

ARGUMENTATIVE ESSAYS 1

on Current South African Questions

Towards a Procedural Revolution

by Rob Amato

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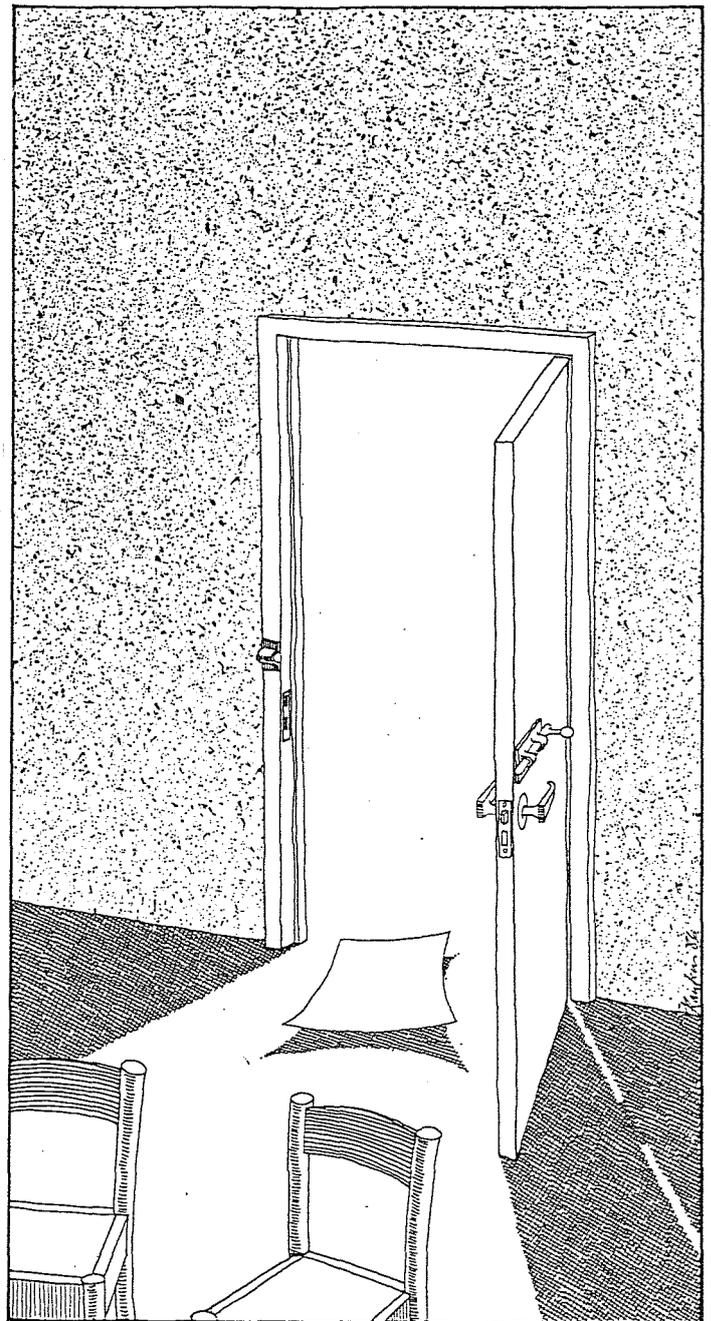
If we depend on their negotiating in vacuo on constitutional or policy matters we will continue our descent into mindlessness, our fate determined by reaction, often violent, on all sides.

This is not an appeal for the abandonment of positions by any parties to the conflict. In a sense a middle ground is not being sought. Violence is an expression of anguish and of a lack of alternatives. Procedure can provide channels for the clear expression of conflicting ideologies and interests. The tension between "enemies" cannot be wished away, but opposition might, by procedural structures, be rendered a productive phenomenon displacing violence.

The main difficulty is that there is no body, internal or external, which can draw up a procedural framework. Such a body should be formed and should be made up of juridical (that is, procedural) experts nominated by all contenders for power in a new South African dispensation.

Stage 1: Committee of Heralds

But who will form the juridical body? Prominent political figures of all kinds could take the initiative to form a collective catalyst for the formation of the body. They would have to speak from all points on the political spectrum and agree on one thing only - that a juridical body whose members were nominated by political organisations (contenders for power?) of all



significant kinds should be set up.

This ad hoc committee might have difficulty in settling on a Chairperson. His or her function would, however, be so much an administrative one that his political inclinations or position would not be vital factors in his effectiveness. He might be anyone noted and respected for good manners, good judgement and efficiency. Perhaps a certain kind of judge.

The ad hoc committee would concern itself only with calling on all contenders for power to nominate procedural experts from within or without our borders to a Juridical Council. The committee would stand down once the Council was established to start Stage Two.

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The ad hoc committee would concern itself only with calling on all contenders for power to nominate procedural experts from within or without our borders to a Juridical Council. The committee would stand down once the Council was established to start Stage Two. The high profile political figures would now be a liability if they were perceived as influencing the Council.

The ad hoc Committee's Chair would of course also stand down, but only at the still-to-come stage when the Juridical Council appoints its Chair.

Stage 2: Juridical Council's formation and Project

At Stage Two the Juridical Council would elect a Chair (from within or without its ranks - perhaps an ex Chief Justice or World Court Judge) who would call on all political organisations of substance to submit, within a limited period, a mandated formal statement, under co-ordinated topic headings, of their proposals for the new South African Constitution. This would be a different activity to presenting a party's **policy** documents.

Political organisations not yet represented on the Council would have the right to nominate their own experts to serve as Councillors at any stage (up to a certain date, or until the Council completes its tasks).

Because the Council would have an editorial rather than a decision-making brief the numbers and alignments of the contributing parties would not be of crucial importance to its proceedings. The Council would not decide which of the proposals submitted to it were most worthy of implementation. Its

Chair and Committees, each devoted to a significant constitutional topic, would reduce the number of proposals received to a minimum number of models, Constitutions A, B, C, etc. Obviously the Council's skills will be directed towards maximising the areas of consensus and clarifying points of difference. The process of collation would conclude Stage Two.

Each Constitution's elements would by now be trenchantly expressed in a covering document and details would be codified in supporting documentation.

Stage 3: One-adult one-vote Referendum

The third stage would be the presentation, to the entire citizenry of the country, of the various constitutions in a judicially administered one-adult one-vote referendum. Each voter would indicate the constitution he or she most favoured.

The winning constitution, even if no outright majority were achieved, could amount to a social contract arrived at by deliberate choice following informed debate, a degree of grassroots education - and due democratic procedure. It would not be an imposed set of rules.

Stage 4: First Election under New Constitution

The rules for the first election in the new state would have been established and the election - the fourth stage - could proceed immediately, to be followed, one hopes, by a long series of elections, under the same constitution, in which power might well change hands fairly often.

There is no point in speculating here on what combinations of groupings would win the first or subsequent elections, but one long-term speculation (or article of faith) is worth expressing here.

It is that the groupings that determine this country's politics will have more to do with individual sensibilities and class positions than with race, or ethnic origin, or language.

The process here outlined would encourage

this because people would be voting (in the referendum) for the first time in our lives as individual members of the entire citizenry.

Difficulties abound in the procedure, as everyone is quick to point out. The following is a list of the most salient of the objections I have met with, and my answers to them.

- **"The procedure depends on a one-adult one-vote referendum and it is precisely on this point that the opposed parties differ most."**

Of course the bottom line to any ANC, Azapo or UDF manifesto is universal franchise and the government would have to extend its commitment on single and equal citizenship to the franchise in any form of settlement whatsoever. It is actually questionable whether universal franchise is really the key issue, for other, more difficult, issues back up behind it, such as nationalisation and privatization; land useage and ownership - and the nature of the Bill of Rights. The universal franchise issue is a shibboleth to be got behind us. The franchise (perhaps unfortunately) is not the process which most limits the actions of modern governments for most of their lives. The protective and limiting clauses of a good constitution would form a much more pervasive and day-to-day inhibition to abuse of power than the fear of losing a forthcoming election, though this must be present too.

- **"No party to the conflict will enter into a process from which it may emerge the loser."**

The only reason that the government or the ANC might agree to take part in the process is that they would then be seen to be willing to present themselves for real legitimization as rulers or contenders for power in a new dispensation. It may be true that they care only for power and not a fig for legitimization but this may be **untrue**. Governing South Africa without the consent of the governed will be, increasingly, a very

difficult business, no matter who is trying to do it.

- **"The ANC and the government are increasingly adopting warlike postures and so the process will not get off the ground."**

The ANC and the government are both central actors in a drama that involves all the major world powers in some measure. There is nothing to prevent them continuing their bellicose postures while entering the process, which does not in fact involve any commitment to mutual recognition or to negotiation. The public remain the arbiters of validity.

An important point here is that the process will tend to force participants into negotiation and compromise with their political neighbours rather than their "enemies". The philosophy will be that the worse the opposition's proposed constitution is, the better, so leave them to it.

Each grouping will have to consider if and how it should accommodate other groups in order to widen support for its constitutional proposals, but it could leave those groups it wants nothing to do with to their own devices. The ANC or the government or anyone else would therefore not be compromised or lose face by entering the process.

The tendency of each party will be to propose a constitution that would favour their direct supporters but in so doing, on many issues, they would simultaneously find themselves favouring other groupings

The process would thus tend to marginalize extremism and, if it in fact did so, a government of Left, Centre or Right could be returned in any election. Thus, ideally, procedural union activity, ordered and equitable land reform and ordered nationalization would be processes acknowledged to be constitutionally valid on the one hand, and on the other hand delineated individual rights to the freedoms of speech, religion, association and movement, to modest and reasonable compensation, to smaller business activities etc., would also be constitutionally protected.

- "How can the government of the day enter into a process which looks towards its own demise?"

The answer here is that the National Party has to look towards its survival (perhaps in altered form) after the democratization of the country as a whole. There is reason to suppose that widespread conservative impulses among blacks as well as whites will play a part here.

It is possible, if not likely, that Mr Botha and his party are tired of the impossible position that the opposition, internal and external, and the "international community" have been complacently putting him into, to the country's great cost.

I mean that were the proposal widely approved he would no longer have to be a judge in his own cause, proposing statutory bodies "under my chairmanship" to decide upon electoral procedures in which he will himself want to be a winning contender.

It is not beyond the bounds of possibility that the Government could fly the proposal - or one like it - avowedly as a kite in order to test whether it will in fact produce a Constitution under which the vast majority of South Africans could live with a sense of justice, and a dynamic political life involving ordered, continuous and meaningful change.

And the process would allow the ANC to continue to consolidate itself in the mind of the country as the focus for a possible and procedurally sophisticated alternative government.

16th June 1986