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CONSTITUTIONAL ASSEMBLY

THEME COMMITTEE 1
CHARACTER OF DEMOCRATIC STATE

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WHAT IS SEXUAL EQUALITY?

What are we demanding when we demand that sexual equality be guaranteed in our constitution? One answer to this question, the one that springs most readily to mind, is that we are demanding that sexual discrimination should be outlawed, sexual discrimination being understood as the less favourable treatment of a member of one sex than a member of another, solely on the grounds of their sex.

This was the view of those who campaigned for the Equal Rights Amendment in the United States. Their conception of a sexually equal society was one in which the law guaranteed sex-blindness, especially in the important areas of education and the workplace. In effect, it was formal equality of opportunity which they wanted guaranteed, the once revolutionary principle that careers should be open to talents - that valuable educational and occupational benefits ought not to be a matter of hereditary privilege but the reward of those who merit them.

The principle of non-discrimination rules out obviously sexist laws and practices. Thus if there were a ban on sex discrimination in the workplace, it would be unlawful for a selector to decide 'No women', and on that basis to pass over a woman who was better qualified for some position than a man. However, the principle also has less immediately obvious implications. In particular, it has been interpreted by British and American courts to rule out any reliance on stereotyped assumptions in the place of an inquiry into individual merit. Thus suppose a woman applies for the job of driving a juggernaut and the employer rejects her out of hand, assuming she is not qualified to do the job on the basis of the true belief that driving juggernauts calls for an amount of strength which women in general do not have. British and American courts have decided that this amounts to discrimination because a fair assessment of an individual's merits must rest on an assessment of his or her *own* ability to do the task, and not on statistical generalizations, even true statistical generalizations, about the average ability of members of the social group to which the individual belongs. Thus on this interpretation of the principle of non-discrimination, it requires so-called 'individualized inquiry': everyone is to be treated as an individual and assessed on their own merits, with a view to determining whether they may not perhaps be an exception to the statistics.

The principle of non-discrimination is clearly an important and powerful ideal, and some people feel that it fully captures the concept of sexual equality. Others, however, disagree, saying that in certain important respects the principle of non-discrimination does not deliver the good of sexual equality.

I discuss one respect in which I believe this is so in my article 'Sexual Equality and the Law'. [1] It has to do with the fact that in most of the cases in which women are treated less favourably than men this is on the basis of characteristics which *only* women can have, but which not *all* women have. Pregnancy is a good

example. And the problem with such characteristics - so-called 'sex-plus' characteristics - is that it is not at all clear that a ban on sexual discrimination would do anything to outlaw less favourable treatment on their basis.

Suppose an employer dismisses an employee for the reason that she is pregnant. To show that she has been discriminated against on the grounds of her sex she will need to show that she has been less favourably treated than a comparable man on the grounds of her sex. There are - though they are sometimes incorrectly run together - two quite separate legs to this test. For the employee needs to show not merely that she has been less favourably treated than a comparable man, but also that the less favourable treatment was on the grounds of her sex.

The British case of *Turley v Allders Department Stores Ltd*[2] in effect argued that the employee could never succeed on the first leg. The EAT argued that a woman who had been dismissed because she was pregnant had not been discriminated against, because the concept of discrimination presupposes the possibility of a comparison, and since it is impossible for men to become pregnant there was no comparably situated man with whose treatment the pregnant employee's might be compared. This reasoning is, however, flawed. Suppose that someone is passed over for a job just because she is a woman. The reasoning of the EAT implies, absurdly, that she cannot be said to have been discriminated against because it is impossible for a man to be a woman and so there is no comparable person who has been treated more favourably. In fact, despite the fact that pregnancy is a characteristic unique to one sex, there *are* men in a comparable position to pregnant women, namely those men who require a comparable amount of time off from work due to temporarily disabling conditions from which they suffer.[3] The implication of this is that the pregnant employee *can* succeed on the first leg of the test for sexual discrimination, for she will succeed if the employer does not dismiss men who require a comparable amount of time off from work.

There is, of course, also another side to this coin. For while the first leg of the test licenses a search for characteristics possessed by men which are analogous to characteristics possessed by women, yet not the basis for detrimental treatment in the case of men, it also legitimates a search for characteristics possessed by women which are analogous to characteristics which attract a penalty in the case of men. The case of *Wimberly v Labor and Industrial Relations Comm'n of Missouri*[4] is instructive in this connection. The court rejected a sex discrimination challenge to a state law denying unemployment benefits to a woman out of work because of pregnancy, despite a federal statute forbidding discrimination in unemployment compensation 'solely on the basis of pregnancy', arguing that the state law also denied benefits to others who left their jobs voluntarily, or for reasons unrelated to the employer's action.

But while it will sometimes be possible for the pregnant employee to succeed on the first leg of the test for sexual discrimination, it is, by contrast, not at all clear that there

are any circumstances in which she can succeed on the second leg, that she show that her less favourable treatment was on the grounds of her sex. The reason for this was given in the well-known American Supreme Court case of *Geduldig v Aiello*.[5] An employer had been operating a disability insurance scheme which provided benefits for almost all disabilities, but excluded those connected with pregnancy and childbirth. The Court found that the scheme did not violate the equal protection clause of the Constitution, arguing that less favourable treatment on the grounds of pregnancy amounts to less favourable treatment of a *sub-class* of women, pregnant women, and therefore does not amount to discrimination on the grounds of sex.

Those opposed to the penalizing of pregnancy have poured scorn on the Court's reasoning, arguing that policies which less favourably treat only women, even if they do not less favourably treat all women, do discriminate on the grounds of sex. It seems to me, however, that, though it is quite wrong to penalize pregnancy, there was nothing wrong with the Court's reasoning, given the fact that what it had to decide was whether the company's scheme discriminated on the grounds of sex. Suppose the company had offered an insurance scheme to its employees which denied cover to all male employees, no matter what the disability suffered, but paid for all disabilities suffered by women, with the single exception of pregnancy. Such a scheme would have discriminated against two classes of people, men and pregnant women - men on the basis of their sex and women on the basis of their pregnancy. If the company had then ceased to discriminate against men, changing its policy to cover all disabilities suffered by all employees, but retaining the pregnancy exclusion, this would not have transformed the discrimination suffered by the pregnant employees on the basis of their pregnancy into discrimination on the grounds of their sex.

The lesson of this discussion is that the concept of sex discrimination is likely to be ineffective in outlawing detrimental treatment on the grounds of such characteristics as pregnancy - firstly, because pregnant employees treated disadvantageously may have been treated no worse than comparable men, and secondly, because, even if they have been treated worse than comparable men, this will not have been on the grounds of their sex. It is, of course, true that legislation is likely to make special provision for the needs of pregnant women, but this would still leave us with the problem of detrimental treatment on the basis of sex-plus criteria *other* than pregnancy. A relevant work-place example of detrimental treatment on the basis of sex-plus criteria other than pregnancy is that of sexual harassment. Typically the employer does not harass all his female employees, but only those he finds sexually attractive. If my argument is correct, those who are harassed will find it hard to argue that they have been discriminated against on the grounds of their sex.

Of course, this is not to say that a sexually equal society would tolerate detrimental treatment on the grounds of pregnancy and other sex-plus criteria. But it does show us that we need a concept other than that of sex discrimination to give us an adequate handle on the notion of sexual equality. I believe that

the concept better suited to this purpose is that of fairness. We should be asking how fair it is that a particular policy should impact adversely on women's interests. Thus in the pregancy context we should be asking: 'Is it fair to operate with employment policies which penalize those who bear children and assume more of the responsibility for their care, especially given the fact that the task of bringing up children is in the whole community's interests?' The test would be whether, if one did not know one's sex, one would be willing to accept that women's disproportionate burden in the domestic sphere should translate to the extent that it does into social and economic disadvantage.[6] I believe that anyone who seriously reflected on this question would not be willing to accept the disadvantages.

There is also another way in which the concept of discrimination is not adequate to deal with the facts of sexual inequality. In effect, a ban on discrimination would guarantee that there are no deliberately imposed external obstacles to women's personal advancement. But consider the fact that even if we were to find ourselves overnight in a society in which there was no sexual discrimination at all, we would still continue to find huge differences in welfare between men and women considered as groups. The reason is that it is not deliberately and unjustly imposed legal barriers which really account for the disadvantaged position of women, but far less visible features of our society, and in particular the fact that women bear a much greater share of the domestic burden. The result is that women are less likely to have the qualifications which are rewarded with income, status and power by perfectly non-discriminatory or open competition for jobs and social positions, and therefore that the outlawing of sexual discrimination cannot be expected to go far in countering the substantive social and economic inequalities between the sexes. When one adds to this picture the fact that those whose life prospects are increased or diminished through the factor of their sex are not responsible for their fate - that the advantages and disadvantages are undeserved, a matter of good or bad luck merely - many theorists want to conclude that in the absence of any other justification of these inequalities, to allow them is fail to deliver on the goal of sexual equality. After all, it is to tolerate differences among men and women which, being a matter of chance, are irrelevant from the moral point of view and therefore unfair.

Notice that this point is true whether the inequalities between men and women have social or biological causes. For the point being made is that people's destinies ought not to be unjustifiably affected by matters of accident or chance, and it is irrelevant whether your good or bad luck is a matter of social or natural factors. Thus it is not necessary to assume that the existing inequalities of wealth, status and power between the sexes have social causes in order to label them unfair. If, for instance, it is unfair to demand that women who want access to the public world of paid work should meet standards which it is much easier for male employees to meet, then this will be so regardless of whether women's difficulties in meeting the standards have social or biological causes.

How, then, should we deal with undeserved and unfair inequalities between men and women? The ideal solution would be if we had some means of ensuring that men and women have the same chance of developing the characteristics which society rewards. But if this is utopian, as it seems, then
the only other solution is a redistributive one. It is to say that we should aim to equalize educational and occupational *benefits* across the sexes, even if in the process we have to some extent to ignore the superior qualifications of men. We may, in other words, be forced to ask the sexes to meet *different* rather than the same criteria - at any rate until the point is reached at which the costs of such a policy can no longer be justified. The solution, in other words, is to give a certain amount of priority to diminishing social and economic inequalities, even if in the process we may be forced to violate the principle of non-discrimination.

Legal developments overseas are influenced by this line of thought. It is accepted by British and American law that certain non-discriminatory practices, or practices which treat the sexes identically, may actually stand in the way of the achievement of sexual equality. Suppose, for instance, that an employer wishes to make a 'young blood' appointment, and therefore stipulates that applicants for a job must be under a certain age.[7] This is a facially innocent or sex-neutral policy which, in demanding that members of both sexes meet the same criterion, treats them identically. Women, however, are less likely to pass the test, because their child-rearing responsibilities tend to interrupt the progress of their careeers. Use of this criterion therefore disadvantages them disproportionately, and British and American law would be prepared to prohibit use of the criterion, provided that the disproportionate impact is not necessitated (in American law) or merely justified (in British law) by other interests. Clearly, the underlying ideal here is that of equalizing unfair occupational benefits or outcomes acoss the sexes. The law is being used to diminish undeserved and unfair social and economic inequalities between the sexes.

Unfortunately, however, the legal position has been complicated by the fact that - instead of frankly acknowledging that the principle of non-discrimination may come into conflict with the goal of equalizing economic outcomes for the sexes, and giving a certain amount of priority to the latter - overseas jurisdictions have chosen to gloss over the conflict by expanding the concept of discrimination artificially. What I called the principle of non-discrimination is seen as outlawing only one kind of discrimination, now labelled 'direct' discrimination, and a new form of discrimination has been discerned, and labelled 'indirect discrimination'. Direct sexual discrimination refers to the differential *treatment* of the sexes - treating members of one sex less favourably than members of the other, on the grounds of their sex. Indirect sexual discrimination refers to *identical* treatment of the sexes which has a different *impact* on them and which cannot be justified. Thus these jurisdictions would call the young blood criterion, if it failed to be justified by other interests, not merely unfair, as I would, but discriminatory. In particular, it would be indirectly discriminatory.

While I am sympathetic to the aim of reducing disparities in welfare between the sexes considered as groups, I do not believe in the workability of this particular solution, namely that of simply *tacking on* the demand that employment and other practices should not unjustifiably adversely affect the members of one sex to the traditional demand for sex-blindness, as if they were mutually compatible ways of avoiding the evil of discrimination. For the only way to avoid policies with a disparate impact on women may be to require women to meet different criteria from men, and therefore to treat men and women differently. But this would come into conflict with a ban on direct discrimination on the grounds of sex.

This problem could be avoided if we gave up the conceptual apparatus of discrimination entirely, and sought rather to determine whether particular policies which impact adversely on women's interests are fair. But that is probably an unrealistic solution, the language of discrimination being so firmly entrenched in our politics, and in the legal systems of other countries. If we take the vocabulary of discrimination as a constitutional given, we will need to decide which, in a particular set of circumstances, is more important, the ideal of sex-blindness, or the ideal of diminishing social and economic inequalities between the sexes. One way in which the law could allow for that decision to be made would be if it refrained from outlawing direct discrimination on the grounds of sex specifically, and chose rather to outlaw direct discrimination more generally, this being defined as any form of unjustified differential treatment. If this solution were adopted the onus would be on men treated differently from women to *prove* that their different treatment was, in the circumstances, unjustified. It is, however, unlikely to be adopted, given the current predilection for listing and, indeed, proliferating outlawed grounds of discrimination. A second way in which the law could allow for a trade-off between the two ideals would be for it to retain a ban on direct sex discrimination, but to give the ban on indirect discrimination priority. This would allow for treating women and men differently in circumstances which justify it. But a *blanket* ban on both direct and indirect sex discrimination, which is what we unfortunately find in several of the proposed bills of rights, will merely create an impasse.

Footnotes

[1] D Meyerson 'Sexual Equality and the Law' (1993) 9 *South African Journal on Human Rights* 237 at 239-40

[2] [1980] ICR 66 (EAT)

[3] This was recognized in *Hayes v Malleable Working Men's Club and Institute* [1985] IRLR 367. Cf also the American 1978 Pregnancy Discrimination Act, which amended the title VII sex discrimination ban to provide that 'women affected by pregnancy, childbirth, and related medical conditions shall be treated the

same as other persons not so affected but similar in their ability or inability to work.'

[4] 107 SCt 821 (1987)

[5] 417 US 484 (1974)

[6] It will be obvious that I am here relying on the intuition so powerfully exploited in Rawls's work, that imagining that you do not know certain facts about yourself, such as your social and economic position, your natural talents and endowments, and your sex, helps you to arrive at an impartial solution to questions of social justice, because it does away with your natural inclination to favour those social institutions which cater to your particular interests.

[7] This was the situation in *Price v Civil Service Commission* [1978] ICR 27 (EAT)

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THE CONSTITUTIONAL VALUE OF EQUALITY

The inclusion of a right to equality in a bill of rights is in effect a recognition that each of us deserves to be treated with the same concern and respect as everyone else. This, however, doesn't take us very far, because the almost universal acceptance of the value of equality is compatible with many different versions of what equality actually amounts to, or requires in practice. In fact, there is probably no other political concept as complex and contested as this one. This means that the only way to get clarity on the issue is to spell out the different policies which political theorists and political actors have fought for under the banner of equality. This should put us in a better position to understand the implications of alternative formulations of an equality clause in a bill of rights.

How do we treat everyone with the same concern and respect? Probably the answer which springs most readily to mind invokes the principle of non-discrimination, or of formal equality. This principle can be phrased in general terms, in which case it asserts that no-one should be less favourably treated than another person on the grounds of a characteristic which is irrelevantly related to the distribution of the benefit or burden. Or it can pick out certain supect characteristics, typically race, sex or religion, as characteristics which should be regarded with a higher degree of suspicion when used as a basis for differential treatment than other characteristics.

Apart from guaranteeing the equal protection of personal and political liberties, in practice, the principle of non-dsicrimination is most important in the area of educational and occupational opportunities, and here it is often expressed as the principle of formal equality of opportunity. This is the once revolutionary principle that careers should be open to talents, that valuable educational and occupational benefits ought not to be a matter of hereditary privilege but the reward of those who merit them. Once again one can express this principle in slightly different ways. One can express it in general terms, saying that whether someone gets, say, a place in a university, or a particular job, should depend only on their relevant characteristics, that is, on how well they qualify for the place or are able to do the job. Or one can identify certain characteristics, such as race, sex, or religion, as in general incapable of being regarded as qualifications and therefore as in general irrelevant to the allocation of educational and occupational opportunities.

Clearly the principle of formal equality or non-discrimination is a powerful principle, ruling out apartheid-style laws and practices which say that, irrespective of their ability to qualify, those of a particular race (and, by analogy, sex) are not eligible to compete for benefits. It also has less immediately obvious applications. For instance, it has been interpreted by

British and American courts to rule out any reliance on stereotyped assumptions, and to require an inquiry into individual merit. Thus, suppose a woman applies for the job of driving a juggernaut and the employer rejects her out of hand, on the basis of the generalization that driving juggernauts calls for an amount of strength which women in general do not have. British and American courts have decided that this amounts to discrimination because a fair assessment of an individual's merits must rest on an assessment of his or her *own* ability to do the task, and not on statistical generalizations, even true statistical generalizations, about the average ability of members of the social group to which the individual belongs. Thus the principle of non-discrimination requires so-called 'individualized inquiry': everyone is to be treated as an individual and assessed on their own merits.

The principle of non-discrimination is clearly an important and powerful ideal, and some people feel that it fully captures the concept of equality. For these theorists, the law need only be concerned with guaranteeing that there are no deliberately imposed obstacles to personal advancement. Others, however, disagree, saying that in certain important respects the principle of non-discrimination does not deliver the equality of respect owed to everyone. This is because even if we were to find ourselves overnight in a society in which there were no racial or sexual discrimination at all, we would still continue to find vast differences in welfare between blacks and whites, and women and men, <u>considered as groups.</u> The reason is that some people are less able to acquire the relevant characteristics or qualifications rewarded with income, status, and power by non-discriminatory or open competition for jobs and social positions. The competitive disadvantages suffered by blacks, which will continue to be the legacy of apartheid for many years to come, are the starkest example of this kind of handicap. But women also face greater difficulties than men in acquiring the skills which society rewards. So all sorts of circumstances influence people's life-chances besides overt racism, or sexism - besides, that is the deliberate and unjust imposition of obstacles. But this seems unfair. It seems unfair that one can go into a maternity ward, look at the babies in the cribs, and be able to estimate those babies's future chances of success on the basis of the colour of their skin or their sex - characteristics which they have done nothing to deserve. This unfairness suggests that equality of concern generates a principle of <u>substantive equality</u>, as well as a principle of formal equality. The principle of substantive equality would assert that group characteristics like race or sex should not affect one's share of social rewards. And it would be satisfied when blacks and women, and perhaps other members of significant social groups, are represented in proportion to their numbers in the population in socially desirable positions.

Of course, the value of substantive equality can come into conflict with other non-equality-driven values - and even with the value of formal equality (on which, see below) - and these other values can, in particular circumstance, override the value of substantive equality. But in circumstances where it is not overridden, how can it be implemented? Ideally, undeserved advantages should have no influence on the acquistion of qualifications. But even with good free compulsory education that is a solution which will be practically impossible to achieve. Redistribution of wealth is another option. Finally, there is affirmative action which aims to equalize educational and occupational benefits across groups.

Two final points: (1) A terminological point: I have talked about the principle of non-discrimination (which I also called the principle of formal equality) and about the principle of substantive equality. These issues are, however, also often talked about using other terms, namely those of direct and indirect discrimination. These terms capture the same concepts as formal and substantive equality. Direct discrimination refers to the differential treatment of those who are similarly situated: a ban on it therefore aims to rule out the kind of overt discrimination which we associate with apartheid. Indirect discrimination, by contrast, refers to race-*blind* or sex-*blind* treatment which, despite treating the races or sexes identically, nevertheless has a different and unjustified *impact* on them: a ban on it therefore aims to equalize social and economic benefits among these groups. For example, suppose an employer refuses to employ anyone who has primary responsiblity for small children: this is a sex-blind restriction and therefore does not fall foul of the ban on formally unequal treatment or on direct discrimination. However, it disadvantages women more than men, and if it cannot be shown to be otherwise justified it falls foul of a ban on substantively unequal treatment or indirect discrimination.

(2) The principles of formal and substantive equality can conflict because the only way to equalize social and economic advantages for blacks and women may be to discriminate on the basis of their race or sex against whites and men. This is, after all, what affirmative action licenses. The drafters of the constitution therefore need to be alive to this conflict and provide specifically for its resolution.

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Evidence to Theme Committee 1, Constitutional Assembly

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By democracy I understand a political system possessing three institutional attributes:

(1) universal adult suffrage, permitting eligible voters to participate in regular, free elections;

(2) the protection of human rights, especially the rights to freedom of expression and freedom of association; and

(3) an independent judiciary.

Modern democratic political systems vary in the ways in which these attributes are embodied: types of electoral systems vary; some may protect rights through a bill of rights, others not; systems may be federal or unitary, presidential or parliamentary, bicameral or unicameral, etc. The appointment procedure for judiciaries may vary; and some systems employ constitutional courts, while others permit constitutional cases to be heard by the ordinary courts.

Governments of the day are accountable, in the first place, to legislatures, and, in the second place, to the electorates that choose them. Where the constitution is supreme law, governments are accountable for their actions to the constitution through the institution of judicial

review. A variety of mechanism exists whereby legislatures can hold executives to the accountability principle.

Since there is virtually complete consensus on these formal criteria of the democratic political system little more needs to be said about them in this context.

My focus, instead, is on some of the problems arising out of their practical implementation. Regular, free and fair elections presuppose a reasonably regular alternation in the governing party (or coalition) or a shifting composition of the governing coalition in those parliamentary systems which feature rule by coalitions as a norm (which is the case in about 70% of all established parliamentary democracies). If this were not the case the necessity for holding elections would be much reduced, if not superfluous: why bother to hold elections if the outcome is pre-ordained?

If governing parties are to change and / or the composition of coalitions is to change, then it follows that some percentage of the electorate must switch party affiliation from time to time. This is the whole rationale of elections in democratic systems: voters support the party which they believe will best safeguard their interests, and they switch their support to another if they perceive that their interests have been neglected or if they believe that a rival party could do so more effectively.

What happens in political systems in which this phenomenon of shifting voter allegiance does not occur, or occurs only to a negligible extent, or occurs only between parties rooted in the same segment of a society, e.g. the Protestant voter in Northern Ireland who switches support from a moderate Protestant-based party to a radical Protestant-based party; or the Malay voter in Malaysia who switches support from the Malay party in the ruling coalition to a more radical Islamic party also rooted in the Malay segment? What happens, in other words, to any credible theory of a democracy if the electorate is divided into relatively fixed blocs with little or no mobility of voter support among them?

That this pattern of voting behaviour is not merely a hypothetical example but conforms to the data revealed by all deeply divided societies can be confirmed by an analysis of the literature. (Bibliography available on request.)

Certain conclusions flow from these findings (again, verifiable in the technical literature):

(1) the paradigm of alternating governments / shifting coalitions is largely inoperable in deeply divided societies where electorates are divided into blocs based upon race / ethnicity, religion and (occasionally) ideology.

(2) minorities (however configured) that suffer exclusion from a share of power in perpetuity are liable to become alienated from the political system and may have recourse to violent methods.

(3) 'permanent majorities' are liable to create single-party hegemonic systems that profoundly subvert any coherent notion of democracy. The idea of a party as 'the natural party of government' (as claimed recently by a cabinet minister for one of South Africa's parties) is similarly inconsistent with democracy.

(4) non-racial / non-ethnic parties seldom, if ever, are superseded by parties that are based around class, ideology or some other non-ascriptive feature. More common is the tendency for 'catch-all' parties (i.e. broad-based parties appealing to a wide spectrum of diverse ethnic, caste and other ascriptively-based groups, exemplified by the Congress Party of India) to lose their 'catch-all' appeal as more particularistic groups mobilise.

I have not been requested to explore ways of coping with the problem of sustaining democratic government in deeply divided societies (and the time allowed, in any case, does not permit this). I offer instead a series of brief propositions (each capable of much greater elaboration):

(1) there is no recorded case of 'simple majoritarianism' proving consistent with democracy on a durable basis.

(2) at all costs, political systems in deeply divided societies must avoid 'winner-take-all' outcomes.

(3) no minority population element (however configured) must feel that representation in government by credible representatives (as opposed to non-representative 'fringe' elements) is not a possibility denied to it in perpetuity.

(4) the chances of sustaining democratic government will be enhanced to the extent that all decisions of major political importance are based upon maximal consensus across party lines.

(5) broad-based coalitions, on the basis of the available evidence, offer the best hope of underpinning a democratic political system.

(6) if minority parties habitually frustrate majority parties, and majority parties habitually steamroller minority parties, failure of the political system is inevitable.

(7) constitutions can address only a small part of the problem. They are 'mere parchment barriers' (James Madison). The prospects for democratic sustainability are enhanced by higher socio-economic levels of development, a supportive political culture (conducive to democratic values), and a vigorous civil society. In the final analysis sustained democracy will be achieved and sustained only if the politicians and parties that operate a political system are committed

to it. In the special circumstances of a deeply divided society that commitment must include a generous and pragmatic view of the supreme importance of preserving, increasing and consolidating racial harmony. All political decisions have to be measured against that touchstone.

David Welsh

Liberals and the future of the New Democracy in South Africa

David Welsh

Late twentieth century liberalism is a protean creature. It incorporates a wide spectrum of views ranging from conservative neo-liberalism to those that are hardly distinguishable from social democracy. Notwithstanding this diversity liberals have historically been unified around the belief that individual rights were inalienable, that divergent opinions should be tolerated, and that individuals should be enabled to develop their potential to the maximum possible extent.

Liberalism arose in the relatively homogeneous societies of Western Europe, but in the modern world it has been forced to address the challenges posed by the internal diversity of most contemporary states. The traditional concept of the nation-state is seriously out of alignment with the observable fact that, perhaps, no more than ten per cent of all contemporary states are "nations" in the traditional sense of possessing that overarching sense of identity.

A comparable paradox affects liberalism: the more liberal democracy becomes the preferred state form the more marginalised specifically liberal parties have become. Only in Canada and Iceland, to this writer's knowledge, do parties proclaiming an unambiguous commitment to liberal values actually rule.[1]

The paradox is more apparent than real because what has actually happened is that core liberal values such as constitutionalism, respect for human rights and the rule of law have become part of the universally accepted fundamentals of the modern democratic policy. The liberal democratic state can be ruled by conservative, democratic socialist or even by repentant communist governments without violating its basic principles.

A distinction must be drawn, however, between liberal-democracy, which is a kind of political system, and democratic liberalism, which is a particular ideology.[2]

The seeds of a South African Liberal Democracy...

South African liberalism has reflected liberalism's diversity. It has been held together also by a common rejection of racial discrimination, a preference for reform over revolution, and a rejection of Marxism-Leninism. Like liberals elsewhere, South African liberals varied in their economic views but all agreed that market-driven economies based upon strong private sectors were superior to command economies.

What happened to South Africa's Democratic Party in the election of April 1994 is partly a reflection of wider trends, although peculiar local circumstances were decisive. Most notable among these was the considerable extent to which voting went along ethnic lines - most blacks voted for liberation, most whites voted for a counterweight to the forces of liberation, while most Coloured and Indian voters voted for the devil they knew (without affecting the principle that the voting was more of a census than a free choice, to borrow Donald Horowitz's phrase[1]).

Our version of the paradox lies in having an interim constitution that has all the trappings of the classic liberal-democratic form, but with a ruling government consisting of political organisations whose traditions show scant respect for democratic liberalism.

This observation should not be construed as a cheap debating point. There are historical reasons why the National Party traditionally regarded liberalism as a doctrine only marginally less dangerous than communism; and, equally explicable, there are reasons why by the late 1940's the ANC rejected the kind of constitutional liberalism it had espoused from its inception in 1912. By the late 1950s stalwart African liberals like ZK Matthews and Albert Lutuli were being eclipsed by younger radicals who had become impatient with liberalism's essential moderation and its preference for negotiated, reformist and incremental change.

What might loosely be called "Third Worldism", an inchoate ideology of protest, had influenced the ANC. Ideology is perhaps the wrong word because it suggests some degree of systematic doctrine, whereas "Third Worldism" was more an outlook or even a state of mind. It embodied a radical critique of imperialism, exploitation and racism. In varying degrees "Third Worldism" incorporated also a Fanonesque vision of violence as the instrument of liberation and the means of purification from imperialism's polluting embrace.

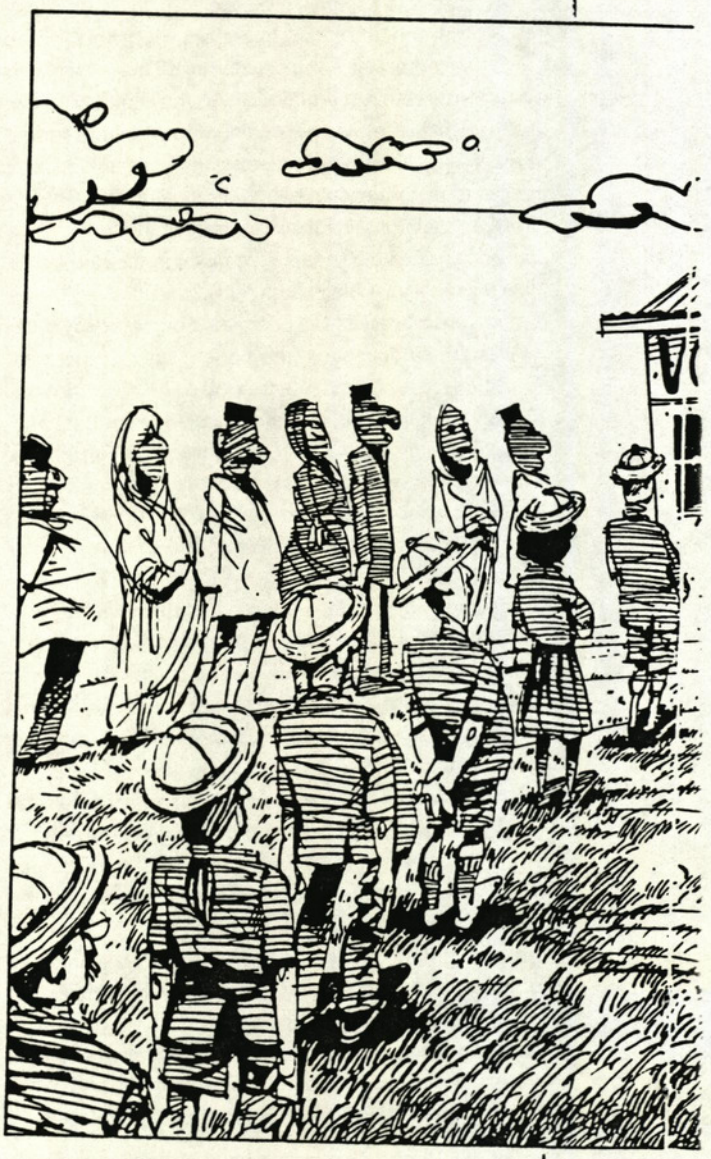
This was a heady brew when combined with a strong sense of racial nationalism and its essentially Jacobin view of popular sovereignty. Liberalism's insistence on restraints upon power, its finicky insistence on proper constitutional and procedural forms, and, above all, its apparently symbiotic link with capitalism ensured that it was no match for the allure of "Third Worldism".

In South Africa liberalism was increasingly regarded as a middle-class white doctrine that was fundamentally concerned with staving off the revolution and protecting property rights. In nineteenth century Europe, liberalism was the creed of liberation; by the late 1960s in South Africa it was widely perceived as a Marcusean-style doctrine that offered the shadow, but not the substance, of real change.

The dramatic collapse of Marxism-Leninism (which survives now in its pure form only in quaint relics such as Cuba and North Korea), the serious and, in some cases, successful challenges to one-party states in Africa, and the demonstrable superiority of market-driven systems have combined to give liberalism a powerful new impetus.

One does not have to go as far as Francis Fukuyama to agree that the liberal-democratic form of state has no serious ideological challenger. Nor has there been a convincing refutation of Peter Berger's sixteenth proposition that "Capitalism is a necessary but not sufficient condition of democracy under modern conditions".[2]

Liberalism, as an organised force (or party), may have lost many battles, but there is a larger and more important sense it which it has won a war. It has won an ideological war, but it has not conclusively secured the peace. Fierce ethnic nationalism and demands for



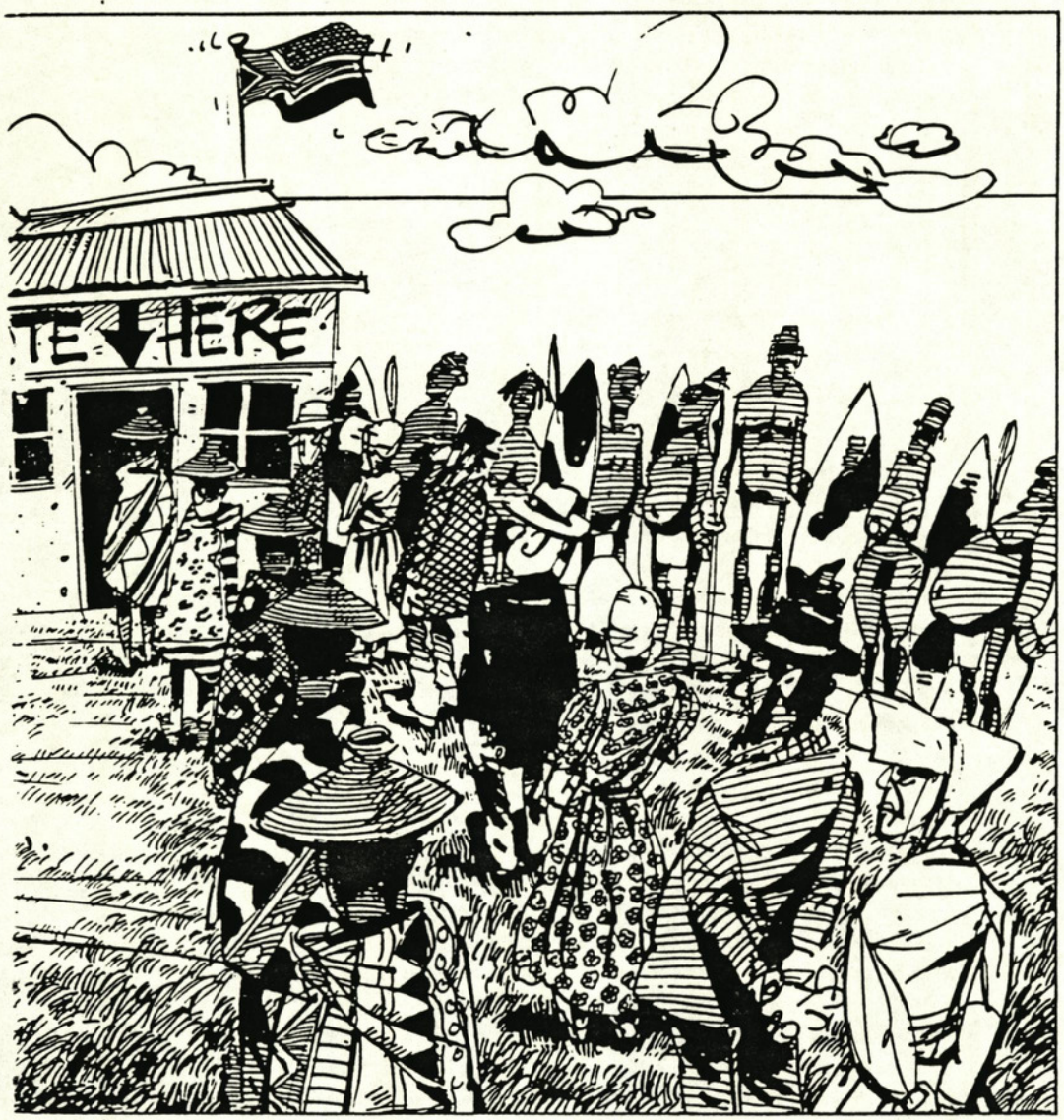
self-determination threaten to tear parts of Europe and Africa apart. Even in established democracies there is a widespread cynicism about political leaders and institutions, though not a repudiation of the underlying principles.

Notwithstanding these qualifications, liberal-democracy remains ahead of the pack. Henceforth the debates will be mostly second-order ones over the form institutional embodiments of liberal-democratic principles should take (e.g. what kind of electoral system, how much federalism), and what restraints should be placed upon market forces, how comprehensive welfare systems should be, and so on. The designation of these issues as "second order" should not be read as implying their unimportance, merely that they arise within the context of an agreement on fundamentals. Even so, many are profoundly difficult to resolve.

Shallow soil For Democratic Liberalism

Seemingly, democratic liberalism as an organised party force appears not to be viable in South Africa. This may be a premature judgement, given that the Democratic Party's disappointing performance occurred in the atypical circumstances of a founding, *uhuru* election. Moreover, if party alignments are more-or-less frozen by the squalid provision (section 43) of the interim Constitution that denies MPs' rights to change party affiliation, currents of realignment may nevertheless continue to swirl beneath the frozen surface of the lake.

It is likely that individuals with genuinely liberal-democratic convictions exist in all of the major parties, but it would be inadvisable to infer from this that realignment will necessarily occur in the future. However, a realignment that cuts across existing party and racial divides would be a desirable development, especially if it created a party system featuring, say, two bigger parties roughly equal in size, and two or three smaller parties, some or all of whose support was necessary to a bigger party to enable it to govern. I advance this possibility for the reason that I do not share the view that South Africa has yet democratised. It has established democratic institutions and it has held a deeply flawed founding election, which was anything but "substantially free and fair" (though nevertheless yielding a result that was probably a reasonably accurate picture of the distribution of popular preferences).



Before a political system can be pronounced democratic, its institutions have to be consolidated and the political actors have to demonstrate that their respect for the rules and procedures carries greater weight with them than does any particular electoral outcome - which is a ponderous way of saying they must be prepared to accept defeat.

Democratic stability, it has

been maintained, is demonstrated by, and achieved when, two changes of government via the ballot box have occurred. Adam Przeworski goes further, maintaining that no state in which a party wins 60 percent of the vote twice in a row is a democracy.[3]

These may be unfairly rigorous criteria, but they highlight a concern of liberals since the time of de Tocqueville and John Stuart Mill, namely the problem of the tyranny of the majority. In the South African context the issue may be crisply stated: if democracy requires the reasonably regular alternation of government, or the realistic possibility of this, how will democracy prove compatible with the racial voting that seems likely to continue?

The rocky ground of an untested Democracy

Is South Africa likely to prove different from the recurrent pattern found in deeply divided societies in which racially/ethnically defined majorities and minorities crystallise in relative permanence?

I am not making a prediction that this is what South Africa is fated to experience. The potentially benign constellation of political forces that I have mooted above may occur naturally in the ebb and flow of politics. On the other hand, it may not, and this is a possibility that is fraught with danger to any credible concept of liberal-democracy.

Creative liberal thinkers ought to turn their minds to the problem of how one sustains liberal-democracy (and not just its outer forms) in a situation in which racial voting stubbornly refuses to disappear.

In terms of constitutional principle xiv of Schedule 4 of the interim Constitution the final Constitution is obliged to provide for the "participation of minority political parties in the legislative process in a manner consistent with democracy".

How the Constitutional Assembly will give this constitutional expression will be interesting to see. It is an issue of critical importance upon which liberal voices should be heard.

My advice to liberals is, I fear, not very inspiring for the simple reason that there is no magic formula waiting to be discovered.

Liberals have to go on doing what they have always been doing, namely playing the role of vigilant watchdog and ensuring that creative ideas are injected into public debate. Liberals are strongly represented in many of the major organs of civil society, including the professions, business, the media, educational institutions and a wide variety of other associations. From de Tocqueville onwards political scientists have known how critical a vigorous civil society is to the health and resilience of democracy.

TRANSPARENCY AND ACCOUNTABILITY ARE TWIN PILLARS OF DEMOCRACY, BUT THEY CANNOT BE SECURED BY POLITICAL AND CONSTITUTIONAL MECHANISMS ALONE

If liberalism means anything it means commitment to an open society in which lines of communication remain unclogged, in which government and other centres of power remain under the critical scrutiny of the public gaze, and in which alternatives can be debated.

I agree with Ralf Dahrendorf's observation about the collapse of communism in Eastern Europe of which he said:

> ... they have shed a closed system in order to create an open society, *the* open society to be exact, for while there can be many systems, there is only one open society. If any creed has won in the events of last year, it is the idea that we are all embarked on a journey into an uncertain future and have to work by trial and error within institutions which make it possible to bring about change without bloodshed. What has died in the streets of Prague and Berlin and Bucharest is not just communism, but the belief in a closed world which is governed by a monopoly of 'truth'.[4]

Transparency and accountability are twin pillars of democracy, but they cannot be secured by political and constitutional mechanisms alone.

It is doubtful whether liberalism will make headway by means of ringing appeals. There is undoubtedly a place for exhortation and the constant reiteration of liberal values, but their strength and appeal are more likely to be enlarged by their proven worth on the anvil of experience.

Abuses of power, invasions of freedom of expression and attacks on academic freedom or university autonomy, to name a few potential examples, may unite a few diverse coalitions in defence of values whose usefulness and intrinsic worth even non-liberals can appreciate. Or the new government may try to implement some of the hegemonic aspirations that its wilder elements espouse. This could have serious implications for the vitality of civil society. Associations that value their autonomy - which is the defining attribute of civil society - may resist the threat.

And the thorny issue of the middle class

The failure of explicitly liberal organisations to acquire major black support is a longstanding lament: if liberal values are to thrive they will require large-scale support in black communities. In nineteenth century Europe liberalism was often referred to (usually derisively) as "the creed of the middle classes". Derisive or not, there

was some truth in the observation. In general educated, professional people evince a stronger self-consciousness of their rights and demand more space or freedom. It is also true that the larger the middle class the stronger the chances of making a success of liberal democracy. The radical scholar Barrington Moore put it pithily in his maxim "No bourgeois, no democracy".

The growth of a sizeable middle classes in modern societies is an aspect of the wider process of socio-economic development. The middle class commonly contains quite wide variations in political preferences, as the declining link between class and voting behaviour in many Western Democracies shows. Relatively small percentages of the middle class will support specifically liberal parties, but their support for those core liberal values which undergird the democratic state is thorough-going.

With a generous definition of 'middle class' including teachers, nurses, clerks and other white-collar workers, the African middle class represents about five percent of the African population. It is bound to grow rapidly, just as an Afrikaner middle class developed rapidly after 1948. It would be wrong to infer mechanistically from this that ergo support for liberal values will increase. A dependent bureaucratic bourgeoisie may develop more interested in parasitism than the enlargement of their freedoms.

Hopefully, if South Africa can shake off its legacy of low growth and place itself on a path of reasonably high growth, there will be a surge of black professionals and entrepreneurs who, like their counterparts elsewhere will be receptive to liberal values.

Educated, professional people require a certain psychological space around them if their creative energies are to flourish. Only an open society can secure that space. Again, it must be stressed that there is nothing inevitable or mechanistic about this process: it is merely a possibility.

IF THE INTERIM CONSTITUTION AND ITS FINAL SUCCESSOR SURVIVE IN LIBERAL DEMOCRATIC FORM AND WORK SUFFICIENTLY WELL TO PUT DOWN ROOTS OF LEGITIMACY, IT MAY BE REASONABLY ANTICIPATED THAT DEMOCRATIC CONSTITUTIONALISM WILL SEEP INTO THE PORES OF SOCIETY ... INFLUENCING EVEN THOSE PARTIES THAT HAVE HISTORICALLY REJECTED LIBERALISM.

If the interim Constitution and its (final) successor survive in liberal democratic form and work sufficiently well to put down roots of legitimacy, it may be reasonably anticipated that democratic constitutionalism will seep into the pores of society, finding resonance with these rising classes and influencing even those parties that have historically rejected liberalism.

This is an optimistic scenario, which assumes no breakdown of the system, no ethnic conflagration, and the sustained, wide diffusion of prosperity - and hope.

In these circumstances the strength of liberal values will grow by a process of political osmosis rather than by a sharp ideological break.

It would be realistic to anticipate that those who steer the process and articulate what is happening will mostly be black. Overtly liberal bodies, like the SA Institute of Race Relations or the Democratic Party, are largely white, but they have never claimed to be the exclusive custodians of liberal values. If the process sketched above occurs they would surely welcome it.

The inclusion of a justiciable Bill of Rights in the interim Constitution represents a major advance that liberals welcome. They would be churlish not to acknowledge the strong commitment to it that both the National Party and the African National Congress have shown. It is no doubt true that several clauses in the Bill of Rights need tightening up - journalists, for example, have demanded more explicit protection of freedom of the press -and others may be ambiguous in their meaning. Equally welcome are other sections that contain powerful safeguards against the abuse of power. Some of apartheid's worst excesses occurred during states of emergency under which the executive assumed draconian powers. Section 34 of the interim Constitution lays down stringent conditions for the imposition of a state of emergency, including the capacity of the superior courts to challenge its validity, and provide safeguards for detainees.

Notwithstanding these admirable innovations we should be realistic (or cynical enough) to realise that constitutions are, to quote James Madison, "mere parchment barriers" that are not invulnerable to the depredations of politicians. The modern world, however, is increasingly intolerant of governments that renege on democratic commitments, and powerful sanctions can be imposed upon those that do. The internationalisation of the South African issue that began in the 1960s was not an unmixed blessing, but it may have the unintended and benign consequence of keeping South Africa's government up to the democratic mark. The dismantling of apartheid and the creation of a new, non-racial system represented a famous victory for liberty: no political leader in his right mind would want to incur the international odium that failure of the democratic experiment would undoubtedly cause.

Economic growth and liberal values

What of business and liberal values in the new South Africa? Collectively business played a significant role in bringing about the transition. Moreover, its experience in the turbulent field of industrial relations taught all South Africa valuable lessons about negotiations that rubbed off on the politicians. The frequent, hard-headed analyses of our economic restraints that emanate from the private sector have played no small part in persuading the new government to adopt what, so far, have been pragmatic and moderate policies.

Fifteen years ago many in the ANC regarded business as part of the "enemy". Today leading ANC figures speak of "partnership" between government and the private sector, and President Nelson Mandela emphasises the private sector's "central role" in promoting the sustained growth that must be attained if the Reconstruction and Development Programme is to succeed. South Africa, moreover, is evolving a neo-corporatist system, common in Western Europe democracies, in which the state, the private sector and organised labour come together in regular 'summits' to hammer out economic policies.

All of this suggests that business will have significant influence and leverage in the new order. At the risk of some over-simplification, it used to be said in the heyday of apartheid that business was all about politics, meaning that politics crucially shaped the private sector's existence and freedom of manoeuvre. Today it may be that politics is all about business, meaning that without a vigorous private sector and the diffusion of increasing prosperity South Africa will stagnate and become yet another African basket case.

Business faces tough challenges. To thrive private sectors require three fundamental conditions: stability, predictability and security of property. Contrary to the commonly-held view that democracy is inimical to economic growth, the evidence is stronger that democracy, by institutionalising political and economic freedoms, may in the longer run encourage stronger growth than non-democratic systems.[7]

The issue remains a hotly debated one, and South Africa will provide an illuminating test case. Freed from the constraints of apartheid and strangulation by sanctions, business has a major role to play in making a success of the new South Africa. In partnership with a legitimate government it can demonstrate the vigour and vitality of which it is capable. As the saying goes, the business of business is primarily business. In South Africa, though, that was never a wide enough vision. Just as business sloughed off its earlier attempts to stand aside from the great political issues, so it needs to remain involved in the great task of ensuring that South Africa's democracy puts down firm roots.

The critical issue that South Africa faces is whether it will degenerate into a society that is corroded and dragged down by a "culture of entitlement" in which people demand rights, state-support and handouts, or whether South Africans will acquire the self-discipline and sense of self worth that accompany what might be called a "culture of enterprise".

Higher levels of job-creating investment in South Africa, coupled with an active support by big business for the emerging business sector, are preconditions for the growth of a culture of enterprise. Yet, as the American writer Shelby Steele has argued so eloquently, such a culture will not survive in the context of policies which favour racial entitlements at the expense of development. It is a lesson which South Africans should heed.

CONTRARY TO THE COMMONLY-HELD VIEW THAT DEMOCRACY IS INIMICAL TO ECONOMIC GROWTH, THE EVIDENCE IS STRONGER THAT DEMOCRACY, BY INSTITUTIONALISING POLITICAL AND ECONOMIC FREEDOMS, MAY IN THE LONGER RUN ENCOURAGE STRONGER GROWTH THAN NON-DEMOCRATIC SYSTEMS.

Endnotes

1. Frank Parkin, *Marxism and Class Theory - A Bourgeois Critique*, (London: Tavistock Publications, 1979) p 189.
2. Richard Bellamy, *Liberalism in Modern Society* (Cambridge: Polity Press, 1992) p 252 ff.
3. Donald L Horowitz, *Ethnic Groups in Conflict* (Berkeley: University of California Press, 1985) p 86
4. Peter Berger, *The Capitalist Revolution - Fifty Propositions about Prosperity, Equality and Liberty* (New York: Basic Books, 1986) p 212.
5. Adam Przeworski, *Democracy and the Market: Political and Economic Reforms in Eastern Europe and Latin America* (Cambridge: Cambridge University Press, 1991) p 95.
6. Ralf Dahrendorf, *Reflections on the Revolution in Europe* (London: Chatto and Windus, 1990) p 36-7
7. *The Economist*, 27 August 1994, pp 9-10, 15-17

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I have spoken them in deference to a man whom I deeply respect and with whom, on this issue if not on others, I profoundly disagree.

And, perhaps, I had to express these thoughts as a reminder to myself that, in the search for principle, loyalty and truth, I have so often known the agony of conflict and indecision, that I must concede at least the possibility that what I believe to be right may not be altogether right; and that what I believe to be wrong may not be wholly wrong.

Then, if I concede this to one man whom, knowing him, I respect, surely I dare not before my own conscience exclude all others, known or unknown, with whom I disagree.

4

The Governing of Divided Societies: A South African Perspective

DAVID WELSH

INTRODUCTION

As apartheid enters what appears to be its terminal phase, South Africans of all political persuasions have become preoccupied, if not obsessed, with the question of what form a post-apartheid political system might take. In this chapter I propose to ask what lessons, if any, the comparative analysis of other deeply divided societies has to offer South Africa, as it inches its way painfully towards a non-discriminatory social order. Some may contend that the inquiry is misplaced since South Africa's problem is *sui generis*. Since each society is unique, this is by definition true, but it should not stop us from recognizing that we may gain greater understanding of our own situation by examining others, even if they are comparable only in the broadest sense. We should, however, reject a 'shopping basket' approach to comparative politics, which tours the world of divided societies, selecting conflict-regulating mechanisms or institutions that appear to have been successful elsewhere and then supposing that they might be transplanted in South Africa.

It must also be recognized that workable constitutions are not usually dreamed up by scholars and then imposed. While scholars may often have valuable inputs to offer, constitutions are generally constructed by politicians with constituencies to consider. The process whereby constitutions are drawn up is often

as important as the provisions they contain. The basic aim of a constitution is to provide for a set of fundamental rules that govern the establishment of political institutions, deploy political power and, above all, regulate political conflict. The success of a constitution is gauged by its legitimacy, and legitimacy, in turn, will depend broadly on the extent to which all salient political forces have been involved in the process of constitution-making.

The Cyprus constitution of 1960, however, is a case of a constitution brokered by the British, but ultimately unacceptable either to the Greek-Cypriot majority or to the Turkish-Cypriot minority, both of whom had been extensively involved in the constitutional talks leading up to independence. The constitution itself was something of a milestone in the annals of constitutional solicitude for minority rights, containing as it did massively detailed provision for ethnic proportionality (although weighted somewhat in favour of the Turks) and other safeguards against simple majoritarianism.

Given the deep conflict between the two communities it was not surprising that the constitution failed the test of legitimacy. Greek-Cypriots felt hamstrung by the abridgement of simple majoritarianism, while Turkish-Cypriots continued to feel vulnerable. No conciliatory atmosphere was generated between the rival leaderships and no over-arching Cypriot national loyalty was built up. Both communities looked over their shoulders to their ethnic brethren on the mainland, themselves bitter rivals.

As is well-known, Cyprus lurched from crisis to crisis until in 1974 Turkish military intervention forcibly partitioned the island, whose northern and southern regions are now largely ethnically homogeneous Turkish-Cypriot and Greek-Cypriot states, respectively.

The cases of Cyprus and Lebanon, which were ruled by a delicately balanced ethnic power-sharing arrangement from 1943 to 1975, are often invoked supposedly to 'prove' that elaborate schemes for 'power-sharing', abridgements of simple majoritarianism and the converse, safeguarding of minority rights, either do not work or are undemocratic (or both).

Those who offer this perspective seldom feel obliged to supply the working model of an alternative system that they would have opted for in place of the original power-sharing arrangements. An argument for this hypothetical alternative may be constructed along the following lines, and I shall call it the 'centralising steamroller' model: ethnicity is a dangerous, disruptive and destabilising force that is highly inimical to the working of democratic government. The best way of coping with it is not to provide it with any structural toeholds in the political system, by outlawing ethnic parties, rejecting secessionist

movements and federalism. By creating a strongly centralised government you create both a force that is strong enough to fend off and neutralise ethnic challenges and a focus for a new national identity that is based upon the essential unity of interests of the citizenry. A resolutely 'non-racial' or 'non-ethnic' approach is the only one that holds out the hope of inculcating a spirit of national unity and attachment to common symbols of nationhood among a previously bitterly divided population.

Quite possibly this hypothetical argument will seek to explain ethnicity as a response to relative deprivation or occasionally as a resource invoked to protect privilege. For some Marxists it is essentially a widened form of class. Given these premises the remedies are obvious: the economic roots of ethnicity must be destroyed by radical redistributive programmes, far-reaching development plans and affirmative action schemes. The reasoning is that a society without serious and impacted economic inequalities would, hopefully, deprive ethnicity of its *raison d'etre*.

At the same time as this root-and-branch assault on ethnicity and its supposed causes, governments who adopt the 'centralised steamroller' model might simultaneously offer pious assurances to ethnic minorities, ostensibly encouraging their rights to develop their cultures, including language and religion.

In general terms this approach has been adopted by the USSR in its handling of the nationalities question. In theory it offered 'self-determination' to the ethnic minorities of the old Tzarist Empire, but in practice denied it in the interests of the working class; in theory it created a federal state, but in practice established a highly centralised state under the control of the Communist Party, and in theory it encouraged 'the flowering of national cultures' but in practice, at least for much of the time, promoted intensive Russification.

At the same time, we should not overlook certain resemblances with the 'melting pot' attitude characteristic of the United States' treatment of the millions of immigrants who entered America in the nineteenth and twentieth centuries. They were expected to assimilate and leave behind the cultures of their countries of origin.

Many of the governments of newly independent African states, confronted with major ethnic diversity, also attempted variants of the 'centralised steamroller' model. Except where no alternative was feasible, as in Nigeria, federalism was ruled out. It was perceived as a conservative form of government, tainted by neo-colonial overtones, that placed unacceptable obstacles in the way of governments that were intent on modernising their societies and forging new national identities. The saying was that every state has its 'Katanga', to which, in due

course, could be added Biafra and others. Federalism created regional bases for potentially secessionist ethnic groups and must therefore be avoided.

Much of the impetus behind the drive towards the one-party state stemmed from a belief (by no means groundless) that opposition parties would be virtually synonymous with ethnic or 'tribal' parties whose activities might threaten the integrity of the new state. Opinions vary on the efficacy of the one-party state as a strategy for curbing ethnicity: some argue that without undercutting the basis for politicised ethnicity, as in Kenya and Zambia, the state would not have been able to cope with the intensity of ethnic conflict; others maintain that the one-party system, even if the ruling party is forced to bargain with ethnic groups, is not only a serious infraction of democratic principles, but is also, ultimately, counter-productive as far as dealing with ethnic issues is concerned (Lewis, 1965). Donald L Horowitz (1985: 433) remarks:

> The end of party competition in elections means the end of the most important form of public accountability. It opens opportunities for ethnic and subethnic cliques and factions to attain hegemonic influence that would probably be checked in openly democratic systems, where failure to pay careful attention to ethnic distribution and representation risks loss of power.

If the 'centralising steamroller' model is committed to the elimination of ethnicity as a factor the chances are high that undemocratic and coercive measures will be adopted - unless, of course, the ethnics in question are scattered and fragmented, in fact, desire assimilation into the dominant group. Much more common, however, is the stubborn refusal of ethnic groups to sacrifice their identity on the altar of nation-building. Recent history is full of examples of minorities who were persecuted for claiming a right to remain different. One of the worst cases is the persecution of the Turkish minority (approximately 10% of the total population) by the Bulgarian government: A recent survey points out that while all Bulgarians are denied civil rights, the Turks are oppressed even more by the authorities' refusal to allow them to use the Turkish language, traditional forms of dress and some Islamic religious practices. Turks, moreover, were forced to adopt Bulgarian names and some were reportedly killed for refusing to do so. Emigration to Turkey was stopped (US Department of State, 1987: 860).

A refusal to make political allowance for the existence of ethnicity may mean that ethnic minorities are denied any effective voice in the governance of the country. In one or other form this is a common phenomenon in those societies where one ethnic group is big enough to dominate the other(s). By invoking the democratic principle of majority rule the dominant group can entrench itself in power while minorities that are incapable of challenging them electorally are consigned to

ly democratic principle will almost certainly widen the mistrust that exists between the majority and the minority and heighten the disaffection of the minority.

The classic example of this phenomenon occurred in Northern Ireland, which although not an independent state, enjoyed a substantial degree of autonomy from Westminster. In the fifty years of the operation of the Stormont (the Parliament of Northern Ireland) until the reimposition of direct rule by Britain in 1972, the substantial Catholic minority, over one-third of the Northern Ireland population, did not enjoy so much as a sniff of effective political influence. Partly, of course, Catholic powerlessness was self-inflicted, since disenchantment with the way in which the Northern Ireland scales were weighted against them combined with a rejection of anything less than a united Ireland caused a withdrawal from full participation in public life - and thereby compounded Protestant suspicions of the essential 'disloyalty' of Catholics (Buckland, 1981: 66-7).

Northern Ireland's problems are complicated by the widespread Catholic rejection of the partition of Ireland in 1920 and by the Ulster Protestant fears of a re-united Ireland in which they would be outnumbered by four to one. It is an intractible situation whose resolution is not in sight.

A variation on the theme of minority exclusion is to be found in another violence-wracked society, Sri Lanka. In formal terms Sri Lanka counts as reasonably democratic, although its human rights record is deeply flawed. Nevertheless, it has had regular elections, and it is one of the few third world countries where there has been alternation of government via the ballot box. The problem, however, is that electoral competition has occurred exclusively between the two predominantly Sinhalese parties: Sinhalese accounting for nearly 80% of the Sri Lankan population. The two groups of Tamils make up the remaining 20%. Of these groups the Ceylon Tamils, whose roots in the island go back several hundred years, have been the more restive. They preponderate in the Northern and Eastern provinces and, during the colonial period, enjoyed a marked advantage over Sinhalese in the bureaucracy, in the professions and in commerce.

With the coming of independence in 1948 the Sinhalese majority, like the Malay majority in Malaysia, set about ending what was construed as an undue Tamil advantage. Among the measures was making Sinhalese the sole official language in 1956.

Tamil complaints about pervasive discrimination escalated, until, by the mid-70s,

A notable phenomenon in the Sri Lankan case has been what is called 'ethnic outbidding'. The more radical or extremist leaders of both the groups try to strengthen their political bases by inflaming communal passions, making it increasingly difficult for more moderate leaders to negotiate and to reach deals that will be honoured. Ethnic outbidding is a serious problem in every divided society and is a major obstacle to the possibility of reaching accommodations.

In yet another variation on the theme of minority powerlessness we may mention the case of the Sikhs in India, which is also, in formal terms, a democratic state, even if a deeply flawed one. The Sikhs number only 2% of India's population, yet they are said to be the most prosperous and progressive community in the country. Sikh grievances are summed up in a statement presented to Indian MP's by one of their leaders:

> India is a multi-lingual, multi-religious, and multi-national land. In such a land a microscopic minority like the Sikhs has genuine forebodings that ...they may also lose their identity in the vast ocean of the overwhelming Hindu majority. (Tully & Jacob, 1985: 51)

Accounts of vulnerable, persecuted and powerless minorities could be continued for some time. I have indicated in the briefest of terms only some examples of a far wider phenomenon, and I have deliberately chosen most of them from states that, in formal terms, are democratic. The evidence leaves little doubt about the conclusion: that simple majoritarian democracy can have profoundly undemocratic outcomes in societies where deep divisions ensure that voting goes largely along communal lines. Earlier in this essay I cited the cases of Cyprus and Lebanon and observed that the collapse of democratic government in both was somehow held to 'prove' that power-sharing or consensual types of government that formally or informally took account of ethnic groupings were doomed to failure. I do not believe that they do anything of the kind. What they do demonstrate is the great difficulty of instituting and maintaining democratic forms of government in deeply-divided societies, but by no means do they 'prove' that 'non-ethnic' or 'non-racial' simple majoritarian systems are appropriate in deeply divided societies. All the evidence from divided societies around the world suggests that faith in the viability of an entirely 'non-ethnic' approach is misplaced. Indeed, insistence by the majority communities in Cyprus and Lebanon on 'non-ethnic' principles would have ensured that those short-lived experiments in democratic government would not even have got off the ground. In what I have said so far I have been careful to avoid drawing any parallels with South African circumstances, but it must be obvious that future political structures in South Africa are my major concern.

Heeding my own earlier cautionary warnings I shall not assume that minorities

any of those whose cases I have considered. Instead, I consider the arguments advanced by Heribert Adam and Kogila Moodley in their provocative recent book *South Africa Without Apartheid*.

In a chapter entitled "A Plural or a Common Society?" they reject the view that South Africa's social structure is plural in character like those of Northern Ireland, Lebanon, India, Sri Lanka, Cyprus, Nigeria and Sudan. Why? As a preliminary they reject the imposed racial classifications 'which lie at the heart of South Africa's illegitimacy' (Adam and Moodley, 1985: 196). This reference is to the principle of compulsory grouping provided for in the Population Registration Act of 1950, which is the basis for the National Party's 'group' approach to constitutional planning.

Among divided societies South Africa is unique in requiring compulsory association by law. The categories specified by law are not 'ethnic' groups in any conventional sociological sense, but rather arbitrary colour classifications.

Secondly, Adam and Moodley argue that since most South Africans are adherents of the various Christian denominations conflict is played out under a 'shared Christian ideology' which keeps it within certain humanitarian bounds (Adam and Moodley, 1985: 198). The ease with which Christians of rival denominations slaughter one another in Northern Ireland may cause one to doubt the validity of this argument, but the view that the South African conflict is not centrally about religious issues or between religiously demarcated groupings is true.

Their argument continues:

> Societies where racial divisions coincide with cultural differences are unlikely to eradicate racial divisions. Differences in religion or language reinforce visibility. Cultural heritage maintenance then becomes at the same time a perpetuation of racial group cognition. In South Africa, however - fortunately - race and cultures overlap greatly. Most people in the urban sector speak one of the official languages, the major Christian churches have members of more than one racial group, and the educated of all racial groups share a common cultural outlook and aspirations. This allows class divisions that cut across racial boundaries. Where the Shiite Moslem in Lebanon considers American consumer culture an evil empire whose promises and vices corrupt the believer and distract from the real purpose of life, many South African Blacks would like to share in capitalist affluence. Like Afrikaner nationalism, which used the state to seize its share of wealth from English imperialism, so Black nationalism, on the whole, aims at capturing capitalism for its own benefit rather than overthrowing it (Adam and Moodley, 1985: 197 - 8).

While there is much truth in this perspective the extent [illegible]

selves and most blacks to be vast, and, irrespective of the correctness or otherwise of this perception, it is perceptions that are salient. Nor should one assume that because of this increasingly common cultural matrix class divisions and class organisations will easily 'cut across racial boundaries'. It should also be remembered that apart from the fundamental sectarian divide (itself within Christianity) Catholics and Protestants in Northern Ireland are also culturally and physically alike.

Adam and Moodley proceed to argue that the extent of industrialization and the consequent degree of economic interdependence among the races invalidates the view that South Africa resembles the 'plural societies of semi-industrialized Lebanon, Cyprus, Nigeria, Sudan, and Sri Lanka' all of which have 'relatively autonomous segmental economies'. Ethnic sentiment, they maintain, will decline 'when it impedes economic advantages and symbolic needs are fulfilled differently' (Adam and Moodley, 1985: 210). This may have occurred in Quebec, Scotland and within the European Economic Community, but it has not occurred in Northern Ireland or Belgium, both of which are industrialized societies, although Northern Ireland's problems have been greatly exacerbated by its chronically depressed economic situation. These apparent exceptions are explained away by Adam and Moodley as stemming from 'historical identities as well as material advantages tied to ethnicity'. This strikes me as question-begging.

On the basis of their critique of the pluralist model to South Africa they conclude that it is a "common society" and that "the relatively weak South African cultural cleavages do not form the obstacle to democratic majoritarianism they do in genuinely plural societies". Moreover, they point to the astonishing diversity of views among blacks, surveys of which suggest that in the hypothetical event of a free election under universal suffrage the outcome would be 'one of the more conservative governments in Africa, in which radical socialist demands on the left would compete with Black and White conservative groups on the right, with the government determined by a broad centre of social-democratic and liberal voters in shifting coalitions' (Adam and Moodley, 1985: 211).

While I agree with the broad thrust of their critique of "compulsory grouping" and of sham consociational schemes that would "freeze racial boundaries", I believe that Adam and Moodley are overly sanguine about the prospects for majoritarian democracy. I think they under-estimate the tenacity of sheer racial feeling, even when it no longer serves any functional purpose. The great majority of whites will not submit voluntarily to a majoritarian system in a society in which they will, by the year 2000 be 10.5% of the total population (*South African Digest*, September 16, 1988).

A difficulty that faces any attempt to analyse post-apartheid constitutional possibilities is that it is impossible to predict what configuration of groupings would

crystallise under a fully inclusive democratic system. I am reasonably certain that it is wholly utopian to imagine that South Africa could be transformed, even in a short time-span, into a thoroughly non-racial society. I need to specify carefully what I mean by this: I am not making a veiled plea for the retention of some elements of racial discrimination - which would be unthinkable - nor am I proposing that the categories in the Population Registration Act be set in constitutional concrete. Post-apartheid South Africa must, by definition, be committed to non-racial norms, but non-racialism as an attitudinal predisposition that penetrates the warp and woof of political and social life will be a very long time in the making. Voters in a hypothetical future democratic election will reflect the long legacy of conflict that has shaped South Africa's history, and most are likely to vote for parties that seek to represent those 'historical identities' (which Adam and Moodley acknowledge as facts of political life in Northern Ireland and Belgium).

The lessons taught by the fate of powerless and vulnerable minorities the world around have not been ignored by most South African whites. They recognize their immensely stronger bargaining position in comparison with whites in Rhodesia or Algeria.

The thrust of the recently-published African National Congress "Constitutional Guidelines for a Democratic South Africa" is also firmly in the 'centralizing steamroller' mould. Since the ANC would in all probability win over 60% of the black vote in a universal suffrage election, this document is of the utmost importance. The Guidelines advocate a unitary, democratic and non-racial state in which sovereignty is to be exercised through one central legislature, executive, judiciary and administration.

Federalism is rejected, but provision is to be made for the delegation of the powers of the central authority to subordinate administrative units.

The Guidelines emphasize the need for national identity:

> It shall be state policy to promote the growth of a single national identity and loyalty binding on all South Africans. At the same time, the state shall recognize the linguistic and cultural diversity of the people and provide facilities for free linguistic and cultural development.

Further clauses provide for a Bill of Rights based upon the Freedom Charter and guaranteeing the fundamental human rights of all citizens. In a separate clause provision is made for a charter protecting workers' trade union rights "especially the right to strike and collective bargaining".

A multi-party system is envisaged, but the legal [illegible]

or the incitement of ethnic or regional exclusiveness or hatred. The same prohibitions qualify freedoms of association, thought, worship and the press.

This is hardly a radical document, and in my view, it could well be the basis of a negotiated post-apartheid constitutional settlement. But I do have reservations that are in line with what I have said previously. Basically, the Guidelines presume to impose a non-racial system on a society that may remain obdurately 'racial' to a regrettable degree - in which case the whole issue of minority exclusion will come to the fore. How minorities are composed is not at issue. I strongly doubt, however, that an election would throw up a unified black majority pitted against a unified white minority. In a commentary on the Guidelines Tom Lodge says that the ANC's constitutional thinkers favour a fairly simple electoral system. He cites Mr Kader Asmalas contending that:

> a majoritarian 'first past the post' Westminster system would have strong advantages in the South African context. It would enhance the effectiveness of government, minimise the role of sectional parties unless they were regionally based, emphasise policy and ideology and hence allow for major swings in public opinion, and promote national integration (Lodge,1988: 18).

I do not follow the logic of these contentions. Westminster systems are invariably associated with 'winner-takes-all', adversarial types of government that may be suitable for homogeneous societies in which regular voting swings ensure a reasonable alternation of governments. It is entirely inappropriate in divided societies in which it is vitally important that government rest upon as wide a coalitional basis as possible, ideally so that no politically significant party (and hence its social base) should feel excluded from a degree of political leverage.

One can readily understand the ANC's implacable hostility to ethnicity and racism, while at the same time questioning the efficacy of their proposed method of coping with the problem. It might eventuate in a tragic irony whereby a post-apartheid government became as authoritarian in its efforts to combat racism as its predecessor had become in its efforts to combat non-racism. Constitutions, as I have stressed, do not arise in political vacuums. As Adam & Moodley say, they "reflect rather than alter power relationships" (Adam & Moodley, 1985: 215). It is very difficult to foresee a situation in which the ANC could impose its guidelines on a constitutional *tabula rasa*. More likely is a situation in which deadlocked groups seek a negotiated accommodation. Deadlocks can be broken if adversaries believe that they have more to gain from a compromise than they have to lose from continuing the conflict. At this stage that point of mutual recognition remains far off, neither side having yet appreciated the strength and durability of its adversary, and each continuing to demonize the other.

In publishing moderate and affirmatively (even aggressively) non-racial Guidelines the ANC is confirming its status as principal occupant of the high moral ground in South Africa. Its virtually certain claim to majority support in South Africa and the general thrust of its analysis, which sees society in 'class' rather than 'race' or 'ethnic' terms, place no hindrance in its vigorous endorsement of 'non-racial democracy'. None of this is necessarily to impute a cynical propaganda exercise to the ANC, nor to imply that there is a more sinister hidden agenda. Given the anger of a substantial part of the ANC's younger domestic constituency it could probably not afford to be seen by blacks as more moderate or conciliatory than it has been.

Moreover, given the ANC's status as an excluded opposition, engaged in an armed struggle, it is unsurprising that it demands total control of state and government in a 'winner-takes-all' system. When it says that it will negotiate only about the terms on which power is handed over, it is talking the language of an army which demands the unconditional surrender of its enemies. Allowance must be made for inflated rhetoric and even posturing in pre-negotiating situations. The point is that neither rhetoric nor posturing should necessarily be confused with what a party to a conflict will finally accept if the inducements to, and the anticipated pay-offs from, a negotiated accommodation are sufficiently compelling.

The prospects for such an accommodation appear remote, since the South African government, faced with serious ethnic outbidding from the ultra-right, shows not the slightest sign of embracing genuine power-sharing, let alone of abdicating from power. For both it and the ANC South Africa's future can be reduced to the stark question: who rules, 'them', or 'us'? In divided societies around the world this has been the essence of the fundamental political problem.

To suggest some form of power-sharing along consociational lines or bi-communal arrangements (such as those proposed by Hermann Giliomee) is to invite derision from radicals and allegations of 'conservatism' and being 'soft on racism'. Those arguing from this perspective seldom, if ever, feel obliged to spell out how change to a majoritarian system might occur or how majoritarianism might prove compatible with a recognisable form of democracy in a deeply divided society. A sophisticated exponent of this general trend of argument is Robin Cohen, whose book *Endgame in South Africa?* was written during 1985, when it did seem that "the political initiative has been wrested from the hands of the government and passed to those who oppose the system". (Cohen, 1986: ix). (Whether such a judgement could be made in the stalemate of late 1988 is at least arguable.) Cohen argues (correctly in my view) that South Africa has entered "a new long-term unstable equilibrium, such as that obtaining in Northern Ireland

More problematic is Cohen's prediction:

> The most likely scenario to emerge from the current powerful challenge to the regime and its increasing openness to political negotiation would be for a small opportunist element of the ANC to do a deal with the white minority government, on the basis of some power sharing arrangement in the urban areas, leaving the existing bantustans intact and the power base of the Inkatha Movement inviolate. However, such a partial solution is likely to be part of a continuing unstable equilibrium and in the long run it is likely that the centrist elements of the UDF and the mainstream of the ANC will link together once the ANC is legalised, or is sufficiently strong to operate in open defiance of the government. The next, *perhaps optimistic*, scenario amongst the many possible ones available is that such a coalition movement representing the generality of black and brown interests will inherit political power based on a non-racial franchise with a minimal degree of violence and electoral fraud. (Emphasis added) (Cohen,1986: 89).

Although his meaning is not entirely clear, it appears that Cohen's optimistic scenario flows out of his 'opportunist deal' scenario, i.e. that they are successive stages of a process. That such a major transfer of power could occur with relatively so little convulsion is overly optimistic to the point where it strains credulity. From the perspective of my argument, however,what is significant is Cohen's evident recognition that the crucial first stage of the process, the 'opportunist deal' will have to embody power-sharing arrangements, by which, presumably, he implies some or other special protection for minorities (including Inkatha supporters). To acknowledge this is in large measure to confirm the thesis of this section of the paper, namely that the great majority of whites will countenance the political incorporation of blacks only if they believe that their interests will be secure. This is not a moral judgement, but an appraisal of political reality. Clearly white power can be eroded from below and weakened by disagreement within, but even taken together, these forces do not presage capitulation.

A very oblique acknowledgement of the same argument is contained in an important article by Roger J Southall (Southall, 1987). Southall bases his hard-nosed assessment of the constraints that would face a socialist post-apartheid government on the assumption that "the reins of formal state power will have been captured by either the African National Congress (A.N.C.), or, by a party embodying the mainstream anti-apartheid tradition ...". It is, however, an assumption made only for the purposes of his main argument, since he explicitly recognises it as unlikely that "any future constitutional settlement would represent a 'winner take all' solution".

The major constraining forces on a putative socialist government boil down essentially, in Southall's view, to the power of domestic and international capital,

committed personnel with the experience and skill required to tame and socialise an advanced capitalist economy" (Southall, 1987:363). These constraining forces would be operative before as well as after any major political transition (and the logic of Southall's argument could be deployed to suggest that they might be capable of blocking the transition in the first place.) The major point, however, is that the hypothetical transition might be facilitated by a frank recognition that whites and white interests, as well as those members of other minority categories who essentially share white fears, have understandable concerns about their security and possible loss of all political leverage under majority rule.

As I have suggested elsewhere in this essay, the case for recognizing minority rights (however the minorities are configured) should not be confused with the present South African government's efforts ostensibly to secure the same thing. Nor should one allow an utter repudiation of the historical record of white racism to carry over into a complete disregard of minority fears under a future government that will be preponderantly black. The urgent quest for national unity and national reconciliation will not be served by an essentially punitive approach that dismisses these fears as entirely the malignant residue of racial privilege.

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DR. M. RAMPHELE

SUBMISSION TO THEME COMMITTEE 1 OF THE CONSTITUTIONAL ASSEMBLY ON AFFIRMATIVE ACTION AND EQUAL OPPORTUNITIES

> *"Too great a degree of inequality makes human community impossible" (Aron, French Philosopher as quoted in Wilson & Ramphele, 1989).*

The current debates amongst constitution drafters and public policy makers is informed by an acknowledgement of the above statement as valid. The legacy of apartheid and colonial conquest has bequeathed us a dubious status of being a society with one of the highest levels of inequalities in the world. Such inequalities are measured by indicators such as levels of educational qualification, profiles of high level skilled jobs, levels of income, home ownership, etc. We score dismally on all those indicators between, and within various population categories.

In responding to your request to speak about Affirmative Action and Equal Opportunities I will address four key issues:

(i) Acknowledgement of the legacy of the past, and recognition of the differential impact that legacy has had on various categories of South Africans.

(ii) The centrality of an equity focus to provide a holistic framework within which one could address racial, gender, age, class, geographic and other inequalities of our society.

(iii) The choice of appropriate strategies within an equity framework to ensure optimal outcomes in the medium and long-term for individuals, categories of individuals and communities, and the wider society.

(iv) The need to create mechanisms to manage the process of transformation to ensure that fears, anxieties and unrealistic expectations are managed creatively.

Philosophical Considerations

Current public debates on redress are sadly impoverished by a focus on Affirmative Action which evokes strong emotions from both sides of the divide. Affirmative action is a concept imported from the United States of America and means different things to different people. It is a concept which may have had a place in the USA, but we have to ask ourselves whether or not it has a place in South Africa, and if so what its appropriate place is. There are two main differences between our social conditions and those of the USA. First, the USA have a majority white population which in the politics of the 1960's was expected to affirm a minority black population. Second, there was not any questioning of the fundamental tenets of the USA socio-economic system beyond its racism by most Americans, black or white. The American dream was, and is still seen as the basis for their socio-economic system, and the clamor is not to transform the system, but to gain access into the system and share in the dream.

South Africans face very different challenges. We have to address the needs of a majority and have committed ourselves to fundamental transformation of our social relations. We also have to deal with the politics not of the 1960's, but of the 1990's, both globally and nationally. We thus have to look beyond Affirmative Action to tackle our problems of inequalities.

Canada and Australia provide better integrated models of constitutional mechanisms for dealing with the legacy of inequalities than the USA. We need to examine those models and learn from their successes and failure to inform our own constitution making process. Both countries have opted for Equal Opportunity Commissions to manage the process of moving towards greater equity within their societies. Equal Opportunity Commissions are charged with the responsibility of creating the necessary criteria parameters and regulations which both public and private institutions have to develop their own set goals, objectives and time scales which are then subjected to monitoring processes on a regular, and commonly, annual basis.

Some definitions

Equity is used in this submission to refer to a desired state in which citizens are treated in a manner which is fair and just, and receive a fair share of national resources in accordance with their needs and

responsibilities in society. Equity differs from equality.

Equality refers to sameness in defined measurable terms. Thus equality of all citizens before the law is regarded as non-negotiable. But equal treatment of different categories of people may not always be equitable. For example, treating a woman employee the same as a male in all matters may have consequences which put the woman at a disadvantage. The latter is best illustrated by the biological fact of women bearing children and the need to take cognisance of their responsibilities pre- and post-natally both in terms of maternity leave benefits, and protecting their career advancement.

Equal Opportunities refer to the provision of an environment which enables individuals to realise their full potential. The underlying principle being that all things being equal, individuals are differently talented, and should be allowed to apply themselves in such a manner as to bring out the best in themselves. Given the assumption that talent is randomly distributed in any society, those societies which give equal opportunities to all their citizens would tend to prosper from the diversity of talent which becomes unleashed.

Affirmative action is used here to refer to specific measures which are taken to remove impediments to the full realisation of the potential of individuals or

categories of individuals or communities. Affirmative action in this formulation is a tool or strategy to achieve set goals and enable individuals and groups to utilize the equal opportunities made available to them in the transformed environment. Affirmative action has to thus be situated within an equity framework to ensure that it is an appropriate strategy in a given case, and that it achieves the goals of making equal opportunities accessible. A free standing affirmative action programme runs the risk of bedeviling social relations as will be explained below.

(i) Acknowledging the Legacy of the Past

There can be no healing without an acknowledgement of the woundedness of the affected person. It is a sad reality that many white people in general, but white males in particular, deny the reality of having been advantaged at the expense of the majority of the South African population. It has to be acknowledged that apartheid was a monumental successful affirmative action programme from which white males in particular benefitted.

For example, the Central Statistical Service reported that in 1985, of all the engineers in South Africa, only 0,1% were not white, and only 1,6% were not male. Figures for managing directors of companies were 3,9% and 5,1% respectively. These figures cannot be explained in terms of differential intelligence scores or potential to succeed of white males in relation to the rest of the

population. There was a social engineering process at work which selected white males for preferential treatment. Active steps would need to be taken to redress these imbalances and allow the country to draw from a wider pool of talent to drive our economy to greater prosperity.

(ii) A Vision of Equity

An equity framework is crucial to any redress programme which is not intended to be punitive, but to create an equal opportunity environment to bring out the best in all citizens. The articulation of such a vision within our constitution is essential to setting the tone for more equitable social relations. There are several advantages to adopting an equity framework:

(a) It enables one to address multiple needs and to manage competing demands and claims on limited resources. The differential access to resources is defined by racial, gender, age, class and geographic realities. An equity focus would allow one to focus redress programmes on the truly disadvantaged, namely, black, rural, poor people, of whom women are the majority. But such a focus would not deny the need to enable urban people male or female, black or white, poor or rich, who are talented from being given equal opportunities to realise their full potential, and thus benefit the country as a whole.

The current focus on affirmative action without an equity framework is creating enormous conflict, and in some cases, enriching a few people in the name of redress. For example, the call by the Black Management Forum for affirmative action denied the reality of women as a disadvantaged category of persons despite lip service to non-sexism. In fact a past executive director of the BMF went as far as suggesting that gender inequity was not a human rights issue, and did not require any specific redress measures. Clearly this gentleman being black and male was looking after his own interests and those of his peers. There is ample evidence to demonstrate the danger of the BMF's limited focus on Affirmative Action (see slide).

Another example of the limitation of a focus on a strategy without an equity framework is the black empowerment drive which is enriching a few individuals. Affirmative action benefits have a tendency of flowing along the contours of existing privilege. Evidence in the USA confirms this - a few blacks who have positioned themselves have become millionaires, without any visible benefit flowing to those who really need empowerment - the very poor. If anything, it is often the case that black owned concerns do no better, and in some cases do worse than, their white counterparts. Change in ownership alone is not enough.

An equity framework demands transformation of social relations to include:

- Increased access to resources

- Greater focus on the development of people i.e. a person-centered development process

- Change in the institutional culture to allow for greater diversity recognising both males and females, blacks and whites, rural and urban inputs.

Finally, the vexed question of who is "black" needs to be addressed. Current perceptions that "black" refers only to Africans cannot be left unchallenged because it poses a danger to the promotion of national unity. Sources of this perception are to be found in the legacy of divide and rule which differentially treated so-called "coloureds" and Indians differently from Africans, and the internalisation of the resultant divisions by the various categories of people.

The Western Cape Province captures these tensions most starkly. Political leaders from all sides have not acquitted themselves well on this score. There has been a tendency to deny the pain, fears and anxieties of people around the process of change. Racist comments abound all round. There has also been a tendency to encourage unrealistic expectations on the basis of

"demographic reality" arguments. It is unrealistic to imagine that after decades of Bantu Education and other cumulative educational disadvantage one can rapidly transform profiles of skilled posts to reflect demographic realities of a given area. Although talent is randomly distributed in society, it takes more than raw talent to do skilled jobs - the legacy of lack of equal opportunities to develop the talent of most people has to be acknowledged.

(b) An equity framework also enables one to distinguish between equality and equity. Equality is not always achievable nor desirable. I have already referred to the example of employee benefits which have to be different for males and females to accommodate the biological demands society makes on women as the bearers of children.

But there is also the question of equality of opportunity versus equality of outcome. Society has a responsibility to create an equitable framework in which all citizens have an equal opportunity to develop their potential, but successful performance under such conditions has to be the responsibility of individuals. The right to equal opportunities should not be extended to the right to successful outcomes. For example, a student at university where residence space is provided, academic and financial support given, and attempts made to create a more inclusive culture, has to take responsibility for

his/her academic success or failure. One cannot under such circumstances claim the right to succeed.

(iii) Choice of Appropriate Strategies for Redress

An equity framework as articulated above allows one to formulate appropriate strategies to intervene at various levels. Affirmative action becomes a useful, but not the only tool to bring about greater equity. Careful attention has to be given to the rights and needs of individuals, groups of individuals in relation to others, in choosing what is appropriate in each specific case. It is also important to keep a focus on medium and long-term consequences of any specific redress measure taken. What may be good for short-term political benefit may become costly for the country. For example, free tertiary education may win a lot of votes, but would bankrupt the country, and advantage an already relatively advantaged category of persons at the expense of those without access to basic education.

Affirmative action whilst essential to increasing access to resources such as jobs, educational opportunities, is an inappropriate tool for promotion of people simply because they are black or female. Promoting people beyond their level of competence is a disservice to the individuals involved, and society as a whole - the long-term costs are incalculable. There are no quick fixes to the legacy of apartheid.

Affirmative action is appropriate in developing targeted developmental programmes such as skills training, flexi-time to allow one to work at a pace suitable to one's needs, mentoring and general support to advance one's career. But the career development of targeted people depends on the co-operation of those in senior positions who happen in the majority to be white males. It is thus imperative that people-centered development be inclusive to ensure that everyone sees the benefits of the changed environment. White male culture is also oppressive to other white males in less senior positions - they should be liberated too. Human beings function best when they perceive that their self interest is not threatened, otherwise sabotage will be the outcome.

(iv) Managing Change

There has been little understanding of the importance of managing the fears, anxieties and high expectations of various segments of the population. The President of our country is often seen as being too accommodating by those who do not understand the importance of his thrust in reassuring all South Africans that they have a place in the new South Africa.

There are both pragmatic reasons such as that cited above in terms of the centrality of white males to the training of new entrants into skilled jobs or academic areas, and moral ethical ones. One cannot build a country on the

foundations of punitive action against those previously advantaged. A focus on building a more equitable society allows one to value current skilled people whoever they are, and to harness their energies for the process of transformation.

Conclusion

I would like to urge you to shift gear away from a focus on Affirmative Action towards Equity as a social goal. Affirmative Action within such a holistic equity framework would then be a powerful tool to enable previously disadvantaged people to gain access to equal opportunities. An equity framework would enable us to holistically address racial, gender, age, class and geographic inequalities with minimum distortions.

I would also plead with you to create a constitutional mechanism to enable us to manage the process of transformation creatively. The Canadian and Australian models of Equal Opportunity Commissions are worth exploring further. We may well elect to coin ours an Equity Commission to reflect the arguments I have put before you. I would caution against creating separate commissions to deal with discrimination such as gender or "race" commission. An Equity Commission would be preferable and allow one to deal with discriminatory behavious holistically. Whatever we do we have to ensure that we do not confuse strategies for programmes, and use means which are politically attractive in the short-term,

means ~~which are politically attractive in the short-term~~, but would in the medium and long-term compromise our vision of an equitable, non-racial, non-sexist society.

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UCT

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6 March 1995

SYNOPSIS OF PRESENTATION ON AFFIRMATIVE ACTION AND THE CONSTITUTION

Key Points to be Raised

1. Acknowledgement of the need to create a more equitable distribution of resources as part of nation building. "Too great a degree of inequality makes human community impossible."

2. The need to articulate a vision of equity which addresses race, class, gender, age and geographical inequalities within a holistic framework to minimise potential conflict around competing demands and claims.

3. The importance of the choice of an appropriate strategy within an equity framework to ensure the best outcome over the medium and long-term which would enhance both the society and individual's capacity to realise their full potential. Goals, targets and time tables are essential to ensure that the process of reducing inequalities is properly monitored. Rights and responsibilities of individuals, organisations, institutions and the wider society have to be clearly spelt out to promote a healthy balance between rights and corresponding responsibilities. For example, institutions have a responsibility to create environments which promote the personal development of people within their midst, but individuals have the responsibility to perform and utilise the opportunities afforded them to realise their full potential. Institutions have a right to expect good performance from individuals placed in positions of responsibility and given the supportive environment within which to perform.

4. Proper and creative managment of the fears, anxieties, expectations of all citizens is essential to success. Human beings perform best when they feel that their own interests are best served by such performance. Neglect of the fears generated by Affirmative Action politics is likely to be costly for the nation, particularly in provinces such as the Western Cape where competition for scarce resources is complicated by the legacy of the Coloured Labour Preference Policy.

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