

American University International Law Review

Volume 8

Issue 2 Vol 8. #2/3 Winter/Spring 92/93

Article 1

1993

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Recommended Citation

Schwarz, Harry. "Foreword." American University International Law Review 8 no. 2/3 (1993): 347-353.

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FOREWORD

Harry Schwarz*

The articles contained in this publication flow from papers delivered by the distinguished authors at a symposium held in Washington, D.C. on June 1 through June 3, 1992. The topic of the symposium was Constitutional Federalism: The United States Experience—Implications for South African Reform. This symposium was sponsored by The Washington College of Law of The American University and The Eleanor Roosevelt Institute for Peace. The symposium brought together great American constitutional law scholars, well-known public figures, and representatives of the main South African political parties who are actively engaged in negotiating a new Constitution for South Africa. I am confident that the symposium will be a benefit to South Africans.

This publication comes at a most opportune moment. The next round of negotiations seeking an equitable political dispensation in South Africa will soon be underway.¹ The United States system of government, and the American experience, will be a valuable guide to South Africans engaged in the negotiating process. I am sure most South Africans will join me in thanking the university, the institute, the academics and the editors of this journal for their fine effort.

Apartheid is an oppressive discriminatory system in which political power is vested in a white oligarchy which draws substantial economic benefits from this system. This monopoly of power is coming to an end, not because of a change in the power structure as a result of an election, nor because of a coup d'état or a revolution, but because the party of apartheid has abandoned its apartheid policies. It is now engaged in negotiation with black liberation organizations and other political groupings to create a democratic government.² While in many parts of the

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1. *South Africa: The New Apartheid*, GUARDIAN, Feb. 22, 1990, available in LEXIS, MDEAFR Library, SAFRIC File.

2. *Economic & Political Forecasts from 1991 and 1992: Results for 1990*, BUSINESS INT'L COUNTRY RPT., Nov. 7, 1991, available in LEXIS, MDEAFR Library, SAFRIC File.

world countries are fragmenting, and minority groups are seeking self-determination in small self-contained national states, South Africans, with few exceptions, are seeking to maintain one unified country.³

The process of democratization, and the movement of other nations towards market economies, has influenced the politics of South Africa. In the economic field, however, the country has witnessed a contrary movement. This is evidenced by the demand, by some, for an increased role of the state in South Africa's economy. This would include ownership of some of the means of production.⁴ While Communist parties closed down in many parts of the world, one opened up for business in South Africa and a number of powerful organizations openly advocate the implementation of Socialist policies.⁵

Creating a new constitution can be both easy and difficult. Engage a constitutional lawyer and a Constitution can be produced in a month. There are numerous precedents and innumerable volumes have been written on the subject. The task in South Africa, however, is far more difficult. A new Constitution must be negotiated.⁶ One cannot simply be imposed as widely differing interest groups need to be reconciled.⁷ Those with power are reluctant to relinquish it. Many of those previously deprived of power seek it all, and want it immediately.⁸

Minorities are fearful of oppression and the majority is reluctant to do without the power it believes it is entitled to exercise. Some question why, if a minority of the white population has a monopoly on all of the political power, this should not be transferred to a majority of the black population. In turn, those who have the power ask why they should surrender it without safeguards for their future. Therefore, the first task in the negotiations is to reconcile the mass of conflicting interests.⁹ The

3. *Id.* (reporting that the South African nation is holding talks among various political groups in efforts to move the country into a "new South Africa").

4. *The Financial Mail Has Asked Several of South Africa's Business Leaders to State What They Think Should Be Done About the Current Political and Financial Situation*, FINANCIAL MAIL, Sep. 6, 1985, available in LEXIS, MDEAFR Library, SAFRIC File.

5. Ross Dunn, *Mandela - We Won't Turn To Socialism*, THE AGE (Melbourne), July 19, 1991, available in LEXIS, MDEAFR Library, SAFRIC File.

6. 1992 NAT'L TRADE DATA BANK, MARKET RPT., SOUTH AFRICA - COUNTRY MARKETING PLAN FY - 93 (1992) available in LEXIS, MDEAFR Library, SAFRIC File.

7. Ross Dunn, *South Africa: The Country Looks to the Great Indaba*, AUSTRALIAN FINANCIAL REV., Feb. 22, 1990, available in LEXIS, MDEAFR Library, SAFRIC File.

8. *South Africa - Wind of Change for Apartheid*, GUARDIAN, Mar. 24, 1992, available in LEXIS, MDEAFR Library, SAFRIC File, [hereinafter *Wind of Change*].

9. See COUNTRY RPT., FROST & SULLIVAN INC., FIVE YEAR POLITICAL &

majority wants power to which it feels it is entitled, but the minorities seek to ensure their security. South Africa needs to ensure that the country has neither a tyranny of the minority nor a tyranny of the majority. To ensure peace, national reconciliation will have to be the basis of a new political system.

Negotiations must confront the need for legitimacy to ensure the acceptance and survival of a new Constitution. Perhaps the main reason for the breakdown of the negotiations at the second meeting of the Convention for a Democratic South Africa (CODESA) was the perception by some that a constitution drawn up by political elites, has little prospect of success if supporters are not carried along enthusiastically in the process.¹⁰

Since there have not been elections for black people, there are no leaders with a mandate from the people as a whole. There are only leaders of parties and organizations. All claim support, but only the ballot box will eventually decide the extent thereof. In addition, leadership of some minority interests fear that if they cannot make their input at an early stage, there will be no opportunity for it in the future. Therefore, leaders presently exercising power, as well as others in minority positions, want to establish ground rules in advance. They seek to form a consensus on principles and agree that thereafter an elected body should draft the details of the constitution.

Fortunately, there is already a consensus on many issues. This is demonstrated by the Declaration issued at CODESA I.¹¹ A universal franchise, a bill of rights, proportional representation, and a form of regional government are examples of matters upon which there is already agreement. Unfortunately, much of these issues stand only in general terms and considerable room exists for disagreement on detail.

The problem will probably be solved, however, by a multiparty conference agreeing to guidelines such as: holding a universal franchise election for a constituent assembly; have the constituent assembly, through a committee, structure, draw up the constitution; agreeing upon specific majorities in the constituent assembly for acceptance of specified provi-

ECONOMIC FORECASTS (1987), available in LEXIS, MDEAFR Library, SAFRIC File (speculating on the various political conflicts which may arise among interest groups, right-wing factions and black political groups).

10. See *Wind of Change*, *supra* note 8, (explaining that the multi-party CODESA convention attempts to instate blacks into the government under the new constitution).

11. See *Wind of Change*, *supra* note 8, (citing the large support for the negotiation issues).

sions of the new constitution; and possibly having the whole constitution ratified by a referendum requiring a specific majority. Such a referendum might prove to be highly divisive and, therefore, some may wish to avoid it.

Before the constitution can be written, its scope must be decided. Will it be centrist, unitary, federal or confederal? Whatever the words used, the substance which will preoccupy the politicians is related to states, provinces or regions and the powers they will exercise either exclusively, concurrently or by delegation from a central government. There is likely to be little dispute on the horizontal division of power between the executive branch, legislature and judiciary. There are differences, however, which the drafters must resolve with respect to the method of electing or appointing an executive, the nature of the Central Government Second Legislative Chamber, and the appointment of judges.

A crucial and most divisive issue may be the power to be exercised by regions or states. In particular, whether some of the power will be exclusive and original and inscribed in the constitution and incapable of being abrogated or overridden by a central government, or whether the central government will have the right to legislate concurrently and override local legislatures. It is significant that no one appears to want a "race federation." All regions or states will be multi-racial and it is unlikely that a single state or region will have a majority of white voters. Therefore, a white veto, through regionally exercised power, is not on the agenda of the main parties. The terms of the constitution almost certainly will prevent central, regional and local governments from discrimination and other encroachments on human rights.

The problem of the division of power between central and regional authorities will be complicated by powers of taxation. Obviously, the central and regional governments will have taxing powers, but the poorer regions are likely to want a disproportionate share of state revenue to help with reconstruction. Wealth and income gaps exist not only on a racial, but on a regional basis, and will need attention. The issue of fiscal federalism will need much more consideration. It has not yet been fully addressed and certainly has not been solved. Perhaps, if it is, many of the objections to federalism by some politicians will disappear.

The division and sharing of power are issues likely to be debated at length. This will find expression in the debate on the form of a franchise, the majorities to be obtained for adoption and amendment to the Constitution, the degree of detail contained in the Constitution, the majorities to be obtained in the legislative chambers for certain laws, the powers of the different chambers (if there is a bicameral system), and whether

power sharing should be extended to the executive. Many politicians have not yet clearly distinguished, in their public statements, and perhaps in their own minds, between dividing and sharing power.

Constitutional models have been placed into the negotiating arena by many political parties, academics, and interest groups. Some have, however, limited themselves to principles they wish to be adopted and criticism of the proposals of others. Constitution makers will look to models from abroad to examine their advantages, imperfections, experiences; their lessons and mistakes. In this, the United States provides a rich source of material. It has a constitution which has stood the test of time, with no shortage of experience as to its benefits and pitfalls. It is a country of numerous minorities, with many examples of struggles for political rights and economic benefits. It may not yet have solved all of its problems. But then, what country has?

The United States also has another benefit for South Africans; it has no shortage of experts, political scientists, philosophers, and social engineers in the field of constitutional law. More importantly, it is a society where all speak their minds, express their opinions, criticize, praise, attack and defend institutions without fear. The benefit of this form of debate to the new constitution-maker who has an open mind, and is prepared to learn, is immeasurable.

The papers which were delivered at the Symposium contribute substantially to the debate in South Africa and to the font of knowledge on which the fathers of our new South African Constitution can draw. The papers presented at the Symposium covered federalism in all its aspects: its history, the creation of the United States Constitution, its structure, its contrast with other systems, its advantages and disadvantages, its need for legitimacy, the separation of powers, the role of the Judiciary, and human, social and economic rights, among others. Many important lessons can be learned by South Africans from these learned authors.

A constitution needs to be both rigid and dynamic. It needs to allow the majority to exercise its power, but not at the expense of the minority. It needs to cater to the haves as well as the have-nots. The timing and methods used to correct the disadvantages suffered by the bulk of the population are real issues for South Africans.

There needs to be protection against the will of temporary majorities, which might act against minorities. Yet, at the same time, we need to avoid the frustration which makes government impossible. Power is necessary, but it is frequently abused. It should be shared and divided, rather than concentrated.

Perfection can be sought but it will not be attained. The world is full

of compromise. People are oppressed and must be freed. Resources need to be distributed. Government must be coordinated, but not excessively, and certainly not at the expense of human rights. Self-interest is an important motivating factor, but the common good should be a dominating feature of government.

The citizen must have access to government, but legislators and members of the executive government must have an opportunity for proper planning and execution of policies. Ideally, all are equal, and no one should oppress another. Mutual respect is essential but, because we live in an imperfect world, we need laws, police, judges, and protection against the abuses of power. We need impartiality and objectivity from those who are charged with making decisions which affect our lives.

We can learn all this, and much more, from the learned authors of this volume. They do not, however, agree on everything. They disagree on the role of the United States Supreme Court and the President. Yet, they agree on the need for both. They do not argue that the United States Constitution is perfect and can be exported without modification to other countries.

Like academics, politicians, and political scientists everywhere, they have a gloss—a perspective. They are critical, but they do agree that although democracy may be cumbersome, it is better than any other system and can take many forms. While we can learn from these and all the other authors, in the end, South Africans are the ones who have to address the wrongs to be corrected, the rights to be protected, and the cultures to be fostered.

The words of our new Constitution will be valuable and the structures created, essential. Thus, safeguards cannot be overlooked in the context of our history, social conditions, and economic necessities. Paper constitutions are essential, but without the consent, understanding, and tolerance of the people and cultures of democracy they have limited prospects of success.

Being able to draw on the experience of others is vital; their models and their mistakes; the problems which drafters of constitutions did not anticipate; the changing circumstances in one country and the whole of a shrinking world. Examples of bloodshed, civil war, ethnic cleansing, holocausts, genocide, and other conflicts, are there to examine and avoid. All of these place South Africa in a unique position to find an acceptable and workable solution.

In South Africa, as in the United States, we have people who speak different languages, are of different races and colors, and practice varying religions. We have the opportunity of working out how to live together.

In fact, we have no other choice if we are to survive. We now need to accept that the ballot box, and not violence, must determine our political future. Violence must come to an end. The people are exhausted from it, and fortunately, many of our leaders are realizing it.

We need to talk until we have solutions. No one can expect to get precisely what they want. If we talk to each other long enough, however, we may find that most of our people want much of the same things: freedom of expression, freedom of movement, freedom of religion, protection against incarceration without fair trial, protection against the abuse of power, a level playing field socially and economically, a hand up for those disadvantaged by the injustice of the past, an opportunity and reward for hard work and ingenuity, and remedies against exploitation. Much of this cannot be in a constitution. We need the culture of democracy, tolerance, and understanding to which I have referred. The best Constitution cannot stand up against ruthless individuals who exploit situations and people.

We can lay down the rules of the game and we will do so, but how the game goes will depend on the players. This is perhaps our greatest challenge. Our thanks go to those in the United States who help us along the road, not for their own political gain, but because they share and possess the values which the best of our South African people, who constitute the overwhelming majority, also treasure.