

THE PROPOSED SOUTH AFRICAN CONSTITUTION

A (Westminster) Pig in a (Pretoria) Poke?

Among the striking features of the Westminster constitutional system are its flexibility and its adaptability. It has survived and facilitated Britain's progression from absolute monarchy through oligarchy to democracy based upon a universal franchise. In the process the functions of particular institutions of government have changed drastically. The medieval *curia regis* composed of noble cronies of the monarch, became, for example, the privy council consisting of the great officers of state which in turn gave birth to the modern cabinet made up of leading members of the governing political party. Throughout this process the essential structure of government has remained unchanged for almost five hundred years. Where exported, it has proved equally adaptable. Its essential features have been incorporated in federal systems (as in Canada and Australia) and have proved to be consistent with such exotic constitutional mechanisms as bills of rights (as in India and Sri Lanka). The fact that it has failed to produce stable constitutional government in Africa is the result less of its inherent character than of the difficulties which face any attempt at constitutional government on this continent.

The flexibility and adaptability of the system have a price. They are the result of the fact that many of the ground rules of the constitution do not exist in any authoritative form and are essentially political in character. In consequence, they can be readily re-interpreted to reflect the political realities of the society in which the system operates. This is why white minority rule of an increasingly authoritarian character has been possible in South Africa within a constitutional framework which, in formal terms at least, is strikingly similar to the British system.

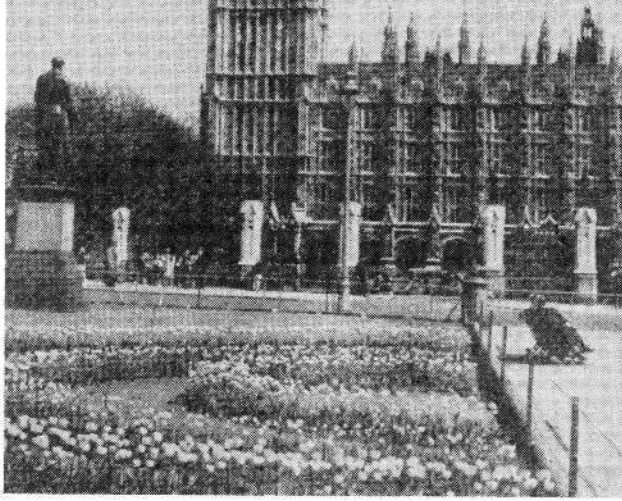
This is not to say that the constitution is simply a passive instrument of those who walk the corridors of power. Values inherent in the Westminster system such as representative and responsible government, freedom of political activity, impartiality in the public service, judicial independence, the Rule of Law, and constitutionalism,¹ have provided South Africans with criteria for evaluating and criticising the actions of those in government to which the latter retain an appreciable degree of sensitivity. Two examples will illustrate this point. The new Internal Security Act 1982, however inadequate it is from the point of view of the respect for civil liberties and the protection of the individual, contains changes which are

the direct result of criticisms whose validity depends upon acceptance of the values of the Westminster system. Equally, one of the striking differences between the earlier models of the proposed constitution and the Republic of South Africa Constitution Act, 1983 is the limited reassertion of Parliament rather than the State President as the ultimate source of constitutional authority. Whereas the Constitutional Committee of the President's Council would for example have given extensive powers to the State President to take over the whole conduct of government in the event of the breakdown of the existing constitutional order,² the 1983 constitution gives this power to Parliament. I have no doubt that these changes were the result of criticism from virtually all quarters that the State President would become a dictator under the proposed constitution. Significantly the principal thrust of the amendments moved by both the Progressive Federal Party and Conservative Party in the Parliamentary Select Committee on the Constitution were aimed at re-asserting parliamentary control over the President and were often framed in essentially Westminster terms. The government's sensitivity to the criticism was obvious from the Prime Minister's speeches and in the Second Report of the Constitutional Committee of the President's Council.³

I am not trying to suggest that the South African constitution represents a lively and healthy example of Westminster-style democracy. It does not. What I am trying to suggest is that the constitutional system has played a significant role in checking progress towards authoritarian government in South Africa. True, it has done so in an essentially political manner but that is because the Westminster constitutional system is essentially political in character. It is a constitutional system none the less for that and changes in it are therefore potentially significant. It is for this reason that we should be concerned about the proposed constitution.

THE PURPOSE OF THE NEW CONSTITUTION

According to the Minister of Constitutional Development and Planning the main purpose of the new constitution is to give those South Africans classified as 'Coloured' and Indians 'an effective say in the decision making processes which affect their interests and aspirations'. This is to be achieved by institutionalizing 'self determination' and providing 'the devolution of power' in what is claimed to be a consociational system of government. This means



of course that the proposed constitution makes no attempt to deal with the 'interests and aspirations of Africans'. Their political kingdom is to be sought in 'self governing' and 'independent' national states but the government has yet to find the solution to the chronic poverty of these areas and their incapacity to provide an adequate channel for the political aspirations of those Africans living and working in the (White) urban areas. In this respect, the proposed constitution leaves the current major problem of South African politics unresolved.

Apart from local government,⁴ the incorporation of 'Coloureds' and Indians in the (previously exclusively White) decision-making processes of central government is to take place at two levels. In relation to 'own affairs' (i.e. matters 'specially and differentially (affecting) a population group in relation to the maintenance of its identity . . . way of life, culture, traditions and customs') separate governmental institutions will be created. Each group will have a legislature (almost all of whose members are directly elected on the basis of universal franchise within the group) and an executive, a Ministers' Council, consisting of members of the legislature appointed by the State President. With regard to the more important of these appointments (including that of the chairman) the State President is required to appoint persons who, in his opinion, enjoy the support of the majority in the legislature in question. The relationship between the executive and legislature at the level of 'own affairs' bears a strong resemblance to the Westminster system of responsible government. Thus, for example, the State President is bound to dissolve the legislature or reconstitute a Minister's Council if the legislature either passes a motion of no confidence in

the Council or rejects appropriation legislation proposed by it. *Prima facie*, therefore, at this level, the system gives the legislature considerable control over the executive and therefore government policy but these rules have to be viewed in the light of two other factors: the nature and scope of 'own affairs' and the position and powers of the State President in relation thereto.

OWN AFFAIRS

The proposed constitution contains a list of matters which are 'own affairs in relation to each population group'. Some of these, such as education, are of considerable political significance but by and large they are not and in most cases the determination of basic policy is in any event to be treated as a 'general affair'. In particular governmental institutions for 'own affairs' have virtually no power to raise money and their power to appropriate funds allocated to them will be subject to strict control by the institutions of government for 'general affairs'. The result is that their primary function will be to carry out policies determined by the latter. It goes further than this, however. It is quite clear from the proposed constitution that the content of 'own affairs' (even those matters listed as such) will not be fixed. Any matter can be treated as a 'general affair' if treating it as an 'own affair' would enable 'the governmental institutions serving the interests of one population group . . . to affect the interests of any other population group'. As a result although education is an own affair, a decision by the 'Coloured' Ministers' Council to open 'Coloured' schools to Whites could legitimately be regarded as a 'general affair' and beyond its power to make. The distinction between 'own' and 'general affairs' is not like

the distinction between state and federal matters under a federal constitution — i.e. an attempt to create a constitutionally defined division of powers between co-ordinate governmental institutions. It is rather an administrative system which allows for the delegation of functions to subordinate institutions of government not in terms of the constitution but in terms of Presidential decree.

The State President plays a critical role in relation to 'own affairs'. Not only does he have full (and unsupervised) power to determine the scope of government at this level but he is also able to exercise close control over the functioning of the legislature for each group by determining whether it has power to consider any particular piece of legislation and any amendments thereto. He may also have the power to secure the passage of legislation and the approval of budgets for 'own affairs' in the face of obstruction by individual legislatures by redirecting the legislation to the governmental institutions for 'general affairs'. As we will see, these can operate without the co-operation of two of the three groups with the result that government of each group's 'own affairs' will continue to be possible even in the face of obstruction by that group's legislature. In exercising these powers the State President is not subject to the supervision or control of the individual legislatures, except perhaps the (White) House of Assembly. He is elected by an electoral college controlled by representatives of the House of Assembly and cannot be removed from office by any individual legislature. The nature and extent of the 'devolution of power' as a method of institutionalising 'self determination' in the area of 'own affairs' will depend entirely upon the way in which the State President exercises the powers given to him by the proposed constitution.

GENERAL AFFAIRS

As 'general affairs' relate to matters which do not 'specially or differentially affect a population group', they are matters of mutual interest the regulation of which should involve co-operation between the three groups. Again according to the Minister of Constitutional Development and Planning such co-operation is to be sought by seeking consensus 'by way of negotiation and persuasion of other actors in the political drama'. In this process 'no group ought to dominate another or . . . deny (it) participation in the political decision making processes'. Participation will be principally as groups and not individuals. Thus although legislation on 'general affairs' will in principle require the approval of the legislatures of all three groups, such approval will be given separately. The proposed constitution expressly provides that 'no resolution shall be adopted at any . . . joint sitting' of Parliament. The Prohibition of Political Interference Act will continue to apply with the result that extra-Parliamentary political activity will continue to be strictly segregated. As significant is the fact that in the event of a conflict between the three groups, the constitution is designed to ensure that the smooth operation of government can continue under the control of the White dominated institutions of government. Disagreement between the three Houses of Parliament can be resolved by decision of the President's Council in which the 20 representatives of the (White) House of Assembly and the 15 Presidential nominees (who do not have to be members of opposition parties) constitute a clear majority. Government can continue to function even in the face of boycotts or obstructions by two of the three groups. Both

the electoral college and the President's Council can operate without the representatives of the Coloured and Indian Houses and any one of the Houses will constitute Parliament for the purpose of enacting general laws if the other Houses are 'unable . . . to meet for the performance of (their) functions or to perform (their) functions'. In theory the State President could use this provision to govern without the co-operation of the White House but, unless he were prepared to change the constitution, this is unlikely because his continuation in office will ultimately depend upon support in the White House and not the other two Houses. It is even possible that the constitution can be amended to eliminate 'Coloured' and Indian participation without their co-operation.

In short the proposed constitution gives the 'Coloureds' and Indians no institutional base which is secure enough to extract concessions from Whites in return for their co-operation to make the new constitution work. As under the present constitution, concessions will come not as an institutional necessity but in response to what Whites in power see as politically desirable.

If one has regard to the nature and scope of government at the level of both 'own' and 'general affairs', the proposed constitution has greater affinities with Ian Lustik's control model of stable but deeply divided societies (in which 'stability is the result of the sustained manipulation of subordinate segments(s) by a super-ordinate segment') than with Arend Lijpard's consociational model for such societies (in which stability is sought by negotiation and consensus).⁵

ANOTHER DIMENSION

But the incorporation of 'Coloureds' and Indians under the proposed constitution has another dimension. In order to allow for such incorporation and yet preserve the supremacy of Whites, some of the basic features of the existing constitution have had to be sacrificed. **In the first place**, the constitution for the first time will become a fully fledged apartheid constitution in the sense that participation will be on segregated lines. Previously, although those entitled to participate were narrowly defined, all participants were full participants. This will no longer be the case. **Secondly**, the executive government need no longer reflect the wishes of the majority in the electorate or even in Parliament. This is the result of three factors: the State President is elected and removable by an electoral college in which representatives of the White House of Assembly will constitute a majority; he is only obliged to resign or call an election if all three Houses pass a motion of no confidence in him or reject his appropriation legislation and, lastly, he can continue to govern effectively with the co-operation of only one of the three Houses which in the circumstances is most likely to be the (White) House of Assembly. **Thirdly**, while the substantive powers of the State President have not been significantly extended under the proposed constitution, his position vis-a-vis the legislature has been considerably strengthened. While he may dissolve the Parliament at any time, he will enjoy, if anything greater security of tenure between elections than South African prime ministers have enjoyed under the present constitution. No single House can remove him from office. In addition, the State President has become the gatekeeper to the complex process of enacting legislation. It is he who will: initiate legislation; decide whether legislation should be referred to the Presi-

dent's Council in the event of disagreement between the three Houses; appoint a significant portion of the members of the President's Council and it is he who will, in the first instance, decide whether general laws can be enacted by only one House in the face of boycott or obstruction by the other Houses. These powers will enable him in most cases to manipulate the legislature to his advantage. **Fourthly**, in exercising his powers, the State President will be subject to little or no supervision. It seems that he will not participate in the day to day proceedings of the Houses and will therefore not be personally subject to the kind of pressures and criticism to which prime ministers are presently subject. In some cases he is bound to consult Ministers of State and chairmen of the three Houses but except with regard to 'own affairs' (over which of course he has substantial control) he is not bound by the advice tendered to him. Review of his actions by courts of law will either be excluded or be more theoretical than real because of the unwillingness of the South African courts to question the validity of the exercise of discretionary powers. **Fifthly**, although the jurisdiction of the courts has been somewhat expanded by the entrenchment of the essential features of the new constitution, this may simply result in the courts being cast in the role of guardians of its apartheid character. The one possible exception here would arise in times of crisis in which the government was attempting to take short cuts or to eliminate 'Coloured' and Indian participation. There is authority in recent commonwealth decisions which could allow the courts to adopt the role of guardians of 'Coloured' and Indian participation in such case. To do so they will have to take the government at its word and abandon the traditional theories of all-powerful character of a sovereign legislature. Recent decisions such as **Komani** and **Rikhoto** in the area of urban Black law and that in the Ingwavuma land case suggest that the Appeal Court might be willing to do this. **Finally**, as the White referendum on the constitution has illustrated, judicious use of referenda to appeal to the electorate on a non-party-political basis, could seriously weaken what has probably been the most significant 'popular' check on executive power in South Africa in recent years, the political party system and the caucus of the Nationalist Party in particular. The legislative process which emphasises negotiation in joint committee rather than open debate and the continued operation of the Prohibition of Political Inter-

ference Act in what has now become a common institutional framework makes the role of the opposition equally doubtful.

This last point highlights yet another important feature of the proposed constitution. Under the present constitution, the primary purpose of political activity amongst Whites has been to gain sufficient popular support for policies at the polls to secure control of the powers of government. For 'Coloured' and Indian politicians this will not be so under the proposed constitution. Unless the constitution is altered, there is absolutely no way in which they will be able to translate popular support amongst their own (and opposition White) voters into real political power. They cannot even bring the government down. They will still have to seek concessions from the Whites who will make such concessions not out of concern for the political power of those within the parliamentary system but out of fear of the extra parliamentary consequences of not doing so. Viewed in this perspective, the proposed constitution could change little except to give 'Coloured' and Indian politicians greater visibility.

If this last point is correct the direction of political change under the proposed constitution will depend more on political priorities as they are perceived by those in power than upon the institutional framework created thereby. The proposed constitution gives us little assistance in predicting what these perceptions will be. Those elements of the Westminster system which have proved useful to those in power (such as the sovereignty of parliament) have been retained. The basic framework of apartheid has been retained. What has been rejected has been any move towards casting the South African constitution in a mould more like that of the British model by extending the franchise and thereby giving direct access to political power via popular political support. In the process important aspects of the South African Westminster system have been weakened. Ironically the extension of the franchise under the proposed constitution has been accompanied, for example, by a weakening of representative and responsible government. This is important because it will make it more difficult to assert these values in criticising and evaluating the conduct of those in power. We have in fact bought a less Westminster-like pig in an increasingly Pretoria-like poke. □

REFERENCES

1. S.A. de Smith **Constitutional and Administrative Law** (4 ed 1981) 27 – 30.
2. **Second Report of the Constitutional Committee of the Presidents Council on the Adaptation of Constitutional Structures in South Africa** (PC 4/1982) para 6.14.2
3. Both the Prime Minister (in his address to the Transvaal Congress of the National Party in September 1982) and the Constitutional Committee of the President's Council (Second Report para 6.11) went out of their way to rebut these criticisms.
4. Local government at provincial level has proved remarkably resistant to change. Proposals for the reform of local government – emphasised by the Prime Minister (in his speech to the Federal Congress of the National Party in July 1982) and contained in the Joint Report of the Committee for Economic Affairs and the Constitutional Committee of the President's Council on Local and Regional Management Systems in the Republic of South Africa (PC1/1982) have yet to be reflected in practice. The existing provincial system (as set out in the Republic of South Africa Constitution Act 32 of 1961 – to be renamed the Provincial Government Act 32 Of 1961) are to be retained: a victory for vested interests.
5. Ian Lustik 'Stability in Deeply Divided Societies: Consociationalism versus Control' (1978-9) 31 **World Politics** 325. For an interesting marxist critique of Lijpard see E A Kieve 'A Marxist Critique of Consociational Democracy in the Netherlands' (1981) **Comparative Politics** 313.