

aimed at examining the nuts and bolts of federal systems.

Different of federalism



CANADA, Switzerland and Germany – prime federations and exemplary constitutional states. The opportunity to see and discuss the principles and practices of these systems with the practitioners themselves is the stuff the dreams of constitutional lawyers and political scientists are made of! In preparation for the process of constitution writing, Idasa's Pretoria office led a two-week tour to these countries in July.

Among the 29 participants were Constitutional Development Minister Roelf Meyer, deputy minister Vali Moosa, chair of the commission on provincial government Thozamile Botha, the Freedom Front's Constand Viljoen, the Inkatha Freedom Party's Peter Smith, government officials and constitutional legal academics (pictured above).

Peering into the mirror of comparative constitutionalism and finding reflections of aspects of our own Constitution (some in an improved form, according to our hosts) was a satisfying experience for those involved in developing our new dispensation. One comes away with the knowledge that South Africans have done well for themselves constitutionally and that we are well equipped to do even better in the process of constitutional refinement.

"Our motivation for this project lay on two levels; the importance of international exposure and influence on our constitution-writing process and, secondly, the importance of timing such influence in relation to the key actors in this field," said Idasa's Pretoria director, Ivor Jenkins.

With its strong emphasis on federal government and the ongoing conflict around Quebec secession, Canada was an obvious starting point. Once, like South Africa, a product of British colonial constitutional law, Canada has transformed itself from a Westminster model to a modern constitutional democracy with a federation that meets its own unique purposes.

The Canadians' capacity for blending old and new, imported and original concepts, is also reflected in their constitutional structures: they maintain a senate which everyone knows (and accepts) does not serve much purpose; they are a profoundly *federal* nation, but have not effected a separation of the executive and the legislative branches; constitutional jurisprudence is very important, but they show no interest in a separate constitutional court.

The next stage of the programme took delegates into a two-day conference in Switzerland where they and European experts reviewed constitutional models from Spain, Belgium and Switzerland and analysed underlying concepts within the context of what needs to be accomplished in South Africa within the next 10 years.

The serenity of the picturesque Swiss scenery, one feels, must have infused itself into Helvetic constitutional thinking: it is neat and clean, it functions like clockwork, it is kept well lubricated by complex conventions, it prevents the emergence of insoluble conflicts – and it cannot be exported.

Although Swiss practices, such as direct democracy by means of a multiplicity of referenda regularly held as a matter of course, are simply

unattainable in our country, many Swiss concepts may find resonance in our constitutional planning. Here one thinks of the canton system, not really (as some would wish) as a vehicle for ethnic or cultural packaging, but as one which demonstrates the importance of popular democratic involvement and of the development of community-specific solutions to questions of communal interest. A powerful example of First World "grassrootism".

Federalism was very much a focal concept of the whole tour, but we learned that the *confederation* of Switzerland historically employed the seemingly inconceivable notion of dual (cantonal and federal) sovereignty; but that at present, in the words of Wolf Linder, writing under the baffling heading of *Non-Centralisation – Not Decentralisation*, "even on an abstract constitutional level the distribution of powers between central government and the cantons cannot be defined once and for all".

The tour concluded in Germany with delegates observing a functioning federalist state. In the *Karlsruhe* or constitutional court there is a quiet self-confidence based upon carefully conceived, though adaptable, dogma and a proven record of jurisprudential satisfaction. We came away with the knowledge that a new constitutional court in South Africa will not gain respect nor succeed because of the powers granted to it by the constitution, but because of the intelligence and quality of its work and its sensitivity to justice and equity.

In Bonn we were introduced to the reality of the German Federation's constitutional entrenchment of the federal principle despite the systematic erosion of the legislative autonomy of the *Länder*. Seemingly the Germans could not care less about this erosion because the real devolved power is perceived as lying in the execution of the laws at regional and local level and not so much in their making. Now try to sell that to South African federalists! Nevertheless, it again proved a point: constitutions (especially the successful ones) have a life of their own. Such life is not given to them by their manufacturers. The constitution becomes a living organism only in the hands and hearts of the people who live by it.

The German electoral system is proportional but, we were informed, this does not mean that parliamentarians are not accountable to the voters: even the members who were elected on party lists have to work hard at home if they wish to have their names reappear on the lists at the next election.

And the *Bundesrat*, composed of the leading members of the regional governments, represents the interests and views of the *Länder*. It is capable of the veto but seldom uses it despite the fact that the majority of its members support opposition parties. Regional interests reign supreme in this worthy chamber: if those interests are not endangered, why let party politics interfere?

We flew off wondering: senate and provinces of South Africa, quo vadis? ■

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