

Reshaping The Body Politic— The South African Experience*

Professor Deryck M. Schreuder

The ‘miracle’ of South Africa’s transition from apartheid to democracy continues.

The euphoria of the 1994 elections has dissipated, there is disappointment over the agonisingly slow progress of economic and social reconstruction, and there is deep concern over a rising culture of apparent lawlessness.

And yet the ‘negotiated revolution’ of change does miraculously advance, with last week being a notable bench-mark of this progress—a new democratic constitution and bill of rights is now framed and established, some hopeful signs of growing accord between African National Congress (ANC) and the Zulu Inkatha Party in Natal Province are emerging, and Mr Mandela last Friday installed Dr Mamphale Ramphele as the first black woman Vice-Chancellor of South Africa’s premier research university in Cape Town.

The scale of this achievement should not be lost sight of as a post-apartheid South Africa begins to face its past, either in terms of social justice or of civil rights. All too quickly the critics have arrived to question the pace of change, to project a gloomy future for its forty-one million people—based often on some negative analogies from the agonies of the rest of Africa—and to associate the transition essentially with Mr Mandela’s undoubtedly remarkable role as reconciler and visionary. ‘After he is gone’ is the solemn cover story of the

* This paper formed the basis for a lecture given by Deryck Schreuder in the Department of the Senate Occasional Lecture Series at Parliament House on 18 October 1996. Professor Schreuder is Vice-Chancellor of the University of Western Sydney.

British *Economist* magazine this week, with a photograph of the aging, anxious-looking President and liberator.

Just to step back from this extraordinary piece of contemporary history is important at this time, to get a measure of the extraordinary South African achievement as it reaches this point after six years on the road to democracy—since the unbanning of the ANC, the release of Nelson Mandela, the multi-party negotiations which led to the government of National Unity, the interim constitution, the first democratic elections (27 April 1994), the coalition government and now the shaping of its democratic constitution.

The process has been so extraordinary I would argue—in achievement, principle debate and democratic reforming outcomes—that other societies can well learn from this dramatic reshaping of a body politic. The South African experience should be required ‘reading’ for all in other states where liberty is not established, or even in constitutional democratic states considering reviewing their own constitutions.

Most obviously the miracle has been focussed on the establishment of a civil society, symbolised by new and democratic constitutions supported with ‘sufficient consensus’ (a key South African phrase from the negotiating phase) of all parties. But not merely a new constitution, rather one which has been assessed by an independent constitutional court of independent jurists, who have tested the new document against first principles established earlier in public debate in South Africa. Part of that constitution is assurance of an independent judiciary, a bill of rights, and a series of clauses entrenching the constitution against any transitional party political desires for its quick amendment.

James Madison, the great American founding father, once described a national constitution as being a parchment barrier between freedom and autocracy. South Africa has committed itself to that faith in ensuring liberty by assuring authority beyond Government in a democratic constitution. It has also recognised the fragility of that freedom—the mere parchment barrier—by providing checks and balances built into the constitution and the significant role which it has given to an independent judiciary, to a free press and to a citizen’s freedom of expression.

That said, I also wanted to draw from my professional experience as an historian and comment on three other dimensions of the democratic miracle which were much less obviously critical in the ultimate success of the negotiated revolution.

The first is the very method by which it was done. It is rare in history to find minority-rule regimes of power transferring their authority to a mass movement in either such a process-driven manner, or indeed engaging in what was essentially an act of extreme decolonisation as the occupying settler society.

There are lots of examples of European imperial governments negotiating a transfer of power which indeed involved bilateral negotiations with local nationalists, leading to their own withdrawal from colony or state. The classic 1960’s decolonisation in Africa, the Carribean, Asia and the Pacific all followed this pattern. But in the South African case the governing regime negotiated matters in such a way that its supporters could actually remain part of the post-independence body politic and society.

Admittedly, those in the government of Mr De Klerk had aspirations for ‘power sharing’ when they began the process in 1990 and by 1996 they had resigned from the National Unity government. Yet in that crucial interim period, the body politic had been reshaped so that a democratic society could emerge, and this had been done by entirely internal negotiation and internal transitional arrangements.

In notable contrast, the road to democracy in Zimbabwe, as a key example of another settler decolonisation, had involved the British government actually taking back the Unilaterally Declared Independence (UDI) state of Rhodesia under Imperial authority, and then engaging in the Lancaster House talks, leading to a negotiated settlement of a new constitution to be tested at the polls in the new Zimbabwe. A much nearer parallel was the transfer of power in Namibia—but even that strongly involved outside agencies, not least the United Nations as inheritor of the League of Nations’ mandate responsibilities in relation to South-West Africa.

In the end, the parties concerned in the South African settlement have agreed among themselves to construct a process and to adhere to it so that former bitter enemies could save the nation from violent catastrophe (a possibility, as Mr Mandela has recently suggested, that had existed in 1994 when over 100 000 armed rightists stood ready to launch a kind of military counter-revolution) and also shape the principles and frameworks of a constitution to assure the future of South Africa and its peoples.

Here was the remarkable second aspect of South Africa’s negotiated revolution. Commentators have already remarked on the path of reconciliation, or at least accommodation, that the various ethnic regional groups have embarked upon. But what has hardly been set out is the extraordinarily hostile historical environment from which it was created.

By that I mean more than a background history of racism. I refer rather to a modern history of some 300 years in which complex systems of domination had been developed and a tradition had evolved of illiberal politics and constitutional arrangement that was the deepest enemy of a real constitutional democracy. The Dutch and British Imperial presence had left strongly atavistic forces which assured minority white rule in a pluralist society. From the Dutch in the 17th and 18th century had come a major reliance of the state on étatism, the role of the central government and the use of bureaucratic law as constitutional rule. That had been so strong it had even been challenged by its own frontier settlers, some of whom had attempted a burgher’s republic in the 1780s and failed, others who later trekked away from the succeeding British colonialism—after 1815—and successfully established their own Boer republics on the interior grass lands. But the constitutions of both the republics of the Orange Free State and the Transvaal (of 1852 and 1854) had denied all political rights to the African indigenous peoples. These constitutions had rather created populist white states based on universal male burgher rights.

In contrast, the British approach was to build constitutional arrangements in the colonies of the Cape and Natal, which followed classic, liberal, imperial precepts of colour-blind constitutions moving to ever greater local autonomy—from crown rule to representative to responsible government. But, and it is a big but, the British (a) allowed class qualifications in determining the criteria and qualifications for the franchise, which effectively limited African participation, and (b) instituted a highly significant development in a process of indirect rule to govern the great mass of tribal indigenous peoples, when they recognised traditional black

rulers in reserves or homelands which were defined by their own expansion. A key set of administrative seeds had been sown for the later apartheid architects.

Britain effectively decolonised South Africa as an imperial province after the Anglo-Boer war by establishing the Union of South Africa as a British dominion in 1910. Britain had actually won the war but lost the peace. Under the 1910 constitution the rights of Africans were enshrined in local autonomy, which of course meant that in the right circumstances they could be altered by South African politicians. That duly happened in the 1930s when black Africans were put completely beyond the pale of the constitution even though 'native representatives' (all white) were elected to the main Parliament. While parallel to that, systems of separate administration for the reserve homeland areas were instituted as part of a form of dual governments—one for the whites, one for the blacks. It was not a long step for the apartheid concept to emerge, which made the perverted but effective constitutional arrangement that Africans should have their rights secured in their own designated homeland territories. Black residents, the indigenous peoples of the country, overnight became foreign sojourners and workers in white South Africa.

There was of course significant opposition to all these trends, not least from black South Africans. The ANC has a proud tradition of challenge and contestation from the early part of the century. There is also a notable tradition of black trade union opposition, of white liberal (often Christian), radical and socialist opposition—which was ultimately ruthlessly crushed by the government in the 1950s. There was also a significant oppositional support overseas from opponents of apartheid, who included South Africans in exile. Indeed by the next decade when South Africa declared itself a republic (1961) outside the Commonwealth, and entered what I regard as its dark age of apartheid politics, the notion of constitutionalism had been thoroughly subverted to the service of white minority governments.

A new constitution was enacted in the 1980s which revealingly set out the mind-set of the rulers of South Africa. Not only was a powerful executive presidency created, with an executive presidential council (which included the military leaders) but a tricameral system of governance was projected, with parliamentary houses for different race groups—whites, coloureds, Asians—from whom the government would be drawn unequally and from which black South Africans were to be totally excluded. They had their rights, you will recall, set in their external homelands.

That system failed lamentably and the tradition of minority constitutionalism reasserted itself, only to be progressively made unworkable by forces of challenge within South Africa itself, by opposition including sanctions imposed externally, and by the extraordinary events surrounding the collapse of the Soviet system and the emergence of new alliances in world international politics.

The Government was moved in the 1980s to consider survival by other means of constitutional change. And the majority black South African liberation movement (ANC) came to the view that it should engage in what became effectively the negotiated revolution. The ANC brought with it a strong commitment to constitutional rule, to the rule of law within a democratic framework of principles—many of which had been reflected in the remarkable document of 1954, 'The Freedom Charter'.

The miracle of what then happened was, in my view, not so much the remarkable negotiations between the National Party (NP) and the ANC involving the oppositional commitment of the two parties to each other—but the very processes which framed the outcomes.

While there was still contention over what the outcomes might be, all parties became involved in the convention for a democratic South Africa (CODESA), which developed key principles for a new constitutional South Africa, agreed on the need for an interim constitution and a government of national unity after general elections, based on a new universal colour-blind franchise.

The ANC won nearly 63% of all the party vote, but there was notably little triumphalism and the new arrangements in the GNU assured proportional representation for all significant parties, something which has lasted until the 8th of May this year when Mr De Klerk withdrew the NP from the government. Yet even that development has not fatally undermined the broad movement towards a new constitution, which has been negotiated at frantic pace over the past two years in a massive national effort, and then referred to the Independent Constitutional Court for examination. The fact that this court raised eight areas of reservation where it believed the new constitution had failed to meet the agreed principles, remarkably and revealingly did not derail the entire process, rather all parties accepted the verdict of the court, indeed welcomed the challenges and went back to redrafting, leading to last week's outcome of declaring a constitution for the new South Africa.

Being a human story it is not going to be without its fallibilities and in this case the weaknesses have been enumerated in the debate over the constitution itself. They mainly focus on the extent to which the constitution adequately reflects the views of a pluralist South Africa and the degree to which it ultimately reflects the enormous support gained by the ANC in the 1994 elections. Certainly the ANC's own strong preference for a unitary style of state is fully evidenced in the constitution, and the role of the nine provinces in what is declared to be a federal constitution, is in fact subsidiary to the role of the centre. One perceptive South African political commentator, David Welsh, has termed the constitution 'unitary but with federalist fig leaves'.

Other concerns surrounding the constitution range from the degree to which it will gain support from the Inkatha Freedom Party in Natal to its capacity to encourage the emergence of a political culture in which parties cross the ethnic lines. So far, it has been said rather sharply, South African elections look more like the taking of a census, with parties essentially winning their own ethnic communities—with a small number of cross-over voters; whites, say, to ANC, or blacks to NP. The 1999 national elections, the first under the new constitution, will be a vital step in seeing the degree to which South Africa can develop a pluralist party system reflecting a pluralist society.

But I would simply, at this vantage point of 1996, remark on the positive elements in the story so far. They are so much more encouraging than the history of constitutionalism in South Africa before 1990 and they suggest the real possibility that South Africa may become a genuine democratic society under the rule of law in the next century.

There is a significant public commitment, to start with, in making that society, after the horrors of apartheid and also after the deep colonialism of minority governments preceding apartheid. There is a palpable yearning indeed in South African society for a non-racial order, and a questioning of ethnic alliances as a basis for politics itself.

The constitution—with its bill of rights, constitutional court and independent electoral commission—gives powerful signs of hope to a society that is painfully trying to reconstruct itself in conditions of dislocating change and difficulty, including a worrying culture of crime and lawlessness among groups either alienated from society or by simply opportunistic groups, both white and black.

When the *South Africa Act* establishing the Union of South Africa (1910) passed through the British House of Commons, the labour radical Keir Hardie commented that the motto of the new country could well be the old text, ‘Abandon all hope all ye who enter here.’

That cannot be said of the constitution of the ‘new’ South Africa. Translating hope into reality is now the quiet challenge for South Africa and its friends.