

MCH 91-98-7-6

TOWARDS THE REBUILDING OF SOUTH AFRICA:
THE COMPLEXITIES OF THE CONSTITUTIONAL PROBLEM

a contribution from Albie Sachs, 18 November 1985

.....

A country and a government out of control

The central drama of South Africa, in its political and legal aspects, has come about because the growing popular struggle, anti-colonial in essence, is taking place in a country which has long ceased to be a colony. On the one hand, the territory of South Africa is independent and, on the other, the great majority of the people of that territory have never enjoyed the fruits of independence. One consequence is that the removal of the last remnants of colonial rule in South Africa can never be accomplished within the classic framework of secession and the creation of a separate State - on the contrary, as we all know, it is apartheid (the root meaning of the word is separation) that seeks to impose separation, unlike the anti-apartheid forces which hold by the principle of territorial integrity. A second and necessary consequence is that the struggle for self-determination is developing within South Africa into a movement to create a new constitutional order. The battle for the constitution has therefore become as vital for our people as was the battle for independence fought by the people of Mozambique and other colonial territories.

It is in this context that we must consider the argument that sometimes arises as to whether the struggle against apartheid is a struggle for national liberation or a battle for civil rights. One of the useful things that the popular rising in South Africa has done is the way in which that rising has rendered the argument completely obsolete. For those of us directly involved in the struggle, the distinction between national liberation and civil rights has always been a false one.

We can sum up the main political features of our struggle in the following terms: its essence is self-determination, its substance national liberation, the form through which these aims will be achieved is democracy, and the result will be, in the end, civil rights for all.

What is important here is the order. Self-determination and national liberation will never follow from a gradual extension of civil rights, however attractive the apparent signs of apartheid seeking its own destruction may be.

On the contrary, civil rights will become a reality as a consequence of self-determination and national liberation. The growing insurrection in our country has proved once and for all that what the people want, above all, is the full enjoyment of their political rights, their right to choose their own government and to create the society in which they would like to live. In the simple but expressive words of the Rev. Alan Boesak spoken at the conference establishing the United Democratic Front, "We all want civil rights, we want those rights here, we want them now". What possible significance is there, today, in the fact that blacks and whites can legally kiss, or sit on the same seat, when armoured cars scour the streets of the oppressed townships and the air is full of tear-gas?

The deep political crisis, provoked essentially by the success of the ANC's call to make the country ungovernable, is producing a very serious and growing institutional crisis. It is not only the entire country that has become ungovernable, it is the government itself that has got out of control. The rulers of the country are losing the war that they started against the people and are losing control even within their own ranks. They had already ceased to trust their servants and now they have begun to distrust their children and sometimes even one another.

It is in this context that proposals for new constitutional changes are being made almost monthly. The air is thick with a special vocabulary invented or adapted for the occasion: confederation, federation, association, three-chamber parliament, three-tier organisation, "own affairs".... Some people, it seems, feel the need

to equip themselves with multifaceted eyes like those of certain animals which can look backwards and forwards, up and down, at the same time. But beyond the multiplicity of committee reports and proposals it is, nevertheless, possible to discern certain key positions.

While fully aware that the categories merge and overlap, we can, for the sake of convenience, distinguish five basic constitutional schemes which may be summarised as follows:

- (i) Declared apartheid;
- (ii) Reformed apartheid;
- (iii) Multi-racial apartheid;
- (iiii) Hidden or disguised apartheid;
- (iiiii) Anti-apartheid (non-racial democracy), or dismantled apartheid.

It is obvious that these terms do not coincide with the terms employed by the authors of the proposals, since most of them insist that their schemes, far from perpetuating apartheid, put an end to it. What the first four proposals have in common is the fact that all of them are based on the desire to retain a privileged constitutional position for the white minority and, directly or indirectly, distribute power and prosperity according to racial criteria.

Compared with the struggle for independence in, for example, colonial Mozambique or occupied Namibia, they represent a set of options ranging from open colonialism to internal arrangements, presupposing key positions of prominence for South Africans who would be on a par with Tshombe, Simango or Muzorewa. The main difference is that the first three options take race as their starting point and add varying touches of democracy, whereas the option of hidden (suppressed or disguised) apartheid takes democracy as its starting points and introduces the racial elements subsequently.

Adding touches of democracy to racist principles

The basic constitutional principles (dogmas) of open, declared, apartheid are well-known. They presuppose separate sovereignty for whites and blacks, without constitutional mixture at any level. The whites keep exclusive control over so-called white South Africa, comprising 87% of the land, including all the devolved areas, and the blacks become independent in the so-called tribal homelands. Even the blacks who live in areas reserved for whites can only exercise their rights through the Bantustans with which they have family and language ties. Ethnic origins were given a territorial base and made into the sole constitutional principle. The relations between whites and blacks were transformed into relations deriving from international law and excluded from the constitutional sphere.

This, which is the position of classic apartheid, has gained the support of large sections of the Afrikaner rural population, of white foremen and skilled workers and of the lower and middle grade officials in the State service and the nationalised industries. At political level, it also constitutes the programme of the Conservative Party and other forces of the extreme right, some of which are forming themselves into paramilitary organisations as they lose their power in high-level government circles.

Reformed apartheid

Reformed apartheid makes race the dominant but not the exclusive principle of the constitution. It bases political rights on race but recognises the need for some political interrelation involving all ethnic groups. The term most frequently employed for this is "confederation". In essence, it presupposes the existence of links between the Central Parliament, dominated by the whites, and the Bantustans.

To complete the picture, South Africans of mixed or Indian descent (almost completely disregarded in the scheme of open apartheid), would be the minority partners in the three-chamber Parliament, and

the so-called urban blacks would have a series of Councils to represent their interests, starting in the local communities and reaching up to the highest levels.

Apartheid would remain intact in all these legislative bodies, would continue to be firmly based on ethnic separation and each body would have exclusive control over what are defined as its "own affairs". The element of reform would be contained, in that "matters of common interest" would be dealt with at a higher level, on the basis of meetings between the representatives of the various groups in a kind of federal council.

Once everybody had a vote at one level or another, it would be possible to proclaim that the principle of universal suffrage was being recognised. At the same time, the most openly discriminatory laws would be gradually reduced. The fundamental result of this scheme is that, by dividing the black population, by regulating numbers at crucial levels, by controlling the funds and machinery of the State, including the army and police forces, the white minority, and more specifically the National Party, would retain control of the country.

All this would amount to a limited form of power-sharing, under the clear hegemony of the ruling party in the white Chamber of the three-chamber Parliament. It is therefore obvious to any reader of the constitutional documents that this will be the dominant role of the National Party.

Support for this position is drawn initially from a broad spectrum of forces, including the combined forces of white industrial and financial capital, from whites occupying central or leading positions in the Government and State undertakings and from white professionals who depend on State patronage, as well as from a small fraction of the black collaborationist class, entrenched in the organisational structures of the Bantustans and the three-chamber Parliament, and also from international capital and Western governments.

Multi-racial apartheid

It is the manifest failure of this scheme, even before it was fully implemented, that is at the heart of the present political crisis in South Africa. Far from being a magic formula to prolong the life of P W Botha's regime, these proposals are proving fatal to it.

The United Democratic Front, the most prominent anti-apartheid force in South Africa, was created precisely to fight these constitutional proposals. It picked two battles with apartheid and won both of them, successfully leading the boycott of the three-chamber Parliament and destroying the councils in the black communities. While it was the popular struggle that destroyed reformed apartheid and caused the Botha government to lose the support of local and international capital, the demands that are being made by the West are not sufficiently cogent to meet the imperatives of the great fighting majority of the South African People.

This is where the scheme of multi-racial apartheid comes into its own.

The real confrontation in circles within South Africa, the real and daily contradictions between the racist regime and its former international defenders, are emerging not as the conflict between apartheid and democracy but as an unresolved difference between reformed apartheid and multi-racial apartheid.

Before taking the first few steps towards multi-racial apartheid, P W Botha hesitated. It was in order to urge him to pursue that course that Western governments and financial institutions suddenly began to apply pressure. All of us who for years had campaigned for sanctions against the regime of apartheid, were struck dumb at the speed with which the most Conservative governments recognised that it was their duty to bring external pressure bear on Pretoria. Although always welcome, there was something artificial about the tremendous wave of condemnation of apartheid that suddenly arose in the West - it will be no surprise, one of these days, to hear General Pinochet declare that he is going to prohibit the sale of

South African peanut butter in Chile. The secret of this is not that apartheid has suddenly become worse but that it now has less force. Apartheid when it is strong is embarrassingly calm and assured but when it is weak it becomes intolerable. Hence the urgency underlying the project of multi-racial apartheid.

In essence, multi-racial apartheid is based on a policy of inter-ethnic alliances rather than on consultation between the races. The Bantustans are given a certain importance but cease to be the base from which the Africans can exercise their political rights. Rather, they are gradually integrated as components in the regional political structures, retaining some autonomy but sharing certain powers with the people who live in the so-called multi-racial areas.

The premises for this idea are contained in the report of the Commission that Chief Gatsha Buthelezi set up a few years ago to enquire into the future of the province of Natal. The region was conceived as the embryo of a future federal State. The various regions may differ in their political structures and may be at different stages. The federal Government operates on the basis of interaction between the leaders of the regions. This leaves the way clear for an elected black Head of State to declare, on the strength of his mandate, that apartheid is dead and buried.

Thus, all the legitimate objects of white fears become, in effect, a kind of game in which territorial divisions play a part, along with ideas of what constitute each group's "own affairs", constitutional vetos for the minorities and the entrenchment of the rights of groups and individuals.

Behind all these expedients lie two fundamental principles: there will be no majority government and no radical change. It is not surprising that one can detect here the marks of a certain kind of American political practice: the proposals themselves and the game of inter-ethnic roulette played with great intensity in smoke-filled rooms are highly typical of the political scene in the United States. But the American constitution, unlike the proposals recommended by the Buthelezi Commission, does not recognise ethnic origin as a fundamental principle. Similarly, any comparison with

The Zimbabwe Constitution which resulted from the Lancaster House Agreement is inadequate because, although it contains clauses of a racial nature and others that are more oblique, at least it permits majority government.

Who are the proponents of the scheme of multi-racial apartheid? Basically it has the support of those sections of local and international opinion that previously supported reformed apartheid, white professionals and small businessmen, some dominant figures in the service of the State and government undertakings and a section of the black middle class in the towns and of the black feudal bureaucracy in the country. In political terms, it presupposes a tripartite alliance between the National Party, representing the institutions of State power, the Progressive Federal Party, as an expression of economic power, and Gatscha Buthelezi, providing the necessary black component. Such an alliance would be given a constitutional basis and, with the West's blessing, outside criticism would be disregarded and internal opposition crushed. The demise of apartheid would be publicly announced.

If every journey of 1000 km starts with one simple step, why is it that P W Botha refused to take this last step along a path that he is already treading? Various reasons, both psychological and tactical, have been suggested. From my point of view, the main question is whether the National Party is seeking to maintain its hegemony over the entire State machine, including control of the Armed Forces and the whole Security apparatus. When P W Botha says that the whites will never commit suicide, what he really means is that the party through which he rose to eminence and which he leads will never put itself in a position from which it could easily be swept from power. It is not just that Gatscha Buthelezi is openly ambitious and inconsistent in his dealings and, even on the best possible hypothesis, unable to count with any certainty on the support of his followers, nor that the Progressive Party is split down the middle when it enters into agreements of this kind, nor that P W Botha faces opposition in his own ranks.

Nor is it a simple caprice to reject power-sharing on principle.

The problem is one of control. P W Botha and the group that he leads fear - and with good reason - that the "English" and the blacks will join forces against the Afrikaners and that, once the Party has lost control of the instruments of government, security and the exercise of patronage, it will never again regain it.

If this view is correct, how are we then to explain the fact that Western pressure is once again demanding freedom for Nelson Mandela and open dialogue with the ANC? The answer falls into two parts:

- In the first place the imprisonment of Nelson Mandela is beginning to be seen internationally as the clearest possible proof of the intransigence of apartheid, so that his release could be projected as a spectacular sign of reform, with the prime object of conferring legitimacy on P W Botha and not on the ANC. Dialogue with the ANC would also be essential to bring about an end to the war.

This is the major weakness of the Boer-Zulu-Progressive centre alliance, since the only way to deal with the prevailing popular insurrection would be, ultimately, by employing armoured cars, tear-gas and torture. This was what destroyed the internal agreement in Zimbabwe and turned Muzorewa from a reasonably popular nationalist figure into a hated puppet.

To avoid this happening again, the ANC has to be brought into the scheme, not as the spokesman and historic leader of the struggle against apartheid, speaking for the masses of the oppressed and the forces of democracy, but as a claimant to power seeking a place in the smoke-filled room. It is to be feared, therefore, that the aim is to have Mandela released from prison, but not in order to recognise him along with Tambo as leader of a future democratic South Africa; the intention is to get the ANC to the so-called negotiating table and then surround it with so many "other forces" that it will have the greatest difficulty in getting its voice heard.

- The second reason prompting the West to accept the risks inherent in granting the ANC a certain degree of legitimacy and greater freedom of action is that the fourth constitutional scheme, known as

Suppressed or hidden apartheid, remains in reserve.

To cut down the tree but keep the fruit

Hidden or democratic apartheid arose from the democratic, albeit reluctant, admission that there must be universal suffrage in a unitary State and it accepts the likelihood that the ANC will very probably become the ruling party in the new society - our revolution being the only one to be accompanied by public opinion polls, there can now be no doubt that we would win if it were possible to hold free elections. Where apartheid would survive, deep in the heart of the new democratic constitution, would be in the escape clauses in which it would once again be insisted upon as a condition for the acceptance of the principle of one man one vote. Such clauses would block the dismantling of apartheid in two ways - they would limit the power of Parliament and they would institutionalise the dominant white conservative machine to ensure that the power of Parliament cannot be overturned.

This means that, under the pretence of protecting minority rights, many of the structures of apartheid would remain intact, especially in the economic sphere. To protect minorities from discrimination is one thing and that is what is normally understood by the constitutional protection of minority rights; but to protect the privileges of a minority is something else and that is what the escape clauses are really designed to do, making them a kind of ill-concealed (hidden) apartheid. Similarly, no-one could argue against the protection of individual rights and such rights mean a guarantee of equal rights and equal status for all - the right to vote, the right to freedom of conscience, the right to work, the right to walk freely in the streets and to sleep freely in one's home.

These rights deserve special constitutional protection and no harm would be caused if certain group rights, such as for example the right to speak one's own language or practice one's own religion, were to be equally strengthened. But a right that is apparently innocuous and free of racial criteria, such as the right not to be deprived of one's property without full compensation in

freely convertible currency, preferably dollars - could in fact be a way of using the law to perpetuate social distinctions based on race.

- How for example could millions of blacks, forcibly expelled over the years, pay in rands - let alone dollars - for the right to return to the lands of their ancestors?

- How could the mass of the South African people, kept in poverty on land subject to famine, by means of the pass laws and the rules governing migrant labour, find the money to buy back the land that was taken from them over centuries by force of arms, by taxation and the bulldozer?

It is obvious that if the constitution destroys the tree but protects the fruits of apartheid it will be preserving important elements of the system instead of destroying them irrevocably.

The question of disguised or hidden apartheid is not therefore directly on the agenda, though it does come up in various indirect ways and this is bound up with the problem of the negotiations. If the Freedom Charter does not allow any form of disguised apartheid and if, respecting the ANC, the fifth and last constitutional scheme - namely an anti-apartheid constitution based on non-racial democracy - is not negotiable, what would there be left for us to talk about here?

The "exceptional nature" theory : in the name of what?

A non-racial democracy presupposes a united South Africa ruled on the principle of universal suffrage, majority government and equal individual rights. The Freedom Charter adopted by the People's Congress in 1956 launched a clear programme rooted in South African realities, that could serve as a basic document from which a new constitution could evolve. It is not easy to imagine the ANC agreeing to submit to negotiating on declarations such as those which asserted that "South Africa belongs to all who live there" or that "the doors to learning and culture should be open."

It is not merely a matter of keeping faith with thousands of patriots who, like Ruth, ^[First] gave their lives to gain the basic conditions: that apartheid should be completely abolished and the benefits of a new society enjoyed by the whole people rather than remaining available only to a small section of those who had formerly been oppressed. If we want to escape once and for all from the destructive policy of race, then, assuming that the war is ended and peace established on firm foundations, there is no solution except the one we have spoken of. This is only being practical and realistic. We must finish, once and for all, with the essentially racist idea of the exceptional nature of South Africa, according to which South Africans are different from other human beings in other parts of the world; we must have done with the argument that democracy is not for our country. If we take our stand on the basic structure of the Freedom Charter with the aim of ensuring that its principles belong to all the people of South Africa, there would be various items to be discussed. For example: the internal structure of the Government in the presidential or prime-ministerial form; the official language to be adopted; where the capital of the country should be located.

Even more important, however, the negotiations could play a key part in helping the transfer of power from the racial minority to the people as a whole. Once the principle is accepted that apartheid must be dismantled, and once it is agreed that the only effective and lasting way of dismantling it lies in establishing a democratic, non-racial society in a united country, the details of how to proceed rapidly to bring this solution about will be placed firmly on the agenda.

The financial leaders who recently went to Lusaka to meet the ANC showed the first glimmerings of understanding of this principle and saw that now, not later, is the time to act. If their friends in banking and industry in other parts of the world can impose sanctions on Pretoria, why cannot they impose sanctions, and far more effective ones, from within? Although one cannot expect bananas to grow on mango trees, or that Gavin Reilly from Anglo-American should seize an AK47 and join Umkhonto we Sizwe, but he could ensure that the factories he

controls stop supplying arms and munitions to the security forces of the racist regime. And if it is true that an army's strength is in its belly, there is nothing to stop Tony Bloom, of Premier Milling from cutting off food supplies to the SADF (South African Defence Forces), especially when they are engaged in criminal raids on neighbouring countries or in search operations and in asserting their domination over the people of the South African suburbs.