

Some Reflections on the new Constitution

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1 New Constitution and the Rule of Law

The primary task of the builders of the new nation is to teach the people of South Africa to enjoy freedom both in their public life and in their attitude to each other in their private affairs. Indeed, out of the old state whose people have not only suffered persistent divisive onslaughts from the racist regime but are also filled with hatred and bitterness towards each other, a new non-racial, democratic and non-gendered prosperous South Africa must be born. Its constitution must not only reflect the sufferings and the evils of apartheid but must also ensure that the evils of the past do not recur. That constitution must be acceptable to the majority of the people of South Africa. It must be a constitution that will always remind them that their strength and happiness are national and not parochial.

The constitution must aim to set up 'a government of laws and not of men'.¹ It must not only foster unity and nationalism but it must also guarantee the fundamental individual rights and freedoms.² Its framers must always remember that dots "if men can suffer for one belief, others may suffer for the holding of other beliefs; that if men can be deprived because their skin is dark, others may be deprived because their skin is white. Only where the law protects all beliefs and all men is there safety for any belief or any man"³

The framers of the new constitution, therefore, must ensure that changes in government will come in peace and order, and that oppression and tyranny will never return. They must establish a system of checks and balances to ensure that no one branch of government, executive, legislative or judicial will have more power than the other. They must protect the constitution against hasty and ill-advised amendment. They must give an independent Constitutional Court the power to interpret the document and that court must become the guardian of constitutional rights against governmental encroachment.⁴ Only when rights are inviolate will they seek change peacefully; only when they know that basic rights are secure will they accept change which allows to other interests a share of the responsibility and power of government decision. And that security for change is essential in every land and

¹John A Hawgood, *Modern Constitution since 1787* (1939) 25.

²Fortunately almost every political organisation or party at Codesa is for the inclusion of the Bill of Rights in the Constitution.

³Address of Senator Robert F Kennedy to the Johannesburg Bar' (1966) 83 *South African Law Journal* 273 at 274.

⁴The African National Congress in its Constitutional proposals is proposing the establishment of Constitutional Court to adjudicate upon constitutional disputes.

nation.⁵

2 Permanence based on the people's will

The new constitution, therefore, must last for ever and ever. It will be the fourth South African Constitution to be passed within a century.⁶ The previous three constitutions could not survive the test of time simply because they were all passed with the primary aim of oppressing the majority of South African people. They were based on evil system of racism and, therefore, could not last.

It is not easy to pass a lasting constitution. France ran through twelve distinct fundamental constitutions before finding "unexpected" durability in the three-piece reach-me-down of 1875.⁷ However, one of the oldest written constitutions is that of the United States of America which was passed at the Philadelphia convention of 1787. Its durability is attributed, inter alia, to the following three factors:⁸

1. it was drawn up as a layman's document, not a lawyer's document;
2. it confines itself on the whole to laying general rules and thus allows itself to be molded to meet the changes of time;
3. 'The federal constitution survives today bent and not battered, but if it had been given the complete and detailed rigidity of some written constitutions it would assuredly have broken on the wheel of time, perhaps even before civil war'.⁹

Molteno comments as follows on the USA constitution:-

'At this stage it suffices to recall that a Constitution originally framed for the government of thirteen agricultural and commercial ex-colonies, geographically remote from the metropolitan centres of Western civilization, with a racially homogeneous free population, has proved capable of adaptation to the needs of vast industrial and financial empire of fifty states, of continental proportions, and with a teeming population comprising of wellnigh every national culture and racial strain on earth'.¹⁰

Such must be the new constitution. It must be neither too rigid nor too flexible. It must in time be a venerable fossil of the ideas and horizons of a distant age. It

⁵Robert F Kennedy op cit at 277.

⁶The first constitution of South Africa was the South Africa Act of 1910 which introduced the Union of South Africa, the second was the Republic of South Africa Act 59 of 1961 which introduced the Republic of South Africa and the third was the Republic of South Africa Act 110 of 1983 which introduced the tricameral parliament.

⁷John A Hawgood op cit at 14.

⁸John A Hawgood op cit 23.

⁹Ibid.

¹⁰Donald B Molteno 'The flexibility of a Rigid Constitution' (1970) 87 *South African Law Journal* 204 at 204.

must be a workable document embodying familiar principles. However, its duration depends on the will of the people. That will of the people, in turn, depends on whether the constitution will be able to be an instrument to weld a nation out of the disparate linguistic groups, and thus help to build a spirit of nationalism. The people's foremost loyalty is due to the national community, based upon law, liberty and equality, and held together by a feeling of brotherhood and mutual devotion. Such a community can only be founded on the will of all its members.¹¹ To educate the will of the South African people, to create conditions favourable to its formation and duration, must be the central task of the building of our new nation. It is only when the people of South Africa are willing not only to defend the new constitution, but also to make it work that it can last for ever.

3 Avoidance of foreign constitutional principles

It is very natural for the people to accept and jealously defend something rooted on their traditional way of life. It is equally natural for the people to easily reject something foreign to their way of life. Should the new South African Constitution embody too many foreign principles, it will be doomed to failure. For example, Hawgood recounts how the first method of electing a USA president was entirely without any precedent and how 'although it met with less criticism in the convention than many long-tested principles, it was the first thing to break down in practice and to require replacement'.¹² In fact, South Africa has its own example. The framers of the South Africa Act of 1910 thought South Africa to be too large a country to have a form of government which constituted only of a parliament and purely local institutions like municipal and divisional councils. This idea, taken in conjunction with the fight by Natal for federalism, resulted in the creation of provincial councils. It was decided that their territorial jurisdiction should coincide with the former colonial boundaries and that their subjects of jurisdiction or heads of power should embrace what were more or less local matters. It was the wish of the framers that the provincial councils should be free from party politics. They searched for the most successful of a non-party executive council, and they found it in Switzerland.¹³ The provincial system was thus largely based on the Swiss system. The election of the executive committee for proportional representation and an independently appointed administrator were thought to be further safeguards against party politics in provincial affairs. However, their very first elections in 1912 were conducted on the principles of party politics.¹⁴ Further, during the early 1950's the provincial councils were used to staff the Senate with the Senators belonging to the National party to enable parliament to get the $\frac{2}{3}$ majority which it needed to remove the Coloured voters from the common voters roll.¹⁵ Further, the central government made more inroads in the Provincial Councils' area of jurisdiction such that in 1986

¹¹Carl J Friedrich *Trends of Federalism in Theory and Practice* (1968) at 38.

¹²John A Hawgood op cit at 21.

¹³Henry John May *The South Africa Constitution* (1955) at 13.

¹⁴Ibid.

¹⁵Ibid.

they were abolished.¹⁶ This proves how unworkable and temporal a foreign principle can be. The new South African constitution, therefore, must embody familiar and popularised principles. It must not be a replica of any of the foreign constitution nor should it contain a conglomerate of foreign principles. It must be uniquely structured both to suite the good practices of the South African people and to eradicate the evils of the past. Perhaps it is proper at this point to examine briefly the following state models; confederation, federation and unitary systems.

4 Confederation, Federation or Unitary?

4.1 Confederation

Confederation is totally foreign to South African traditional politics. Even the United States of America had to abolish it because of its weaknesses. When it was set up in the United States of America it proved not to be a national government, but only a league of friendship. Each state retained its sovereignty, freedom and independence, and every power, jurisdiction and right which was not, by confederation, expressly delegated to the United States in Congress assembled.¹⁷ The powers delegated were so meagre that Washington promptly pointed out: "Without a controlling power in Congress it will be impossible to carry on the war",¹⁸ Alexander Hamilton urged "we ought, without delay, to enlarge the powers of Congress"¹⁹ ... Congress could only recommend legislation to the states and could only requisition monies and armed forces. The states were quite at liberty to ignore its recommendations and disregard its requisitions.²⁰ Washington described it as a half-starved, limping government, always upon crutches, and tottering at every step.²¹ Federation was, therefore, resorted to in 1787 by the Convention of 1787.

South Africa cannot risk confederation. It can lead to serious division of the South African people.

4.2 Federation

Federation is favoured by most states because it accommodates the cultural diversity of their people. It allows people who have been governed differently a measure of autonomy whilst being allegiant to the central government. As Dietze puts it:

'The Founding fathers' merit in this respect is a twofold one. They not only created the modern federal state as distinguished from traditional confederacies, but also conceived of that state as a means of constitutionalism. For whereas prior to the founding of the American Republic federations served to prevent foreign aggression and to secure peace among

¹⁶By the Provincial Government Act 69 of 1986.

¹⁷Article 2 of the Articles of Confederation.

¹⁸Hawgood op cit at 15.

¹⁹Ibid.

²⁰Ibid.

²¹Ibid.

the federating units, the Americans saw in federalism also a means for the protection of the individual from the government'.²²

Traditional factors that drive neighbouring states to form federation are external aggression and economic problems. The states, therefore, join in order to create a common defence force and to formulate a common economic policy. A central government is formed democratically by the people of the states concerned and it is granted certain powers which are excluded from the federating states. The traditional powers are those concerning formulating policies, defence, economic and foreign affairs. But with the modern states these powers have grown to social welfare, health, education, etc.²³ However, the states always jealously guard their respective autonomies.

The main disadvantage of federation is the ever existence of tensions caused by the factors such as religion, language, racism and territory. If the divisive forces caused by these factors do overcome the inter-state binding forces such as a need to have a defence force, a uniform economic policy, etc. the state may disintegrate. Federalism, therefore, must be based on free will, mutual understanding on the part of the federating states and the existence of common external threats. For example, many political scientists believe that one of the causes of the disintegration of the Soviet Union is that from the beginning it was formed by coercing smaller states into the federation. Federation, therefore, was not out of free will. There were internal threats as opposed to external threats. When the threats were removed by granting democracy to the people, then the Soviet Union disintegrated.

4.3 Unitary

It has been suggested that South Africa must form a federal state and not a unitary state. Differences of culture have been suggested as the primary cause for the creation of many semi-autonomous states in South Africa that will form a federation. Perhaps it is proper at this juncture to examine the factors mentioned above that usually cause tension within the federal states viz race, language, religion and territory, because they equally apply to the unitary state²⁴ It is submitted that the extent to which the people will allow themselves to be governed by a single authority depends on the strength of the forces that draw them apart. The weaker the forces are, the stronger will be the tendency to form a unitary state and the stronger the forces are the stronger will be the tendency to form a federal state. In the following analysis only Africans will be examined because the whole apartheid policy was

²²Gottfried Dietze 'Economic Rights and Federalism in the United States' (1966) 83 *The South African Law Journal* 60 at 61.

²³See David M O'Brien 'Federalism as a Metaphor in the Constitutional Politics of Public Administration' September/October (1989) *Public Administration Review*.

²⁴See Edward McWhinney *Federal Constitution — making for a multi-National world* (1966) at 2 et seq for the discussion on the problems of the Roman Catholic, Frenchspeaking Province of Quebec it has with the rest of the English-speaking substantially Protestant provinces of Canada; see also J C Boogman 'The Union of Utrecht, its Genesis and Consequences' *Federalism History and Current Significance of a Form of Government* (1980) 5.

aimed at dividing the African people. Further the purported confederating states coincide with the TBVC and self-governing states.

4.3.1 Racism and tribalism

The apartheid rule has been characterised by the division of Africans into tribal units led by chiefs who in turn were appointed by the State President. It is public knowledge that most, if not all, of these chiefs were not hereditary chiefs.²⁵ The tribes were forced to live in the Bantustans and encouraged to form the self-governing states, four of which eventually became the so-called independent states (TBVC).²⁶ The racist regime has used every opportunity and every method possible to sow enmity and distrust among the tribes. However, the majority of South African people have always been against being divided along the tribal lines. The majority of the political organisations that have made their mark in our struggle have all preached unity among South Africans. For example, the Azanian People's Organisation (Azapo) has always promoted Black consciousness, an ideology which was and is still aimed at eliminating all types of complexes in the minds of the Blacks. Blacks according to this organisation included Africans, Coloureds and Indians. The Pan African Congress started by encouraging unity among Africans, only but to date it has reached out and includes Coloureds, Indians within its ranks. The African National Congress has succeeded to teach its members to regard each other not as Zulus or Sothos, Blacks or Whites, but as South Africans. All the abovementioned political organisations combined enjoy a considerable support if not a majority support both in the rural and urban areas of South Africa, TBVC states included. The logical conclusion, therefore, is that our people refused to be divided on tribal basis. The apartheid regime has failed to instil tribalism in the minds of the majority of our people.

4.3.2 Language

Language differences have not been a cause of conflict. That among Blacks in South Africa, has been caused, inter alia by the use of English as a medium of instruction in the secondary and tertiary institutions attended by Africans. This had an effect of stagnating the development of African languages and therefore could not compete against each other. English, therefore, serves as a unifying language. The forceful introduction of Afrikaans as a medium of instruction became the primary cause of revolt in 1976 and, therefore, this language which could compete with English was rejected by the majority of our people. Language, therefore, is not a cause of division in our country.

²⁵The popular example to date is Mangosuthu Buthelezi who as preferred to his brother by the Pretoria regime. See *Buthelezi vs Minister of Bantu Administration* 1961(4) SA 835(A)

²⁶Republics of Transkei, Bophuthatswana, Venda and Ciskei.

4.3.3 Religion

Religion is part of the African tradition. In the past Africans worshipped God through the ancestors. It became easy for them, therefore to substitute God Almighty for Qamata, Molimo and Velinqangi with Xhosas, Sothos and Zulus respectively and to substitute the Lord Jesus Christ for the ancestors. Further, many Africans are still sceptical of a white man's religion. They, therefore, could not be divided on denominational lines. The result is that religion has not been a factor of our division. To date almost every denomination is preaching unity among all the South African people irrespective of race or colour. One is aware of the fact that there are some other types of religions in our country i.e. Islam, Bhuddism, etc. However, even these are not the source of our division. At Codesa, for example, the opening prayer was conducted by leaders of different religions and denominations to show the respect South Africans have for a right to belong to any religion.

4.3.4 Territory

South Africa is divided into 4 (four) provinces whose areas of jurisdiction coincide with those of the previous colonies viz Zuid Afrikaanse Republiek, Republic of Natal, Orange River Colony and the Cape Colony. Africans have been scattered among these colonies. This incidentally caused a considerable difficulty in defining the boundaries of the homelands. No tribal group therefore can claim to own any territory with a well-defined boundary. These boundaries, were drawn merely to suite the convenience of the racist regime which pursued the divide and rule policy.

The above-mentioned factors that influenced many Western and Eastern countries to opt for federalism instead of unitarianism are not as strong in South Africa as they are in those countries. What plaques South Africa is racism on the part of the majority of whites and mere tribalism on the part of the minority of Blacks. Fortunately the majority of South Africans are out in arms against these two evils.

4.4 Choice of a unitary state in 1910

The argument for federalism is not new. In 1909 many factors were prevailing that heavily influenced the decisions of the four independent states i.e. Natal, Cape Colony, Orange River Colony and the Transvaal. These were the following:-

'The Transvaal's treasury was full and overflowing, and treasuries of the other colonies were empty, faced with the problem of balancing their budgets. While they feared that the Transvaal's wealth would control the politics of the country under a purely unitary constitution, the Transvaal felt that she might have to carry the rest of the country financially on her shoulders. The two smaller colonies feared that they would be overwhelmed by the voting strength of the two larger colonies. Natal, a small colony, somewhat cut off from the rest by the Drakensberg range, feared that she would have Dutch influences and the Dutch language forced upon her. She had a history and a tradition that were different from those of the other colonies. Her white population was predominantly English, with English traditions and culture. The Orange River Colony predominantly Dutch, was placated by the promise of an

elastic delimitation on constituencies and more parliamentary representation than she was entitled to — in the form of equal state representation on the Senate and a minimum number of seats in the Assembly for the first decade of the Union. Natal could not be placated with these advantages, but the railway traffic to the rich gold fields, the vista of expanding commerce, and the general fear of being left out of the great project of union were too much for her. The Cape also had her fears; she wished to protect the franchise rights of her Native and Coloured people. When she was assured of a constitutional guarantee for these rights, she was satisfied.²⁷

Such were the fears against the unitary states in 1909. Some of them, though much modified, still exist even to date against the new unitary South Africa. What is interesting, however, is that although the union was decided upon primarily because of the 'Native problem', today the federation is agitated for primarily because of the 'Black threat'.

However, the union was arrived at primarily because it provided a possible solution to a common threat native aggression. Under the union 'there would be a single Native Policy for the whole country; there would be one police force and one army; a common treasure; economy of administration; uniformity in the laws and statute, one great state railway system; and in all things the voice of one people. Union was strength and federation was weakness.'²⁸

The strength of the new South Africa rests on the unity of its people. "Unity is your basic maxim. Unity is your defence. Unity is your blessing". Indeed, a voice of one people is needed; an effective government that will ensure that all the evils of apartheid are buried with the past. A unitary state, therefore, is all the new South Africa needs.

4.5 Advantages of a unitary system

Perhaps it is good here to state that the prime advantage of a unitary system is that it fits the era of national planning and of the welfare state because it aims at assuring a uniform development and progress, not hindered by local shortsightedness but perhaps assisted by local flexibility and responsibility within the framework of a national plan.²⁹ South African national plan is eradication of inequalities in every sphere of the lives of its people. That needs an effective central government with a degree of decentralisation. However, excessive or unwise decentralisation may compartmentalise a national community into feuding, intolerant, and egoistic local communities, totally disregarding the interest of the collective whole. In some institutions a grant of local autonomy is viewed only as a first concession by tribes or movements whose hearts are set, not on local self-rule, but on secession. This is often a distinct possibility in newly established states and, therefore, is a favourite argument on the part of the national leadership for tightly centralised authoritarian rule. 'In another context, in the unitary democratic system of prewar Czechoslovakia, the Sudeten German ethnic group began its pressures by a demand for territorial auton-

²⁷Henry John May op cit at 8.

²⁸Henry John May op cit at 9.

²⁹Ivo D Duchacek op cit at 120.

omy or federation and finally, in 1983, after the Munich Conference, led to secession from Czechoslovakia and accession to Hitler's Germany'.³⁰

In South Africa today there are such feelings of secession which, although expressed by the minority, if given enough chance of incubation through a federal system may destroy the national plan of building one state, one people. Again, a unitary state, therefore, is the only remedy. Such a state should be composed of the following:

1. A central legislature composed of
 - (a) the House of Assembly whose members are elected on proportional representation to make sure that every significant party is represented in the House.
 - (b) the Senate wherein every region is equally represented. For instance, each party represented in the House of Assembly may send one representative from each region. These representatives may be elected by the parties themselves. The Senate may delay a bill for a reasonable period before being passed (the cooling effect)³¹ if it regards such a bill as controversial but should not have the power to veto it. It is further suggested that the traditional leaders be represented in this house in a manner acceptable to them.
2. Regional councils³² whose members will be elected on proportional representation.
3. Local governments that will suit the rural and also the urban communities. The members will also be elected on proportional representation where possible. Where a traditional leader wishes to be part of a local government, he or she may be an ex officio member of the local government.

The idea of a non-political local government will have to be abandoned. It just does not work in South Africa. Further, it is important to have uniformity of ideology in all levels of the government so as to avoid a struggle for power, tension and competition between the different levels of government. What should be encouraged is co-operation between the different levels of government authority.

Co-operation will, therefore, need an active central government that will interfere with the exercise of the powers of both the regional and local governments. Indeed, there is just no area of the people's life that has not been bedevilled by racism and

³⁰Ibid.

³¹"Jefferson, returning from France after adoption of the constitution, protested to Washington over breakfast against the existence of two houses in the federal legislature. Washington is said to have met his protest with the question, 'Why do you pour that coffee into your saucer?' 'To cool it' replied Jefferson. 'Even so', commented Washington, 'we pour legislation into the senatorial saucer to cool it.'" Hagwood op cit 19.

³²The African National Congress has proposed 10 regions and the South African Development has proposed 9 regions. As to the number and boundaries of these regions Codesa will decide soon.

inequality in South Africa. Almost all the powers will need to be with the central government. For example, policies on defence, economy, foreign affairs, internal affairs, health, housing, education, pensions, disabled persons, children, the aged, justice, immigration, environment, mining, agriculture, police and many others that may be forgotten, will have to be national. To leave these matters to the regions which may be dominated by racists or tribalists may be counterproductive. The regions, on the one hand, however, must be given the powers to decide how best they should implement the respective national policies in their respective regions. The constitutional court, on the other hand, should be able to redress the grievances of citizens who feel that their rights are violated by the regional and local governments.

A co-operative regionalism, therefore, should be encouraged i.e. a system whereby the different levels of government works in a co-operative way. This will ensure that while the central government makes policies, it will depend on the expertise of the regional and local authorities — men on the spot, for their implementation. Further, it will ensure that, at least, the majority of the people are represented in all structures of the government and, therefore, should aim at protecting and defending the new constitution. If that spirit or feeling of belonging can be achieved, then the constitution may be the South African constitution for ever and ever.