, with his customary élan, 'Causation in the Constitutional Court' teases out the Court's new rules of delict after *Lee* and compares them with our well-established rules pre-*Lee*. He proves, once again, that everyone, including our Constitutional Court, can use a good copy-editor. *Wit*'s Brahm Fleisch and I then take our cue from collateral remarks made by Deputy Chief Justice Moseneke in *Ermelo*. In 'The Problem of the 'Other' Language', we look at novel language policies designed to enable current learners to one day be in a position to read Anton Fagan's article in a South African language other than English or Afrikaans. We assess these new first, second and third public school

language policies, and the many constitutional provisions that cabin them, in terms of the following proposition. You haven't discharged your duties to treat fellow South Africans as equal citizens if you haven't made some effort to speak to others in an African language, and not just our two dominant tongues.

Symposium two features yet another mad scramble to make sense of our socio-economic rights discourse. *Cleveland-Marshall*'s Brian Ray's second lead essay, 'Evictions, Aspirations and Avoidance', is a monograph length gem. It also reflects a truly gracious effort at hymn sheet jurisprudence. Brian shows us how we might enable proponents of subsidiarity, substantive reasonableness, minimum core analysis and experimental constitutionalism to agree with one another, at the same time as he nudges the Court's housing jurisprudence along. Happily, for our sake, Brian's five interlocutors will have none of it. Well, not none of it – only their part of it. *Boston College*'s Katie Young agrees with Brian that avoidance is a fundamental problem with the Court's socio-economic rights judgements in 'The Avoidance of Substantive Rights', but thinks that the move toward subsidiarity raises not so novel problems of avoidance. *Florida State*'s David Landau agrees. Much like Katie, he also wonders, in 'Aggressive Weak-Form Remedies' where Brian's previous dual commitment to experimental constitutionalism and socio-economic rights with core content has gone? *Wits*' Jackie Dugard, in 'Beyond Blue Moonlight', and *SERI*'s Stuart Wilson, in 'Curing the Poor' don't abjure engagement with theory. They do, however, excoriate the Court for all the adjudicatory models it has thus far proffered. They expressly question whether 'meaningful engagement', as currently constructed, can ever deliver on the promise of socio-economic rights. Their withering assessments are not for the faint-hearted. *Johannesburg*'s David Bilchitz's 'Avoidance is Avoidance' – read after Dugard's and Wilson's contributions – is a pretty clear 'I told you so'. Having pounded the drum of the minimum core for well-over a decade, David could (if he wanted) point to recent housing and eviction case law and say here's the proof in the pudding. In fairness to the Court, none of the authors goes quite so far. Read collectively, this sextet instead points out the manifold flaws in the Court's extant housing law jurisprudence and suggests possible avenues for improvement imminent in the Court's own judgments.

Just when you thought it might be safe to go back into the water without diving into the deep end, *Yale*'s James Fowkes applies his novel theory of managerial adjudication to such apparently mundane issues such as access to court and the raising of new constitutional questions mero motu. James suggests how they can expand such access and constitutional oversight without danger of judicial overreach. *SAIFAC*'s Michael Dafel demurs. He doesn't deny the desirability of a court's doing so with care, but worries that pressing such an approach without extremely careful delimitations risks undermining one of the Constitution's most basic reasons for existence: the entrenchment of the rule of law. We do get a momentary breather in the colloquy between *Johannesburg*'s Mia Swart and *Wits*' Tom Coggins, and *Edward Nathan*'s Ngwako Raboshakga. This troika considers the relationship between the constitutionally-entrenched separation of powers doctrine and interim interdicts. Fortunately, there's no baby in the bathwater. Mia, Tom and Ngwako are thereby able to limit their disagreement to two questions: (1) Has the standard test for interim interdicts been altered at all, or simply mildly

amended? (2) Did the facts in the recent e-tolling decisions warrant – under any of the tests considered – the imposition of an interim interdict?

Symposium three sends us right back into the deep end. *Glenister* is the departure point for all four contributions. The emphasis here is on departure. The *HSRC*'s Vanessa Barolsky casts her sociologist's gaze upon our police force and asks whether we have, in fact, an effective and independent security service. Her answer flows largely from the perspective of those persons who most matter: the citizens who must rely upon the police for their protection. That's the tease: read the article. The conversation then moves on to one of the bases for the *Glenister* Court's decision: international law. The *Centre for Applied Legal Studies*' Boni Meyersfeld, the *European University Institute*'s Juha Tuovinen and *Wits*' Franziska Sucker don't just bitch and moan about the Constitutional Court's rather limited engagement with South Africa's obligations under international law. To their credit, they patiently take us through a complex thicket of oft misunderstood constitutional provisions, set against the background of any equally complex body of international law, and show us when and how FC ss 7, 39, 231, 232 and 233 ought to import international law into our municipal law.

The final two comments return us to concerns that animate the very first symposium: executive overreach. *KwaZulu-Natal*'s Karthy Govender shows us how the Court in *Simelane* requires the appointment of public officials that require independence to discharge their duties to be undertaken in terms proper guidelines and rationality review by our courts. *Webber Wentzel*'s Okyerebea Ampofo-Anti and Ben Winks ask how our Republic can undertake decisions when the governors, with the assistance of the courts, regularly deny the governed access to the kinds of documents required to make informed assessments themselves or have representatives make such evaluations for them.

After having read every line and every footnote of every article in this volume with the greatest pleasure, I just want to thank the authors, my fellow editors, copy-editor Kallie Pauw, publisher Michelle Govender and our sponsors – the Konrad Adenaeur Stiftung, the South African Institute for Advanced Constitutional, Public, Human Rights and International Law, the University of the Witwatersrand, Juta Law and *Constitutional Law of South Africa* – for making this volume the best *CCR* to date. I stand by my offer at the outset. Find me a better journal volume on constitutional law in South Africa to date, and the scotch is yours. However, the quality of the exchanges here is proof of something far more significant. Though South Africa may find itself in straitened circumstances some 20 years after liberation, there's no shortage of people with the imagination and the will necessary to address with creativity our collective plight. Pace Professor Chicken Little, 'The sky is not falling'. Indeed, the authors of these 22 articles and 500 pages have shown us how to go about setting matters right. They are not alone. Innumerable members of civil society, government and the private sector employ ingenuity and elbow grease, each and every day, in order to make the lives of all of us a little bit better. This volume then provides but one beacon of hope for our constitutional democratic project, even in its edgiest moments.

4 July 2014
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