

THE ISSUES

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It is generally agreed that South Africa must be seen as a whole, with a single Constitution and a unified citizenship. This represents a great victory in that it acknowledges the need to end the Bantustans, the tri-cameral parliament, the black local authorities. There are however, very different viewpoints on how unity should express itself in a new SA.

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In terms of language, religion and cultural rights, we can accept differences in local practice and usage, on the basis of a platform of guaranteed equal rights for all individuals as set out in a Bill of Rights. Thus in principle there would be no objection to the existence of Afrikaans-medium schools, and it might even be possible to negotiate terms in which certain aspects of what some Afrikaaner leaders regard as an Afrikaaner atmosphere are maintained (for eg areas where there is no fishing or cinema on Sunday). But these agreements should not be permitted either to retain any form of racial discrimination or privilege, or to lock up resources in the hands of any particular communities. The battle against apartheid is going to be the battle of local government and *provincies*.

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The future of the Bantustans has to be looked at closely. There is the question of their participation in the negotiations, the timing and modalities and their re-integration into SA, the future of their civil services, armies, judicial institutions, pension rights, laws of education, land rights etc, and the participation by voters in the Bantustans in crucial elections or referendum (millions of voters who could be expected to express the wishes of the poorest and most oppressed, sections of the community could be excluded, giving a skewed result unduly favourable to the existing power).

There is also uncertainty about the future territorial divisions of the country and the Constitutional significance of regions that might emerge. There appears to be growing consensus on the need to have about 10 or 11 regions based upon non-racial demographic and economic criteria. All sides are agreed on the importance of not having an over-centralised and over-bureaucratized State that stifles all regional and local initiative. At the same time our view is that there must be a broad framework of national principles and a national effort and national resources to attend to the huge social problems facing the country. There must also be a firm commitment to a system of guaranteed equal Constitutional rights for all South Africans throughout the country. Two alternative proposals are being floated by the other side. One is to grant regional and local autonomy under the guise of local options so as to build frontiers around privilege on a local and regional basis. This would involve a form of federalism related to a canton system. Another suggestion is that the regions be represented as such in an Upper House and that the Afrikaans-speaking and the English-speaking whites be designated as "Cultural Regions" to be represented with veto or blocking powers in that house.

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As far as the Upper House is concerned, we cannot entertain any suggestion of racial or linguistically-based representation, which would only result in highlighting divisions, negotiating a shared South African loyalty and encouraging the mobilisation of ethnicity.

There are other means of ensuring that groups that regard themselves as minorities should not be subjected to abuse or oppression. As far as representation is concerned, we believe that proportional representation, as applied in Namibia, offers a guarantee that all voices will be heard in a new dispensation. The Bill of Rights should also contain enforceable guarantees against oppression of minorities, or of majorities or individuals. Our objective should be to ensure that the institutions of democracy are effective and strong; and not to dilute them with provisions that will intensify racial rather than democratic consciousness thinking.

The second major area where considerable advances have been made is in relation to the franchise. It is now widely accepted that there shall be universal suffrage on the basis of one person one vote, each vote having equal value. There is also extensive support for the idea of proportion representation. Proportioned representation has two major advantages. In the first place, it ensures that all significant political groupings are represented. This is particularly important when it comes to getting the signatures of political leaders to a new Constitution - they are hardly likely to agree to a Constitution which ends their political careers. Secondly, it provides for easy registration of voters without dividing the country up into constituencies which would inevitably raise hotly contested problems of delimitation. Our proposals for the National Legislature are that there be a single vote, with the vote being counted both for regional lists and national lists. We recommend a threshold or cutoff point of between 2 to 5%. This would have considerable implications for smaller parties or parties that had only a regional base. Attention would have to be given to electoral systems for local and regional government. In principle, proportional representation should serve at these levels as well.

We can expect battles however over the following :

- a) attempts to raise the voting age from 18 to 20, 21 or even 25. The object will be to reduce the number of blacks voting as a proportion of the whole, and also to take away the support which the ANC cannot expect to get from the younger generation. We must insist that excluding the youth from elections would only result in marginalising them just at the time when they should, like all South Africans, be encouraged to see the democratic process as the way of solving problems. In general, the objective of the new Constitution should be to be as all-embracing as possible, excluding no one, except on grounds internationally accepted. We wish the Constitution to be a Constitution for all South Africans, to the elaboration of which all South Africans will have contributed and to which all South Africans will be answerable.

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- b) attempts to give a special franchise to what will be called Voluntary Associations of Electors. The objective will be to enable Afrikaners (and English speaking whites) to continue to vote as a bloc. The argument will be that since these Associations are voluntary and not prescriptive, they do not offend against the principles of democracy. In South Africa conditions they will, however, inevitably be racist, and be seen to be such. If they are purely voluntary, then anyone can join in and they make no sense at all. If the law lays down criteria, then boards will have to be set up to determine who may or may not be members, and we are back with a form of Capital Population Registration.

We should firmly resist any attempt to create such separate voters' rolls, which would only serve to constitutionalise ethnicity and highlight separateness. Far from protecting the groups concerned, it would emphasise their special and privileged status outside of the general South African community. *(in the long term prejudicial, because presents with implications into a certain society's disciplines etc. minority status)*

It seems likely that there will be agreement in relation to the Lower House being elected on a non-racial, undifferentiated franchise. Attempts will be made however to elect the Upper House on different foundations which would make it an institution for blocking or overriding the decisions of the Lower House. In principle there is no reason why regional representation should not be acknowledged in the composition of the Upper House. However, such representation should correspond in broad lines to population distribution and should in no way be correlated with ethnic or racial enclaves. We do not favour corporate representation, that is representation of bodies such as trade unions, traditional leaders, or business people. This would encourage bloc thinking and open the way to ethnic and racial representation. On the other hand, we feel that such interests could be acknowledged in terms of a relatively small number of persons nominated to the Upper House, taking into account the advice of special interest bodies.

A third area where there is widespread agreement relates to the need for a Justiciable Bill of Rights. The proposals of the Olivier Commission are expected to be tabled soon. The probabilities are that there will be a considerable degree of overlap between his proposals and the working draft on a Bill of Rights produced by the ANC Constitution Committee. There will, however, be areas of disagreement.

Olivier is likely to recommend a simple property clause requiring just compensation to be paid for the taking of property. Our provisions, on the other hand, are more qualified. This is a delicate area and we should be careful about accepting generalised propositions which end up by legitimising present forms of ownership and in particular which make any opening up of access to land more difficult. This will inevitably be a central issue that cannot easily be avoided. It is the only area where the 1982 Namibia Principles are unfavourable to us. We acknowledge that compensation should play a big role but are reluctant to accept a formula that is completely rigid and that requires a willing-seller, willing-buyer situation in all cases. What is needed are clear principles and flexible application taking into account the concrete situation. The provisions of the West German Constitution, which introduce notions of equity and the national interest into the computation of compensation, appears to be more appropriate to South African conditions.

Another area of discrepancy relates to so called second and third generation rights that is the so called social, cultural and peoples rights. These rights cannot be enforced in the ordinary way by means of individual complaint to a court, and many people argue that they are not really legal rights at all but only moral or political claims. We feel that in line with the spirit of the Freedom Charter they should form an integral part of a Bill of Rights for South Africa. Our strategy has been to place a duty on the State to use all available resources to establish a minimum floor of rights in the areas of nutrition, shelter, education, employment and family income. There are considerable technical difficulties in this approach and some people suggest that we opt instead for the policy of placing a chapter in the Constitution entitled Directives of State Policy. Our view is that this should be regarded as a minimum, fall-back position. Our people will find the whole Constitution more acceptable if it spells out clearly rights to education, clean water, electric lights and so on.

Olivier is expected to recommend acknowledgement of second generation rights in a negative sense only, that is, that the State shall be under a duty not to take any action which diminishes enjoyment of these rights.

There are also likely to be provisions in the Olivier report which give Constitution<sup>(?)</sup> recognition to freedom of business enterprise. We are in favour of removing all the impediments which apartheid has created towards enterprise on a non-racial basis. We also support the idea of a mixed economy in which the private sector has an active and dynamic role. We would, however, recommend against any formula that prevented the State from taking initiatives in economic areas, from regulating matters such as safety and quality, and we must oppose provisions which impede the free functioning of trade unions. The function of a Bill of Rights is to guarantee basic rights and freedom, not to determine economic policy - that is what elections are for. This is an area that has to be watched closely, but there is no reason why an acceptable formula should not be worked out. We could in the meantime invite the business sector - black and white - to make suggestions to us.

It remains to be seen whether the Olivier Commission recommends anything along the lines of cultural preference zones, which would have to be examined closely. The Commission will almost certainly make recommendations much weaker than ours in relation to gender and trade union rights.

A fourth area in relation to which there is growing consensus is that of the judiciary. There is widespread support for a Constitutional Court that is linked to the present judiciary but is not simply a part of it. Such a court would have the last word in deciding questions of the interpretation and application of the Constitution. It would operate as an independent judicial authority and not be subordinate to either the Executive or the Legislature. It would have two major advantages: First, it could be made up rapidly of persons drawn from all sections of the community, without following the prolonged processes of selection presently in force in relation to the judiciary, which would make it almost impossible for well-qualified black lawyers to participate for a generation or more. Secondly, the court could function with more creativity than the Courts presently embedded in a positivistic and technicist tradition. We have no doubt that a Bench of half dozen or a dozen eminently well-qualified South African men and

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women lawyers could be created that would enjoy high general prestige. The question of modes of selection will be extremely important. The Constitutional court could set an example for all other courts in the country in being independent, skilled and representative of the experience and talents of all sectors of the community.

There also appears to be growing support for the creation of a Human Rights Commission and for the office of Ombudsman as recommended in the ANC working paper on a Bill of Rights.

There are two areas however where considerable difference of opinion can be anticipated. They are in relation to the Government and to the organs of government such as the civil service, the army and the police force.

If it was once our policy to make the country ungovernable, it now appears to be the policy of the present government to make South Africa in the future ungovernable. The idea seems to be to create national talking shop institutions with all the symbolism of Parliament but with very little effective say in how the country should actually be run. The private sector will be given enormous space for unrestricted activity in a way in which our national resources will remain almost exclusively under its control. There will be systems of devolution of power whereby the Centre will have virtually no authority at all. In addition, the government will be structured in such a way as to ensure almost permanent paralysis. As one writer has put it, there will be all checks and no balances.

Specifically what is being projected is a Presidency with little more than ceremonial powers, and a Prime Minister who does little more than chair cabinet proceedings. In addition, proposals are being made that there should be a form of institutionalised power-sharing on a proportionate basis in government. This would mean the office of President would be a divided or rotating one and that the Cabinet would be made up of persons chosen to represent their respective parties in a ratio that is either fixed in advance or that is proportionate to representation in Parliament.

We feel that there is serious confusion here between the idea of a coalition as a practical means of ensuring effective and popular government, and coalition as something enforced by the Constitution. Where people do not get on, attempts at solving the problem by Constitutional quotas only seem to make the matter worse - see the disastrous experiences of Cyprus and Lebanon. In addition to all other quarrels, the parties fight over the terms of the Constitution and its mode of application. On the other hand coalitions based upon the voluntary coming together of different parties work precisely because they are founded on mutual interest and not constitutional prescription - see the experience in Germany, Austria, Italy and the Nordic countries. See too the experience in Namibia, where the fact that parties formerly in bitter opposition had worked together in a spirit of give-and-take in the Constituent Assembly to draft a new Constitution, facilitated the inclusion by Swapo of representatives of all parties in the new Government.

We do not think we should fight for proposals that could lead to authoritarian one person rule, whether on a presidential or other basis, but we feel that the government should be seen to be clean, open, principled, competent, efficient and real and not just a place for speech-making and collecting salaries.

Similarly we can anticipate having battles over the composition, role and functioning of the civil service, the army, the police and the prison service. Already there is talk about the ANC trying to "infiltrate" these bodies, as if they presently are, above the political battle. For the great majority of people these bodies are illegitimate in terms of how they were constituted; they are racist in terms of how they are composed; and they are partial in terms of how they function. There are undoubtedly elements of professionalism and traditions of neutrality that can be developed so as to encourage in the future truly impartial organs of government that genuinely serve the whole population on an equal basis. But there can be no question that institutions conceived of in the mould of apartheid, staffed by a personnel selected for their zeal in promoting the policies of apartheid and structured in such a way as to reflect white domination and the fragmentation of South African society, cannot be regarded as truly national in character. There has to be a rapid end to "own affairs" departments, and a speedy restructuring of all these bodies so as to make them representative, non-racial and fair.

The question of professionalism and standards does not in itself create problems. The people at large are entitled to access to the best. We do not support a crumbling of infrastructures or a lowering of competence. We do not imagine that the problems of South Africa will be solved by a policy of jobs for pals, or by arbitrary decision-making by poorly qualified bureaucrats. If anything, we demand higher standards of behaviour and competence from those close to us. At the same time we cannot support the extensive favouritism and feather-bedding which successive white governments have shown towards the white electorate. We would like everybody to have a chance to develop their talents and to be rewarded on merit. What we want is a South African government for the South African government.

Quaen. Cost of getting rid of apartheid civil servants?