

COMMENTARY ON DE KLERK'S CONSTITUTIONAL PLANS**STRATEGY OF F.W. DE KLERK IN THE CONSTITUTION MAKING PROCESS**

It is evident from the speeches, statements and initiatives of De Klerk, Gerrit Viljoen and other government leaders, that the De Klerk strategy is designed to achieve certain fundamental objectives:

1. De Klerk wants a constitutional framework which will render ONE PERSON ONE VOTE ineffective by making rule by an elected majority party impossible.
2. Such a constitution will also effect a distribution of powers which will make it difficult, if not impossible to embark on a programme to eliminate the inequalities and disparities created by the apartheid system.
3. The constitution will be so structured as to ensure the entrenchment of all the major elements of the status quo.
4. The achievement of these objectives depend on the regime's ability to negotiate a constitutional framework PRIOR TO elections of any kind. An elected Constituent Assembly is most unlikely to produce such a Constitution. Hence the proposal by Government for a Multi-Party Conference (or some similar variant) to draw up and agree to a new Constitution after which it may be submitted to a referendum of one or other kind.
5. To ensure the achievement of all these objectives, De Klerk is determined to remain in control of the transitional process.

IN SHORT, DE KLERK'S STRATEGY IS TO ENSURE THAT HE AND HIS GOVERNMENT NOT ONLY MANAGE THE PERIOD OF TRANSITION BUT ALSO DETERMINE ITS EVENTUAL OUTCOME.

I propose now to elaborate on these propositions.

DE KLERK'S OWN STATEMENTS

De Klerk, Viljoen and other government leaders have in a number of speeches outlined the government's constitutional proposals.

On 30 March 1990, for example, in a major speech de Klerk said "Anyone who believes that we will accept a dispensation in which the quality of existing freedoms and rights is negatively affected is making a mistake".

The alternatives before South Africa, he said, was "PARTITION, SIMPLISTIC MAJORITY RULE ON THE BASIS OF ONE MAN ONE VOTE OR POWER SHARING". He rejected majority rule on the basis of one person one vote because it entailed "GREAT RISKS" for the rights and values of minorities. Commenting on land reform specifically, he said it would have to take into account the principle of private enterprise, security of tenure and vested property rights. Numerous other statements by him as well as statements by Viljoen contain one bottom line: THERE WILL BE NO MAJORITY RULE.

In May this year Gerrit Viljoen re-emphasised the need to have a constitution which ensured that the ability of a party, which wins elections, to rule would be severely restricted. Says Viljoen "A system in which the arithmetic majority is given all political power for a period, is unacceptable and unworkable. There must be a balance between one person one vote and the effective protection of minorities". (i.e. no interference with existing privileges - my comment).

HOW DOES THE GOVERNMENT PLAN TO ATTAIN THESE OBJECTIVES

To attain these objectives, the government has made certain constitutional proposals which include the following features:

1. A PARLIAMENTARY STRUCTURE TO NULLIFY MAJORITY RULE

The South African government proposes that under the new Constitution, the legislature should be so structured that government by an elected majority party would be rendered impossible.

In the words of Viljoen:

"As an instrument of minority protection, consideration should be given to a central legislature comprising two Houses. In this way a balance would be achieved between universal voting rights and majority power in the one House, and minority rights protection through special representation and decision-making in the other House....."

The second Chamber, he said, could be a "CHAMBER OF MINORITIES". "Structures for self-determination by individual communities must serve as a fundamental building block of minority protection".

2. MULTI-PARTY CABINET

With regard to the function and powers of the Cabinet the government rejects the democratic principle that a party, or coalition of parties, which achieves electoral victory and obtains a majority of seats in parliament, shall be entitled to govern the country and

form the Cabinet. This majority principle is unacceptable, says the Government, because it means simplistic majority rule. And so it proposes power sharing in the Cabinet itself. In Viljoen's words, consideration should be given to "a multi-party compilation of the legislative authority" (i.e. a multi-party Cabinet).

3. **ROTATING HEAD OF STATE OR TROIKA**

The Broederbond some time ago proposed a rotating Head of State. Viljoen in his May speech also called for a spreading of the powers concentrated in the office of the President. There could, he says, "be a head of state and a head of government, elected by each House, or the Swiss Model could be followed, providing for a multi-party college with a rotating chairman". The latter proposal serves to find favour with the N.P. The implications of this elaborate design can better be understood in the context of the requirements for law-making and decision taking as proposed by De Klerk.

4. **REQUIREMENTS FOR LAW MAKING AND DECISION TAKING**

The government proposals include the following:

- (a) A measure will only become law if it is passed by both Houses. In other words, a democratically elected House will not be able to make legislation. In Namibia, for example, following other democratic models, the second House can delay but not block legislation. But in terms of the government proposals, the second Chamber, or as Viljoen calls it the Chamber of Minorities, will function as a blocking mechanism. The government envisages that the second Chamber will play a crucial role in preventing electoral majority rule. If the second Chamber refuses to consent to a measure, then such measure cannot become law. The plan released by the N.P. contains a different model for the second chamber but it is still unclear what is envisaged.
- (b) Cabinet decisions, in terms of these proposals, will also require the agreement of representatives of minority parties.
- (c) Even if both Houses approve a measure by a majority in each House, that will not necessarily be good enough to make it law. The same applies to the Cabinet. Even if there is a majority decision in favour on any particular issue, such decision will not necessarily be good enough. The government's proposals for CHECKS AND BALANCES include the need for total consensus in important

matters, loaded majorities (for example two-thirds majority or 75% majority) in others and veto powers by minorities in matters affecting them.

- (d) The above proposals will have serious implications for regional and local governmental structures. Similar structural arrangements and blocking mechanisms will be replicated at all levels of government.

5. **DISTRIBUTION OF POWER TO FRUSTRATE MOVES TO ELIMINATE INEQUALITIES CREATED BY THE APARTHEID SYSTEM**

De Klerk has consistently stated that he wants a Constitution which ENTRENCHES (i.e. which renders it difficult or impossible to amend) MAXIMUM DEVOLUTION OF POWER AND DECENTRALISATION OF AUTHORITY. The aim is certainly not greater democracy or popular participation at different levels of government. So, what does it mean for our country?

IT MEANS THE FOLLOWING:

- (a) South Africa will not be a UNITARY or even a UNITED STATE, but a fragmented one - and such fragmentation would be entrenched in the Constitution. Nine regions with autonomous governments are being proposed.
- (b) The Central Parliament (already structured to nullify majority rule) will be stripped of powers to deal with those matters which in terms of the Constitution have devolved upon or been granted to regional or local bodies. These would, as is generally the case in federal constitutions, include areas such as HOUSING, EDUCATION, HEALTH, ELECTRICITY, WATER, ROADS, OTHER ESSENTIAL SERVICES, AMENITIES and FACILITIES - those very areas in which apartheid has left a terrible legacy of inequalities and disparities.
- (c) Within such a framework, the power of the Central Parliament to legislate on major social and economic issues and therefore to deal with the legacy of inequalities and disparities, would be severely restricted or rendered impossible. In many ways it will be a toothless parliament.
- (d) Such a constitutional arrangement differs in a number of fundamental respects from the principles contained in the Freedom Charter, the ANC Constitutional Guidelines and the Constitutional Principles and Structures for a democratic South Africa proposed by the ANC. It is also in conflict with major provisions contained in the ANC draft Bill of Rights. The ANC draft Bill of Rights makes provision for social and economic rights, affirmative action and positive action to eradicate apartheid inequalities, race and gender discrimination.

The ANC draft also imposes duties on the State to undertake, to the maximum of its available resources, appropriate legislative and executive action in order to achieve the progressive realisation of basic social, educational, economic and welfare rights for the whole population.

Such state action shall establish, according to the ANC draft Bill, standards and procedures whereby all men, women and children are guaranteed by law a progressively expanding floor of enforceable minimum rights with special attention to nutrition, shelter, health care, education and income.

Under the constitutional arrangement proposed by De Klerk, with entrenched devolution and decentralisation, a number of the major pillars of the ANC Bill of Rights would have to be abandoned. In short: NO SOCIAL AND ECONOMIC REFORM OR TRANSFORMATION.

6. A BILL OF RIGHTS TO FREEZE THE STATUS QUO

Even though the current plan does not refer to it at all, the government has expressed itself in favour of a Bill of Rights. It would include internationally recognised civil rights which would be justiciable in a court of law. For the rest, however, the government's proposals as to what a Bill of Rights should contain makes it clear that the government sees the Bill of Rights as a mechanism to prevent the extension of real democracy and to protect existing privileges and property rights. Hence De Klerk's reference to "the quality of existing freedoms and rights".

In the speech referred to by Viljoen, he also called for a justiciable Bill of Rights to protect individuals from future government interference.

Not only is the government totally opposed to the inclusion of social and economic rights as proposed by the ANC, but the whole proposed constitutional framework and the objectives of such a framework will mean that the Bill of Rights will act as a mechanism to entrench existing privileges rather than extend rights and democracy. It will also protect regions and local groups against the democratic state.

7. WILL A MULTI-PARTY CONFERENCE DRAW UP AND AGREE TO A NEW CONSTITUTION?

It must be clear by now that the objective of the South African government is to win a Constitution which denies majority rule and entrenches the basic elements of the status quo. Because the end objective is undemocratic, the mechanism chosen to attain that objective is equally undemocratic. A democratic elected Constituent Assembly will never produce such a result. Hence says De Klerk "the Government declares its opposition to the idea of an elected

Constituent Assembly. It is of the opinion that the negotiation of a new Constitution should be the responsibility of representatives of all political parties which enjoy proven support and are committed to a peaceful and negotiated solution". In his May 1991 speeches in parliament, Viljoen also ruled out a Constituent Assembly or Interim Government along the lines proposed by the ANC.

According to Viljoen "the continuous, complex and most responsible business of governing a nation remains the task of the National Party Government until such time as the proposed changes have taken place. The same applies to "the present constitution and its institutions. The Government will continue to govern and the National Party will negotiate.... The lawful institutions of government and administration, set up according to the valid constitution and laws of the land, will continue to provide sound government and administration but there are four possibilities for acceptable transitional arrangements.

"Firstly, the mooted negotiating forum might itself acquire the stature and capacity to influence the legislative, executive and administrative processes directly and with greater authority" - but its primary task will remain the achievement of consensus on a new Constitution.

"Secondly, an informal, influential leadership corps could emerge during negotiations, which might even develop into a formal structure".

"Thirdly, the Cabinet could be expanded, with the approval of the negotiating forum, to include a relatively broad spectrum of competent South Africans".

"Fourthly, multi-party working groups specialising in various fields of government could emerge and provide guidance in the transitional period to the established Government institutions".

Clearly the regime hopes that a Multi-Party Conference will agree to the establishment of a negotiating forum which will produce a new Constitution.