

FEDERALISM AND THE PROPOSALS OF THE NATIONAL PARTY AND DEMOCRATIC PARTY:

A CRITIQUE

KADER ASMAL

1. INTRODUCTION

1.1 We will begin with definitions. Traditionally, one way of classifying constitutions is in terms of the method by which powers of government are distributed between the government of the whole country and any local governments which exercise authority over parts of the country. Therefore, you may choose between a federal government or a unitary one.

1.2 In a federal constitution, the powers of government (sovereignty) are divided between a government for the whole country and governments for parts of the country in such a way that each government is legally independent within its own sphere. The federal government is sovereign in some matters and the 'state' or provincial or regional governments so. Each within its own sphere exercises its authority. Neither is subordinate to the other and

1.3 In other words, the government of the whole country has limited powers, while the 'states' or provinces have authority and independent power.

1.4 Under a unitary system, the parliament of the whole country is the final authority. It may permit other legislative bodies to exist but it has the right, in law, to remove their power from the centre and give it to regional bodies. Therefore, the regional bodies are therefore subordinate to the central government.

1.5 Apart from a handful of countries in the world, the vast majority of countries have written constitutions which normally are described as the supreme law of the land. In a unitary state, the constitution will recognise limitations of the power of the central parliament to pass laws through devices such as a Bill of Rights which will be justiciable before a Constitutional Court (as in Portugal, Italy, Spain) or before a Supreme Court. But what distinguishes a federal constitution from a unitary one in relation to the competences of government is that in a federal constitution, the allocation of power between a federal and provincial government is set out in a constitution and the basic terms

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1.3 In other words, the parliament for the whole country has limited powers. Power is diffused and the centre and the 'states' are co-ordinate in their authority and independent in their status.

1.4 Under a unitary constitution, the parliament of the whole country is the supreme law-making body. Final authority vests with the central government. It may permit other legislatures to exercise their powers but it has the right, in law, to overrule them as they derive their power from the central legislature. Provincial or regional bodies are therefore subordinate to the central government.

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are 'entrenched' in that they cannot be amended at the sole discretion of the central parliament or of a region or a combination of regions. Changes to the allocation of functions may only be brought about by a variety of procedures laid down in the constitution. Federations normally have two 'houses' of parliament, the 'upper house' being constituted so as to represent regional interests, with disputes between the centre and the periphery being resolved ultimately by the courts. These disputes as to who has authority to do what are very contentious, bitter and, as in the American and Nigerian civil wars, have led to bitter conflict.

1.6 Federal arrangements -based as they are on the 'inherent' rights of separate governmental bodies - usually provide for financial resources to be divided between the federal and provincial governments to match their respective responsibilities. In Germany and the U.S., to name the two major federations, personal income tax is collected by the central government; so is VAT in Germany and there is a formula for its distribution to the constitutional units. In Germany, there is no independent taxation power for the provinces; there is such a power in the United States.

1.7 As the states or regions are independent sources of governmental power, each state has its legislature, executive, ordinary and supreme courts and its own bureaucracy. In some federations, the central government will have its own offices to carry out the functions allocated to it in each of the states, resulting in a parallel central and local bureaucracy while in others (as in Germany), the central functions are administered by the regional bureaucracies.

1.8 Studies have shown that the formal picture of separate and independent governments may not be reflected in practice. The control of the central government in a federation may be so great (as in Mexico, Venezuela, Australia and the old USSR) that in practice, the states are little more than administrative agencies of the central government. This may arise because of the greater resources of the centre or because of emerging national needs.

1.9 On the other hand, the class of unitary constitutions is so wide and varied, (the vast majority of states are formally unitary), the degree and decentralisation in practice is so diverse, that constitutions which are highly centralised on paper, may be federal in practice (as could be argued in the regional devolution of unitary states such as Italy, Portugal and Spain today).

2. PROPOSALS FOR SOUTH AFRICA

2.1 Proposals for a federal constitution in South Africa have only been revived very recently. The Progressive Party, through the Molteno Commission, came out in support for the system in the early sixties. The revival of the concept arose in recent years from among those who desired to protect 'minorities' and who supported limited government. The Kwa Natal Indaba proposals of the mid-eighties for the whole of South Africa anticipated a federalist option based on regional governments each with their own special composition.

2.2 But it was not until the National Party foresaw that the 1989 proposals for the protection of crude group rights and for veto powers to be vested in the legislature for racial minorities were doomed to failure as they were unacceptable to national or international opinion that the federal card - which had been rejected when the Kwa Natal Indaba proposals were turned down by the regime - was played. In August 1990, Dr Roelf Meyer became the first leading personality in the National Party to call for support for a federal state of nine regions each with their own government.

2.3 Subsequently, National Party spokespersons spoke of the maximum devolution of decision-making processes (which can, of course be achieved in a unitary country) and 'three fully-fledged' levels of government.

2.4 The National Party proposals of 4 September do not use the dreaded word 'federal' to describe their constitutional proposals. But words, specially as used by the National Party have lost their technical qualities. The effect of those proposals is to impose a unique, tightly drawn and inflexible version of federalism on to the South African body politic.

2.5 Under the guise of 'participatory democracy', it is suggested that political parties must participate in 'power-sharing'. This 'concept' (which of course has nothing to do with the democratic concept of the individual citizen participating in decision-making and influencing governmental activity) will be implemented in such a way that '...political power may be divided among various authorities. Most important here is the distribution of power among the different tiers of government. This is normally referred to as the principle of devolution of power' (p.9 Constitutional Rule in a Participatory Democracy).

2.6 It is, of course, no such thing. Devolution of power takes place under a unitary state where, for various

reasons, the central government, devolves or decentralises functions either for more efficient administration or for political reasons. Such devolution or decentralisation does not affect the authority of the central government to legislate in the area devolved or to supersede the authority of the subordinate entity.

2.7 What the National Party proposes to do, in addition, is to allocate functions among the different tiers of government '...in such a way that the constitution confers autonomous authority on every tier. (That is, original and entrenched authority with which the other tiers of government may not interfere)'.

2.8 The National Party proposes that there should be nine regions and local authorities with 'autonomous powers'. The constitution will determine which tier of government can perform a particular function in the most appropriate and effective manner. There is a striking vagueness about which 'tier' will perform which function but (at p.10) the proposals state that while some functions may as a whole be allocated to one of the three tiers, it will be appropriate to spread functions among all three tiers so as to allocate to each tier that aspect of a function which can be handled most effectively in the interest of the community.

2.9 These proposals for the structure of a federal government must be seen in the context of the way 'power-sharing' at all levels must operate. There has to be consensus in decision-making, the regional executive and local authorities must be elected on the same basis as the President i.e. three to five persons representing the major actors. Majority rule even at the level of the region has to be discarded in favour of the veto by a party which has a predetermined minimum representation in the Legislative Council!

2.10 the Democratic Party Discussion Paper of 23rd August 1991 is more detailed both in its case for federalism and the way it is to be implemented.

2.11 The D.P's case, briefly put, is that (i) federalism will distribute power and enable more people to take part in the process of power; (ii) federalism will provide a variety of sites of power, provide a defence against tyranny and therefore make the need for central government power less important; (iii) federation will assist in accommodating the linguistic, geographic and political pluralism of South Africa.

2.12 As with the National Party , the Democratic Party insists that the power of the regional authority should be written into the constitution and 'entrenched'. 'It is a central tenet of Democratic Party policy that the central parliament will enjoy co-ordinate sovereignty with the state parliaments'.

2.13 The Democratic Party favours 8-12 states, subject to negotiation. The powers of the federal government are all those powers essential to the national interest. All other powers will be exercised by the state governments. The Democratic Party, rather than beginning with the powers of the central government, instead lists those of the state governments which will include : health, local government, licensing, town planning, local taxation, nature conservation and tourism promotion, roads, education, police, prisons and land settlements (my emphases).

2.14 The federal government list which will be a closed one in the Constitution, is limited to: foreign relations, economic affairs, water affairs, labour, citizenship, currency, inter-state commerce, defence, borrowing on the credit of the government, emigration, foreign trade, customs and excise, national transportation and mineral and energy affairs.

2.15 Like the National Party proposals, the Democratic Party proposals must be seen in the context of its other suggestions concerning drastic restrictions on majority rule. As with regional government, local government must be established on the same basis as first and second tier structures. The question of majorities, entrenched sections and vetoes where applicable should be contained in the constitutions of all levels of government (par. 2.6.1).

3. WHICH POWERS TO CENTRE?

3.1 The battles for the constitutional allocation of authority to the centre or to the regions have been acute. As we shall see, the successful federations arose out of a coming together of existing or natural units or areas which had been administered as a unit. These therefore guarded their powers strenuously.

3.2 The allocation concerns the marking out of spheres in which the government of the whole country and the governments of the constituent parts have authority. This allocation therefore puts limitations on the legislature. The Constitution therefore may have to have elaborate and complicated provisions in relation to the exercise of the legislative area. In South Africa, the reconstruction of our country (which neither the National Party nor the

Democratic Party refers to) would require a political assessment of what competences that central government should have, to what extent it would have access to resources (it is estimated that under the National Party proposals, half of the national budget would be locked into the regions, beyond the reach of the central government) and what the needs of the country are.

3.3 The National Party is coy about the allocation of powers. But de Klerk's statement (September 4) that his proposals offer the possibility of reasonable self-determination by communities in matters of intimate concern provide some insight into the kind of competences to be allocated to the regions and local authorities. Apart from the Democratic Party list which is wide enough to be acceptable to the National Party, the Neighbourhood Council (which will be the only authority which can decide by majority vote) would have wide powers over housing, security, education and welfare. These functions, of course, would be beyond the reach of the central legislature.

3.4 The Democratic Party follows the approach which most limits the power of the central government. The central government will only have enumerated powers. All other powers will vest in the region. Another approach, as in Canada, would be to enumerate the functions of the regions and to allocate the remainder to the centre. The third is to provide two lists, one list with exclusive powers for the centre and the other exclusive to the regions. Finally, one which has been favoured in a number of jurisdictions is to provide a concurrent list where the centre and the regions are allowed to legislate on some objects but in the event of conflict between the two sets of laws, the central legislature prevails.

3.5 The depressing aspect about the Democratic Party proposal is not simply its suspicions of a central parliament but its refusal to acknowledge the inherent difficulties and dangers in denuding the central government of authority by constitutionally limiting its powers. Experience has shown that it is impossible to foresee when important subjects may arise in future which the central legislative should control. It is a recipe for constitutional immobilism and constitutional warfare.

4. CONSTITUTIONAL AMENDMENT

4.1 Constitutional amendment is much more complex in a federal state compared to a unitary state. In the latter, the constitution could provide for a two-thirds majority of parliament together with a referendum, if this were considered necessary for amending the constitution.

4.2 In a federation, it is a principle that powers are divided between a government for the whole country and for its parts and that these governments are independent of each other within their own spheres. It follows therefore that the amending process must be so devised that neither the central government or parliament acting alone nor the constitutional parts alone are able to alter the division of power in the constitution.

4.3 Therefore, to amend federal constitutions, joint action between the central government or parliament and constituent units is necessary. In the U.S. a two-third majority of Congress must pass the amendment which must then be supported by three-quarters of the legislatures of states. In Switzerland, a two-third majority in parliament must be followed by electoral majorities in the majority of the cantons.

4.4 Such complex constitutional amending procedures may not raise difficulties for those who are committed to vetoes and special franchises which may affect the composition of the regional parliament and executives. But in the context of South Africa, a very rigid amending procedure is part of the excessive protectionism for whites which can only result in resentment and instability.

5. THE ARGUMENTS AGAINST FEDERALISM

5.1 South Africa has been administered as a unitary state since 1910 when the federal approach was rejected by the all-white National Convention. The system of administration, supervision and control and the division of functions have become part of our culture. Proposals for political federalism in a non-racial future can only be perceived cynically when matched against the highly centralised system under white minority rule. Proposals which modify the present structure have here nothing to do with participatory democracy or bringing the government to the people. Some of the most bureaucratic and impersonal governments are federal. These proposals of the National Party and Democratic Party, with a number of co-equal sovereign regions and autonomy down to the level of towns and even neighbourhoods could possibly be the result of a rational, planned and organised system of devolution. Right now, it must be seen as a method of locking wealth and resources into smaller units of government where consensus decision enables a veto to be used resulting in constitutionally-protected walls of privilege to be erected, a recipe for the entrenchment of segregation and privilege.

5.2 Under apartheid, our country has been fragmented to a degree unknown elsewhere. Such fragmentation has not been part of a policy of economic development and social upliftment but to create division and to maintain the political power of the minority. The status quo can therefore be maintained by ensuring that existing patterns of government (amended so as to reject the four provinces as units of government) serve as the basis for regions. Proposals for a geographical federation ignore the need for a recognition of the political and economic unity of South Africa. This is not a matter of sentiment or aspiration, important as it may be. Unity is important for an 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.

5.3 In the context of a written constitutional order embracing a Bill of Rights which imposes severe constraints on governmental action and provides for determined protection of citizens' rights, it is vital that a democratic government in a free South Africa has the competence and authority to embark on the reconstruction of our society. It must therefore have the constitutional competence to shift resources, to take commanding decisions which could be implemented by regions and local government and to adopt national policies which would tackle and undo the established patterns of discrimination in housing, health care and employment.

5.4 The federal option uses language to conceal its real meaning. Under this system, the central government will be constrained by constitutional restrictions of one kind or another from tackling the injustices of the past. The result would be to entrench these injustices, a sure recipe, if not for ungovernability, for civil war.

5.5 The function of economic management in a country where the economy has been operated for the minority imposes a severe challenge on the government. Any major changes to the constitutional order or to present arrangements have to be reconciled with the maintenance of uniformity of approach in South Africa as a whole as to the allocation of resources, to taxation arrangements and to the overall management of the economy. If taxation raised in a region is locked into that region, if the central government can only allocate 50% of total revenue for its purposes, then the need to 'develop industrial policies aimed at transforming imbalances that exist between blacks and white, between urban and rural areas and between regions', as envisaged by the COSATU-ANC Document of June 1990, will be totally frustrated as each region will take autonomous and independent decisions. This document also urged for a recognition of the need for rural industrialisation 'with

well developed linkages with the local region.' The argument for social justice depends for its effective application on the capacity of a government to control and use resources in order to ensure a larger measure of equality in public services and general standards of living.

5.6 It would be difficult, if not impossible, under a federal system, to bring about social and economic transformation and may give rise to serious problems concerning the implementation of aspects of the Bill of Rights, especially in relation to social and economic rights. Control over resources is vital in a democracy. Successful federations have worked under conditions of reasonable parity in economic resources and an agreement or consensus about the goals to be achieved. In neither area is there consensus in South Africa and it is not difficult to envisage rich and powerful regions denying access to 'its' resources and its taxable income, as has happened in other countries. Disparities in size and economic strength, reflected in the overwhelming economic and political power of the PWV, Durban and Cape Town areas, would make a federation so 'imbalanced as to be unworkable' (Royal Commission on the Constitution 1969 - 1973, par. 531). There is no equilibrium within such a system of disparities, as the Nigerian Civil War in 1968 shows where the North claimed that as its population was the largest, it should obtain the greatest resources.

The result of the formation, artificially, of a large number of statelets to provide credence of the federal idea would be disastrous.

5.7 The fundamental objection to the federal idea is that it is based entirely on ahistorical premises by its proponents in South Africa. As the British Royal Commission pointed out 'Federalism was designed and is appropriate for states coming together to form a single unit, and not for a state breaking up into smaller units (par. 526).

5.8 As many of the National Party's proposals are an eclectic pot pourri of examples from here and there and which ignore the historical and political traumas and complexities of their evolution, it is necessary to look at some aspects of successful and not so successful experiments in federalism.

5.9 In the United States, before the federation of 1789 the 13 states which broke away from the British Empire regulated their common affairs from 1776 onwards under the articles of Confederation. They each had governments of their own and were agreed on the fundamentals of the new order: slavery and states rights. In Germany, various historically involved states, with their catholic and protestants princes, fought each other vigorously and then came

together. Under Bismarck they came together in 1871 in a state which became a federation in 1919 under Weimar, on the basis of the historical assumptions. Similarly in Switzerland, over the centuries a number of independent or quasi-independent statelets set up a confederation which evolved into a federation. In the colonial territories of Australia and Canada, independence came to various Crown Colonies, with their separate colonial authorities, which associated together the better to organise their common endeavours. Even in India, which today can only be described as a quasi-federation, the units which came together were by and large based on the colonial boundaries of the British Raj, complemented by the princely states who were coerced into what is described as the Union. As for Eastern Europe, in theory the USSR and Yugoslavia were federal states, based on the administrative divisions of the Russian and the Ottoman Empires respectively, supplemented by Stalin's and Tito's views on the national question, which created 'natural' units of a federation. We know today of course, that there was nothing natural about them.

5.10 Acting on the impetus of the U.S. example, a number of Latin American states such as Mexico, Venezuela and Argentina adopted a federal system. There was no material basis for such an experiment. Apart from creating a vast infrastructure of civil servants and governors and legislators, the provinces were not able to grapple with the problems of poverty, illiteracy and exploitation and became, in effect, the private possessions of the war lords, until the modernisation process of the twenties and thirties.

5.11 The most dramatic examples of the imposition of the federal option in Africa were the Central African Federation of the fifties uniting Nyasaland and the two Rhodesias. They were clearly meant to perpetuate the race rule of the small white minority of Southern Rhodesia and doomed to failure. It was for this reason that ZAPU and ZANU rejected a federal approach during the independence talks in 1979 as it was perceived as weakening national unity in a state already plagued by many other problems. In Nigeria in 1960, the Constitution established a federation bringing the three units - North, West and East - which had traditionally been administered separately by the British. The disparities in wealth, population and levels of education, compounded by the discovery of oil in the sixties, led to the success of fissiparous tendencies, with untold human suffering and loss of lives.

5.12 The African National Congress, in its policy documents has made it quite clear that its adherence to a unitary government is in the context of the commitment to a lively, participatory democracy. It is opposed to an over-centralised, impersonal, bureaucratic and elitist concept of

government which we have had up to now and which will continue with the proposals of the National Party.

5.13 Throughout its modern history, the ANC has made its adherence to a unitary form of government one of its cardinal principles of policy. This has most recently been reflected in the discussion document on Constitutional Principles of April 1991. The Principles document supports governmental structures and institutions which are based on 'democratic principles, popular participation, accountability and accessibility'. On this basis, the document comes out in support of 'strong and effective central government to handle national tasks, strong and effective regional government to deal with the tasks of the region and a strong and effective local government to ensure local government in handling local issues'.

5.14 Federal systems in themselves are neither more nor less democratic than unitary systems. There is a large and varied number of unitary states, from the social democratic state of Sweden, with its decentralisation to the English model under Mrs. Thatcher, with the central government organising more and more power. Even a highly integrated state such as France has in modern times set up a viable regional government. On the other hand, federal government can be very remote and bureaucratic. Levels of government with their bureaucracies must not be confused with participatory democracy or, as the Democratic Party claims, enabling more people to take part in the process of government. Unitary government can do this as well, if not better.

As for a variety of sites of power, a claim made for federal government, the history of federations belies this alleged advantage. Racism and slavery in the U.S. show that the local option was usually the option for discrimination. The development and encouragement of the organs of civil society, independent of the state is a surer basis for the protection of individual and collective interests.

5.15 It is our conviction that the claims made by the proponents of federalism are really support for a surrogate system of apartheid. We reject diffusion of power which will have the central organs of people's power - the National Assembly - powerless in the face of artificially created units of government which have neither a historical nor rational basis. Instead, we propose a constitutional order, with a strong regional and local authority component, which will provide appropriate, effective and secure protection against oppression or domination. Their strength comes precisely from the fact that they are not specifically designed to protect the privileges of any group, but intended to secure the fundamental rights and freedoms of all South Africans.

5.16 The debate must not therefore be allowed to degenerate into a sterile discussion on the forms or structure of the governmental machinery. The heart of the issue is the extent to which proposals for political change will assist or hinder the move towards the removal of apartheid and its effects from our lives. Put in another way, to what extent will federalism help in deracialising South Africa?

5.17 It is our contention that a democratic and united South Africa, with a Bill of Rights and proportional representation for the election of all governmental structures, separation of powers and an independent judiciary will provide a surer basis for the protection of the rights of all individuals and minorities. The National Party and Democratic Party proposals will promote conflict, rather than the harmony which we should surely desire.

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