

1992

# Visions of Legitimation in Old and New South Africa: A Summary and Response

Stephen Ellmann

*New York Law School*, [stephen.ellmann@nyls.edu](mailto:stephen.ellmann@nyls.edu)

Follow this and additional works at: [http://digitalcommons.nyls.edu/fac\\_articles\\_chapters](http://digitalcommons.nyls.edu/fac_articles_chapters)

---

## Recommended Citation

16 Legal Stud. F. 193 (1992-1993)

This Article is brought to you for free and open access by the Faculty Scholarship at DigitalCommons@NYLS. It has been accepted for inclusion in Articles & Chapters by an authorized administrator of DigitalCommons@NYLS.

# Visions of Legitimation in Old and New South Africa: A Summary and Response

Stephen Ellmann\*  
*Columbia University Law School*

There is a great deal that we do not know about legitimation — including, perhaps, whether it plays any real role in societies' functioning at all.<sup>1</sup> But we do know that governments, and would-be governments, appeal to the governed for their support. Since we know, too, that the policies of every government or group include gains for some and losses for others, we can readily understand that governments and potential governments hope to present appeals to the governed that persuade both those who profit, and those who lose, that they should accept the institutions that produce these effects. And so we know, as well, that when societies are changing, the various forces competing for the power to shape the future will also compete for popular support. The wide-ranging papers in this symposium help us to see the competing visions of legitimacy on the South African scene, and to recognize what we know, and do not know, about the likely outcome of this competition.

## The Legitimation of Discrimination

Until quite recently, the dominant vision of legitimacy in South Africa sought to legitimize racial discrimination. Whites had won the power to rule; as C.R.M. Dlamini indicates in his essay, they had suppressed (and continued to suppress) blacks by force of arms. But they also claimed the right to rule. Their claim may have rested on a combination of an assertion of the "rights" of conquest,<sup>2</sup> their belief in their own racial and cultural superiority,<sup>3</sup> and on a perception of themselves as engaged in the paternalistic uplift of South Africa's blacks.<sup>4</sup>

Such arguments were probably very persuasive for many years when directed at South African whites. For a time, especially when other Western countries themselves were practicing segregation and colonialism, South African whites' justifications of their power may have had a receptive audience abroad as well. Whether they held any appeal for South African blacks is a much more puzzling question. Certainly blacks had many reasons not to be impressed by such appeals. They knew, always, that the law under which they lived was not their own.<sup>5</sup> Many surely felt, too, that what whites called paternalism was better described as a systematic blocking of their aspirations, and more bluntly as greed and blindness. They were well aware, in addition, that

naked force, as well as the veiled force of the law, were constantly being deployed to keep them in line. They responded to this oppression with resistance and struggle, again and again and in countless different areas of South African life, over many decades — a long and painful struggle now at last tasting success.

And yet, perhaps, South African blacks did in some measure accept the legitimacy of the oppression under which they lived. Perhaps they were impressed by the apparatus of Western institutional and material technology;<sup>6</sup> perhaps their very vulnerability to white power encouraged a sense of dependence on whites' humane exercise of this authority;<sup>7</sup> perhaps they were daunted by the sheer magnitude of the invaders' ultimate victory over them; perhaps they came to doubt their own cultural and personal resources as defeat followed defeat. Perhaps the government's efforts to coopt traditional chiefly authority also bore fruit, either by diminishing popular respect for traditional leaders or channeling that respect into acceptance of white rule. In short, like subordinated people in many different societies, black South Africans may have come, through these or other mechanisms, to identify in some measure with their oppressors. How far such sentiments went is not clear, in South Africa or in other instances of oppression — but there are few rulers so powerful that they rule by force alone, and South Africa is not an exception. We need to understand better whether and how unjust states can achieve legitimacy in their victims' eyes — but fortunately we no longer need so urgently to examine this question in the context of apartheid, because its day is passing.

Indeed, it is clear that neither force nor sentiment is any longer enough to maintain the structure of apartheid. Instead, this structure is collapsing almost before our eyes, much as Soviet communism has — but in South Africa, as in East Europe and the erstwhile "Soviet Union," the shape of the future is still to be decided, and is presently being contested. In this contest, the parties competing to frame South Africa's future must offer visions of that future which express the most urgent desires of their supporters, and yet offer enough to their opponents to form a plausible basis of compromise. Not surprisingly, therefore, these visions overlap. Moreover, there are not just two of these visions, but rather, perhaps, as many images of the future as there are conflicting parties. Nonetheless, it is possible to sketch, with the aid of these essays, two prominent competing perspectives.

### **The Legitimation of White Privilege**

Let me begin with the ruling National Party, which has for some time now assiduously sought to shed the mantle of apartheid. In its place, the National Party seems to be offering to South Africans a new legitimation vision, one tellingly illustrated in the essays by Dirk van Zyl Smit and Nico

Steytler. As these essays reflect, the government's new legitimation vision has some potent elements. Perhaps its most important feature is an absence — the removal of the central legitimation flaw of the old order, namely its blunt, unmistakable denial of majority rule. The new vision takes as its premise the wrongfulness of apartheid. In its stead, the government's vision offers several features.

First, the government now endorses a Bill of Rights, a position almost all political groupings in South Africa have suddenly come to hold.<sup>8</sup> Providing judicially enforceable constitutional protections in South Africa is a wise step, and deserves the approval of the South African people. The contents of the Bill of Rights, however, are crucial and definitely a matter of debate. It seems very likely that the government hopes to use this document — and its legitimating appeal — to protect such significant rights for whites as the right to hold onto their property and, perhaps, the right to engage in private discrimination on the

basis of race.<sup>9</sup> Protecting whites, to be sure, is not a powerful basis for legitimation among black South Africans, but the government has repeatedly asserted its "opposition to domination of any kind,"<sup>10</sup> and this admirable, rights-minded goal (itself an element of the government's legitimation vision, and one with which the ANC has been able to concur<sup>11</sup>) can be put to the service of insulating those with privilege from those without.

Second, the government offers the promise of neutrality. Nico Steytler captures this theme in his discussion of the government's moves towards an image of professionalism and nonpartisanship for the police. This image is still far from a reality — as Steytler points out, the South African Police (SAP), despite vehement protestations, are perceived as active and partisan participants in the political arena; the widespread accusations of SAP's complicity in the rampages of Inkatha ['Jimpis' leave an indelible impression of sectarian policing.<sup>12</sup> Whether or not the government wants to achieve true nonpartisanship, however, it does seem to want a nonpartisan image. Dirk van Zyl Smit captures a similar aspiration in his reference to the government's announced intention to run the prisons according to business principles.<sup>13</sup>

Third, the government offers nondiscrimination. Many of its most publicized reforms so far have underlined this offer, as one legislative insistence on discrimination after another has been abruptly repealed. These papers reflect the same development in the specific fields of prisons and police. Complete nondiscrimination is of course still very far from a reality, and it is hardly clear how far the government is prepared to go to make good on this promise. The promise, however, can be made in advance of, or instead of, the reality, and the offer now being made to blacks by the government is that they can

advance, in law enforcement and in the society as a whole, on meritocratic grounds.

Fourth, and perhaps most important, the government promises order. This is the central promise being made by the police, and its appeal, as Nico Steytler emphasizes, should not be underestimated. Indeed, in a paper not included in this symposium Jeremy Seekings has tellingly illuminated the strong sentiment for order among some, perhaps many, of South Africa's blacks.<sup>14</sup> They have good reason to want order, for their lives have been horrifyingly disrupted by its absence. The party of order — that is, whichever party can ultimately lay claim to that label — will have a real base of support.

A Bill of Rights, professionalism, nondiscrimination, and order — these are a potentially attractive mixture, especially when combined with the long-awaited attainment of the right to vote.<sup>15</sup> We do not know yet just how persuasive these appeals are likely to be with the various audiences to whom they can be directed. It remains to be seen whether the current, white government is prepared to make good on these promises, or able to appear to be doing so; so far, the state seems much too deeply implicated in the continuing injustice and political violence of South African life for it to carry off this appeal easily. It also remains to be seen just how compelling the legitimization visions offered by the African National Congress and the other extra-governmental forces become.

The National Party may hope that it can offer these features to the electorate and actually win the first post-apartheid election. That is probably unlikely; the taint of apartheid is too deep, and the prestige of Nelson Mandela and the anti-apartheid movement too great. It is considerably more likely, though, that the government and its allies will obtain a substantial measure of popular support.<sup>16</sup> Even in the absence of electoral success, moreover, the government may invoke these legitimization claims in its negotiations with the African National Congress — and in the appeals to broader South African and international audiences that may well affect these negotiations significantly. And although the outcome of these negotiations may turn directly on raw political power rather than rationalizing ideology, the government's legitimization vision may well become a part of the founding framework of the new nation and so play a part in preserving the outcome of negotiations after the ink is dry.

But what would this appeal legitimize? Steytler suggests that the government's strategy in the field of law enforcement is to secure continued white control under the rubrics of professionalism and neutrality. The insistence on professionalism could locate control of the SAP within the institution itself and under the continued guidance of the old elite. The government may have similar aspirations for the military.<sup>17</sup> So, too, the government appears

determined to stem the rise of trade unionism within the Prisons Service, and to reinforce a "military" ethos in prison administration.<sup>18</sup> If whites preserve their control over the instruments of "coercive force," Steytler argues, they will have circumscribed the power of a post-apartheid state to invade their privileges.

Indeed, it seems entirely likely that this legitimation strategy, though it starts from the wrongfulness of apartheid, is meant in large part to provide the basis for legitimizing and protecting white privilege in a post-apartheid South Africa. This strategy, moreover, surely goes well beyond efforts to control, or at least neutralize, the military, police and prisons. If the National Party's negotiators are successful, they will be able to write limitations on state power into the new nation's Bill of Rights.<sup>19</sup> They will also be able to enact equally fundamental restraints in the constitutional provisions setting up the structure of the new nation — and the Nationalists' first proposals for these structural sections suggest just such an intent.<sup>20</sup> The government's vision of legitimation therefore cannot be ignored, for it may well affect the shape of the new South Africa.

### The Legitimation of Majority Rule

The opponents of apartheid, that epitome of minority rule, have long waited for "majority rule." This could mean "black rule," pure and simple, and there may well be many South African blacks whose anger over white oppression is so acute that they simply desire the expulsion of whites from the nation.<sup>21</sup> But one can embrace the goal of majority rule without endorsing the notion that the majority, however numerous, should be free to oppress the minority — this constrained majority rule, indeed, is the standard aspiration of liberal democratic states. As Donald Horowitz has pointed out, moreover, there is evidence that most South African blacks (to say nothing of South African whites) look to a future in which power is shared by all races rather than monopolized by one.<sup>22</sup> For these blacks, as well as for South African whites and for many foreign observers, the legitimation of majority rule must rest on more inclusive rationales. These essays help us to identify several elements, or potential elements, of such an anti-apartheid legitimation vision.

First, this anti-apartheid vision certainly does call for majority rule in the sense of a government accountable to the people. Thus van Zyl Smit envisages lay boards of visitors, outside inspectors, and direct access to prisons by an ombudsman and the courts. Similarly, Steytler cites the ANC's call for the police (and the military, the prison service and the civil service) to be accountable to Parliament and to the whole community. As he notes, the ANC calls for adequate control and supervision over these structures and an effective machinery to investigate complaints against these services.

The great challenge, of course, is to provide such accountability without also generating a new partiality. This spectre of partiality is what makes appeals to professionalism and neutrality potentially attractive, and suggests the need for those who advocate fundamental restructuring in South Africa to offer as well at least some measure of the orderly virtues that the government's legitimation vision highlights. Indeed, the ANC does exactly this; the Constitutional Committee's discussion of accountability actually falls under the rubric of "[i]mpartiality," which, the Committee explains, "presupposes a balanced composition of the bodies concerned and a sensitivity to the needs and aspirations of all sections of the community."<sup>23</sup> The police and other services, the ANC declares, are not "to serve the interests of any party or sectional grouping."<sup>24</sup> In the same vein, the ANC in December, 1991 concurred with the National Party in a declaration of intent to achieve "a country free from apartheid or any other form of discrimination or domination."<sup>25</sup>

Second, the anti-apartheid vision promises the redress of grievances. Where the government promises wealth, the ANC offers redistribution. Article 10 of the ANC's draft bill of rights, for example, begins with the declaration that "[a]ll men and women have the right to enjoy basic social, educational, economic and welfare rights."<sup>26</sup> So, too, where the government promises meritocracy, the ANC calls for affirmative action, and in very firm tones.<sup>27</sup> Where the government offers order, the ANC would stand for change. In the words of another section of the draft bill of rights:

The State and all public and private bodies shall be under a duty to prevent any form of incitement to racial, religious or linguistic hostility and to dismantle all structures and do away with all practices that compulsorily divide the population on grounds of race, colour, language, or creed.<sup>28</sup>

Third, the anti-apartheid vision embraces the importance of a Bill of Rights. Indeed, the ANC's draft bill of rights, containing as it does approximately 140 separate sections, is a far more elaborate statement of rights than the United States Constitution contains. As we have seen, a number of these sections deal with socioeconomic or "red" rights, while certain sections deal with such "green" rights as the right to a healthy environment.<sup>29</sup> Many other sections, however, guarantee classic individual liberties or "blue" rights, such as free speech, free association, freedom of religion, protection against unreasonable searches and seizures, and the presumption of innocence in criminal trials.<sup>30</sup> In some respects these rights are more circumscribed than their counterparts under United States law,<sup>31</sup> but they nonetheless amount to a substantial commitment to individual liberty and the freeing of the human spirit — the sort of commitment that C.R.M. Dlamini's essay in this symposium evokes and rightly endorses.

Fourth, the anti-apartheid vision invokes the value of community. The value of community is, of course, a rather protean one, and the shape that this value comes to have may profoundly affect South Africa's future. As A.J.G.M. Sanders formulates the idea of communitarianism in his essay, it rests in part on participatory democracy — an idea reasonably compatible with both individual liberty and effective majority rule.<sup>32</sup> It also entails a rejection of what Sanders calls "groupism," which I take to be a vice particularly characteristic of apartheid, and this rejection is surely compatible with the anti-apartheid demand for accountability, as well as with a substantial field of individual freedom. But Sanders' image of communitarianism also entails a rejection of liberalism and of individualism. This is strong medicine for South Africa's ills, so radical a cure that it seems likely to undercut the protection of liberty that I have suggested is, and should be, part of the legitimating vision underlying majority rule.

Just how strong this medicine is can be seen from the provisions of the Banjul Charter that Sanders quotes. Article 29, for example, declares that "[t]he individual shall . . . have the duty . . . . (1) To preserve the harmonious development of the family and to work for the cohesion and respect of the family; to respect . . . his parents at all times . . . ; (2) To serve his national community by placing his physical and intellectual abilities at its service; . . . . (4) To preserve and strengthen social and national solidarity."<sup>33</sup> A responsible citizen in a just society might well accept many of these duties — but ethical people in imperfect societies often have good reason to resist such obligatory solidarity. As legal rules, these requirements would profoundly diminish the options, the freedom, of a wide variety of people: women who come to find their families oppressive, artists who want to create art for its own sake, acerbic social critics, and no doubt others.<sup>34</sup> Members of all democratic societies have potentially burdensome duties, such as the obligation to pay taxes, but the Banjul Charter's prescriptions, if understood as wide-ranging rules of law, would dangerously expand the state's claims on individual citizens.<sup>35</sup>

It remains to be seen whether this form of communitarian vision becomes a central basis of an appeal for legitimation in a future South Africa. The ANC's draft bill of rights reflects a much greater respect for individual liberty than an unchecked communitarianism would allow, and thus suggests that the ANC is promising South Africans individual liberty as well as majority empowerment; those who support this more liberal vision must seek to protect it from the inevitable storms of politics, including those resulting from the varying sentiments that probably persist within the ANC itself. But even those who support this latter vision (as I do) ought not to reject many of the ideals of communitarianism. Protection of the family, of the national community, and of social and national solidarity are desirable goals rather than dangerous

temptations; moreover, such communitarian values may have deep roots in African society.<sup>36</sup>

Indeed, these ideals intersect with another, broader aspiration — that the new South Africa be founded not simply on some calculating exchange of rights and obligations among the conflicting forces within the society, but also on a new social compact of all the races and groups of the country, and on the forging of a new national identity. In arguing for "the development of a rights culture," C.R.M. Dlamini identifies one valuable element of such a new nationhood. Albie Sachs, who concurs in this goal,<sup>37</sup> speaks in even broader terms as well, urging that the new constitution "must be rooted in South African history and tradition. It must draw on the traditions of freedom in all communities," from Africans to Afrikaners.<sup>38</sup> Moreover, he writes:

The constitution has to be for all South Africans, former oppressors and oppressed alike. It expresses the sovereignty of the whole nation, not just a part, not even just of the vast majority. If it is to be binding on all, it should speak on behalf of all and give its protection to all.<sup>39</sup>

A new national identity does not require the rejection of individual liberty, nor the elaboration of potentially burdensome legal duties of social solidarity that the Banjul Charter's listing might suggest. It may well require, however, the growth of a spirit that encourages individuals to accept such duties as their own. More broadly, a focus on the goal of a new national identity suggests that the legitimation of the legal system of a new South Africa will not depend solely on the particular legal rules and institutions of that future society, but more broadly on the character of the nation of which the legal system is a part. Each of the essays in this symposium helps us to imagine that new nation, and to begin to understand the moral, social, and legal steps between here and there.

## NOTES

\* This article is a substantially revised version of comments I made as a discussant in a symposium on "Law and the South African Legitimacy Crisis," at the Joint Meeting of the Law and Society Association and the Research Committee on the Sociology of Law of the International Sociological Association, held in Amsterdam in June, 1991. I am grateful to David O. Friedrichs for organizing, and chairing, the panel; to my fellow panelists for their provocative papers; and to Nancy Rosenbloom for her thoughtful reading of earlier drafts. Columbia Law School supported my attending the conference.

1. See generally Alan Hyde, "The Concept of Legitimation in the Sociology of Law," 1983 *Wis. L. Rev.* 379; David O. Friedrichs, "The Concept of Legitimation and the Legal Order: A Response to Hyde's Critique," 3 *Justice Quarterly* 33 (1986).

2. In the words of Chief Justice John Marshall, discussing American Indians' rights to the land, "[c]onquest gives a title which the Courts of the conqueror cannot deny, whatever the private and speculative opinions of individuals may be, respecting the original justice of the claim which has been successfully asserted." *Johnson v. McIntosh*, 21 U.S. (8 Wheat.) 543, 588 (1823).
3. Whites may have rested this claim of superiority in part on their perception of themselves as having imposed law on what otherwise would have been (in their eyes) savagery; in this sense, the very process of ruling through legal forms offered whites a source of self-legitimation. I discuss this form of legitimation in Stephen Ellmann, *In a Time of Trouble: Law and Liberty in South Africa's State of Emergency 184-85* (Oxford University Press, forthcoming 1992); see also the insightful paper (on which I draw) by Martin Chanock, "An Ecology of Coercion: Criminology, Criminal Law and the New State. South Africa 1902-1930," unpubl., 1990.
4. Van Zyl Smit notes in his essay the presence of notions of the "white man's burden" in justifications for the prison system. Similarly, and as recently as 1977, a Chief Justice of South Africa's highest court could declare that "[t]he Blacks in the white cities and towns are willingly and often keenly taking over the White way of life" and that "[i]t is . . . clearly our duty to produce . . . non-White lawyers and jurists into whose willing hands our legal heritage can be placed, to be enjoyed not only in the Republic but also in the independent homelands." "Centenary of the Transvaal Supreme Court," *De Rebus Procuratoriis* 393, 397 (1977) (speech of Chief Justice Rumpff).
5. The only exception to this proposition was African customary law, but the grudging and stultifying white recognition of customary law, described by Dlamini, seems unlikely to have done much to reduce blacks' sense of being ruled by others.
6. Thus Sandra Burman has commented on nineteenth-century Christianized Africans' opposition to the use of African law to decide Africans' cases. Sandra Burman, "Symbolic Dimensions of the Enforcement of Law," 3 (2) *Brit. J. L. & Soc.* 204, 210 (1976).
7. This is the mechanism to which Douglas Hay points in his analysis of eighteenth-century English criminal law. See Douglas Hay, "Property, Authority and the Criminal Law," in Douglas Hay, Peter Linebaugh, John G. Rule, E.P. Thompson, and Cal Winslow, *Albion's Fatal Tree: Crime and Society in Eighteenth-Century England* (1975). But see John H. Langbein, "Albion's Fatal Flaws," *Past and Present* 96 (Feb. 1983).
8. Martin Chanock emphasizes the suddenness of this transformation in his insightful essay, "A Post-Calvinist Catechism? Intersecting [N]arratives about a South African Bill of Rights" (paper presented at the Joint Meeting of the Law and Society Association and the Research Committee on the Sociology of Law of the International Sociological Association, Amsterdam, June 1991). On Afrikaner attitudes towards notions of human rights and the rule of law, see also Stephen Ellmann, *supra* note 3, at 195-96, 200-01. On the other side of the political spectrum, as Albie Sachs has pointed out, "South Africa must be the only country in the world in which sections of the oppressed actually constituted an anti-Bill of Rights Committee." Albie Sachs, *Protecting Human Rights in a New South Africa* 6 (1990).
9. It is possible to get intimations of the government's likely proposals from the work of the South African Law Commission, a body which in 1986 was asked by the government to consider the question of a bill of rights. It responded in 1989 with what, at the time, was a quite startlingly progressive report, South African Law Commission, "Working Paper 25, Project 58: Group and Human Rights" (n.d.-1989). Among the rights it proposed to protect, however, were the right "to establish and maintain commercial undertakings, to procure property and means of production, to offer services against remuneration and to make a profit" (id., Article 14), "[t]he right to private property," subject to expropriation on "payment of reasonable compensation"

(id., art. 15), and "[t]he right of every person or group to disassociate himself or itself from other individuals or groups: Provided that if such disassociation constitutes discrimination on the ground of race, colour, religion, language or culture, no public or state funds shall be granted directly or indirectly to promote the interests of the person who or group which so discriminates" (id., art. 17).

10. South Africa's State President, F.W. de Klerk, recently described "a system of 'participatory democracy'" as the "second pillar" of the National Party's constitutional proposals. Participatory democracy, he wrote, "indicates that political power shall not be vested solely in the hands of any single individual, political party or group. We therefore proclaim our opposition to domination of any kind." "Constitutional Rule in a Participatory Democracy: The National Party's framework for a new democratic South Africa" (Federal Council of the National Party, 1991) (prefatory letter to "Dear Nationalist" from F.W. de Klerk). For an analysis of these National Party proposals, see note 20 *infra*.

11. For the ANC's endorsement of the goal of preventing domination in a new South Africa, see text at note 25, and note 25, *infra*.

12. Since the Amsterdam conference, fresh evidence of the government's undercover links with Inkatha (the mass organization of Zulu leader Mangosuthu Gatsha Buthelezi) has lent even further support to suspicions of police partisanship and complicity in violence. See, e.g., Ellen Bartlett, "Pretoria funded 1991 Inkatha rally — Secret aid went to ANC rival after de Klerk vowed to stop it, police say", *Boston Globe*, Dec. 13, 1991, at 2, col. 1.

13. In the prison context, Dirk van Zyl Smit mentions the abolition of "the remaining overtly racially discriminatory measures" in amendments to the prison regulations in 1990. Meanwhile, as Steytler notes, the police will begin "the desegregation of basic training facilities" at the start of 1992, and Adriaan Vlok, then the Minister of Law and Order, "called on black policemen 'to go all out for the top jobs in the force.'"

14. Jeremy Seekings, "Visions of 'Community' in South Africa's Informal Township Courts" (paper presented at the Joint Meeting of the Law and Society Association and the Research Committee on the Sociology of Law of the International Sociological Association, Amsterdam, June 1991).

15. These essays do not focus on one other, potentially important, part of the government's legitimation appeal — the promise of wealth, to be obtained through private enterprise. Whether South African blacks can readily be persuaded that any of this promise will be reaped by them, however, is not clear.

16. Steytler mentions the government's possible aspiration to position itself as "one of the senior partners in a 'Christian Democratic Alliance' [which] wins majority support." It might seem incredible that the National Party could hope to obtain popular consent to its continued power, and yet political soundings so far indicate that this hope is not entirely without foundation. There have been striking indications that the National Party is gathering support among some "nonwhite" voters. See Christopher S. Wren, "Mandela Wants More Nonblacks in His Group," *N.Y. Times*, Sept. 29, 1991, at 8, col. 1 (on "Coloured" support for the National Party). It may also be able to fashion an electoral alliance with Buthelezi's Inkatha Freedom Party, and perhaps with some other African factions — although these alliances may have much less to do with the legitimating vision sketched in the text than with crass political maneuver and advantage. If these various alliances do not add up to electoral victory, they might provide enough votes to limit the new majority's freedom of action. With substantial South African aid, opponents of SWAPO were able to achieve this level of success in Namibia. See Christopher S. Wren,

"Pretoria Spent \$35 Million To Influence Namibian Vote," *N.Y. Times*, July 26, 1991, at A3, col. 5.

17. Thus Dr. Jakkie Cilliers, a "defense analyst and former SADF [South African Defence Force] commandant," recently urged that the future SADF "should be subject to multi-party control, rather than that of the government of the day." He also maintained that "the defence force of a future South Africa would be built around the SADF as it exists today, but would require affirmative action and changes in doctrine and practice." Gavin Evans, "Conference looks at future role of SADF," *Weekly Mail*, Nov. 29 - Dec. 5, 1991, at 11, col. 1 (paraphrasing Cilliers).

18. Van Zyl Smit discusses the government's efforts to suppress POPCRU, the Police and Prison Officers Civil Rights Union.

19. See text at note 9, and note 9, *supra*.

20. See "Constitutional Rule in a Participatory Democracy: The National Party's framework for a democratic South Africa," *supra* note 10. This document reaffirms the National Party's desire for a "new dispensation" which is, *inter alia*, "free from domination," *id.* at 1 — a desirable abstraction that in practice seems largely to connote the protection of whites from the power of a state controlled by blacks.

Among the elements of this new dispensation would be a bicameral Parliament, the First House elected by proportional representation, but the Second produced by a system in which seats are allocated by region and "[e]ach political party which has gained a specified amount of support in the election in the region's legislative body will be allocated an equal number of the seats for that region" — a system which could wildly over-represent smaller political parties at the expense of larger ones. *Id.* at 11-12. The role of the Second House would include "deliberat[ing] on and pass[ing] by a weighted majority legislation which amends the constitution; relates to the interests of minorities; relates to the interests of regions; is entrenched in the constitution." *Id.* at 12 (punctuation modified).

Another section proposes that the single State President of today's South Africa be replaced by "a collective body known as the Presidency," to "consist of the leaders of the three largest parties in the First House," and to make decisions by "consensus." *Id.* at 13. The National Party also envisions local government elections in which "owners, lessees and rate-payers" might have special voting power, see *id.* at 17, and in which "neighbourhoods" could acquire "autonomous power" over "security matters and civil protection." *Id.* at 17-18. This package of proposals, undermining national authority and enhancing the voice of the privileged in local governance, would profoundly constrain the power of future electoral majorities to enact their programs into law. For a trenchant analysis of these proposals, to which I am indebted, see Arthur Chaskalson, *The National Party's Constitutional Proposals* (Lawyers' Committee for Civil Rights Under Law, 1991).

21. Donald Horowitz cites a 1986 survey in which 78 percent of Africans expressed the belief "that Whites should continue to live in a future South Africa." Horowitz properly describes this as "an overwhelming majority," but notes that "a significant minority" took a different view. Donald L. Horowitz, *A Democratic South Africa? Constitutional Engineering in a Divided Society* 110 (1991).

22. See D. Horowitz, *supra* note 21, at 101-02 & n.46; but cf. *id.* at 109-10.

23. African National Congress Constitutional Committee, "Discussion Document: Constitutional Principles and Structures for a Democratic South Africa" 18 (African National Congress, 1991). In this vision, as Steytler suggests, "impartiality does not mean independence."

24. African National Congress Constitutional Committee, *supra* note 23, at 18.

25. "Text of Declaration of Intent by South Africa Convention," *N.Y. Times*, Dec. 22, 1991, at 14, col. 5. This declaration of intent was "signed by 17 of 19 political groups that took part in the Convention for a Democratic South Africa," *id.*; the Convention is the forum in which "[t]he opening phase of official negotiations on South Africa's future" has now begun. Christopher S. Wren, "Talks in South Africa End Hopefully," *N.Y. Times*, Dec. 22, 1991, at 14, col. 4.

26. African National Congress Constitutional Committee, *A Bill of Rights for A New South Africa*, art. 10, § 1 (African National Congress Constitutional Committee, 1990) (hereafter cited as ANC Draft Bill of Rights). The remainder of this Article directs the state, "to the maximum of its available resources, [to] undertake appropriate legislative and executive action in order to achieve the progressive realisation of" such rights (*id.*, § 2), including rights to freedom from hunger (*id.*, § 7), to shelter (*id.*, §§ 8-10), education (*id.*, §§ 10-11), health (*id.*, § 12), work (*id.*, § 13), and to "a minimum income and welfare rights" (*id.*, §§ 14-15). In a related section, the Draft Bill of Rights authorizes the taking of private property in order to achieve "the objectives of the Constitution" (*id.*, art. 11, § 7); compensation is required and must be "just," a standard to be measured by "taking into account the need to establish an equitable balance between the public interest and the interest of those affected" (*id.*, art. 11, § 9).

27. *Id.*, art. 13. Section 1 of this Article in broad terms authorizes affirmative action for "men and women who in the past have been disadvantaged by discrimination," and Section 2 bluntly declares that "[n]o provision of the Bill of Rights shall be construed as derogating from or limiting in any way the general provisions of this Article."

28. *Id.*, art. 14, § 3.

29. Albie Sachs, borrowing a color scheme from Kader Asmal of the ANC Constitutional Committee, describes blue rights as the classic "civil and political rights and rights of due process," red rights as "those of a social, economic, and cultural nature," and green rights as "the rights to development, peace, social identity, and a clean environment." Albie Sachs, *supra* note 8, at 7-9; see *id.* at 144-45. For the ANC's treatment of environmental rights, see ANC Draft Bill of Rights, *supra* note 26, art. 23.

30. *Id.*, respectively, art. 4; art. 5, § 1; art. 5, § 2; art. 2; §§ 29-30; and art. 2, § 14.

31. Thus, for example, one section provides that "[n]othing in the Constitution shall be interpreted as implying for any group or person the right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth in the Constitution . . ." *Id.*, art. 15, § 1. See also *id.*, art. 13, § 2 (providing that "[n]o provision of the Bill of Rights shall be construed as derogating from or limiting in any way the general provisions" for affirmative action); *id.*, art. 14, § 4 (authorizing the State to "enact legislation to prohibit the circulation or possession of materials which incite racial, ethnic, religious, gender or linguistic hatred, which provoke violence, or which insult, degrade, defame or encourage abuse of any racial, ethnic, religious, gender or linguistic group"). At least some of this language is perilously broad.

32. This ideal can also be used, however, as a rationale for protecting disproportionate power (under the rubric of participation) for particular groups. For the National Party's endorsement of participatory democracy, see note 10 *supra*.

33. African [Banjul] Charter on Human and Peoples' Rights, adopted June 27, 1981, O.A.U. Doc. CAB/LEG/67/3 Rev. 5, 21 I.L.M. 58, art. 29.

34. If duties such as these would unduly exalt the power of the state, another element of Sanders' image of communitarianism might unduly restrict it. This element is the emphasis on "consensus law." The ideas of community and consensus are related, but the more the absence

of consensus becomes a basis for blocking government action, the more the profound divisions in South African society may undercut the power of the majority to rule (a point David Dyzenhaus made in the workshop discussion). The National Party's constitutional proposals appear to have precisely this feature. Sanders, however, is careful to point out that there is room for "command law" as well as "consensus law" in a communitarian society.

35. This is not to say that the sphere of protected individual rights in South Africa must be identical to that in the United States. United States citizens cannot receive titles of nobility without Congressional consent, U.S. Const., art. I, § 9, cl. 8, but it is quite conceivable that South Africa could buttress rather than weaken its new society if it rejoined the Commonwealth and its citizens regularly received knighthoods and other honors from the British Crown. On the other hand, the United States currently gives constitutional protection to a wide range of hate speech, and it is possible that the forging of a new nation in South Africa calls for a constitutional commitment to the prohibition of the deliberate use of the language of racial hatred. See A. Sachs, *supra* note 8, at 50-52; but cf. D. Horowitz, *supra* note 21, at 156-57 (arguing that ethnically based political parties should not be suppressed but rather encouraged, by the structure of the political system, "to dilute the exclusivity of their appeals").

36. Allister Sparks, *The Mind of South Africa* 5, 14-21 (1990).

37. See A. Sachs, *supra* note 8, at 32-42.

38. *Id.* at 187.

39. *Id.* at 185.

