

CONSTITUTIONALISM, MINORITIES AND POWER SHARING

INTRODUCTION

Until recently five themes dominated the thinking of political decision makers on the process of constitutional change in South Africa. These are: (i) that ethnicity is the most salient basis of political and social division in South Africa; (ii) that the institutionalisation of ethnicity is a necessary condition of political stability; (iii) that political power is a necessary condition of cultural survival; (iv) that liberal democracy, based on individual rights is inappropriate in a multi-national society and (v) that representative government is not possible unless boundaries are drawn to coincide with ethnically homogeneous groups. The tricameral parliament was clearly a product of the kind of thinking which informs points (i) and (ii). The Conservative Party continues to base its thinking on points (iii), (iv) and (v). It has therefore concluded that radical partition provides the only possible basis for a constitutional solution in South Africa.

Our first point of departure is that ethnicity is not the only or most important cleavage in South Africa. Ours is in fact a complex society in which there are potentially multiple sources of political mobilisation. Group based constitutional ordering, far from guaranteeing stability, will only entrench historical lines of political division and subject

the political contest for the right to govern to a 'zero-sum' contest for group political power. Above all, it is inconsistent with the democratic norm of equal citizenship in a common society. For us, the central object of constitutional change is to facilitate the emergence of an inclusive political community within which rights are allocated without regard to ethnic background.

Since February 2 1991 the degree of polarisation on constitutional questions has been considerably reduced. A significant convergence has taken place amongst the major political actors on the so-called group rights issue, the relevance of ethnicity to constitutional ordering and the accommodation of majorities and minorities in a democracy. This is largely attributable to a shift in our collective thinking to a constitutionalist perspective. Constitutionalism comprises three elements: it is colour-blind; it is based on a human rights philosophy; and it creates, within limits, a zone independent of the state. To the extent that constitutionalism implies a separation of powers and an extended role for the judiciary it also represents an important shift in the thinking of the liberation movement. For a long time, the thinking of the liberation movement was quite understandably dominated by a concern to extend the franchise and to establish a non-racial representative government which implied the restructuring of the executive and legislature on a non-racial basis. The shift to a constitutionalist outlook, provides a new perspective on the issues which have divided us in the past and has considerably improved the prospects for a successful transition to democratic government in South Africa.

CONSTITUTIONALISM AND ETHNICITY

No party to CODESA has advanced constitutional proposals which would require the accommodation of groups as corporate entities in a future system of representation. The published proposals of the parties to CODESA converge in recommending that the constitution should enshrine the basic rights of the individual citizen, that political society should be structured on the basis of an equal and open citizenship, that civil society should be structured on the basis of freedom of association and that a future electoral system should be based on proportional representation - an inclusive system which allows individuals to select the constituencies to which they wish to belong and guarantees the representation of minority viewpoints. These proposals amount to a recommendation of *colour blind, ethnically neutral constitutionalism*, recognise the importance of depoliticising ethnicity in the process of constitution making, and would require a future democratic state to adopt a neutral position in relation to ethnic identities. *The achievement of democratic rule therefore is not equivalent to the establishment of the hegemony of a particular racial group. Constitutions are not based on language unity or blood, tribe or group.* On the other hand a constitutional state could protect and promote the expression of ethnic identities by guaranteeing space to associate on a voluntary basis in civil society. A constitutionally guaranteed freedom to associate will allow communities to emerge and organise without coercing individuals and without limiting democracy. This model has great potential to reconcile group conflicts and to harmonise individual freedoms with the collective needs of communities. In this respect, we think that the National Party has creatively developed

the concept of a communities' right to self-determination as a qualified right analogous to other private law rights exercised in civil society.

CONSTITUTIONALISM AND MINORITIES

Constitutionalism represents a shift from majoritarianism without undermining the basic democratic principles of equal citizenship and majority rule. Constitutionalism protects i) political minorities by guaranteeing basic civil liberties, ii) ethnic communities by guaranteeing language rights, religious freedom and the right to associate. It does so by: a) substituting the courts for parliament as the final decision maker on constitutional questions; b) withdrawing constitutional questions from the exclusive jurisdiction of temporary electoral majorities and c) empowering minorities to prevent future changes of the constitution. Constitutionalism also limits the powers of national minorities through a system of institutional checks and balances on the powers of the executive, the legislature and the judiciary, and by creating multiple points of access to the political process through a two chamber parliament and through a strong system of regional and local government. A constitutional democracy, therefore, is a democracy which incorporates a strong system of minority protection, without emphasising group distinctions. It is nevertheless capable of providing for a full and principled promotion and protection of diversity.

Cultural Communities

We see our society as a society of people of diverse cultural backgrounds struggling

to consolidate a common nationhood based on democracy. We are not separate nations, or potential nations, irrevocably divided against each other. It would follow that for us the basic purpose of a new constitution is to create and guarantee the structure of basic citizenship rights. But within this framework provision should be made for the rights of communities to assert and protect their identities. A future South African constitution could *inter alia*, i) incorporate in addition to the usual equality and non-discrimination provisions a clause modelled on article 27 of the Covenant on Civil and Political Rights. This provision recognises that rights with a *cultural content* are exercised in association with others and has been interpreted as placing a positive obligation on states to promote the diversity of a population within a state. However, the main obligation of a future South African state would, in our view, be to address the social and economic needs of the population *as a whole*; ii) provide, as does the Canadian Constitution, that the multi cultural character of the South African population be recognised. This will create a strong constitutional foundation for the review of legislation affecting the needs, interests and the legitimate expectations of cultural communities; iii) enshrine the right of communities to establish autonomous institutions, with due regard to the public law of the country; iv) recognise the legal personality of communities for defined purposes; and v) incorporate a system of judicial review accessible to communities. The Australian Law Commission has made specific proposals in this regard. The ordinary law of the land, could also be adapted to ensure that the specific needs of communities, particularly in the area of family law be accorded some recognition.

Political Minorities

The process of democratisation involves more than the extension of the franchise. It requires the emergence of a system of public contestation which legally entitles the opponents of the government to organise themselves into political parties in order to oppose the government and to contest its incumbency in free, fair and regular elections. One of the basic purposes of the new constitution should be to create a structure of basic rights which protects the system of contestation. This includes the right to vote, the right to form and join organisations, a comprehensive right to information, freedom of expression, the right to stand for public office, and the right of political leaders to compete for support in free, fair and regular elections. *The creation of conditions for the expression of dissent and free political action within wide limits is particularly important in societies characterised by sharply clashing ideologies and a history of intense and even violent conflict.*

The establishment of such a system - characterised by what Robert Dahl calls "polyarchy" - is in our view, an essential prerequisite for a rational consideration of alternative policies in a democratic society. It will also extend opportunities for *effective participation* and therefore the number of individuals, groups and interests whose preferences have to be taken into account in the formulation of policy. Of course, systems of representation may not work perfectly. Parliament may be dominated by concentrated interests; alternatively, small and insular minorities may be effectively marginalised. When this happens, the courts should intervene to correct the political error. (See, United States v Carolene Products 304 US.144 (1938)).

CONSTITUTIONALISM AND "SIMPLE MAJORITARIANISM"

In the light of the pervasive influence on constitutionalism on constitution making process currently under way in South Africa we must question the appropriateness of continued references to the supposed 'majoritarian' dangers of representative democracy and the risks of a "winner-take-all" system. This only serves to diminish the confidence of the public in constitutionalism and democracy. At the risk of some repetition, we identify the following non-majoritarian features of the democratic society which is emerging in South Africa:

(i) Constitutionalism

The constitutional separation of powers and regionalisation, create a variety of alternative sites for the exercise of power and *thereby reduces the possibility of an all or nothing victory through elections.*

(ii) Electoral System

Proportional representation apportions parliamentary seats on a fair and equitable basis. It is not a *winner-take-all* system. Insofar as it decreases the concentration and distinctiveness of opposition, it increases the possibility that governmental authority will circulate among the competing political leaderships. It also encourages parties to form coalitions and to use bargaining rather than combative strategies.

(iii) Constitutional System and the Organs of the Executive

The debate on the accommodation of political minorities has incorrectly focussed attention on the executive rather than the constitutional system as a whole. It also has certain 'blind spots'. In the "new South Africa" power will continue to be exercised through the military, police, and bureaucratic apparatuses, sites which will change in their composition over a much longer period than the legislature and the executive.

(iv) The Constitutional System and Society

We sometimes forget that the vote is not the only political resource in representative democracies. While we are about to extend the vote to all citizens on an *equal basis*, other political resources continue to be *unequally* distributed. There will remain many strategic sites outside parliament, from which organised interests will seek to influence and pressurise government.

CONSTITUTIONALISM AND POWER SHARING

The National Party is evidently of the view that the mechanisms prescribed by "ordinary constitutionalism" are not sufficient to protect minorities and therefore advocate the adoption of a power-sharing constitution. In our view, constitutionalism and power-sharing are distinct notions which have different, even contradictory logics, and are aimed at achieving different ends. Constitutionalism is concerned with the content of constitutions, with the structuring of governmental institutions, and with the

distribution of decision making powers. It incorporates a system of institutional and substantive controls on the exercise of governmental authority in order to prevent the concentration and abuse of power. Power-sharing on the other hand is concerned with determining the composition of a government.

The original rationale for power-sharing was that in a deeply divided society such as South Africa, a non-majoritarian form of decision-making is necessary to accommodate *ethnic minorities*. The approach of the advocates of power-sharing today is different. It is to secure mandatory power-sharing of executive authority by *political parties* competing for electoral support. This notion is not easily justified. It certainly cannot be contended that this mechanism is necessary to protect ethnic communities. We have already argued that communities can be adequately protected by the constitution. There are at least three other arguments that have been advanced in support of the power-sharing concept. For the purposes of simplification these are referred to as the exclusion argument, the stability argument and the democracy argument.

The Exclusion Argument

Proposals for power sharing are essentially an attempt to limit party political competition. It is argued that in a deeply divided society, a government versus opposition pattern characteristic of competitive democracies operates as a principle of exclusion. Minorities may be permanently excluded from government. Of course, this may be the case where the most politically salient line of cleavage is ascription and where a political party and segmental cleavages coincide. To the extent that this

was the case in the past in South Africa, this was largely in our view the effect of the *institutions* of apartheid and not a natural result of the underlying social structure. Today the party system is evolving on a different basis in our country. The major parties are emerging as classical aggregating parties, seeking to represent a broad coalition of interests. Parties are already responding to the strong in-built incentives to secure the support of minorities. The National Party itself is in the process of diversifying its constituency. Under these conditions, it is not at all unlikely that political parties will alternate in power. If we are correct, power will be shared "synchronically", not won or lost once and for all.

The Stability Argument

Sometimes it is argued that power-sharing is necessary to ensure stability in deeply divided societies. This view is questionable. Entrenched power-sharing arrangements do not produce open and accountable government, a pre-requisite for stable democracy. It creates elite cartels and in the South African context would solidify historical lines of political division. We think that open public contestation is essential for democratic legitimacy and in order to facilitate the emergence of a stable party system in our country. *The right to govern can only be won legitimately if it is risked regularly in a public contestation of the right to govern.* Mandatory power sharing, furthermore, can lead to *immobilism*, lack of popular responsiveness and policy incoherence. Jonathan Hartland's comments on the Colombian experience are worth noting:

"The danger of immobilism is that elites cannot reach agreements because of party or inter-party differences. The difficulties many democratic regimes find in establishing working majorities for policy purposes can be considerably magnified in consociational cases such as Columbia when the need for inter-party support or a two thirds congressional majority are built into prior agreement. Support could be held back due to intractable policy differences or for narrow partisan reasons, resulting in either case in immobilism. Another possibility is policy incoherence as the regime is continually forced to change policies as different groups successfully pressure for measures and further their interests or prevent the implementation of policies they believe oppose them."

It is therefore strongly arguable that constitutionally entrenched power sharing could in fact become a source of instability. Furthermore, since one of the characteristics of the transition currently under way in South Africa is that social interests and party systems have not yet crystallised, shifting coalitions characteristic of competitive democracies are more likely to achieve stable and legitimate outcomes than grand coalitions. Under conditions of rapid change, mandatory power sharing could in fact result in the exclusion of "small" minorities and new political forces. In short, the power sharing model is essentially a static one which takes insufficient account of the dynamic factor in political processes.

The Democracy Argument

This argument is really implied by the first. It is contended that the ordinary democratic principles of majority rule and competitive politics effectively exclude minorities in deeply divided societies. Therefore power sharing is in such societies necessary to guarantee democracy. We do not agree. In our view power sharing will create a *multi party oligarchy*, a species of one party rule inconsistent with the principles of *multi party democracy*. Oppositions play a vitally important role in ensuring open and

accountable government.

COALITION GOVERNMENT

Voluntary coalitions on the other hand or even enlarged coalitions are not an unusual or even undesirable feature of democratic societies. A form of 'power sharing' which follows elections, is not open to the same objections as constitutionalised power sharing. The sharing of power will then be based on a real and shifting balance of electoral influence and will reflect a popular mandate.

POWER SHARING AND INTERIM GOVERNMENT

Notwithstanding the foregoing, there is a case to be made for power sharing in the interim phase. Our society is currently undergoing a transition which for many will require a leap of faith. Mechanisms which calm fears and anxieties, reduce polarisation and build consensus, which familiarise the extra institutional opposition with government, and government with oppositional aspirations can only help consolidate transition to a democracy. But we must sound a caveat. We cannot do better than quote from a recent paper by Lynn Barret and Yossi Shain : "Power sharing involves opportunities and dangers for the incumbents and opposition elites alike. Critical is the time factor, namely the length of time the power sharing regime is in control before democratic legitimation is completed."

PROPORTIONALITY IN THE EXECUTIVE

The argument for proportionality in the executive is equally thin. It rests on the supposed risks of the exclusion of minorities inherent in the majority rule principle. In fact, when one considers the constitutional system as a whole, and in particular basic structure of civil liberties created and protected by the constitution, it becomes clear that the introduction of the system of public contestation in South Africa will expand rather than diminish opportunities for ordinary citizens, whether they hold majority or minority viewpoints, to participate in the political process. It is true, that as the political process is opened up, current incumbents will experience the risk of displacement. This is a matter which must be addressed sensibly. But temporary expediency should not be elevated to matters of constitutional principle. The argument that parties should be represented in the executive in proportion to their proportionate strength in the legislature as of right mistakes *representation* with *government*. The legislature is the representative branch of government; the executive *organises* a government and is charged with the responsibility of *implementing* decisions. Where coalitions control the executive, this is based on an agreed policy programme. What sense is there in compelling parties with different or even irreconcilable policy positions to form a government? It will only encourage executive government by stealth. In any case, proportionality, if it is not linked with veto, is ineffectual. It provides a semblance of representation without effective control over decisions. It is also difficult to comprehend the mechanics of the formation of such a proportional executive. Who would allocate portfolios and on what basis? The most important consideration for us, is not who governs, but how the government is held accountable.

CONCLUSION

The debate on political minorities has unfortunately focused one-sidedly on the composition of the executive. The constitutional system as a whole should be examined to determine whether or not political minorities are properly protected. Various mechanisms are available to ensure that political minorities participate effectively in the law-making process, and in the permanent institutions of government (Standing Committees, Judicial Commissions, Civil Service Commissions etc). It is true that modern governments are characterised by an expansion of executive power. But this phenomenon should be dealt with by institutionalising a system of administrative review of executive decisions.

The debate about the accommodation of political minorities has effectively become a debate about the design of the executive under a new constitution. It should be both effective and responsive to a broad range of interests. Power-sharing and proportionality are not the only ways to achieve this. In some respects proponents of these two notions have pre-empted this important debate about the design of a future executive without considering what effect their proposals might have on other components of a future system (the party-system, the relationship between executive and legislature etc).

They have also argued for the incorporation of provisions in a constitution which in time will become *obsolete*. We believe that the constitution, as the basic law of the land, ought to be relatively *permanent*. It should, therefore, incorporate only those

institutions and values we expect will endure over time and bind future generations. Therefore, although as many delegates have already reminded us, we should keep our feet firmly rooted in current realities, we should not lose sight of our responsibilities to our progeny. Time clauses are not open to the same objections: they are by definition designed to lapse in time, and when they do, they leave the principal structure of the constitution unsullied.