

MINORITIES AND DEMOCRACY**1 THE CONSTITUTION, MINORITIES AND A NEW SOUTH AFRICA**Introduction

South Africa is not unique in having a number of minorities within it. Such entities are common in all countries and indeed a rich diversity of cultures and languages is a feature which should be protected and promoted, and is not incompatible with the project of building a single nation.

We take as our starting point the belief that individuals should not be constitutionally ascribed to any fixed ethnic, racial or other group for the purposes of political representation.

1.1 The logic of apartheid has been re-enforced by the pervasive influence of the ideology of ethno-nationalism on the process of constitutional change in South Africa. This ideology regarded ethnic conflict as the most important form of political conflict, conceives of cultural communities as national political minorities, and insists upon placing the ethnic group at the centre of constitutional ordering. The legacy of apartheid is that we speak of "the role of political minorities" rather than "the role of political opposition" or of minority parties as is common in most democracies.

1.2 We believe that the equality of individual rights should not be upset by the creation of group political statuses. The constitution should not compel membership of groups in order to secure rights. The effect of this would be that the political process would be overwhelmed by ethnic conflict.

2 RACE AND MINORITIES

The participants of CODESA, the majority of political organisations in South Africa, have rejected the suggestion that minorities defined by colour or race should be afforded a special rights or status in the constitution of a democratic South Africa. This rejection is implicit in the commitment expressed in the Declaration of Intent. This reflects both the international rejection of colour or race as a form of differentiation, and the reality that "race" has been used to bind very different cultural or linguistic groups into an allegedly homogenous entity for the purposes of protecting political or economic privileges rather than the legitimate but different cultural, religious or linguistic interests of such persons. For these reasons this memorandum does not deal with the argument that interests based on colour should be protected but rather explores the appropriate modalities to protect the interests of cultural/language/religious minorities on the one hand and on the other political minorities/opposition.

Because we reject the constitutional allocation of individuals to groups, the question arises as to how the legitimate interest of minorities will be addressed.

3 POLITICAL MINORITIES/OPPOSITION

3.1 Introduction

While the ANC believes that the rich diversity of South African cultures and languages needs to be protected and promoted it does not follow that constitutional mechanisms allocating special additional political powers to minorities, either political or ethnic is an effective way of addressing minority concerns. Furthermore the ANC believes that such a method of trying to protect minority interests would fundamentally and dangerously infringe on the principles that must underpin a democratic system.

3.2 Democracy

The word "democracy" derives from the proposition that 'the people' must govern their own country. The ANC believes that a democratic system requires institutions and practices that will encourage and promote the fullest participation by citizens in the decision making processes. At the heart of democracy, however, is the requirement that the majority viewpoints must prevail in society. The ANC also believes that democracy requires limitations on the way in which "the people" govern. Such limitations would relate directly to the rules in terms of which the will of the people is articulated through political structures. For example, democracy requires a free political climate, a capacity to oppose majority positions, and an independent judiciary to ensure that the rules are maintained. It is also clear that democracy will stagnate, however democratic its institutions, without an active and vibrant opposition. In this sense political minorities have a vital role to play in a democratic society.

3.3 The role of political minorities

Effective government is not possible without an acceptance of the principle that the elected representatives of the majority should have the right to make decisions affecting the political life of the nation. Minority parties on the other hand, should have the right to communicate views freely, organise and participate in elections and in this way become the majority. Opposition parties have an important role to play in expressing minority opinions and in challenging and exposing government abuse of power. Both the majority and the minority have the potential to abuse their powers and must be restrained. The majority should not be able to ride roughshod over the constitutional rights of citizens and the minority should not have the power to prevent the government from legislating. Political minorities thus play a vital role as the opposition in legislatures and in society generally in keeping the government of the day on the tracks of democratic rule. More specifically, the role of a

political minority or an opposition may and should involve the following roles:

- i. To present and articulate alternative views.
- ii. Challenge, examine and debate government programmes and policies and thereby influence them.
- iii. Expose errors, corruption, misrule and arbitrary action by the government and the administration.
- iv. Ensure that the checks and balances in the constitution are operable and functional.
- v. Present the option to the citizens at large of an alternative government thereby conferring choice upon the citizens in regard to the way in which their aspirations can be politically fulfilled.

To ensure the fullest participation of political minorities/opposition in the democratic process requires:

3.3.1 The fullest and most vigorous promotion and protection of freedom of association including the institutions necessary for a multi-party democracy, as well as such classic democratic freedoms as freedom of expression, freedom from arbitrary arrest, freedom of movement, the right to free assembly. Such rights, adequately protected by an independent judiciary having the testing right in regard to executive action and legislative decree is one effective method of guaranteeing the rights of political minorities/opposition.

3.3.2 The system of proportional representation guarantees a certain and proportional support and representation in all the legislative organs. Taken together with the doctrine of separation of powers this ensures that all political parties with a minimum threshold of support will be adequately represented in the decisive branch of government, the branch of government which lays down the ground rules for the operation of society.

3.3.3 The fullest protection and development of civil society and its institutions allows all members of a society the right to engage in the diverse activity taking place in that society with only those limitations which are consistent with an open and democratic society. In such circumstances it is open to cultural, linguistic and religious minorities, as well as other interest groups, economic or otherwise, to associate and influence the political processes. In other words, in as much as there is an overlap between a cultural/religious/language minority and a political minority, the promotion of a free civil society enhances the institutions with which the political minority is associated.

These three factors would, in the ANC's view, lend vitality to the legitimacy and status of political minorities/opposition.

3.4 Dangers of enforced coalitions/powersharing/minority vetoes

3.4.1 The ANC does not support constitutional devices which would have the effect of frustrating the essential element of democracy so fundamentally that it would be impossible for the will of the majority to be articulated through the political structures. We accept the principle of special majorities being required for amendments to the constitution. In this regard proposals which would subject majority parties to the requirement that they obtain the consent of minority parties as a constitutional principle would be a destructive element in the constitution. In summary, the ANC believes that checks and balances in a constitution which would have the effect of conferring collegial, executive power to minority parties poses the following dangers to the operation of a democratic constitution.

- i. The principle of an active and vibrant opposition would be undermined thus rendering dysfunctional the checks and balances in the constitution.
- ii. The government would become a form of political monopoly, effectively

a one party system. The experience of one party states, notwithstanding the intentions of its architects, has not served democracy well.

- iii. The exercise of executive authority would become ineffective.
- iv. The devices would lead to constant friction and confrontation as the majority would find its aspirations constantly thwarted. The resulting antagonism may well lead to increasing hostility towards minorities thus undermining the very purpose for which the participation of political minorities in government has been proposed.
- v. Compulsory coalitions would lead to coalitions not based on mutual interest or arising from the need and circumstances of South Africa and thus would not necessarily be appropriate. (The ANC does not oppose the formation of voluntary coalitions which may be formed for entirely laudable and appropriate reasons). Indeed in societies where there is a large degree of consensus this has arisen out of the workings of competitive parliamentary politics not the constitutional enforcement of consensus. In addition the process of nation-building and reconciliation in deeply divided societies may also be strengthened by voluntarily forming coalition governments. On the other hand the same process performed as an act of constitutional compulsion would undermine the nation-building benefit of coalitions.

3.5 General approach to political minorities

Unlike racial or ethnic minority status, which passes on from generation to generation, the composition and status of political minorities is fluid. It is noted that political parties in South Africa have rapidly departed from the racial form and have sought to expand both their base by founding political groupings on the basis of shared interests. It is indeed more than possible that in South Africa, a party which is initially in the minority could end up in the majority.

3.6 Further possible constitutional role for minority political parties

Minorities parties could be represented on all party committees of the legislature scrutinizing legislation, appointments, the operation of institutions, and could serve on a number of other governmental and parastatal boards and commissions as of right, including the electoral commission. Such a recommendation/proposal would be consistent with the principle that government should be open and the opposition should actively participate in the shaping of legislative policy and in exercising supervision of the legislature. Such details should of course be developed by the constitution-making body, but are dealt with here to indicate the vibrant role minority parties should ^{and} can play without subverting the democratic process.

A CULTURAL, RELIGIOUS AND LINGUISTIC MINORITIES IN A CONSTITUTIONAL STATE

4.1 The ANC proposes strong protection of linguistic, religious and cultural communities through the constitutionalisation of these rights and the institution of judicial review. The constitution should guarantee that subject to the general principles of the constitution the members of cultural communities shall

- 4.1.1 enjoy all the entitlements of citizenship;
- 4.1.2 be entitled to equal treatment before the law;
- 4.1.3 not be discriminated against on the basis of cultural membership;
- 4.1.4 be entitled to associate to promote the interests of their members in a constitutionally recognised space.

4.2 There is an unfortunate tendency in debates on this matter to counterpose individuals and communities. The individual rights incorporated in a bill of fundamental rights are in fact vitally important to communities seeking to advance their collective needs. While rights protect the autonomy of individuals they are also a means of securing collective ends. Freedom of association, for

example, is in this sense a collective right.

- 4.3 We therefore are in agreement with the South African Law Commission, that rights, including those essential to community life, should be formulated and exercised as individual rights.
- 4.4 It does not follow that we see society as being made up of a collection of atomised, abstract individuals. On the contrary, we recognise the importance of communities in constituting individual identities and the diversity of the emerging South African nation.
- 4.5 The 1978 UNESCO Declaration on Race and Racial Prejudice is only one example of a trend to recognise the needs of distinct communities. The Declaration affirms the right to be different, the right to cultural identity; it forbids forced assimilation; and it stresses the need for affirmative action in favour of disadvantaged groups. There is nothing inherently objectionable in the notion of creating individual rights which address the needs of such specific communities.
- 4.6 Within the framework of a colour-blind constitution and a free civil society there is the scope for developing mechanisms for enhancing community autonomy and for ensuring that the constitution and government are sensitised to the needs of communities. It could be provided for, for instance, at the standing committee stage of the legislative process, that communities (and other interest groups) have the right to be heard on matters affecting their interests, rights and legitimate expectations. Communities could also have locus standi before institutions which are set up to monitor human rights abuses (the Ombud, Human Rights Commission). This schema, however, does not require the constitutional ascription of individuals to groups based on race, colour, ethnicity, language or religion.
- 4.7 These and other mechanisms are matters of detail for negotiation and for final

decision in a constituent assembly.

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