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Constitutional Options for a Democratic South Africa

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Book Reviews

Constitutional Options for a Democratic South Africa

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MOTALA, ZIYAD; CONSTITUTIONAL OPTIONS FOR A DEMOCRATIC SOUTH AFRICA; Howard University Press, Washington, D.C. (1994); \$39.95; ISBN 0-88258-187-2; 276 pp. (hardcover).

This volume begins with a descriptive analysis of the unjust South African political and social relations under the system of apartheid. It moves to a discussion of the new constitution which should bring a newer and more just South Africa. The author resists the temptation to get lost in unbounded academic optimism and instead presents a careful analysis of the causes which have led to and perpetuated the unjust system. This timely book may help to reverse the trend toward unexamined optimism which currently exists in South African politics.

First, the author provides a short analysis of the philosophical origins of liberal constitutions and of the implied meanings of democracy, federalism and past liberal experiences in post-colonial African states. After a description of African failures, Motala demonstrates how Western approaches to the South African constitutional problems are inadequate. In particular, these approaches fail to take into account that a mediating, politically neutral judiciary does not exist in South Africa. The author appears to adopt the classical position against legal positivism, claiming that politically installed "legal" procedures do not guarantee the existence of a "Rechtsstaat" in the true sense of the word. Motala's descriptive study of the inherently conservative classical South African legal system, favoring a political *status quo*, leads him to conclude that South Africa is in a situation comparable to post-World War II Germany. How could former positivist servants of Nazi law become loyal followers and cornerstones of a new democratic system?

The options for South Africa range from the radical solution of replacing each and every judge to the pacifist compromise of retaining the

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entire judicial system in the hope that a new constitution will solve this problem. The author rejects both extremes with the implicit argument that a legal order has to function to guarantee order, and by stating that the dangers of a "vague constitution (such as the United States)" could be overcome with a new and more precise Bill of Rights. However, the supreme authority of either a non-trained or non-trusted judiciary forces the author to discard the Anglo-American constitutional model. Using U.S. Supreme Court Justice Felix Frankfurter as a reference, Motala claims that the vigilance of the people over their political and judicial representatives is the sole efficient defense of the public good. This political statement, which could be seen as an interpretation of Aristotle's definition of man as a "political animal," leads the author to the Anglo-Germanic political model of courts of specific jurisdiction. Such specialized tribunals would be beneficial for South Africa because the highest legal positions available do not have to be filled by trained career judges. Furthermore, Motala envisions these judges as representative of all political forces in parliament.

This argument is weakened by its assumption of a stable political system. The West German and French models have been based on a relatively stable political system, which has yet to be established in South Africa. Whereas the post-war German legal system benefitted from stability under allied supervision, this is not likely to be repeated in South Africa today. Motala's assumption that the South African system could circumvent the stability problem overlooks the fact that all German parties had to accept a common, democratic ground before being permitted to enter the democratic system. Accordingly, the Neo-Nazi and Communist parties were excluded. A similar democratic foundation among the different social, tribal, and political forces is not in sight in South Africa. The Socialist-Marxist view, which Motala describes very well, prescribing all powers of the state to merge, seems to underline Motala's plan to merge politics with the judiciary by means of specialized courts. Motala's optimistic view that "the judicial function would be performed in terms of the values of the larger society" is questionable.

More promising, however, is his claim that the popular court structures at the lower level could be copied from Mozambique and other former Portuguese colonies. Here, the author realizes the implied danger of control by one-party governments in the Marxist tradition. With direct community involvement and simplified legal procedures, a new system of local responsibility could arise and help to solidify the democratic movement. As such, the democratic "virtues" could be experienced by South Africans and appreciated so as to form a democratic tradition.

However, the final conclusion of the book, espousing a "unitary form of the state," which emphasizes integration and national identity, could conflict with such local movements. Focusing on regularity as a necessary tool for a functional legal system seems to minimize the likelihood that local participatory structures will develop. It is not surprising that the author feels an urge to reintegrate the only *pro forma* independent home-

lands into a greater and unified South Africa. However, the true balance of power in the German system is probably less a function of its legislature and more a result of the *de facto* division of powers between relatively independent regional states and the central government. Implementing a similar federal structure in South Africa would go beyond the proposed and limited structural division desired for administrative purposes.

In respect to attempts to cut across racial and ethnic boundaries in South Africa, the Bosnian civil war comes to mind. Can we really risk putting people together who do not feel that they belong together? The French could be taken as a counter-example to successful integration. It should not be forgotten, however, that France was "created" by a form of inner-colonization which left no space for cultural or ethnic independence of its minorities, i.e. the Bretons and Occitans.

Motala's volume closes with a laudable proposal that a new South African constitution contain a core of individual rights, including labor rights, supported by far-reaching welfare rights akin to the German social "welfare constitution" of the state. Of special interest is Motala's warning against "strongman" rule and elite decision-making, both of which appear difficult to reconcile with two-chamber legislature politics. These could coexist provided that the "functional elites or the professional core" of the second chamber are viewed as representatives of the people. At this point, a federal constitution may be an appropriate tool to help overcome the potential for elitist and dictatorial tendencies.

Motala also makes an interesting suggestion that the terms of all public officers be limited. From a U.S. perspective, this system may appear tempting. Term limitations, however, may not allow the prospective officers to accumulate sufficient expertise in the allotted five-year period of time. Further, an inability to be re-elected may not cure the problem of irresponsible political behavior. The widely-praised Swiss example of rotating presidencies is properly rejected by the author. The possibility of poor political accountability in the executive branch alone is apparent. However, making the executive accountable to the legislature could, in effect, help to prevent the flaws, such as state bureaucracy, corruption and poor human rights, in the political systems of many African countries.

It could be argued that the perception of corruption depends largely on the eyes and conventions of the beholder. What appears to be corrupt for a Western, independent mind might be seen as an ethically-mandated fulfillment of clan or familial obligations in a non-Western system. Again, such problems could be alleviated by a federal structure.

The final analysis of constitutional options for South Africa is perhaps the most important. The comparison of Soviet Communism and liberal constitutionalism leads us to a compromise that is not simply a copy of continental European options. The central role of fundamental human rights, like the right to life, is perceived to be embedded in socioeconomic

and cultural rights. The author emphasizes that without the recognition of fundamental social and economic rights, stability and democratic development will fail in South Africa. He is willing, however, to enshrine a basic core of inviolable individual rights into the South African political system. Both principles have to be balanced. The historical liberal tradition which absolutely guarantees private property is, therefore, "not a viable option for a future South Africa."

Consequently, the author must refute the option of a plural paradigm which leaves the choice of rules to each segment of the population, because "its constitutional prescriptions would mean freezing the economic and social disparities in the population." In the epilogue, Motala requests a redistribution of land formerly taken from black owners so as to unfreeze of the economic *status quo*. Motala does realize that "the demand for a strong government in a new South Africa is not synonymous with unrestricted government."

Motala's final suggestion is a compromise, drawing "from the strengths of major traditions while rejecting what is not appropriate to the new South African order." One could only wish that some genuinely African tribal legal traditions will be included in a future analysis. It should also be noted that the praised social welfare models in Germany and Sweden have faced recent political challenges as well.

Notwithstanding, this book remains highly relevant for its description of the interim constitution in South Africa and the prospects for the future. Even after the negotiation of a permanent constitution, which started after the 1994 elections, the volume raises interesting constitutional questions not only regarding South Africa, but regarding all emerging democratic systems. This timely publication serves as a useful guidebook for a democratic South Africa.