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# STABILITY AND DYNAMISM: PRESIDENTIALISM OR PARLIAMENTARIANISM: EXECUTIVE AND LEGISLATIVE RELATIONS

Lloyd N. Cutler\*

My assignment, according to the program, is presidentialism or parliamentarianism. As I understand the discussions in CODESA, (Convention for a Democratic South Africa), this topic does not mark one of the burning issues, so I will try to put the issue of separation of powers into a relevant South African context. Within CODESA, as I understand it, the Nationalists, the African National Congress (ANC), and the other parties are in general agreement on a number of basic principles: that there be a written and entrenched constitution; that the constitution contain a bill of rights and an independent judiciary with the power to set aside legislation and government actions which violate the constitution; that there be a one person, one vote system; a separation of executive and legislative powers; that there be an elected constituent assembly empowered to write the constitution, subject to conformity of the final constitutional document with the basic principles now in process of negotiations; and that there be some form of judicial review of the final constitutional document to determine whether those basic principles had in fact been observed.<sup>1</sup>

I understand that, in recent weeks, you have moved to the point where there may be agreement, or something close to agreement, on turning this constituent assembly from a constitutional convention into a legislative form of constituent assembly which would be the legislature of an interim government, and that the interim government, in one way or another, would be an all party government. As to how that interim government would be constituted, I believe there is still a deadlock within CODESA.<sup>2</sup>

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1. See Albie Sachs, *A Bill of Rights for South Africa: Areas of Agreement and Disagreement*, 21 COLUM. HUM. RTS. L. REV. 13, 20 (1989) (defining the areas of agreement between the government and the African National Congress concerning constitutional reform).

2. See Fred Bridgland, *ANC CRACK-up*, NAT'L REV., Oct. 1992, at 24 (discuss-

I also understand there is still disagreement as to the structure of the legislative upper house, and as to the structure of the ultimate executive power, whether it should be a single executive, as exists in most countries, or a plural executive including representatives of more than one party.<sup>3</sup> There are also unresolved issues as to whether you should have a unitary government, a federal government with member states, or a three tier government including a third level of regions within states. I also take it that a basic concern of those who have power today, the white community and to some extent, the colored communities, is to achieve more than merely judicial protection of the fundamental individual rights and any group rights that will be incorporated into your ultimate bill of rights. The great concern is whether, under a one-man, one-vote system, the minority parties are to have some form of legislative or executive blocking power over legislative or executive action, in addition to the normal right to challenge such actions in the courts.<sup>4</sup>

In the field of legislative protection, the Nationalist Party has proposed an upper house which would be comparable to the United States Senate, in the sense that its concurrence with legislation is absolutely required.<sup>5</sup> Accordingly, the Nationalist Party would have more than delaying power as its concurrence would be necessary for legislation. Under the Nationalist proposal, the representation in the Senate would be equal for each state or region. But for any state or region, its representation would be shared equally by all the parties that exceed some minimum percentage, say 15 to 20 percent of the popular vote.

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ing the disagreement between the African National Congress and the government concerning the formation of an interim government); see also Rick Lyman, *Mandela Cuts Off Talks, Negotiations were Suspended to Protest the Massacre*, PHILADELPHIA INQUIRER, June 22, 1992, at A1 (commenting that efforts to form an interim government have failed in part because of a disagreement between the government and the African National Congress as to the shape and duration of the interim phase).

3. See Conor O'Brien & Patrick Cruise O'Brien, *Better but not All Better*, ATLANTIC, July 1992, at 72 [hereinafter O'Brien, *Better but not All Better*] (noting the Nationalist Party's proposals for a new constitution and the African National Congress' reaction to these proposals).

4. See *de Klerk across the Rubicon*, ECONOMIST, Mar. 1992, at 45 (describing reasons behind the National Party's objection to a one-man, one-vote system); see also Charles Villa-Vincencio, *Whiter South Africa?: Constitutionalism and Law Making*, 40 EMORY L.J. 142, 148 (1991) [hereinafter Villa-Vincencio, *Whiter South Africa?*] (presenting the government's arguments against majoritarian rule in South Africa).

5. See O'Brien, *Better but not All Better*, *supra* note 3, (outlining the Nationalist Party's proposal for an upper legislative house designed to protect minority interests).

In effect, it is a double protection: both a regional system, and within the region, equal representation for each party that obtains a significant minority of the popular vote. The first of these protections resembles the great compromise reached in the Philadelphia Convention on the United States Constitution. This compromise found that the lower house, the House of Representatives, would be elected on the basis of population, and the upper house would have equal representation from each of the states. Originally, the legislature of each state had the right to elect the two senators from that state, but early in the twentieth century, we adopted the Seventeenth Amendment providing for the direct popular election of Senators.<sup>6</sup> But we cannot amend our Constitution to give each state a number of senators in proportion to its population. In Article Five of our Constitution there is a permanent provision stating that there can be no amendment affecting the equal suffrage of any State in the Senate without the consent of that State, whereby the equal representation of each state in the Senate is embedded into our Constitution.<sup>7</sup> Constitutional lawyers can argue that this does not forbid an amendment of Article Five, the amending article, simply to eliminate the paragraph that forbids an amendment changing the equal representation of the states. Since it would take a two-thirds vote of both houses of Congress, plus ratification by three-fourths of the states (38 states) to amend the Constitution, it is highly unlikely that this provision for equal suffrage in the Senate will be amended.<sup>8</sup>

However, we have no United States counterpart for the proposal to give the significant minority parties in the Senate equal representation with the majority party. Indeed, I do not know of such a precedent in any democratic constitution anywhere.

Now, what I have to say about the executive may also be outdated. When I was in South Africa last April, I believe the Nationalist Party proposal was for a plural executive rather than a single executive, to be structured so that each of the parties achieving a significant minority or majority percentage of the vote would be a member of the plural executive.<sup>9</sup> The chairmanship, or presidency, or whatever it would be called,

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6. U.S. CONST. amend. XVII.

7. U.S. CONST. art. V.

8. The 26 smallest states have only 14 percent of the population, yet in the Senate, they can out-vote the other 24 states which comprise 84 percent of the population.

9. See O'Brien, *Better but not All Better*, *supra* note 3 (describing the Nationalist Party's proposal for a collective executive with three to five members).

would rotate annually, and the plural executive would operate on a consensual basis.

On this issue, some aspects of our Philadelphia Convention may be of interest. One of the plans submitted to the Philadelphia Convention, the New Jersey plan, provided for a plural executive of just that type, but was rejected in favor of a single executive. Two principal reasons can be cited for its rejection. First, there is the hesitation and deadlock that can arise with a plural executive if its members disagree, particularly if the executive must operate on the basis of unanimity. Second, there is the problem of accountability. If there is a plural executive which cannot agree, it is difficult for the voters to know whom to blame. In the Federalist Papers, these objections were summed up in Hamilton's Paper No. 70.

"It is evident from these considerations that plurality of the Executive tends to deprive the people of the two greatest securities they can have for the faithful exercise of any delegated power: *first*, the restraints of public opinion, which lose their efficacy, as well as on account of the division of the censure attendant on bad measures among a number, as on account of the uncertainty on whom it ought to fall; and *secondly*, the opportunity of discovering with facility and clearness the misconduct of the persons they trust, in order either to effect their removal from office, or to their actual punishment in cases which admit of it."<sup>10</sup>

If we had a plural executive in the days of Watergate, which Sam Dash told you all about, whom among them would have been impeached? It seems ironic that the Nationalist Party, which adopted a constitution providing for a single elected executive, should now be saying that under the South African Constitution as it now exists, the elected executive has too much power, and, therefore, there ought to be a plural executive more representative of all of the elements of the population.<sup>11</sup> Suppose that when only the white community could vote, there was a plural executive consisting of one representative of the Nationalist Party and one of the Conservative Party. Under such circumstances could Mr. de Klerk ever have accomplished what he has managed to accomplish if he had been simply a member of a plural execu-

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10. THE FEDERALIST NO. 70 (Alexander Hamilton).

11. See Villa-Vincencio, *Whiter South Africa?*, *supra* note 4, quoting Albie Sachs, *Toward Bill of Rights for a Democratic South Africa*, 12 HASTINGS INT'L & COMP. L. REV. 289, 294 (1989) (stating that South Africa has been governed under the principles of majoritarianism (white majority rule) since 1910 and majority rule is now being attacked because the majority party promises to be black).

tive?

Our Constitution says, incidentally, that the executive power shall be vested in "a President of the United States," not vested partly in the Department of Defense, or Department of State, or Department of the Treasury, but wholly in the President of the United States. The energy and decisiveness and indeed, the accountability of a single executive, are enormously important to the ability of the government to act, even though when you have a single executive with all the executive power, you must have a system of checks and balances, such as the one our Constitution contains. The appropriations and authorizations the executive needs to carry out his policies can be refused by the Congress. The President may even be impeached by the Congress, and all his actions and those of his subordinates are subject to being overruled as arbitrary and unconstitutional by the independent judiciary.

I believe that the real objective of the plural executive, as well as the proposed membership structure of the Senate, is to enable the minority parties to block the majority party's proposals. The major reason for all of this is that those with property and political power today are unwilling to rely solely upon the protections afforded by a bill of rights, an independent judiciary, and the rule of law. They feel the need to build some protections by blocking power into the structure of both the legislative and the executive branches. Underlying this concern is the fear that a new majority party, long suppressed and never before allowed to vote, will have the power to amend the constitution whenever the courts find the majority's actions unconstitutional, and to take away whatever protections the courts' interpretation of the bill of rights has afforded to the former ruling minorities in the country.

That is a quite serious concern, especially when the new majority has never voted before, has genuine grievances against prior regimes, has no experience in running a national government and national economy, and has almost no experience in the give and take of democracy. As long as the majority party has sufficient power to amend the constitution, the bill of rights and the independent judiciary may prove meaningless, unless they are fully entrenched and cannot be amended out of existence; or unless, as a result of years of practice in cohabitation, in living together, and in learning how democracy really works, amending the constitution to undo a bill of rights decision of the independent judiciary is something that no government would be willing to do.

This appears to be your basic dilemma in arriving at your constitution: how to create blocking power for minority parties at the legislative or executive level or both; or alternatively, how to guard against future

amendments of the constitution that would undo decisions of your independent judiciary protecting the rights of minorities. This is the central issue you have to work out. I do not know of a country—I think a number of you who are political scientists have pointed this out—in which power is being transferred from a minority racial group to the majority racial group, in which the rights of the minority have been fully protected. There are some very good constitutional provisions that grant such protection in the Namibian Constitution which many South Africans helped to draft. It is an admirable constitution from that point of view, but we have not yet seen a country that has successfully made this transition.

You also have the problem of a majority party being able to do what we in the United States refer to as court packing. When President Roosevelt felt frustrated by a series of Supreme Court decisions holding several New Deal economic measures unconstitutional as invading individual property and contract rights protected by the Fifth and Fourteenth Amendments, the solution he finally arrived at was to propose legislation increasing the number of members of the Supreme Court from nine to fifteen so that he would be able to appoint six additional members and change the balance of the court. The public outcry was so strong that the Senate, even with its large Democratic majority, rejected the plan.

There is also the problem you heard about this morning in the discussion between Judge Higginbotham and Charles Cooper—how an elected president or an administration of one party, if in office long enough, can change the entire character and outlook of a court from that of the Warren Court of twenty to thirty years ago to that of the current Rehnquist Court. It is a risky business to pick new justices on the theory that they are going to follow your own political persuasions and your own views as to how controversial constitutional issues should be resolved.

Many presidents have made mistakes in their selection of justices. Theodore Roosevelt appointed Oliver Wendell Holmes and was terribly disappointed when Holmes narrowly interpreted Roosevelt's anti-trust laws. President Eisenhower supposedly was asked to describe his biggest mistakes while he was President, and he said there were two: one was Earl Warren and the other was William Brennan, two of his appointments to the Supreme Court. There is also the famous story of President Lincoln concerning the Supreme Court's four-four split on the legality of the Legal Tender Law, a Civil War law that authorized the printing of paper money. The case was to be re-argued after Lincoln filled a

vacancy on the Court. Lincoln wrote to a friend about whom he would appoint: "We dare not ask the man how he would vote, and if he should answer us, we should despise him for it, therefore we should pick someone of whose views we are absolutely certain." He then picked his own Secretary of the Treasury, Salmon P. Chase, who proposed the Legal Tender Law and lobbied it through Congress. But in the outcome, Chase cast the fifth and deciding vote holding the Legal Tender Law unconstitutional.

The problem of how to entrench the bill of rights and an independent judiciary is a difficult one. In a society where power is being transferred from a minority racial group to a majority one, and all of the property is in the hands of the minority group negotiating the transfer of its power, it is understandable why this problem is so difficult. I have one suggestion, which is based on what I understand to be the agreement already reached, that might help to resolve it. The final constitution must conform to the basic principles which you are now negotiating within CODESA, and should this issue ever arise in the future, some form of judicial tribunal will be set up to resolve that issue in some binding way. Assuming that you are able to do that, it might be possible to provide, in your ultimate constitution, that the constitution also cannot be amended in a way that goes beyond the fundamental principles agreed in CODESA. Should this issue arise at some future date, it would be within the competence of your own independent judiciary, or possibly an independent judicial body which includes some international representatives, to resolve the issue with binding effect. In this way, the power of future amendment would be limited so as to prevent future amendments from transgressing the basic principles to which you are now agreeing.

The German Constitution has a provision of this type. Further, it has a very fine and elaborate bill of rights, both what we call basic human rights and also economic and social rights. There is a provision that no future amendments can alter the basic principles of any of those entrenched rights (or the federal structure of the government).<sup>12</sup> You will also recall the similar provision of the amending article of the United States Constitution, Article V, that no future amendment may change the equal suffrage of any state.

To give assurance to the minority populations which are about to transfer power, I would suggest that you also consider expanding the judicial tribunal that would resolve the issue of whether a future

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12. GRUNDGESETZ [Constitution] [GG] art. 79 (F.R.G.).

amendment violates the entrenching clause so that the tribunal has some international members. Over the years, the United Nations and the World Court have been strong supporters of the efforts to end apartheid.<sup>13</sup> Suppose you incorporated a provision in your final constitution that when an issue arose as to whether a future amendment goes beyond the fundamental principles of the agreed constitution, the tribunal to review that issue would include one, two, or some other number of members who are present members of the World Court, to be designated by the President of the World Court or the Secretary General of the United Nations. In that way, you would have some external participation in the review of whether or not the challenged future amendment transgressed the agreed fundamental principles. That sort of external participation can no longer be characterized as a violation of traditional national sovereignty, now that all of the nations of democratic Western Europe, and recently the new democracies of Eastern Europe, have signed the European Convention on Human Rights and have accepted the jurisdiction of the European Court of Human Rights, which can hear the claims of an individual citizen of any member nation that actions of his own government have violated his fundamental human rights as set forth in the Convention.

I would like to offer two other observations. One is how important it seems to me that the remaining outstanding constitutional issues be resolved while Mr. Mandela and Mr. de Klerk are still around. The risk that you will fall apart if anything happens to one or both of them before agreement is reached is too great. The moment ought to be seized, if you can possibly seize it, while they are both still exercising significant power.

The second observation finds that the best hope for a South African future in which power moves democratically and peacefully from one government to another lies in the future development of the ANC. We

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13. See *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276*, 1971 I.C.J. 16 (June 21) (discussing the actions the United Nations would pursue in order to resolve this matter); G.A. Res. 23, U.N. GAOR, 42nd Sess., Supp. No. 49, U.N. Doc. A/42/49 (1987); *Policies of Apartheid of the Government of South Africa*, G.A. Res. 50, U.N. GAOR, 43d Sess., Supp. No. 49, U.N. Doc. A/43/49 (1988) (reaffirming the United Nations support of the people of South Africa in their struggle against apartheid and demanding dissolution of the apartheid system); G.A. Res. 27, U.N. GAOR, 44th Sess., Supp. No. 49, at 113, U.N. Doc. A/44/49 (1989) (calling upon the United Nations Secretary-General to strengthen its activities against the policies and practices of apartheid).

must all hope that the ANC adheres in practice to its principle that it is open to the members of all races; that it is not a racially based party. We must also hope that the ANC, like all other parties in democratic countries which have huge majorities, splits over time into one or more factions oriented along economic or other policy lines rather than along racial lines. That is the only way a genuine, non-racial, two- or three-party system can develop in South Africa, and the only way voters can democratically transfer power from time to time from one party to another.