

A POST-APARTHEID CONSTITUTION FOR SOUTH AFRICA: LESSONS FROM PUBLIC CHOICE

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Introduction

As South Africa continues to strive toward constitutional reform, it seems appropriate to examine normative public choice theory for insights that might be relevant to the South African constitutional process. Normative public choice, often called constitutional economics, comprises a comparative analysis of the rules and institutions that govern economic, social and political interactions. The purpose of constitutional economics, in the tradition of Knut Wicksell and James Buchanan, is to identify the attributes of socially efficient rules.¹

Constitutional economics extends the market exchange paradigm to the study of rules and institutions. There is a fundamental distinction between, on the one hand, choice of rules, and, on the other hand, political and economic decisions that are made within a given structure of rules. A central tenet of constitutional economics is that individuals can often agree on a mutually advantageous set of rules, although they normally disagree about specific political and economic questions that are decided within the framework of rules. A level of constitutional deliberation exists conceptually prior to the level of "in-period" politics. While the latter is inherently conflictual, the former bears certain similarities to market exchange if the choice of a constitution reflects voluntary agreement of all parties.

The setting within which constitutional deliberations take place, the "constitutional environment," is an important factor in determining

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¹See Wicksell ([1896] 1958) and Buchanan (1975, 1990).

the efficiency of the constitutional contract that emerges from the deliberations. Recent advances in constitutional economic theory suggest that an efficient contract requires an environment in which all parties are able to exercise an "exit" strategy.² Exit, in this context, refers to the ability of a contracting party to choose the highest valued contractual arrangement from among an array of viable alternatives. Availability of exit opportunities makes the constitutional environment competitive, with the result that the contract produced from this environment is socially efficient.

An efficient contract is mutually beneficial to all participants. It allows individuals to reap the full gains from social cooperation and to maximize the value of post-contractual decisions (Lowenberg and Yu 1990, Gifford 1991). But even an efficient contract will not necessarily survive in the absence of an enforcement mechanism. Individuals have incentives to break rules after the rules have come into effect. This is true even of those individuals who agreed to the rules in the first place. Post-contractual opportunism is especially problematic in the case of political constitutions, which lack effective third-party enforcement.

The problem of enforcement has been addressed in constitutional economics under the rubric of "constitutional maintenance."³ According to the theory of constitutional maintenance, a social contract can be made self-enforcing by including certain types of principles and procedural rules in the constitution. In broad terms, these principles and procedures must entail a commitment to uphold competition in post-constitutional economic and political exchange. The returns to post-contractual opportunism are reduced considerably in a competitive society. Again, the notion of exit provides a useful analogy. In a competitive market, the mechanism through which preferences for private goods are revealed is essentially that of exit (ensured by the availability of alternative trading opportunities of equal or similar value). This market competition paradigm can be extended to the post-constitutional political sphere as well.

The purpose of this paper is to analyze constitutional change in South Africa from the perspective of constitutional economic theory. I will examine the existing constitutional environment in South Africa to determine whether that environment is likely to produce an efficient constitution. I will argue that the existing environment

²See, for example, Lowenberg and Yu (1990, 1992) and the references cited therein.

³Although the term constitutional maintenance is not used by all of these authors, a sampling includes Anderson and Hill (1986), Buchanan and Faith (1987), Wagner and Gwartney (1988), Aranson (1988), Wildavsky (1990), Niskanen (1990), and Lowenberg and Yu (1992).

is not an efficient one, and I will suggest a way to restructure the *environment to make it efficient*. I also will use constitutional economic theory to identify appropriate constitutional principles that ought to be embodied in a new South African constitution to ensure its survival as a self-enforcing contract. The main conclusion derived from this analysis is that a self-enforcing constitution for South Africa must create decentralization of political authority and provide guarantees of private property rights and freedom of contract.

The Constitution as a Contract⁴

The fundamental problem of social organization can be characterized as a prisoner's dilemma game, in which the dominant strategy, in the absence of agreement or coordination among the players, is noncooperation (for example, stealing, renegeing on the rules, and free riding in contributions to public goods) (Wagner and Gwartney 1988). Although each individual would gain if everyone behaved cooperatively, uncertainty about whether others will cooperate leads to a socially inefficient Cournot-Nash equilibrium of mutual noncooperation.

The only way out of the prisoner's dilemma is an enforceable agreement among the players to cooperate. The agreement must be enforceable because each individual has an incentive subsequently to defect from the cooperative agreement. The mutual gains from social cooperation are a public good, and, as with any other public good, the dominant strategy is to shirk in contributing to its provision. The constitution is essentially a contract intended to secure mutual cooperation, but, without an enforcement mechanism, it cannot succeed in doing so.⁵ Despite the substantial potential gains that a consensual agreement is capable of producing, "the maintenance of such a constitutional contract does not resolve itself naturally" (Wagner and Gwartney 1988, p. 54). Unlike many legal contracts, there is no third-party enforcer, external to the contract, who can ensure that defectors from the cooperative agreement are caught and forced to comply with the terms of the agreement. Of course, many countries have a nominally independent Supreme Court whose purpose is to *enforce the constitution*. But the Supreme Court can only do this imperfectly in most cases, because the judges themselves are not totally immune from political pressures by groups wishing to subvert the original intent of the constitution (Wagner and Gwartney

⁴The next two sections are based on Lowenberg and Yu (1992).

⁵On the definition and purpose of a political constitution, see Mueller (1991, pp. 326-27).

1988, pp. 40–42; Niskanen 1990, pp. 54–57; Merville and Osborne 1990, p. 40).⁶

Given the unreliability of third-party enforcement, and given the strong individual incentive to defect from social cooperation, a constitutional contract needs to be self-enforcing if it is to be maintained. The first condition necessary for a constitution to be self-enforcing is that it be efficient, i.e., it must provide mutual gains from cooperation. An efficient contract is one that maximizes societal wealth. It produces the largest gains relative to any other feasible contractual arrangement, including the absence of a contract.

The second condition that is necessary for a contract to be self-enforcing is that, in addition to providing mutual gains, recognition of these gains must be sufficient to induce compliance. For example, rules that lower the transaction costs of exchange are mutually beneficial for all participants, and these rules might be expected to be self-enforcing. Most people probably would choose to drive on the same side of the road, even in the absence of traffic police. Such rules are self-enforcing because they solve coordination problems, with the result that all parties have a stake in obeying them (North 1990, p. 41). Many social institutions that are self-enforcing emerge more or less spontaneously, and need very little explicit third-party policing. As an example, Niskanen (1990, p. 58) points out that the mutual desire for continued relations between parties is often enough to enforce contractual performance. A reputation is a valuable asset whenever repeat dealings are involved (North 1990, p. 50). Thus, Axelrod (1984) has demonstrated that cooperation will tend to evolve in repeated prisoner's dilemma games of uncertain duration.

One important attribute of a self-enforcing political constitution is that it must successfully constrain the power of the state. It is not immediately obvious why this should be so, therefore I will elaborate on this point at some length. First, it must be recognized that the rules of a constitution normally are embodied in a state that is given a monopoly of legitimate force. The state is set up to collect taxes to pay for public goods (a necessarily coercive act, given the solution of the prisoner's dilemma game) and to regulate private actions to internalize the spillover effects arising out of externalities and other interdependencies. The state also might be assigned, through the constitution, a role of income redistribution. Individuals at the constitutional stage of deliberation might agree on a mutually beneficial social insurance contract to provide a "safety net" against reductions

⁶Landes and Posner (1975) argue that the U.S. Supreme Court serves the weighted interests of current and past Congresses. See also Aranson (1988, pp. 308–9).

in income due to recession or random events, and therefore might build into the constitution a *redistributional function for the state*.⁷

Once the instruments of state power are established, however, there is an incentive for groups of individuals to seek to capture these instruments and to use them as vehicles to enrich themselves in ways that are not possible as private citizens. This tendency exists even in liberal democracies (Wagner and Gwartney 1988). In these societies, laws and policies normally are enacted through majority rule. Tullock (1959) has shown that under any voting system that requires less than unanimous approval to implement policies, majority coalitions of interest groups will seek to obtain public provision of special-interest projects. Each of these projects provides large benefits to one group, but is of little interest to anyone else, since the costs are spread over the entire population. Through implicit logrolling, a coalition of interest groups, comprising a bare majority of voters, can get all of their favored projects approved for public provision. Under certain plausible conditions, the total costs of these projects can exceed their total benefits, while cost-spreading through the *fisc* induces a rational ignorance of this process on the part of the disadvantaged majority (Ordeshook 1986, p. 214; Aranson 1988, p. 291). The result is a diminution of societal welfare through excessive government provision of special-interest legislation for purposes of redistribution (Mueller 1989, p. 84).

A further inefficiency arises as a consequence of rent dissipation occurring through the expenditure of resources by coalitions of special interests seeking redistributional policies. Interest groups spend resources in lobbying politicians and bureaucrats to enact regulations or policies that are beneficial to the groups in question. Politicians respond to these pressures by supplying regulation in accordance with the relative influences of competing interest groups (Peltzman 1976, Becker 1983). Small groups typically are more effective in exerting political influence than large groups, because the benefits obtained by a small group are concentrated among relatively few individuals. This concentration of benefits spurs individual group members to contribute resources and effort to help achieve the group's goals. Small groups are therefore better able to control free riding among their members, which makes them more politically effective than larger groups (Olson 1965). Because the social costs

⁷Ex post redistribution for social insurance purposes, which is potentially wealth enhancing, must be distinguished from inefficient governmental redistribution policies that are primarily a consequence of majority-rule voting and rent seeking. The latter policies are discussed in more detail below. See Mueller (1991, p. 327) for further discussion of governmental redistribution viewed as an insurance contract.

of the policies sought by these politically effective groups are spread over the entire populace, political resistance against these groups' activities is normally weak. Thus, for example, relatively small producer groups often are successful in seeking regulations that raise the costs of entry into their industries, thereby producing rents for existing producers at the expense of large numbers of consumers.

The dominant strategy for any organized interest group in a majoritarian polity is to lobby for policies that create rents for its members and disperse the costs over everyone else (Ordeshook 1986, pp. 213–15). Thus, it is evident that even democratic governments may become instruments of plunder, with those who gain control of the power of the state using that power to prey upon others (Gwartney and Wagner 1988). This brings us back to the Cournot-Nash solution to the prisoner's dilemma game. Although society as a whole would be better off without the existence of redistributive coalitions and the rent seeking that goes along with them, it is privately optimal for all individuals and groups to defect from the cooperative strategy and to join in the plundering. The appropriate notion of government, according to this public choice view, is that of government-as-Leviathan (Wiseman 1990, p. 112).

The contractarian approach to political economy allows the problem of Leviathan to be expressed usefully in terms of principal-agent theory (Anderson and Hill 1986, Merville and Osborne 1990). The political process can be viewed as one in which citizens (principals) grant the power of coercion to an agent (government) in return for the provision of public goods. However, these legitimate public-good outputs of government are like common pool resources, in the sense that no one owns a claim to the capitalized value of public assets whose benefits are widely diffused (Pejovich 1990, p. 33). Political agents soon realize that they can gain greater support by underproviding these public goods and providing instead privatized transfers with concentrated benefits targeted to specific interest groups, financed out of general tax revenues (Anderson and Hill 1986). This leads inevitably to the creation of a Leviathan state. Merville and Osborne (1990) use agency theory to demonstrate formally that, in majority-rule political systems, coalitions of minority factions will induce politicians to systematically break the constitutional contract in order to supply special-interest projects. Political contracts are much more susceptible to this post-contractual opportunism by agents than are private market contracts. In the market context, contractual performance is assured by various self-enforcement mechanisms such as residual claimancy, price signals and competition (Klein and Leffler 1981). All of these serve to lower the

principals' costs of monitoring the agents. The problem of constitutional maintenance in the political arena is essentially a problem of how to replicate some of these mechanisms in order to enforce and monitor the post-contractual performance of political agents.

An efficient constitution, by definition, maximizes the potential gains from cooperative endeavor in the post-constitutional society by constraining noncooperative behavior. However, unless there is some built-in enforcement mechanism, noncooperation will become prevalent and the efficient constitution will be replaced by a Leviathan government, as legislation is increasingly used for redistributive purposes (Wiseman 1990, p. 112; Aranson 1988, p. 310). To prevent this, the constitution must limit the regulatory powers of the state and constrain the scope of state intervention in the realm of private exchange. If the constitution is successful in doing this, the result will be less rent seeking, because a noninterventionist state has fewer rents to award. Rent seeking processes are attenuated in polities where the state is constitutionally limited in its ability to supply special-interest legislation.

The question, then, is how to ensure that a constitution is not only efficient but also self-enforcing. It is not enough for a contract to produce mutual gains from cooperation. That cooperation itself must be maintained. Yet individuals and interest groups inevitably will attempt to subvert the constitutional authority of the state to their own advantage, at the expense of the welfare of the community as a whole. This defection from mutual cooperation diminishes the value of the constitutional agreement and eventually renders meaningless the terms of the constitution. Acceptance of, and adherence to, any contract depends not only on mutuality of gains but also on protection against exploitation of advantage by special-interest groups (Lingle 1991, p. 31). To guarantee this protection, the constitutional contract must be self-enforcing. In the next section, I will consider the conditions necessary for a constitution to be efficient and self-enforcing.

Conditions for Constitutional Efficiency and Maintenance

A constitutional proposal that embodies positively valued prospects for all participants could conceivably garner unanimous consent at the constitutional stage of deliberation (Buchanan 1990, p. 9). It follows that the main normative focus of constitutional economics is on the actual *process* through which rules come to be adopted (Buchanan 1975, p. 6). If that process entails unanimous

consent by all affected parties, then the outcome is efficient, but it is inefficient if elements of coercion are present in the constitutional deliberations.

Thus, unanimous agreement at the stage of constitutional deliberation is a necessary condition for an efficient contract. However, unanimity implies that all parties give their assent knowingly and voluntarily. This, in turn, requires that no one be coerced into the agreement and, most importantly, that all parties possess real, viable alternatives to the contract toward which they are negotiating. A precondition for contractual efficiency, therefore, is the existence of exit options for all contracting parties. An exit option comprises the availability of alternative contracting partners, or alternative and equally-valued contractual arrangements, for individual parties to the constitutional agreement.

The notion of exit is derived from Albert Hirschman's (1970) classic distinction between exit and voice. Exit (and entry) is an important means by which individuals are able to express their preferences, and is precisely the method through which preferences are revealed in competitive markets for private goods. Voice is an alternative method of preference revelation. In this case, the individual expresses his attitudes through complaint, commendation, voting, political influence or some other persuasive device that is not dependent on the threat of exit (Mueller 1989, p. 149).

The essence of the exit strategy in constitutional negotiations is the element of choice among alternative contracting partners. Each individual party to the contract is able to search across an array of potential partners in order to choose the optimal contractual arrangement. No one is coerced to make a contract with anyone who they would not voluntarily choose. The assets brought by any party into a potential cooperative agreement are not specific to any one set of partners or to any one constitutional arrangement. Each party can walk away from an opportunistic partner and seek a higher valued contract with someone else. If exit options were unavailable, however, or if exit were costly, it is unlikely that the resulting contract would be wealth maximizing because individuals involved in contractual negotiations would be locked into dealing with partners whom they would not have chosen if they had the ability to shop around. The availability of exit options helps to defuse potential hold-up threats, bilateral monopoly, and coercion in contractual dealings.⁸

⁸See Alchian, Crawford, and Klein (1978) on the problems of rent appropriation caused by asset specificity and bilateral monopoly. The fewer alternative employment opportunities an asset possesses, the more susceptible it is to post-contractual opportunism. The same principle applies to partners in a political constitution, if they are not brought together initially through a consensual process.

Only with alternatives can agents meet as equals in a trading relationship (Buchanan 1979, p. 34). It is not even necessary that the exit options be exercised, since merely the threat of their use should be enough to restrain rent appropriation. The scope for opportunism is effectively constrained by competition, actual or potential (see Anderson and Hill 1986, pp. 321–22).

Thus, the foregoing discussion implies that the constitutional environment must be characterized by exit options for all parties, if the resulting constitutional contract is to be efficient.⁹ But although an efficient constitution might have considerable potential to create mutual gains for all parties, this is of little value if the rules contained in the constitution are not self-enforcing. As explained in the previous section, constitutional maintenance requires rules that effectively limit the power of the state. As North and Weingast (1989, p. 808) observe, “because constitutional restrictions must be self-enforcing, they must serve to establish a credible commitment by the state to abide by them.” (See also North 1990, p. 50.)

Again, the availability of exit options is an important condition for a self-enforcing constitution, except now the exit options must prevail not only in the constitutional environment but also in the post-constitutional society. Even once all parties have committed to participate by making specific investments in a contractual relationship, it is still possible for exit options to exist post-contractually if the constitution is structured in a way that commits the participants to maintain a competitive environment in the post-constitutional society. In a competitive social setting, each party possesses a credible threat that can be used to prevent other parties from behaving opportunistically. This threat is precisely the option of “exiting” to make a deal with an alternative trading partner.¹⁰ Competition ensures that the terms of trade will not differ significantly from one trading partner to

⁹A familiar proposition in constitutional economics is that an efficient constitution requires a “veil of uncertainty,” in which participants in constitutional deliberations are ignorant of their future interests in post-constitutional distributional struggles (Buchanan and Tullock 1962; Buchanan 1986, p. 95). Unfortunately, it is by no means clear how such uncertainty can be achieved in a real-world setting. However, according to Lowenberg and Yu (1992), the existence of exit opportunities for contracting parties can produce efficient results identical to those that would be produced by a veil of uncertainty. With viable exit options for all parties, no interest group, no matter how effective it might be in exerting political influence, can succeed in extracting terms from another group that are any less favorable to it than the best terms available in alternative cooperative agreements.

¹⁰A self-enforcing constitution embodies a credible commitment to support exchange in the post-constitutional society. This commitment grows out of the ability to credibly threaten exit. On the distinction between credible threats and credible commitments, see Williamson (1989, pp. 16–17).

another.¹¹ Therefore if one partner attempts to appropriate rents from another, the latter can simply refuse to do business with the opportunistic partner and switch to someone else at little or no cost to himself. The threat, "I won't deal with you any more if you don't play by the rules" becomes perfectly credible in this scenario. It follows that a strategy of rent seeking and noncooperation does not pay if the post-constitutional society is sufficiently competitive.

The availability of exit options means that each individual is guaranteed a wide range of choice in many spheres of political and economic life. "When people have other decisionmakers or forums to turn to (alternative firms, alternative courts, alternative legislatures), such options enable private individuals to impose costs (consequences) on those attempting to [behave opportunistically]. . ." (Crew and Twight 1990, p. 27). Constitutional rules guaranteeing these options are inherently self-enforcing because of the competitive characteristics of the society that they create.

A number of constitutional procedures and principles that could help to maintain a competitive, pluralistic environment for political and economic exchange have been proposed in the constitutional economics literature.¹² A common theme running through many of these proposals is the strengthening of regional and local government relative to national government. The existence of separate jurisdictions with some protected powers within a constitutional federation inhibits coercive behavior by the government (Wiseman 1990, pp. 121–22). Such an arrangement facilitates migration at low cost between federal sub-regions and thereby enhances competition between these sub-regions. The ability to "vote with their feet" enables individuals to reveal their preferences by exercising a "spatial" exit option. The resulting mobility forces competitive governmental units to supply public goods in preferred quantities and to "price" them broadly in line with relative marginal evaluations (Buchanan and Faith 1987, p. 1023). This is known as the Tiebout effect (Tiebout 1956), whereby individuals sort themselves across communities in accordance with their preferences for the packages of taxes and public goods provided in each community. To the extent that the Tiebout effect is fully operative, the wealth created through government protection of property rights is not specialized to any one jurisdiction. The ability of the owners of these rights to move

¹¹Mueller (1991, p. 332) points out that international mobility of capital in modern financial markets limits the scope for monopolistic and monopsonistic exploitation of capital or labor, as long as government policy, driven by special-interest pressures, does not intervene.

¹²See Lowenberg and Yu (1992) for a review of some of these proposals.

to competing jurisdictions protects them from potential rent appropriation by a coercive government (Anderson and Hill 1986, p. 323).¹³

Constitutional rules allowing for mobility and political diversity will help to ensure a competitive political system with many alternative forums for seeking political redress. Wildavsky (1990) argues that a federalist constitutional system embodies this kind of diversity and effectively constrains the monopoly power of government. The defining characteristic of federalism is competition. Federalist institutions provide opportunities for experimentation with alternative approaches to legislative action. In dealing with local legislators or local courts, for example, aggrieved parties can essentially vote with their feet by seeking relief elsewhere if they are not satisfied with the ruling of a particular level of government (Crew and Twight 1990, p. 27).¹⁴ Thus, an important element of a self-enforcing constitution is the effective self-enforcing constraint that is placed on the power of the state as a consequence of inter-jurisdictional political competition.

The ability of majority coalitions to use legislation to redistribute income and wealth from the rest of the community can be constrained by constitutionally limiting the redistributive element of legislation through adoption of appropriate electoral and voting rules. A strong government can be produced out of a winner-takes-all system of single-member constituencies, in which a runoff election is held to determine which party will hold an absolute majority in the legislature (Mueller 1991, pp. 334–36). But a disadvantage of this system is the potential alienation of voters in the minority who feel inadequately represented. To avoid this, a proportional representation system might be used to ensure that the composition of the legislature reflects the full range of voter preferences.¹⁵ Under proportional representation, however, it will be necessary to use a supramajority voting rule (two-thirds or three-quarters) in the legislature to mitigate the tendency for logrolling coalitions to subvert the legislative

¹³See Epple and Romer (1991) for further analysis of the constraints that potential migration, as well as other factors such as property ownership, place on the ability of local governments to undertake income redistribution.

¹⁴Wildavsky (1990, p. 45) provides further elaboration of this process:

Anyone who has to deal with governmental agencies, or who wants to apply for grants, knows that it is useful to have a multiplicity of points of access and largess. It is then possible to play them off against each other or simply to go to the most receptive place. Individuals can thus sort themselves out among agencies with different rules, objectives, and personal predilections. Similarly, grievances encountered in one place may be redressed in another.

¹⁵Proportional representation also can result in higher voter turnout in elections. See Kaempfer and Lowenberg (1993).

process for redistributive purposes. Even under the two-party, winner-takes-all system, which depends on simple majority rule, a supra-majority rule would be desirable for legislation that is overtly redistributive (such as import tariffs), to prevent potential zero-sum or negative-sum redistributions.¹⁶

We can conclude that an efficient constitution requires as a precondition a constitutional environment characterized by availability of exit options in the sense of voluntary participation. But contractual efficiency is not sufficient to ensure contractual maintenance. For an efficient constitution to survive, it must be self-enforcing. An effective way to make a constitution self-enforcing is to build in procedures and institutions designed to establish a competitive post-constitutional environment for political and economic exchange. Constitutional principles that fulfill this purpose include guaranteed property rights, freedom of association, freedom of migration, local political autonomy, rights of communities or regions to secede from a polity or incorporate as separate entities within a polity, use of supramajority voting rules in legislative bodies, etc.¹⁷ Some of these will be examined in more concrete terms in the next section, which uses public choice analysis to generate proposals for restructuring the South African constitutional environment, and makes suggestions for specific principles that ought to be included in a new South African constitution.

Reinventing Constitutional Discourse in South Africa

Constitutional economics suggests that there are two difficulties associated with efficient constitution formation and maintenance in the South African context. First, the present constitutional environment does not offer realistic exit opportunities for all participants. Second, the political heritage of the major players in the South African constitutional process does not include the traditions of competitive exchange that are needed for constitutional maintenance. Consideration of these two general areas of difficulty leads to the following proposals for alteration of the current constitutional process:

The Constitutional Environment

Currently, each of the major participants in the constitutional process is seeking exclusive control, or at least a substantial share in

¹⁶This argument is made by Mueller (1991, p. 343).

¹⁷For more detailed discussion of constitutional principles that are needed to establish a society based on private rights, see Mueller (1991, pp. 328–33).

control, of a unitary polity. Both the African National Congress (ANC) and the National Party represent broad alliances of whites and non-whites. These two alliances are competing for leadership in the government of a centralized South African state. All ethnic, language and ideological groups, within the two major coalitions and outside them, are locked into the necessity of making a constitutional arrangement with one another to live together in a single society. There are no exit options.¹⁸

Exit opportunities could be introduced into the South African constitutional environment by restructuring constitutional discourse. The restructuring would entail creation, *ab initio*, of separate constitutional destinies for each group within the South African polity. These separate constitutional futures could be compromised or abandoned only with the consent of the groups in question. Thus each group would enter into constitutional negotiations *de novo*, with realistic options of choosing alternative partners, or no partners at all, with whom to join in a cooperative social arrangement.

This constitutional environment is a realizable prospect because many of the major political groups involved in the South African constitutional process are, or could be, defined in terms of their territorial identities. Most of the ANC's supporters, for example, are Xhosas from the Transkei and the urban townships of the Witwatersrand. Most of the supporters of the Inkatha Freedom Party are Zulus from Natal. The extreme right-wing parties draw most of their support from whites in the northern Transvaal. Coloreds (mixed-race) people are concentrated in the western Cape province, and Indians are concentrated in Natal. Urban areas such as Soweto, that are ethnically and politically mixed, could enter into the constitutional process as separate city-states.

The notion of a South Africa comprising a collection of autonomous groups is not alien to the constitutional debate. South Africa already has considerable experience with political decentralization and restructuring due to the "homelands" policy of the National Party government (Kendall and Louw 1987, p. 192). Almost all the major parties to the South African conflict now endorse, in one form or another, a federal, consociational or partition constitution, or, at a minimum, some degree of constitutional protection for group identi-

¹⁸The February 1993 agreement between the ANC and the National Party makes clear that, initially, political power is to be centralized in a single national government, and any consideration of regional autonomy will be deferred until after the election of a national constituent assembly (as reported by Bill Keller in the *New York Times*, 19 February 1993, pp. A1, A4).

ties.¹⁹ According to Kendall and Louw (1987, pp. 98–99, 110), the National Party, the ANC, and the Democratic Party support some form of devolution or recognition for national groups, although the ANC's Freedom Charter still calls for a unitary state (see Lingle 1991, p. 32). The right-wing Conservative Party and Afrikaner Weerstandsbeweging (AWB) support partition.

The parties involved in constitutional deliberations need to consider a number of factors that together determine the optimal number and configuration of polities. These factors include, among other things, the geographic distribution of the population, physical characteristics of the country, costs of running separate governmental units, and the benefits of matching the suppliers of public goods to the group benefiting from them the most.²⁰

The advantage of placing constitutional discourse in a decentralized federal framework is that each group would be assumed from the outset to have a right to an autonomous polity, defined territorially, and no group would be in a position of competing for political power over a unitary state. The ability to shop around among alternative partners and alternative arrangements among autonomous groups provides the basis for efficient constitutional outcomes. Moreover, constitutional exit options reduce conflicts at the level of the national constitution by allowing regional and other lower levels of government to define particular individual rights in their own constitutions, especially in those situations where agreement at the national level is not possible (Mueller 1991, p. 342).

Federalism

As pointed out above, in the absence of a self-enforcing constraint on the scope of government regulation, a democratic majoritarian polity is likely to produce a Leviathan state that uses its regulatory powers to make inefficient redistributions. Government regulation emasculates competitive exchange, in both economic and political spheres, and replaces it with monopoly rents.

To constrain Leviathan, decentralization of political power is desirable. Federalism within a unified (as opposed to unitary)²¹ state

¹⁹Consociationalism refers to the decentralized "canton" system of government epitomized by Switzerland, but also present at various times in other ethnically or linguistically diverse countries such as Belgium, the Netherlands and Austria (Lijphart 1985). On consociational proposals for South Africa, see Schlemmer (1978), Wiechers (1978), Hanf, Weiland, and Vierdag (1981), Boule (1984), Lijphart (1985, pp. 31–35), Kendall and Louw (1987), and Giliomee and Schlemmer (1989).

²⁰See Mueller (1991, p. 340), Tullock (1969), and Oates (1972).

²¹On this distinction, see Lingle (1991, p. 39).

provides a viable approach to political decentralization. Wildavsky (1990, p. 41) argues that the appropriate term is "noncentralization." This refers to independent centers of power in geographic areas that differentiate and compete among themselves. Noncentralization, according to Wildavsky, is characteristic of federalism, whereas decentralization could be consistent with delegation of authority within a unitary polity.

A federalist constitution possesses the advantage of entrenching mobility and spatial exit opportunities that are needed to facilitate Tiebout competition and efficient public good provision. As pointed out above, the most important attribute of federalism is competition. "The operational meaning of federalism is found in the degree to which the constituent units disagree about what should be done, who should do it, and how it should be carried out" (Wildavsky 1990, p. 43). Wildavsky adds that a true federalist constitution should extend competition between jurisdictions from the state level to regional and local levels of government as well (1990, p. 48).

An additional advantage of a federalist structure arises in situations where ethnic, religious and language groups reside in particular sections of a country. Under federalism, "conflicts over distributional and rights issues can be reduced, thus freeing each polity for the task of discovering and supplying a community's collective goods by drawing federalist political boundaries to separate the cultural groups that feel hostility toward one another" (Mueller 1991, pp. 340-41). The responsibility of each level of government should be defined by the magnitude of the spillovers from production and consumption of local public goods. For example, the geographic area impacted by the provision of a fire station or trash collection service is relatively small and could be administered by a town or city. However, externalities that affect larger areas, such as traffic on a highway or a river, require regional levels of government (Mueller 1991, pp. 339-40).

An important insight derived from recent work in comparative institutional analysis is that even informal constitutional arrangements have considerable impacts on economic performance (North 1989, 1990). Many scholars have argued that a decentralized constitution is a precondition for successful economic development. For example, according to Rosenberg and Birdzell (1986), the dynamics of competition among a multiplicity of independent decision centers helped to fuel Western growth. North (1990, p. 130) likewise argues that competition among political units was an important reason for successful European economic performance in contrast to China, Islam, and other more centralized systems. Vanberg (1992) points out

that the competitive-evolutionary process that facilitates economic growth and development requires an environment characterized by diffusion of authority and decentralization. Moreover, as Brennan and Buchanan (1980, pp. 184–85) demonstrate, decentralized government can substitute for explicit constitutional constraints on the power to tax and spend (see also Oates 1989).

In the South African context, the maintenance of post-constitutional exit options in the form of local political autonomy is just as important as the availability of exit options at the constitutional stage of deliberation. A new South African constitution should contain rules entrenching the autonomy of local governments. One way to ensure the diffusion of power from central government to regional and local governments is to have procedural rules requiring larger legislative majorities for legislation at higher levels of government (Wagner and Gwartney 1988).²² Such rules would raise the cost of using central government legislation for redistributive purposes. The coercive power of any one governmental authority or jurisdiction in post-apartheid South Africa can be further constrained by permitting free migration of individuals and a generalized right of residence. As pointed out above, inclusion of these principles in the constitution creates Tiebout competition which diminishes the scope for rent appropriation brought about through redistributive legislation.

The South African constitution also should guarantee the rights of disaffected communities to secede from an existing political jurisdiction,²³ and the right of incorporation of new jurisdictions, such as cities, within larger regional entities. Buchanan and Faith (1987) use the term “internal exit” to refer to the establishment of new political units by individuals defecting from a given polity. Internal exit, like other forms of spatial competition, imposes effective constraints on the potentially exploitative behavior of a dominant political coalition.

Economic Rights

In addition to federalism, constitutional maintenance requires a commitment to uphold *individual* rights to property and contract. In a society in which competitive exchange is the norm and monopoly the exception, rent seeking processes are substantially attenuated. Private monopolies, most of whom’s long-term survival depends on state regulation of private markets, can be inhibited by procedural

²²On the advantages of procedural rules over substantive constraints on government, see Wagner and Gwartney (1988), and Dorn (1991, p. 164).

²³In a plural society, it is often desirable for a segmentally homogeneous territory to secede from the federation (Lijphart 1985, p. 99n).

rules protecting property rights and freedom of exchange from incursions of government laws. For example, legislative redistribution can be reduced by requiring a supramajority vote for all legislation that is not explicitly aimed at deciding on efficient levels of public goods or externalities. Mueller (1991, pp. 329–30), for example, advocates that supramajorities be required for any legislation enabling the government to intervene in a market by restricting prices, quantities or entry, or to engage directly in the production and sale of a good, or to tax or regulate foreign trade.

As pointed out above, the theoretical basis for unrestrained market exchange is that exchange provides post-constitutional exit opportunities for all individuals in the form of alternative trading partners. These exit options help to reduce opportunistic or noncooperative strategies in the post-constitutional society.

South Africa unfortunately faces formidable barriers to the establishment of a free enterprise society based on private rights. The dominant political ideologies, both those of the National Party and the Africanist parties,²⁴ were formulated in a statist tradition. For decades, the South African political economy has been characterized by heavy-handed state regulation of private exchange. In order to support a massive affirmative action program for white workers and farmers, the apartheid state intervened in almost every aspect of social and economic life, severely circumscribing private property rights and curtailing individual freedom to contract (Hazlett 1988, Lowenberg 1989). The result was an economic system in which rents were allocated through the political process and wealth was often systematically destroyed by removing individual incentives to allocate resources efficiently. *The South African economy remains one of the most socialized in the noncommunist world, with many key industries owned by the state and a large proportion of the labor force employed in giant state bureaucracies.*²⁵

Many South Africans, especially among the younger generation of blacks, believe that the apartheid economy was a capitalist one. Consequently, they believe that the post-apartheid society must abandon capitalism. In fact, South Africa never bore much resemblance to a liberal, free-enterprise system. In large part, the capitalism

²⁴These include the ANC and the more radical Pan Africanist Congress. For detailed descriptions of the policies and ideologies of the major participants in the South African constitutional process, see Kotze (1990).

²⁵Until recently, state-owned firms monopolized the production of electricity, iron and steel, railroad transportation and broadcasting among many other goods and services. In 1986 the ratio of public sector employment to total employment was 30 percent. See Kendall and Louw (1987, pp. 60–61, 72).

that exists in South Africa is more akin to the state capitalism of the former Soviet Union than it is to that of Western capitalist countries (Lingle 1990). Large monopolies, both privately and publicly owned, are protected by regulations that raise the costs of entry by smaller enterprises. Throughout the heyday of apartheid, influx controls and residential segregation inhibited the freedom of resource owners to choose efficient combinations of factors of production. As in the former Soviet Union, true free enterprise has flourished only in black markets or informal sectors of the economy.

There is a strong temptation among members of the Africanist parties to design a post-apartheid constitution along socialist lines, creating an omnipotent, centralized and unitary state and entrusting to it the job of confiscating property and redistributing wealth to those who have suffered so unjustly under apartheid. Given the historical heritage of apartheid and the struggle against apartheid, it is not surprising that, as Lingle (1991) points out, both the National Party and the ANC share a collectivist vision of government, in which political power is centralized and directed toward redistribution favoring special-interest groups. The only difference, of course, is in the identities of the groups who would benefit from the ANC's policies as opposed to those of the National Party. In fact, there is a remarkable resemblance between the economic system that prevailed under apartheid and the extensive state ownership and large-scale state intervention envisaged in the Freedom Charter to which the ANC subscribes (Lingle 1991, p. 40). Vorhies (1991, p. 13) argues that, in its continued support for strong centralized government and nationalized monopolies, the ANC is a virtual clone of the National Party.

Constitutional economics provides a strong argument against pursuing this statist model. To preserve the cooperative benefits of the constitution, individuals should be guaranteed exit options in all political and economic interactions. In the economic sphere, this translates into a system of private property rights and minimal restrictions on exchange. Again, procedural rules built into the constitution that constrain the regulatory powers of government, especially central government, can help to maintain such a system.

Conclusion

Constitutional efficiency requires voluntary unanimous agreement. But for an agreement to be voluntary, the parties must possess viable alternative options that they willingly agree to give up in order to commit themselves to one constitution out of a set of possible

constitutions to which they might otherwise commit. Therefore an *efficient social contract can only emerge out of a constitutional environment that provides exit options for all contracting parties*. Exit options allow each party a choice of partners with whom to make cooperative arrangements of more or less equal value. The availability of exit opportunities removes all elements of coercion from the constitutional bargaining process, and thereby ensures that the constitutional outcome is the highest valued of all arrangements that are potentially achievable.

Even if a mutually beneficial cooperative arrangement does emerge, however, it will not necessarily survive unless the constitution is self-enforcing. There are strong incentives for individuals to defect from cooperative strategies in the post-contractual setting. To limit these tendencies, the post-constitutional society should contain many opportunities for political and economic exchange. Only the fluidity of competition can ensure compliance with the cooperative agreement embodied in the constitution. Competition closes off avenues for opportunism and rent seeking. Therefore the constitution should *entrench rules that effectively restrain the regulatory and redistributive powers of the state*.

The constitutional process currently under way in South Africa is unlikely to produce an efficient constitution, unless the existing constitutional environment is replaced with one that is able to offer viable exit options to all participants. To achieve this, the format of the constitutional debate should be restructured into a voluntary association of autonomous groups, each seeking to form a cooperative society by choosing from an array of possible constitutional arrangements. This restructuring of constitutional discourse could help to ensure that an efficient constitutional contract (or contracts) eventually will emerge out of the current process. By definition, an efficient constitution is a positive-sum agreement. Therefore, an efficient social contract enables redistribution of wealth to be achieved without destroying wealth. Slices of a growing pie can be reapportioned without necessarily making anyone worse off in absolute terms. Simply by abolishing the inefficiencies of apartheid, an efficient constitution has the potential to make both blacks and whites better off while also achieving a redistribution in favor of blacks (Kendall and Louw 1987, p. 86).

But this is not enough. The new constitution must be made self-enforcing to avoid the pitfalls of the past. The apartheid edifice crumbled because it was not a self-enforcing constitutional system. It was never the product of a consensual process of constitutional deliberation, nor did it provide a competitive environment for social

interaction. Instead it was a system of political plunder orchestrated through a large, interventionist state. While blacks were the main losers, consumers and taxpayers of all colors paid a high price to support monopolized production, emasculated trade, and the appetite of a Leviathan state.

Several elements are necessary to ensure that a new post-apartheid constitution is self-enforcing. Such a constitution ought to provide for decentralization and plurality of political power through the adoption of a federal system. Procedural rules designed to diffuse political power from the central government to regional and local levels of government will help to create spatial competition among jurisdictions and efficient provision of governmental services. The redistributive tendencies of majoritarian government should be offset with the use of supramajority legislative voting rules. In addition, the principles contained in a new South African constitution should establish a free enterprise society based on private property rights and a minimalist state. A post-apartheid constitution can be made self-enforcing only by building in a commitment to political and economic competition.

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