

5. LAW AS A VEHICLE FOR PEACE IN SOUTH AFRICA¹

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ABSTRACT

Is the law at all an aid towards the defusing of the complex and potentially explosive political situation in which the Republic finds itself today? Seeing that the state is a creation of the law, the answer to this question has to be affirmative, because the contentious institutions and structures of the state can only be applied through legal process.

Although race and ethnicity are concepts which lie outside the creative power of the law, and although constitutional apartheid has often ignored this fact, the most effective change of the system will take place through the use of the system itself. Encouraging signs that this is indeed happening are already discernible.

1. THE NATURE AND ROLE OF LAW IN SOCIETY

The question as to the nature and role of the law in society is a fundamental jurisprudential if not a general philosophical matter. Philosophy is a tedious business, but difficult to avoid when fundamental questions are to be considered. The following statements are intended to summarize the matter:²

- The most fundamental function of the law is to order society

¹ This paper was delivered at a conference of the Professors World Peace Academy held during March 20-23, 1986 in Johannesburg.

² For a more detailed disquisition of these matters, cf. Venter, F. 1985. Die Publiekregtelike Verhouding. Durban: Butterworths.

- Law is relevant only within the context of a society
- Legal rules are devised by man for man
- Legal rules are imperative in nature and their prescription and maintenance require authority
- Those empowered to formulate legal rules authoritatively, are in a position to manipulate the law
- The moral quality of legal rules depends upon the lawgiver

Without law an orderly society would not be possible. It is not surprising that the notion of law and order sounds like a duplication. In some contexts, such as the environment of South African security legislation, the expression "law and order" has obtained an unpalatable flavour. The connotation of forceful armed or clandestine combating of civil insurrection is however not what is meant here by order.

No society can know prosperity, development or calm without order. Obviously order does not only concern the relationship between the individual and the state, because individual relationships, eg. marital, contractual, property, delictual and many other relationships are dependent upon order in society. The responsibility for creating and maintaining societal order primarily falls upon the state, the legal system as a whole being its instrument.

The law concerns human relationships. Therefore law is only relevant in human society. Robinson Crusoe had no need for law as long as he was isolated from the rest of humanity. Although law is not the only ordering factor in society, it is the most fundamental. Some human relationships, eg. those within the family or those pertaining to religion, are not as heavily dependent upon the law as others are. The relationships between citizens within the state, and between them and those having governmental power in that state, however, is almost completely determined by law.

Legal rules in its ordering of a multitude of facets of society do not have some external source. By this is not meant that moral, historical, economic and other norms are irrelevant in law, but that the material, positive rules known as law are creations of man. By what means, with what motives and along which avenues those rules become law, is not, for the present discussion as important as the fact that they cannot become such without active human involvement. Law is made by people for people.

An important difference between legal and some other rules, eg. economic or social rules, is the fact that those subject to the law are obliged to obey it. Therefore the formulation of legal rules is, with some exceptions, in the imperative. The exceptions concern regulative measures, eg. those determining the nature of legal concepts such as contracts, accountability, status, etc. However, although the formulation of such rules is not in the imperative, their effect is that those concerned with them, are unquestionably bound to comply with them in order to obtain the benefits of their ordering effects.

Law is normally complied with by those subject to it, without external exhortation or compulsion. This is however not merely a matter of goodwill. Backing the imperative nature of legal rules, must be authority. Authorities need to be in the position, in cases of non compliance with the law, to enforce compliance. The authority required for the authoritative formulation, maintenance and enforcement of law, vests in the state.

Since law is dependent for its formulation and application on some lawgiving organ of state, and such organ or organs are of necessity endowed with authority, the potential for the manipulation by the organs of state of the law for whatever purposes, is real. Through the ages, the problem of limitation and control over government, has occupied many concerned minds. One may even consider it to be one of the central themes of political and constitutional theory. Different constitutions provide for different means of control over government, some making it difficult and others enhancing the opportunities for organs of state to make unfettered use of the law for their own, eg. ideological purposes.

Morality and law often occupy the same stage. In many instances the upholding of some of the moral standards of a society is made the task of the law. Obviously it would be fallacious to expect of the law to be the sole guarantor of morality. In fact, morality is a precept for law and, accordingly, positive law is formulated according to a particular moral perception. The nature and extent of constitutional control over government, being a function of the law, is fundamentally determined inter alia by the perception of morality currently espoused by, or enforced upon the legal community of a state.

In considering these matters, I believe one should strive to distinguish between moral ideals on the one hand, and attainable constitutional morality within the framework of a particular legal society on the other. In plain language, this means that the starting point for the "improvement" of the standard of constitutional morality in a state as measured against some preconceived ideal, should not be that ideal, but a clear perception of the current notions of constitutional morality effective in the community. To me, such an approach seems not only to be theoretically sound, but also methodologically correct.

Although it has as yet not become the general approach in the Anglo-American systems of law, the Continental and many other systems, including the South African system, distinguish between private and public legal relationships. This distinction is not difficult to grasp. Public law concerns the relationship between a person or group of persons on the one hand and the state, endowed with authority, on the other hand. In the private legal relationship the state as bearer of authority is not a direct party as in public law. Whereas private legal relationships can certainly affect the attainment of a peaceful society, it is primarily in the field of public law, that one would seek a legal vehicle for the kind of change being contemplated here.

2. THE LEGAL RELATIONSHIP BETWEEN THE STATE AND ITS CITIZENS

The nature of the state has occupied many minds over many centuries. This notwithstanding, a single, indisputable definition of the state does

not exist and some,³ consider it unnecessary to be consistent in such matters. Since language in general is the only proper, though insufficient medium of communication over such matters, definition or circumscription of basic terms cannot be avoided, even though differences in opinion over them will perpetually crop up.

The most practical, and to my mind theoretically acceptable, legal notion of the state is that its foundation and substance is human. The state consists of its citizens. People are citizens in terms of law. Citizenship law associates people, having certain things such as a country and a legal system in common, with a legal entity called a "state". This state exists for the purpose of ordering the citizenry by means of the authoritative formulation and maintenance of law. Authorities within the state, all organs of that body, consist of individuals or groups of people. If one accepts this, it becomes clear that an important measure of identity exists between the interests of the state and those of its citizens.

A peculiarity in contemporary Western constitutional thinking is its uncompromising insistence upon the protection of the individual citizen against the authority of the state. Unfortunately the identity of interests between the citizen and his state mentioned above has more than often in history been distorted for various ideological reasons. Eventually approaches to the matter of state/individual relationships have polarised: on one side of the spectrum the individual, his interests and attributes are deified, and at the other extreme the state is considered to be all-powerful and an end unto itself.

The attributes of a particular state, being a creation of law, for legal ordering, is profoundly dependent upon the legal philosophy obtaining in its legal system. This naturally also applies to the relative legal po-

³ Eg. Baxter, L.G. 1982. The 'State' and other basic terms in public law. *South African Law Journal*, 212, who, at 236 states: "As is evident, I am one of those who repudiates the personification of 'the State' as being no more than metaphysical and unnecessary mumbo-jumbo for lawyers".

sitions of organs of state and individual citizens. A concept of pivotal importance in this regard, is the notion of authority.

The nature and source of governmental authority is another popular theme for philosophical divergence. It would serve little purpose to attempt here to review the various approaches to this question. Suffice it to say that whatever or whoever the different schools of thought consider to be the primeval source of authority, be it the common will of the people, the ability of the depository of authority to enforce its will or fate, common to all approaches is the fact that some questions always remain unanswered. Thus the will of the people is often construed as being founded upon some primordial, non-historical occurrence, the reasons for some to become powerful and others not, are fundamentally unanswerable and "fate" continues to be unknown, unidentified and uncontrollable.

I believe that authority in its most profound form is vested with God in such a manner that we cannot fully conceive of its real nature. The motivation for and method of distribution and dispensation by Him of such authority among people is therefore also not cognizable by us. We do however have to be able to manage and manipulate various forms of power and authority on different levels and in a variety of societal contexts. To enable us to understand and handle authority in the context of the state, we employ the law. It is in terms of the law that juridical authority is ordered in society. By means of public law, and especially constitutional law, authority in the state is defined, distributed, delimited and destroyed. If change is therefore to be brought about in the manner in which authority is handled in South Africa, it is to constitutional law that we will have to look.

Since people form the fibre of the state, and citizens are the construction material of the state, it follows that the organs of state can only be human. The authority of a state is therefore without exception in the hands of individuals or groups of individuals who are, in their non-official capacities also mere citizens. This is however no guarantee that the power-bearers will not abuse their official powers. What does however become clear from such perspective, is that it is not the state or government as institution that constitutes a threat to the integrity of the individual, but that people entrusted with authority may, through

their aberrant employment of power, present such threat. It may even be that such people misuse their positions in order to adapt constitutional institutions to their own ends or according to misguided ideologies. Even then, the antagonist is not the state as institution, but those in control of governmental authority. To make such a distinction may seem frivolous, but consider the implications:

- it is not state institutions that should be aimed at by reformists, but the attitudes of the (human) organs of the state
- although state institutions are sometimes the end-products of injustice, they are also the only available instruments for justice: differently stated, constitutional justice can only be attained by means of state institutions
- precisely as the law may be used as a vehicle for confrontation, in matters of state and government it is eventually the only available means for adapting the status quo.

3. LAW, RACE, ETHNICITY AND APARTHEID

Although law concerns a very wide spectrum of aspects of human life, it is subject to some very important limitations. As was stated before, the aim of the law is to order society. In order to reach this aim, the law regulates many human actions and circumstances. Some things are outside the range of legal regulation, such as the laws of nature, economic contingencies, human thinking (including eg. religion and political disposition), simply because these matters concern areas of reality where the law does not operate. The law may however provide for matters concerning things outside its range, especially concerning the consequences of such things, eg. that damage to an insured property caused by lightning creates liability for the insurer to pay out the insured sum, or that conduct furthering the aims of communism is a crime.

This then enables us to approach our subject-matter more directly. I would like to quote from LM du Plessis' individual report to the HSRC's Investigation into Intergroup Relations:⁴

"... the ethnic group ... with its extremely permeable lines of demarcation and its lack of a formal (or 'official') inner organization of authority, is an essentially non-juridical collectivity. An ethnic group would hold not on account of the law-based exercise of authority, but rather on account of the voluntary assumption of responsibility of its members among themselves. Its 'primary basic order' is of an ethical or moral and not a juridical nature: it is an associative collectivity in the true sense of the term. For these very reasons it is impossible to give a juridically apt definition of the ethnic group: it is no juridical phenomenon. It also follows that the ethnic group or the volk cannot act as an entity in law (eg. a legal persona). The sense of unity among its members has a much more emotional than rational basis."

Let us now consider some historical aspects of South African constitutional law. The fact that race and what may be termed "statutory ethnicity" are central pillars in South African constitutional law, has a well known historical background. From the earliest colonial times, distinctions between white or "european" and non-white were made in law and society. Such distinctions mostly coincided with differences either in culture or in station, or both. The British colonialists, who originally institutionalized discrimination, rather dialectically proposed to apply the standard of "civilisation" before eliminating differentiation, obviously with little effect, since "civilisation" was to them synonymous to "Anglicization", a process not highly successful in Africa. The Afrikaners, when they came to power in the racially sensitive post-war years following the catastrophic results of Hitler's ideological racism, attempted to change the emphasis upon race to an emphasis upon ethnicity, and called it "apartheid" and later "separate development".

⁴ Du Plessis, L.M. 1984. *The Law as Regulator and/or Manager of Conflict Particularly in Ethnically Plural Societies*, Potchefstroom 75.

In order to attain the goals of this policy, extensive use was made of the public law, especially administrative and constitutional law. We find, therefore, that South African constitutional law has over many years developed a system typified by its dependence upon a distinction between racial groups within the body of its citizenry and a partial identification of ethnic groups as perceived by the legislature. Whether it was possible to do otherwise, given the historical racial and political attitudes, the cultural composition of the populace and the changing international status over the past centuries of the country and its parts, is only relevant for the purpose of an explanation or justification of the status quo. That is however not the present purpose.

4. SOME CONSTITUTIONAL PERSPECTIVES

The most important, though by no means the only constitutional document in South Africa, is the Republic of South Africa Constitution Act, 110 of 1983. One of the "national goals" identified by Parliament in the preamble to this Act, is "To respect, to further and to protect the self-determination of population groups and peoples."

In sections 14 and 15 a distinction is made between "general affairs" on the one hand, and on the other, "Matters which specially or differentially affect a population group in relation to the maintenance of its identity and the upholding and furtherance of its way of life, culture, traditions and customs ..", being the "own affairs" of such population group.

The Constitution Act furthermore provides for the appointment of a Cabinet for the administration of general affairs, and three Ministers' Councils, each appointed from the relevant population group as represented in the three different Houses of Parliament instituted in terms of the Act.

Section 100 of the Act contains a number of definitions, including the following:

- "population group" means the White persons, the Coloured persons or the Indians ...
- "White person" and "Indian person" respectively simply means a person classified as such in terms of the Population Registration Act, 1950, and
- "Coloured person" means a person classified as a member of the Cape Coloured, Malay or Griqua group or the group Other Coloureds in terms of the Population Registration Act, 1950.

These provisions more or less accommodate the non-Black South African citizenry constitutionally. Regarding the Blacks, the following statutory provisions apply:

- Section 2 of the **Promotion of Black Self-Government Act, 46 of 1959** states that "the Black population shall for the purpose of this Act consist of the following national units, namely -", followed by a list that originally consisted of eight groups, was expanded once to include the South-Ndebele and reduced thrice following the independence of the TBVC countries. At present the list comprises the North-Sotho, South-Sotho, Swazi, Tsonga, South-Ndebele and Zulu units.
- A system of tribal, regional and territorial authorities was instituted in terms of the **Black Authorities Act, 68 of 1951** within the framework of the statutorily identified Black ethnic groups.
- Eventually, the **National States Citizenship Act, 26 of 1970** created an additional, separate citizenship for each of the territorial authority areas without thereby terminating the South African citizenship of those affected.
- The **Bantu Homelands Constitution Act, 21 of 1971** enabled the transformation of territorial authority areas into self-governing areas, i.e. autonomous constitutional units each established for the ethnic unit concerned. In 1978 the expression "National States" replaced "Bantu Homelands".

Thus the whole of the South African population is addressed constitutionally in terms of race and ethnicity. Whereas the relevant legislation require ethnic distinctions to be made within the Black group for constitutional purposes, the rest of the population is arranged constitutionally only according to race. Since this is the case, it follows that the law concerning racial and ethnic classification, albeit intended to be an administrative matter, has fundamental constitutional implications, because such classification determines the form and extent of one's potential participation in governmental affairs.

The legislation relevant to racial and ethnic classification is the Population Registration Act, 30 of 1950 to which the Constitution Act also refers. Section 5(1) of this Act provides as follows:

"Every person ... shall be classified ... as a white person, a coloured person or a Black, as the case may be, and every coloured person and every Black whose name is so included shall be classified ... according to the ethnic or other group to which he belongs."

From what has been said previously, it is clear that the ethnic classification of Coloureds does not affect them constitutionally in the same manner as it does Blacks, since the various "Coloured" ethnic groups are constitutionally regarded to be one.

In view of what has been said about the limitations of the law, as well as the nature of ethnicity, one may now legitimately question the legality of the racial and ethnic approach of South African constitutional law. Keeping in mind that the South African Parliament is, and has been the sovereign lawgiver in South Africa since its coming into existence and that consequently there is no compulsory external or objective standard with which its legislation must comply, there can be little doubt about Parliament's competence to arrange the constitutional system as it did. Parliament may quite validly take cognizance of the actual racial and ethnic composition of the citizenry and legislate in terms thereof. It may even statutorily "create" fictitious racial and ethnic groupings and found other laws upon such groupings. What it can however not do, is to factually create racial and ethnic groups, for the simple reason that race

and ethnicity, as has been pointed out, materially falls without the reach of the law.

Interpreting the constitutional system as described, it would seem that South African legislation quite legitimately (moral questions apart) distinguishes between the white, black and Indian races, but that its attempts at ethnic classification, though they coincide with some important ethnic factors, must be considered to be legal fictions: the Coloureds can hardly be considered to be an ethnic group in the sense of people voluntarily associating themselves with all other people classified as such, nor can they realistically be considered to belong to an identifiable separate race; the "ethnic" units statutorily recognized among the Black population may probably be considered to exist on the grounds of common culture within those groups, but in so far as it is employed as an exhaustive classification, it is unrealistic, because a variety of ethnic associations, often divorced from tradition and mother tongue, have emerged in eg. the urban environment.

Mostly when these matters are considered, it is done in terms of the morality of the system. In principle there is nothing wrong with such an approach. Moral indignation however tends to obscure rather than enlighten. I would therefore propose that we regard the system as a given fact, and with the clear general ideal of constructing a constitutional system just to all concerned, consider the legal adjustments required and options available to us in order to enhance peaceful change.

Race and ethnicity can obviously not be instantaneously eradicated from the statute books without much constitutional, administrative and personal confusion. In fact, as long as these phenomena remain to be important sociological factors in our society, the law will not be able to ignore them. What is however required, is that the existing legislative attempts at creating racial and ethnic groups, should be adapted to legislative acknowledgement of the extra-judicial existence of racial diversity and ethnicity founded upon voluntary association, without necessarily employing those factors as the main cornerstones of the constitution.

In order to facilitate the transition from the present system to one more satisfactory to all concerned, use will inevitably have to be made of the

structures of the present system. Whatever the merits or demerits of the tricameral parliament may be, until such time as that body replaces itself in terms of its own legislation, nothing short of a bloody civil war will bring a new system about. Therefore one must expect the initiatives to come from the established authorities. In this regard some very positive indications of an awareness of the necessity for such initiatives have become evident, including the acceptance of

- the principle of power sharing in a future unitary state
- common citizenship
- equal political, educational and economic opportunities for all and
- the necessity for negotiation.

Judging from governmental announcements made in the recent past, one may soon expect legislation concerning the restoration of citizenship to those who have involuntarily lost it to TBVC citizenship, as well as the creation of a body designed to serve as an authoritative institution for negotiating and designing a restructured constitutional dispensation satisfactory also to the Black citizenry.

Given the need to de legislate race and ethnicity on the one hand, to build on the other hand upon the foundations of the status quo making use of the promised new structures, what options may realistically be considered?

1. The proposed statutory council may prove to be of pivotal importance to future constitutional development, provided that
 - those taking part in its deliberations can authentically lay claim to being representative. This may require a special general election, especially among the Black population, since it cannot confidently be presumed that the elected leaders of the national states also enjoy the support of a substantial part of the urban population;

- the statutory council is entrusted with substantial influence. This does not mean that it will have to replace Parliament, since Parliament will have to be the eventual amender of the constitution. It does however mean that such body should not merely be an advisory or consultative institution, but that it should have the authority to make decisions or negotiate agreements that will bind the State President to introduce legislation to implement such decisions or agreements.
2. From equitable negotiation and deliberation one would not expect a conventional unitary constitution to emerge, at least not initially. The independent TBVC-states as well as the Black national states do represent vested political and constitutional interests and rights. Similarly the various social institutions designed for racial, ethnic and cultural differentiation, in the fields of eg. education and housing, cannot be replaced overnight. Delegation of race and ethnicity is therefore no simple matter, especially where legislated differentiation coincide with perceived social differences. A primary theme for negotiation will therefore have to be the minima and maxima of racial and ethnic delegation.
 3. Finally, it would seem that, whatever the details of an eventual new system may prove to be, it will have to operate upon the presumption that a formidable range of interests will have to be weighed and counterweighed. To achieve that, human goodwill, at best a very fragile commodity, will have to be bolstered by constitutional structures and procedures tailor-made for and generally agreed upon by a substantial majority of South Africans. Apart from the intensive deliberation that is therefore needed, the eventual vehicle for actual peaceful change, will have to be the order of law.