THE CONSTITUTIONAL CHANGES

by Terence Beard

Writing in 1954 on constitutionalism in the Orange Free State and the South African Republic, the historian L. M. Thompson concluded:

> "The constitutional history of these two nineteenth century republics shows that there are two distinct and widely divergent Afrikaner constitutional traditions. On the one hand there is the tradition of the Orange Free State, where the written Constitution was rigid, the judiciary was in fact completely free and independent, and the legislature did not in fact exceed its proper powers—an admirable tradition in all these respects. On the other hand there is the tradition of the South African Republic, where the written Constitution was often ignored, the judiciary became the creature of the government of the day, and the legislature passed laws on any subject, including constitutional amendments, in the simplest possible way." (1)

"The simplest possible way" consisted in regarding resolutions passed by the Volksraad as having the status of law. Thompson ends by asking which of these two traditions is likely to prevail in the second half of the twentieth century.

The short answer to Thompson's question is of course that the Orange Free State tradition has all but disappeared, and that the Transvaal tradition has prevailed, but in a modified form. The tradition which has prevailed is in substance the Transvaal one, while some of the formal features and procedures are superficially misleading. The concept of grondwet or fundamental law no longer has any significance in South Africa. While the entrenched sections of the Constitution remain, and while the South African Parliament is, even as I write, sitting unicamerally and camerally in order to observe the conditions stipulated in the entrenched sections, it is now commonly accepted that these sections could easily be repealed even by a government which did not have the required two-thirds majority. The Constitutional struggle of the 1950's revealed that the necessary majority may legally be created artificially. Thus while the Constitution appears to incorporate rigid features, these have proved to be matters of form rather than of substance. Again, while the Constitution requires that "Parliament shall not—(a) alter the boundaries of any province . . . except on a petition of the provincial council of every province whose boundaries are affected thereby", (2) this procedure has been disregarded in the granting of independence to Transkei, Bophuthatswana and Venda. Of course it can be argued that as no special procedure is laid down in the Constitution for the repeal or amendment of this provision Parliament is competent unilaterally to repeal it, and that in the light of the acts granting independence to Transkei, Bophuthatswana, and Venda, the provision has been repealed by implication, the later acts taking precedence over the earlier. On the other hand it was the National Party government which drew up and introduced the new Constitution which was adopted in 1961, and it has disregarded its own provision which presumably was thought necessary at the time. That it has, inter alia, disregarded this provision illustrates a particular attitude to the Constitution and to law.

Except then for a minor quibble concerning the entrenched sections, the doctrine which applies to the South African Constitution is that of Parliamentary Sovereignty, in terms of which Parliament may make or unmake any law whatever, and is therefore regarded as supreme. On the other hand, this is a British doctrine which, developed along with the British Parliament and it is a doctrine which, as Thompson observes, "has only lingered on in Great Britain because the conventions of their Constitution limit the powers of the British government and parliament just as effectively in practice as the legal limitations which are found necessary in other civilised countries." (3) These legal limitations in other civilised countries are, of course, usually Bills of Rights.

In South Africa there are no corresponding conventions which serve either to give a special status to the Constitution thereby making it an object of respect and even awe, or to curb the legislature in order to protect the liberty of the subject. Consequently constitutional laws tend to be regarded as no more than procedural rules which, as in the case relating to provincial boundaries referred to above, can be ignored if they are inconvenient. And this tendency must be seen in the light of the prevailing attitude to laws per se, an attitude which derives almost unmodified from the South African Republic under Paul Kruger. This is the attitude which might be termed the *instrumental* view of law, and it implies that laws are regarded not so much as providing frameworks for the guidance of the administration and setting the limits within which administrators may impartially perform their functions under law, but rather as instruments of policy designed to achieve the stipulated goals of government, providing licences or authorisations to administrators to pursue what is taken to be government policy. Laws seen in this way are like tools rather than toolsheds. They are employed for the manipulation of the populace as instruments of control, so that government policy is implemented by the use of laws, tools, which are given direction and a cutting edge by ministerial decision and employed by civil servants. Thus the law enables a minister to remove hundreds of thousands of persons from one place to another at the stroke of a pen.

The whole trend in South Africa has been towards the increasing of executive discretion on a scale unknown in Great Britain, or indeed in any Western democracy. While the principle of government under law has usually been adhered to in a formal sense, in spirit and in substance it has not. The grand instrument has been the enactment of laws so wide in their scope and so great in their delegation of executive and administrative powers as to confer unbridled legislative and executive powers upon ministers. These powers extend not only to the normal areas of executive discretion as is the practice in many other modern states, such as pen-

sions, government controlled boards etc., but also to matters normally falling under the criminal law. For ministers have powers to apply punitive measures without recourse to the courts, and these are now employed on so vast a scale and confer upon ministers powers so great, that it is difficult to see how South Africa can presently be described as anything other than a police state.

Because the doctrine of Parliamentary Sovereignty applies to Great Britain, it would be inappropriate to describe the constitution of that country as constituting a grondwet or fundamental law, these terms connoting rigid constitutions requiring special procedures for their amendment. On the other hand, the British constitution, unwritten though it is, and in spite of the fact that it can be amended in the same way as any other law may be amended, is treated and looked upon as if it were fundamental law, and there is consequently a convention that constitutional changes should as far as possible have the support of all the parties in parliament in order that the constitution should not become a 'political football' and can so continue to provide an agreed framework within which the political process is carried on. It is precisely this attitude to the constitution which is absent in South Africa, so that the doctrine that parliament may make and unmake any law whatever, is applied without distinction to constitutional and ordinary laws. Grundnorms are conspicuously lacking.

While the judiciary cannot be said to have become the creature of the government as in the old South African Republic, the jurisdiction of the courts has been drastically curtailed, so that the same end has been achieved by different means. There exist many areas in which the citizen cannot seek a remedy through the courts. An early example of this was the Prohibition of Interdicts Act, passed in the early 1950's, which prevented Africans who were threatened with eviction from their places of residence from seeking a remedy through the courts, as many had hitherto successfully done. As in the old Republic, the operative principle is that nothing should be allowed to thwart the aims of government. The principle of parliamentary sovereignty has been re-interpreted and has given way to the principle of governmental sovereignty, and it is not surprising that the government has increasingly come to be identified with the state. The distinction between state and government is a vital one in giving significance to the distinction between rule under law and arbitrary rule.

The constitutional changes are to be seen within a context in which there is no respect or reverence for law on the part of those who govern, a context within which so great a proportion of the laws discriminate against the majority of the population, that respect and reverence for law on the part of the governed have largely given way to fear and contempt. Laws tend to be regarded as arbitrary by those against whom they discriminate, while many of the laws allow so wide a discretion to the executive that they are in effect arbitrary.

The new constitutional proposals are the result of the Schlebusch Commission Report. This Commission sat and heard many opinions and examined many blueprints for constitutional change in South Africa before submitting its report. No sooner was the report published than the government announced its intention to introduce legislation to:

(a) abolish the Senate; (b) enlarge the membership of the House of Assembly by a number of nominated and indirectly elected members; institute a Consultative Council comprising Asians and Coloureds as well as Whites: (d) institute a new office of Vice-State-President who will preside over the council; and (e) set up a separate Council for Africans.

There is a very real sense in which this announcement came as a bombshell to many citizens, for not only has there been no time for public debate of the Schlebusch recommendations, there has not even been time to read and digest its findings. The publication of the report, the government announcement, the joint sitting of Parliament at which the entrenched sections were amended to allow for their unicameral amendment, and the passing of the forthcoming bill to implement all the proposals but (e) above, will all have been telescoped into a period of approximately one month. This cavalier approach to matters constitutional epitomises the instrumentalist approach to which I have referred.

The step to abolish the Senate is inexplicable except in terms of this instrumental approach. In the early years after Union there were what may be called 'teething troubles' concerning the role and powers of the Senate, especially as the dispute in the United Kingdom over the powers of the House of Lords affected attitudes towards second-chambers in South Africa, Merriman, for example having regarded second-chambers as "either nuisances or nullities". (4) Once, however, the party system had become established in the Senate, disputes became a thing of the past, and since the late 1920's the Senate has never been the subject of serious criticism except during the brief period when it was enlarged in membership in order to remove the Coloured voters from the common voters roll, a strategy which served to demonstrate the ineffectiveness of the entrenchment provisions in the Constitution. There have also been criticisms of particular appointments to the Senate—but there has been no criticism of the Senate qua institution. Indeed the relative merits of bi-cameral legislatures versus unicameral legislatures have never been the subject of either parliamentary or public debate.

In the recent debate at the joint sitting regret was expressed from both sides of the House at the demise of the Senate. No-one from among the ranks of the government or the opposition parties gave even the slightest hint that the Senate had been anything other than a useful second-chamber and many speakers paid tribute to it. And yet all were assenting to the first stage of its abolition. A tried institution as old as Union itself is to be abolished without considerations as to its past usefulness or to whether it could not better be reformed rather than abolished. The self confessed conservatism of the vast majority of the members of both Houses proved in a most fundamental respect to be skindeep in more senses than one.

It is patently clear that the new constitutional changes are of an interim kind—there could hardly be anyone who regards it otherwise. The instrumental approach to constitutional law is in process of becoming a feature of our political culture, and this is a development which, while it might contribute to predisposing the populace to the necessity of political change, removes that respect for the constitution as being in any sense grondwet, as the framework within which the political process proceeds. This could well become a source of instability in the future. There are strong arguments for proceeding with reforms within the framework of existing institutions, adding to and modifying those institutions rather than abolishing and replacing them with new and untried ones. Instead of this, it has been suggested, not least by the S.A.B.C., that the Westminster system must be replaced by

a new system. Of course the main reason for this is that direct representation in our existing Parliament for Asians and Coloureds would threaten National Party rule and African representation would be unthinkable. The government's notion of controlled change is of change controlled by the National Party government, and definitely not the broader one of change within the framework of relatively stable institutions which, through their relatively flexible character, permit of change, while retaining the important attribute of fundamental law if not in the strict legal sense, at least in the eyes of rulers and ruled.

The abolition of the Senate should be seen as a fundamental change, for it means that South Africa will from 1981 have a uni-cameral legislature in which the governing party will have an overwhelming majority, a majority the proportions of which will be increased by the inclusion of nominated and indirectly elected members despite the inclusion of opposition members on a pro rata basis. To all intents and purposes we shall have a uni-party uni-cameral system. The few checks and balances which have survived will have been even further reduced.

As I have not as yet seen the substantive proposals, the new bill having been only just tabled, and after I began this article, I shall restrict myself to a few general comments relating to the principles involved.

While, as I have already mentioned, the new Council which is to be presided over by the Vice-State-President is almost certainly only a temporary or interim body, the fact that it is only to be an advisory body is a serious defect, as is the proposal that its members are to be government appointees. Its members are unlikely to have the respect of the Coloured and Asian populations—persons who have indicated their willingness to serve on such a body have already come in for serious criticism from the public. Advisory bodies have a long history of failure in South Africa, and it is ironic that one of the first acts of the National Party government after the 1948 election was to abolish the Native Representative Council, recognising that as a body with no real powers it had proved a failure. And since 1948 the government has tried advisory bodies in urban and rural areas and always without success. Advisory bodies are quite clearly no substitute for parliamentary representation, and Africans, Coloureds and Asians have mostly long since come to appreciate the validity of this claim. One of the members of the N.R.C. had said of it that it was rather like talking into a toy-telephone, and there is little reason, especially after the failure of the Coloured Representative Council, to believe that the latest experiment will be any different. The new Council will not even be a representative body so that it is likely that what is said by the members of that body are the kinds of things which the government wants to hear. And the more the government is told what it wants to hear the greater will become the already wide gulf between the official notions of the present state of South Africa and the realities. The toy-telephone analogy may well in this case not apply, for it will be more like talking to oneself. The reason that the principle of representation has been abandoned is precisely because the C.R.C. presented viewpoints which the government rejected, and because it refused to do as the government bid.

The proposed separate Council for blacks has been described as a major weakness of the plan proposed, and some critics have suggested that Africans should be included in the Vice-State-President's Council. But would it be of any great significance were unrepresentative Africans to be appointed to such a body? The only advantage which seems to me arguable would be that it would imply a recognition that urban Africans are an essential part of South Africa and not citizens of other, often putative, states. But would this necessarily be so? Membership of advisory bodies need not imply anything so significant. Power and representation are the only real indicators of change, and the new bodies will have neither. Need any more be said? □

REFERENCES

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