

CONSTITUTIONAL DEVELOPMENT AMONG THE VOORTREKKERS, 1836-56

*The form of government of this State shall be that of a Republic.
(Grondwet — S.A. Republic).*

The nineteenth century saw a considerable expansion of European settlement in Australasia, southern Africa and North America. All are of great interest politically, socially and economically, but for the student of constitutional development the southern African movement is of possibly unique interest. The American, the Australian or the New Zealander took his accepted constitutional forms and practices with him, but the Voortrekkers left in search of independence, seeking escape from political practices and theories of which they disapproved. In other words those other pioneers advanced their frontiers, while the Trekkers broke through their's, intent on preserving the old ways on the other side. They therefore had to erect their own constitutional establishments, starting very nearly from scratch as far as the central government was concerned, though they were better placed as regards local government, having had some first hand experience of the Cape's system. It is in the unique nature of their movement and the fact that they were not over well equipped for their self imposed task that the major interest in studying their actions lies.

Did the farmers have the right to emigrate? There was some doubt as to the legal position but, as Attorney-General Oliphant pointed out,¹ there was no doubting the practical difficulty of stopping them. Though it did not approve of the movement there was little of a practical nature that the British government could do; we can therefore pass straight on to the emigrants' constitutional experiments and experiences.

On the whole their prospects were not good. The government whose policies they wished to leave behind insisted that they were still its subjects, the area into which they were moving was dangerous and wild, vast² and isolated from the outer world — communication with each other would be difficult enough. They themselves were a mobile community of cattle farmers, lacking an advanced cash economy and with little education and diversity of talent or experience to draw upon. They were, for what these generalizations are worth, hardheaded individualists, narrow in their outlook, set in their ways, impatient of authority, democratic (so far as white people were concerned) and independent to a fault.³ Neither Dutch nor British had found them the easiest of people to govern, now they were to have a similar experience themselves. On the other hand

1. Eybers, G. W.: *Select Constitutional Documents Illustrating South African History*, Item No. 93, pp. 145-6.

2. It was especially vast in relation to their small numbers.

3. We hope that it will be made clear why leaders such as Pretorius and Potgieter gained such influence as we proceed.

they were not lawless people; their strong sense of religion and the fact that crime would not profit anyone ensured that. And though hotheaded they were not dangerously violent folk. One need not be surprised at the elementary and naive nature of their early failures to frame constitutions and institute efficient administrations; one must give full credit for that willingness to learn from experience which, together with other factors, resulted in the production of a satisfactory constitution for that "model republic", the Orange Free State.

The Trekkers, who had left the Colony in parties organised along the lines of the commando system, did not establish effective states at either Thaba 'Nchu (December, 1836) or Winburg (April-June, 1837). Their first effort was so simple and makeshift that it is doubtful whether it may justifiably be called a constitution at all. It should be regarded as an example of the work of a popular gathering, making rules for a limited and temporary purpose. It is also the first example of democratic procedure in our history. Halting to collect themselves, both physically and metaphorically, the Trekkers elected a "Burgherraad" on December 2, 1836. This consisted of Maritz as chairman, Potgieter as laager commandant, and five others. This "Raad", the majority of which was loyal to Potgieter, combined legislative, executive and judicial functions. When it was acting as a court Maritz served as landdrost; he was also responsible for the administration of estates and for marrying people. The "Burgherraad" might also serve as a "Krygsraad", in which case Potgieter was chairman. Despite this body's sweeping powers there was some doubt as to where the final sovereignty lay: with it or "Het Volk", for while the people of the "Maatschappij" were sworn to obey the 'Raad, it had to observe the decisions of a popular assembly. These arrangements were made before all the parties had met; there is some doubt as to whether this little 'Raad ever functioned in this first form.

During the period April to June, 1837, the Voortrekkers, drawing on what they knew of conditions under the Company and British rule prior to 1827, were engaged in adapting the primitive Thaba 'Nchu "constitution" to new conditions, themselves caused by the arrival of the able and ambitious Piet Retief who, aided by the quarrels of Potgieter and Maritz,⁴ had gained the ascendancy. At a general meeting on April 17, 1837, the members of the Thaba 'Nchu "Burgherraad", with two exceptions, were elected again. These five and two new members were to serve on what Erasmus Smit calls the "Raad van Policie".⁵ Maritz kept his posts as chairman, when the "Raad van Policie" was sitting in a legislative capacity, as landdrost, when that new body, like the old, sat

4. They were two very different characters and Maritz was jealous of Potgieter's power as military leader.

5. This appears to have been the accepted name. On p. 51 of his *Gelofte Kerk en ander Studies oor die Groot Trek* Professor H. B. Thom tells us that both Retief and Maritz employed it when writing to D'Urban on the 21st July, 1837. Professor Thom thinks that probably the name was chosen owing to the Trekkers remembering a body of the same name under the Dutch.

in a judicial capacity and as head of the marriage court. Retief was "Gouverneur en Opperhoofd" (the derivation of the name of this office is obvious) with an elected council (probably the 'Raad sitting in an executive capacity) under him. This is a most noteworthy feature; it was the closest thing to a civil executive that the Voortrekkers were to have for a number of years, for they feared that an executive would become despotic, like the Cape governor. The various leaders were also jealous of each other. Probably it was the energetic and comparatively well educated Retief who appreciated the importance of a proper executive; certainly his premature death on February 17, 1838, was a grave loss.

On June 6, 1837, the "Nine Articles of Winburg"⁶ were introduced, to serve as a guide to the executive. They condemned the "sendelings genootskap van Engeland", insisted on obedience to officials, demanded an oath of allegiance to the "Maatschappij" and deprived members of the executive of their rights in the "Maatschappij" if they failed in their duties. The reference to the missionaries reflects not only bitter memories of the Cape but also the quarrel then raging among the emigrants, as to whether they should make use of Smit's services or those of the Wesleyan missionary Archbell.

It is impossible, owing to the paucity of the surviving sources, to trace the path of Trekker constitutional development during 1838 with any degree of exactness, though a very competent attempt, to which we are heavily indebted, has been made by Dr. J. H. Breytenbach in his introduction to *Notule van die Natalse Volksraad* (S.A. Archival Records, Natal No. 1). All that can be said is that a 'Raad with twenty-four members was in existence and that a constitution was drawn up for it *later*.

To consider the question of the 'Raad first: in a letter, written at Bloukransrivier, dated April 15, 1838, and published in the *Zuid-Afrikaan* of the 8th of June⁷ mention is made of the appointment of a 'Raad of twenty-four members, after the murder of Retief and the Bloukrans massacre. Though the writer's attention was taken up with more pressing matters the little he has said is indirectly confirmed by Henry Cloete,⁸ who tells us how he "ascertained that, immediately after Retief's death (who appears to have been constituted a permanent governor) the people . . . determined to establish a government of a still more popular and democratic nature than before". Cloete then goes on to describe the later workings of the Natal Volksraad itself. Thus we may reasonably accept that a 'Raad of twenty-four members came into being shortly after February 17, 1838, and probably before March 28, 1838, for in an entry to his diary bearing that date Smit⁹ mentions how the "wetgevende lichaam" drew up instructions for a commando to proceed against Dingaan under Piet Uys and Potgieter. It seems that Smit is referring to the 'Raad

6. For the text of these articles see Preller, G. S.: *Voortrekkermense*, Vol. I, pp. 300-1

7. *Ibid.*, Vol. VI, pp. 7 ff.

8. Bird, J.: *Annals of Natal*, Vol. II, p. 207.

9. Preller: *op. cit.*, Vol. II, pp. 188-9.

mentioned by the writer of the letter we have referred to above though it must be admitted that the first time he (Smit) actually mentions a 'Raad of twenty-four members is on June 12, 1838,¹⁰ of which we will have to make further mention shortly.

So much for the 'Raad. We may now turn to the equally obscure question of the constitution.

On May 25, 1838, Smit wrote in his diary concerning a general meeting at the Modderlager,¹¹ where Jacobus Boshof (who was visiting Natal) and others were deputed to draw up "de instruktien voor al de burgerambtenaren". The Trekkers were lucky to obtain the aid of Boshof, who was the civil commissioner of Graaff-Reinet's clerk and so had some knowledge of legal principles and administrative practice. Though the details are not clear it appears from Smit's diary that Boshof and his helpers were ready with the "Regulatiën en Instructiën voor de Raad van Representanten van het Volk, aan Port Natal en omliggende Land" and the "Regulatiën en Instructiën voor de Regter of Magistraat en de Maniere van Regtspleging voor het gemeenbest and Port Natal en dies omtrek", by June 4, 1838.¹² Presumably, though not certainly, these are "de instruktien" Smit referred to on the 25th of May. A quarrel between the Uys and Maritz parties delayed the promulgation of the new constitution, under which Natal would presently be governed but in the meantime, at a general meeting on June 12, 1838, Boshof was elected "President" of the new "'Raad van 24 Leden", as Smit calls it in an entry of that date.¹³ He would assume office when he finally returned from the colony and when the new body, which he had (presumably) planned, came together. On October 20, 1838, there is reference to the "'Raad der Representanten van het Volk";¹⁴ Boshof and his committee's comparatively elaborate constitution was being put into effect as opportunity offered by the 'Raad of twenty-four members already in being. By this time it had been accepted that the town being laid out on the Umzinduzi should be the capital, Pietermaritzburg. We may certainly regard the republic of Natalia as having been constituted by May, 1839, at the latest for the official minutes from that date have survived, with traces of earlier proceedings.¹⁵ Before passing on to a consideration of this, the Voortrekkers' first real constitution, we must point out that the name "Raad der Representanten van het Volk" was too long and clumsy to ever gain general acceptance. The very "Regulatiën" also referred to the "Raad der Representanten" and on November 19, 1838, Smit refers to the "Raad des Volks".¹⁶ The "Regulatiën" had even used the term

10. *Ibid.*, p. 212.

11. *Ibid.*, pp. 207-8.

12. *Ibid.*, p. 210. For the texts of the documents see Preller's *Voortrekkerwetgewing, Notule van die Natalse Volksraad*, p. XII ff. or Breytenbach, J. H.: *Notule van die Natalse Volksraad, 1838-1845*, (S.A. Archival Records, Natal No. 1), pp. 285-8.

13. *Voortrekkermense*, Vol. II, p. 212.

14. *Voortrekkerwetgewing*, p. XVI.

15. Breytenbach: *op. cit.*, p. XLV.

16. *Voortrekkermense*, Vol. II, p. 252.

“Volksraad”; while we cannot be quite certain that this was the first time it was ever employed it is probable that from about November, 1838, it was coming into general use. An official receipt for powder received from Maritz’s widow and dated November 14, 1838, is the earliest document known of, other than the “Regulation”, that refers to the representatives of the people in this fashion, from then on it became more and more popular and the other abbreviations dwindle away.¹⁷

In February, 1840, with the British gone, Dingaan broken and Panda dependent, the Trekkers were completely free to apply their most ambitious set of fundamental laws yet, though by then land had been occupied and the new state in existence for a good year. Up to the end of 1838 they had been little more than a pastoral community on the march, linked by ties of blood, language, history, religion, cultural outlook, nascent nationalism and occupation. But here at last was a real state, with a real constitution, whatever its shortcomings. From the strictly legal point of view there may be some doubt whether Natalia was a proper state. No sovereign power ever recognized it and its founders remained British subjects. None the less in practice it functioned as a state, its government concluded treaties, made laws and attempted to enforce them. We were bound to mention these doubts and reservations; to a far greater extent we are bound to make a relatively close examination of the Republic of Natalia’s constitution.

According to J. S. du Plessis¹⁸ this and the earlier Trekker institutions were strongly influenced by the Batavian system. Certainly the system of local government instituted by De Mist in 1805 was the model followed by the Trekkers in organising all their republics.¹⁹

The constitution of Natalia, which was flexible,²⁰ defined the composition and functions of the legislature and judiciary and discarded direct democracy, for all power went to the Volksraad. This was elected yearly by citizens who were at least twenty-one years of age (though no mention is made of the vote being restricted to men only and article 2 actually refers to “elk persoon” the women, as in all other Trekker states, had to be content with such indirect influence as they might have had). Its members had to be between twenty-five and sixty years of age, might not refuse election, had to attend meetings and could not resign other than on what their fellows thought were valid grounds. Failure to fulfil these obligations would incur a fine of 50 Rds. All this was probably thought necessary in a comparatively large country where communications were poor and the Raad members were not paid. To begin with there were twenty-four members of the Raad, of whom twelve formed a quorum.

17. See Thom: *op. cit.*, p. 43 ff. for a full discussion of this question.

18. Du Plessis, J. S.: *Die Ontstaan en Ontwikkeling van die Amp van die Staats-president in die Zuid-Afrikaansche Republiek* (1858-1902), Archives Year Book for S.A. History, 1955, Part I, p. 8.

19. Walker, E. A.: *A History of South Africa*, p. 141.

20. An element of rigidity was introduced in January, 1840, when the Volksraad resolved that the existing “Regulation” might only be altered by laws in keeping with them.

Meetings, which usually lasted a week, were held quarterly and elections annually. Decisions depended on a simple majority. If and when the necessary members for a quorum were lacking co-option could be resorted to. The 'Raad had a chairman, who was elected from among the members present at the beginning of each session. He regulated meetings but that was his sole function and it would be wrong to regard him as any sort of head of state.

Legislative, judicial and executive power were all combined in and exercised by this Volksraad which made law (gaps in local legislation were filled by what was known of the Roman-Dutch law), treaties and alliances, appointed and removed all officials including the landdrost, and, in serious cases, heard appeals. It might also grant or sell public land, lay out towns and villages and negotiate with the Imperial authorities. In no case was there any possibility of a review by a President or upper house; such institutions did not exist. The 'Raad was responsible for religion and education and was to do all that it could to promote them. The state church was the Dutch Reformed.

From March, 1842, onwards a "Kommissie Raad", consisting of some three to five members of the Volksraad who lived in or near Pietermaritzburg, handled matters of urgency during the intervals between sessions. Its decisions had to be confirmed by the full 'Raad. Being responsible for the continuity of administration between sessions this "Kommissie Raad" may be regarded as an attempt to fill the gap left by the lack of an effective executive, for up to the time of its establishment the only form of executive between sessions had been the landdrosts. The chairman of the Volksraad had not been able to fill the gap, because his post was limited to the duration of each sitting.

Lack of a real executive was the prime weakness of this constitution. When they drew up the "Regulatie" (if they had indeed done so) Boshof and his committee were possibly under the impression that Retief's old office, the governorship, would in due course be filled again. (The "Regulatie" actually make passing mention of a "President of Policy" by which they probably mean Retief's old position.) But this was not done, partly for the reasons already mentioned above, partly because Maritz and his large following, which survived him as an extremely democratic faction, were especially hostile to the idea of having one particular person as the head of state. Though Retief had done much to impress the need for a proper head of a real executive upon the Trekkers, Maritz's party confused such an institution with autocracy;²¹ neither they nor many other Trekkers had sufficient grasp of political theory to appreciate its importance. They also lacked that knowledge of constitutional law and procedure which would have enabled them to understand that an executive may be made responsible to an elected legislature. Finally there was in

21. Hence the old quarrel between Maritz and Potgieter at Thaba 'Nchu and Winburg.

fact no one person whom all were disposed to trust as a formal head of state. Such distrust embraced even A. W. Pretorius, who, when appointed leader of the commando that defeated the Zulus at Blood River, had been the nearest approach to a central executive officer in the country. Lack of such an officer was actually dangerous for the security and harmony of the state and it was through Pretorius that this was revealed. A popular hero could easily come between Volk and 'Raad, and draw support away from the constitutional body. The victor of Blood River was such a figure. Though not all trusted Pretorius he was deservedly renowned and he had a personal following. So he slipped easily into the position of head of state, a process which was furthered by four factors: firstly Pretorius was not the sort of man to discourage a tendency of this nature (he was still referring to himself as "Hoof-Kommandant" in his letters in February, 1839, long after the Blood River campaign was over, though his power had only been supposed to endure for the duration of that expedition); secondly, a head of state was really and genuinely needed. Thus, for example, when dealing with Charters Pretorius spoke for the people. Thirdly, the outer world, in which the British authorities loomed largest, expected and looked for a head of state. They regarded Pretorius as such and tended to treat him accordingly. Finally, the times were full of danger for the Zulus (even after Blood River) and the British offered potential threats to the republic. Retief had been accepted when the Trekkers felt relatively secure, in Natal an uneasy people felt the need for a military leader. Certainly it was the Zulu danger that brought the 'Raad round to making Pretorius permanent "hoof-kommandant" over the whole "maatschappij" on both sides of the 'berg. Circumstances thus compelled the 'Raad to treat their military creation as something approximating to a head of state and so in October, 1839, he was given a seat but not a vote. Here he was supposed to act as a kind of advisor to the legislators, a function, in this respect, similar to that of the State Presidents in the later republics. The subsequent long struggle by the Volksraad, led by Stephanus Maritz, to curb the power and minimise the influence of the commandant-general provides further emphasis of this weakness produced by lack of experience and ultra-democratic prejudice. It also offers us a preview of later difficulties beyond the Vaal.

Ideally Voortrekker society had always been one and in theory the groups centered on Winburg and Potchefstroom had always been extensions of the main body in Natal though in practice they were ruled by chief commandant Potgieter with the aid of a small council. But by 1840 there was a sufficiently strong feeling of security east of the 'berg for the idea of a genuine union to be entertained. On October 16, 1840, it was agreed that Potchefstroom and Winburg should be under the ultimate control of Natalia's 'Raad, with representation in that body. Potgieter was to be "Bestierder" at Potchefstroom and Pretorius "Hoof Bestierder" in Natal. Both men were to be responsible to the elected representatives

of the people.²² Through the efforts of Caspar Kruger and A. W. Pretorius more definite arrangements for what was theoretically a union, though in practice it was never more than the loosest of federations, were made by the treaty of February 2, 1841.²³ On this occasion a special meeting of the Pietermaritzburg 'Raad was attended by Potgieter and Kruger, who was chairman of the Potchefstroom 'Raad. The laws of Natalia were to apply on the highveld. At Potchefstroom an adjunct 'Raad, a mere committee of twelve members, eight of whom formed a quorum, was to be responsible for local matters. It was to meet as often as need be; its decisions were subject to the approval of Pietermaritzburg. The minutes of the meetings at Potchefstroom had to be brought before the Secretary of the Volksraad every three months and at least twice a year a commission consisting of not less than two members of the adjunct 'Raad had to attend at Pietermaritzburg, in order to ascertain the policy of the central movement. Until such time as the adjunct 'Raad had drawn up instructions for the commandant and other officials on the high veld and had them approved, those applying below the 'berg had to be followed as far as possible. The rules applicable in Natalia regarding the issue of land had also to be followed in the interior.

Great distances, poor communications and the large area over which a small white population was scattered made the effective working of this united Trekker republic almost impossible. Sentimental ties were the only ones that joined the Trekkers. When British forces returned to Natal the high veld lost interest just as soon as its people were sure that their own freedom was not in jeopardy. On September 4, 1843, the Volksraad at Pietermaritzburg accepted British allegiance in terms of Napier's proclamation of May 12, 1843, whereupon Winburg and Potchefstroom broke away. Cloete received official information of this from Potgieter in October, 1843.

On May 23, 1844, the Potchefstroom 'Raad (probably the old adjunct 'Raad)²⁴ decided to enforce the "Thirty-three articles". These were a mixture of civil and criminal law with some administrative rules and were to be supplemented by the "Dutch law".²⁵ They had been drawn up at Potchefstroom on April 9, 1844. Mention was made, more than once, of "the 'Raad", of the "Burgerraad", and of the "Volksraad" which was to be elected annually. The small population, poor communications and more than ample grazing land continued to hinder the successful application of any centralizing policy. North of the Vaal personal loyalty

22. The text of the agreement is reproduced by Breytenbach: *op. cit.*, pp. 350-1. There is no single English word that gives the precise sense of „Bestierder“. The office was a civil one of an executive nature and distinct from Pretorius and Potgieter's military positions. In view of the prevailing prejudice against an effective executive it is interesting to speculate as to whether this was an attempt by these two leaders to gain more power but anything more would take us beyond the scope of this article.

23. *Ibid.*, pp. 81-2.

24. Eybers: *op. cit.*, p. 349.

25. *Ibid.*, Item No. 174, pp. 349-56, article 31.

to trek leaders was more potent and more real than communal loyalty to any rudimentary state; the state remained little more than a nebulous conception for many years.

In 1845 Potgieter left Potchefstroom for the north-east and founded Andries-Ohrigstad. He did this partly to evade the Punishment Act and partly to try and open up trade with Delagoa Bay. Even while at Potchefstroom Potgieter and his followers, as the oldest inhabitants, had been claiming the right to rule a vast area beyond the Vaal. Once settled at Andries-Ohrigstad some of his followers, who were among the least sophisticated of the Trekkers, petitioned that the patriarch should be made chief executive officer (the President mentioned in the "Thirty-three articles" was a chairman), head commandant for life and a full member of the 'Raad, with power to summon that body, conclude treaties and give orders to all the commandants in Africa. But immigrants from Natal, not relishing such a prospect, proceeded to build up a Volksraad at Andries-Ohrigstad itself. This they did piecemeal, by resolutions and instructions, under the leadership of J. J. Burgher, who had been secretary to the Pietermaritzburg 'Raad. They paid particular attention to local government, drawing heavily on De Mist's ordinance of 1805.²⁶ Possibly they understood that under the prevailing conditions local government was the most important. Their finished constitution was similar to that of Natal and showed that they had failed to learn at least one lesson; they desired no executive officer at all when the 'Raad was in recess. But possibly Potgieter's rather too masterful manner had made that lesson difficult to appreciate.

The quarrels that followed make Transvaal politics in the late 'forties confusing, to say the least. At Ohrigstad itself there was a struggle between the 'Raad party, which enjoyed a majority in the legislature and Potgieter's following, which formed the majority of the people. Thus groups at Mooi River and Magaliesberg together with Potgieter himself and "Het Volk" (in general meetings) denied the Ohrigstad 'Raad's claim to authority over all Trekkers north of the Vaal. In 1847 matters almost reached the point of civil war, but then Potgieter left for the Zoutpansberg, where he set up yet another republic at Schoemansdal.

Meanwhile Pretorius, Potgieter's more far-sighted rival, had gained the ascendancy at Potchefstroom and it was largely due to him that further disintegration was avoided. He presided at the Derdepoort conference in May, 1849, where six delegates from Ohrigstad met fourteen from the rest of the Transvaal, excluding Zoutpansberg, and the foundations of the future South African Republic were laid. Nor was this Pretorius's last contribution to Voortrekker constitutional development for by doing much to obtain recognition of the Transvalers' independence at Sand River (lack of similar recognition had always overshadowed Natalia)

26. Walker: *op. cit.*, p. 256.

in 1852 he made the later completion of the edifice of the state more worthwhile and so more probable.

The assembly at Derdepoort decided that a peripatetic united Volksraad²⁷ for the whole Transvaal should meet three times a year, with a "Kommissie Raad" during the intervals — the whole arrangement being subject to the "Thirty-three articles". In order to try and sooth a turbulent and influential character Potgieter was made head commandant for life. The first Transvaal Volksraad, consisting of twelve from Ohrigstad (soon to be abandoned in favour of the nearby but healthier Lydenburg) and as many others, abolished Potgieter's office but the lack of a proper executive was ever very noticeable. So in 1850, despite the opposition of the probable majority of the people but following demands in the west, Pretorius took office as Commandant-General until the Volksraad met. What happened when it did shows that some Transvalers²⁸ still thought that an effective executive entailed too much power in the hands of an individual, for in January, 1851, the 'Raad decided on no less than four commandants-general: Joubert (Lydenburg), Potgieter (Zoutpansberg), Pretorius (Potchefstroom and Magaliesberg) and Enslin or Pretorius (Marico). Enslin's death avoided the probability of further disputation.

If this was a retrograde step the Sand River Convention (1852) itself, followed by its ratification and the subsequent reconciliation between Pretorius and Potgieter, were significant steps forward, for the clash between these two leaders had been a major barrier to progress. But dissension did not end here, even though both Pretorius and Potgieter died in 1853. The Volksraad appointed their sons to their places and even when Piet Potgieter was killed in 1854 bickering went on for one Schoeman married the widow and succeeded to the office and the feud. If this were not enough an unhappy religious dispute looked as though it might entirely wipe out what little progress had been made over the last decade.

By the mid-fifties it was obvious that the Transvaal or "The South African Republic north of the Vaal River" as the Volksraad had decided it should be called (November, 1853) needed order badly. The 'Raad was meeting quarterly but there was no executive, relations between the legislature and the commandants-general were quite undefined, the debates were too much under the influence of "Het Volk" who might come together at any time, in turbulent assembly. Finally Marthinus Pretorius persuaded the Volksraad which met at Pienaar's River in September, 1855, to appoint a committee to draft a fresh constitution. Their report, based on their experiences on trek, some knowledge of the O.F.S. constitution and a French edition of that of the U.S.A., formed the basis of the Rustenburg Grondwet, the constitution of the "South African Republic". The name is significant in Walker's opinion, for the new state was envisaged as

27. Thus testifying to the separatist nature of the various regions.

28. Especially the Lydenburgers under the leadership of Bührmann, a Dutch friend of Smellekamp.

eventually including the O.F.S. and perhaps stretching from ocean to ocean.²⁹ The constitution was finally adopted at a meeting of the 'Raad and "Het Volk" at Potchefstroom in December, 1856, though Lydenburg and Zoutpansberg still held aloof, the former until 1858 and the latter for two years more.

The constitution, a product of a southern African frontier society, was long, clumsy and rambling. It resembled that of the O.F.S. but lacked its concise clarity and rigidity. It also contained some material that had no place in fundamental law.³⁰ For example the hours during which the government offices would be open were laid down and the civil service were spurred on with the somewhat ambiguous:

"All services required for the public shall be rewarded by the public."

This extraneous material is however always noteworthy, as it affords clear indications of the circumstances under which the "grondwet" was drawn up, and of the nature and historical background of its authors, as do other stipulations (not to mention the flexible nature and the tone of the entire constitution with its frequent references to the wishes and desires of "Het Volk") whose inclusion in a constitution is justifiable.

Thus we may remark on the assertion that the republic desired ". . . to be acknowledged and respected by the civilised world as an independent and free people."

Pretoria was to be the capital, but Potchefstroom had to be consoled with the designation of "chief town".

Most significant of all, it was laid down that:

"The people desire to permit no equality between coloured people and the white inhabitants, either in Church or State."

This last, besides reminding us of the major cause of the Great Trek, throws light on what is meant by the following:

"The people permit the spread of the Gospel among the heathen subject to definite safeguards against fault and deception."

The fact that white men might be sentenced to hard labour, with or without chains, depending on the nature of the case, or even to death, but were specifically excluded from suffering corporal punishment is also significant.

A ban on slavery and the slave trade affords evidence of the Trekkers' awareness of the British government's strong feelings on this subject and of their own repudiation of the institution. Which consideration was uppermost is uncertain, probably feelings varied from individual to individual.

We have already mentioned the emphasis placed on "the people". For example it was laid down that, other than in an emergency, three months notice of proposed legislation had to be given to them so that they could make their views known to the Volksraad. This stipulation,

29. See article 1, Eybers: *op. cit.*, p. 362 and Walker: *op. cit.*, p. 276.

30. The constitution has 232 articles and covers forty-six pages in Eybers, (*op. cit.*, pp. 362-410). That of the O.F.S. has sixty-two articles and is thus about a quarter as long.

and that which prohibited any one not a member of the Volksraad from addressing that assembly, “. . . except when he has to reply to a question from the chairman”, together with the emphasis on the 'Raad's possession of “the highest authority in the country”, remind us of the ultra-democratic tendencies among the Trekkers and of the popular notion that sovereignty lay in the people and could be exercised by them directly, at a mass meeting. A member of the public might make personal representations to the President, and the annual presidential tour was designed, *inter alia*, to facilitate this.

The Voortrekker took easy access to land as his indisputable right. The constitution endorsed this but combined prudence with generosity in that it laid a limit (3,000 morgen) to the area of the farm a burgher might claim, having “. . . reached the age of sixteen”.

Where the constitution deals with religion it appears to reveal a narrow and intolerant spirit but in actual practice there was no discrimination.

Awareness of a need to promote religion is shown by an explicit statement that it is the government's duty to do so while the homogeneity of the community made it possible to limit offices and membership of the 'Raad and Executive Council to the Dutch Reformed Church and partly explains this narrow outlook.

The enduring strength of the personal factor comes out in the establishment of a popularly elected commandant-general whose term of office, subject to certain conditions, was to be indefinite. On the other hand the fact that race relations were regarded as essentially a military problem helps to explain this and also the prominent mention given to the Krygsraad and military system in general. But one lesson at least had been absorbed, and an important one too: provision was made for a president with an Executive Council to help him.

The last forty-nine articles of the constitution provide minute details concerning administration, the collection of revenue and the remuneration of officials, many of which particulars are out of place in a document of this type.

This constitution, which reflected twenty years (or perhaps two and a half centuries) of southern African history, which embodied the ideas, prejudices, experiences and also inexperience, naivete and aspirations of people who had been unwilling to accept British policy in the circumstances prevailing at the Cape, laid down that there was to be a Volksraad of at least twelve members, half of whom retired annually. This body was “the supreme authority and the legislative power” of the country. All its members had to be: members of the state church, the Dutch Reformed, burghers who had had the vote for three years, who were between thirty and sixty years of age, landowners, of good character and white.

All matters discussed were to be decided by a three-quarter majority.

All civil officials were to be appointed by the Volksraad on the recommendation of the President of the Executive Council.

All treaties were subject to Volksraad ratification, though the decision could be left, in times of war or emergency, to the commandant-general and the Council of War.

A Council of War was to be summoned by the commandant-general when he deemed it necessary, in time of war, emergency or when a commando was in the field. It would consist of all the officers and officials present, its secretary being nominated by the commandant-general, its chairman, who had a casting vote, being the most senior officer present.

The President of the Executive Council was to be the highest official in the state. He had to propose all bills (his own or suggestions from "Het Volk") to the 'Raad and promulgate them should they be accepted. He was responsible to the 'Raad for the public service and the revenue of church and state.

The president was elected from among such burghers of at least five years standing who were at least thirty, members of the state church and unstained by "any dishonouring crime".

An Executive Council assisted the president. Its members had seats but not votes in the 'Raad. The council was made up by the commandant-general (whose term of office was necessarily indefinite), two burgher nominees (who had to be in possession of the qualifications demanded for membership of the 'Raad) of the Volksraad (three years) and the State Secretary who, being at least thirty, was also chosen by the 'Raad (four years).

Order would be maintained by the "military power" while judicial power was vested in landdrosts, heemraden and jurors. Twice a year a high court of three landdrosts went on circuit, hearing appeals from the local courts of landdrosts and landdrosts and heemraden with the aid of a jury of twelve. The common law was provided for by the "Thirty-three articles", with their reference to the "Dutch law".

Every Transvaal burgher had a vote providing he was twenty-one or more and a member of the Dutch Reformed Church.

When the British abandoned the Orange River Sovereignty in 1854 a provisional government in the form of a committee of six under J. P. Hoffman was left in temporary control. A constituted Volksraad was then elected, each ward and village having one representative, except Bloemfontein, which had two. These twenty-nine representatives³¹ then assembled and drew up (with considerable help from a copy of the U.S.A. constitution) a well balanced, rigid and unitary constitution. This was adopted on April 10, 1854.³² On the whole the legal framework of the

31. See Malan, J. H.: *Opkoms van 'n Republiek*, pp. 221-2 for a list of their names arranged according to the villages and districts they represented.

32. The constitution of 1854 is reproduced in W. B. van der Vyver and J. H. Breytenbach's compilation: *Notule van die Volksraad van die Oranje-Vrystaat, Part I (1854-1855)*, (S.A. Archival Records, O.F.S. No. 1), pp. 194-201.

new republic exemplifies the best in Voortrekker constitutional thought, tempered by experience (for the first time since the days of Retief a proper civil executive appeared), enriched by American, British and Dutch example³³ and modified by the fact that the white community of what had become the Orange Free State did not have as marked a frontier character as that of the Transvaal. Trekboers were present, many English-speaking settlers had entered the area in the days of the Sovereignty, and at the same time many diehards had left Winburg for the north.

As already mentioned, the constitution was clear, short and rigid, for a three-quarter majority in three successive annual sittings was required if it was to be altered. A unicameral Volksraad of twenty-nine members, half of whom retired biannually,³⁴ wielded "the highest legislative power" and a large measure of control over the executive. "Het Volk" had no direct authority. The 'Raad members, one from each field-cornetcy (i.e. town or village in each district) debated in public other than in exceptional circumstances when secrecy was required. Aspirant members had to have lived in the country for at least one year and be at least twenty-five years old, they had to possess unencumbered property worth R400 and never have been sentenced to corporal punishment. They assembled once a year at Bloemfontein to "make the laws" and "regulate the government and finances of the country". They had to further religion and education and they were also to acquaint their constituents, to the best of their ability, with what they had done. Twelve members formed a quorum and a chairman, with a casting vote and the right to summon special sessions, was chosen by the 'Raad from among its own members for the duration of each sitting.

The 'Raad was itself elected according to the majority of the votes cast by the enfranchised inhabitants of each ward and village. These were the "burghers", white people who had lived in the country for at least six months. Though they were not expressly excluded women did not vote.

The Roman Dutch law was to apply ". . . where no other law has been made by the Volksraad".

The head of the executive was the State President who was "chosen by the public" from among "one or more persons" recommended by the Volksraad. The president served a five year term and could be re-elected. He might also be turned out of office by a two-thirds majority of the Volksraad for serious crimes and offences such as corruption and treason. The American influence comes out strongly here. His functions and powers were not very wide and in general it may be truthfully said that he was responsible to the 'Raad. As head of the state he supervised the various departments of state, his decisions being subject to appeals to the 'Raad. He

33. Dr. G. D. Scholtz discusses the sources of the Orange Free State's constitution in some detail in his book *Die Konstitusie en die Staatsinstellings van die Oranje-Vrystaat*, 1854-1902, pp. 18-28.

34. Who was to retire after the first two years was decided by lot (article VII).

had to give advice to the legislature and could introduce bills when necessary but had no vote. Between sessions he nominated officials for the later approval of the Volksraad and he had the right to suspend any official. Either he or the chairman of the 'Raad signed bills but neither had a veto over legislation. However the president could grant pardons if supported by the majority of his Executive Council. He also declared war, established peace and framed treaties with the necessary Volksraad approval. The president had to make an annual tour of inspection of the republic, during which citizens might take the opportunity to make their views known to him. He was also bound to report to the Volksraad once a year on the state of the country and its administration.

The Executive Council (in the formation of which the Free Staters were influenced by a similar body of the same name in the defunct Sovereignty) consisted of two officials (the landdrost of the capital and the government secretary) and three non-official members, these last being chosen by the Volksraad. The president, with a casting vote, was chairman. This body's major duty was to give aid and advice to the president. Its members were bound to make an annual report to the 'Raad of their doings. Together with the president they could declare martial law.

Significantly the commandant-general, unlike those north of the Vaal, was not elected indefinitely, but only for the duration of a war and the constitution made it clear that he took his instructions from the president. The actual choice of commandant-general was made by the field-commandants from among their own number. The field-commandants and field-cornets were themselves elected by the burghers of the districts and wards respectively.

It remains to consider the judiciary and local administration. The greater part of these burdens was born by landdrosts, one of whom was appointed to each district of the republic (Smithfield, Harrismith, Sannah's Poort, Winburg and Bloemfontein itself). The first appointments were made by the provisional government in February, 1854.³⁵ The landdrosts had the right to sit in the Volksraad and take part in debates but had no vote, which idea was also probably inspired by Sir Harry Smith's arrangements for the Executive Council of the Sovereignty.³⁶ They had the powers and, by implication, the duties of a civil commissioner and resident magistrate, an obvious reference to the officials of the Cape Colony. The 'Raad also appointed six "heemraden" to each district. They served for two years and might be reappointed.

While the office of landdrost and even more particularly that of the heemraden were inspired by the example and practice of the Dutch another instance of the Free State's debt to British procedure in the Cape and the old Sovereignty may be seen in its circuit court, which consisted of three landdrosts. When appeals were addressed to it the landdrost

35. Van der Vyver and Breytenbach: *op. cit.*, p. 15.

36. Eybers: *op. cit.*, Item 157, p. 276, Article 3.

against whose judgment the appeal was being made would not sit, and the court was to be assisted by a jury when criminal cases came before it.

The constitution made no provision for a final court of appeal, though the need for one was soon felt. At the same time the lack of properly qualified persons to constitute it was appreciated. Accordingly the Volksraad decided, on September 8, 1854, that appeals might be brought from the circuit court to the president and Executive Council. Should the landdrost of Bloemfontein have been involved in the original case the president was to replace him by some other capable person.³⁷ Four days later a further resolution, according to which the Executive Council should hear cases against the landdrost, was approved.³⁸ The president as such was not mentioned on this second occasion but since he was chairman of the Executive Council³⁹ he presumably assisted in hearing these cases also.

These resolutions deserve praise in that they amount to an effort to fulfil a much felt need but apart from the fact that the members of the Executive Council were no better qualified than the landdrosts themselves, they had the unhappy effect of involving the head of the state in the quarrels of the citizens. This should have been apprehended and avoided though when the lack of trained lawyers is born in mind it is not easy to see what else the fathers of the Free State might have done. And it is a fact that the Executive Council did its best and that its best was usually good enough.

Instructions to the field-cornets dated April 16, 1854⁴⁰ and based on the decisions of the old Executive Council under Warden made it clear that the field-cornets were to be regarded as "lesser magistrates" in their wards; they were responsible for peace and good order, they had to act as impartial mediators in minor disputes and they had to carry out various administrative duties, including the investigation of crimes and the apprehension of suspects. Assistant field-cornets, appointed under instructions from the landdrosts, helped them carry out these tasks.

The state church was the Dutch Reformed. While the 'Raad was to promote and support it there was to be liberty of conscience and freedom of the press was ". . . guaranteed, provided the law is not contravened". The influence of American practice is especially apparent where fundamental rights such as equality before the law (for white people), security of property, personal freedom and the free press already mentioned were recognized. Freedom of assembly and the right to petition the government were also granted, these provisions being the only positive limits to the 'Raad's legislative capability.

37. Van der Vyver and Breytenbach: *op. cit.*, p. 73.

38. *Ibid.*, p. 79.

39. According to Article XL of the constitution. See above.

40. Eybers: *op. cit.*, Item 161, pp. 297-301.

Hoffman acted as president until his formal installation as the first head of the new state on September 13, 1854. The "model republic" was in being, Voortrekker constitutional development had reached its climax.

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