THE URGENT NECESSITY FOR AN ALL-ENCOMPASSING IDEAL OF REFORM FOR SOUTH AFRICA[1]

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ABSTRACT

In view of the ironies of the realisation of the democratic ideal, which often do not answer to the exaggerated expectations of the participants, the idea of the regstaat is investigated as an "overriding purpose or transcending value" for reform in South Africa. Important facets emerge with regard to the concept of the regstaat in the legal and political development of the Greeks and Romans with the institutionalization of the idea that the state is a res publica, and especially the influence of the Roman ius gentium is visible in the legal and political development in Western Europe via the reception of Roman law in the development of the modern differentiated civil law which is based on the fundamental human rights of civil freedom and equality (independent of nationality, public legal status, race, religion etc.) of all people and all societal forms within the territory of the state. A study of the development of the regstaat in England indicates that the institutionalization of the concept of rule of law developed during the "Glorious Revolution" prior to the actual development of the individual political right of the English citizen. Through this it becomes clear that the institutionalization of the regstaat is not necessarily dependent on democracy. While the idea of democracy stresses political freedom and participation, the concept of rule of law goes much further and encompasses not only the sphere of public law (within which political rights constitute a part) but also the sphere of

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civil law and the curtailment of the power of government with respect to the sphere of internal jurisdiction of the non-state societal forms. Because of the problems which reform in South Africa faces, the emphasis on political participation for the immediate future can be counter-productive for the institutionalization of the regstaat. The concept of the regstaat which has to be incorporated in a declaration of intent will link reform in South Africa to criteria of freedom which should be acceptable to all groups and individuals. With the concept of the regstaat as an ideal of reform which should also guide the immediate reforms of the present government, negotiations can be conducted in a more relaxed and less polarized situation - honestly and openly, not only with regard to its institutionalization but also with regard to an eventual time schedule.

1. INTRODUCTION

The realisation that there are no instant solutions or magical formulas for the very complex problems which render the South African society unique tends to keep academics humble. The role of an academic cannot be that of a political oracle or of a prophet. We can at most attempt to indicate the main trends and offer an indication of possible ways that can be taken. The problems which we experience in our society with regard to the inputs made by academics have been outlined strikingly:

> "Many are in the ring-side seats who all yell advice, with a lot of players on the field who play as if they do not understand the rules of the game - or all in reality playing different games with their own rules and prescriptions" (Wiechers, 1985:15).

In the light of this the task of academics can be seen as a clarification both of the rules of the game and the type of game, which will not only make the game run more smoothly but which will also contribute to the promotion of the safety of all the teams and players. In line with this, this article is an attempt to look at, especially, reform in South Africa and, in contrast to the clichéd concept of democracy (and without

chucking out the baby with the bath water) investigating the idea of the regstaat[2] as an "overriding purpose or transcending value" (Giliomee, 1982:154) in terms of the reform process in South Africa. From a comparison of the reforms implemented from above in csarist Russia (from the liberation of the serfs in 1861 by Czar Alexander II to the revolution of 1917) with the style of reform of the Botha regime in South Africa, it seems that an important similarity is situated in the absence of a clearly delineated ideal of reform. What Giliomee said about the style of six years ago is practically verbatim applicable to today:

> "In a series of speeches in 1979 Botha tried to legitimise his promised reforms by espousing a blend of liberal (Afrikaner) nationalism and universal Christianity. What he did not was to spell out clearly what the political goals of these reforms were. It is to be doubted whether he himself has clarity about such political goals. As in the case of the Russian reform from above this has created the impression that the reforms would be implemented mainly to increase state power and military efficiency. And as in the case of Russia the absence of political goals means that there exists no yardstick by which progress towards some ideals of reform can be judged" (Giliomee, 1982:154-155).

The first part of the discussion will centre on the concept of the regstaat and the reasons why it is to be preferred to the concept of democracy. Following this attention is directed to the options available on the road of reform as well as the thorns and the thistles which are scattered across the road. Finally attention is directed to the possibilities which exist to overcome these problems which beset the institutionalisation of the regstaat in South Africa.

2. REGSTAAT VERSUS DEMOCRACY

[2] The term regstaat will be used consistently because the nearest English equivalent, which is rule of law does not convey the identical meaning, as will emerge from the text.

2.1 The ironies of the concept of democracy

In his survey of the more recent contributions in the field of comparative political science, Inglehart is of the opinion (1983:433) that research in this field has since the Second World War been confronted with the central issue: "What are the conditions under which democracy can survive?" While this question dealing with participation (who rules? or who participates and why?) is the first question to be asked in the political sciences, the second question is why? (what social bonds, objectives and values motivate people to participate?) Apart from these two issues (in which two of the three underlying variables and accompanying research directions in which he focuses in his survey emerge) there is the third type of variable concerning the structural factors (political and economic institutions of a particular society) which determine political behaviour and events.

While in his survey of the literature on political participation especially the distinction between the older élite-directed and the newer élite-opposed participation is highlighted, he points out that in the literature dealing with political divisions the burning issue concerning the influence of class difference as opposed to so-called ethnic (religious, linguistic or racial) difference is still topical. He is also of the opinion that concepts that have to do with long-term orientations (identification with parties or political culture) would still be of great interest in any explication of political behaviour (the reason why people participate politically). With regard to the third central variable, viz. structural factors, he points out that the question "Who participates in politics?", which is one of the central issues of political behaviour, is only meaningful if the assumption upon which both mass and élite research is based is correct, viz. that those who participate probably will get what they desire or what they are supposed to desire:

> "This is the ultimate 'So what?' question; Does political participation make any difference? Does it result in a higher share of the national income, or a higher life expectancy for the given group? Does it influence public policy, bringing it closer to the given group's goals?" (Inglehart, 1983:454).

About this issue, as well as the controversies about the possibility of democracy in a capitalist society, the ways of the authors diverge. The authors who feel that economic development is a condition for a stable democracy, according to Inglehart, assume automatically that democracy is a good thing. He poses the question, however, whether "it (does make) any difference, in terms of economic equality, or might democracy be interpreted as a sham, from a purely materialistic viewpoint?" (1983:456). According to him writers have pointed out that, in spite of the coherence between economic development on the one hand and equality in terms of income and the presence of democracy on the other hand, the coherence between democracy and equality disappears when the level of economic development is taken into consideration. It is in this regard that Schlemmer (1978) talks of a certain irony in liberal-democratic political forms which, if they demand what amounts to consensus on underlying interests as a condition for their establishment and continuing existence, and if this consensus in turn demands shared wealth, the immediate relevance of democratic forms becomes problematic for most of the areas of the world. The basic antagonisms of society cannot be reconciled, because their neutralising is a condition for the success of the democracy. This neutralising, which is partly obtained through the creation and satisfaction of unnecessary consumer needs of bored, complacent Western populations, conceals the controlling power of élites enjoying a unilateral freedom, precisely because criticism is blocked by the automatic assumptions about democracy. In his survey of the theories of democracy Macpherson (1984) criticises, in conjunction with this, precisely the equilibrium theory of the twentieth century (with its narrow definition of democracy as a mechanism for the election and the authorisation of a government) which excludes the idea of democracy as a kind of society in which the equality of chances needed for a full human life is denied.

It is in this that Schlemmer finds the reason for the willingness of many researchers in the field of developmental studies to defend the merits of whatever possibilities of political participation "progressive" one-party states might offer in the Third World. It can even be argued that a consideration of the development of South Africa should not involve a concern for "freedom and democracy", but primarily a concern with the redivision of the material resources or simply with a shift of power away

from the White minority. Although Schlemmer accepts the underlying importance of these considerations, he is just as hesitant to do his analysis of the development in South Africa without any reference to the ideals of a democratic society.

> "Whatever its ironies, the democratic ideal is difficult to lose sight of even in the murk of the Third World's problems. The constant apology to these ideals in political nomenclature is compelling - 'People's democracies', 'Guided democracies', 'One-Party democracies' and the like are all evidence of the world's discomfort in the face of these ideals" (Schlemmer, 1978:122).

The inflation in meaning which the term democracy has undergone, however, has the effect that it is appropriated by left, centre and right to provide legitimacy to their specific representations regarding politics and the eventual implementation of these representations. In this way the German Democratic Republic, the East German state has appropriated the name for itself in the same fashion as any of the other peoples' democracies (with or without the Moscow connection). Over against this view of democracy, as of one-man-one-vote, there is the approach in South Africa of the "Volksstaat", where each man has a vote, but only and strictly within the closed cultural community of which he is a member:

> "Various peoples ("volke") which live in the same country cannot all rule. Under a true democracy, however, the supreme power goes to the people ("volk") who can master 50% plus one of the votes ..." (Sabra, 1985:12).

Somewhere between the one-man-one-vote and the "one-people-one-state" democratic ideals there is the effort towards consociation democracy in the new constitutional disposition, which can rightly be described as "sham consociation" (Hanf, et al. 1981:408). The idea of the rule of law which is posited in this paper as an alternative for the false dilemma posed by one-man-one-vote and one-people-one-state, does not imply that the idea of consociative democracy escapes this dilemma, seeing that in an ethnically divided society it boils down to a compromise between these two extremes, to the idea of one-nation-one-vote or -veto democracy. Consociative democracy is also not free of the ironies highlighted above.

While the term totalitarian democracy (Talmon, 1952) seems like a contradictio in adjectiva, the term "participatory democracy" (HSRC, 1985:172) attempts on the one hand to find a way through this labyrinth of meanings, but can on the other hand also seem to be tautological, because political participation (in whatever form, by whomever) is precisely the greatest common factor which emerges in all the uses of the term democracy. In that precisely do the users of the term find the legitimising characteristic:

> "Seeing that the concept democracy today is accepted practically universally as a principle of political legitimacy, all kinds of democratically doubtful regimes are forced to base their claims to legitimacy on claims of democracy. The practical result of this is that the democracy label is either used without fine distinction so that it becomes meaningless, or it is adjusted to such an extent to accommodate claims that it becomes practically unrecognizable" (Faure and Kriek, 1984:33).

To break through this circulus vitiosus of views of democracy and concepts of legitimacy which cover for each other mutually, one should pay attention to another link in the chain of meaning, viz. the concept of state underlying the view. An effort to explain democracy and/or legitimacy and to define it/them should therefore end with the concept of state which renders it meaningful. Without a crusade (undertaken by seven-mile boots) through the history of political philosophy or hesitant steps through recent philosophy of science to retrieve this holy grail, we land in the quicksands of paradigmatic relativity. Ons has to look at the theoretical framework within which the concept of the state is rooted. Without depriving anybody of academic freedom in terms of his right to hold to his own view of democracy, the concept of the regstaat will be examined as an alternative. In this a deliberate attempt is made to avoid any possible ambiguity which has become a real danger in terms of a word that has become clichéd through verbal inflation.

2.2 The concept of the regstaat

The concept of the regstaat, just like the concept of democracy, has a history, although the former is probably of more recent origin (Robert von Mohl probably used the term in 1855 for the first time), and has probably not, like the latter, been forced into a popular legitimising corset.

Neumann (1967) compares the German concept of Rechtstaat with the English doctrine of rule of law, and finds that they have nothing in common. The former he typifies as liberal-constitutional, because the nineteenth-century German bourgeoisie (an economically upwardly mobile but politically stagnant class) were satisfied with the juridical protection of their economic liberties, and resigned themselves to their exclusion from political pwoer. The division of juridical form from political structure of the state which constitutes the core of this viewpoint, thus means that the Rechtstaat, as an isolated juridical form, independent of the political structure of the state, had to guarantee liberty and security. German liberalism, which exchanged political freedom for economic progress, was therefore satisfied to defend its (property) rights against the monarchy, but did not worry about the conquest of political power. As against this the English doctrine (which Neumann describes as being democratic-constitutional) encompasses two separate statements, viz. that on the one hand the parliament is sovereign and therefore possesses legislative monopoly (democratic legitimising of power), and on the other hand legislation has to comply with the requirements of a liberal legal system (in the sense of the "supremacy of the law"). While the German concept of the Rechtstaat was not interested in the origin of laws but in their interpretation (never mind the origin), the English bourgeoisie was intensely interested in the origin of laws and expressed preferences through parliament as a medium. Existing laws of the constitutional monarchy the Germans merely systematized and interpreted in order to render a maximum of economic liberty within a more or less absolute state. The basis underlying difference between the English and the German theory is summarised in the following terms:

> "In the German theory the Rechtstaat did not become the specific juridical form of democracy as was the case in England, for in the

German concept it observed a much more neutral stance towards the political structure" (Neumann, 1967:27).

Because the juridical forms which created the society of free enterprise in Germany in the nineteenth century were, according to Neumann, the Rechtstaat, one could incorrectly assume that not only in the case of this view as such but also in terms of any further developments of the concept of the regstaat any participatory process, which in democratic terms is a prerequisite, would be eliminated. This wrong impression can be corrected by pointing out that the concept of the regstaat which Neumann contrasts with the actual English doctrinal concept of rule of law constitutes only a phase in the development of this idea. In the above quote from Neumann it is also implied that the Rechtstaat in Germany and in England assumed different forms in the nineteenth century. The element of mutuality which was contained in both these forms is situated in one or the other form of delimitation of the powers of government. The German variant therefore implies that a form of regstaat is possible without democracy. Whether the obverse is also true is an important question that has already been answered indirectly in the section on the ironies contained in the idea of democracy.

According to Van Zyl and Van der Vyver (1982) it is incorrect to refer in terms of democracies to those states where the legislative and executive competencies of the government are circumscribed or held within prescribed limits in the form of an act on Human Rights (cf. the USA and the Federal Republic of (West) Germany), or by constitutional conventions (cf. the United Kingdom):

"The term democracy refers to the way in which the government is elected and not to the size and scope of governmental competencies. A democratically elected government and legislator can, in fact, demand for himself practically unlimited powers. The term which to our mind is the one to use in this instance is regstaat (rule of law). The principle of regstaat indicates that the governmental competencies are described and limited in terms of legal provisions, while certain liberties of subjects (in relation to the government) are guaranteed" (Van Zyl and Van der Vyver, 1982:460).

From the foregoing it emerges that these authors use the terms regstaat and rule of law interchangeably. A significant difference between the viewpoint of these writers and Neumann's view is that the latter sees democratic legitimizing of power as indivisibly linked to rule of law, while Van Zyl and Van der Vyver's viewpoint implies that democracy is not an essential or adequate condition for rule of law/regstaat, although in their discussion of general principles of constitutional law for a well-structured state the principle of democracy is regarded as being fundamental together with other principles, including the principle of regstaat. They give no indication, however, of the possible connection between these two concepts, and an important question that can be asked in this regard is whether the liberties of subjects guaranteed by the principle of the regstaat do not include the freedom of shared participation implied by public law. Does Van Zyl and Van der Vyver's viewpoint imply that democracy (in the sense of political participation) does not guarantee the regstaat, but that the regstaat guarantees democracy?

To find an answer to this question one has to study the process of the institutionalization of the regstaat in history.

2.2.1 Institutionalization of the concept of the regstaat in history

True government institutions only came into being in Western history when a process of differentiation occurred in societies when the state as a differentiated public legal order (res publica) (a matter of general interest according to which political authority is seen as a public office and not as a private asset) assumes a place adjacent to non-state societal forms. This process of differentiation implies on the one hand the development of spheres of public and civil law which rest on the division between public governmental authority and private personal rights. On the other hand it means the monopolization of governmental power over a specific area of land through the destruction of the political power which was concentrated in the undifferentiated tribal, clan, family and medieval communities. In the light of this, for example, one can refer to the Greek polis, the Roman imperium, the Carolingian empire, and the Burgundian state (based on social estate), as states while the ancient Asiatic empires, the Merovingian kingdom and the medieval feudal kingdoms, not to speak of the ancient Greek and Roman family bonds,

or the Gallic tribe and Germanic clans do not qualify as states. According to Hommes (1975a) the latter (which was a model for several medieval cummunities) was a society in which the various societal forms were undifferentiated thus totally intertwined in totalitarian fashion, so that it was not only a family community but also a cultic, entrepreneurial, juridical and educative grouping. Seeing that the states mentioned above as examples are less differentiated than the various states and societies which we know today, clear differences can be discerned. One could explain this by referring to the legal and political development of the Greeks and Romans.

Between the developments taking place in ancient Greece after the Persian Wars (5th century B.C.) and in Rome following the Punic Wars (3rd century B.C.), one can discern interesting parallels in spite of obvious differences. In both cases there was a development from an undifferentiated legal order of the patristic family bonds to a differentiation between the spheres of public and of private law. In Greek society the old political organization which rested on descent was replaced by the territorial political organization of the polis, and in the differentiated legal order of the polis one could speak of "public and civil law" (Hommes, 1975b:67), although the latter was not yet quite on the level of the Roman ius gentium. Apart from the small group of free citizens who occupied themselves with matters of state, there were slaves and inhabitants who had no civil rights. The Greeks had to sacrifice all of their lives to the Greek polis, which they experienced as an all-encompassing religious community, and freedom meant that they could devote themselves to matters of government - for material considerations were not a prepequisite any longer for full citizenship. In the golden age of Greek culture the undifferentiated relationships which characterised the whole of Greek society prior to the advent of the democratic polis remained as a characteristic of the Greek household. There was no question of differentiated non-state societal forms and the concomitant private law as we know it in a modern differentiated society. Among the Romans, too, the differentiation of the private and the public spheres did not mean the differentiation of the non-state societal forms and the coming into being of differentiated spheres of private law. Before the state developed in Roman society as a public legal order only the old ius civile existed which only applied to Roman citizens and within

which there was a distinction drawn between public and private law (which rested on, respectively, the national community and the familia), although there could be no question of differentiated public and civil law. The detachment of the Roman state from the interwovenness with the patristic family bonds (gentes) also does not mean only that the political power of the latter was broken down, but also that these bonds resolved into the Roman familia (household) which was, in accordance with the undifferentiated family and tribal bonds, at one and the same time religious, entrepreneurial, family and political bonds in embryo. According to Van Zyl (1977,1979) the competencies of the pater familias, who was the head of the household, held sway over the persons who stood under his patriapotestas, and they were considerable, as he originally had the power over life and death (vitae necisque) over them. His sphere of power was not only absolute in the sense of the territorial jurisdiction over the land owned by the familia, but is was also sharply delimited as against the jurisdiction of the state. Next to the differentiation of the state as res publica, the origin of the ius gentium (from the third century B.C. onwards) was perhaps the most important development in terms of the concept of the regstaat, seeing that it was the unmistakeable precursor of the modern differentiated civil law which is based on the fundamental human rights of civil liberty (irrespective of nationality, public legal status, race, creed, etc.) of all people within the territory of the state. Mekkes (1940) is of the opinion that the development of the ius gentium (under the guidance of Stoic philosophy) with its civil law concept of cosmopolitan equality of all free people as legal subjects in their individual juridical actions, without reference to their being part of a national community, is of world historical significance. According to Van Zyl (1977, 1979) the Roman praetor (an official who was responsible for civil judicature) often reverted to the ius gentium to effect a more elastic application of the strict ius civile. Van Zyl calls this a sort of law of nations, which was based on natural fairness and which developed with the expansion of the Roman territories and Rome's dominium over other peoples. The importance of the ius gentium (as precursor of civil law) for the later legal development in Western Europe should not be under-estimated. With the abolition of the obsolesecent forms of the ius civile it was codified in the sixth century B.C. by Justinian in the Corpus Iuris Civilis, and with the reception of Roman law (especially through this processing of the ius

gentium by the post-glossarians or commentators of the 15th and 16th centuries) it entered into Western European law. This contributed greatly to the development of a differentiated civil law in these countries, especially under the influence of the French Declaration of the Rights of Man and of Citizen of 1789:

> "It would be one-sided to deny the huge importance fo the declaration des droits de l'homme et du citoyen for the emergence of the modern concept of civil law as essential factor in the modern concept of the regstaat. In this regard Rousseau was probably not the single guiding star. More likely it would be regarded, in this sense, as the results of a struggle begun with Hugo de Groot of the Humanist concept of the doctrine of the law of nature in opposition to the undifferentiated Germanic legal relations and bonds, under the impetus of the idea of the classical Roman ius gentium" (Mekkes, 1940:335,336).

The most important facets of the concept of the regstaat which thus emerge in the Greek and Roman law and state development are the institutionalisation of the idea that the state is a res publica, and the concomitant division of public law (the internal of the state), civil law and private law. Although there could not yet be a differentiated private law (the internal law of non-state societal forms) the development of the ius gentium was an important milestone in the development of a differentiated civil law (which regulated the free and equal legal traffic between individuals and societal forms within the territory of the state).

This excursion into the history of the law state development indicates that the concept of the regstaat (that is, the idea that the state as res publica has to stand under the guidance of a public concept of justice) has clear roots in this history. Accordingly we will look at the relations between democracy (political participation) and the regstaat.

2.2.2 The regstaat preceding democracy in England

In this context Mekkes (1940) makes a distinction between formal-organizational and material elements in the concept of the regstaat, for the modern state according to the regstaat as it has de-

veloped in England to his mind reveals both. The former touches on the variable organization and societal form of government and presupposes as such the latter which is directed at the material juridical principles, which are realised within this organizational form. In the material sense it structures, in the negative sense, the limits of legal competence of the state with regard to the non-state societal forms (marriage, family, enterprise, university, tennis club, etc.) and in the positive sense with the activities of the state in general and to its public juridical and civil legal formation of justice.

In his investigation of the institutionalization of the first modern manifestation of the regstaat (in England) Mekkes looks at the formal elements (the development of the governmental institutions) and the material elements (the guarantee of human rights). As regards the legislative power, rule of law came into being in a sense with the "Long Parliament" in the formal sense in the form of a democracy which degenerated, however, when parliament acted in contravention of the "Agreement of the people" which was submitted to the House of Commons in 1649. In this document the following material principles of the regstaat came to expression which are represented as "native rights" of the English nation, and to which, according to this document, a government should direct itself: personal liberty, liberty of conscience, equality before the law and limited sessions of parliament. As against parliament that wished to concentrate all power within itself, the dictator Cromwell interceded for the national liberties while he voluntarily limited himself in terms of his competencies by a constitution that he himself called into being and in which provision was made at the fundamental level for the division of legislative and executive powers. Although he had the opportunity to take over the legislative power he did not try to do it but deliberately introduced the division between legislative and executive power seeing that he had the right to promulgate ordinances outside the times of session of parliament on condition that parliament would later have to ratify these. In other cases parliament had to submit, in terms of article 24 of the constitution, its provisional acts to the Lord Protector, and if he did not within twenty days give his approval, these would become law if they were not in contravention of the constitution. The struggle with parliament (in the course of which two further parliaments fell) ended provisionally with the death of Cromwell and the restoration of Charles

II under whose reign the famous Habeas Corpus Act of 1679 was promulgated. The efforts under Charles II and his successor James II to reintroduce absolutism ended with the "Glorious Revolution" of 1689 through which the constitutional monarchy was established, with as its result not only the assurance of individual rights of freedom in civil rights and in criminal law under the rule of law, but also the constitutional rights of parliament. The development of the actual system of parliamentary democracy (in the modern sense of the individual political liberties of the English citizen) would only take place in the subsequent period through the establishment of the freedom of the printing press, freedom of petition, right to association and meeting as well as the franchise (which until 1832 was limited to the aristocracy). In England the concept of the regstaat was thus largely institutionalised before parliamentary democracy in the modern sense of the word developed.

This cross-section from English political history indicates, therefore, that democracy is not an essential or adequate prerequisite for the institutionalization of the concept of the regstaat, although the latter can make an important contribution to the establishment of the former through the development of a mutual participatory political culture among all the citizens of the state.

3. REFORM OPTIONS/STRATEGIES

The dialogue about and the demands for political reformation in South Africa will be with us for a long time, and it would seem as if Price's view of five years ago will be valid for much longer than the next five years still:

> "Currently when attention is focused on the Republic of South Africa, political change is almost inevitably the subject of discussion. Foreign governments claim to desire it and sometimes to require it; spokesmen for the African, Colored, and Indian populations that constitute four-fifths of the Republic's population demand it; the Nationalist government of the country alternatively promises and proclaims it; sympathetic observers detect it, while their more critical colleagues deny it" (Price, 1980:297).

With regard to possible reform options and their eventual implementation by the government, one can ask whether, like five years ago, three main strategies can still be distinguished. Du Toit (1980, 1980b) and Giliomee (1980) then distinguished between

- White/Afrikaner domination;
- hegemony with indirect control; and
- true power sharing following negotiation.

Seeing that the government with the new constitution moved from the first to the second strategy, a movement back to the first strategy would mean regression which would probably only take place should the conservatives in the National Party gain the upper hand or the parties to the right of the NP come into pwoer. The reduction of the number of choices from three to two centrally poses the question of the probability of a transition to the third strategy. This question has already been asked: "Is there any prospect of sham consociation developing into genuine consociation in the long run?" (Hanf et al., 1981:418). More important here are the questions as to whether the government, with regard to the Black people, thinks in consociative terms at all, and whether the concept of consociative democracy has not already been so discredited in the new constitutional disposition that any movement in that direction would be futile. About the absence of important conditions for consociative democracy in South Africa, as well as the lack of crucial, key characteristics of it in the new constitutional disposition a great deal has already been written: Boulle (1980, 1984); Hanf et al., (1981); Schlemmer (1978); Slabbert (1983) and Venter (1982).

Seeing that it is the Botha government which disposes of the key to political reform, it is of great importance, in the consideration of the options for reform, to know what the ideal of reform is which guides and informs the reform. Should Giliomee be right in his view that in the final analysis the concern is for Afrikaners/Whites to make an effort to share power without losing control, his summary of the developments in South Africa are probably spot on:

> "South Africa is slowly moving from a racial oligarchy to a multi-racial oligarchy with the Afrikaners still predominant politically" (Giliomee, 1984:29).

His view implies that the government has remained stuck at the second view expressed above, and that one cannot so much speak of an ideal of reform as of "a bottom line". Reference has already been made to the similarity with the absence of a true ideal of reform and the results it had for Czarist Russia.

Should Giliomee be wrong and one can speak of an ideal of reform or a willingness to find a meaningful ideal of reform, the idea of the regstaat can make a crucial contribution. The obstacles in the way of the institutionalization of such an ideal of reform, however, are many and legion.

4. OBSTACLES IN THE WAY OF REFORM

Only a few of these obstacles will be referred to:

4.1 Unrealistic political demands

As a result, amonst others, of differences in privilege and the concomitant polarization, there is a strong divergence both as regards the experiences of the present situation and the ideas held by Whites and Blacks about what the situation should be in future. The "unrealistic" political demands of the Blacks feed fears on the side of the Whites. From the processing of the data (Van Niekerk, 1984) of multi-purpose surveys (MPS/OV/56 and MPS/OV/71) done by the HSRC for the Intergroup-Relations Project, it emerges that Black people not only experience present events much more negatively than Whites but also feel much more negative about the direction in which events are moving than Whites do.

4.2 Polarization and the cross-fire of the double-bind dilemma

According to Du Toit (1980a), Giliomee (1980), Adam (1980) and Slabbert (1983) this dilemma means that leaders have to do with two fronts. When they wish to negotiate with the leaders of other groups, they run into difficulties with their constituencies because of polarization. That this dilemma has been operative in South Africa for some time emerges from the statement taken from the first half of the seventies:

> "Present leaders of the central government are caught in the cross-fire of maintaining legitimacy in the eyes of the electorate and accommodating black demands. Present black leaders, too, are caught in a cross-fire of voicing black grievances and conforming to the policy of separate development. In a crisis situation these cross-fires will intensify" (Bekker, 1973:10).

4.3 The Janus faces of reform

The various groups, as well as the groupings within each groups, notice various sides of the reform process in South Africa. This obstacle goes together with the previous two and contributes to an intensification of the interpolarization and intrapolarization.

4.4 The absence of comprehensive, all-encompassing ideals of reform

The lack of clarity about or absence of guiding ideals for reform do not only contribute to fears about the future, but also cloud the present reforms with mistrust and scepticism.

5. INSTITUTIONALIZATION OF THE REGSTAAT IN SOUTH AFRICA: POSSIBLE SOLUTION TO THE IMPASSE

In the light of the ironies contained in the realisation of the democratic ideal, which often does not comply with the tense expectations of the participants, the concept of the regstaat was studied as an "overriding purpose or transcending value" for reform in South Africa. Important facets of the concept of the regstaat emerge in the development of the Greek and Roman concept of state and law with the institutionalization

of the idea that the state is a res publica and especially under the influence of the Roman ius gentium via the reception of the Roman law in Western European development of state and law in the development of modern differentiated civil law based on the fundamental human rights of civil liberty and equality (independent of nationality, public legal status, race, creed, etc.) of all people and societal forms within the territory of the state. An investigation of the development of the regstaat in England indicates that the institutionalization of the concept of the regstaat law during the "Glorious Revolution" occurs prior to the actual development of individual political rights of the English citizen. In this way it becomes clear that the institutionalization of the regstaat is not really dependent on democracy. While the idea of democracy especially stresses political liberties and participation, the concept of the regstaat goes much further and encompasses not only the sphere of public law (within which political rights constitute a part) but also the sphere of civil law and the curtailment of the power of government with respect to the sphere of internal jurisdiction of the non-state societal forms. Because of the problems which confront reform in South Africa, the emphasis on immediate political rights can be counter-productive to the institutionalization of the rule of law. The concept of the regstaat, which can be contained in a declaration of intent, would link reform in South Africa to criteria of freedom which should be acceptable to all groups and individuals. With the concept of the regstaat as an ideal of reform which should also guide the immediate reforms of the present government, negotiation can be conducted in a more relaxed and less polarised atmosphere not only with regard to the institutionalization of the regstaat but also in terms of eventual time schedules.

In the terminology of systems theory the foregoing can be formulated as follows: In a deeply divided, polarized developing society, in which there is no question of a homogeneous participatory political culture, it can be counter-productive to start with immediate reforms on the input side of the political system. When radical reforms under the guidance of an encompassing ideal of reform (for example, the concept of the regstaat) and accompanied by a time schedule (which issues forth from negotiations) are started from the output side, the contributions which are made in this way towards the development of a homogeneous, participatory political culture can make the inputs of political participants more meaningful.

The concept of the regstaat can then serve as a criterion to place reforms already effective into perspective and be a guideline for the re-institution and the full deployment of the elements of the concept of the regstaat which was abolished prior to and following 1948 in South Africa, especially in the form of racial discrimination.

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