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TOWARDS THE RECONSTRUCTION OF SOUTH AFRICA - THE CONSTITUTIONAL DIMENSION

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The central drama of South African politico-legal life is that a people's struggle essentially anti-colonial in nature is taking place in a country that has long ceased to be a colony. On the one hand the territory of South Africa is independent, on the other, the great majority of the people in this territory have never enjoyed this independence. One result is that the elimination of the relics of colonial conquest in South Africa can never be achieved in the classic form of secession and the creation of a separate state - on the contrary we know that it is apartheid (the very word meaning separate-ness) that wishes to impose separation, while it is the anti-apartheid forces that insist on the principle of territorial integrity. A second and necessary consequence is that the struggle for self-determination takes the form of a struggle within the frontiers of South Africa to create a new constitutional order. The battle over the Constitution therefore has become as vital for our people as the battle for independence was for the people of Mozambique and other colonised territories.

It is in this context that we should consider the debate that surfaces from time to time over whether the struggle against apartheid is a national liberation struggle or a struggle for civil rights. Amongst the many useful things achieved by the people's uprising in South Africa has been the way in which it has rendered this debate largely obsolete. For those of us directly involved in the struggle, the antithesis of national liberation and civil rights was always a false one. We may summarise the principal political characteristics of our struggle in the following terms: its essence is self-determination, its substance is national liberation, the form through which its goal will be realised is democracy, and its result will be civil rights for all. What is important is the sequence. Self-determination and national liberation will not come about through a gradual extension of civil rights, however attractive the prospects of a voluntary apartheid self-destruct might be. It is civil rights that will come about through self-determination and national liberation. What the growing insurrection in our country has established is that what the people want above all is their political rights, their right to choose their government and to create the kind of society that they wish to live in. In the simple but telling words of the Reverend Alan Boesak at the founding conference of the United Democratic Front,

'We want all our rights, We want them here and We want them now.' What does it signify today that black and white may legally kiss each other or sit on the same bench when armoured cars grind their way through the townships and the air is filled with teargas so that apartheid may survive?

The profound political crisis brought about essentially by the success of the ANC's call to make the country ungovernable, is producing a progressively more serious institutional crisis. It is not only the country at large that is becoming ungovernable, the government itself is becoming ungovernable. The rulers of the country are losing the war against the people, and they are losing control amongst themselves. Whereas formerly they could not trust their servants, now they cannot trust their children, frequently not each other.

It is in this context that proposals for new constitutional dispensations are being made almost on a monthly basis. The air is thick with a specially invented or adapted vocabulary: confederation, federation, consociation, tri-cameral, three-tier, own affairs... One needs to be like those animals with swivel eyes that can see backwards as well as forwards at the same time, upwards and downwards too. Behind the multiplicity of commission reports and proposals, however, it is possible to discern a number of major positions. For the sake of convenience, and bearing in mind that the categories shade into each other, five basic constitutional schemes may be distinguished. They can be summarised as follows:-

- (i) Open apartheid
- (ii) Reformed apartheid
- (iii) Multi-racial apartheid
- (iv) Hidden or democratic apartheid
- (v) Anti-apartheid (non-racial democracy).

The terminology is, of course, not that of the authors of the proposals, since most of them insist that their schemes will end rather than perpetuate apartheid. But what the first four proposals have in common is that they are all based on a desire to preserve a constitutionally privileged position for the white minority and that all either directly or indirectly make the distribution of power and wealth dependent on the criteria of race.

On the analogy of the struggle for independence of, say, colonial ... Mozambique or occupied Namibia, they represent a range of options from open colonialism to internal settlements, presupposing key front positions for South African equivalents of Tshombe, Simango and Muzorewa. The main difference between them is that the first three take race as a starting point and add varying touches of democracy, while the option of hidden apartheid takes democracy as the starting point and introduces elements of race.

The basic constitutional tenets of open apartheid are well known. They presuppose separate sovereignties for whites and blacks with no constitutional mixing at any level. Whites have exclusive control over so-called white South Africa, that is, 87% of the surface area of the country, including all the developed zones, and blacks become independent in their so-called tribal homelands. Even blacks living in the so-called white areas are to exercise their right through the Bantustans to which they are attached by descent and language. Ethnicity is given a territorial base and is made the exclusive constitutional principle. Relations between black and white become relations of international and not of a constitutional law. This, the classical apartheid position, is supported by large sections of Afrikaner rural capital, of white artisans and supervisors and of low and medium-ranking employees in the state apparatus and nationalised industries. At the political level, it is the programme of the Conservative Party and other ultra-right forces, some of whom are constituting themselves into para-military organisations as they increasingly lose power in the higher levels of government.

Reformed apartheid makes race the dominant but not exclusive principle of the constitution. It bases political rights on race but recognises that some sort of political inter-relationship involving all ethnic groups is necessary. The term most frequently used is confederation. Essentially it presupposed links between the white-dominated central Parliament and the Bantustans. To complete the picture, South Africans of mixed or Indian descent (almost completely ignored in the open apartheid scheme) were to be junior partners in the tri-cameral Parliament, and so-called urban blacks were to have a series of councils, starting...

...at the community level and moving upwards, to represent their interests. Apartheid would remain intact in that all organs of legislative power would continue to be established on a separate ethnic basis, and that each one would have exclusive control over what is defined as 'own affairs'. The element of reform would be contained in a provision that 'common affairs' would be dealt with at a high level on the basis of meetings between representatives of the different groups in some form of confederal council. Since everybody would have the vote at some level or other, it would be claimed that the principle of universal suffrage was being recognised. At the same time, overtly discriminatory laws would be gradually reduced. A fundamental feature of this scheme is that through dividing the black population, through regulating numbers at crucial levels, through the definition of own affairs and common or general affairs, through control of funds and control of the state apparatus, including the army and police force, the white minority and more specifically the Nationalist Party would maintain control of the country. This would be a form of limited power-sharing under the clear hegemony of the leading party in the white Chamber of the tri-cameral Parliament. The dominant role of the Nationalist Party is therefore evident from a reading of the constitutional documents themselves. Support for this position came initially from a wide range of forces, including white industrial and financial capital as a whole, whites in middle or senior positions in government or state enterprises, and white professionals dependent on government patronage, as well as from a small black collaborator class entrenched in the structures of the Bantustans and the tri-cameral Parliament, and from international capital and western governments.

It is the manifest failure of this scheme, even before it is fully implemented that it is at the heart of the immediate political crisis in South Africa. Far from being the elixir of life for the regime of P.W. Botha, these proposals are proving to be its graveyard. The United Democratic Front, the leading legal anti-apartheid force in South Africa, was created precisely to counteract these constitutional proposals. It chose two battles with the apartheid regime and won them both, successfully leading the boycott of the Tricameral Parliament and the...

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...destruction of the Black Community Councils. Yet though it was popular struggle that wrecked the reformed apartheid project and provoked the disaffection of local and international capital from the Botha camp, the demands being made by the West do not go anywhere near to corresponding to the demands of the struggling majority of the South African people. It is here that the scheme of multi-racial apartheid makes a strong appearance. The real clash within ruling circles inside South Africa, the real present-day contradictions between the racist regime and its former international defenders, arises not over apartheid versus democracy, but over reformed apartheid versus multi-racial apartheid. After taking a few steps along the road of multi-racial apartheid, P.W. Botha halted. It is to push him further along the road that Western governments and financial institutions are suddenly beginning to apply some pressure. Those of us who have been campaigning over the years to have sanctions applied against the apartheid regime, find ourselves astonished by the rapidity with which even the most conservative governments have suddenly come round to acknowledging a duty to apply external pressure on Pretoria. Though entirely welcome, there is something a little artificial in the vast wave of condemnation of apartheid sweeping in from the West - one expects any day to hear General Pinochet declare that he has banned the sale of South African peanut butter in Chile. It is not that apartheid has suddenly become more evil, it is that it has suddenly become less strong. Apartheid that is powerful is mildly embarrassing, apartheid that is weak is completely intolerable. Hence the urgency with which multi-racial apartheid is projected.

In essence multi-racial apartheid is based on the politics of inter-ethnic alliance rather than inter-ethnic consultation. The Bantustans retain some importance but are not projected as a sole structure through which Africans can exercise political rights. Rather, they are gradually integrated as component parts of regional political structures, retaining some autonomy, but sharing certain powers on a regional basis with the people living in the so-called multi-racial areas.

The foundation of this approach lies in the Report of the Commission, which Chief Gatsha Buthelezi set up some years back to enquire into the future of the Province of Natal. The region is projected as the embryo unit of a future federal state. Regions may have differences in their political structures and advance at different rates. The federal government evolves on the basis of inter-action between leaders of the regions. The way is left open for a black head of state, who by virtue of his own election to office will declare that apartheid is dead and buried. What are referred to as legitimate white fears are constitutionally catered for by means of a combination of territorial divisions, own affairs concepts, group vetoes for minorities and entrenched group and individual rights. Behind all these devices are two fundamental principles: there shall be no majority rule and there shall be no radical change. It is not surprising that the brand of a certain type of American political science lies stamped on these proposals, since inter-ethnic wheeling and dealing in smoke-filled rooms is a prominent feature of the US political scene. But the American Constitution does not recognise ethnicity as a fundamental fact in the way the Buthelezi Commission proposals do. Similarly, comparison with the compromise Zimbabwe Constitution produced at Lancaster House are not apt, since for all its racial provisions and entrenched clauses, at least it clearly allowed for majority rule.

Who are the proponents of the multi-racial apartheid scheme? Basically it has the support of those sectors of local and international capital who formerly supported reformed apartheid, of white professionals and small business people, of certain leading figures in the State apparatus and government enterprises, and of a sector of the black middle class in the towns and parts of the black feudal bureaucracy in the countryside. In political terms it presupposed a three-way alliance between the Nationalist Party, representing the institutions of State power, the Federal Progressive Party, representing economic power, and Gatsha Buthelezi, providing the necessary black component. Such an alliance would be given appropriate constitutional underpinning, and with the blessing of the West, would ignore criticism from outside and crush opposition from within. Obituary notices of apartheid would be published.

If every journey ends with a single step, the question is why P.W. Botha has been refusing to take this last step along the road. Many reasons have been advanced from the psychological to the tactical. In my view, the fundamental question is that of retaining Nationalist Party hegemony over the whole government apparatus, including control of the armed forces and security machine. When P.W. Botha says the whites will never commit suicide, he really means that the Party in which he has grown up and which he heads will never voluntarily put itself in a position where it may easily be ousted from power. It is not simply that Gatsha Buthelezi is notoriously ambitious and unstable in his dealings, with an insecure following at best, nor that the Progressive Party is split down the middle as to whether to enter into compromises of this kind, nor even that P.W. Botha faces opposition from within his ranks. It is certainly not simply a desire to avoid power-sharing as a matter of principle. The problem is one of control. P.W. Botha and the group he heads are fearful - and with cause - that the English and the blacks will gang up together against the Afrikaners, and that once Nationalist Party dominance of the instruments of government, security and patronage are lost, it can never be retrieved.

If this thesis is correct, how does it explain that pressure from the West goes on to demand the release of Nelson Mandela and the opening of talks with the ANC? The answer is twofold. In the first place, the imprisonment of Mandela has come to be regarded internationally as the clearest proof of apartheid intransigence, so that his release could be projected as a spectacular sign of reform, the principal objective being not so much to legitimise the ANC as to legitimise P.W. Botha. Talks with the ANC would also be vital in order to bring the war to an end. This is the greatest weakness of the projected centrist Boer-Zulu-Prog alliance - the only way in which it could deal with the existing popular insurrection would be through armoured cars, tear-gas and torture. It is this that destroyed Zimbabwe's internal settlement and reduced Muzorewa from being a reasonably popular national figure to a hated puppet. To avoid a repetition of this happening, the ANC needs to be drawn into the scheme, not as the historic leader .....



....of the anti-apartheid struggle speaking on behalf of all the oppressed and all democratic forces, but as just another contender for power jostling for its seat in the smoke-filled room. One fears, then, that the objective is to have Mandela out of jail, but not to recognise him, side by side with Tambo, as leaders of a future democratic South Africa; that the intention is to get the ANC to what is called the negotiating table, but then to surround it with so many 'other forces' that its voice can hardly be heard. The second reason for the West accepting the risks inherent in giving the ANC a degree of legitimacy and greater scope for action is that the fourth constitutional scheme, namely hidden apartheid, lies in reserve.

Hidden or democratic apartheid starts off on the democratic assumption, however reluctant, that there must be universal suffrage in a unitary state, and accepts the hypothesis that the ANC would probably be the ruling party in the new society - ours being the only revolution to be accompanied by opinion polls, there can be no doubt who would win the day if free elections were to be held. Where the apartheid aspect would live on buried in the heart of the new democratic constitution would be in entrenched clauses which will be insisted on as the condition for the acceptance of the principle of one person one vote. Such clauses would impose a double brake on the dismantling of apartheid - they would restrict the competence of Parliament and they would institutionalise conservative and white dominated machinery to guarantee that such competence is not exceeded. This will mean that under the guise of protecting minority and individual rights, many of the apartheid structures will remain intact, especially those in the economic sphere. Protecting minorities from discrimination is one thing, and this is normally what is meant by constitutional protection of minority rights; but protecting minority privileges is another, and this is what is really contemplated by the entrenched clauses and what makes them a form of not very-well hidden apartheid. Similarly, none can quarrel with protection of individual rights if this means the guarantee of.....

...equal rights and dignity for all, the right to vote, the right to conscience, the right to work, the right to walk freely in the streets and to sleep freely in one's home. These rights merit special constitutional protection, and no harm would be done if certain group rights, for example, the right to speak one's language or practice one's religion, were also entrenched. But an apparently innocuous and race-free right such as the right not to be deprived of one's property without full compensation in freely convertible currency, preferably dollars could in fact be a means of using the law to keep alive in perpetuity social distinction on the basis of race. How, for example, can the millions of blacks evicted by forced removals over the years be expected to pay in Rands, let alone dollars, to get back their ancestral lands? How can the mass of South Africans, kept impoverished by land hunger, the pass laws and migrant labour, find the finance to buy back the land that was seized from them over the centuries by force of arms, taxation and bulldozers? It is obvious that if the Constitution protects the fruits of apartheid while purporting to knock down the tree, it is preserving important elements of the system rather than destroying it once and for all.

The question of disguised or hidden apartheid is not yet directly on the agenda, but indirectly it does arise, and that is in connection with the question of negotiations. If the Freedom Charter does not permit any form of concealed apartheid, and if as far as the ANC is concerned the fifth and final constitutional scheme, namely, an anti-apartheid constitution based on non-racial democracy, is non-negotiable, what is there left to talk about?

Non-racial democracy presupposes a united South Africa governed by the principles of universal suffrage, majority rule and equal individual rights. The Freedom Charter adopted by the Congress of the People in 1956 sets out a clear programme born out of South African reality which could serve as the fundamental document around which a new Constitution would be developed. It is not easy to imagine the ANC agreeing to submit to negotiation such declarations as that South Africa belongs to all who live in it, or that the doors of learning and culture shall be opened. It is not just a question of being loyal to the...

...thousands of patriots such as Ruth who gave their lives in the pursuit of the basic propositions: that apartheid must be totally eliminated, and that the benefits of the new society should become available not just to a small section of the formerly oppressed, but to the people as a whole. If we are ever to escape from the destructive politics of race, there is no other solution that has any prospect of functioning at the practical level, first by ending the war, and then by constructing the peace on secure foundations. We must end once and for all the essentially racist idea of South African exceptionalism, that somehow the South African human being is different from the human being in other parts of the world, the argument that democracy is not for our country. But within the basic framework of the Freedom Charter, and with a view to making its principles the property of all the South African people, there would be many issues which could be discussed, for example, the internal structure of government, whether to have a Presidential or Prime Ministerial form of leadership, what the official languages should be, where the country's capital should be situated. Perhaps more important, negotiations could play a key role in assisting the transfer of power from a racial minority to the people as a whole. Once the principle is accepted that apartheid has to be completely dismantled, and once it is agreed that the only effective and lasting way to dismantle it is to establish a non-racial, democratic society in a united country, the issue of how to proceed most rapidly to the materialisation of this solution comes to be placed squarely on the agenda.

The business leaders who recently went to Lusaka to meet the ANC, showed glimmerings of recognition of this principle, and of the fact that the time for them to act is now and not later. If their banking and industrial friends in other parts of the world can impose sanctions on Pretoria, why not them, and far ~~more~~ effectively, from inside South Africa? One does not expect bananas from a mango tree, one does not expect the immediate formation of a Congress of Capitalists, nor does one expect Gavin Relly of Anglo American to pick up an AK and join Umkhonto we Sizwe. But he could get the factories he controls to stop supplying arms and ammunition to the security forces of the racist regime. And if it is true that an army marches on its stomach, there is nothing...

.... to prevent Tony Bloom of Premier Milling to cut off the SADF's food supply, especially when engaged in criminal raids into neighbouring countries or search-and-dominate operations against the people of the townships inside South Africa.

Once the principle of democracy and majority rule is accepted, the question of preserving the material wealth of the country takes on special importance. For the mass of the people in particular, it would be a bitter victory if white intransigence meant that the Africa that came back to the people was an Africa in ruins. The people have earned a double right to gather the fruits of their labour and those of their forefathers and mothers, since the building of farms and railroads were produced over the generations by their sweat, and since the right to enjoy these facilities will have been won by struggle and sacrifice. The whites, as ordinary and equal citizens of a new South Africa, would obviously wish to continue as much as possible to maintain the living standards to which they have become accustomed. But it would not only be a question of preserving the skyscrapers and hotels. Escalated and bitter racial conflict would leave further and deeper scars in the minds of all, that generations of efforts would not easily erase. Perhaps this is the vital theme. The towers and railroads could be re-built, but the already profoundly ruptured human relationships could not stand even further trauma. Finally, it would be in the interest of all to create as rapidly as possible a new South African state whose representatives could hold their heads high in the community of nations, that could participate in the world of the United Nations and other international bodies, that could trade freely with all the world and, with heads high, send out to and receive sports and cultural groups from all over the globe. In cleansing South Africa of the stigma of apartheid, all its people will benefit.

In that sense it is the historic destiny of the oppressed people in liberating themselves to liberate the whole country and to enable it at last to take its place with pride amongst the community of nations.