

Albie, this is an "aid" to constitution designing  
 I prepared in response to various requests, and  
 based on a survey I did on all the world's  
 constitutions (± 180 national + 75 regional). Intended  
 to be a ~~short~~ check list of what should be  
 considered, whether accepted or rejected. Whilst I  
 like most I don't like all. Take care,  
 Jean.

## DEMOCRATIC CHECKS AND BALANCES

This is a comprehensive list, with minimal commentary, of (mostly) recognised and tested constitutional and democratic mechanisms (checks and balances) intended to ensure democratic processes and values and to curtail the potential abuse of power.

The ideal combination of mechanisms suitable for any individual can be regarded as the one that is desirable when his worst enemy is in power.

### 1. DIRECT DEMOCRACY (REFERENDUMS)

- 1.1 Optional (by government decree)
- 1.2 Initiatives (by citizens petitions)
- 1.3 Obligatory (required by constitution eg amendment of entrenched clauses or specified laws)
- 1.4 Recall

### 2. ELECTIONS

- 2.1 President/Prime Minister
- 2.2 Politicians
- 2.3 Specified government officials
- 2.4 Limited term of office

### 3. VOTING SYSTEMS

- 3.1 Universal and equal franchise
- 3.2 Secret ballot
- 3.3 Multiple choice -
  - 3.3.1 List
  - 3.3.2 Transferable vote
  - 3.3.3 Cumulative vote
  - 3.3.4 Alternate elections

#### 4. PROPORTIONAL REPRESENTATION

- 4.1 At all levels
- 4.2 In prescribed bodies (eg Cabinet, school boards)

#### 5. BICAMERALISM

- 5.1 National and geographic houses
- 5.2 Equal powers (for initiation, adoption, veto)

#### 6. SEPARATION OF POWERS

- 6.1 Legislative
- 6.2 Administrative
- 6.3 Judicial

#### 7. INDEPENDENT JUDICIARY

- 7.1 Autonomous regional courts
- 7.2 National court of final appeal
- 7.3 Constitutional court
- 7.4 Common/customary law prerogative

#### 8. BILL OF RIGHTS

- 8.1 Civil liberties -
  - 8.1.1 Association/disassociation
  - 8.1.2 Religion/values/lifestyle
  - 8.1.3 Speech/press/broadcasting
  - 8.1.4 Assembly/protest
  - 8.1.5 Habeas corpus/fair trial/jury option
  - 8.1.6 Movement/residence
  - 8.1.7 Informed adult consent
  - 8.1.8 Rule of law, not men
- 8.2 Economic freedoms -
  - 8.2.1 Property rights
    - 8.2.1.1 Owner's/proprietor's discretion (conditions/ right of admission)
    - 8.2.1.2 No expropriation/confiscation (except possibly for place/route-bound infrastructure)
  - 8.2.2 Freedom of contract
  - 8.2.3 Freedom of enterprise/entry/competition
  - 8.2.4 Right to work (freedom of employment/self employment)
  - 8.2.5 Balanced budget
- 8.3 Social rights (2nd/3rd/4th generation rights) -

NOTE: So called 1st generation rights have the legitimate purpose

of protecting the individual against abuse of power by the state or the majority. Social, or 2nd/3rd/4th generation "rights" represent benefits that are considered to be desirable. Unfortunately they generally do not refer to the right to strive for such benefits but to a legal obligation upon the state (and therefore upon fellow citizens) to supply them. One is a "negative" obligation to desist (the state should not cause harm); the other is a "positive" obligation to act (the supply of goods and services).

The latter "rights" can consequently not be truly justiciable and can not, as in the case of 1st generation rights, be legitimately included except (a) if it is provided that no law or action will deprive the individual of the right to obtain or supply such benefits himself/herself (which is desirable), and/or (b) as obligatory policy goals, with policy bona fides reviewable by the courts.

"Second generation rights" are eg housing, education, employment, health services, pensions. "Third generation rights" refer to eg a clean and safe environment. "Fourth generation rights" are rights to eg positive feelings/emotions (absence of fear etc).

*How about something like this?*

8.4 Political rights (democratic processes etc as described in this document)

## 9. DEVOLUTION OF POWER

- 9.1 Regional level
- 9.2 District level
- 9.3 Local level
- 9.4 Community level

(specified in the constitution and entrenched - the principle that only powers that can not be realistically exercised at lower levels are exercised at higher levels)

## 10. DEMOCRATIC CULTURE/VALUES

- 10.1 Civil society
- 10.2 System above party

11. SUNSET CLAUSES  
(for transitional powers eg affirmative action)

*Transitional Affairs Act.*

12. SECESSION  
(by adequate majority in referendum)

13. OMBUDSMAN

14. SUBSIDIARY CONSTITUTIONS

(for regions and even districts/communities)

**15. PRESIDENT/PRIME MINISTER**

- 15.1 Limited powers/suspensive veto
- 15.2 Rotating (through cabinet and/or elected)

**16. ENTRENCHED CLAUSES  
(minimum vote/referendum)**

- 16.1 constitutional amendment
- 16.2 specified laws/rights

**17. MINORITY VICTIMISATION  
(judicial test of "minority" and "victimisation")**

- 17.1 Class/minority actions
- 17.2 Public interest actions

**18. GOVERNMENT EQUIVALENCE  
(government not to exempt itself from laws/regulations, except as specified in the constitution, for eg the right to tax)**

19. *Term Limits*

*(Problem I have with term limits is restriction of voters' right to elect whomever they wish, eg a US president for a third term.)*

To.

Albie Sachs.

Hosi Katekisa i Afrika

~~Mudzimu mashudu Afrika~~

Nenda

Mudzimu (fhatutsheza)  
Afriki

nd.

**STATUS OF DRAFT CONSTITUTION FOR THE COUNCIL**

<b>CHAPTERS/CLAUSES STILL WITH BILATERALS</b>	<b>CHAPTERS/CLAUSES BEING DRAFTED BY THE TC</b>	<b>CHAPTERS/CLAUSES ACCEPTED BY THE NC</b>
		Preamble
Flag, national anthem, TBVC reincorporation	Chapter: 1 Languages (Clause 2)	
	Chapter 2: Citizenship	
	Chapter 3: in the process of finalisation	
Chapter 4: Electoral system (schedule 5)	Chapter 4: Duration of parliament; Dissolution; Sessions;	
Chapter 5: Deadlock (Clause 68)		
Chapter 6: Percentages and rotation (Clauses 77(6), 81(2) and 116(2))	Chapter 6 (rest done) Enactions	
		Chapter 7
		Chapter 8
Provincial coalitions; Quota (50 000) Term of office and election of legislature	Chapter 9: Clauses 119,120 (Possibly move to Transitional Arrangements)	Rest of Chapter 9 done
		Chapter 10 (Today?)
		Chapter 11
		Chapter 12
Chapter 13: SAP and prisons	Chapter 13: SADF	
Chapter 14: Transitional arrangements	Chapter 14: Education only	
Schedule 5, including anti-defection and alliances		



	Tidying up	

- Depending on the sensitivity of the matters to be discussed meetings can be held in camera.
- Sensitivity of matters will be determined by the Chairpersons.
- Members absent from meetings should hand in a written apology to the Secretariat at least three days in advance.
- Members will vacate their positions if they are absent from three consecutive meetings or if they resign by notice in writing to the Chairpersons.
- Vacancies will be filled by the organization which originally appointed such a person.
- A member who cannot attend a meeting may designate in writing a representative for that meeting.
- Members will attend for the full duration of the meeting.
- Members will be free to address the Forum/Management Committee in the official language of their choice.
- Members are only allowed to speak through the Chair.
- Members will not use offensive language.
- Members will not refer to matters on which a judicial decision is pending.
- Any member may rise to a point of order or in explanation.
- Decisions will be taken by consensus and will be binding on all members with immediate effect.
- Decisions will be formulated by the chairpersons and recorded by the Secretariat.
- A register of decisions made by the Forum/Management Committee will be compiled and updated by the Secretariat.