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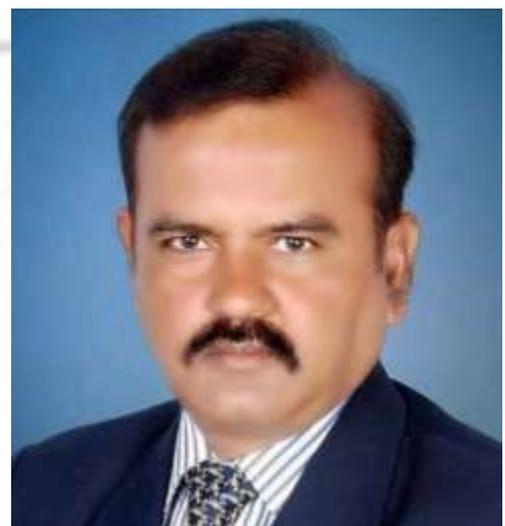


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WHITE BLACK LEGAL is an open access, peer-reviewed and refereed journal provided dedicated to express views on topical legal issues, thereby generating a cross current of ideas on emerging matters. This platform shall also ignite the initiative and desire of young law students to contribute in the field of law. The erudite response of legal luminaries shall be solicited to enable readers to explore challenges that lie before law makers, lawyers and the society at large, in the event of the ever changing social, economic and technological scenario.

With this thought, we hereby present to you

A STUDY ON CONSTITUTION-MAKING PROCESS OF SOUTH AFRICA

AUTHORED BY - S.KUMUDHA¹ & SREE LEKHA V²

INTRODUCTION

A constitution is the whole body of rules, written or unwritten, legal and extra-legal, which describes a government and its operation.³ The idea of making constitutions has become a fashionable activity only since the eighteenth century, at least in some countries like France, Germany, as well as in few others.⁴ For example, France is one such having more than ten constitutions in 200 years. The making of a constitution happens under some special circumstances such as after a revolution, after gaining independence or from a transition of governmental forms. The Epilogue, also known as the Postamble, to the interim Constitution describes the Constitution as providing:

"a historic bridge between the past of a deeply divided society characterised by strife, conflict, untold suffering and injustice, and a future founded on the recognition of human rights, democracy and peaceful co-existence and development opportunities for all South Africans, irrespective of colour, race, class, belief or sex".⁵

This is a magnificent goal for a Constitution to heal the wounds of the past and guide us to a better future. The country of South Africa has a history of colonialism, racism and apartheid for years together and came to be known as the Republic of South Africa in the year 1996 and the country has a constitution said to be known as one of the best constitutions in the world. It is said to be a constitution providing a bridge between the past of strife and conflict to a future of rights and peaceful co-existence.⁶

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³NUZHAT PARVEEN KHAN, COMPARITIVE CONSTITUTIONAL LAW, 619(2015).

⁴MICHAEL ROSENFELD &ANDREAS SAJO, OXFORD HANDBOOK ON COMPARITIVE CONSTITUTIONAL LAW, 420(2013).

⁵SOUTH AFRICAN CONST, Act 200 of 1993.

⁶See SOUTH AFRICAN CONST, Act 200 of 1993, Postamble, headed, "National Unity and Reconciliation", inserted at the end of the 'transitional constitution'.

South African constitutional democracy has been more than a decade in the making. Despite the continuous burden from apartheid and colonialism, the country's continuous pledge towards constitutionalism provides for the dramatic change in their own society. The paper discusses on the history and analyses the reason for such a dramatic change.⁷

Research objective of the paper is to analyses the past of the country of South Africa and the transitional phase in the constitution making process of the country where in the present world, the Constitution of Republic of South Africa is said to be the best and tries to find out the best approaches in the constitution making of the said country that has made it to be identical in nature.

Hypothesis of the paper is Constitution- making process of South Africa offers a paradigm for nations overhauling or creating new constitutions.

Research questions to be answered in the paper are:

1. What is history of South Africa?
2. What is the transitional phase that South Africa went through in the Constitutional making?
3. What are the features that makes the South African Constitution an ideal one?

Research methodology used in the paper is that it is a doctrinal study and descriptive approach. The analysis made for studying the constitution making process of South Africa is by analysing the history and the processes involved in making of the constitution. The materials collected are both primary and secondary data such as books, articles, journal articles and online sources. Limitation of the paper is that only the special features and some basic important processes involved in the history and transition process of South Africa is explained.

HISTORY OF SOUTH AFRICA

The history of South Africa from the past to the present democratic state is because of two reasons- colonialism and the apartheid. This chapter tries to bring light on both the reasons in a brief:

⁷ See HEINZ KLUG, THE CONSTITUTION OF SOUTH AFRICA: CONTEXT AND HISTORY, 6 (2010).

2.1. Colonialism:

‘Colonialism in Africa was started in early 17th century. The Dutch east India Company in 1652 was the first European settlement in Southern Africa. They made a colony and the colony grew rapidly and the Dutch settlers started farming in South Africa. People from different places such as Madagascar, East Africa and East Indies were imported as slaves.⁸ The first British settlers were known as the 1820 Settlers, arrived on 21 ships and there were nearly 4500 people who included artisans, traders, merchants, teachers, farmers, soldiers, etc.,. There were conflicts between the colonists and the bantu- speaking people of Africa and conflicts between the Dutch, French and the British to occupy the Cape.⁹South Africa’s diamond mining industry dated back to 1867 was said to be the world’s leading producer of diamonds. And an important turning point in the history of South Africa is the discovery of Gold mines in in 1886. There starts a war between the English and Boers (native Africans) which is said to be the longest and the expensive war between the years 1815 to 1915 in the demand of franchise rights.¹⁰

In 1910, the Union of South Africa was formed out of Cape, Natal, Transvaal and Free State. This was a white union and then the formation of African National Congress happened in 1912 mainly to exclude the blacks from power.¹¹ In 1921, the South African Communist Party was formed at a high time of militancy and many discriminatory legislations were enacted. In the year 1943, ANC Youth League was formed with the idea of nurturing leaders like Nelson Mandela, Oliver Tambo, and Walter Sisulu. But, then in 1948, the African National Party was formed and this party came to power with the idea of apartheid.’¹²

2.2. Apartheid:

Apartheid- a practise in South Africa as a result of colonisation. Among the three forms of racial discrimination- Zionism, Nazism and apartheid, apartheid is the brutal form and is of extreme rigidity. The forms of racial discrimination have their roots in the economic and social structures of that particular society.¹³“In the propaganda literature of the South African Government Apartheid means separate development. According to this interpretation the term envisages social, economic and political development for all racial groups in South Africa. It

⁸See <https://www.gov.za/about-sa/history>. (Oct 25, 2019, 11.00 am)

⁹See <https://www.gov.za/about-sa/history>. (Oct 25, 2019, 11.20 am)

¹⁰ Ibid

¹¹ Ibid

¹² Ibid

¹³See Talat. A. Wizarat, *Apartheid and racial discrimination in South Africa- An overview of the control network*, 33, PAK INS OF NATIONAL AFFAIRS, 84 (1980).

is to proceed along different lines in keeping with the cultural traditions of various groups. But even a cursory glance at data is enough to disprove this fragile.”¹⁴ Some of the examples of this are:

- (i) An African living in the town shall not teach or educate the other Africans without fee, but, this does not apply to the whites.
- (ii) Whites cannot teach their black servants to read or write.
- (iii) If there is a waiting room in a railway station, then, only the whites can access it and not the blacks.¹⁵

The apartheid laws are discriminatory in form and only a small fraction is stated here, which proves that the laws in those period does not allow for the growth of the blacks.¹⁶

For the blacks of the nation, apartheid has been a symbol of discrimination and inequality. In the light of the evidences it can be studied apartheid had never been a form of development for the majority population of South Africa. It had the effect of putting the Africans at serious disadvantage and also through this the government tried to bring in national unity among the whites who were of different languages and culture.¹⁷ And the African population is the most heterogeneous than any others in the country and the government were trying to impart this by recognising the tribes of the country. Since the African national congress won the elections in the year 1948, apartheid gained strength since it was institutionalised, before which there were no status of national importance to it. Since then, apartheid was considered a vital ideology and measures were taken to bring it in laws.¹⁸ The power is vested with the head of the political party who is the Prime Minister and has a considerable authority. He passed legislations for rooting the practise of apartheid and gave wide powers to the police such that they can arrest anyone who acts against the laws even without a warrant. They had the power to arrest people stating them as anti-apartheid groups and thus, the Anti-terrorist Act was passed. It is not only in the hands of the police but the defences forces, intelligence gathering department and the department of national security acts as an important feature in implementing

¹⁴LESLIE RUBIN, APARTHEID IN PRACTICE, 22-24 (1976).

¹⁵See LESLIE RUBIN, APARTHEID IN PRACTICE, 26 (1976).

¹⁶See. Talat. A. Wizarat, *Apartheid and racial discrimination in South Africa- An overview of the control network*, 33, PAK INS OF NATIONAL AFFAIRS, 85 (1980).

¹⁷ Ibid

¹⁸See. Talat. A. Wizarat, *Apartheid and racial discrimination in South Africa- An overview of the control network*, 33, PAK INS OF NATIONAL AFFAIRS, 86 (1980).

apartheid in the society.¹⁹ Not just these features, but even the modern technologies paved way for strong implementation of this. “However, the developments in Rhodesia have given impetus to the debate about the prospect of peaceful change in South Africa. A variety of propositions had been suggested in this regard;²⁰ It is also believed that industrialisation would compel the government to gradually do away with racial segregation. The liberation of Rhodesia has been a great source of encouragement to the non-white population of South Africa. Nations still under the yoke of colonialism have found that there is no real alternative to armed struggle. There is little to suggest that the experience of South African people would be different from the trend in other colonies.”²¹

CONSTITUTION MAKING PROCESS OF SOUTH AFRICA

3.1. Initial stages of transition:

In the year 1961, the National Party government declared South Africa as a republic nation after a white referendum. After this, South Africa was at the verge of independence and the government divided the nation into white areas and for that of the native Africans. Leaders of the black organisations were arrested and June 1976 there were a sustained anti-apartheid revolt. Protests in large scale entered a series of limited reforms in the 1980's. In 1983, the constitution was reformed and the minorities were also allowed to participate in the subordinate houses of the parliament. 1986 saw the passed laws to be scrapped and the international communities also supported the anti- apartheid clause.²²

South Africa achieved its democracy in two phases of constitution- making process. The first stage shall be from 1990 to 1994, which was made by the violence and protests that were going on, but still the process remained under the negotiating parties. In contrast the second stage was from the time of elections to the enforcement of the new constitution of 1996, which was made by constitutional principles in the Interim constitution.²³

The major phase after the protests in South Africa was initiated by President De Klerk by

¹⁹ Ibid

²⁰ Ibid

²¹ See. Talat. A. Wizarat, *Apartheid and racial discrimination in South Africa- An overview of the control network*, 33, PAK INS OF NATIONAL AFFAIRS, 87 (1980).

²² *Supra* note 6.

²³ See HEINZ KLUG, *THE CONSTITUTION OF SOUTH AFRICA: CONTEXT AND HISTORY*, 23 (2010).

freeing political prisoners and normalising political activity at the opening of the Parliament in 1990. The first step was decolonising pull away from the imperial power until 1960; It is also made sure that all countries including South Africa was benefited by happy congruence of substantial shifts in the balance of world political power. The process of constitutional change starts with the negotiation process. Law commission on 'Group and Human rights' made under the head Judge Pierre Oliver from 1986 to 1993, made the protection of individual Human rights in the governmental circles; ANC has an extended history in accepting these rights given. These were made possible through the negotiation process that held outside the state of South Africa in the year 1987 to 1989.²⁴

3.2.The middle phase:

With the organising of multiple party discussions and negotiations, at the Convention for a Democratic South Africa (CODESA) in the late 1991, the transition process was already started. There were many opinions on the basic issues.²⁵ The ANC and the government agreed to have a multi-party democracy. Substantive negotiations began in 1992 with 5 groups of the CODESA. "They are on the issues:

- The reincorporation of the four 'bantustans' given independence under apartheid, Transkei, Bophuthatswana, Ciskei and Venda;
- The creation of a transitional group to lead the country and democracy;
- The establishment of a set of constitutional principles;
- A method to draft and adopt a new constitution;
- The creation of a climate ensuring a free political activity."²⁶

As a pre-requisite to agreement on the nature of a future Constitution-making body, the government began to insist there be prior agreement that any future Constitution be premised on a strictly federal system of government based on the balkanisation of the country into a number of all-but-independent regions. There held an ANC mass-action campaign and the participants demanded an amendment to the 1983 constitution and thus adopt a 'transition to democracy act', which presented a scheme of an establishment of the interim government and a democratically elected constitution-making body.²⁷

²⁴See HUGH CORDER, HOW CONSTITUTIONS CHANGE- ACOMPARITIVE STUDY, 58 (2011).

²⁵ See HEINZ KLUG, THE CONSTITUTION OF SOUTH AFRICA: CONTEXT AND HISTORY, 25 (2010).

²⁶ Ibid

²⁷See HEINZ KLUG, THE CONSTITUTION OF SOUTH AFRICA: CONTEXT AND HISTORY, 27 (2010).

With many number of negotiations, the ANC and National Party government were pushed to reach agreement in the record of understanding on 26th September 1992, setting the scene for the creation of a new negotiating process. The key elements for this agreement were the National Party's concession regarding an elected constituent assembly and the ANC's acceptance of a government of national unity under a transitional Constitution.²⁸ Thus, by accepting a democratic constitution-making process, both ANC and National Party accepted for an Interim Constitution, which would establish a government of national unity for five years and ensure a legal continuousness. Thus, the Interim Constitution of 1993 was adopted in December 1993 and this came into force by democratic elections in April 1994.²⁹

3.3.The final phase:

The interim constitution was considered to be the epitome of the final constitution such that it was designed in a way that it has a life span of 5 years and has provisions for achieving a democratically constituted Constitution-making body to produce a final constitution.³⁰ Three elements of the interim constitution provided as fundamentals in providing a government of transition to democracy in South Africa:

- Firstly, the interim constitution provided a basis for the election and empowerment of a democratic government;
- Secondly, it included a number of provisions for the framing of the constitution by a constituent assembly and mainly the 34 constitutional principles; and
- Thirdly, the postamble promised a new transition which included national unity and out of a need to achieve a national reconciliation.³¹

ANC leader Joe Slovo's 'sunset clause' was adopted by ANC National Executive Committee in February 1993, represented the epitome of an elite pact. The essential feature of the clause is that it gives the elected parliament the power to write a new constitution such that the proposals seems to grant a negotiated constitution and future power-sharing.³²

As mentioned in Chapter 5 of the Interim Constitution³³, both the houses of the parliament- the

²⁸ Ibid

²⁹ See HEINZ KLUG, THE CONSTITUTION OF SOUTH AFRICA: CONTEXT AND HISTORY, 28 (2010).

³⁰ See HEINZ KLUG, THE CONSTITUTION OF SOUTH AFRICA: CONTEXT AND HISTORY, 42 (2010).

³¹ Ibid

³² See HEINZ KLUG, THE CONSTITUTION OF SOUTH AFRICA: CONTEXT AND HISTORY, 50 (2010).

³³ SOUTH AFRICAN CONST, Act 200 of 1993.

national assembly and the senate together were given 2 years for passing the Constitutional text. At its first meeting, it elected Cyril Ramphosa of ANC as its chairperson and Leon Wassels of the National Party as its deputy chairperson. And in its second meeting in August 1994, the Assembly established a 44- member Constitutional Committee as a steering committee and created an administrative structure to manage the process. This committee held support to the Assembly and facilitated other aspects such as public participation programmes that involved both written and electronic submissions; a constitutional education programme; a constitutional public meeting programme³⁴ and a newsletter, 'CONSTITUTIONAL TALK', to explain the process. In addition to this was the theme committee for collecting information, ideas, views from political parties, interest groups and individuals that would come from the content of the constitution.³⁵ Thus, on 8th may 1996, 87 percent of the members of the Constitutional Assembly voted in favour of a new constitutional text that was to form the basis of the final Constitution. Thus, constitution of Republic of South Africa, 1996, was adopted.³⁶

SIGNIFICANT FEATURES OF SOUTH AFRICAN CONSTITUTION AND THE FORMULATING PROCESS

The Final Constitution is the formal product of Constituent Assembly, which met between May 1994 and December 1996. The constituent assembly were elected by democratic election in April 1994; and the Assembly spent a long time debating and adopting different provisions of the Constitution. Similar to other National Constitutions, the 1996 Constitution also reflects a broad range of sources, including the Interim Constitution, legacies of the struggle against Apartheid. It also paved in way for legal continuity and also the legal and constitutional traditions of the pre-democratic South Africa. All of these including the human rights and political culture were brought in together to draft the final Constitution.³⁷

So the first significant feature was that the Final Constitution was that it was drafted by negotiating the Interim Constitution which itself had the provisions for the Constituent Assembly, Constitutional principles as stated in Schedule 4.³⁸ It created a globalised Property Clause. The final property clause reflects the democratic origins of Constituent Assembly and

³⁴ See HEINZ KLUG, THE CONSTITUTION OF SOUTH AFRICA: CONTEXT AND HISTORY, 52 (2010).

³⁵P. BELL, THE MAKING OF THE CONSTITUTION: STORY OF SOUTH AFRICAN CONSTITUENT ASSEMBLY, 32 (1997).

³⁶ See HEINZ KLUG, THE CONSTITUTION OF SOUTH AFRICA: CONTEXT AND HISTORY, 53 (2010).

³⁷See HEINZ KLUG, THE CONSTITUTION OF SOUTH AFRICA: CONTEXT AND HISTORY, 45 (2010).

³⁸SOUTH AFRICAN CONST, Act 200 of 1993.

guarantees not only the restitution of land taken after 1913 but a right to legally secure tenure for those whose tenure is insecure as a result of racial discrimination, but also enables the citizens to gain access to land on an equitable basis.³⁹

Most prominent among the sources were the legacies, legal traditions and the limits of path dependency. The advocacy of human rights and demands for political and social rights kept the notion of in-alienable rights alive within the anti-apartheid movement and social movements in South Africa. Two documents that stand out as the product of these claims are that ANC's African claims in South Africa, 1945⁴⁰ and the Freedom Charter adopted by Congress of the people on 26 June 1955⁴¹. The ANC's publication of Constitutional Guidelines for a democratic South Africa in mid-1988 marked a dramatic shift away from unrestrained of Harere Declaration by organisation of unity in 1989. This document used the Constitutional Nations General Assembly. Finally, the ANC proposed its own Bill Of Rights in 1990, with further amendments in 1991 and 1992;⁴²

The formulation of these rules or the transition was initiated by the adoption of four pieces of legislation. The statutes were initially approved by the Negotiating Council and enacted by special sitting of the tri-cameral parliament in 1993.⁴³ Formal shifting of the apartheid government began with the passage of Transitional Executive Council Act⁴⁴. Together with other three statutes Independent Electoral Commission Act, Independent Media Commission Act and the Independent Broadcasting Authority Act, the Transitional Executive Council Act, provided for the basis of a pre-constitutional order.⁴⁵ The IMC was designed "to ensure equal treatment of the different political parties taking part in the non-racial democratic elections in order to promote and contribute towards the creation of a climate favourable to free political involvement and a free and fair election."⁴⁶ The IBA was designed to reverse a history of government controlled media, maintain a diversity of views and expand the participation of those historically denied access to and control over broadcasting.⁴⁷ The Electoral Act

³⁹ See. Sec 25 of SOUTH AFRICAN CONST, Act 108 of 1996.

⁴⁰ See. M. BENSON, THE AFRICAN PATRIOTS: THE STORY OF THE AFRICAN NATIONAL CONGRESS OF SOUTH AFRICA, 117 (1963).

⁴¹ See. R. SUTTNER, 30 YEARS OF FREEDOM CHARTER, 1 (1984).

⁴² See HEINZ KLUG, THE CONSTITUTION OF SOUTH AFRICA: CONTEXT AND HISTORY, 61 (2010).

⁴³ See HEINZ KLUG, THE CONSTITUTION OF SOUTH AFRICA: CONTEXT AND HISTORY, 34 (2010).

⁴⁴ Transitional Executive Council Act, Act 151 of 1993.

⁴⁵ Supra note 41.

⁴⁶ Sec 3 of Independent Media Commission Act 1993, Act 148 of 1993.

⁴⁷ See Independent Broadcasting Authority Act 1993, Act 153 of 1993.

proceeded to establish an IEC with responsibility for ensuring a fair electoral process and verifying the result as 'substantially free and fair'.⁴⁸ Debates over the nature of Transitional Justice, particularly in the creation and practise of South Africa's Truth and Reconciliation Committee, an understanding of the role of law in transition must reach beyond the truth and reconciliation paradigm.⁴⁹ The subsequent passage of Promotion of National Unity and Reconciliation Act in 1995 and the establishment of Truth and Reconciliation Committee projected the process of transitional era into democratic era. Although TRC aims to achieve some national level reconciliation through its three separate branches- the victims hearings, amnesty process and reparations committee. This focuses on the past produced a process of limited amnesty, accountability and forgiveness.⁵⁰

CONCLUSION

The 1996 Constitution is said to be known as an autochthonous Constitution⁵¹, a 'home-grown' product of negotiations among local parties who had been elected in the Constituent Assembly. Yet, like all the birth certificates the document acknowledges its parental characters. While the birth was internationally heralded as a beacon of hope for Africa and the world, there was also a sense of recognition or note of pride among foreign observers that revealed a familial connection which represents umbilical connection to many of its unspecified sources.⁵² While the written Constitution is the primary source, the task of interpreting and implementing the constitution requires to understand the deeper legal traditions as well as the traditional, social and political legacies. Apart from this, the Constitutional principles were taken from the Interim Constitution and the Constitutional Courts were called upon to apply these principles to certify that Constitutional Assembly had remained true to the agreements reached by the parties who negotiated for establishing democratic South-Africa. Along with the political struggles, legal practices, culture, international law and foreign jurisprudence were also taken into consideration.⁵³ The promise of the Constitution and democratic transition to be fulfilled, those undertaking this interpretative task will have to remain loyal to the fundamental mission of a new society that remains as the heart of the final 1996 Constitution. Thus, the special feature of the constitution making process shall be the degree of public exposure in the drafting process

⁴⁸ Sec 5 of Independent Electoral Commission Act, 1993, Act 150 of 1993.

⁴⁹ See. R.G. TEITAL, TRANSITIONAL JUSTICE, 2 (2000).

⁵⁰ See HEINZ KLUG, THE CONSTITUTION OF SOUTH AFRICA: CONTEXT AND HISTORY, 43 (2010).

⁵¹ See. Y. GHAI, *A Journey around Constitutions: Reflection of Contemporary Constitutions*, 4 SOUTH AFRICAN L.J., 122 (2005).

⁵² See HEINZ KLUG, THE CONSTITUTION OF SOUTH AFRICA: CONTEXT AND HISTORY, 46 (2010).

⁵³ See HEINZ KLUG, THE CONSTITUTION OF SOUTH AFRICA: CONTEXT AND HISTORY, 83 (2010).

through a number of methods like the newsletter Constitutional Talk and various committees involved in the negotiating process.⁵⁴ Thus, the paper states that there are special features and processes involved in the making of the South African Constitution. Hence, Constitution-making process of South Africa offers a paradigm for nations overhauling or creating new constitutions.

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