

WORKING GROUP TWO

PRINCIPLES AND PROCEDURES FOR ADOPTING CONSTITUTION

PROPOSALS BY THE ANC TO WORKING GROUP TWO

The ANC proposes:

1. That the constitution be drafted and adopted by a body to be elected according to the principles of universal franchise and a common voters roll.
2. That the voting takes place in the whole of South Africa, including the areas designated as the TBVC states.
3. That the system of proportional representation be used.
4. That the body be called the Constituent Assembly.
5. That in order to guarantee that the elections are free and fair, they be supervised by a broadly-based Interim Government of National Unity, with appropriate international monitoring.
6. That the Constituent Assembly will respect the general constitutional principles set out in the schedule annexed hereto, and will enshrine them in the constitution.
7. That decisions at the Constituent Assembly will be by a two thirds majority.
8. That, functioning according to the above principles, the Constituent Assembly will have sovereign powers to draft a new Constitution for South Africa.

shall enable

9. The Constitution will permit the application of affirmative action in order to help redress the racial and gender imbalances created by past discrimination.

COMMENT

The above formulations quote directly from the Declaration of Intent. The parts underlined have been added.

*Non-sexist

The issue is an important one. The only question is whether having the word non-sexist in the first paragraph [describing the nature of the state] is sufficient to cover all situations, or whether it needs to be underlined in areas of crucial importance. The feeling is that the judiciary at present is so sexist that special attention needs to be drawn to this area.

*Each vote will be of equal value

This term has been used at times by government spokespersons as a softer and more elegant way of saying one person one vote. Its acceptance would scupper any attempts to load votes in favour of certain groups, such as property-owners. It would also put paid to proposals by the National Party to equalise representation in the Second Chamber for all parties that get more than a certain percentage of the votes. These kinds of proposals are so manifestly undemocratic that it would be difficult for anyone seriously to defend them. It would be good to get them out of the way here and now. The chances of sufficient consensus must be good.

A more difficult question is whether it is possible to permit regions with smaller populations to have equal representation in the Upper House with regions of larger populations. We might support the idea of an Upper House in which, say, the Northern Cape and the PWV have equal representation. We feel that the principle of each vote having an equal value should not be interpreted as contradicting the possibility of equal representation of unequal regions, and this should be made clear.

*To prevent abuse of power or oppression of any group:

Now that the government have been forced to accept the basic principles of non-racial democracy as far as the electoral

system is concerned, they are attempting to ensure a permanent place in government, even if in a junior capacity, through means of constitutionalised power-sharing. They argue for proportional representation not only in Parliament but in government. In other words, they demand enforced coalitions.

We are not in principle against sharing responsibility for running the country with others. Our criterion always must be: what is in the interests of the great majority of the people. If it would be in their interests to have a relatively tranquil period of transition in which the skills and know-how of all were being used while a new generation was being trained, and if it helps to avoid anti-democratic resistance and sabotage by uniting the widest sections of the population against the hard-line racists, we might well favour a broad government of national unity and advance. This would be a voluntary choice, based on perceived shared interests. Coalitions of this kind are to be found throughout the world; Sam Nujoma invited every party in the National Assembly to join his government. This was his constitutional right. The DTA thanked him but refused, preferring to be in the opposition, and to plan for the second elections. This was their right.

The fact is that coalitions work if they are voluntary and fail if they are forced. Forced coalitions encourage disputes over who gets what position, and will inevitably give rise to government paralysis if the parties are locked together without the will to be together.

The government argues for what it calls meaningful participation of all groups in national political institutions, stating that it is damaging to any country to cast certain groups into limbo as permanent outsiders. They also claim that the success of negotiations depends on satisfying all groups that they will not expose themselves through democracy to domination by others.

Our answer is that the normal checks and balances of democracy should be copper-bottomed so as to prevent abuse or domination of any group, majority or minority. Thus we support an entrenched Bill of Rights which defends all individuals against discrimination and also defends the interests of groups in developing their languages, associating freely, advancing their cultures and practising their religions. We also support proportional representation in the electoral system because it guarantees meaningful participation in Parliament by all groups.

majoritarianism
informal arrangements. Common in Europe.
short-term 'sunset clauses' Not a genl. const princ.
No opposit

The inclusion of the above clause is a signal that we are happy to leave the door open to voluntary sharing of responsibility of the country if we believe this to be in the interest of the people at large, but that we are opposed to the Constitution prescribing in advance who should be in government.

*Within the context of an undivided South Africa, government will function at national, regional and local levels; the appropriate territorial division and de-centralisation shall be such as to encourage non-racial, democratic participation and administration at all levels.

This important issue is dealt with fully in a document on regions in a united South Africa, being published by the Constitution Committee. The wording of the paragraph is self-explanatory, and does not pre-empt debate at the Constituent Assembly on the question of whether to have a unitary or a federal state, or one with features of the other.

*The Constitution will permit the application of affirmative action in order to help redress the racial and gender imbalances created by past discrimination.

The danger of not putting in a clause like this at this stage is that the declaration that South Africa shall be a non-racial, non-sexist state will be said to preclude the introduction of any programmes aimed specially at helping those disadvantaged by apartheid or sexism. The Namibian Constitution contains a widely-phrased article on affirmative action. The Law Commission recommends the inclusion of an affirmative action clause in a Bill of Rights, but in an extremely limited form. We must ensure now that there is nothing to prevent the issue from being on the agenda at the Constituent Assembly. The Constitution must not be used to block advancement, but rather to ensure that advancement takes place in an orderly and principled way.

*Note on the absence of any proposal by us on the economic system, economic rights, social rights and property.

Sooner or later these issues will crop up as part of the constitutional debate. We feel that it should be later rather than sooner. Whereas the basic lines of what kind of constitutional settlement we need have been long debated, and universally-held principles are at last beginning to be accepted outside the ranks of the democratic movement, the gap on socio-economic questions is still large.

We are against trying to constitutionalise any economic system. We are opposed to attempting either to prescribe or to proscribe nationalisation or privatisation. These are issues that belong to the political, not the constitutional domain. This is what elections are for.

On the other hand, many constitutions contain a property clause which is designed to prevent the arbitrary seizure of property by those in power. Historically, this provision was aimed at preventing absolutist monarchs from seizing the goods of the merchant class, or colonial rulers from confiscating the possessions of the colonised. The problem in South Africa is that arbitrary seizures having been going on for generations, and a property clause would be protecting the equivalent of the absolute monarch or the coloniser rather than the victims of plunder.

We are not against a property clause which protects possessions against arbitrary seizure. We favour the idea that property can be taken only in the public interest and according to law, and that compensation should have an important role to play. The problem is how much compensation, and how to protect the interests of those who were unjustly deprived of their possessions in the past. We would like to explore further the possibilities of distinguishing between land, personal possessions and other forms of property, and to find a suitable way of including affirmative action in the total picture.

The Namibian Constitution recognises the right to just compensation for property taken in the public interest. The ANC's Draft Bill of Rights contains a similar clause. As a result of comments received and a workshop on the subject, the Constitutional Committee has proposed a special clause dealing with rights to land and compensation for interfering with existing titles. It is also working on reviving the general clause on property.

This is an area where all parties, not just the ANC, will have to go carefully.