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Some arguments in support of unitary constitutional models
from selected historical and contemporary case studies.

INTRODUCTION

South Africans are at present in the process of debating the merits of various constitutional models. The two models which are most seriously being considered to order a post-apartheid South Africa are unitary and federal arrangements and their many variations. According to a recent study undertaken by Professor Hennie Kotzé of Stellenbosch University on "Elites and Democratisation", the overwhelming majority of the white leadership elite of South Africa favour a federal system of government and approximately 74 and 67 percent of the leadership elites of the ANC and PAC respectively support a unitary alternative. [Pretoria News 24/9/91].

The debate has centred around how a new constitution for South Africa should be drawn up and what its main features should comprise, for example a uni-cameral or bi-cameral legislature, a bill of rights, presidential or parliamentary government, decentralisation of power, and alternative electoral systems. Supporters of a federal model for South Africa have spelled out to some extent the rationale and detail of such a model, whereas very little attention has been given to a unitary model and the arguments in favour of it and against a federal model. The purpose of this paper then is to analyse some of the arguments advanced in favour of a unitary model and against a federal or confederal model by referring to historical and contemporary examples of where a deliberate choice has been made, or where a re-evaluation is being made between between one model or the other. The conditions necessary and the theory behind unitarism will not be discussed in detail in this paper.

Reference will be made to the experiences of the United States of America, Italy, and South Africa.

WHAT IS UNITARISM?

Unitarism should be distinguished from Unitarianism - a "liberal movement which developed within the congregational churches of New England in the eighteenth century, emerging as Unitarianism in the nineteenth." [Wright, 1976:3] Unitarism should also be distinguished from union, unionism or unification which refers to the bringing together of disparate units within a single state, as for example the coming into being of the United States of America in 1787 when the Confederate States were unified under a federal constitution, or the unification of the South African colonies in 1910.

Unitarism therefore refers to a unitary constitutional model as compared for example with federal or confederal models. Unitarism refers to the philosophy and processes underpinning a unitary constitutional model. The concept of unitarism has been defined by many authorities in the field of constitutional law. A V Dicey writing in 1885 in his famous Introduction to the Study of the Law of the Constitution, explains English unitarism. He refers to unitarianism and a unitarian constitution as "the principle...which gives its form to our system of government...or the habitual exercise of supreme legislative authority by one central power, which in the particular case is the British Parliament." [1959:139-140]

By contrast, Dicey [1959:140-143] explains the federal form of government by referring to America where there is a "distribution of limited, executive, legislative, and judicial authority among bodies each co-ordinate with and independent of the other...the ordinary powers of sovereignty are divided between the common or national government and the separate states." A federal state derives its existence from the constitution which constitutes the "supreme law of the land." [Dicey, 1959:144] In England by contrast, "there is no such thing as a supreme law, or law which tests the validity of other laws." [Dicey, 1959:145] In short, for Dicey unitarism "means the concentration of the strength of the state in the hands of one visible sovereign power." [1959:157]

UNITARISM AND THE FORMATION OF THE UNION OF AMERICAN STATES

As is well known, the present day American constitution is a leading example of a federal constitution. However, the broad idea of a unitary state was evident in the speeches and writings of James Madison, a delegate from the state of Virginia to the federal convention held in 1787 in Philadelphia. Madison was known as "the father of the Constitution." [Brant, 1968:15]

Although he is never described as such, James Madison displayed unitarist and strong centralist tendencies when closely analysing his early thinking, letters and speeches. He was very often unclear in his use of words. As deliberations in the Federal Convention progressed, shifts took place in his thinking and he ultimately accepted a federal constitution and the enumeration of federal powers. In Madison's case, the arguments revolved primarily around the degree of state sovereignty and federal sovereignty and the correction of the deficiencies as he saw them in the Articles of Confederation. Some of his early arguments in favour of union of the states will be mentioned below.

On March 1, 1781 the Articles of Confederation came into effect creating a confederation of the thirteen independent

north American states. In a series of pronouncements on the confederation from about 1783 onwards Madison criticised it on a number of grounds. In referring to the states he felt that "blind devotion to a country's views and prejudices - miscalled patriotism - united with competition of interest and ambition of rulers, had laid the foundation of the wars that desolated the world and entailed misery on the human race." [Brant, 1968:62] The results of the competition between states resulted in "contemptuous neglect by the states of federal requisitions for men and money; the defeat through ignorance, jealousy, or neglect, of every effort by Congress to settle war accounts with the states; failure of the states to support federal plans for paying continental loans and debts; injustice of the uninvaded states to those that had endured the ravages of enemy armies; callous neglect of the just claims of war-worn veterans, now reduced to poverty and wretchedness." [Brant, 1968:63]

As a result of a study which Madison undertook of ancient and modern confederacies, he concluded that, "in all confederations the impotence of the central government left the component states free to indulge their jealousies and rivalries, subjected weak states to oppression by the strong, paralysed the common defence against external enemies, and usually ended in subjection of the whole to a domestic or foreign tyranny." [Brant, 1968:71]

Two fundamental thoughts were on Madison's mind when framing a new federal constitution. "The great desideratum in forming a government, as Madison described it, was 1) to render the sovereignty sufficiently neutral, between different interests and passions, to prevent one part of society from invading the rights of another; and 2) to control the sovereignty form setting up an interest adverse to the whole society." [Brant, 1968:73] Madison's fundamental point then was that "'an individual independence of the states is utterly irreconcilable with the idea of an aggregate sovereignty'. At the same time a consolidation of the states into one simple republic was both unattainable and inadmissible. They should therefore seek a middle ground which would 'at once support a due supremacy of the national authority, and leave in force the local authorities so far as they can be subordinately useful.'" [Brant, 1968:74] Madison's language is often imprecise, but from this statement it would seem that he was not prepared to concede any sovereignty to subordinate authorities. Hence his unitarist tendency.

There are further indications of Madison's unitarist tendencies. In 1787 Madison prepared what was known as the Virginia Plan in which he set out his proposals for a supreme national government for the United States. It was resolved that the national government should be supreme as far as the legislative, executive and judicial functions

were concerned. Madison placed great value on congressional power to veto state laws. This proposal was not accepted by the convention on the grounds that the courts would override any state law conflicting with the federal constitution. Madison felt that it was more convenient to "prevent the passage of a law than to declare it void after passage." [Brant, 1968:78-79]

The Virginia Plan contained no enumeration of the powers to be given to the national legislature. This alarmed certain delegates to the convention. When asked to explain his position, Madison indicated that he had doubts whether it was practicable to enumerate powers and would "shrink from nothing essential to such a form of government as would provide for the safety, liberty, and happiness of the community." [Brant, 1968:79]

Small states defended their sovereignty as a protection against tyrannical large-state combinations. Madison's answer to this fear was that "at every stage of civilisation, history had proved that a strong government was needed to protect weak states from the strong. If the thirteen United States were separately independent, the weak states would have everything to fear. If all were counties of one entire republic, they would have nothing to fear." [Brant, 1968:81]

Madison was critical of state sovereignty. The states under the Articles of Confederation in Madison's opinion, "never possessed the essential rights of sovereignty...Under the proposed government their character will be much further reduced." [Brant, 1968:81] Madison linked the issue of a supreme national legislature to the question of representation in that legislature. In the debates on a supreme national legislature, small states felt that larger states might dominate them. Two alternatives were proposed to this problem of domination, a single vote per state, or a proportionate vote. Madison favoured proportional representation as opposed to each state large and small, being given an equal voice in government. Madison feared that a single vote per state would lead to tyranny and disunion within and amongst the thirteen states. This was one of the main criticisms of the Articles of Confederation under which the thirteen colonies were governed at the time.

THE ESTABLISHMENT OF ITALY AS A UNITARY STATE

The Kingdom of Italy became a highly centralised unitary state in 1861 when the central and southern regions fell under the Piedmontese government of the north. The states brought under the control of the Piedmontese government included the Kingdom of Sardinia, the Duchies of Parma and Modena, the Grand Duchy of Tuscany, the Papal States, and the Kingdom of the two Sicilies. This period is described as

the Risorgimento or national resurgence which culminated in the formation of the Kingdom of Italy.

Two choices confronted Italy in the first part of the 19th century in the formation of a new regime, and that was either to reject federalism in favour of a unitary state, and the question of establishing a highly centralised rather than a decentralised unitary state. Some of the factors resulting in the eventual establishment of a highly centralised unitary state will be mentioned. This period in Italian history is complicated and only brief references will be made to the general factors contributing to this process.

In the late 1850's, Piedmont defeated several despotic states which did not desire union. When these defeats were complete, no governmental structures remained. "It would have been a gigantic task to establish new and stable governments for these states, while at the same time establishing the new government for a united Italy." [Zariski, 1983:7] For this reason, a federal form of government was rejected.

A further factor which contributed to the Risorgimento, is the distrust and antagonism that divided the various Italian governments between 1849-1859, and the lack of law and order. The latter helped to "account for the centralising backlash of 1859-1862." [Zariski, 1983:7] Tuscan and Emilian landowners played an important role in Italian unification. "They resented the governments of the Duchies and of the Papal States, not because they were too strong and tyrannical, but because they were too weak, inefficient, and indecisive. They wanted a regime that would be enlightened enough to promote economic modernisation and a greater degree of cultural secularisation; but they did not want social disorder or major social changes.. above all, they wanted to keep the sharecroppers in their place. For these reasons they wanted a strong government capable of protecting them from possible social unrest and of preventing a repetition of the disorders that had accompanied the revolutionary uprisings of 1848-1849." [Zariski, 1983:9]

The desire for law and order was then closely related to the Italian propertied classes determination to retain their social and political supremacy over the masses. The wealthy and powerful in all parts of Italy "opted for centralisation in order not to be dominated by their social inferiors in the local areas. Centralisation then was seen as a convenient barrier against social and political equality." [Zariski, 1983:10]

A further factor in support of a highly centralised unitary system, was that Italy would be less likely to disintegrate

as a result of foreign encroachments. This was the first foreign policy objective of Italian unification. Italy had previously a history of dismemberment.

A second foreign policy objective was to create an image of stability and order. It was "essential that international opinion accept Italy as a new and responsible member of the family of European states. This meant bringing a quick end to the 'brigandage' of the south. It also meant setting up the type of government [unitary and highly centralised] which would de-emphasise the differences among Italians." [Zariski, 1983:13]

Finally, in contrast - mid-nineteenth century Germany was a nation ready for statehood whereas in mid-nineteenth century Italy a small national-minded elite had constructed a state "long before a sense of nationhood had been widely diffused among the culturally backward masses. Under the circumstances, even a moderate degree of decentralisation was seen as a possible source of dangerous centrifugal tendencies which might set in motion a process of national disintegration." [Zariski, 1983:16]

It was in 1947 that Italy amended its constitution and became a decentralised unitary state.

THE CREATION OF A UNITARY STATE IN SOUTH AFRICA

Constitutional alternatives have come up for debate on a number of occasions in South Africa's political history. Two of these occasions will be discussed [there were others] when the idea of unitarism has been seriously proposed, they being at the South African National Convention of 1908-1909, and at present and in particular by the African National Congress [ANC] and supporters.

I will firstly mention the arguments put forward in favour of unitarism at the National Convention in 1908-1909. General Jan Smuts is considered to be the pre-eminent person of many who worked towards achieving a Union of the four South African colonies in 1910. I will therefore refer primarily to his arguments in support of a Unitary constitution for South Africa. According to Thompson [1962:253] Smuts wanted a unitary and flexible rather than a federal and rigid constitution for a united South Africa. In various statements Smuts explained his thinking and preference for a unitary constitution. He often explained his preference by contrasting unitarism with federalism.

In 1907 he explained his thinking to the Transvaal Parliament. "The federal system is not only undesirable because it involves more expense and means more machinery superimposed on the people of South Africa, which is already groaning under all this administration, but to my mind the

great difficulty with federation is this, that it assumes that a number of independent parties come together into a compact, into an agreement, which is binding for the future...do we want a constitution which led to civil war as the American constitution led to?...We must not be prevented in far-off years from going forward because we have an agreement which cannot be altered. What we want is a supreme national authority to give expression to the national will of South Africa, and the rest is really subordinate." [Thompson, 1962:253]

Another reasons advanced in support of a unitary constitution was the need to bring together and unify the white groups [Afrikaans and English] in South Africa. [Kriek, 1958:29] A further reason advanced was the need for a uniform policy to address the "native question" in South Africa. In this regard Smuts said that he could not conceive how this question could be dealt with without the existence of a supreme parliament. He continued "in years to come...when the white people are one, you will find that the best reason for the unitary form of government in South Africa was the added strength it gave to the government in dealing with this enormous problem of the natives of South Africa. If you enter into a struggle with a problem of that kind you cannot enter it with your forces divided. You cannot enter it upon the beautifully balanced plan of a federal system. You must have a strong power which is supreme...and you must apply that power to the solution of these questions." [Kriek, 1958:29]

A further reason advanced by Smuts for a strong central government was that South Africa already formed a unit. Because the different colonies made up a geographic and economic unit, a political unit should also be created which should be governed by a supreme parliament. Further, the struggle between labour and capital, and between urban and rural sectors had brought about certain social and economic problems which needed to be addressed by a strong government. As a criticism of a federal arrangement in South Africa, it was suggested that it would be difficult to apply uniform and co-ordinated policy to problems which may require it. This criticism Smuts believed, applied particularly in the areas of economic and race policy. A second argument critical of a federal constitution, was that it was impossible to prevent corrupt practices being followed. Smuts explained this by saying that because authority was distributed in a federal system, it was difficult to apply corrective measures to prevent misdemeanours. This problem would be further exacerbated by an uncertainty about which authority had jurisdiction over the particular issue concerned.

A further criticism against federalism is that a final authority is necessary to determine when the central and

local and regional authorities exceed their powers and responsibilities. When this happens, it is usual for the supreme court to intervene. The legislatures of both the central parliament and local and regional authorities are then subjected to a small group of people and in this case supreme court judges. Smuts felt that the will of society should be reflected in the legislation emanating from a legislative body. Where a court is involved as arbiter in constitutional disputes, this could lead to the appointment of judges for political reasons and the intervention by political parties in order to ensure that their policies are not frustrated. It was felt that the role of the courts should simply be as was the case in the British system, to implement legislation as passed by parliament.

Smuts also felt that the fact that because a federal constitution is inelastic and rigid, such a constitution could restrict developments in South Africa. A federal constitution is difficult to dissolve, and South Africa should in the future be free to adapt to changing circumstances. In General Smuts' words "if you see that one of the provisions in the constitution is wrong, if we want to make a deliberate move in a new direction in the future, there should be complete freedom for us to do that." [Kriek, 1958:34]

A further argument used against a federal constitution is that it would divide loyalties between the central parliament and existing colonial parliaments. In the case of disputes, some people would support the central parliament and others the local parliament. This would result in a waste of political energy. Smuts felt that it would be preferable to abolish all existing state institutions and to begin with arrangements which would not result in divided loyalties.

It was also argued that since South Africa was small, there would be insufficient statesmen to see to the needs of the central and local parliaments. Moreover, administrative costs would impose great strains on the population. Reference was also made from time to time that federal constitutions retarded the development of states. The Netherlands was cited as an example of where provincial and city authorities had too much power.

As is well known a unitary constitutional model was eventually adopted by the National Convention of 1908-1909 which excluded black people from governmental decision making processes.

Arguments by associates of the African National Congress [ANC] in favour of unitarism.

In the 1980's and 1990's, unitarism as a constitutional alternative has once again come up for debate in South Africa. The main proponent of unitarism is the ANC. The arguments in favour of unitarism have not been fully spelled out by the ANC. However, an attempt will be made to tease out the arguments in favour of unitarism by referring to two recent documents produced by individuals associated with the ANC.

The two and perhaps the only people to have written on unitarism in contemporary South Africa are Kader Asmal and Albie Sachs, both members of the Constitutional Committee of the ANC. I will attempt to extract some of their arguments in favour of unitarism and against federalism from two papers presented by each of them in October 1990.

Both authors base their constitutional thinking on their understanding of South African reality. Although Apartheid has become outdated, "racism remains at the core of our country." [Asmal, 1990:2] Sachs says that "the anti-apartheid position is to eliminate race as a constitutional determinant...thus the undivided South Africa could be a united country, or it could be a jumble of loosely related, race-based bantustans, cantons and confederal states." [Sachs, 1990:2-3] Notions like an undivided South Africa, no domination of any group over any other group, and universal suffrage, as expounded upon by the traditional defenders of Apartheid, still when converted into constitutional principles, give saliency to race. Federation in South Africa would "inevitably modify rather than dismantle apartheid." [Sachs, 1990:6]

Sachs continues that "all the evidence suggests that black South Africans wish overwhelmingly to opt in rather than out of a common society, and that the thrust for federation comes from whites who, fearful of losing their hegemony, seek to opt out. From an economic point of view, South Africa has long been a common society. There are no autonomous or self sufficient areas. The bantustans and the towns are closely if unequally tied by migrant labour and economic dependency. Over eighty percent of the population, both black and white, regard themselves as Christian...Trade unions are country wide. From the side of authority, the army, the police, the prison services are organised on a nation-wide basis: so are transport and communications: there is one Stock Exchange for the country, one basic electricity grid, and integrated system of water supply and a single time zone. Companies have one head office and even the sporting unions are national in character." [Sachs, 1990:7]

It is interesting to note that much of the above echoes Smuts' earlier defence of unitarism.

Drawing boundaries according to Sachs can be an artificial exercise which in the context of South African realities and federal proposals can mean two things, "legitimising and perpetuating the structures of the bantustans, and carving out pockets of continuing white domination in areas which, by fortuitous coincidence, happened to contain the great bulk of the country's wealth." [Sachs, 1990:7] Sachs continues advocating unitarism by critiquing a federal alternative. Federalism may result in weak central government and for some it may be a way of depriving majority rule of any meaning "by drawing boundaries around race and ethnicity...keep the black population divided, prevent any economic restructuring of the country and free the economically prosperous areas of the country of any responsibility for helping develop the vast poverty-stricken areas." [Sachs, 1990:8]

The thrust of Sachs' argument is that institutions must not be racially based but must be democratically based. South Africa must move away from the protection of the group to the protection of the individual through a Bill of Rights.

Asmal argues in a similar vein. "Proposals for a geographic or 'racial' federation simply ignore the need for political and economic unity in South Africa....Unity is important for and effective role in international relations; it is crucial for the central management of the economy and for the redistribution of resources in favour of the less prosperous parts of South Africa, as well as for undoing the patterns of discrimination which the majority have undergone." [1990:4]

Asmal does see a place for strong local and regional government, however powers should be delegated without relinquishing sovereignty. By relinquishing some sovereignty this would result in federalism, and following the general thrust of Asmal's argument could lead to the entrenchment of race, ethnicity and privilege.

ANALYSIS AND CONCLUSIONS

The arguments in favour of unitarism are generally not spelled out in great detail. They are often couched in reservations about an alternative constitutional order and particularly a federal order.

The creation of the states as referred to above with the exception of a post-apartheid new South Africa, has followed a "centre to periphery" process as referred to by Tilly [1975:636]. Post -Apartheid South Africa is the exception where an existing state is in the process of re-ordering itself and attempting to free itself of racial divisions. Further, the process of state creation in the United States, to use Duchacek's [1986:62] notion, was a "bottom up"

process where the states themselves opted for a closer federal union. In nineteenth century Italy it would seem to have been a "top down" process where change was initiated by elites. At the creation of the Union of South Africa it was a "bottom up" process where the former colonies opted for a closer union. In post-Apartheid South Africa, it would seem to be both a "top down" and "bottom up" process.

The creation of unitary or federal states seem to be very much at the mercy of circumstantial factors and the degree of will power amongst elites. In the case of the United States, the federalists had the greater will than the unitarists. At the time of Union in South Africa, the unitarists were stronger. A post-Apartheid constitutional order is likely going to depend upon the levels of support amongst unitarists and federalists.

Unitary states may be created as a result of a revulsion or disappointment with a previous order. The sentiment is that unitarism will redress a wrong, for example it will correct an economic imbalance. Federations seem to be created when there is a will to retain something from a previous order. This was the case in the creation of the United States federation, whereas it was not the case in creating the Italian union or the creation of the South African state in 1910, and does not fit with the arguments in favour of unitarism in contemporary South Africa.

Supporters of unitarism it would seem, want a fairly free hand at the central government level to make far reaching changes to their respective societies. Unitarists appear to be more reform oriented. They have a fear of being bound in the future. They are suspicious of subordinate structures and boundaries between structures which might provide arenas for future conflict. Even amongst diverse people, states and different time periods, there are nevertheless common threads that can be detected in the arguments in support of unitarism.

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