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TOWARDS DEMOCRACY IN A NEW SOUTH AFRICA

ZIYAD MOTALA, CONSTITUTIONAL OPTIONS FOR A DEMOCRATIC SOUTH AFRICA: A COMPARATIVE PERSPECTIVE. Washington, D.C.: Howard University Press, 1994. vii + 276 pp.

*Reviewed by Adrien Katherine Wing**

Almost all fifty-two African countries have been undergoing dramatic political changes in the past few years.¹ Reforms have occurred at such a rapid rate that the period has been called the second independence of the continent.² After a post-colonial period typified by authoritarianism,³ military coups, one party states, ethnic rivalries, and dictatorships, the populace in many countries is clamoring for multiparty democracy,⁴ free market capitalism, and constitutionalism.⁵

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1. Adrien K. Wing, *Communitarianism vs. Individualism: Constitutionalism in Namibia and South Africa*, 11 WIS. INT'L L.J. 295, 305 (1993).

2. Colin Legum, *The Coming of Africa's Second Independence*, 13 WASH. Q. 129 (1990).

3. Samuel Decalo, *The Process, Prospects, and Constraints of Democratization in Africa*, 91 AFR. AFF. 7, 13 (1991). See generally 2 DEMOCRACY IN DEVELOPING COUNTRIES (Larry Diamond et al. eds., 1988).

The exceptions to authoritarianism are Botswana, Gambia, Mauritius, Zimbabwe, and Namibia, which have been democratic since their independence. See Larry Diamond, *Introduction: Roots of Failure, Seeds of Hope*, in 2 DEMOCRACY IN DEVELOPING COUNTRIES 1 (Larry Diamond et al. eds., 1988); John D. Holm, *Botswana: A Paternalistic Democracy*, in 2 DEMOCRACY IN DEVELOPING COUNTRIES, *supra*, at 179; Masipula Sithole, *Zimbabwe: In Search of Stable Democracy*, in 2 DEMOCRACY IN DEVELOPING COUNTRIES, *supra*, at 217; John Hatchard & Peter Slinn, *Towards an African Zimbabwean Constitution?*, in 1988 THIRD WORLD LEGAL STUD. 119 (1988); Edison Zvobgo, *The Zimbabwe Constitution After Four Years of Independence*, PUB. L. 447 (1984); Wing, *supra* note 1, at 329. There are semi-democratic cases as well. See Christian Coulon, *Senegal: The Development of Fragility and Semidemocracy*, in 2 DEMOCRACY IN DEVELOPING COUNTRIES, *supra*, at 141.

4. See generally 2 DEMOCRACY IN DEVELOPING COUNTRIES, *supra* note 3. Five concepts characterize western style democracy: popular participation, social equality, concern for the public welfare, united government, and a tradition of democratic behavior. Popular participation includes regular elections for governmental representatives and the ability to express opinions publicly. Social equality presumes that all members of a society have the ability to participate without discrimination on the basis of race, sex, color, ethnicity, religion, political opinion, or property ownership. Concern for the public welfare means that the government must hold "serving the people" as its primary objective. Seymour Martin Lipset notes the preconditions that made western democracy possible: an open class system, a capitalist economy, literacy, and a high degree of participation in voluntary organizations. Seymour M. Lipset, *Some Social Requisites of Democracy: Economic Development and Political Legitimacy*, in EMPIRICAL DEMOCRATIC THEORY 151 (Charles F. Chuddle & Deane E. Heubauer eds., 1969).

5. Wing, *supra* note 1, at 305. For an optimistic study regarding the existence of some

Democracy is based in part on constitutionalism, the creation of a culture in which the governing document is followed as a charter for the exercise and limit of official power.⁶ Constitutional structures must be established so that individual rights are guaranteed, but within a context that gives the government the ability to implement fundamental reforms and social reconstruction.⁷

Africa has been "a living laboratory for observing the interrelation between American, European and African ideas of constitutionalism."⁸ Unfortunately, this process has not necessarily resulted in documents that are consistent with the various legal and cultural traditions of the continent.

Constitution drafting sometimes seemed like participation in an elaborate buffet, with elegant constitutional provisions from other existing constitutions spread across the glittering sideboard, from which the constitution maker filled her plate to her taste. . . . Sentences, paragraphs, whole sections and chapters float from one constitution to the next.⁹

Many of these piecemeal constitutions have been symbolic at best, totally irrelevant at worst.¹⁰

Very few attempts to maintain democratic constitutions have prevailed over the three decades of independence.¹¹ The men and political factions whose forceful leadership served so well in the independence struggles often turned into petty despots.

democracies in Africa, see JOHN WISEMAN, *DEMOCRACY IN BLACK AFRICA: SURVIVAL AND REVIVAL* (1990).

6. Crawford Young, *The Debate on Democratization in Africa*, in KENNETH W. THOMPSON, *THE U.S. CONSTITUTION AND CONSTITUTIONALISM IN AFRICA* 121, 127 (1990).

7. Ralf Dahrendorf, *Europe's Vale of Tears*, *MARXISM TODAY* (1990), cited in Patrick Fitzgerald, *Democracy and Civil Society in South Africa: A Response to Daryl Glaser*, 49 *REV. AFR. POL. ECON.* 94, 109 (1990).

8. THOMPSON, *supra* note 6, at vii.

9. Robert B. Seidman, *Perspectives on Constitution-Making: Independence Constitutions for Namibia and South Africa*, 3 *LESOTHO L.J.* 45, 56 (1987).

10. According to Green, these constitutions

do not in any meaningful sense represent the goals or operating principles of any significant interest groups/sub-classes, are not seen as relevant to constitutional orders and exist because it is believed that, like national anthems, coats of arms and flags, constitutions and 'development plans' are something that states have to have for ceremonial and formal symbolic purposes.

Reginald H. Green, *Participatory Pluralism and Pervasive Poverty: Some Reflections*, *THIRD WORLD LEGAL STUD.* 21, 47 (1989).

11. See Harvey Glickman, *Frontiers of Liberal and Non-Liberal Democracy in Africa*, 23 *J. ASIAN & AFR. STUD.* 234 (1988).

[T]he elimination of [colonialism] does not guarantee freedom even for the formerly oppressed. History unfortunately records many examples of freedom fighters of one generation who become oppressors of the next. Sometimes the very qualities of determination and sense of being involved in a historic endeavour which give freedom fighters the courage to raise the banner of liberty in the face of barbarous repression, transmute themselves into sources of authoritarianism and historic forced marches later on. On the other occasions, the habits of clandestinity and mistrust, of tight discipline and centralized control, without which the freedom fighting nucleus would have been wiped out, continue with dire results into the new society.¹²

Kenyan professor Ali Mazrui describes the African state as "excessively authoritarian to disguise the fact that it is inadequately authoritative."¹³ Such states have failed to obtain legitimacy from their citizens, i.e., the people fail to accept authority without coercion because they do not believe that the ruling authority or processes are valid.¹⁴ Thus, "the future of democracy in Africa is at best uncertain, fragile, and contradictory."¹⁵ Serious doubts thus exist about the sincerity or ability of African countries to establish and sustain constitutional democracy, especially in poor multi-ethnic societies.¹⁶

Professor Ziyad Motala,¹⁷ a South African scholar on the faculty at Howard Law School, has written a well timed book concerning the democratic constitutional possibilities for the one African country with

12. ALBIE SACHS, *THE FUTURE CONSTITUTIONAL POSITION OF WHITE SOUTH AFRICANS* (1990), cited in Fitzgerald, *supra* note 7, at 108-09.

13. Ali Mazrui, *Political Engineering in Africa*, 25 INT'L SOC. SCI. J. 279, 293 (1983).

14. See generally Seymour M. Lipset, *Social Conflict, Legitimacy, and Democracy*, in LEGITIMACY AND THE STATE 88 (William Connolly ed., 1984); THOMAS M. FRANCK, *THE POWER OF LEGITIMACY AMONG NATIONS* 15 (1990); 1 MAX WEBER, *ECONOMY AND SOCIETY* (Gunther Roth & Claus Wittich eds., 1968). The term legitimacy is used here in the sociological sense. It is not the philosopher's concept of moral legitimacy. For a discussion of moral legitimacy, see e.g., David Hume, *On the Original Contract*, in *ESSAYS: MORAL, POLITICAL & LITERARY* 465 (Eugene Miller ed., 1985); Ken Kress, *Legal Indeterminacy*, 77 CAL. L. REV. 283 (1989).

15. Robert Fatton, *Democracy and Civil Society in Africa*, 2 MEDIT. Q. 83, 95 (1991). Some commentators doubt the sincerity or ability of African states to sustain democracy, given the lack of democratic traditions in multi-ethnic societies — especially under conditions of extreme poverty. See Richard Sandbrook, *Taming the African Leviathan*, 7 WORLD POL'Y J. 673, 679-85 (1990).

16. Sandbrook, *supra* note 15; see also Harvey Glickman, *Frontiers of Liberal and Non-Liberal Democracy in Tropical Africa*, 23 J. ASIAN & AFR. STUD. 234 (1988).

17. Professor Motala was born and educated in South Africa. He received his B.A. and L.L.B. from the University of Natal at Durban. He earned his L.L.M. and S.J.D. from Northwestern University School of Law in Chicago, Illinois.

perhaps the greatest potential to succeed: the new South Africa.¹⁸ With the electoral victory of the African National Congress (ANC) in the April 1994 elections,¹⁹ the nation will be subject to an interim constitution for the next five years.²⁰ By 1996, the new Parliament sitting in its alternative role as constitutional assembly, must draft and approve a permanent constitution.²¹ Although the book was primarily written prior to the passage of the interim document, this study makes a major contribution to the permanent constitutive process by gathering together the various options for consideration. The purpose is not to create a blueprint, but to outline the broad parameters of constitutional choice and direction in which "constitutional engineers" should be thinking.²²

The author operates under three basic premises. First, he feels that any new constitutional order must go beyond elite decisionmaking to mass participation.²³ The new South African Minister of Justice, Abdullah Omar, echoes Professor Motala's concerns with respect to the constitution making process itself. "*How can we ensure that our people who have offered so many sacrifices in struggle, so many deaths, so many hardships, imprisonment, detentions, fights and confrontations with the system are not bypassed in the process of constitution-making?*"²⁴

Second, Motala calls for the constitutional order to have the capability to effect a socioeconomic transformation for the excluded South African majority.²⁵ The masses have suffered under several centuries of discrimination and oppression, including the official apartheid legacy.²⁶

18. ZIYAD MOTALA, *CONSTITUTIONAL OPTIONS FOR A DEMOCRATIC SOUTH AFRICA: A COMPARATIVE PERSPECTIVE* (1994).

19. The African National Congress (ANC) won 62.65% of the votes in South Africa's first multi-racial democratic election. *South African Vote Election Declared Fair; ANC Wins Nearly 63%*, ATLANTA J., May 6, 1994, at A8.

20. See S. AFR. CONST. (1993).

21. *Id.* at art. 73.

22. MOTALA, *supra* note 18, at 1.

23. *Id.*

24. Abdullah M. Omar, *Combative's First Decade of Political Independence: Lessons for South Africa and Namibia* (Aug. 1990) (unpublished paper on file with author) (emphasis in original).

25. MOTALA, *supra* note 18, at 1.

26. *Id.* at 1. Apartheid has been described as a "complex set of practices of domination and subjugation, intensely hierarchized and sustained by the whole apparatus of the state which affects the distribution of all values." MYRES S. MCDUGAL ET AL., *HUMAN RIGHTS AND THE WORLD PUBLIC ORDER* 523 (1980). The roots of apartheid are found in the national socialist policies of Nazi Germany and the fascist policies of Italy under Mussolini. See generally BRIAN BUNTING, *THE RISE OF THE SOUTH AFRICAN REICH* 54-68 (1986) (discussing the influence of the Nazis on the members of the Nationalist Party and Afrikaner leadership, many of whom sided with the Nazis against the Allies).

Apartheid affected every area of life, including housing, land ownership, education, health, employment, judicial administration, freedom of speech and association, public accommodation, and marriage.²⁷

Third, the author wants a constitutional order that can bridge the divisiveness engendered by apartheid to create a unitary South Africa.²⁸ This divisiveness has included racial and ethnic tensions between the major groups. Those designated white held protected positions at the top of the hierarchy, with the somewhat larger British group dominating the economic sphere and the Afrikaners dominating the political sphere under the leadership of the National Party.²⁹ The mixed race Coloureds³⁰ and the Asians constituted buffer groups between whites and blacks and held relative positions of privilege.

27. The Population Registration Act of 1950 classified everyone as either White, Coloured, Indian, or Black. Population Registration Act, Act No. 30 of 1950, S. Afr. Stat. 275, 279 (1950).

No interracial sex or marriage was allowed under the Immorality Act. Immorality Act, Act No. 23 of 1957, S. Afr. Stat. 276 (1957), and Prohibition of Mixed Marriages Act, Act No. 55 of 1949, S. Afr. Stat. 614 (1949).

The Group Areas Act mandated segregated living conditions. Group Areas Act, Act No. 36 of 1966, S. Afr. Stat. 141 (1966). Pass laws required that every black show his or her pass authorizing him or her to be in a white area. Separate black homelands known as "bantustans" were created for the different black ethnic groups, and four of these homelands opted for so-called independence between 1976 and 1981. LEONARD THOMPSON, *A HISTORY OF SOUTH AFRICA 191-94* (1990); see also John Dugard, *South Africa's "Independent" Homelands: An Exercise in Denationalization*, 10 DENV. J. INT'L L. & POL'Y 11 (1980); Henry J. Richardson, *Self-Determination, International Law and the South African Bantustan Policy*, 17 COLUM. J. TRANSNAT'L L. 185 (1978). The so-called independent homelands were Transkei, Venda, Bophutatswana, and Ciskei, and the remainder were Lebowa, Qwa-Qwa, Kwazulu, KaNagwane, Gazanklu, and KwaNdebele. JOHN DUGARD, *HUMAN RIGHTS AND THE SOUTH AFRICAN LEGAL ORDER 93-94* (1978). See also A. Leon Higginbotham et al., *De Jure Housing Segregation in the United States and South Africa: The Difficult Pursuit for Racial Justice*, 1990 ILL. L. REV. 763, 778-82 (1990); LAURINE PLATZKY & CHERRYL WALKER, *THE SURPLUS PEOPLE: FORCED REMOVALS IN SOUTH AFRICA* 16 (1985).

The Separate Amenities Act segregated all facilities such as public toilets, parks, schools, sports, public transport, etc. Reservation of Separate Amenities Act, Act No. 49 of 1953, S. Afr. Stat. 311 (1953). The legacy of apartheid in education is revealed by the fact that 30% of South Africa's 11 million workers have no education, and only 36% have been to primary school. Only 7% of those blacks who made it to their secondary school final exams passed, as compared to 97% of the whites. SEBASTIAN MALLABY, *AFTER APARTHEID: THE FUTURE OF SOUTH AFRICA* 68-69 (1992).

28. *Id.* at 1.

29. A history of the South African conflict is beyond the scope of this review. For a discussion of the white tribes, English, and Afrikaners, see MALLABY, *supra* note 27, at ch. 3. The Afrikaners are descendants of Dutch immigrants who came to the Cape of Good Hope in 1652, fleeing religious persecution. For more on the Afrikaners, see, e.g., THOMPSON, *supra* note 27; ROBERT LACOUR-GAYET, *A HISTORY OF SOUTH AFRICA* (Stephen Hardman trans., 1970).

30. The Coloureds are the descendants of Africans who intermixed with Afrikaners and others.

A unique feature of Motala's comparative approach is his decision to include the experience of African countries rather than just Europe or the United States. He evaluates constitutional models based upon their potential for achieving the goals of democracy, socioeconomic transformation, and national unity.³¹ Additionally, Motala explores the three broad schools of political thought with historical relevance to Africa: liberalism, scientific socialism, and African socialism. Despite the downfall of the Soviet Bloc and the resultant international discrediting of doctrinaire socialism, he does not ignore the socialist influences on the continent. He looks at how each school has influenced Africa and South Africa, as well as how its constitutional theory views the public exercise of power.³²

The book not only examines constitutional texts but places them within the context of culture, and details the institutions and rules that accompany them.³³ Motala understands that constitutions are not neutral documents, and that law can not be separated from politics.³⁴ In addition, the relevance for South Africa is always elaborated.

I. PHILOSOPHICAL ORIGINS OF LIBERAL CONSTITUTIONS

Professor Motala starts out his study by distinguishing constitutions from constitutionalism. He notes that the latter concept includes not only the written document, but the norms and institutional frameworks that underly it.³⁵ The first chapter analyzes the philosophical notions of constitutionalism from the perspective of the western liberal tradition. This tradition emphasizes individual rights and the free enterprise system.³⁶ The three branches have separate powers, and there are regular elections, as well as a multi-party political system.³⁷ Government is

31. MOTALA, *supra* note 18, at 2.

32. *Id.*

33. According to John Merryman, legal systems are composed of legal rules, institutions, processes, culture, extension, and penetration. JOHN BARTON ET AL., *LAW IN RADICALLY DIFFERENT CULTURES* 3 (1983).

34. MOTALA, *supra* note 18, at 3.

35. MOTALA, *supra* note 18, at 6; Giovanni Sartori, *Constitutionalism: A Preliminary Discussion*, 56 AM. POL. SCI. REV. 853 (1962). According to Nwabueze, the constitution is both a symbol and instrument of constitutionalism. BENJAMIN O. NWABUEZE, *CONSTITUTIONALISM IN THE EMERGENT STATES* 23 (1973).

36. For a discussion of the liberal tradition, see MARY ANN GLENDON ET AL., *COMPARATIVE LEGAL TRADITIONS: TEXT, MATERIALS AND CASES ON THE CIVIL LAW, COMMON LAW AND SOCIALIST LAW TRADITIONS, WITH SPECIAL REFERENCE TO FRENCH, WEST GERMAN, ENGLISH AND SOVIET LAW* (1984).

37. MOTALA, *supra* note 18, at 7.

limited in both its powers and procedures, and rights are enforceable by an independent judiciary.³⁸

The author continues by noting that the South African constitution has been an outgrowth of the British Westminster system, since South Africa is a former British colony.³⁹ Unfortunately, the transplanted system of parliamentary supremacy and weak separation of powers turned into a nightmare in South Africa. It became

a disease that grew and developed from what was effective government in Britain, given to the hard won affirmation of individual rights, into a monster that eventually devoured justice itself when transplanted into colonial South Africa. In brief the monster has two limbs: the unrestrained supremacy of Parliament and the constitutional denial of democracy, both of which resulted in an all powerful white racist rule.⁴⁰

The rule of law, in the narrow sense of certain and clear rules, was lacking in the apartheid state. The exercise of power was often arbitrary, as evidenced by the various emergency laws⁴¹ and States of Emergency.⁴² Motala classifies the apartheid legal system as being part of the repressive machinery of the state in the orthodox Marxist sense.⁴³ Despite the racism and repression in the legal system for the black popula-

38. *Id.*

39. *Id.* at 11. The South African legal system is a composite of African indigenous, Roman, Dutch, and English influences. The Roman Dutch law is a hybrid of the Roman and Germanic custom used in Holland in the seventeenth and eighteenth centuries. Higginbotham, *supra* note 27, at 777 n.50.

40. Charles Villa Vicencio, *Whither South Africa? Constitutionalism and Law Making*, 40 EMORY L.J. 141, 145 (1991).

41. The vast array of security laws resulted in the arrest, detention, imprisonment, torture, and banning of thousands of South Africans, without the protections of due process or right to counsel. These laws are discussed in DUGARD, *supra* note 27; ANTHONY S. MATHEWS, FREEDOM, STATE SECURITY AND THE RULE OF LAW: DILEMMAS OF THE APARTHEID SOCIETY (1986); Lynn Berat, *The South African Judiciary and the Protection of Human Rights: A Strategy for a New South Africa*, 5 TEMP. INT'L & COMP. L.J. 181 (1991). The laws included the Suppression of Communism Act of 1950, Act No. 44, S. Afr. Stat. 549 (1950), later renamed the Internal Security Act of 1976, Act No. 79, 8 STATUTES OF THE REPUBLIC OF SOUTH AFRICA 921 (Butterworths, 1976); Criminal Law Amendment Act of 1953, Act No. 8, S. Afr. Stat. 35 (1953); Public Safety Act of 1953, Act No. 3, S. Afr. Stat. 12 (1953); Sabotage Act of 1962, Act No. 76, S. Afr. Stat. 1371 (1962); Terrorism Act of 1976, Act No. 83, S. Afr. Stat. 605 (1976); Internal Security Act of 1982, Act No. 74, 8 STATUTES OF THE REPUBLIC OF SOUTH AFRICA 1291 (Butterworths, 1982).

42. Berat, *supra* note 41, at 192. States of Emergency were declared three times since 1960, with the most recent in June 1986. Proclamation 108 of 1986 in GOVERNMENT GAZETTE, June 12, 1986, at 10279.

43. MOTALA, *supra* note 18, at 13. For a view that South Africa did conform to a repressive model of law, see JOHN HUND & HENRIK W. VAN DER MERWE, LEGAL IDEOLOGY AND POLITICS IN SOUTH AFRICA: A SOCIAL SCIENCE APPROACH 11 (1986).

tion and their supporters, the same system operated as a liberal capitalist democracy for the benefit of the white minority.⁴⁴

II. DEMOCRACY: MEANING AND INTERPRETATION

The next chapter explores present conceptions of democracy in western liberal, communist, and traditional African societies. Professor Motala first sketches the traditional liberal view of direct participatory democracy of all citizens as espoused by the Greeks and French philosopher Jean Jacques Rousseau.⁴⁵ He notes that this concept did not include slaves or women in its concept of equality among citizens.⁴⁶

The revisionist approach to liberal democracy rejects the traditional one as too idealistic and unwieldy for a large population. It favors instead a representational democracy, in which concerned citizens entrust elected officials with decision-making power.⁴⁷ Equality of opportunity to elect officials and not equality of actual power is the goal.⁴⁸ Modern liberal theory describes the prevailing system and legitimates it, rather than challenge its assumption that everyone has equal opportunities to participate.⁴⁹ The reality is that those with greater financial resources can manipulate the political process.⁵⁰

Motala next discusses communism and Marxism. Karl Marx saw communism as ideal democracy, whereas capitalism perpetuated class inequalities. The only solution was the overthrow of capitalism and its replacement with democratic socialism where all class distinctions were eliminated. The status of workers would be thus enhanced and there would be a dictatorship of the proletariat, which would be the agent for effecting the transformation to democracy.⁵¹ Motala notes that the elite rule that developed in the former Soviet Bloc was not what Marx had in

44. MOTALA, *supra* note 18, at 14.

45. Jean Jacques Rousseau, *The Social Contract*, in SOCIAL CONTRACT: ESSAYS BY LOCKE, HUME, AND ROUSSEAU (Ernest Barker trans., 1962).

46. MOTALA, *supra* note 18, at 31 n.12.

47. See ROBERT A. DAHL, DILEMMAS OF PLURALIST DEMOCRACY: AUTONOMY VS. CONTROL 10-11 (1982); ROBERT A. DAHL, WHO GOVERNS? DEMOCRACY AND POWER IN AN AMERICAN SOCIETY 311 (1961).

48. MOTALA, *supra* note 18, at 22.

49. *Id.* at 23.

50. See Arthur Miller, *On Politics, Democracy, and the First Amendment: A Commentary on First National Bank v. Bellotti*, 23 WASH. & LEE L. REV. 38 (1981).

51. See KARL MARX ET AL., ON THE DICTATORSHIP OF THE PROLETARIAT: A COLLECTION 5 (1984); KARL MARX & FREDERICH ENGELS, THE COMMUNIST MANIFESTO (Samuel Moore trans., 1948).

mind.⁵² Lenin expanded Marx' conceptions by noting that the workers did not possess the mentality to engage in democratic transformation on their own. There had to be a vanguard movement to lead them.⁵³ This elitist element came to characterize the Soviet Bloc, and Motala finds it clearly undemocratic.

Professor Motala next moves on to the conception of democracy within traditional African societies. These cultures are based upon communitarianism, rather than the western notion of liberalism. Communitarianism is concerned with an emphasis on various kinds of groups, such as the family, ethnic groups, and community organizations, and the duties and obligations that one has to such groups.⁵⁴ African custom and religion, which form the backdrop of communitarianism, have mandated obedience to a traditional ruler. This chief was always a male from the appropriate lineage. He may have solicited advice from elder males who represented certain clans or groups, and often consensus decisions were reached after prolonged consultation between the elders and the chief.⁵⁵ As was the case with Athenian democracy and early American democracy, women were excluded from the formal process.⁵⁶ The socioeconomic system was communal, with property being held by the clan or tribe. Private property ownership did not exist and the tribe looked out for the welfare of all its members.⁵⁷

III. STATE ORGANIZATION AND FEDERALISM IN AFRICA

The book next goes on to highlight the primary differences between the unitary and federal forms of a state, especially as seen in the African context. Some African nations such as Nigeria, Kenya, Uganda, and Ghana, became federal states at independence as a means to implement

52. MOTALA, *supra* note 18, at 27.

53. See VLADIMIR LENIN, *WHAT IS TO BE DONE?* (Joe Fineburg & George Hanna trans., 1988).

54. See generally Wing, *supra* note 1. For more on communitarian theory, see MICHAEL SANDEL, *LIBERALISM AND THE LIMITS OF JUSTICE* (1982); ALASDAIR MACINTYRE, *AFTER VIRTUE: A STUDY IN MORAL THEORY* (1981); MICHAEL WALZER, *SPHERES OF JUSTICE* (1983); Clarke E. Cochran, *The Thin Theory of Community: The Communitarians and their Critics*, 32 POL. STUD. 422 (1989); Michael Walzer, *The Communitarian Critique of Liberalism*, 18 POL. THEORY 6 (1990).

55. For a discussion of traditional decisionmaking, see JARAMOGI O. ODINGA, *NOT YET UHURU: THE AUTOBIOGRAPHY OF OGINGA ODINGA* 12 (1967); KOFI A. BUSIA, *AFRICA IN SEARCH OF DEMOCRACY* 23 (1967); KOFI A. BUSIA, *THE POSITION OF THE CHIEF IN THE MODERN POLITICAL SYSTEM OF THE ASHANTI* 14-16 (1968).

56. MOTALA, *supra* note 18, at 35 n.118.

57. Ziyad Motala, *Human Rights in Africa: A Cultural, Ideological and Legal Examination*, 12 HASTINGS INT'L & COMP. L. REV. 373, 382 (1989).

powersharing among the various ethnic, religious, and linguistic groups.⁵⁸

It is here that Motala first discusses the notion of consociational democracy, which he sees as a form of federalism. It has been used successfully in societies such as Switzerland, the Netherlands, and Austria to protect the political and cultural status of distinct ethnic, racial, or religious groups. Consociation is based upon the notions of executive power sharing among the groups, segmental autonomy of each group, group proportionality in all institutions of government, and minority group veto power.⁵⁹ In the 1970s and 1980s, some South African political theorists and governmental officials considered adopting consociational democracy as a possible compromise between the apartheid status quo and Westminster democracy.⁶⁰

IV. WESTERN CONSTITUTIONAL MODELS AND GOVERNMENT IN AFRICA

In Chapter Five, Professor Motala focuses on the distinctions between the powers of different branches of government in the Westminster parliamentary system of Great Britain, the French Presidential system, and the federal presidential model of the United States.⁶¹ Another alternative is presented in the German federal parliamentary system with its notion of the welfare state, which guarantees economic, social,

58. For a discussion of sources on federalism in Africa, see KOFI A. BUSIA, *AFRICA IN SEARCH OF DEMOCRACY*, *supra* note 55; OBAFEMI AWOLOWO, *THOUGHTS ON THE NIGERIAN CONSTITUTION* (1966); R.B. NEUBERGER, *CONCEPTS OF NATIONHOOD IN THE THOUGHT OF SELECTED AFRICAN LEADERS* 204 (1975); BENJAMIN O. NWABUEZE, *A CONSTITUTIONAL HISTORY OF NIGERIA* (1982); T.O. ELIAS, *NIGERIA: THE DEVELOPMENT OF ITS LAWS AND CONSTITUTION* 121 (1967); BENJAMIN O. NWABUEZE, *PRESIDENTIALISM IN COMMONWEALTH AFRICA* 139 (1974); S.A. DE SMITH, *THE NEW COMMONWEALTH AND ITS CONSTITUTIONS* 263 (1964).

59. For the writings of its major proponent, Arend Lijphart, see, e.g., AREND LIJPHART, *DEMOCRACY IN PLURAL SOCIETIES: A COMPARATIVE EXPLORATION* 25 (1977).

60. See S. Venter, *Some of South Africa's Political Alternatives in Consociational Perspective*, *S. AFR. INT'L* 129, 131 (1981); Arend Lijphart, *Federal, Confederal, and Consociational Options for the South African Plural Society, in CONFLICT AND COMPROMISE IN SOUTH AFRICA* (Robert I. Rotberg & John Barratt eds., 1980); N.J. Rhoadie, *Value Consensus as a Prerequisite for Consociationalism in Southern Africa, in POLITICAL ALTERNATIVES FOR SOUTHERN AFRICA* 486 (D.J. Van Vuuren & D.J. Kriek eds., 1983); AREND LIJPHART, *POWER-SHARING IN SOUTH AFRICA* (1985); LAURENCE J. BOULLE, *CONSTITUTIONAL REFORM AND THE APARTHEID STATE: LEGITIMACY, CONSOCIATIONALISM AND CONTROL IN SOUTH AFRICA* (1984). For a critique of consociation, see John McGarry & S.J.R. Noel, *The Prospects for Consociational Democracy in South Africa*, 17 *J. COMMONWEALTH COMP. POL.* 3 (1989).

61. MOTALA, *supra* note 18, at 46.

and cultural rights through government intervention.⁶² Consociation as a type of federalism in western European nations is discussed in more detail than in the previous chapter.⁶³

The British and French models have been particularly popular in Africa due to the large number of former colonies of these two nations.⁶⁴ One difference from Great Britain in the former British colonies was that the parliamentary system was introduced within a federal rather than unitary state. This was the case in Nigeria, Uganda, Ghana, and Kenya. Additionally, these countries incorporated a bill of rights, which is not the case in Great Britain.⁶⁵ Professor Motala notes that liberal approaches to constitutional change in South Africa have shifted from the simple federal system of the United States to a model advocating the protection of group identity and group rights within a consociation framework.⁶⁶

V. SOUTH AFRICAN CONSTITUTIONS AND GOVERNMENT

The book next provides a detailed overview of the various constitutions and governments of South Africa. The South Africa Constitution Act of 1909⁶⁷ introduced a variant of the British Westminster system within a unitary state of four provinces. Blacks and Coloureds were on a common voting roll with whites, and could vote, at least theoretically, in two provinces. In practice, however, few could actually vote due to income and property requirements. In 1936 Blacks were removed from the common voting roll, and Coloureds were removed in 1956.⁶⁸

Although racism was a part of white domination before 1948, apartheid as a legal system of official racial segregation was instituted when the Nationalist Party came into power that year.⁶⁹ The new governing party decided to create separate "nations" for the various disen-

62. *Id.* at 54.

63. *Id.* at 57.

64. Former British colonies in Africa include: Botswana, Ghana, Nigeria, Kenya, Uganda, Tanzania, Zambia, and Zimbabwe. Francophonic Africa includes: Benin, Togo, Mali, Gabon, Senegal, Guinea, Upper Volta, Ivory Coast, Niger, Morocco, and Algeria.

65. MOTALA, *supra* note 18, at 61.

66. *Id.* at 62.

67. South Africa Act, Sept. 20, 1909, 9 Edw. 7, ch. 9, pt. II (1909), reprinted in HENRY MAY, SOUTH AFRICAN CONSTITUTION, (1st ed. 1950), at appendix 48.

68. See Representation of Natives Act, Act No. 12, 10 UNION STATUTES (1910-1947) 443, 449-53 (1936); Separate Representation of Voters Act, Act No. 30, S. Afr. Stat. 443 (1956).

69. See generally THOMPSON, *supra* note 27. The Nationalist Party was influenced by the Nazis and the fascist policies of Mussolini's Italy. See BRIAN BUNTING, THE RISE OF THE SOUTH AFRICAN REICH (1986).

franchised black ethnic groups. In theory, blacks would lose their South African citizenship and gain citizenship in their ethnic homeland, when it became an independent nation, even if they had never visited those desolate places.⁷⁰ Four of these homelands, Transkei, Venda, Ciskei, and Bophutatswana, were eventually granted independence, which no country recognized except South Africa. Millions of black South Africans were thus forcibly stripped of their citizenship.

In 1983, the last apartheid constitution was passed, and it radically altered the Westminster tradition even further by combining a parliamentary system with a presidential model.⁷¹ While the blacks were still excluded, Coloureds and Indians were now entitled to vote for racially separate houses in a tricameral parliament.⁷² The president was elected for a five year term by an electoral college made up of members of the three houses, in a ratio of four whites: two Coloureds: and one Indian.⁷³ All matters relating to blacks were left within the state president's authority.⁷⁴

VI. FEDERALISM AND LIBERAL CONSTITUTIONS IN AFRICAN STATES

Chapter Seven focuses on the successes and failures of African states with the federal and liberal constitutional model. Professor Motala concludes that such constitutional transfers have been a failure in Africa because of their inability to deal with issues such as national unity and socioeconomic change.⁷⁵ The federal model has fostered African ethnic conflicts, rather than minimized them, and the author is skeptical that such models are appropriate for culturally diverse countries.⁷⁶ United States federalism is not based at all on cultural, religious, or ethnic differences. In Africa, citizens retain allegiance to their ethnic group which is politically empowered within the federal system, rather than gaining a new sense of national consciousness.⁷⁷ Political upheavals

70. The Bantu Homeland Citizenship Act of 1970, Act No. 26, S. Afr. Stat. 1771, 1776 (1970).

71. See Republic of South Africa Constitution Act, Act No. 110, entered into force Sept. 3, 1984, S. Afr. Stat. 1301 (1983).

72. *Id.* art 52, S. Afr. Stat. at 1333.

73. *Id.* art. 7 (1)(b), S. Afr. Stat. at 1305.

74. *Id.* art. 93, S. Afr. Stat. at 1355.

75. MOTALA, *supra* note 18, at 84.

76. *Id.* at 85.

77. S.A. DE SMITH, THE NEW COMMONWEALTH AND ITS CONSTITUTION 117 (1964).

have been experienced in such federal states as Congo (Zaire), Uganda, and Nigeria.⁷⁸

In an era of limited economic resources, it has been too expensive to maintain regional and national organs of government within the federal model in Africa. Vast disparities in economic development have occurred in federal states, with the more powerful ethnic groups being able to redirect resources in a disproportionate manner.⁷⁹

One problem with Professor Motala's argument is that he seems to blame ethnic breakdown on the federal form of the state. Many African nations have experienced ethnic tensions and violence even within a unitary framework. The Hutus and Tutsis of Rwanda do not live in a federal state, but have managed to take ethnic cleansing to a new level on the African continent.⁸⁰ The Arab northern Sudanese and the African Christian or animist southern Sudanese have managed to keep a civil war going for many years in a unitary state.⁸¹ It would be very difficult to factor out what fraction of the violence in some countries may be due to the federal nature of the state. At the end of the twentieth century, we are seeing a resurgence of ethnic violence in formerly peaceful Yugoslavia, based on tensions that go back hundreds of years. The former Soviet Union is threatening to break up into smaller and smaller ethnic enclaves. Africa may just be the most uninterrupted example of ethnic tensions spanning a wide variety of governmental frameworks.

Professor Motala definitively rejects the federal or consociational model in the South African context.⁸² According to Motala, this notion of pluralism is inappropriate in the South African context because it is ahistorical and fails adequately to describe the influence of apartheid on ethnic divisions.⁸³ The only ones to benefit from a South African federal model would be those whites and homeland leaders who already hold a disproportionate share of political and economic power. Decentralizing authority on such matters as education, culture, and business to the local level would leave the national government with limited power and

78. For more on these conflicts, see MICHAEL A. TABUWE, *THE ONE PARTY SYSTEM AND AFRICAN TRADITIONAL INSTITUTIONS* 19 (1980); RONALD L. WATTS, *NEW FEDERATIONS: EXPERIMENTS IN THE COMMONWEALTH* (1966); NWABUEZE, *supra* note 58.

79. MOTALA, *supra* note 18, at 86-87.

80. For an example of the numerous articles on Rwanda, see Sonja Pace, *Scenes from A Nightmare*, *AFR. REP.*, Jan.-Feb. 1995, at 41.

81. See Angela M. Lloyd, *The Southern Sudan: A Compelling Case for Secession*, 32 *COLUM. J. TRANSNAT'L L.* 419 (1994).

82. MOTALA, *supra* note 18, at 2.

83. *Id.* at 2-3.

resources to effect socioeconomic change for the majority of South Africans.⁸⁴

Instead of the federal model, Professor Motala espouses a unitary system that institutionalizes civil and political equality and downplays ethnic privileges. Improving educational and occupational opportunities would lessen conflict between groups and enable the government to produce socioeconomic transformation. The constitution must actually foster national unity and assist in the restructuring of civil society.⁸⁵

While I agree with Professor Motala's goals, I do not see how they will be attained in the current world economy. Africa is falling further and further behind, and is wracked by disease,⁸⁶ drought, and a lack of markets for the limited crops or products that it does produce. In conditions of deep poverty, there would be an inevitable scramble for scarce resources, even if all citizens were of the same ethnicity. Can democracy exist, much less flourish, in such an environment? This sort of question would have been very interesting to analyze within the African context.

Some African political elites and scholars have justified the lack of democracy by citing the need to protect weak states from ethnic tension.⁸⁷ Others have claimed that urgent economic development does not permit democratic debate.⁸⁸ According to some political theorists, democracy can not take root in Africa because it lacks the necessary preconditions: widespread literacy, a high per capita income, a sizeable middle class, a vibrant civil society, strong independent public institutions, national rather than ethnic political parties, and a political culture of tolerance, debate, and compromise.⁸⁹ Other theorists have reversed the analysis. They claim that the lack of democracy is the cause of continued poverty on the continent.⁹⁰ An analysis of these possibilities would have enhanced Motala's study, and made it even more useful for resource strapped African nations.

84. *Id.* at 88.

85. *Id.* at 100.

86. As an example of the diseases affecting the continent, there are more than two million adults with AIDS, two-thirds of the present world total. Wilson Wanene, *AIDS: Pioneering Africa's Research*, AFR. REP., Jan.-Feb. 1995, at 45, 46.

87. Wing, *supra* note 1, at 308.

88. Carol Lancaster, *Democracy in Africa*, 85 FOREIGN POL'Y 148, 149 (1991-92).

89. *Id.* at 157.

90. These sentiments were expressed by delegates at the United Nations Economic Commission for Africa, held in Arusha, Tanzania, in 1990. The African Charter for Participation in Popular Development was adopted. Anacleto Rwagayura, *Africa: Putting People First in Development*, Inter Press Service, Feb. 12, 1990, available in LEXIS, Nexis Library, Inpress File.

VII. THE SOVIET CONSTITUTIONAL MODEL AND AFRICAN MARXIST STATES

After expressing his skepticism about the federal model for South Africa, Professor Motala discusses various socialist models. In contrast to the liberal view, some Marxist theorists see law as an instrument of class rule.⁹¹ Marxist theory interprets the trappings of the liberal state, such as parliamentary democracy, as frauds disguising the reality of oppression and exploitation.⁹² On the other hand, there are socialist theorists who support several liberal assumptions, such as the need for the rule of law. For them the rule of law is necessary because it effectively inhibits the use of power.⁹³ According to classical Marxism, the law becomes unnecessary as the state eventually withers away.⁹⁴

Modern Marxist theorists have had to explain the fact that the state in the former Soviet Union did not wither away. In contrast to liberal theory, which strives for the separation of the state and the individual, Marxist theorists maintain that the state in the communist order was not coercive and was merged with society.⁹⁵ Since the state and society were one, there was no need to espouse separation of powers in the Soviet constitutional system. Following the Leninist concept of a vanguard party, the Communist Party played a dominant role.⁹⁶ Although federalism existed in the former Soviet Union, with the fifteen republics based on ethnic clusters, there was no strict demarcation of power between the national and local levels.⁹⁷

Motala next discusses three countries in Africa that pursued the Soviet model of constitutionalism. These were Angola, Guinea-Bissau, and Mozambique, which all fought prolonged guerrilla wars against the Portuguese.⁹⁸ The contradiction within these countries, according to

91. HUGH COLLINS, *MARXISM AND LAW*, ch. 2 (1982).

92. MOTALA, *supra* note 18, at 110.

93. *See e.g.*, EDWARD P. THOMPSON, *WHIGS AND HUNTERS: THE ORIGIN OF THE BLOCK ACT 266* (1975).

94. VLADIMIR LENIN, *STATE AND REVOLUTION*, ch. 5 (1932).

95. WILLIAM G. ANDREWS & FRANZ D. SCHOLZ, *SOVIET INSTITUTIONS AND POLICIES: INSIDE VIEWS* 53 (1966).

96. MOTALA, *supra* note 18, at 114.

97. *Id.* at 115.

98. For further discussion, see LUIS B. SERAPIO & MOHAMED A. EL-KHAWAS, *MOZAMBIQUE IN THE TWENTIETH CENTURY: FROM COLONIALISM TO INDEPENDENCE* (1979); KEITH SOMERVILLE, *ANGOLA: POLITICS, ECONOMICS AND SOCIETY* (1986); BASIL DAVIDSON, *GROWING FROM THE GRASSROOTS: THE STATE OF GUINEA-BISSAU* (1974); LARS RUDEBECK, *GUINEA-BISSAU: A STUDY OF POLITICAL MOBILIZATION* (1974); JOSEPH HANLON, *MOZAM-*

Motala, was that they espoused mass political participation while maintaining the notion of the vanguard party. The democratic centralism of these countries meant that decisions came from a very few elites at the top.⁹⁹

While Mozambique and Angola have been wracked by war for many years, Guinea-Bissau has had enough peace to be able to judge the effectiveness of the Soviet constitutional model. In that country, the lack of participation was combined with coercion, manipulation, and corruption, which eroded governmental legitimacy and led to two coups.¹⁰⁰ Although Motala's overall assessment of the Soviet experiment in Africa is bleak, he does offer the positive lesson of experiments with production and village councils. To the extent that the experience of Mozambique can be evaluated, its use of the Soviet constitutional model demonstrates that ethnic tensions can best be checked in a unitary state. It also highlights the need to contain middle class bureaucracies to prevent them from dominating governmental processes.¹⁰¹

VIII. AFRICAN SOCIALISM AND ONE-PARTY STATES

Professor Motala next delves into African socialism, which is an indigenous, vaguely defined concept with some similarities to doctrinaire Marxism. Various African leaders have developed their own notions of African socialism, including Leopold Senghor of Senegal, Julius Nyerere of Tanzania, Jomo Kenyatta of Kenya, and Muammar al-Qaddafi of Libya. Some of these leaders, including Senghor and Nyerere, have located the roots of this concept in precolonial society.¹⁰² In so doing, they have drawn on the portrayal of traditional precolonial society as democratic and harmonious.¹⁰³ Nyerere enunciated the concept of *Ujamaa* (familyhood) socialism:

BIQUE: THE REVOLUTION UNDER FIRE (1984); AFRO-MARXIST REGIMES: IDEOLOGY AND PUBLIC POLICY (Edmond Keller & Donald Rothchild eds., 1987); ROSEMARY E. GALLI & JOCELYN JONES, GUINEA-BISSAU: POLITICS, ECONOMICS, AND SOCIETY (1987). Motala does not mention the similar experience of the other former Portuguese colonies of Cape Verde and Sao Tome & Principe.

99. MOTALA, *supra* note 18, at 132.

100. GALLI & JONES, *supra* note 98, at 71.

101. MOTALA, *supra* note 18, at 135.

102. ONESIMO SILVEIRA, AFRICA SOUTH OF THE SAHARA: PARTY SYSTEMS AND IDEOLOGIES OF SOCIALISM 112 (1976).

103. See, e.g., JULIUS E. NYERERE, NYERERE ON SOCIALISM (1969); JOMO KENYATTA, FACING MOUNT KENYA (1958); JOSEPH KIZERBO, HISTORIE DE L'AFRIQUE NOIRE (1972).

The foundation, and the objective, of African socialism is the extended family. . . . Ujamaa . . . or "Familyhood" describes our socialism. It is opposed to capitalism which seeks to build a happy society on the exploitation of man by man, and it is equally opposed to doctrinaire socialism which seeks to build its happy society on a philosophy of conflict between man and man.

We, in Africa, have no more need of being "converted to socialism" than we have of being "taught" democracy. Both are rooted in our own past — in the traditional society which produced us.¹⁰⁴

Various leaders have espoused the one party state as the proper representation of the unified society. They felt that democracy could exist within the one party framework as long as the masses could participate in the political process.¹⁰⁵ Some leaders such as Nyerere emphasized the need to nationalize the economy to benefit the entire society.¹⁰⁶ Others such as Kenyatta and Senghor thought that their entire societies would be better served by private enterprise.¹⁰⁷

Several writers have debunked the view of traditional African society as democratic. While some societies may have had rudimentary elements of democracy, there were autocratic and despotic trends in others. Hierarchy, gerontocracy, and the total exclusion of women were often the rule.¹⁰⁸ According to Professor Motala and others, the one party state, typified by limited citizen participation, corruption, and swollen bureaucracies, has failed miserably.¹⁰⁹ Socioeconomic transformations benefitting the masses of people did not take place, and in some cases income gaps actually widened.¹¹⁰ Tanzanian law professor Issa Shivji sees these African socialist states as having little to do with socialism. They are instead ideological fig leaves to cover authoritarianism.¹¹¹ The chapter concludes by noting that South Africa needs to avoid

104. Julius K. Nyerere, *Ujamaa — The Basis of African Socialism*, in *UJAMAA: ESSAYS ON SOCIALISM* 1, 11–12 (1968).

105. See W.J. Breytenbach, *One Party Regimes and Majority Rule*, 15 *BULL. AFR. INST.* 18 (1977).

106. JULIUS K. NYERERE, *FREEDOM AND UNITY* 167 (1967).

107. SILVEIRA, *supra* note 102, at 142.

108. V.G. Simiyu, *The Democratic Myth in the African Traditional Societies*, in WALTER OYUGI ET AL., *DEMOCRATIC THEORY & PRACTICE IN AFRICA* 49 (1988).

109. MOTALA, *supra* note 18, at 153.

110. Joel D. Barkan, *On Comparing East African Political Systems*, in *POLITICS AND PUBLIC POLICY IN KENYA AND TANZANIA* 3, 20 (Joel D. Barkan & John J. Okumu eds., 1979).

111. ISSA G. SHIVJI, *THE CONCEPT OF HUMAN RIGHTS IN AFRICA* 58 (1989).

these pitfalls and develop institutions that spread power beyond elites in a one party framework.¹¹²

IX. SOUTH AFRICAN POLITICAL ORGANIZATIONS

This chapter analyzes the constitutional options that have been proposed by political organizations in South Africa. Professor Motala starts with CODESA (Convention for a Democratic South Africa), the assembly of nineteen groups that started negotiations in December 1991. Unfortunately, the author does not detail the negotiating process itself. It may be that the book was in the later stages of editing at that point, and it would have been too much new material.¹¹³ He does have an Epilogue concerning the ultimate result of the CODESA process, the Interim Constitution.¹¹⁴

Motala does detail the positions of several of the groups in CODESA.¹¹⁵ He analyzes the white liberal groups, such as the Democratic Party (DP),¹¹⁶ the Progressive Federal Party (PFP),¹¹⁷ and the New Republic Party (NRP),¹¹⁸ which favored the federal consociation model.¹¹⁹ He also discusses the similar position of the ruling National Party. The National Party favored consociation with devolution of power to the local level, with protection for individual and private property rights as well as minority (white) rights.¹²⁰ The Inkatha Freedom Party, led by Kwazulu leader Mangosuthu Buthelezi, also favored the consociation approach, which would allow the Kwazulu region to retain power.¹²¹

Motala briefly covers the positions of the South African Communist Party,¹²² a long time ally of the ANC, and the all black Pan Africanist Congress (PAC).¹²³ The PAC split off from the ANC in 1959, and

112. MOTALA, *supra* note 18, at 159.

113. For a discussion of the CODESA process, see Wing, *supra* note 1, at 364.

114. Motala, *supra* note 18, at 245-50.

115. The only groups not participating were right-wing whites of the AWB (Afrikaaner Weerstandsbeweging), the HNP (Herstigte National Party) and the CP (Conservative Party), as well as two left-wing black groups, the PAC (Pan-Africanist Congress) and AZAPO (Azanian People's Organization). *CP and PAC Invited to Participate in Codesa II*, XINHUA GENERAL OVERSEAS NEWS SERVICE, Apr. 27, 1992, available in LEXIS, Nexis Library, Xinhua File.

116. MOTALA, *supra* note 18, at 165.

117. *Id.* at 166.

118. *Id.* at 168.

119. *Id.* at 169.

120. *Id.* at 170.

121. *Id.* at 171.

122. 2 ROBERT H. DAVIES ET AL., *THE STRUGGLE FOR SOUTH AFRICA: A REFERENCE GUIDE TO MOVEMENTS, ORGANIZATIONS AND INSTITUTIONS* 292 (1984).

123. PAN AFRICANIST CONGRESS, *ONE AZANIA, ONE NATION, ONE PEOPLE! SPEECHES AND DOCUMENTS OF THE PAN AFRICANIST CONGRESS* (1977).

espoused the African nationalist ideology that only Africans could participate in the liberation struggle, instead of the multiracial ANC approach.¹²⁴ Additionally, Motala details positions of the Black Consciousness Movements best typified by the late Steve Biko,¹²⁵ and currently represented by the Azanian People's Organization (AZAPO).

Motala spends the most time discussing the historical constitutional positions of the ANC. The 1955 Freedom Charter was the framework for the multiracial organization until 1990.¹²⁶ It took the form of a broad manifesto rather than a constitutional blueprint. Because most of Africa was still under colonial rule at the time of its creation, the Charter was a revolutionary document. It demanded that:

the people shall govern: all national groups shall have equal rights; the people shall share in the country's wealth; the land shall be shared among those who work it; all shall be equal before the law; we shall enjoy equal human rights; there shall be work and security; the doors of learning and culture shall be opened; there shall be houses, security, and comfort; and there shall be peace and friendship.¹²⁷

The ANC next developed a series of documents in the 1980s that specifically elaborated its vision of a multiracial, democratic South Africa, guaranteeing civil and political rights as well as some economic, social, and cultural rights. Motala only mentions the 1988 *Constitutional Guidelines for a Democratic South Africa*.¹²⁸ This document called for a

124. MOTALA, *supra* note 18, at 189.

125. STEPHEN BIKO, *I WRITE WHAT I LIKE* (1986). Mr. Biko was killed in police detention in September 1977.

126. The Freedom Charter, June 26, 1955, *reprinted in* THE FREEDOM CHARTER AND THE FUTURE: PROCEEDINGS OF THE NATIONAL CONFERENCE ON THE FREEDOM CHARTER AND THE FUTURE (James A. Polley ed., 1988). For further discussion, see generally ALBERT LUTHULI, *LET MY PEOPLE GO: AN AUTOBIOGRAPHY* (1983); THOMAS KARIS & GWENDOLYN M. CARTER, *3 FROM PROTEST TO CHALLENGE: A DOCUMENTARY HISTORY OF AFRICAN POLITICS IN SOUTH AFRICA 1882-1964* (1973); *THIRTY YEARS OF THE FREEDOM CHARTER* (Ray Suttner & J. Cronin eds., 1986); GILBERT MARCUS, *THE FREEDOM CHARTER: A BLUEPRINT FOR DEMOCRATIC SOUTH AFRICA* (1985); *THE FREEDOM CHARTER AND THE FUTURE, supra*; *SELECTED WRITINGS ON THE FREEDOM CHARTER, 1955-1985* (1985).

127. The Freedom Charter, *supra* note 126, at 249.

128. AFRICAN NATIONAL CONGRESS, *CONSTITUTIONAL GUIDELINES FOR A DEMOCRATIC SOUTH AFRICA* (1988), *reprinted in* 21 COLUM. HUM. RTS. L. REV. 235 App. A [hereinafter *GUIDELINES*]. For a discussion of the philosophy behind these guidelines, see Albie Sachs, *Post-Apartheid South Africa: A Constitutional Framework*, 6 *WORLD POL'Y J.* 589 (1989). For a general discussion, see Hugh Corder & Dennis Davis, *The Constitutional Guidelines of the African National Congress: A Preliminary Assessment*, 106 *S. AFR. L.J.* 633 (1989); Johan D. van der Vyver, *Comments on the Constitutional Guidelines of the African National Congress*, 5 *S. AFR. J. HUM. RTS.* 133 (1989).

Bill of Rights, equality between the sexes, and affirmative action,¹²⁹ and fit squarely within the liberal paradigm.

The book would have profited from also analyzing the 1990 *Proposal for a Bill of Rights for a Democratic South Africa*.¹³⁰ This document protected the right to own private property, but also recognized the state's interest in exploiting natural resources.¹³¹ Since the apartheid regime restricted property ownership to the nonblack population, reformulations of property rights would help address one of Motala's concerns — socioeconomic transformation. In 1992, the ANC published a revised text of the ANC draft Bill of Rights, based upon comments received on its 1990 version.¹³² The revised Bill tackled the highly controversial issue of homosexual rights by forbidding discrimination on the basis of sexual orientation.

In addition to proposals concerning a Bill of Rights, the ANC developed several other constitutional documents. The 1990 *What is a Constitution?*¹³³ built upon the 1988 Guidelines, and the 1991 *Constitutional Principles and Structures for a Democratic South Africa* called for a constitutional court with the power of judicial review.¹³⁴ All of these documents provide rich ground for exploration of the issues about which Motala is concerned, such as political empowerment of the masses, political unification of ethnic groups, and socioeconomic transformation.

129. GUIDELINES, *supra* note 128.

130. ANC CONSTITUTIONAL COMMITTEE, A BILL OF RIGHTS FOR A DEMOCRATIC SOUTH AFRICA (1990), reprinted in 18 SOC. JUST. 49 (1991) [hereinafter *1990 Draft Bill*]; see Nicholas Haysom, *Democracy, Constitutionalism, and the ANC's Bill of Rights for a New South Africa*, 18 SOC. JUST. 40 (1991).

131. *1990 Draft Bill*, *supra* note 130, art. 11.

132. African National Congress Constitutional Committee, *A Bill of Rights for a New South Africa* (1992), reprinted in ALBIE SACHS, *ADVANCING HUMAN RIGHTS IN SOUTH AFRICA* (1992) App. 1.

133. ANC CONSTITUTIONAL COMMITTEE, *WHAT IS A CONSTITUTION?* (1990).

134. ANC CONSTITUTIONAL COMMITTEE, *ANC CONSTITUTIONAL PRINCIPLES AND STRUCTURES FOR A DEMOCRATIC SOUTH AFRICA* 24 (1991). Countries like Mali, Gabon, Togo, Burundi, Rwanda, Zaire, Senegal, Cameroon, Ivory Coast, and Comoros have constitutional courts. Franck Moderne, *Human Rights and Postcolonial Constitutions in Sub-Sahara Africa*, in CONSTITUTIONALISM AND RIGHTS 315, 337. For discussion of these options, see Ziyad Motala, *Independence of the Judiciary, Prospects and Limitations of Judicial Review in Terms of the United States Model in a South African Order: Towards an Alternative Judicial Structure*, 55 ALBANY L. REV. 367, 397 (1991); Pennell Maduna, *Judicial Review and the Protection of Human Rights under a New Constitutional Order in South Africa*, 21 COLUM. HUM. RTS. L. REV. 73 (1989).

X. THE CONSTITUTION AND JUDICIAL REVIEW

This chapter tackles the difficult question of the role of the judiciary in Anglo-American systems and the possibilities for a new South Africa. Since South Africa had an almost all white male judiciary appointed by the apartheid regime, the issue confronting a new government is how to democratize the judges and the entire structure. After first discussing the scope of judicial review in the United States, Professor Motala analyzes the British variant, parliamentary supremacy, in which judges do not have the right to declare an act of Parliament unconstitutional.¹³⁵

While traditional African societies had no concept of judicial review, the newly independent countries followed the examples of their former colonizers.¹³⁶ South Africa followed the British model. Motala calls for the creation of a special constitutional court, separate from the regular courts. This approach follows the model of several European countries such as Germany.¹³⁷ The judges, according to this model, should be periodically elected rather than appointed to the bench.¹³⁸ The South African interim constitution created just such a constitutional court with eleven members elected for nonrenewable seven year terms.¹³⁹ An independent Judicial Services Commission is responsible for proposing names for some of the vacancies, removing them from the politicized appointment process.¹⁴⁰

X. CONCLUSION: CONSTITUTIONAL OPTIONS FOR SOUTH AFRICA

The last chapter summarizes Professor Motala's constitutional proposals for a new South Africa. He proposes a unitary, nonfederal state with guarantees for civil and political rights. One limitation would restrict the freedom of speech and assembly of those who promote ethnic chauvinism, racism, or tribalism.¹⁴¹ While these limitations contradict United States interpretations of free speech, the German Basic

135. MARY ANN GLENDON ET AL., *COMPARATIVE LEGAL TRADITIONS: TEXT, MATERIALS AND CASES ON THE CIVIL AND COMMON LAW TRADITIONS, WITH SPECIAL REFERENCE TO FRENCH, GERMAN, ENGLISH AND EUROPEAN LAW* 468 (2d ed. 1994).

136. The French system utilizes a constitutional council to preview legislation before it is promulgated. *Id.* at 77.

137. *Id.* at 92.

138. MOTALA, *supra* note 18, at 222.

139. S. AFR. CONST. art. 99.

140. *Id.* art 99.

141. MOTALA, *supra* note 18, at 234.

Law permits limiting certain rights. Based upon the legacy of World War Two, the German Constitutional Court outlawed political groups that promote Nazism or fascism.¹⁴² Due to the South African legacy of apartheid, Motala calls upon the new South African constitutional structures to do the same. South African political parties should be required to have democratic structures, as is the case in Germany as well.

Additionally, Motala advocates certain economic, social, and cultural rights such as free education, health care, and adequate housing. Enterprises under state control should have worker control or participation in order to avoid the experience of elite or bureaucratic domination seen in other African and socialist nations. He also wants to avoid future strongmen, and calls for the promotion of accountability by officials "in ways that move beyond the limited elite model of periodic election and rotation of officials."¹⁴³ Professor Motala admits that this approach has not been tried in any country, and he does not offer detailed guidance as to what such a model would entail. Does he envision village councils or some kind of true socialism as envisioned by Marx? Perhaps he means the kind of African socialism that has never occurred, with true equality and consultation.

The legislature should be the only law-making body, and the terms of its members should be limited.¹⁴⁴ The bicameral legislature should have a lower house based upon single member constituencies, and the upper house would be comprised of representatives from political parties elected on a proportional basis.¹⁴⁵ The executive should follow the parliamentary model and be accountable to the legislature, rather than directly to the people. While the executive must be accountable, Motala does not explain why the Presidential model with the executive directly answerable to the people would not be better.

After detailing the various major socioeconomic models in the world, Motala ultimately calls for a flexible approach incorporating relevant parts of the liberal, socialist, and African socialist approaches. Unbridled capitalism, he concludes, would perpetuate the status quo of privilege for the wealthy, while state socialism has often led to stagnation and bureaucracy.

142. *Id.*

143. *Id.* at 236.

144. *Id.*

145. *Id.* at 237.

CONCLUSION

Since Professor Motala's study was written before the passage of the interim constitution, he could only deal with that document in a brief epilogue. Now that we are in a five year interim period, it would be valuable to assess what constitutional options may be advisable given the constraints imposed by the current document. Many political compromises were made to create this document between the major parties, the then ruling National Party, the ANC and Inkatha. Now that there has been an election, with a Parliament dominated by the ANC and a government led by Mandela, the political climate has shifted. It may be possible to implement options espoused by the ANC in its various documents. The PAC and other groups have marginal importance, and even Inkatha did worse than anticipated in the elections. While it is still early in the interim period, the ANC may have a clear mandate to dominate the Constitutional Assembly and impose its views. On the other hand, in the interests of national unity, the ANC may choose the status quo and only tinker with the interim document. A resurgence of the Inkatha violence that has ceased since the 1994 elections would be devastating. The ANC is further constrained by the constitutional principles that are incorporated in Schedule 4 of the constitution. Article 71 states that the new constitution must comply with these principles, which basically follow the liberal paradigm, guaranteeing civil and political rights.¹⁴⁶ Now that various new structures are in place, it may be difficult to think of switching to a third alternative in six years. The consociation model that Motala repeatedly denounces may thus be dead at last. Those groups favoring such an approach, including Inkatha and the National Party, do not command a large enough part of the representatives in the Constitutional Assembly to be persuasive. The new constitutional court is barely getting started, and it is unlikely that there would be sufficient momentum to kill it, especially if the alternative is the unelected white judiciary that the new government was forced to retain. Mandela is the father of the nation, and if he continues to use his new powers in a cautious way as he has been doing thus far there will be no outcry, especially from his majority party, to further constrain the President's powers. On the other hand, if Mandela dies, and his successor attempts to follow a strongman approach, there may be calls to make the president a ceremonial head of state position, and to create a prime minister who administers the government under strict constraints.

146. S. AFR. CONST. Sch. 4.

The socioeconomic transformations that Motala seeks are also unlikely to be manifested in a mere five years. As an example, black South African women have been doubly discriminated against historically, on the basis of both their race and their gender.¹⁴⁷ Under apartheid, they were legally restricted as all blacks were to the most menial positions, and saddled with the majority of child care responsibilities for both black and white children. Additionally, they suffered and continue to suffer under African customary laws that limit their ability to marry, own property, inherit, gain child custody, and otherwise exercise the rights of citizens.¹⁴⁸ It may take generations to transform the position of these women, much in the same way it is taking generations to raise the status of African American women, who likewise continue to suffer from a dual legacy of race/gender discrimination.¹⁴⁹

In conclusion, Professor Motala has produced a useful study, which conveniently collects all the various options in a succinct and readable form. It is sure to be utilized by South African constitutional decisionmakers and scholars, and has much to offer all those concerned with democracy on the African continent.

147. Adrien K. Wing & Eunice de Carvalho, *Black South African Women: Towards Equal Rights*, 8 HARV. HUM. RTS J. (1995).

148. HILDA BERNSTEIN, FOR THEIR TRIUMPHS AND FOR THEIR TEARS: WOMEN IN APARTHEID 7 (1985).

149. For a collection of writings on the legal status of Black American women, see CRITICAL RACE FEMINISM: A READER (Adrien Wing ed., forthcoming 1996).