

# CONSTITUTIONS AND CONSTITUTIONAL CHANGE

A comment on the recent conference at the University of Natal, Pietermaritzburg

by Terence Beard

There is a propensity among South Africans, particularly among those who are far removed from the centres of power to hail events of a political nature in which they are participants or with which they are in some way associated, as historic occasions. Typical candidates for this kind of description are meetings and conferences, and the recent conference on Constitutions and Constitutional Change held at the University of Natal, Pietermaritzburg, was no exception in this respect. The conference at Balugha in November, 1973, was also hailed as historic as were several other meetings and conferences which could be mentioned. The Balugha Conference was hailed as historic because it marked the acceptance of a federal solution for South Africa's constitutional problems not only by the Progressive Party leaders who attended, but also by several 'homeland' leaders and a few academics. While it is true that the 'homeland' leaders were in positions of power, their power was strictly limited and regional in character and defined by the laws of the South African government. Their power to bring about a federal solution was only marginally greater than the other participants at the conference. The Balugha Conference remains unknown to the vast bulk of South Africans and is now all but forgotten by its participants.

But what of the Constitutional Conference? Firstly, it was the brain-child of Professor Denys Schreiner, grandson of W. P. Schreiner, a former Prime Minister of the Cape Colony, and one of the important participants in the formation of the Union of South Africa. He is also the son of Mr Justice O. D. Schreiner of the Appellate Division of the Supreme Court who sat on the bench during the constitutional cases of the 1950's. Professor Schreiner had in mind the papers and discussions which preceded the National Convention in 1908-9, feeling that a very positive contribution could be made by a conference of experts whose opinions could be invaluable to those charged with the responsibility of framing the new constitutional proposals which were made public last year, and which, if implemented, could crucially affect the future development of South Africa.

What distinguished this conference was that, despite the fact that it was organised by and held at an English-speaking institution, it was called to discuss not opposition proposals, not proposals which went against the current of government policy, but a constitutional framework which was devised by and which emanated from the government itself. Ought then, the claim by some of the participants, that the conference was an historic occasion, be taken as an indication that it was destined to have a significant influence upon those who largely hold our fate in their hands? Professor Schreiner would certainly ask no more than this.

The key to any attempt at answering this question, it seems to me, lies in an examination of the paper presented by Dr Denis Worrall, M.P. Dr Worrall spoke to a diagram which purported to illustrate the new constitutional framework. (See figure). The main problem which confronts one, and which confronted the conference, is the paucity of information concerning these proposals. There is as yet no

draft constitution, and Dr Worrall was unable to give clear answers to many of the questions put to him, and frequently had to resort to the language of 'possibilities' employing qualifications of the type "I have reason to believe that . . .". Consequently the conference was not really in a position to discuss the proposals with any degree of clarity or precision. Dr Worrall's interpretation was no more than putative, and, what is more, a contradictory interpretation, implied by various ministerial statements, emerged. Dr Worrall's interpretation was in conflict in particular with statements made by Dr Connie Mulder to the effect that the white parliament would remain sovereign and white supremacy intact, and that the new system ensured that only white persons could be elected to the presidency. It might be remarked that Dr Mulder's interpretation of the new constitutional proposals is consistent with and is given credence by one or two significant statements printed in the pre-election edition of the National Party magazine *Pro Nat*. On the other hand Dr Worrall stressed that the new system was designed to work on the basis of consensus, that is to say, ethnic consensus, and that it would indeed be possible for someone other than a white person to be elected to the presidency. He went even further to argue that the new system could only work on the basis of ethnic consensus. He argued that while it is true that the ethnic or community assemblies would continue to operate on the basis of the majoritarian principle, and would appoint representatives to the joint bodies on that principle (and so presumably excluding opposition representation from the joint bodies), the joint bodies themselves would operate upon consensus terms. I believe that Dr Worrall sincerely believes that this is the path which the National Party should tread, and that it is also the path which they will choose to tread. His reasons for so believing, however, are privy only to himself. For while, like all political parties, the National Party dresses up its policies in nice-sounding phrases, it is necessary to sift out the dross and look at the proposals within the framework of present-day South African political realities.

This was perhaps the main failing of the conference, that for the most part papers were concerned with general constitutional principles and with constitutions in plural societies in general, so that very little time was given to South Africa in particular, and to the South African political, economic and social systems as they exist today. Only a few of the discussants and speakers from the floor brought home to the participants these realities, and these were mostly politicians speaking in their capacity as politicians. Significantly they revealed the lack of consensus between themselves and Dr Worrall, and the nature of the cleavages which separated them from the South African government. These speakers were notably members of the Labour Party and of the Inkhatha movement.

Space forbids my going into these matters in any detail, and I shall therefore confine myself to a general discussion of the following question. To what extent has the South

African government, during the past thirty years, sought to reach a consensus on matters of fundamental disagreement, and in what contexts has a consensus been sought? The answer would seem to be that at no time since it first came to power has the National Party even thought in consensus terms, let alone sought a consensus, except within its own ranks. I exclude the amalgamation of the old Afrikaner Party and the Herenigde Nasionale Party which resulted in the present National Party. In any case this was a union within the Afrikaner nationalist movement. There is no doubt that the coalition of nationalist Afrikaner interests which form the basis of National Party cohesion is, and always has been, a prime consideration of the party leaders. In this sense the party is based upon democratic principles and upon consensus. These democratic principles are, however, vitiated by the cult of authority, a cult which goes a long way to explain how the new constitutional proposals could be made an election issue by the governing party itself, in spite of their nebulous nature and their not having been hammered out in any detail and in public. It explains why the government can go to the electorate and ask for a series of what amount to blank cheques, confident that they will be given a free hand by their supporters, constrained only by the necessity to place Afrikaner nationalist interests first. The breakaway of the Herstigtes under Hertzog was a result of a difference among the party elites as to where Afrikaner interests lay, given the new forces abroad which were seen as threatening their hegemony, and as necessitating a new interpretation of apartheid policies.

Dr Verwoerd himself made this quite plain when in April, 1961, he said in the House of Assembly: "The Bantu will be able to develop into separate states. That is not what we would have liked to see. It is a form of fragmentation that we would not have liked if we were able to avoid it. In the light of the pressure being exerted on South Africa, there is however no doubt that eventually this will have to be done, thereby buying for the white man his freedom and the right to retain his domination in what is his country."

As has been said, the National Party has never sought to establish consensus with parties or groups outside their own ranks, but rather, in terms of their electoral blank cheques, to impose their policies upon a largely unwilling populace. One might go so far as to say that, given the legislative and executive practices of the National Party government, that it has translated the notion of parliamentary sovereignty from a constitutional and legal doctrine into a political doctrine such that parliament is seen as an instrument for making any laws whatever, regardless of majority or minority interests in the country as a whole. Parliament is seen as an instrument for giving ministers carte blanche within ever increasing realms of executive action, leading also to a reinterpretation of the Rule of Law. The Rule of Law applies now to the existence of covering laws which allow for the maximum use of executive discretion, embracing even matters which would normally come under the criminal law, and has thus ceased to be a principle which guarantees certain individual rights.

Majoritarian decision-making procedures have been employed to impose the policies of the governing party upon our heterogeneous and plural society without recourse to consensus outside the ranks of the governing party itself. In group terms this has meant the furthering of the interests of nationalist Afrikaners at the expense of all other groups. Of course this has been made easier by the fact that the economic interests of Afrikaners and English-speakers to a large extent coincide, and that the preservation of these interests of an economic nature has resulted in the muting of English-speaking political opposition. The nature of our plural society with its overwhelming black underprivileged and dominated majority can be seen as a kind of catalyst enabling the all but undisputed domination of Afrikaner nationalists in the political realm, and ensuring the reluctant acceptance of that domination by

the minority English-speaking group. The pursuit of political absolutism by the governing group has thus been able to proceed gradually over the years with minimal opposition within white society.

Absolutism has been described by Preston King as involving "a movement of thought which both describes and recommends the 'illimitable' concentration or integration of political power."<sup>1</sup> For the absolutist "nothing is more important than order, that virtually anything should be done to secure it, that in fact, there is nothing which we may not be forced to sacrifice — to authority, to government — to obtain it. Hence the belief that the power of government must be absolute, perpetual, unlimited, above the law — if it is to do its job properly."<sup>2</sup> The claim, therefore, that the Afrikaner nationalist government seeks absolutism may seem in part paradoxical in the light of the decentralization or fragmentation which the 'homeland' policies involve. For are the present trends not in the direction of pluralism rather than absolutism? Is not the new proposed system a pluralist one? Preston King is concerned with the dependence of absolutism upon the 'ideology of order'. But, as he points out, pluralism, unless it is taken to its extreme, is also so dependent, albeit less so. Both absolutism and pluralism are "aligned on an identical continuum: that which has to do with **how much** power is wielded from a given locus."<sup>3</sup>

The change from apartheid to so-called separate development did not, I believe, result from any basic commitment on the part of the South African government to an ideology of democratic pluralism with a consequent devolution of power, it is to be seen rather as a means of ensuring the retention of absolute power within a viable framework. Dr Verwoerd's statement quoted above is therefore to be interpreted as a recognition that absolute power over blacks is not possible in the long run, and that for its retention the geographical boundaries of South Africa must be redrawn so as to excise certain areas and with them the threatening majority. This would enable the retention of absolute power within a new and smaller geographical unit. And this is not a form of pluralism as it is usually understood. While it does certainly mean the creation of new loci of power, these are not created out of a basic belief in any form of democratic pluralism with its implications of ethnic consensus. Indeed the new power centres in the 'homelands' are a consequence not of consensus between blacks and whites, but of the implementation of government policy devised within the confines of the governing party and imposed upon the black population. At no stage have blacks been offered any alternative to separate development. Put crudely, this policy amounts to the excision of various geographical areas together with their populations in order to make possible absolutism within the territory which remains.

If now we turn to consider the new constitutional proposals it might be argued that they do involve at least elements of pluralism, for they will create new foci of power within the white political system, and what is more, will create new joint bodies of an ethnically plural nature. There is a sense in which this is obviously true, but it is the sense in which pluralism is equated with ethnic differentiation. Ethnic groups are defined by the South African government by law and there is neither voluntary mobility between groups nor can individuals define their own groups. This is all determined from above. In these respects it is not possible to employ the usual concept of democratic pluralism with cross-cutting cleavages, inter-group mobility and voluntary group membership, and the new proposals are not pluralist in this sense.

<sup>1</sup> Preston King: *The Ideology of Order* (Allen and Unwin, 1974), p.17.

<sup>2</sup> *Ibid.*, p. 283.

<sup>3</sup> *Ibid.*, p.21.

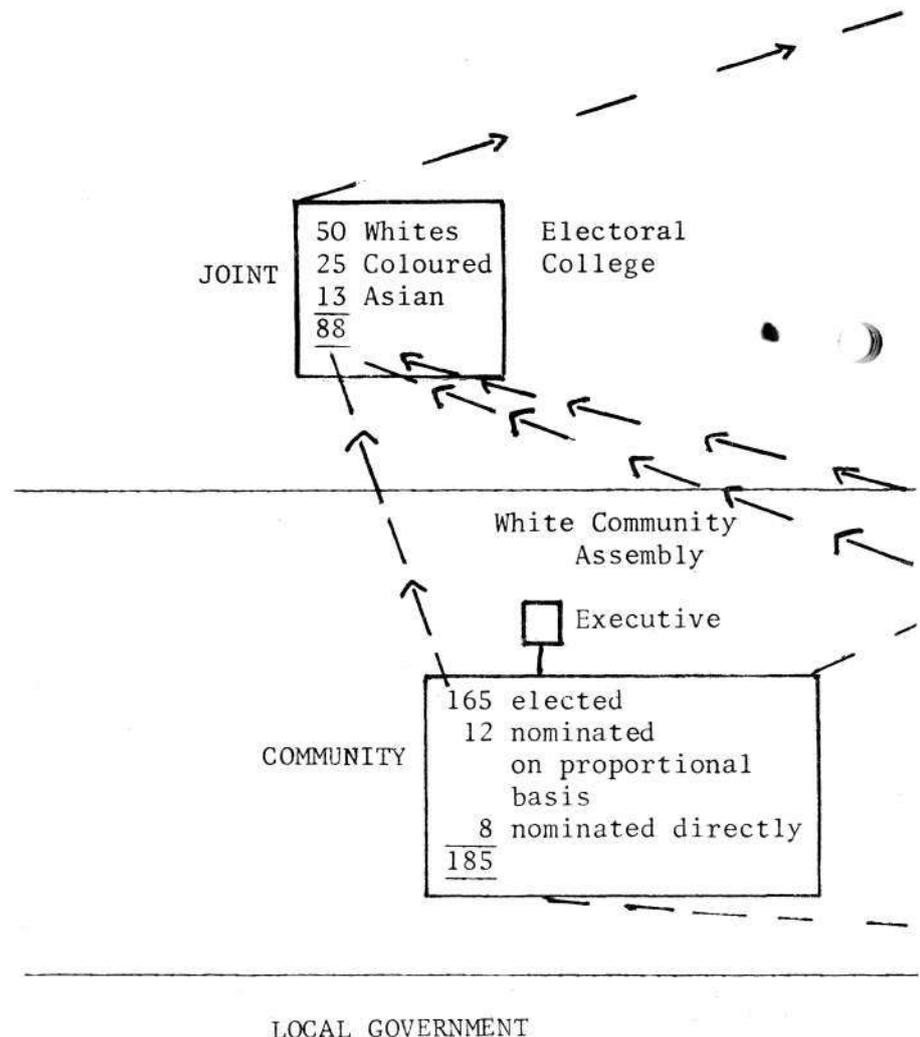
What however if we entertain the notion of conflict pluralism, to which Dr Worrall partly appealed. In this version the emphasis is upon elite accommodation, upon consensus at the top. In this model there need not be cross-cutting cleavages or inter-group mobility. The success of such a system depends upon the nature of the power and authority relationships within the different groups as well as upon consensus between the different group leaders. Elite accommodation may not prove possible where grass roots support does not accept the accommodation at elite level only. Many of the splits in the African nationalist movement in Rhodesia for example were due to this factor. Thus the acceptance initially of the 1961 constitution by Joshua Nkomo led to his repudiation by a large segment of his following and to the formation of a rival movement. Joshua Nkomo was forced to withdraw his recognition of the constitution. But even supposing that this kind of problem does not arise, it is still necessary to suppose that it is possible within the given framework to obtain a consensus, and that the institutional imperatives demand that consensus be found. These two assumptions Dr Worrall makes.

If we focus upon the existing power structures, it is obvious that the real power is located in the white political subsystem, and as has already been said, Afrikaner nationalist power depends upon the maintenance of their majority within parliament, a majority which is secured by the relative sizes of the two main white population groups. The basically ethnic pattern of voting behaviour secures the

Afrikaner nationalists a built-in majority, a majority so secure, in fact, that English-speaking voters have begun to display the 'band-wagon' effect and are increasingly voting for the party in power in the knowledge that there is no possibility of any opposition party being returned with an electoral majority. The beleaguered garrison atmosphere which is steadily growing in South Africa is accelerating this trend.

If we assume that the maintenance of Afrikaner nationalist hegemony is the goal, then it would follow that any political dispensation for Coloureds and Asians would, in order to be consistent with this goal, have to exclude them from the white subsystem. For were they to be included within this subsystem their votes, taken together with the votes of the white opposition, could and possibly would outnumber those of the Afrikaner nationalists, and so permit of their electoral defeat. While Afrikaner nationalist domination demands the inclusion of the English-speaking group within the same political subsystem, it demands the exclusion of the Coloureds and Asians. And it is precisely this which the new constitutional proposals seek to achieve. For the framework illustrated in the diagram allows prima facie for control by whites, particularly as the president is to be vested with strong executive powers. If the white parliament is to retain its present sovereign position as Dr Connie Mulder says it will, it becomes difficult to see how the new system can be described as pluralist except in a very attenuated sense.

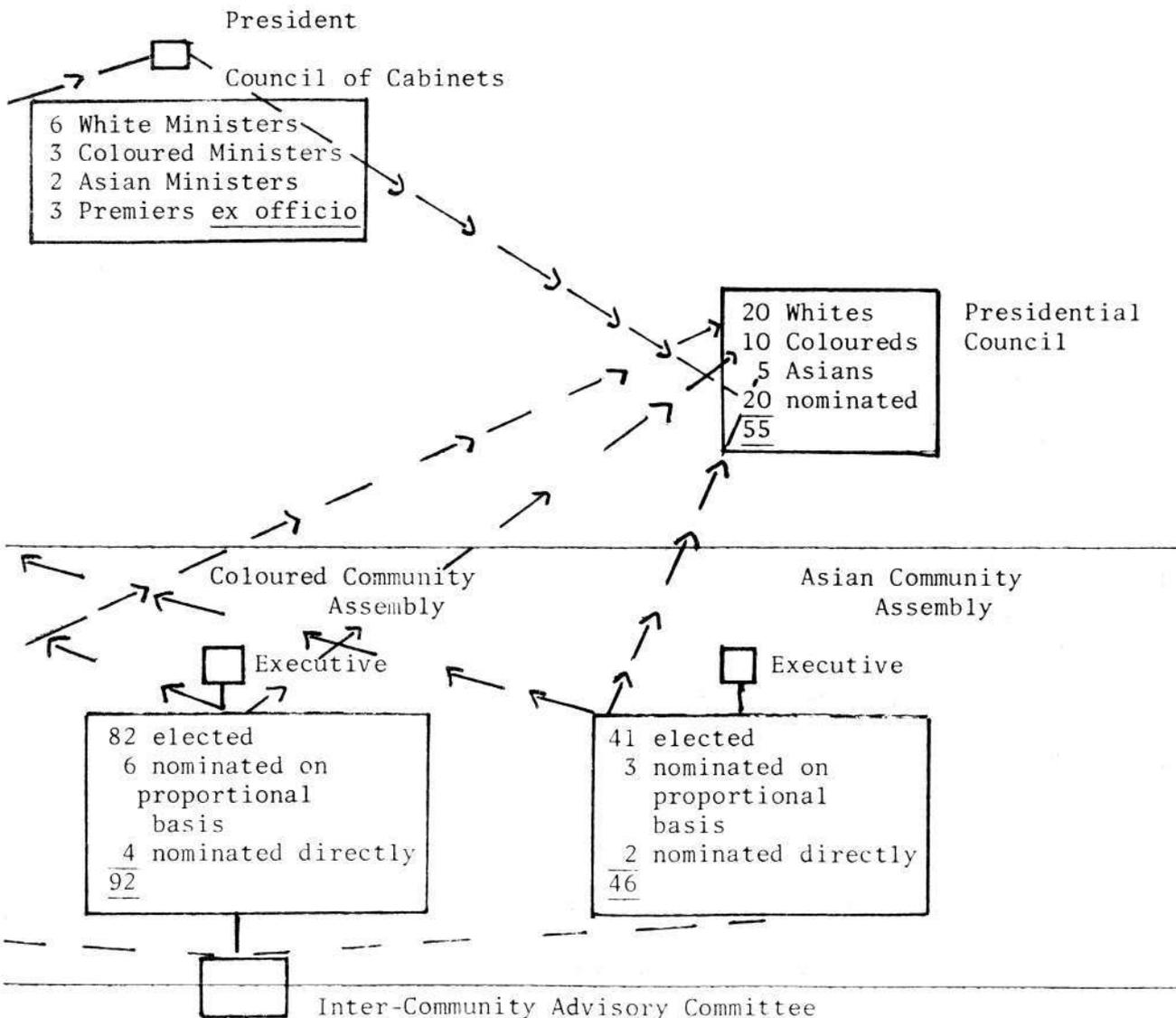
If this argument is wrong, and the aim of the government



is indeed to institute a system based upon an ethnic consensus, there are alternative constitutional schemes which go a lot further towards the attaining of such a goal than the proposals which have been put forward. Let us entertain the possibility of a system based upon ethnic groups which could only work upon the basis of consensus. Dr Worrall presented the conference with a definition of ethnicity in terms of which Afrikaners and English-speakers could be regarded without qualification as separate ethnic groups. There is thus an asymmetry in the new proposals, concerning which Dr Worrall remained silent in spite of the point having been raised from the floor, for there are not separate assemblies for the Afrikaner and English-speaking groups. If separate assemblies were to be introduced (say on the basis of a population ratio of 3:2), then the Joint Electoral College, for example, could consist of 30 Afrikaners, 20 English-speakers, 25 Coloureds, and 13 Indians. The election of the president would thus necessitate a consensus between at least two groups, assuming that only a simple majority is required. If say, a two-thirds majority were required for his election, this could only be achieved with the cooperation of members from at least three groups and the support of at least one member of the largest group (the Afrikaners) would be necessary to achieve the necessary 59 (out of 88) votes necessary for the election of the president. If the numbers in the Presidential Council and the Council of Cabinets were adjusted accordingly to allow for the necessary proportions it would then make government by consensus a much more likely possibility than does the present set

of proposals, and, what is more, it would allow for a 'fall-back' position such as described by Sir Richard Luyt in his account of Guyana. If whites had reason to fear for their security as whites, by voting together they could outvote the other two groups, but in cases where their security was not in jeopardy varieties of voting patterns and consensus would be possible. The irony is that this scheme fits Dr Worrall's consensus model better than do the existing proposals and is more consistent with his own definitions and theorising. In any case, IF ethnic groups are to be the basis of our political system, why exclude one of them, and a fairly large one at that, from participation except as an under-represented minority in a Community Assembly dominated by another group? There is little doubt that the oft alleged apathy of the English-speaking group is due to their being so under-represented because of their minority status in our first-past-the-post electoral system. The new system ensures their exclusion at the Joint level unless they throw in their lot with the Afrikaner nationalists even where their interests diverge.

Why then should the governing party have framed the new system in the way they have done, if not to ensure their own domination by including the English-speaking as a minority in the white Community Assembly, and by including the Coloureds and Asians in separate assemblies which can then be dominated in turn because of the overall white majority resulting from the inclusion of the English-speaking group in the Afrikaner-nationalist dominated Community Assembly.



In the November, 1977 edition of **Pro Nat**, in a series of questions and answers on the Constitutional Plan the question is asked:

- Q: For how long will the position of the whites remain safe under the new dispensation? The reply is as follows:
- A: The position of all three national groups will be safeguarded in the new Constitution. However, if the N.P. should no longer be in power in the White Parliament tomorrow **or in the future**, (my italics) none of the three groups will be safeguarded. For that reason the N.P. must retain control of the White Parliament. If the Opposition should come into power tomorrow, it can alter and entirely rewrite the Constitution of South Africa with a majority of one only. They need one chance only to do so. There is only one entrenched clause in the Constitution, viz. the language clause, which requires a two-thirds majority before it can be amended. If the Opposition were to come to power, it would repeal this plan and replace it with a new plan bringing in the Coloureds and Indians, as well as the Bantu, into the White Parliament. This will not only mean the downfall of the Whites in South Africa but also the termination of the rights of minority groups.

Again, in the editorial of the same issue of **Pro Nat**, the writer states:

**"You will be aware that the pressures on South Africa are increasing and intensifying. You will also understand that these internal pressures can only be eliminated if you and your government are prepared to accept political situations which are incompatible with the South African conditions, its society and its belief in democratic government and processes."** (my italics).

It is against this kind of statement and against the background of the National Party practices and strategies of domination that the new proposals must be seen. Dr Worrall has produced no evidence and no good reasons for his interpretation of the new plan as a democratic pluralist one based upon the necessity of consensus. His interpretation depends upon the disregarding of the whole nature of the South African political culture and the disregarding of the political history of the past thirty years.

In the discussion of Dr Worrall's paper attention was drawn to the exclusion of the African population from the

proposals, but space does not allow for a discussion here, and in any case the general theme of Separate Development has been dealt with frequently in **Reality** and elsewhere. What can be suggested nevertheless, is that, from the point of view of those in power, it would be better to devise a system which includes the African population now while the balance of power remains in their favour, rather than later when the balance of power will have shifted against them. Rhodesia might well be regarded as a paradigm case of the trends in Southern Africa, and if we consider the kind of compromise which the white Rhodesians might have made as recently as the Pearce Commission, let alone the Tiger and Fearless talks, can there be any doubt that from the point of view of their own interests and futures, they have been shortsighted, to say the least?

The sooner the National Party government realises this, the better for all of us whatever our origins, our colour or our language.

I have dwelt at some length on Dr Worrall's contribution to the conference because it was the one paper which dealt directly with the new constitutional proposals and because it was delivered by a member of the governing parliamentary party, and a member of the party committee which drew up the proposals.

Again, space forbids my dealing at any length with the other papers. Suffice it to say that a number of very interesting papers were read, in particular those by Professors Johan van der Vyver, Ben Vosloo, Marinus Wiechers, and Laurence Schlemmer, and also by Sir Richard Luyt. What was interesting was the concern with rights, the control of the executive, and with democratic pluralism.

Was this an historic conference? It is obviously not possible to provide an answer yet, but the answer will depend upon whether or not South Africa does develop in a consensus direction and whether such goods as rights, and the Rule of Law come to be taken more seriously. What did come across forcibly was that in the words of Edmund Burke "A state without the means of some change is without the means of its conservation. Without such means it might even risk the loss of that part of the constitution which it wished the most religiously to preserve." This was a common concern at the conference, but what is in some doubt was how many of the delegates paid heed to the warnings implicit in the points made by Selby Ngcobo, David Currie and others, concerning the exclusion of Africans from the new proposals. □

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