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FOREWORD: CHALLENGES

John B. Attanasio*

SOUTH Africa has achieved what few commentators thought was possible—a peaceful revolution from an authoritarian, apartheid government to an egalitarian, democratic regime.¹ Fifteen years ago, few would have dared to imagine such a peaceful revolution possible. Predictions abounded of large scale fighting and even civil war.² In fact, South Africans did not entirely escape from suffering and violence during this seismic change. A considerable amount transpired in government terrorism conducted by police and military forces, and operations conducted by guerilla forces. Still, in a nation possessing one of the most potent arsenals on earth—including nuclear weapons³—many feared that a great deal more violence would occur. What accounts for this anomalous result?

Part of the explanation undoubtedly lies in the genius and magnanimity of one truly remarkable human being—Nelson Mandela. Historians always debate the extent to which individual personalities really matter. Nelson Mandela proves that they do. Obviously, Mr. Mandela came on the scene at the right time. Developments unfolding for centuries in South Africa made this a time ripe for change of some sort. Nevertheless, what type of change would occur was hardly preordained. Nelson Mandela's life itself—his considerable and sustained suffering—inspired others. Nelson Mandela was not alone in forging these developments; he

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1. See Albie Sachs, *South Africa's Unconstitutional Constitution: The Transition from Power to Lawful Power*, 41 ST. LOUIS U. L.J. 1249, 1249 (1997); see also John Attanasio, *Foreword: Freedom!*, 41 ST. LOUIS U. L.J. 1243, 1245-46 (1997).

2. See Frank Drazan, *South Africa and Revolution*, CHI. TRIB., July 28, 1985, at C12 ("There is no doubt open rebellion is on the horizon."); Doug Lytle, *Irrepressible Conflict in Africa*, SAN DIEGO UNION-TRIB., July 25, 1985, at B12 ("It is impossible to predict the timing, but a civil war is sure to come eventually."); Beyers Naude, *South African Blacks have Started to Rise Up*, N.Y. TIMES, April 12, 1985, at A27. ("It does not require the insight of a prophet to predict that . . . the unrest throughout the country will increase - to the point where violence becomes endemic and eventually uncontrollable."); *Racial Violence Breaks out again in South Africa*, CHI. TRIB., August 23, 1985, at C5 (quoting Nelson Mandela as seeing "no alternative to violent revolution.")

3. See John M. Broder, *S. Africa A-Arms Program since 70s Told; Weapons: CIA Documents Dispute Official Denials from Pretoria. 1979 Test Recalled*, L.A. TIMES, Sept. 27, 1990, at A16 ("South Africa has had an active nuclear weapons program since at least the mid-1970s."); John J. Walte, *South Africa says it Built Nuclear Arms*, USA TODAY, March 25, 1993, at A4.

has stood as one in a collection of giants—Luthuli, Tutu, Tambo, Mbeki, and many others. The people have followed their holy path of peace and forgiveness.

Another less known, recognized ingredient of the South African recipe was the rule of law. Through long negotiations and deliberations, change progressed in a rational, principled fashion. First, there was the period of holding talks about talks, that is, of discerning the procedures that talks would follow.⁴ Then came the fashioning of principles with which the new constitution had to comply.⁵ These principles embodied the concept of rule by both the majority and the minorities, and the protection of the rights of every person, including members of minorities.⁶ In so doing, they comprised a kind of peace treaty by which both sides could live. A new constitutional court comprised of eleven highly respected jurists would check the new constitution for compliance with the principles. Indeed, the court rejected several provisions of the draft constitution and sent it back to the Constitutional Assembly (Parliament) for reconsideration and redrafting as they did not comply with the principles.⁷ Even though a miracle has occurred, South Africa continues to face challenges. Both the new president and the rule of law face severe tests thrust upon them partly by the burdens of history and partly by environmental conditions.⁸

Mr. Mbeki took office on June 17, 1999.⁹ He was well trained for the post, having most recently served as vice-president under Nelson Mandela. He also was a pivotal instrumental intellectual force behind the miraculous changes that ended legalized apartheid.¹⁰ But miracles have hangovers, and many years of apartheid are not cured overnight. Mr. Mbeki focused on part of this hangover in his campaign.¹¹

Essentially, many of these problems implicate the rule of law. At least four problems will test the resolve of the rule of law in South Africa. Some of these problems may be played out in litigation before the constitutional court. Rather than speculate about possible resolutions, I will

4. See Sachs, *supra* note 1, at 1253-54.

5. See *id.* at 1255-56.

6. See *id.* (noting the principles were drafted to be "inclusive as possible to make everybody feel protected in the process.").

7. See *id.* at 1256.

8. See Jon Jeter, *In S. Africa, a President Replaces an Icon; Mbeki Takes Over From Mandela, Nation's 'Sainly Man'*, WASH. POST, June 17, 1999, at A1 (listing challenges faced by South Africa including: unemployment, soaring crime rates, housing shortages, and the AIDS crisis).

9. See *id.*

10. See Lynne Duke, *South Africa After Apartheid: The Legacy of Compromise A Pragmatist Prepares to Succeed Mandela*, WASH. POST, June 1, 1999 at A1 (noting that Mbeki was "very much an architect of the historic compromises that have allowed South Africa to move from apartheid . . . to nonracial democracy without coming apart at the seams" and reporting on his role in the "'talk about talks.'").

11. See David Goodman, *Unfinished Work: Mandela has Remade South Africa But Much Is Left to Be Done*, WASH. POST, May 30, 1999, at B1 (quoting Mbeki's campaign slogan of "'a better life for all'" referring to "grinding poverty that has been the greatest legacy of apartheid.").

simply sketch out potential issues with a view toward glimpsing their enormity and complexity. The four issues are redistribution, affirmative action, crime, and federalism. Each of these issues has obvious constitutional content. However, they are also integrally interrelated in economic, political, and social terms. For example, high unemployment fuels the high crime rate, which helps to drive tourists and businesses away, which feeds unemployment, which feeds crime. All of this inevitably may, at some point, strain the federal structure if the center increasingly faces difficulty in providing for the citizenry. The new government faces these myriad quandaries. How much latitude will the constitutional court afford it to attack these problems? Will it show courage to curb governmental excesses which infringe on political rights and property rights? On the other hand, how long can people who have experienced severe deprivation and injustice for so long wait? But these questions race ahead of the story. Let us first unpack these four problems a bit so that we can glimpse their rough contours.

One of the root problems driving the others is the distribution and size of the economic pie. Unfortunately, the new South African government inherited myriad problems, including one of the most inequitable distributions of wealth in the world.¹²

Tellingly, unemployment is a staggering forty percent.¹³ According to Sampie Terreblanche, a South African political economist, that rate has risen from about ten percent in the 1970s.¹⁴ Professor Terreblanche says that most of the job cuts are in gold mining and corn production.¹⁵ One can trace the decline of South Africa's economy to the decline of the rand. On January 2, 1990, 2.55 rand purchased one dollar;¹⁶ on January 2, 1992, 2.73 rand purchased one dollar;¹⁷ on January 3, 1994, 3.4 rand purchased one dollar;¹⁸ and on September 17, 1999, 6.1 rand purchased one dollar.¹⁹ Thus, the rand has lost more than half of its value during this decade. Many of the reasons for this were beyond anyone's control. First, the economic sanctions that isolated South African business took a considerable toll. Many businesses just did not return after apartheid ended.²⁰ Other factors simply involve bad luck. The price of gold has declined from \$400 per ounce on January 2, 1990²¹ to \$255 per ounce on July 7, 1999.²² Gold is, of course, one of South Africa's key industries.

12. See Peter N. Boucheart, Note, *The Negotiated Revolution: South Africa's Transition to a Multiracial Democracy*, 33 STAN. INT'L L. 375, 404 (1997).

13. See Donald G. McNeil, *As Britain Sells Some Gold, South Africa Howls*, N.Y. TIMES, July 7, 1999, at C1.

14. See *id.*

15. See *id.*

16. See *Foreign Exchange*, J. COM., January 2, 1990, at A2.

17. See *Foreign Exchange*, J. COM., January 2, 1992, at A2.

18. See *Foreign Exchange*, J. COM., January 3, 1999, at A2.

19. See *Foreign Exchange*, J. COM., September 17, 1999, at A2.

20. See Andrew Maykuth, *S. African Labor Reaps Bitter Harvest from Democracy*, SAN DIEGO UNION-TRIB., July 11, 1999, at A25.

21. See *Foreign Exchange*, J. COM., January 2, 1990, at A2.

22. See McNeil, *supra* note 12, at C1.

AIDS has wreaked havoc in southern Africa.²³ Moreover, just as South Africa showed some signs of economic recovery, the world economic crisis prompted a sell-off in its stock market.²⁴ Capital flight has only exacerbated the difficulties. Many prominent South African companies have left the Johannesburg stock exchange for the London stock exchange.²⁵ In his inaugural speech to Parliament, Mr. Mbeki endorsed the conservative economic policies followed by Mr. Mandela.²⁶ He even said that he would review labor laws that might be deterring foreign business from investing in South Africa.²⁷ However, if economic conditions do not improve soon, cries for radical redistributive measures will likely grow louder. Such measures could provoke constitutional challenges.²⁸

A second challenge that may face the constitutional court involves affirmative action. The unemployment rate among blacks is a staggering forty-two percent, while it is four percent among whites.²⁹ Moreover, sixty-one percent of South Africa's blacks live below the poverty line, eclipsing the mere one percent of whites who suffer under this burden.³⁰ In such a milieu, affirmative action is inevitable. But how much? After all, blacks number thirty-two million, while whites number six million.³¹ The tremendous inequities may pressure government dramatically to accelerate affirmative action.³² However, affirmative action is already producing many disgruntled whites who are leaving South Africa.³³

Perhaps the most immediate set of challenges will be posed by crime. Only crime in Moscow and Mexico City surpasses crime in Johannesburg.³⁴ South Africa's crime rate ranks among the highest in the world.³⁵ Criminals sometimes have military weaponry available.³⁶ Illustrating synergy among those problems, the high unemployment, and the particularly high unemployment among youth, have fed the high crime rate.³⁷ In

23. See Terence Samuel, *Freedom's March: South Africa*, ST. LOUIS POST-DISPATCH, June 13, 1999, at A11.

24. See Maykuth, *supra* note 19, at A25.

25. See Andi Spicer, *South African Exchange's Top Official Aims to Halt Listing Exodus to London*, WALL ST. J., April 12, 1999.

26. See Suzanne Daley, *Distinctive and Exhaustive, Mandela's Successor Speaks*, N.Y. TIMES, June 26, 1999, at A4.

27. See *id.*

28. As one woman who sometimes runs out of food for her two children said, "Before, it was possible to be finding jobs, but now there is not even piecework. I thought that we would have things now, but we have nothing." Suzanne Daley, *In Apartheid's Wake: South Africa Grumbles Toward Next Vote*, N.Y. TIMES, February 22, 1999, at A1.

29. See Mark Mathabane, *South Africa's Lost Generation*, N.Y. TIMES, June 4, 1999, at A29.

30. See *id.*

31. See Jon Jeter, *Whites' Fears Deepen in New South Africa*, WASH. POST, July 10, 1999, at A1.

32. See *id.*

33. See *id.* The number of whites leaving each year has doubled since 1990, and was eleven thousand in 1997.

34. See Mathabane, *supra* note 28, at A29.

35. See Daley, *supra* note 27, at A1.

36. See *id.* at A1.

37. See Mathabane, *supra* note 28, at A29.

his opening address to Parliament, Mr. Mbeki referred to crime's impact on society as "brutish."³⁸ He said that he would deal "mercilessly" with crime.³⁹ Of course, a public official is entitled to his rhetoric; at the same time, the court must remain vigilant of violations of individual rights. The new government in South Africa faces many dilemmas. Problems always beset nascent democracies; however, the horrible legacy of apartheid grossly exacerbates South Africa's difficulties. Governmental tensions and pressures frequently assume constitutional dimensions that often express themselves as constitutional challenges. These disputes often reach the doorsteps of young constitutional courts. How this nascent institution responds to these and other quandaries will define its structure in South African society for years to come. It must be assertive, but it cannot take up everything: the majoritarian process—particularly in a new democracy—must inevitably grapple with some of these problems by itself. The center gave provincial governments more than half of their funds in 1997, and began permitting provincial governments to formulate their own budgets.⁴⁰ This may prove a defining moment in the federal/provincial relationship. If the federal government cannot deliver on the economy, crime, or other problems over a sustained period of time, people may call for further decentralization. They may even provoke local challenges to the authority of the center that may reach the constitutional court.

During the week of October 19, 1998, SMU Law School was proud to host an historic visit of four justices of the South African Constitutional Court. I escorted the four South African justices for a meeting with Justices O'Connor, Kennedy, Ginsburg, and Breyer of the Supreme Court of the United States. The South African justices then spent several days at the Law School. Each day one delivered an Alfred P. Murrah lecture. The wonderful papers grapple with some of the problems outlined above. Justice Yvonne Mokgoro explores the tension between cultural identity and national unity. This problem tests South Africa's federal structure. Justice T. H. Madala tackles the difficult problem of affirmative action. While he presents affirmative action as part of South Africa's definition of equality, Justice Madala understandably does not attempt to define affirmative action. Justice Zakeria Yacoob rehearses the constitutional negotiations process, focusing on the tension between majoritarianism and protecting minority rights. His account should prove a useful guide for the difficult and inevitable problems ahead. Justice Pius Langa probes the protection of human rights. The difficult milieu in this area will increasingly place what some characterize as the most liberal constitution in the world under some pressure. Visiting the School several months after the others, Justice Albie Sachs poignantly brings us back to the miracle. You see, Justice Sachs's arm was blown off in a car bomb explosion,

38. See Daley, *supra* note 27, at A1.

39. See *id.*

40. See U.S. Department of State, background notes: Republic of South Africa at 6 (Feb. 1998).

which was a brutal attempt on his life. His is a personal account of the Truth and Reconciliation Commission through his eyes and the eyes of his assailant. Justice Sachs describes his first meeting with one of the people who blew him apart.

Challenges certainly beset this nascent constitutional democracy. But those involved have faced difficulties before.

Symposium

