

SOUTH AFRICA:

THE COUNTDOWN TO ELECTIONS



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SPECIAL EDITION

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South African Constitution of 1993*

On November 17, 1993 the African National Congress ("ANC"), the South African government, and a range of other parties participating in the "Multi-Party Negotiating Process" declared their agreement on a new constitution for South Africa. A month later, after many details had been ironed out and after further, unsuccessful efforts had been made to win the concurrence of the white and black groups which have boycotted the multi-party negotiations, the South African Parliament formally approved a revised version of the text agreed upon in November -- and thereby essentially legislated itself out of existence. As of now, the constitution approved by Parliament is scheduled to come into effect by April 27, 1994, as voting in South Africa's first nonracial election takes place. Negotiations continue, however, and further changes may still be made, perhaps even after the election.

The constitution the negotiators have produced is by definition a product of compromise. It is long and legalistic -- 251 sections, followed by seven "Schedules," all set out in over 100 single-spaced pages of text. Its provisions reflect hard bargaining over power, as well as noble ideals of "national unity and reconciliation." As elaborate as it is, however, this document is not South Africa's final constitution; that will be written by a Constitutional Assembly according to procedures, and in compliance with substantive principles, embodied in this interim document.

Although this is therefore just a transitional constitution, that fact scarcely lessens its importance, because these years of transition will be crucial to the successful birth of a nonracial democracy in South

Africa. The terms of this interim constitution deserve attention both because they will usher in South Africa's first government in which all races are at last represented, and because they will profoundly affect that government's character and policies. As a charter for the transitional years, the new constitution, though by no means flawless, has much to recommend it, for it both empowers the country's future leaders to initiate the kinds of policies that can deal with the heritage of apartheid and contains a variety of provisions meant to protect individual rights and to allay at least some potential dissenters' fears for their own security in the new order.

To explain that assessment, this survey of the interim constitution will look at seven of its fundamental elements:

- (1) The establishment of South Africa's first nonracial Parliament, consisting of a 400-member National Assembly and a 90-person Senate, based on the country's first nonracial elections, to be held in April 1994;
- (2) The structuring of an executive branch of government, in which the President will have substantial authority, although minority parties and groups will also have considerable voice;
- (3) The creation of a new Constitutional Court to enforce the

interim constitution and to insure that the final constitution complies with the Constitutional Principles agreed upon in the negotiating process;

- (4) The designation of the National Assembly and Senate to serve, jointly, as the Constitutional Assembly, responsible for writing the final constitution, if possible within two years;
- (5) The allocation of powers between the national and provincial levels of government, in terms that largely insure the effective functioning of the national government, while giving the provinces real, but decidedly constrained, authority;
- (6) The guarantee of local government powers, and of local election procedures through which property-owners and whites are disproportionately represented -- an apparent effort to accommodate whites' desires to preserve their positions of privilege at the local level; and
- (7) The adoption of a Chapter on Fundamental Rights, which will both guarantee a wide range of freedoms in ways consonant with liberal constitutional practices elsewhere and also empower the new government to take many steps to redress the injustices of apartheid.

(1) The election of the new Parliament: Surely one of the negotiators' greatest achievements is the enfranchisement of all South Africa's people, who will be able to take part in South Africa's first nonracial election in late April, 1994. That long-awaited election will lead to the seating of a new national Parliament, consisting of two houses. The larger, more powerful, and more directly representative of these two houses is the 400-member National Assembly, which will be chosen in this election on the basis of a complex system of

proportional representation. This system will take into account parties' success in the separate vote tallies in the nine provinces into which South Africa will now be divided; 200 seats will be distributed based on the provincial results. The national results, however, will be more critical, because the remaining 200 seats are to be allocated so that each party's total number is proportional to its success in the national vote.

The second house, the Senate, will have 90 members -- 10 from each province, chosen by the parties holding seats in the provincial legislature (whose members will also be chosen in the April 1994 elections) in proportion to the number of seats they hold. Like the United States Senate, the South African Senate will give equal representation to small and large provinces and thus will over-weight the votes of those who live in the smaller provinces. Whether the senators will prove to be attentive to the special interests of the provinces, however, will depend largely on the extent to which the parties represented in the provincial legislatures actually focus on provincial concerns in their selections of senators. In dealing with "ordinary legislation," in any event, the South African Senate will not have the power enjoyed by its American counterpart -- namely to block the passage of legislation altogether by refusing to concur in it. In South Africa, ordinary legislation approved by one House and not by the other will become law if it is passed by a majority of the 490 members of the Assembly and Senate sitting together. Since 246 of the 400 members of the Assembly will be able to constitute such a majority, the Senate's blocking power is quite limited. In dealing with "finance bills," the Senate's power is even more restricted. Only when bills dealing with the boundaries and powers of the provinces are before Parliament will the Senate's role be greater; in these instances separate approval by the Senate and the Assembly will be required.

The election of the National Assembly in April 1994 will be the first time all of South Africa's people have been able to vote for a government of their choice. Three points about the choices which the South African system will offer deserve particular mention. The first is that South Africa's system of proportional representation, though more accurate in reflecting national popular sentiment than the United States' winner-take-all elections, does not provide for representation by district, as in the United States

Congress. Nor will there be any way that a voter can cast a ballot for a particular candidate, except by voting for the list of candidates, designated by a political party, in which that candidate's name appears. Assembly candidates will actually win seats not based on the number of votes they receive but based on the success of their party, and on how high or low their party chose to put them on its list of candidates. The result, presumably, will be enhanced political party power, and diminished direct voter control of representatives. This effect is likely to be even sharper because it appears that members of Parliament expelled from their party automatically lose their seats, which are then filled by new legislators designated by the party in question.

The second point to be remembered is that, pursuant to a last-minute agreement between the ANC and the government, each voter in the April 1994 election will be permitted to cast only a single ballot, the results of which will determine the composition of both the National Assembly and the provincial legislatures. Defended as a step to avoid voter confusion, this feature risks unfairly diminishing support for parties with only regional popularity, if voters cast their single ballot primarily with a view to influencing the results of the national election. Not surprisingly, the negotiators' agreement on this system has been extremely controversial, and its use may still be under negotiation.

The third point to keep in mind is that this single ballot may well be the only ballot that South Africans cast for their national or provincial governments until 1999. Although a new national election is required if Parliament fails to agree on a new constitution, and new national or provincial elections are possible in certain other situations, it is entirely possible that the Parliament selected in 1994, the President chosen from that Parliament, as well as the provincial legislatures elected in the same election and the provincial Premiers whom those legislatures appoint, will all hold office without facing a challenge at the polls until 1999. Presumably this system is meant to help insure that South Africa is governed by a stable government of national unity during this transitional period.

(2) The structuring of the executive branch of the national government: The structure of the executive branch is apparently meant both to

enable the government to act effectively and to prevent any one party within it from exercising entirely unilateral power. To that end, the Constitution vests executive power in a single President (as does the United States); in all likelihood the first President -- to be elected by the National Assembly at its first sitting -- will be Nelson Mandela. At the same time, the Constitution checks the President's power in a number of ways. There will, for example, be certain important bodies substantially independent of the President, such as the Public Protector (ombudsperson) and Auditor-General. Moreover, the President will be joined by two or more Executive Deputy Presidents, since each party winning at least 1/5 (80) of the National Assembly seats will be entitled to designate a Deputy President (and even if only one party -- or none -- wins 80 or more seats, the two largest parties will each be entitled to designate a Deputy President). In addition, the President and Executive Deputy Presidents will sit with up to 27 Ministers in the Cabinet; though the President will make all Cabinet appointments, each party winning at least 20 seats in the National Assembly will be entitled to proportional representation in the Cabinet, and apparently even entitled to name those of its members who will get its Cabinet seats.

The provisions for minority party representation in the Executive Deputy President positions and in the Cabinet are certainly a departure from "winner-take-all" systems of government. But while the President is obliged to consult the Executive Deputy Presidents on a wide range of matters, they do not have a veto on the President's decisions. Similarly, another of the last-minute agreements between the Government and the ANC eliminated the possibility that the President might have to obtain consensus from the Cabinet in order to perform his central functions, although the Cabinet is still to "function in a manner which gives consideration to the consensus-seeking spirit underlying the concept of a government of national unity as well as the need for effective government."

Finally, these elected officials will preside over the apparatus of the state, including the civil or public service, the police and the military. Those who dominate the senior positions in these institutions today are predominantly white, and many or most may still harbor strong sympathies to the apartheid

order they have served for many years. The interim constitution attempts to strike a balance between protecting their vested interests -- and thereby avoiding the alienation of people who could become very troublesome opponents -- and allowing the new government the freedom to begin reforming these institutions. Thus the new constitution provides that those now employed in public service jobs will continue in them after the new constitution goes into force, and also protects these officials' already-accrued pensions and their current retirement ages. But the constitution also allows efforts to make the public service more representative of South Africa's full population, and permits legislation and Presidential action which may alter many of the terms and conditions of employment of these officials and perhaps eliminate their jobs.

The interim constitution also regulates the police and the military. The importance of the distribution of armed force can hardly be overstated in any country, especially one as potentially subject to division and discord as the future South Africa. On this score, the interim constitution reflects at least three particularly significant decisions. First, it devolves a portion of police power from the national to the provincial level, though policing will remain a more centralized function in South Africa than it is in the United States. This step may reduce the danger to liberty that the centralized South African police have so often posed in the past, but by the same token it somewhat limits national authority. Second, the new constitution incorporates into the armed forces the members of formerly extra-legal military forces, such as the ANC's Umkhonto we Sizwe. Past enemies will now, hopefully, become fellow soldiers. Third, the new constitution appears to entitle Parliament to prohibit the establishment of competing military forces, such as the quasi-independent militia that Chief Buthelezi may have envisioned for the hypothetical state of "KwaZulu/Natal."

(3) The creation of a new Constitutional Court: The judicial branch of the government will consist of the present South African courts and judges (subject to reorganization), with the very important addition of a new Constitutional Court. This Court will have final responsibility for judging the constitutionality of actions of the interim government, and on this score alone its creation is a major step forward for South Africa, where with rare exceptions no other court has ever been able to hold a national

statute unconstitutional. The Court will also have a special and potentially important role in the process of adopting a final constitution, for it will be responsible for determining whether the proposed final constitution complies with the Constitutional Principles which are made a part of the interim constitution. In light of both of these functions, the 11 men and women who will serve on this Court will have a very important role to play, and the process by which they will be selected will be correspondingly important. The debate over this process was sharp; ultimately the negotiators decided on a complex system which considerably circumscribes the state President's discretion in making these appointments.

(4) The establishment of the Constitutional Assembly: The National Assembly and the Senate together will also constitute the Constitutional Assembly. The Constitutional Assembly is charged with the task of writing a new constitution, but it will not have a completely free hand in the process. Instead, the new constitution will have to comply with the 33 Constitutional Principles agreed on in negotiations and incorporated as an attachment to this interim constitution. These principles broadly echo the more detailed provisions of the interim constitution itself, and thus provide a legal pressure coinciding with the potential impact of political momentum to make the final South African constitution quite similar to the interim one. Nonetheless there may be many, many elements of the final constitution which the Constitutional Assembly will need to shape and agree upon.

Accordingly, the interim constitution lays out in some detail the process and timetable for the adoption of the final constitution. Ideally, the Constitutional Assembly will approve a draft, by a two-thirds majority, within two years. Should the Constitutional Assembly fail to meet this schedule, the interim constitution provides a set of deadlock-breaking procedures. In one, the constitution will be adopted if it is approved by a simple majority of the Constitutional Assembly and then by 60 % of the voters in a referendum. Failing that, a new Parliament must be elected; it will have one year to approve a constitution, and can do so by just a 60 % majority. (In most circumstances, separate approval is also required from the Senate for provisions bearing on the provinces -- a protection of the nascent vision of South Africa as a federal state.) These

various procedures seem likely to accomplish a very desirable objective -- namely to produce a final constitution rather than leaving South Africa in a constitutional limbo of indefinite duration.

(5) The allocation of national and provincial powers (the federal system): Perhaps the most hotly debated issue of constitutional structure in South Africa has been the question of federalism. The African National Congress sought a strong central government, and initially seems to have had little fondness for federal models at all. On the other hand some of its antagonists, including the various parties now withholding their approval of the interim constitution, shaped images of federalism in which state rather than national sovereignty was most prominent -- if national sovereignty meaningfully existed at all. The result so far resembles modern American federalism in that it gives the provinces real, yet subordinate, functions. Negotiations on this subject may still be continuing, however, and it may well be that some additional authority could be ceded to the provinces without seriously jeopardizing national power, for despite various protections the authority of South Africa's provinces will probably be less than that of American states today.

Three features of the constitution illuminate the status of the provinces. First, although the provinces are entitled to adopt their own constitutions, the national interim constitution specifies many of the details of their internal governance, details from which the provinces are apparently not free to depart. Second, the provinces' legislative power is circumscribed. They are authorized to legislate on a wide range of subjects, but their power in these fields is not exclusive. Instead, it is made concurrent with an equivalent authority wielded by the national Parliament, and in the event of a conflict between provincial and national legislation, the national legislation will prevail in any of a wide range of cases. There will probably be many aspects of potential provincial legislation on which the national Parliament will choose not to exercise its override authority -- but still the power of the provinces is constrained. Third, the provinces are entitled to an "equitable share" of national revenue, including a percentage (to be fixed by Parliament) of income, value-added or sales tax revenues from within their borders, but their own power to impose taxes is extremely restricted.

(6) The special position of local government: While the relationship of provincial and national governments may seem somewhat familiar to an American observer, the constitutional treatment of local governments is much more startling. Our federal constitution is generally understood to leave the shape of local government primarily to the states. The interim South African constitution, in contrast, is careful to protect "the fundamental status, purpose and character of local government" from intrusion. It also guarantees local governments the authority to impose "property rates [taxes], levies, fees, taxes and tariffs" -- in short, a taxing power seemingly more ample than that accorded to the provinces!

Even more important than the powers the interim constitution secures for local governments, however, are the procedures it specifies for their election. Though the constitution directs that "local government[s] shall be elected democratically," these procedures certainly do not comply with the principle of "one person, one vote." Instead, they follow the rule that "[a] voter shall not have more than one vote per local government" (emphasis added). Each voter can vote in the town where she lives, and also in those other towns where she is liable for "property rates, rent, service charges or levies to that local government." This system seems to give those who enjoy economic privilege a political bonus as well.

In addition, a carefully worded section on transitional arrangements for local government appears to give special protection to whites and other non-Africans in local elections. Rather than provide for municipal elections solely on the basis of proportional representation -- the system specified for election of the national and provincial legislatures -- this section specifies that 60% of the members of local government will be elected from wards, and that half of these wards will be allocated to areas apparently defined so as to exclude any areas in which Africans lawfully resided prior to the recent end of de jure segregation in South Africa. Thus, although this section never declares its intention to allocate votes by race, or to overrepresent whites and other non-African groups, these appear to be its results. This departure from the principle of racial equality can only be understood as a pragmatic response to the anxieties of those people, particularly whites, with the power to impede the transition from apartheid to democracy.

(7) The Chapter on Fundamental Rights: Finally, the new constitution includes a Chapter on fundamental rights. The African National Congress at one point proposed the adoption of a Bill of Rights which would have mandated state provision of a wide range of socioeconomic rights, emphatically pressed for the adoption of vigorous affirmative action programs, and circumscribed rights of private discrimination and privileges of property ownership. Only a modest amount of this activist agenda survives in the fundamental rights chapter, but this chapter does confirm the authority of the government to press much of this agenda if it so chooses. In addition, and importantly, the interim constitution secures a wide range of human liberties against excessive state interference. Here let us briefly look at the provisions bearing on three important issues: equality, liberty, and property.

(a) *Equality*: The interim constitution protects all persons from being "unfairly discriminated against, directly or indirectly," on the grounds of "race, gender, sex, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture or language," and perhaps other bases as well. At the same time, it specifically provides that a broad range of affirmative action programs are not precluded by the guarantee of equality.

The prohibition on discrimination just cited, like most of the Chapter on fundamental rights, does not apply of its own force to the actions of private individuals. Since the constitution also protects the freedom of association and the right to participate in the cultural life of one's choice, it might have been feared that the new constitution actually entrenched a right of private discrimination -- as the government had at one point proposed that it should. (One transitional provision does appear to buy time for "community-managed or state-aided" discriminatory schools.) The result could have been a charter for the privatization of apartheid. But another section appears to forbid the creation of new private schools that discriminate on the basis of race, and an important further provision appears to authorize the government "to prohibit unfair discrimination" even by private individuals.

Another danger is that the rights guaranteed in the constitution may not apply fully to African customary law. The chapter on fundamental rights is

only declared to bind the "legislative and executive organs of state," and it is not entirely clear that African traditional leaders exerting customary law authority would come within its scope. The intentions of the negotiators on this score are somewhat ambiguous, because a provision which might have insulated African customary law to some extent from constitutional scrutiny was deleted late in the negotiations, but another proposal which would have explicitly subjected unwritten customary law to the chapter on fundamental rights was also not adopted. This ambiguity may become a serious problem, because customary law unfortunately contains elements that are sexist and perhaps also undemocratic. (African traditional leaders are elsewhere given a modest amount of explicit constitutional power, as *ex officio* members of local government and as potential members of provincial and national bodies of traditional leaders with the power to comment on and delay the passage of legislation bearing on a wide range of matters of tradition. Negotiations reportedly are still continuing over additional constitutional protections sought for the Zulu kingdom.)

(b) *Liberty*: This constitution broadly, and properly, protects a range of human liberties against state intrusion -- liberties that are not novel but that have often been grossly disregarded in South Africa. These include rights of free speech and free press, free assembly, freedom of religion, freedom of movement, and freedoms of political life. Detention without trial is banned, and a variety of other rights are guaranteed to those arrested for or charged with crimes.

This is not to say that the list of rights guaranteed is all-inclusive. It is not. Perhaps the most striking omissions are embodied in the brief text of one section, which states that "[e]very person shall have the right to life." This provision appears to place in the hands of the Constitutional Court the difficult question of whether South Africa will allow the continued use of the death penalty, and the even more difficult question of whether it will constitutionally protect, permit or forbid abortions.

It is also important to note that the rights guaranteed are not absolute. I do not mean to say that they should be absolute; two centuries of American constitutional history help to demonstrate that even firmly worded provisions (such as our guarantee of

free speech) must have implicit exceptions. South Africa has chosen, following the model of a number of modern human rights documents, to state explicitly the circumstances under which the rights it protects can be limited.

Section 33 provides that a "law of general application" can limit a constitutional right, provided the limit is "reasonable" and "justifiable in an open and democratic society based on freedom and equality," and does "not negate the essential content of the right in question." In addition, limits on a relatively short list of particularly important rights must also be "necessary." (Among these rights are the right of free speech, insofar as it relates "to free and fair political activity"; South Africans, however, may contemplate restrictions on hate speech that go beyond those now viewed as constitutional in the United States.) These provisions plainly leave a great deal of room for interpretation; the strength of the protection of human rights in this constitution will depend in good part on the stringency with which the Constitutional Court interprets this section. Even greater intrusions on rights would be permissible in a state of emergency, but it is important to recognize that the restrictions imposed on emergency power by this constitution are much stronger than any that have existed in the past in South Africa.

(c) *Property*: Perhaps no issue of rights has been more controversial in South Africa than the question of property rights. The interim constitution attempts both to honor the claims of blacks determined to recover land wrongfully taken from them under apartheid, and to protect the interests of whites who now hold this land. It does so by entitling "[e]very person or community dispossessed of rights in land" in the past "to claim restitution of such rights" in accordance with provisions laid out in the constitution. These provisions entitle courts to order the state to "purchase or expropriate" land now held by one owner (if the state certifies that such acquisition is "feasible") and restore it to another claimant.

When land is taken in this fashion, compensation must be paid to the person from whom it is taken. How much compensation is due will be determined either by the parties concerned, or failing their agreement then by a court, which will take into account "all relevant factors, including, in the case of the determination of compensation, the use to which

the property is being put, the history of its acquisition, its market value, the value of the investments in it by those affected and the interests of those affected." This somewhat ambiguous language implies that compensation of less than market value will in some circumstances be permitted; it also suggests that in many or most circumstances some real compensation must be paid. The result may be that the interim government -- which will not have unlimited cash at its disposal, and will face almost unlimited social and economic problems demanding its attention -- will not have to pay full market value in order to begin a program of land restitution. It may, however, have to draw on scarce tax revenues, and so a broad program of land restitution, although constitutionally possible, will require hard choices from the new government.

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In general, as the example of property suggests, it seems fair to say that the interim constitution's fundamental rights provisions allow aggressive governmental action against the bitter legacies of apartheid. But these and other provisions will mean that the government cannot initiate such policies without paying a price for the vested interests it disrupts. How far the new government will be politically able to go during the delicate years of "interim" rule remains to be seen. More broadly, it remains to be seen whether the various conflicting parties in South Africa will be able to harmonize their differences enough to begin the task of building a nonracial democracy during the years in which the interim constitution will be in effect. But this constitution born of compromise does offer promise both of soothing the anxieties of some of those who fear the new order and of enabling the government to begin to meet the hopes of those who expect so much from it.

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REMINDER!!

24 February 1994 - Briefing on the South African elections by Gay McDougall, member of the Independent Electoral Commission, will be held at 12:00 noon in the Moot Court Room in McDonough Hall at Georgetown Law Center, 600 New Jersey Avenue, N.W., Washington, D.C. Please RSVP Shirley King on 662-8342, if you plan to attend.

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