



Constitutio

By Professor Lawrence Schlemmer
Director: Centre for Applied Social Sciences,
University of Natal;
Secretary, Buthelezi Commission, 1980-1982.

There is a pervasive sense of change in the region of KwaZulu-Natal at the present time. Many factors and developments contribute to this. In the first place increasing reference is being made in the media and by public figures to the Buthelezi Commission report and by its own admission the South African cabinet is studying at least aspects of the report.

Secondly, certain types of formal cooperation between KwaZulu and other authorities have been instituted which are consonant with suggestions made in the Buthelezi Commission as regards immediate steps in drawing the territories of KwaZulu and Natal closer together.

A joint committee representative of the KwaZulu cabinet and the Natal Provincial Executive Committee, headed jointly by the Chief Minister of KwaZulu and the Administrator of Natal is operating to coordinate and integrate regional planning for the entire joint region. Under it are various technical committees to see to the implementation of decisions.

A three-way committee, including planning officials from the central government department of Constitutional Development and Planning, the Town and Regional Planning Commission of Natal and the KwaZulu Planning Coordinating Advisory Committee is to consider planning problems in the Richards Bay and Tugela Basin areas, across political boundaries.

Furthermore, the KwaZulu-Natal Planning Council headed by Dr Louis Rive, although a temporary body, was established by the Minister of Co-operation and Development to seek

immediate solutions to certain pressing urban and peri-urban problems in Black areas in both Natal and KwaZulu.

The possibility of a statutory council to coordinate general affairs between Natal and KwaZulu has been raised at the Provincial Executive, and individual members of the Executive (Exco) have made clear commitments to work in this direction. Further initiatives are expected in this regard.

Businessmen have also spoken out in clear support of a unification of the two territories of Natal and KwaZulu. The Natal Chamber of Industries has raised the matter at a meeting of the Federated Chamber of Industries, and the President of the Durban Metropolitan Chamber of Commerce has issued a strong call for the recognition of Natal and KwaZulu as a single area and for the establishment of a round-table conference to work out a formula for the area's future.

There has been much positive speculation in the press about the possibility of negotiations between the government and Chief Buthelezi. Recently, when Chief Buthelezi expressed serious misgivings about the constitutional position Mr P W Botha has been taking, virtually all the major Afrikaans newspapers expressed regret and generally ranged themselves behind the possibility of negotiations between the State-President and Chief Buthelezi.

There is thus the appearance of a momentum building up in favour of a political 'settlement' of one form or another in the region of KwaZulu and Natal. One may expect that this

momentum will take the form of various representations, mainly from the business sector, asking the government to establish constitutional negotiations with regard to the future of



Natal and KwaZulu, and perhaps to hold a referendum on power-sharing among all population groups in the region.

It would be naive to assume, however, that a process of constitutional negotiation could commence at the present time. Quite large impediments

nal Perspectives

of a political kind exist.

Firstly, a constitutional unification of KwaZulu and Natal could not reduce the powers which KwaZulu presently enjoys, which means that a considerably greater devolution of power to Natal would have to take place.

The present intentions of the central government are rather to reduce the status of second tier government in Natal to that of nominated instead of elected representation, as at present, and furthermore to remove some of the present powers of the provincial administration and vest them with the

ling to negotiate about "power-sharing", as opposed to the division of powers on a racial basis which has been the basis of government political reform thinking up to now.

Hence KwaZulu participation cannot be counted on if the central government is prepared to talk about no more than constitutional bridging machinery between KwaZulu and Natal or KwaZulu and the central legislature, which may be the case.

A third problem is that any separate political "settlement" in KwaZulu-Natal would be at odds with the pat-

A serious problem in constitutional thinking about the KwaZulu-Natal region is thus the question of how possible developments in one region can be made logically consistent with political planning for the country as a whole.

A fourth problem is the most basic of all. Any reasonable equitable political dispensation in Natal and KwaZulu must imply a very large Black majority in regional legislature. This raises the issue of the protection of minority interests in constitutional development in the future.

The South African government hitherto appears to have been unable to formulate a clear position on the issue of majority versus minority rights. The relatively new tricameral parliament for Indians, Coloureds and Whites essentially avoids the problem in two ways.

Firstly, the issue of numbers is deflected by having separate chambers for the different races, and while so-called general affairs are dealt with by all three chambers, the mechanism of approval of legislation is that of separate "concurrent" majorities in the three chambers.

Secondly, where joint standing committees deal with the issues common to all three houses their composition can reflect the fact that the white chamber is larger than the other two, the numbers of MP's being very broadly proportional to population.

Obviously the latter safeguard would not be appropriate as regards the representation of Black people.

In the rest of this paper, the last two major impediments to a constitutional settlement in KwaZulu and Natal will be discussed. The problem of the protection of minority political interests will be discussed first, and then the problem of how a regional constitutional dispensation could relate to political developments in the rest of the RSA will be taken up.

continued overleaf



Scenes in KwaZulu: Job seekers waiting outside a factory.

tricameral parliament (Education and Health Services being key examples).

Secondly, the position of the Chief Minister and Cabinet of KwaZulu is that it will not be prepared to negotiate on any future constitutional dispensation unless the central government issues a statement of intent that it is wil-

tern of constitutional development (or lack of it) elsewhere in the country and the government may well perceive such a possibility as a dangerous precedent which would create anomalies in its overall policy and heightened expectations among Black people throughout the country.

for a long time, there would be a considerable degree of racial or ethnic concentrations in particular regions. By suggesting that constituencies be defined in terms of sociological characteristics the Commission allowed for the possibility of some degree of over-representation of population minorities whose concentration in relatively small geographic areas with considerable homogeneity would suggest a separate constituency demarcation.

Superimposed on the structure of the legislature as outlined above would be a further provision for minimum group representation, simply to ensure that recognised groups which failed to achieve representation in the regional elections could nominate candidates to

constitute a showing at least for small minorities on the legislative assembly. The combined effect of this provision, the proportionality principle, plus an inevitable degree of variance in the size of constituencies, would provide a guarantee of meaningful representation for minorities in the assembly.

These safeguards notwithstanding, such an assembly would have an African majority. Here it needs to be noted, once again, that all legislation would be framed and tabled by an executive based on a parity principle, and hence such legislation would be the product of inter-group consensus.

The Buthelezi Commission also held open the possibility of a non-racial "expert commission" established to arbitrate on points of conflict in the initial stages of implementation of the new system, continuing in existence with expansion to include community and ethnic interests, in order to function as a second chamber. Such a second chamber could arbitrate on matters of conflict in the legislature.

The legislative assembly would be limited in its power by a right of veto by minority groups on all matters relating to language, religious and educational rights of groups, and by majority delaying clause in less fundamental matters. The assembly would also be limited by the powers delegated to it by the central government of the RSA. Here it needs to be noted that the government of the RSA could possibly

delegate areas of responsibility subject to final approval by the central parliament. The suggestion made by the Buthelezi Commission was that a minority of, say, "10 percent" would be sufficient to justify the use of the veto.

Furthermore, all legislation would be testable against the regional constitution in the courts under an independent judiciary.

Summing up very briefly, the Buthelezi Commission provides for a democratic order based on a general franchise in which race would not be a basis for political participation in a formal sense except in the constitution of the first regional executive. The Chief Minister would be elected by the legislative assembly and would in all probability be an African citizen of the

region. In the initial phase the rights of racial minorities would be directly protected by the parity principle in the executive, and thereafter less formally but equally effectively by the "consociational" principle at executive level, minority veto, proportionality and "community-of-interest" constituency demarcation in the legislature.

These safeguards for minorities are very considerable indeed and, taken together, represent a more powerful package of protection than can be found in any other constitution of which this author is aware. Yet representatives of White political parties, both during the deliberations of the Commission and subsequently in personal to the author have expressed the fear that the recommendations do not

offer sufficient protection of their interests.

This point of view appears to rest on the following considerations. In some cases the reluctance is based not so much on fear of minority repression or of discrimination against minorities, but on an unwillingness to forego political control. This motive is not only based on the desire to retain power but also on a fear of becoming "junior participants" without a keynote role in politics. In a sense it is a fear of political "retirement", as it were.

The Buthelezi Commission, however, makes provision for an active participation of all major parties in the "consociational" executive. Hence regional "cabinet ministers" from all race groups can be expected to participate in the government of the region. Given the population ratios referred to earlier, it is impossible to define a more favourable long-term future dispensation for minorities than this.

In most cases, however, the reluctance is based on the fear that an African majority in the legislature will ignore the rules of the regional constitution and by extra-constitutional means force through legislation, and possibly a change of constitution, which will remove or circumvent the safeguards which lured them into the dispensation in the first place. This fear is well illustrated by Arend Lijphart, referring to Gabriel Almond. He points out that in Anglo-American democ-



Scenes in KwaZulu: Men in traditional attire attending a cultural function.

continued overleaf

from previous page

racies "because the political culture is homogenous and pragmatic (the political process) takes on some of the atmosphere of a game ... The stakes are not too high ... when the stakes are too high, the tone changes from excitement to anxiety." Lijphart argues that for this reason one cannot conduct politics as if it were a contest or a game in plural societies.

It is almost impossible, however, to formulate more powerful safeguards for minorities than those suggested in the Buthelezi Commission unless one moves towards an explicitly racial dispensation at all levels of government, in which racial minorities are hugely over-represented. This has the following obvious disadvantages. Firstly the external world will continue to see the dispensation as a form of "apartheid". Any Black political formation entering into such a dispensation will be accused of selling out its own community's interests and by its participation lending credibility to a thinly disguised form of White domination. Anything less than the Buthelezi Commission proposals would simply offer too little to be workable, and in that sense would not assist the population minorities in protecting their interests in the medium to long term.

One of the very few safeguards which may be acceptable to the interests hitherto excluded from participation is that of an ethnic parity principle applied to a regional army and police force. This would be the ultimate constraint on any intended attempt to usurp the constitutional system. It is not the type of safeguard which is at all desirable for more than an interim period, simply because the presence of this formal safeguard tends to undermine trust in and legitimacy of the democratic process itself. If, however, the fears of Whites cannot be assuaged in any other way the principle of parity in the coercive machinery of a (regional) state is perhaps worth taking to the negotiating table.

The Buthelezi Commission was not called upon to pronounce on the constitutional future of Africans in the RSA. Two statements of relevance to central political rights are made in the Commission report, however. Firstly, the Commission was of the view that the recommendations for the KwaZulu-Natal region might, if suitably adapted, have an applicability elsewhere in the RSA as well.

Secondly the Commission expressed the view in addition to the necessity

for KwaZulu-Natal to remain integrally linked to the rest of the RSA, that "representation (for Africans) at the centre is an essential element in maintaining peace and stability". Both these points require further amplification. In doing so, however, this author is expressing personal views and they would not necessarily be the views of the other members of the Commission.

Despite the general unrest in other

the right of it is too strong to give the present cabinet the necessary freedom of movement. This is particularly true at the present time when the economic recession and the material grievances it brings with it is likely to generate a considerable measure of defection away from the National Party. Since no major constitutional change can take place without a referendum, the constraints on the government are



Scenes in KwaZulu: Market day in a rural today is undertaken by women. The men of a cash wage.

parts of the country, the incisive pressures and criticisms of the current state of affairs in the RSA from Western governments and repeated calls for constitutional reform by the leaders of important organisations and interest groups in South Africa, the present government of the RSA is not likely to move swiftly towards an inclusion of Africans in the central parliament. The influence of conservative groups within the National Party and in parties to

obvious.

Under these circumstances it is appropriate that the government should think in terms of meaningful political reforms which would not arouse the full wrath of White voters in constituencies in which the government is most vulnerable on the right of the political spectrum. Establishing negotiating machinery for a democratic unification of KwaZulu and Natal would be an example of this type of move. In

the introduction it was mentioned, however, that such a development could be viewed as idiosyncratic and anomalous in a wider South African context.

There are other regions of the country which, while not constituted like Natal and KwaZulu, nevertheless have certain features which would lend themselves to a regional devolution or political settlement. Such

these areas could be described as progressive, the hypothesis can perhaps be made that these have a relatively full realisation that some form of power-sharing with Africans is inevitable. These regions include a very substantial proportion of the existing and potential African elites (both political and economic) in the country. If one excludes certain parts of the Witwatersrand, these areas also do not include

sation of these regions.

A process of regional devolution along these lines would also stand a greater chance of giving legitimacy to the African local authorities included within the boundaries of the areas. It is particularly on the Witwatersrand that the existing African local authority system has substantially collapsed under a barrage of criticism and physical attack from political groupings which



village. Much of the subsistence farm labour have to move to the towns and cities in search

regions could include parts of the Witwatersrand, including African, Coloured, Indian and White areas, the Eastern Cape "corridor" between Transkei and Ciskei, and the Cape Peninsula area.

All these regions, along with KwaZulu-Natal, are industrialised areas in which a very high degree of functional interdependence exists between non-African and African areas. While by no means all the Whites in

constituencies in which right wing groups and parties are very powerful.

What is being suggested is that provinces may be so subdivided as to extract territories in which it may be possible to make constitutional advances at greater speed than is the case in the country as a whole. Minority safeguards of a type similar to those formulated by the Buthelezi Commission could be considered in a negotiating process associated with the democrati-

perhaps wish in this way to demonstrate their aspirations to more meaningful rights.

A major point to consider is that a development along these lines might begin to provide the outlines of a possible solution at the central level. If two, three or more regions begin a process of negotiation towards an inter-racial accommodation within their boundaries, an obvious parallel development at

continued overleaf

from previous page

central level could be a "second house" of parliament (as opposed to "chamber") concerned with coordination, funding and facilitation of the affairs of those regions. Representation on such a second house could be elected from within the regions. Representation on such a second house could be elected from within these regions or nominated by the regional executives or "cabinets". Obviously this house would be fully multi-racial. Furthermore, African representation on the central cabinet could be drawn from this "second house".

An extension of parliamentary representation to African people along these lines would still fall far short of the aspirations of even the most moderate Africans active in the political field and would have to be seen as an interim arrangement. It is, however, something which White voters may just accept. A recent Gallup poll among urban Whites showed that 64 percent of people in Johannesburg and Durban, for example, supported the idea of African representation in parliament, which is highly indicative (Daily News, 24/7/85). Developments along these lines will also represent a clear break with the principle of racially organised politics, which is likely to convince overseas governments that a break with apartheid has finally been made.

Suggestions such as those which have been made for KwaZulu-Natal (and more tentatively for other appropriate regions) in this paper are not likely to be read with any enthusiasm by constitutional planners in the central government. As already indicated, Black South Africans are also not likely to wax enthusiastic about such ideas, for completely different reasons. They are essentially the outlines of compromises, around which meaningful negotiation could take place.

It is manifestly clear that some bold constitutional initiatives are required from the South African government. The greatest need is for the constitutional reforms to be sufficiently meaningful for credible Black leadership to participate in the new deal. Only if legitimate leaders are able to acquire

the authority which goes with public office will they be willing and able to encourage the protesters in troubled townships to revert to more conventional political activity. Peace, and the return of economic confidence and Western patience that will come with it, can only be achieved by a meaningful incorporation of Africans into political decision-making. The relative peace in the KwaZulu-Natal region will also not last very long unless the leadership of the majority of people in

the area are able to join in the process of solving its many social and economic problems.

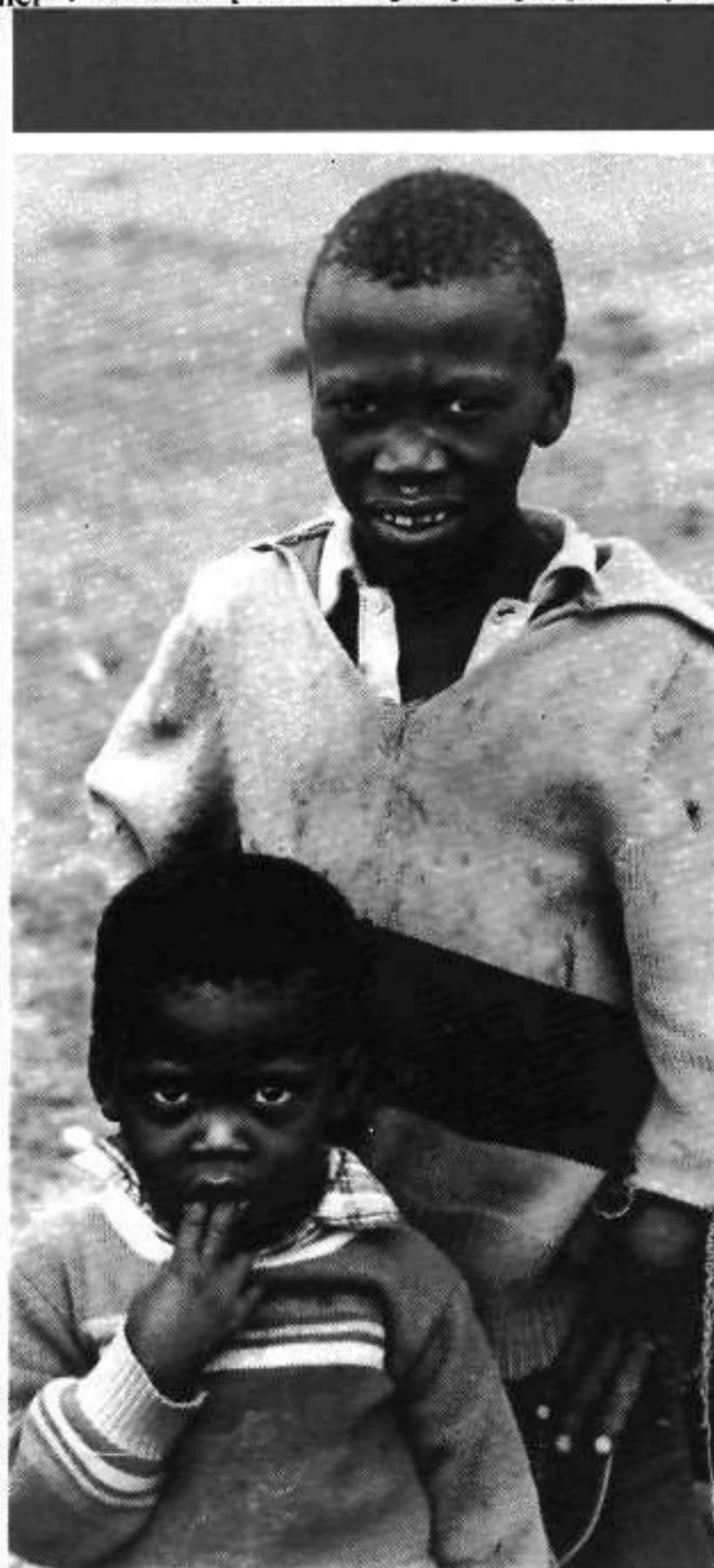
The regionally-based political development which the Buthelezi Commission outlined is broadly the barest minimum by way of concessions from Whites which is likely to gain general acceptance. It is perhaps understandable that Whites should have a range of fears about the consequences of such developments. However, the suggestions made in the Buthelezi Commission were accepted by the government of KwaZulu as "a basis for negotiation". It is ultimately only in the negotiation process that such fears can be allayed. The situation in our country requires that the process of negotiation commence immediately.

In the light of the Buthelezi Commission and its acceptance by the KwaZulu government, the intention of the central government to reduce the status of the Provincial Council to that of a nominated body is a serious affront to a very important Black constitutional initiative. This type of political rebuff represents a squandering of political credit that neither Whites in Natal nor the central government can any longer afford.

This huge political mistake can only be corrected if the government allows the existing Provincial Executive Committee to join with the KwaZulu Cabinet and the South African Cabinet in appointing, from within their own ranks and the ranks of other political groupings and committees, a negotiating body to get to grips with the future of the region. The results of the negotiation can be subject to majority acceptance in all groups in a referendum. All groups must have the right to exercise their judgement about the future of this region now.

References

- Buthelezi Commission, 1982. *The requirements for stability and development in KwaZulu and Natal Vols I and II*, Durban: H and H Publications (Pty) Ltd.
- Lijphart, Arend, 1977. *Democracy in Plural Societies: A Comparative Exploration*, New Haven: Yale University Press.
- "Public Supports House for Blacks", Daily News, 24/7/85.



Scenes in KwaZulu: Brothers in Ingwavuma — a poverty stricken area ravaged by drought and then successive cyclones.