

THE CONSTITUTION IN FLUX: NATAL'S PRESENT POSITION

The ongoing political process involved in the Kwa-Natal Indaba and the inauguration of the Joint Executive Authority in Natal are both exciting events. They are particularly significant when viewed against the back drop of the traditional mode of South African politics in which all constitutional change is initiated at the top; at central government level. What makes Natal exciting and different at the moment is the sense among sections of both the black and the white public that some form of constitutional progress can be made through the actions of ordinary people without their having to get involved in overtly violent revolutionary processes. This kind of hopefulness is in stark contrast to the helplessness which South Africans often feel in the face of the brutal choice: submit or fight.

But how hopeful are the developments in Natal? Is a just regional dispensation possible? Is the Indaba blueprint the one to strive for? It is not possible to tackle these questions without a grasp of the present constitutional position of Natal. The South African constitution as a whole is in a state of flux and it is my impression that many South Africans do not understand what is going on. Some observers make the mistake of suggesting that because the government has dropped the rhetoric of grand apartheid and has not replaced it with any new and equally precise ideology it must be that the government has resorted to **ad hoc** policies. This is not true. I want to argue that the National Party dominated government has a clear and sophisticated plan for the future constitutional development of this country, that several of the stages of the plan have already been implemented, and that the future stages are not hard to discern. Furthermore, I think that what happens in Natal is of the utmost importance for the unfolding of the greater plan.

CONSTITUTIONAL REFORM

Partial Democratisation: A Failed Strategy

Let us look at the present state of constitutional development as a whole and at its component parts. In order to do this we must take note of the way things were. In the years after the National Party came to power it set up a massively complex edifice of laws specifying the ways in which the people of this country would be governed. The complexity was impressive, but the underlying principle was as simple as can be. It was the principle of separate development under National Party domination. This principle was refined to apply to all aspects of people's lives. Four homelands were given autonomy, but the major lever of power, viz the power of the purse, was/is still firmly in the hands of the South African government.

During this stage it would have been difficult to misunderstand the outline of the South African constitutional structure. Nowadays, however, things are different. During the past ten years there has been a spate of legislation which in one way or another has had a bearing on the changing constitutional structure of South Africa. Understanding the underlying logic of the whole process is not as easy as it once was.

The first tentative plans of the government towards reform after the failure of the Coloured Person's Representative Council involved blueprints to incorporate Coloureds and Indians into central government. One such plan involved setting up three separate parliaments at central government level. This was never put into effect and instead in 1983 the new constitution was installed which involved a single three chambered parliament. The underlying logic of this manoeuvre was clear enough. It was aimed at ending the white monopoly on governmental power and establishing a modicum of power-sharing between the elected governments of the three groups involved. Simple extension of the franchise would have brought about either a change of government or a huge enlargement of the opposition in parliament. Instead the three chambered arrangement with a cabinet incorporating the majority parties from the three houses had the effect of incorporating the Indian and Coloured leadership into the government. It was hoped that the Indians and Coloureds in the government would develop interests in common with the existing government. In particular the constitution was designed to ensure that they would have an interest in the stability of the system. Furthermore, it was clearly hoped that the base of electoral support for the government would be expanded.

The 1983 constitution had one feature though that I want to highlight. It involved setting up **democratic** procedures (imperfect ones to be sure) and these required by their very nature that the Indian and Coloured people be invited to come forward and play the democratic game as outlined. This invitation combined with the gallery of world opinion, which had been invited to watch a democratic reform process in progress, created the ideal circumstances for the use of the boycott weapon.

This weapon was seized upon and used by all those internal actors who argued that the new constitution was imperfect because it did not incorporate black South Africans into government at the highest level. Boycotts against the elections for the Indian and Coloured House of the tricameral parliament were successful. Members were

elected on miniscule percentage polls. It was around this issue that the United Democratic Front formed, prospered and extended its activities to include school boycotts, consumer boycotts and the like. Politics escalated to unrest, then to violence and as a result states of emergency were called and are with us still.

In summary then, this the first phase of the constitutional reform process involved changing the rules and inviting some of the previously excluded South Africans in to play politics according to the new rules. This mode of constitutional reform is always open to the boycott weapon. But there are other modes of reforming constitutions which are not so vulnerable to boycotts, these are somewhat more obscure procedures and the South African government is presently hard at work implementing them. It is to these that I now wish to turn.

CONSTITUTIONAL REFORM

A New Start: Redistributing Government

I cannot consider all of the pieces involved in the changing constitutional structure. These include the proposed National Council, the reform plans for the President's Council, the operation of the changed provincial system of government, the introduction of Regional Services Councils, the Joint Management Committee system, the Joint Executive Authority in Natal, and the Indaba proposals. I shall confine myself to comments on a few of these.

The present reform programme takes place against a background in which all normal politics has been effectively curtailed through various items of legislation and the imposition of the state of emergency. The core notions underlying the government's complex structure of constitutional engineering are:

First, the government has widened the focus of the reform process from a narrow preoccupation with central government to a broader focus which includes all levels of government. What might appear to be piecemeal strategies are part of a comprehensive programme.

Second, the point and purpose of the reform process is no longer primarily aimed at the broadening of democracy through the creation of new representative institutions, but at the creation of multi-racial power sharing executive structures at all levels of government.

Third, the creation of such structures of government is to serve the purpose of creating common interests between different regions and groups where none previously existed. As is well known the parts of a federation have a common interest in the wellbeing of the whole. It is this type of common interest which it hopes to forge.

Fourth, this federal type practice will, the government hopes, introduce a dimension of redistribution of resources at local level.

Fifth, there is a cost cutting dimension to the reform strategy. Separate governments, providing independent services to each group in South Africa are expensive. Several of the reforms are aimed at providing economies of scale with regard to the provision of services.

Sixth, the overall strategy is to create local government by local people paid for by local people (because the regions of South Africa are already racially defined

regional government translates in a more or less straightforward way into ethnic government.)

Seventh, an important goal of the present reforms is to ensure that local governments have the financial and police muscle to govern effectively.

I want to repeat the core idea of this whole reform package. The government is seeking to create multiple sites of multi-racial government and thereby aiming to defuse the charge of white rule in South Africa. It seeks to create common interests between whites and blacks where none previously existed. These common interests might pave the way for the introduction of democratic practices at a later stage.

What the government does not intend to do is to devolve overall policy making power. There is a huge drive to overall coherence behind this scheme. This requires centralised policy making. The local governments are to be responsible for carrying out policy, they are to have the right and ability to raise the monies necessary to do so, they are to catch the flack for local government failures, and they are to have the police power to govern properly. Nevertheless, overall policy making remains at central government level.

REGIONAL SERVICE COUNCILS

The future outline of the overall structure can best be seen in the Regional Service Council system. This system has already been installed in several parts of the country, but is blocked in Natal because of opposition emanating from the KwaZulu government. I suspect that matter is probably at present under renegotiation and that a modified RSC package will be accepted in the not too distant future. The government's initial mistake in this regard was not to have consulted with the KwaZulu government in designing the RSC system. The benefits of the system are such that I doubt very much whether the KwaZulu government will, in the long run, reject them *in toto*.

Sometimes in the structure of a cell one can see in microcosm the structure of the composite body of which the cell is but a part. I want to argue that in the RSC system one can see in outline what the government envisages for the whole. Let us look at the micro blueprint contained in an RSC.

The legacy of grand apartheid is such that South African cities consist for the most part of separate areas, where each area is inhabited almost exclusively by people who have been classified as belonging to a specific group (whites, blacks, coloureds, asians), and within each of these areas there are in place separate representative bodies of one kind or another to provide government for those areas. The RSC is an indirectly elected committee designed to provide a level of government overarching these territorial components with a view to providing for their common interests especially with regard to the provision of services such as the provision of water, electricity, refuse collection, sewage and so on. The revenue for the provision of these is to be raised within the area to be governed.

I find it difficult to find a word to adequately describe this form of government. Some light is thrown on this form of government by calling it a "racial/territorial federation". It is not a federation proper in that previously autonomous units have not voluntarily come together. Instead the sub units have been forced to federate. It also lacks that essential component of federations which is a rigid constitution. In

RSCs the constitution has been imposed from above and the powers on high can change it at will. But an RSC is a mini federation in these ways:

- (a) A superior level of government is put in place over a set of inferior regional governments.
- (b) The spheres of competence of each level of government are clearly marked out, i.e. the sub units retain autonomy with regard to specified matters, in particular the "cultural" affairs peculiar to the people living in that territory. Similarly the central or federal government has been given carefully stipulated tasks.
- (c) The arrangement has a confederal aspect in that the representatives of the areas on the RSC committee are indirectly elected, i.e. the white, black, asian and coloured municipalities will each elect who is to represent it on the RSC committee.
- (d) Like all federal governments the central government will be richer than the sub unit governments and will have to effect a measure of redistribution from the rich components to the poor ones.

What is happening with the institution of the RSC system is a major change in the constitution of local government and we need to notice the following political aspects of the process. For the sake of clarity let us not think about a whole set of RSCs, but just one.

First, blacks (non whites) are brought into the central government of this RSC without the franchise system being tinkered with at all. Whites have traditionally been terrified of modifying the constitution to involve blacks at central level because they feared that any new arrangement would have to give the preponderance of power to a black majority. In the RSC blacks are brought into central government in what looks like a mere rearrangement of administrative matters. But the new arrangement is not merely what it appears to be.

Second, a major constitutional reform is brought about without the constitutional process falling into what I call the "boycott trap". Wherever a government tries to reform by drawing up a game plan and then inviting the outsiders in to play, the outsiders have every incentive to boycott, i.e. to refuse to play until they get their preferred set of rules. What the outsiders want will be far beyond what the planners are prepared to give and a stalemate will result with a hardening of attitudes all round. In the long run violent conflict is likely. The RSC strategy is designed to achieve political reform through administrative sleight of hand and avoids falling into the boycott trap.

Third, although the RSC we are considering may be wracked by internal dissension about the amount of representation each area has on the RSC central committee (as the plan stands at present the representation is inordinately skewed in favour of the white areas) and about the proportions in which the resources are distributed, nevertheless these differences will be minor compared to the common interest this RSC as a whole will have in getting a larger slice of the cake compared to competing RSCs in other areas. This competition will force multiracial regional interests to emerge.

Fourth, notice that for black areas prior to the formation of the RSC resources used to come from central government via the Administration Boards via the Department of Plural Affairs (as it was once known). This responsibility has now been pushed down to the RSC.

THE JOINT EXECUTIVE AUTHORITY OF NATAL/KWAZULU

A Macro RSC in Embryo

It is not surprising that the government agreed to accept the outcome of negotiations which had taken place between the Natal Provincial government and the KwaZulu government over a number of years and which had culminated in a set of proposals for the establishment of a Joint Executive Authority. A little thought reveals that the JEA is a macro RSC in embryo. It thus fits in nicely with the overall logic of the government's reform plan. All the core elements of a large RSC are there. The component parts of the arrangement are territories occupied predominantly by a given racial/ethnic/cultural group, each with its own provincial government structure. The JEA establishes an overarching level of government, with the people sitting on it getting there indirectly through the existing governments of the region (the Zulus on the JEA get on to it via the KwaZulu government and the whites via the Provincial government). Like the RSC the JEA is directed to provide a set of specified services to the component parts. However, the parallel with a JSC is not quite right as things stand at present because the whites and Asians on the Provincial Executive Council are not appointed via institutions of local white and Asian government, but by central government.

A KWA-NATAL LEGISLATURE?

The JEA proposals negotiated between KwaZulu and Natal were acceptable to the government and enacted in the Joint Executive Authority Act 80, 1986 because they fitted in with the emerging logic of their reform proposals. The blueprint which emerged from the Kwa-Natal Indaba does not fit in with that logic and has accordingly been rejected. It is not difficult to understand why. As the Indaba proposals now stand the lower house would be dominated by a Zulu majority, albeit a conservative Inkatha based majority. The National Party has on several occasions said that it is not in principle opposed to the re-establishment of a provincial legislature, but it is concerned about what it terms the "protection of minorities". No doubt it considers that one way of achieving this might be through a three parliament system within Natal, with whites represented in one parliament, Indians in another, and the Zulus in the KwaZulu legislative assembly. The members of the JEA would then presumably be indirectly nominated through these parliaments. (Note this would parallel the RSC system in which municipal parliaments are elected by each group and then in turn elect or nominate people to the RSC).

Once again I want to point out some of the political niceties about the way in which the government has tackled the process of reform at provincial level. Had the government tried drawing up a plan to incorporate blacks directly into the provincial government system the whites would have turned the plan down motivated no doubt by their traditional fears of majority domination. This may not have applied in the Cape and Natal, but would have definitely been true in the Orange Free State and the Transvaal. However by legislative fiat the government abolished the old elected provincial councils and established a modicum of inter-racial power sharing in the provincial executive committees. Furthermore many of the powers which used to be lodged with the central government department of Bantu

Affairs and Administration went first to the Department of Constitutional Development and Planning and have now been devolved to the provincial government. Thus the provincial governments now have more powers than the old provincial councils had.

As a next step the government is in effect saying to the various groups in the provinces that they may now set about devising ways of installing democratic processes for electing the multi-racial power sharing government which is already in place. I cannot imagine people responding negatively to such an offer. The rule being followed here would then seem to be "Establish multi-racial power sharing government first, democratise afterwards".

SOME CONCLUDING COMMENTS

What is extraordinary about the constitutional manoeuvring which I have outlined is that the government, in implementing it, is not too preoccupied with the whole problem of legitimacy. In documents I have read and in ministerial pronouncements the government priorities are

first to secure and maintain stability, second to establish good government which provides the services which people need and only in the third place will it then turn to the whole problem of legitimacy. The thinking guiding this order of priorities is that when a government provides good services it will then be comparatively easy to win legitimacy. This is in sharp contrast to the thinking behind many opposition groups who argue that any new constitutional dispensation must first have legitimacy before it can operate and provide services.

The other remarkable thing about the constitutional engineering efforts of the government is the way in which no attention is paid to involving any of the existing black political organisations such as the ANC, the UDF and the PAC to mention but three. These organisations, which are political realities, are simply ignored.

In this paper I have tried to portray as clearly as possible what I discern the logic of the government's reform plan to be. It is only with a proper understanding of this that we might properly evaluate possible plans for the future of the region. □



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