

## CONSTITUTIONAL REFORM IN SOUTH AFRICA

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### THE REFERENDUM

On March 17, 1992, the eyes of the world were fixed on a pivotal event in modern African history. Eligible white voters in South Africa lined up at polling stations to vote on the following question:

Do you support the continuation of the reform process which the State President began on February 2, 1990, and which is aimed at a new constitution through negotiation?

Pollsters radically underestimated the striking margin of votes favouring an affirmative answer to this question. Almost 70 per cent of the voters who cast ballots endorsed President F. W. de Klerk's approach to constitutional reform. In an extraordinary departure from its usual antagonistic attitude toward white-only elections, the African National Congress (ANC), the major organized body of multi-racial opposition to the government, urged white voters to turn out and vote "yes". The Conservative Party (CP), led by Dr. Andries Treurnicht, had spearheaded the "no" campaign.<sup>1</sup> Less than a month before the referendum, the CP had staged an upset victory over de Klerk's National Party (NP) candidate in the Potchefstroom by-election. This was an important catalyst in de Klerk's decision to seek a mandate on constitutional reform.<sup>2</sup> From the temporary heights of that by-election victory, the CP were cast down to the depths of electoral humiliation in the referendum.

As soon as he had announced the referendum, and again during its triumphal aftermath, de Klerk, formerly noted for his staunch and unimaginative conservatism, was hailed for his brilliant stroke in holding this vote and, through it, consolidating white support for his own vision of a new South Africa.<sup>3</sup> The project entrusted to him is, through negotiation with traditionally oppressed groups, nothing less than re-founding the legal order in South Africa. During the campaign, the affirmative option was presented, in both English and Afrikaans, as "vote yes for F.W."<sup>4</sup> As R. W. Johnson noted in *The Times* of London, the referendum allowed de Klerk to "personalize" the issue of constitutional reform: it was framed as a stark choice between de Klerk or chaos.<sup>5</sup> It was reported that this strategy owed something to the advice of the NP's British advertising consultants, Saatchi and Saatchi.<sup>6</sup>

How did South African politics reach this critical juncture? What does the resounding "yes" portend?

Some members of the Canadian media, for example, have interpreted the results as a final blow to the policy of apartheid or racial segregation in South Africa and as the harbinger of unswerving progress toward the establishment of democracy in that troubled country. The dawn of non-racial democracy, according to most reports, is a matter of months away. This view is perhaps unduly optimistic. The process of constitution-making currently underway in South Africa is a fascinating business that, even after the referendum, will take place in the midst of brutal racial violence, excruciating poverty, and demagogic politics. Many of the basic rights of people in South Africa are still determined according to the colour of their skin.

It would take a writer of the stature of Ryszard Kapuściński to capture the extraordinary mood and texture of the events that have unfolded in South Africa.<sup>7</sup> This article briefly and modestly tries to explain how South Africa has made some progress in recent years toward racial equality and how the future might be shaped out of the crucible of constitutional change. Despite the euphoria in many quarters about de Klerk's success in the referendum battle, there are hard times ahead for all peoples in South Africa in the next couple of years.

### DISMANTLING APARTHEID

The 1980s were a discouraging decade for those keen on promoting civil rights in South Africa. The nine-month long state of emergency declared by President P. W. Botha in July, 1985 justified extremely repressive security measures against Africans in particular.<sup>8</sup> These included arrests, bannings, detentions (even of children), treason trials, and the use of torture against anti-apartheid activists.<sup>9</sup> The government used its emergency powers to suppress any publicity about the actions of the security forces.<sup>10</sup> Various declarations of a national state of emergency were renewed up to as recently as 1990. Even the repeal of the notorious "pass" laws did not mark the end of apartheid.<sup>11</sup> These laws were supposed to achieve "influx control".<sup>12</sup> They required blacks to present identity documents in order to account for their presence in such cities as Johannesburg, Durban, Port Elizabeth or Cape Town. Their purpose was to restrict the presence of Africans except as the need for a source of cheap labour justified it. Enforcement of the pass laws led to the arrest of huge numbers of Africans: as high as 381,000 in 1975-76.<sup>13</sup> As had been the case for decades, employment,

education, residence, land-ownership, health care, access to public services, freedom of movement, and the right to vote were available until very recent times only on racial lines.<sup>14</sup> South African blacks, who make up approximately 70 per cent of the country's population, were especially disadvantaged in all these respects.

One of the most important changes in modern South African politics occurred when Parliament began a new session in February, 1990. At that time the ban on such popular black organizations as the ANC, the United Democratic Front (UDF), the Pan-Africanist Congress (PAC), and the South African Communist Party (SACP) was removed.<sup>15</sup> De Klerk, who had been State President for only 6 months, announced that the government would initiate a process of negotiation for adopting a new constitution. The prohibition on political gatherings was lifted. Many of the disabilities imposed on non-white South Africans under the policy of apartheid have subsequently been withdrawn. Charismatic black leaders such as Nelson Mandela and Walter Sisulu, released from twenty-seven years' imprisonment, have been able to play lawful and prominent roles in South African politics.<sup>16</sup> Mandela is now the president and Sisulu the deputy-president of the ANC.

For years to come blacks will continue to suffer under severe economic disparities created by an appalling

history of discriminatory government policy: for instance, 87 per cent of the land in South Africa is owned by whites, who constitute only 13 per cent of the total population.<sup>17</sup> The immense wealth associated with industrial and commercial enterprises is almost totally controlled by whites.<sup>18</sup> While many legal prohibitions in relation to non-whites may have been removed, one of the basic props to the abhorrent apartheid regime remains. Under the current South African constitution, adopted in 1983, white domination continues to be entrenched and blacks are denied some of the basic rights of citizenship.<sup>19</sup> They are treated as inferior citizens, unable to participate in national government in any meaningful way. Blacks still are not entitled to vote or to sit in Parliament. Even the defection, in April 1992, from the Democratic Party to the ANC of five sitting members gives the ANC white-only representation in the House of Assembly.

### DENATIONALIZATION AND DISPOSSESSION

Apartheid connotes not only social segregation based on odious notions of white supremacy, it also has justified territorial segregation and the creation of institutions for "separate political development", ironically as, in part, a reaction to decolonization movements elsewhere in Africa.<sup>20</sup> Under this policy, by the late 1950s the NP government had formulated the strategy of

## A CHRONICLE

Adam Hochschild has provided an account of how the policy of forced relocation affected Mogopa, a black village of about 5,000 inhabitants in the Transvaal, during the 1980s:

The village of Mogopa was an extraordinarily prosperous one by the standards of black South Africa, or of anywhere on the continent. Its several hundred families had had title to their home for more than seventy years. They also communally owned several thousand acres of fields and pasture, on which they grazed their cattle and grew maize, beans, and other vegetables. They grew enough crops to feed themselves and to sell the surplus. With that money, plus wages earned by some of the men who went off to work in Johannesburg or to nearby white farms, the people of Mogopa bought cars, trucks, even tractors. With no government subsidy whatever, the people of the village collected money and built an elementary school, a high school, and a clinic.

For almost all of this century, Mogopa lived in peace, a self-sufficient island in an economy built on exploitation. Then the pace of "removals" increased dramatically, as bureaucrats trucked millions of protesting Africans away from their homes and resettled them in the rural slums of the homelands. Mogopa, surrounded by many miles of white-owned farmland, was designated a black spot, scheduled to be rubbed off the map. As the 1980's began, the Mogopa people sent delegations to Pretoria and filed legal briefs, asking to be allowed to stay where they were.

Fearful of losing white votes, the government did not want to appear to be appeasing blacks. Officials came and painted numbers on the stone houses of Mogopa. In June 1983, when most Mogopa residents still refused to move, government bulldozers showed up and bulldozed three churches. They removed the engines from the water pumps. They bulldozed some homes. They destroyed the medical clinic. They bulldozed into rubble the cut-stone schools, paid for by the villagers themselves.

The bulldozers were from the Department of Cooperation and Development.

setting up ten independent states, known as bantustans or homelands. These were designed to accommodate black needs and aspirations by providing for rights to political participation within the governance of each African's relevant homeland. By becoming citizens of the homeland, the blacks would cease to be South African nationals. It did not matter that those blacks might continue to live within South Africa itself, for example in one of the townships located outside a major white city. They would be stripped of their South African citizenship by government decree. At present, four independent homelands have been established: Transkei, Bophuthatswana, Venda, and Ciskei. They are often referred to as the TBVC states. The total population of these homelands has been variously estimated, but amounts to around 7 or 8 million blacks. The six remaining homelands, including KwaZulu, presided over by Chief Mangosuthu Gatsha Buthelezi, which so far have attained only a limited degree of self-government, have refused to accept independence and wish to remain within South Africa.<sup>21</sup> The process of taking away citizenship in relation to the independent homelands was stopped only in 1986, when mounting international criticism impelled the NP to soften its policy on denationalization.<sup>22</sup>

The proportion of South African land that, by legislation, could be owned by the indigenous African

population was originally fixed at about 7 per cent.<sup>23</sup> Blacks were prohibited from acquiring land outside the reserves designated in elaborate schedules attached to the 1913 Black Land Act.<sup>24</sup> The proportion of land set aside for reserves was increased in 1936 to 13 per cent.<sup>25</sup> To advance its policy of territorial segregation, the NP government engaged in a series of "forced removals" between 1959 and 1988. The purpose was to transport Africans away from white-owned farms and from so-called "black spots" near white areas. Approximately 3.5 million people were forcibly removed from their traditional communities and resettled many miles away in impoverished, often arid areas that usually lacked adequate housing or municipal infrastructure.<sup>26</sup> Also, they were so distantly located from sources of employment that many Africans have been forced to become migrant workers. This disrupted family and community life and has left a pall of apathy over the homelands.<sup>27</sup>

The 1913 and 1936 Acts were finally repealed in 1991.<sup>28</sup> Vocal opposition to this change was raised by white farmers, who identified this territorial legislation as part of the divine dispensation that was signalled to them in the course of Afrikaner national history.<sup>29</sup> The farmers' cause has been taken up by the CP, which described the NP's actions in this context as "treasonous".

## OF DISPOSSESSION

The state hoped these actions would force the remaining people of Mogopa to leave. It offered them new land at a place called Pachsdraai, more than a hundred miles away. But the land was not their ancestral land and it had little water. More ominously, the new land was scheduled to become part of the "independent" homeland of Bophuthatswana, which was the last place anyone from Mogopa wanted to be; since then they would lose what fragmentary rights they still possessed as South African citizens. Furthermore, the only available housing in Pachsdraai was tin shacks. Most people still refused to move. The women were particularly militant, cleaning up some of the damage at Mogopa and refusing to accept removal notices from the police...

The rest of the story is said best in a report from TRAC, the Transvaal Rural Action Committee ...:

In the early hours of February 14, 1984, Mogopa was surrounded by armed police. At 4 a.m. the people were informed through loud hailer that they must load their possessions into trucks and go to Pachsdraai ... All the leaders were handcuffed and put into police vans. Their families refused to pack their possessions — government labourers did so. Women were carried into the lorries and buses. People tried to run away and children were loaded with the furniture and dispatched to Pachsdraai. All of this happened in the presence of armed policemen who had dogs at their disposal. People caught standing together outside their houses were beaten with batons...

No outsiders were allowed in. The press, diplomats, priests, lawyers and members of the Black Sash, were turned back at the entrance to Mogopa. Those who managed to sneak in through back ways were caught and charged. The police initially said Mogopa was an "Operational Area" but subsequently corrected this; they said that since it was black land, no whites were allowed to enter — excepting the police of course, and the white farmers who had free access in and out to buy the people's livestock at a tenth of its value.

After that traumatic night, bulldozers leveled what remained of Mogopa. The authorities told villagers that if they returned to the ruins of their homes, they would be guilty of trespassing.

From *The Mirror at Midnight: A South African Journey* (Harmondsworth: Viking Penguin, 1990) at 230-32

Repealing restrictions on land ownership by non-whites is an important measure, though not capable by itself of erasing the inequalities that have been created. The legislative changes in 1991 only pulled down part of the structure of apartheid. They did not address apartheid's legacy. One of the most pressing issues in the constitutional negotiations will be the manner in which both historical and contemporary injustices in relation to property ownership will be treated. Will a new constitution reflect a policy aimed at restoring land to those peoples that, only recently, were forcibly deprived of it?

### DEALING WITH POLITICAL OPPOSITION

In addition to racial discrimination, another integral part of apartheid was the rigid system of security laws that became increasingly repressive after 1948. After the 1960 police massacre of 69 demonstrators against the pass laws at Sharpeville in the Transvaal, the NP government invoked a state of emergency which lasted for 156 days.<sup>30</sup> During this period, both the ANC and the PAC were banned from political activities. Later, the SACP was also outlawed.

Additional security laws enacted between 1963 and 1985 fortified the security force's ability to deal with "terrorism". This was widely defined to include almost any form of unlawful political activity.<sup>31</sup> For instance, the law permitted detention for up to 90 days without trial for the purpose of interrogation. This period was later extended to 180 days.<sup>32</sup> Other legislation permitted detention without trial simply at the discretion of a senior police officer. Prisoners could be held *incommunicado*. They had no right to receive visits from families, doctors, or lawyers. The interrogation methods of South African security and police forces resulted in a long string of cruel injuries, psychological torture, and suspicious deaths. One of the single most notorious and tragic was the death in 1977 of Steve Biko from a severe beating administered by South African police.<sup>33</sup> Biko was the leader of the Black Consciousness movement.<sup>34</sup> To quell violence in the townships, stemming from such causes as rent increases or corrupt authorities, the police resorted to rubber bullets, whips, tear gas, and bird shot. The government responded by banning political meetings, detaining hundreds of individuals without trial, and calling in the army to help suppress the protests.

In 1991, amendments were passed by the NP government that were designed to obliterate some of the blotches on South Africa's human rights record. For instance, the practice of "banning" individuals, which restricted their personal and political freedom through such measures as house arrest, was abolished.<sup>35</sup> Moreover, detention without trial for interrogation was

made subject to a maximum ten-day period. Any extension would require an application to a court for approval.

### STIMULATING CHANGE

Why did the NP finally realize that the process of constitutional change had to begin? One of the major reasons was the (at least partial) effectiveness of the economic sanctions that had been brought against South Africa. These can be traced back as far as the 1940s, with an important new wave of financial and trade sanctions swelling up in 1985 and 1986.<sup>36</sup> They were designed to embargo such essential items as oil, arms, and electronic equipment as well as to create a general economic strain within the country. This would undermine the morale of apartheid's supporters and encourage the efforts of those fighting against white domination. The Commonwealth Committee of Foreign Ministers, created originally at a 1987 conference in Vancouver, viewed the period of 1989-91 as extremely vulnerable for the South African economy. Within that period, terms regarding the repayment of immense amounts of foreign debt would have to be renegotiated in the face of a continued drop in the price of gold.<sup>37</sup> Contributing also to the economic pressure were the effects of internal boycotts by Africans against white-owned businesses.

It became emphatically clear that one area in which white South Africans have felt the pinch of international pressures is the boycott in entertainment, intellectual, and sporting spheres. The referendum campaign coincided with the return of South Africa to the international cricket community. Live television and radio broadcasts from Australia of the Springboks' matches in the World Cup of cricket were carried alongside political debates over the merits of constitutional reform. One of the likely consequences of a victory by the "no" side in the referendum would have been the return to sporting isolation.<sup>38</sup> The return of South African footballers to world championship play is also eagerly anticipated.

Another impetus for reform lay in the ruinous cost of paying for the administrative structure designed to maintain apartheid. Despite the stringent security measures of the past decade, South Africa has seen "millions of ordinary people, multiplying and migrating and overrunning the barricades".<sup>39</sup> An instructive example of the magnitude of African migration into and near the industrial centres is the relentless growth of squatter camps. Crossroads, originally a temporary black community located outside Cape Town, was supposed to have been eradicated; instead, it has become a permanent settlement which continues to be unmanageable with the arrival of fresh migrants looking

for shelter in corrugated tin shacks sprawling across an ecological wasteland.<sup>40</sup> The pressure is so great that another vast camp, Khayelitsha, located a few miles beyond Crossroads, has been established to absorb thousands more squatters arriving from Transkei and Ciskei. These camps have become the scene for factional quarreling that often erupts into riots, firebombing of shacks, and murder. Recently, the so-called "taxi wars" taking place in Crossroads between two rival groups that ferry workers in and out of Cape Town led to 18 deaths in a two-week period.<sup>41</sup>

The members of the NP pressing for a negotiated settlement that would transform South Africa into a non-racial democracy took note of a new spirit and direction in the ANC. They pointed to the legalization of that party, the unmooring of the ANC from its former sponsors in Eastern Europe, and a willingness on the part of ANC leaders to work towards national reconciliation. Having ANC leaders as partners in the formulation of a new constitution would help legitimate the resulting new structures of government. These NP supporters feared that without some means of effective political consultation of the vast majority of the population, South Africans were proceeding headlong to an eventual civil war and vicious bloodbath.

## PROPOSALS FOR A NEW CONSTITUTION

The prospect of a new constitutional dispensation arose out of several significant changes of direction. Under de Klerk's leadership, the NP has relaxed its obsession with retaining strict, arbitrary control over South Africans. The stringent measures adopted had turned the country into a virtual police state. For its part, the ANC, while still in exile, had published in 1988 a set of constitutional guidelines for a democratic South Africa.<sup>42</sup> The South African Law Commission, a government-appointed agency, recommended the adoption of a bill of rights.<sup>43</sup> In early 1990, de Klerk stated his government's commitment to a fresh, democratic constitution, universal enfranchisement, an independent judiciary, and the protection of the rights of minority groups and individuals. By August 1990, the ANC had pledged to suspend armed actions against the government and had negotiated with the government the outside date of April 1991 for the release of all political prisoners. However, the ANC has not yet dissolved its armed wing, Mkhonto we Sizwe, of which Nelson Mandela remains the commander-in-chief.

The path to a new constitutional deal has not been altogether smooth. The violence that continues to surge between different African groups has hampered the progress of constitutional talks. The ANC has accused

the government of failing to control the belligerence of Inkatha's Zulu supporters.

Another impediment to useful discussions was the initial failure to agree on a procedure for drafting or adopting a new constitution. The ANC has favoured an elected constituent assembly with an interim transitional government.<sup>44</sup> The NP has insisted that any negotiations must involve a multiparty conference that would draft an interim constitution. This would then be presented, first to Parliament, and then to a referendum in which votes would be counted on a racial basis. The idea here is that the NP government would continue to play a central role in the drafting of a new constitution. The NP fears, of course, that if a black majority were to control the constituent assembly, it would be able simply to draft its own constitution.

The ANC has continued to publish working documents to encourage discussion about constitutional reform. Its *Bill of Rights for a New South Africa* was aimed at stimulating discussion both within and outside the ANC.<sup>45</sup>

During 1991 and early 1992, the task of pushing along the constitutional reform process has fallen to a body called Convention for a Democratic South Africa (widely known by its acronym, Codesa). This body is made up of nineteen of the most important political groups in South Africa. Prominent among these are the NP, the ANC, the Democratic Party, the South African Communist Party, the Inkatha Freedom Party, and governments of each of the independent and dependent homelands. The parties refusing to take part in Codesa include the CP, the PAC, and the Azanian People's Organization (Azapo). The last of these is the major black consciousness organization. Co-chairing Codesa are Stoffel van der Merwe, general-secretary of the NP, and Mac Maharaj, who once served ten years in prison on Robben Island before being banned from South Africa for five years. He is now a member of the ANC's National Executive Committee.

The mission assigned to Codesa includes identifying general constitutional principles; devising an appropriate process for adopting a new constitution; advising on how South Africa should be governed until a new constitution is in place; recommending on the future of the TBVC states; and recommending appropriate time lines for completing the jobs assigned to Codesa. To go about these tasks, Codesa has set up five working groups, each designated to deal with one or other of the foregoing issues.

The working groups have been feverishly researching and debating these issues. Considerable talent to

support the tasks of the working groups has been enlisted from universities, political parties, and non-governmental organizations. During the referendum campaign the work that has already been devoted to Codesa's projects hung in the balance. Dozens of participants in Codesa waited breathlessly for an affirmative vote that would authorize their work to continue.

As the discussions within Codesa have made clear, the primary political groups strenuously disagree over fundamental issues. These include: the nature of the future South African state; the composition of Parliament; the future of the independent homelands; the constitutional measures that might be adopted to protect minorities; and the contents of a bill of rights.

### NEW GOVERNMENTAL STRUCTURE

The NP has continued to press for a federal state. They envision the creation of nine regions within South Africa, each with a government having constitutionally protected powers. Like its liberal oppositionist predecessor (the Progressive Party), the Democratic Party has also officially approved of some kind of federal arrangement. Inkatha, in particular, proposes federal states that would be virtually sovereign within their own boundaries. Among the independent states, only Bophuthatswana has indicated a desire to retain the degree of sovereignty it has already been granted by South Africa. Extremist right-wing factions continue to advocate partition of South Africa along racial lines. These are voices emanating from the contemporary equivalent of a white *laager*. When discussion of this sort is held, the areas typically targeted for exclusive white dominion are the Transvaal, the Orange Free State, or northern Natal. These are conceived as traditional Afrikaner territories. Lately, there have been Afrikaners actually taking steps to retreat to the northern Cape to set up an intended *boerestaat* (Afrikaner state).<sup>46</sup>

The ANC favours a unitary state with some regional governments that would be elected, though they would still be subordinate to the central, national government. As emphasized in its 1988 constitutional guidelines, the ANC is strictly opposed to federalism. Regions would not be racially or ethnically based. All ten of the homelands would be immediately reincorporated into the South African state. From the ANC point of view, another reason for a strong central government is that a future black government will need a full array of powers to engage in an overhaul of the South African economy and society. Officially, the ANC has been linked in the past with a socialist ideology.<sup>47</sup> This connection has been attenuated somewhat, and there is significant discussion within the ANC about its future orientation on economic

issues and the scope for state intervention in the economy.<sup>48</sup>

### THE COMPOSITION OF PARLIAMENT

To date, all of the leading political groups within Codesa have agreed on the establishment of a bicameral Parliament in which both houses would be elected. The lower house at least would be elected by proportional representation. The NP has proposed that the upper house would have equal representation from each of the nine regions. The upper house would have a complete veto over decisions of the lower house.

The ANC agrees that the upper house, to be called a Senate, should reflect regional representation, though on the basis of proportion of population. Moreover, the upper house would have only a suspensive veto that would delay, rather than block, legislation made by the lower house.

### PROTECTION OF MINORITIES

The introduction of the universal franchise is inevitable in South African constitutional reform. A large amount of energy is being spent by minority political and ethnic groups to argue for some constitutional checks that would keep the majority from using its legislative power to dominate minorities. Among the devices that have been suggested are a minority veto, proportional representation, and a powerful upper house.

Both the ANC and the NP have indicated that they would be receptive to proportional voting arrangements. The ANC has opposed, however, any suggestions from the NP that any particular ethnic, linguistic, or racial group be granted a veto power over legislation made by Parliament.

### ADOPTION OF A BILL OF RIGHTS

South Africa has never developed a legal culture devoted to a bill of rights protecting fundamental human rights. In the past decade, South African legal and political academics have re-examined the history of liberalism in South Africa in order to help trace the contemporary debates over the uses and application of rights discourses.<sup>49</sup> When the Universal Declaration of Human Rights was being endorsed in 1948, South Africa was at that very moment setting up its system of racial injustice and white privilege. The adoption of the Freedom Charter in 1955 by a Congress of the People, behind which the ANC stood, was an important event in the liberation struggle.<sup>50</sup> The Freedom Charter included economic and social rights that foreshadowed the contents of many of the international documents of later



decades. Successive NP governments used their parliamentary sovereignty to enforce race discrimination and to silence dissident voices. South African courts had very limited means with which to interfere with the essentially unbridled power of Parliament to infringe human rights.<sup>51</sup>

When the South African Law Commission, a statutory body with government-appointed members, was given the task in 1986 by the Minister of Justice, H. J. Coetsee, to investigate how courts might be empowered to protect human rights, it was not immediately clear why the NP government had taken this course. One of the more cynical appraisals was that the government was trying to further entrench the collective rights of whites against any future black government. Another suggested reason was that South Africa, during this period of a declared state of emergency and arbitrary police tactics, was trying to forestall further sanctions by showing a willingness to model its constitution on that of the U.S.

The Law Commission reported in March, 1989.<sup>52</sup> Its report contained a draft bill of rights, with an emphasis on individual rights. It mentioned most of the basic civil and political rights to be found in modern international instruments, including a right to vote for all adult citizens and a guarantee against discrimination on the grounds of race or gender. All the rights would be enforceable through judicial review of legislation or administrative action. The omission of any significant endorsement of a concept of group rights in the Law Commission's draft bill caught many observers by surprise. The Law Commission thought that cultural, linguistic, or religious rights attached to any particular group ought to be protected by means of individual rights.

The NP, of course, was not wildly enthusiastic about the draft bill proposed by the Law Commission. In his important speech in February, 1990, de Klerk asserted that a "well-rounded" regime for protecting rights in a heterogeneous population must include formal recognition of "collective, minority and national rights".<sup>53</sup> How tenaciously the NP will continue to cling to this concept of group rights will be an important factor in the direction that further constitutional negotiations will take.

One of the most intractable problems in South Africa's constitutional remaking will be the matter of property rights. There understandably will be tremendous pressure on any future black government to redistribute land and wealth. Consequently, how a bill of rights offers protection against expropriation or nationalization will be a vital issue to whites and non-whites alike. Both the NP and the CP have been quick to

label any redistribution of ownership as simply "socialist". The PAC has advocated the immediate return of land, without compensation, to the African communities that were dispossessed of it. The ANC's constitutional guidelines and working drafts of a bill of rights have consistently offered protection to "rights to own and acquire property". Any expropriation by the government in the public interest would be subject to the payment of just compensation.

There have been suggestions that a land claims process be set up in a future South Africa, either through ordinary legislation or perhaps in constitutional form. For the moment, the land claims process in South Africa takes what one might call its traditional form. Geoff Budlender, a lawyer with the Legal Resources Centre in Johannesburg, has related how land claims have been asserted by some of his rural clients in Zevenfontein.<sup>54</sup> The tactics used largely have amounted to self-help and civil disobedience.

Budlender is concerned primarily with the right of the propertyless (the homeless and the dispossessed) to obtain what they need for a decent life. This has not been the manner in which constitutionally entrenched property rights are typically conceived. He would like to see included in a bill of rights (either as a directive principle, or as a justiciable guarantee) an explicit duty on government to take appropriate steps to make suitable land and housing available to the landless and homeless.

## SOUTH AFRICAN JUDICIARY

The ANC is justifiably worried about whether the current judiciary in South Africa should be entrusted to interpret and protect the rights contained in a future bill of rights. The current judiciary, almost totally, is white and affluent.<sup>55</sup> The vast majority of ordinary South Africans are black and poor. Judges have been deeply complicitous in enforcing the race and security laws that have caused such great injustice.<sup>56</sup>

The Law Commission recommended that a future bill of rights be placed in the hands of ordinary superior court judges. This has been called a "naive estimation" of the standing of the judiciary.<sup>57</sup> There are real problems with widespread perceptions that the existing South African judiciary cannot be reformed. It will have to be replaced. It is, however, improbable that a brand new judiciary will be created. Therefore, the ANC Constitutional Committee has considered recommending that a constitutional court be established that would reflect the "experience and talents" of the whole population. It might be easier to install a new court, taking into special account the human rights records of potential appointees, than to wait for non-white lawyers

to become eligible to sit on the South African Supreme Court.<sup>58</sup>

## CONCLUSION AND PROSPECTS

Since the start of constitutional negotiations, neither the heartbreaking poverty nor armed violence has abated in South Africa. Africans are still not fully recognized as people in the eyes of the law.<sup>59</sup> Much of the political violence, which accounted for several thousand deaths in 1991, takes place between supporters of the ANC and those who represent the Inkatha Freedom Party. Both Mandela and Chief Buthelezi have issued calls for peace, but this has had little impact on the violence, especially across the Witwatersrand, where constant clashes have arisen between Zulu migrant workers housed in all-male hostels and township residents sympathetic to the ANC.<sup>60</sup> It is unclear how much responsibility for the continued violence rests with the police or the mysterious "third force" of the government's security forces who allegedly are inciting the combatants.<sup>61</sup>

A new constitutional settlement will be unable to solve at a stroke monumental problems that afflict South Africa. The public bureaucracy must be reformed and made more accountable. Serious disparities in income levels must be cured. Language policy, which has traditionally been used to intensify ethnic divisions, must be re-evaluated. Education, formerly based strictly on the principle of segregation, has been administered unequally, with average spending on each white student more than five times greater than that for an African.<sup>62</sup>

In the days after the referendum was held, there was a spate of happy stories in the print media about de Klerk's sagacity and the bright prospects for a peaceful solution to South Africa's troubles. What we must not forget is that there continues to be a formidable body of dissent within that country to revolution through constitutional means. The military and security forces are still controlled by white Afrikaners. The supporters of Inkatha or the PAC remain resolutely opposed to the proposals being put forth by the ANC. There is still scope for the NP to form into a coalition with such groups as the CP or Inkatha and wreck the process of negotiation. Though it has been urged that the ANC ensure that such ideological rivals as the PAC or Inkatha join the process of constitutional negotiation, this advice has so far gone unheeded.<sup>63</sup>

Most importantly, it should not be forgotten that de Klerk's NP has almost two years before it has to call a general election. The referendum victory is liable to be interpreted within his caucus as an overwhelming endorsement of whatever policy of constitutional reform de Klerk wishes to follow in the crucial months to come.

The State President can construe the recent show of popular white support as justifying some very hard-nosed bargaining indeed. The referendum is not necessarily the end of the NP's influence over the constitutional framework of South Africa: it is also a powerful, fresh mandate for the NP to score significant points at the constitutional roundtable.

For observers who are passionately interested in seeing an end to apartheid and the beginnings of a solution to the terrible problems this hateful policy has caused, it is salutary to keep in mind Gramsci's words:

The old is dying and the new cannot be born; in this interregnum there arises a great diversity of morbid symptoms.<sup>64</sup>

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1. Treurnicht left the National Party in 1983 to set up the CP. He had objected to the creation of the tricameral Parliament: see Vincent Crapanzano, *Waiting: The Whites of South Africa* (New York: Random House, 1985) at xvii.

2. The announcement of a referendum appeared immediately to divide the right-wing opposition forces: see Anthony Johnson, "Crisis caucus as CP decides", *Cape Times* (Cape Town) (25 February 1992) at 1.

3. See Phillip van Niekerk, "The metamorphosis of F. W. de Klerk", *The Globe and Mail* (Toronto) (20 March 1992) at A1 and A7.

4. By contrast, the Democratic Party's slogan was "vote yes for peace".

5. See R.W. Johnson, "De Klerk outflanks diehards in their hour of triumph", *The Times* (London) (21 February 1992) at 13. "F.W.'s gamble: Either he wins ... or you lose" was the banner headline in *The Weekly Mail* (Johannesburg) (21 February 1992) at 1.

6. See Peter Fabricus, "Nats use top UK agency in 'yes' drive", *Saturday Star* (Johannesburg) (29 February 1992) at 1.

7. For a sample of his acutely-observed dispatches from foreign places in ferment, see Ryszard Kapuściński, *The Soccer Wars* (New York: Vintage, 1992).



8. The State President is empowered to declare a state of emergency under the Public Safety Act, No. 3 of 1953, s. 2, Stat. Repub. S. Afr. — Criminal Law and Procedure (Butterworths).

9. Reports of children as young as ten years old being subjected to physical abuse, including electric shocks, are referred to in Rian Malan, *My Traitor's Heart* (New York: Vintage, 1990) at 264. How children already by five are drawn into the fractious, often violent world of Soweto politics is described in *ibid.* at 307-19. Malan's book is a grim and haunting account which, read in isolation, would make one despair about the political future of South Africa.

10. For a summary of this period, see Leonard Thompson, *A History of South Africa* (New Haven: Yale University Press, 1990) at 235-40. A fictional narrative based on this "deranged year" is contained in André Brink, *States of Emergency* (London: Faber and Faber, 1988).

11. After the repeal of the pass laws (see *infra* at n. 12), the government continued to exert control through the requirement of work permits and the imposition of penalties for living illegally in township accommodation: see Elaine Unterhalter, *Forced Removal: The Division, Segregation, and Control of the People of South Africa* (London: International Defence and Aid Fund for South Africa, 1987) and Colin Murray, "Displaced Urbanization: South Africa's Rural Slums" (1989) 86 Afr. Aff. 311.

12. See the Group Areas Act, No. 36 of 1966, Stat. Rep. S. Afr. — Group Areas (Butterworths). Legislation restricting the movement of Africans has a long history in South Africa. An overview is given in T. R. H. Davenport, *South Africa: A Modern History*, 3rd ed. (Toronto: University of Toronto Press, 1987) at 554-57. See also the Abolition of Influx Control Act, No. 68 of 1986, Stat. Rep. S. Afr. — Group Areas (Butterworths).

13. Thompson, *supra* n. 10 at 193.

14. See, e.g., the Reservation of Separate Amenities Act, No. 49 of 1953, Stat. Un. S. Afr. and the Discriminatory Legislation Regarding Public Amenities Repeal Act, No. 100 of 1990, Stat. Rep. S. Afr. — Blacks (Butterworths).

15. An excellent treatment of the genesis of opposition groups, as well as their differences, can be found in Tom Lodge, *Black Politics in South Africa Since 1945* (Johannesburg: Ravan Press, 1983). The ANC has been the subject of two recent histories: Heidi Holland, *The Struggle: A History of the African National Congress* (New York: George Braziller, 1990) and Francis Meli, *History Belongs to Us: A History of the ANC* (Bloomington: Indiana University Press, 1989).

16. For an intriguing account (combining texts and photographs) of Mandela's struggle, see Alf Kumalo and Es'kia Mphahlele, *Mandela: Echoes of an Era* (Harmondsworth: Penguin, 1990). See also, George M. Fredrickson, "The Making of Mandela", (Sept. 27, 1990) N.Y. Rev. Books 20.

17. See Albie Sachs, *Protecting Human Rights in a New South Africa* (Cape Town: Oxford University Press, 1990) at 105.

18. See *ibid.* at 165-67 and Robin McGregor, *Who Owns Whom?* (Cape Town: Juta, 1989). The process by which lucrative concessions were granted to corporate enterprise is detailed in Duncan Innes, *Anglo American and the Rise of Modern South Africa*

(New York: Monthly Review Press, 1984).

19. See the Republic of South Africa Constitution Act, No. 110 of 1983, Stat. Rep. S. Afr. — Constitutional Law (Butterworths) which enfranchised Coloureds and Indians and set up a tricameral Parliament comprising separate legislative chambers for whites (the House of Assembly), Coloureds (the House of Representatives), and Indians (the House of Delegates). Under the 1983 Constitution, the most powerful body is the House of Assembly, which consists solely of 178 white members.

20. On H. F. Verwoerd's policy in this regard, see Davenport, *supra* n. 12 at 389-94.

21. See Roger Southall, "Buthelezi, Inkatha and the Politics of Compromise" (1981) 80 Afr. Aff. 453.

22. Restoration of South African Citizenship Act, No. 73 of 1986, Stat. Rep. S. Afr. — Aliens and Citizens (Butterworths).

23. Thompson, *supra* n.10 at 163.

24. Black Land Act, No. 27 of 1913.

25. Development Trust and Land Act, No. 18 of 1936.

26. See Laurine Platzky and Cherryl Walker, *The Surplus People: Forced Removals in South Africa* (Johannesburg: Ravan Press, 1985) and Christina Murray and Catharine O'Regan, eds, *No Place to Rest* (Cape Town: Oxford University Press, 1990).

27. Allister Sparks, *The Mind of South Africa: The Story of the Rise and Fall of Apartheid* (New York: Alfred A. Knopf, 1990) at 203.

28. Abolition of Racially Based Land Measures Act, No. 108 of 1991, referred to in David Welsh, "The outlook for a democratic South Africa" (1991) 67 Int'l Aff. 739.

29. See T. Dunbar Moodie, *The Rise of Afrikanerdom: Power, Apartheid, and the Afrikaner Civil Religion* (Berkeley: University of California Press, 1975) and Robert Edgar, *Because They Chose the Plan of God* (Johannesburg: Ravan Press, 1985).

30. Davenport, *supra* n. 12 at 395.

31. Terrorism Act, No. 83 of 1967, Stat. Rep. S. Afr. — Criminal Law and Procedure (Butterworths), s. 2(1) of which lists a large number of acts as constituting offences.

32. See the account of a prominent civil rights lawyer imprisoned in the 1960s under these regulations in Albie Sachs, *The Jail Diary of Albie Sachs* (Cape Town: David Philip, 1990).

33. See Donald Woods, *Biko*, rev. ed. (New York: Henry Holt, 1987).

34. See Steve Biko, *Black Consciousness in South Africa*, ed. Millard Arnold (New York: Random House, 1978) and Steve Biko, *I Write What I Like*, ed. Aelred Stubbs (London: Bowerdean Press, 1978).

35. 1991 amendments to the Internal Security Act, 1982, as described in Welsh, *supra* n. 28.

36. See The Commonwealth Committee of Foreign Ministers on South Africa, *South Africa: The Sanctions Report* (Harmondsworth: Penguin, 1989) at 15-16.
37. *Ibid.* at 167.
38. Arthur Goldstuck, "Sports enthusiasts would be stumped", *The Weekly Mail* (Johannesburg), February 28, 1992 at 5.
39. Sparks, *supra* n. 27 at 372.
40. See Josette Cole, *Crossroads: The Politics of Reform and Repression, 1976-1986* (Johannesburg: Ravan Press, 1987).
41. See "Police, SADF patrol townships", *The Cape Times* (Cape Town) (24 February 1992) at 5. For a discussion of the structure of the black taxi industry and the violence that has erupted among rival groups see Meshack M. Khosa, "Routes, Ranks and Rebels: Feuding in the Taxi Industry" (1991) 18 J. S. Afr. Stud. 232.
42. African National Congress, *Constitutional Guidelines for a Democratic South Africa*, reprinted in Sachs, *supra* n. 17 at 197-201 and in (1989) 5 S. Afr. J. Hum. Rts. 129.
43. South African Law Commission, *Working Paper on Group and Human Rights*, Project No. 58 (Pretoria: The Commission, 1989).
44. For an outline of the various parties' respective positions, on which my account draws heavily, see Welsh, *supra* n. 28 at 744-50.
45. Included in Sachs, *supra* n. 27.
46. See Jerelyn Eddings, "Planting the seeds of a new Fatherland", repr. in *Edmonton Journal* (21 March 1992) G2.
47. See David Everatt, "Alliance Politics of a Special Type: the Roots of the ANC/SACP Alliance, 1950-1954" (1992) 18 J. S. Afr. Stud. 19.
48. See, e.g., Nicoli Natrass, "Controversies About Capitalism and Apartheid in South Africa: An Economic Perspective" (1991) 17 J. S. Afr. Stud. 654.
49. See especially André Du Toit, "Understanding Rights Discourses and Ideological Conflicts in South Africa" in Hugh Corder, ed., *Essays on Law and Social Practice in South Africa* (Cape Town: Juta, 1988) 237.
50. The Freedom Charter, June 26, 1955 (adopted at Kliptown, Transvaal), repr. in M. Hamalengwa; C. Flinterman; and E. Donkwa (eds.), *The International Law of Human Rights in South Africa: Basic Documents and Annotated Bibliography* (Dordrecht: Martinus Nijhoff, 1988) 99.
51. For a history of the bill of rights debates, see John Dugard, "A Bill of Rights for South Africa?" (1990) 23 Cornell Int'l L. J. 441.
52. *Supra* n. 43.
53. See Dugard, *supra* n. 51 at 451.
54. Geoff Budlender, "The Right to Equitable Access to Land", a paper presented February 28, 1992 at the Land and Property Rights Conference, Centre for Applied Legal Studies, Johannesburg.
55. See D.D. Mokgatle, "The Exclusion of Blacks from the South African Judicial System" (1987) 3 S. Afr. J. Hum. Rts. 44.
56. For a portrait of the South African courts in this century see Hugh Corder, *Judges at Work: The Role and Attitudes of the South African Appellate Judiciary, 1910-1950* (Cape Town: Juta, 1984) and Christopher Forsyth, *In Danger for Their Talents: A Study of the Appellate Division of the Supreme Court of South Africa, 1950-1980* (Cape Town: Juta, 1985). An interesting jurisprudential analysis is David Dyzenhaus, *Hard Cases in Wicked Legal Systems: South African Law in the Perspective of Legal Philosophy* (Oxford: Clarendon Press, 1991).
57. Christopher Forsyth, "Interpreting a Bill of Rights: The Future Task of a Reformed Judiciary?" (1991) 7 S. Afr. J. Hum. Rts. 1 at 3.
58. For suggestions along this line, see Dennis M. Davis, "Social Power and Civil Rights: Towards a New Jurisprudence for a Future South Africa" (1991) 108 S. Afr. L. J. 453 at 471.
59. For a magnificent story on this theme, see Mtutuzeli Matshoba, "Call Me Not a Man" in André Brink and J. M. Coetzee, eds, *A Land Apart: A Contemporary South African Reader* (New York: Viking, 1987) 94.
60. See Lauren Segal, "The Human Face of Violence: Hostel Dwellers Speak" (1991) 18 J. S. Afr. Stud. 190.
61. See Welsh, *supra* n. 28 at 742 and John Brewer, "The Police in South African Politics" in Shaun Johnson, ed, *South Africa: No Turning Back* (London: Macmillan, 1988) 258.
62. These and other crucial issues are examined in Robert Schrire, ed, *Critical Choices for South Africa: An Agenda for the 1990s* (Cape Town: Oxford University Press, 1990).
63. See Heribert Adam, "Transition to Democracy: South Africa and Eastern Europe" (Fall, 1990) 85 Telos 33.
64. From Antonio Gramsci, *Prison Notebooks*. This quotation was used by Nadine Gordimer as an epigraph to her *July's People* (New York: Viking, 1981).