

COMMENTS ON THE ANC'S CONSTITUTIONAL PROPOSALS

Tertius Delpont

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It should be stated explicitly in the first instance that the true status of the ANC's Constitutional Principles as set out in its preface, is that of a discussion document. Thus the document seems to reflect only some tentative thinking within the ANC and allied organisations and is not put forward as a final position paper or a blueprint. These comments must therefore also be understood to deal with hypothetical propositions.

The document is stated to have been drafted according to the following principles:

1. A united South Africa, meaning the territorial unity and constitutional integrity of the country.
2. All South Africans should have a single citizenship and nationality, and a common loyalty.
3. All apartheid structures should be dismantled and replaced by institutions of government which are truly non-racial and democratic.
4. There should be a single system of fundamental rights guaranteed on an equal basis for all.
5. The symbols of State should encourage a sense of shared South Africanness.

The acceptable concepts expressed in the document should be acknowledged. The document was, however, drafted in the tradition of the Freedom Charter. Concepts are employed in such a way that the cumulative effect could even be to sanction an undesirable and undemocratic result. What strikes one in particular in this regard is the absence of democratic control over the ruling party and the over-centralisation of economic control.

As far as political policy is concerned, the ANC document reveals a strong preference for centralisation. Excessive

provision is made for the centralisation of all power. The central government is given the responsibility of ensuring that there is a common framework of principles and practices applicable to the whole country. Regional government is seen merely as an administrative organ of government, without any autonomous power. Thus no provision is made for power-sharing between the first and second tiers of government.

According to the ANC document, local and regional government are to be entirely subordinate to the central government, in the sense that they will exercise delegated powers. They are to have wide discretion in regard to the priorities to be pursued at these levels, provided always, however, that such policies do not conflict with national policies.

The consequences of the ANC's economic policy have not changed significantly - any changes are purely terminological. It is clear that *affirmative action* has become the keystone of the ANC's economic centralism. This must be seen in the light of the unpopularity of the more traditional socialist instruments in the world today. Thus the ANC envisages the state promoting *affirmative action* programmes at all three levels of government.

Other less desirable aspects of the proposals show signs of political pressure in the general direction of pragmatism. The language policy, as set out in the constitutional principles, can thus be seen rather as political opportunism than as sound principles that will function in practice.

The excessive emphasis on non-sexism is a further example of ANC opportunism. The document goes so far as to state that there will be an independent **Ombud**, rather than speaking of an **Ombudsman**!

Despite the democratic image that the ANC document portrays, it is clear that extensive provision is made for government action that would be mainly technocratic, politically unilateral and centralised.

Although the ANC endeavours to phrase its thoughts in democratically acceptable terms, there is a significant difference of approach between the Government and the

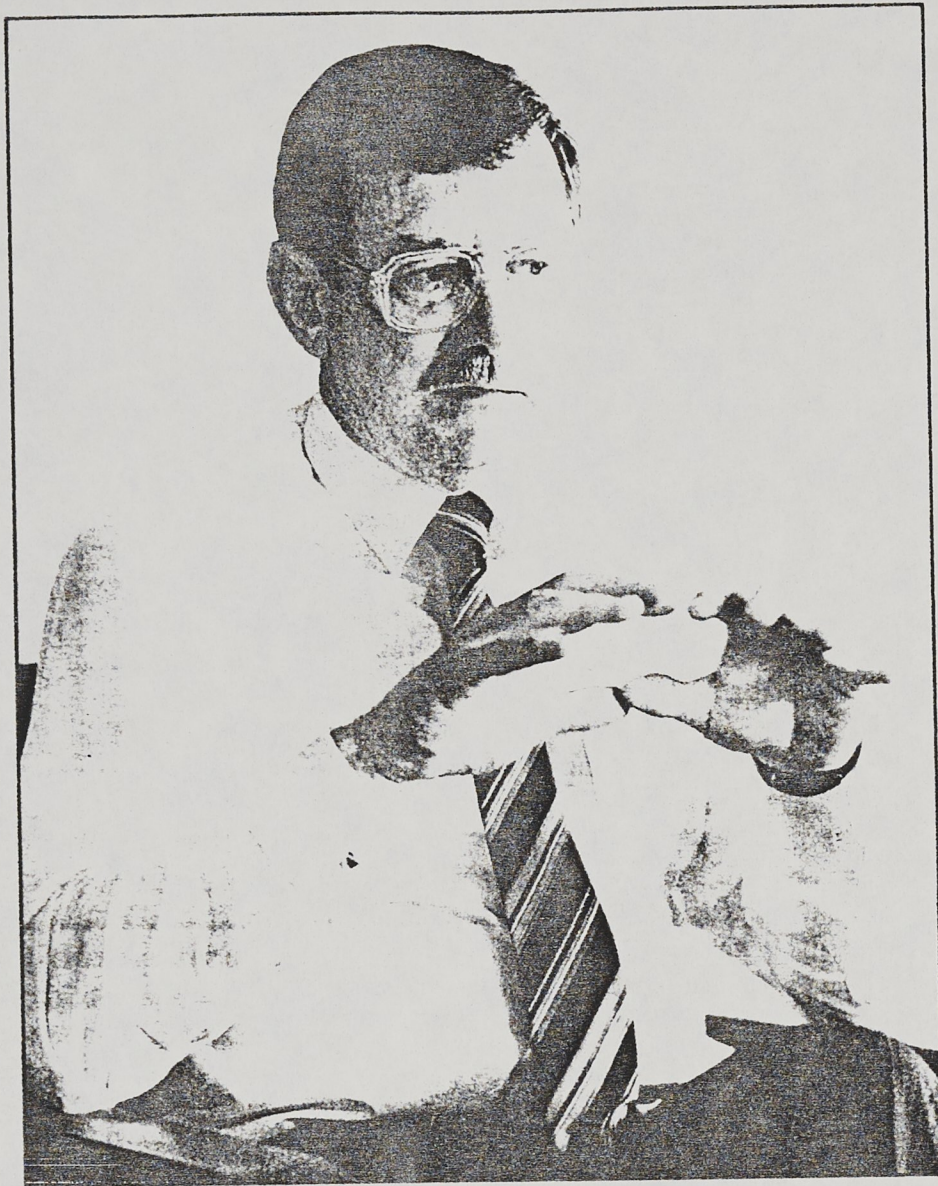


Photo: David Goldblatt

ANC on how the end-result should be attained. This is due to the difference in the content of specific concepts as used by the two parties. This is particularly noticeable in regard to the economic consequences of ANC policy and the proposed extent of the competence of parliament. The content of the ANC proposals clearly undermines the essence of the concept of the constitutional state *RECHSSTAAT* as a whole.

The following points of convergence between the Government's views and those presented in the ANC's document, emerge from the document:

1. The legislative branch of government should be composed of two Houses of Parliament.
2. The electoral system should provide for a proportional representation system.
3. A declaration of fundamental rights should be entrenched in the constitution in order to ensure that rights are guaranteed against arbitrary infringement by the state.
4. The concept of a Constitutional Court entrusted with the jurisdiction to safeguard the constitution.

5. Regional governments are envisaged as taking the place of the present provincial administrations, and the functions at present vested in these administrations will be vested in the regional governments.

Notwithstanding the points of agreement, there remain some important fundamental differences between the Government's views and those expressed in the ANC's discussion document:

1. The Government is considering an executive in the form of a collective body. The ANC, however, seems to be of the opinion that the head of government will be an elected President who will also be the Head of State.
2. The Government is working towards an executive body with power sharing as the underlying principle. However, a simplistic majority government is ostensibly favoured by the ANC.
3. The ANC states that when they speak of a united South Africa, they have in mind in the first place the territorial unity of South Africa as a unitary state. The Government also envisages a unitary state, but expects substantial autonomy to be vested in regional structures.
4. Regional government is seen by the Government as autonomous second-tier government. However, the ANC's discussion document makes no provision for substantial

autonomy at that level of government and seems to see local and regional government as exercising merely delegated administrative powers not in conflict with national policies.

5. *Affirmative action* is emphasised by the ANC as a leitmotif throughout their constitutional principles. It is an important part of the Government's commitment to address social and economic inequalities in society, but punitive or discriminatory *affirmative action* has been shown internationally to be counter-productive.

The Government's action plan, however, is intended to achieve the optimal results within the bounds of the limited resources available and the constraints of demographic trends.

It is therefore evident that there remain some important policy differences between the Government and the ANC. As has been indicated at the outset, the actual and eventual status of the ANC document is as yet unknown, and it can only be seen as stating broad principles without any definite commitment. There are however certain points on which both parties think along similar lines and these may be used as the basis for negotiating an equitable, democratic future for all South Africans.

Donald Leyshon

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The Death Knell of Monarchy?

If constitutional proposals could be likened to motor-cars, then the newly published constitutional proposals of the ANC are far from being the definitive prototype. Indeed, the ANC's ideas are still very much on the drawing board. The ANC's recently published documents offer little more than the rough, sketched outline of a new and daring constitutional machine. Whether that machine will ever leave the design studio to undergo a thorough road-testing remains to be seen. The viability of the product will only become determinable when the ANC's definitive prototype is finally unveiled.

It is clear that constitution-making in South Africa is still in its earliest, preliminary phases. Bearing this in mind, a detailed critique of the ANC's envisaged design would be without merit or purpose. Accordingly, only a few generalised remarks - based upon first impressions - are being offered at this stage.

The main focus of interest is the call for a constituent assembly.

The ANC has stood by its demand for a constituent assembly - which will be charged with the task of drawing up and adopting a new constitution for South Africa. There are many, well-rehearsed arguments for and against the summoning of a constituent assembly, and they do not need to be repeated yet again. The arguments - for all that they are worth - are simply part of the inevitable 'shadow-boxing' between political adversaries.

Behind the familiar arguments, however, lie other, hidden differences between the ANC and its political competitors. The ANC demand for a constituent assembly can be described as a straightforward 'republican' approach to constitution-making. It is a demand for the unambiguous recognition of the political sovereignty of 'the People'. Clearly, this involves the right of the people to confer a constitution upon themselves and to abide by its terms. It is a demand for the right of a Sovereign People to engage in an act of self-limitation - if they so choose.

The present National Party government's refusal to surrender the constitutional future of the country to a new and altogether unfamiliar body is fundamentally 'monarchical' or 'royalist' in character. This royalist approach has two inter-related aspects. Firstly, the republican view of society as being the inheritance of a 'Sovereign People' is rejected. Instead of 'democratic



legitimacy', the royalist focuses his attention upon 'interest groups'. These 'interest groups' may be differently sized and differently composed, but they are recognised on the basis of the actual and potential influence which they exercise in present day society. Head-counting and numbers do not matter - the royalist is concerned with the patterns of power.

Secondly, a royalist approach to constitution-making becomes preoccupied with historical and legal continuity. The royalist is obsessed with pedigree and this means that any constitution which merits his respect must be brought into the world with the appropriate parentage. A constituent assembly produces a child with no parents - a constitution without an ancestry. South Africa's governments have always been careful, however, to deliver new constitutions from the labours of the old. Thus, the Union Constitution of 1910-1961 was the legitimate child of British Imperial supremacy; the 'republican' Westminster constitution of 1961-1984 was the issue of the Union Constitution and 'the Queen's Most Excellent Majesty'; and the Tricameral Constitution of 1984 onwards has been a sickly child of which only its 'republican' Westminster mother could be proud. In reality, South Africa has never been a true republic. Our

present constitution can be traced through an unbroken historical and legal chain to Queen Elizabeth II and King Edward VII.

One may wonder why first impressions of the ANC's constitutional proposals should provoke such an interest in the republican/royalist divide. The answer lies in the writer's suspicion that neither the ANC nor the present government comprehend the long-term legal significance of the different approaches they have adopted to constitution-making.

If the royalist view of constitution-making is to prevail, the content of the constitution will differ in various respects from the ANC's vision for the constitution's future. It is obvious that a constitution based upon the deliberations of interest groups in society will be more favourable to existing holders of power than a constitution based exclusively upon 'the will of the People'. More importantly, however, the republican/royalist divide could profoundly affect the workings of a new constitution - even in relation to constitutional principles upon which both the ANC and the government have already reached a common understanding. This is especially the case in relation to constitutional entrenchment and a Bill of Rights.

The ANC and the government are committed to the idea of a justiciable (court enforced) Bill of Rights as an integral, fundamental part of the new constitutional system for South Africa. This means that both the ANC and the government are committed to the abolition of parliamentary sovereignty. At the moment, whenever Parliament passes a law in the form of a statute, the courts have no choice but to give the new law full force and effect. Parliament's will is supreme and will always prevail, regardless of how distasteful the laws passed by Parliament might prove to be. The courts, in other words, lack the power to control the content of legislation which potentially violates recognised human rights.

The abolition of parliamentary sovereignty and the creation of a Bill of Rights, would ensure that a future, democratic parliament's wishes were not supreme. If new laws violated human rights recognised in the Bill of Rights, the courts would be entitled to strike such laws down - or so the ANC and the government would have us believe!

Unfortunately, there is another, long neglected aspect to parliamentary sovereignty. Thus, if parliament is sovereign and can do whatever it likes, it is constitutionally incapable of fettering itself through the creation of restrictions on its own inherent powers. This means that a sovereign parliament cannot validly enact an entrenched Bill of Rights or any other type of constitutional restriction. The paradox of the omnipotent legislature is that there is one thing it cannot do i.e. undermine its own, omnipotent nature.

If the royalist view of constitution-making is to prevail, the future constitution of South Africa will become valid law through an Act of Parliament passed by the existing tricameral Parliament. This will seriously undermine the efficacy of the Bill of Rights which is intended to form part of that new constitution. Albert Venn Dicey commented over 100 years ago that the only way for a sovereign legislature to eliminate its own omnipotence is to destroy itself - to commit suicide. Parliamentary 'suicide' means that there has to be a break in historical and legal continuity - a legal revolution - so that the new legislature under the new constitution owes none of its parentage or ancestry to the old constitution and the old sovereign legislature. It requires a rejection of the royalist method of constitution-making, and its replacement with something more republican.

The common ambition of the ANC and the government to create a Bill of Rights which will control the legislative excesses of a future, democratic parliament is being unwittingly undermined by the government's approach to constitution-making. There is no precedent in South African constitutional law for Parliament passing a law to restrict its own powers. Parliament has been placed under restrictions by certain provisions in the 1983 Tricameral Constitution (see eg Section 99 of Act 110 of 1983), but as those restrictions were enacted by the sovereign Parliament under the 1961 constitution, their validity is to be doubted.

The creation of a genuinely new constitutional system requires the existing parliamentary structure to end its own life - to phase itself out - without providing for a successor constitution.

The new constitution must be born without a parentage or ancestry which links it to any previous constitutions based upon the doctrine of parliamentary sovereignty. Consequently, the royalist view of constitution-making has to be dispensed with. The efficacy and validity of the new constitution will have to be built upon republican foundations. The new constitution will be valid and lawful because a constituent assembly has correspondingly expressed itself as the sole representative of 'the People' - no matter how fictional 'the People' might be in reality.

Compromise is possible. To the extent that an 'all-party' conference satisfies the royalist requirement of accommodating 'interests', the principles of the new constitution could be settled in the manner currently favoured by the government. The ANC call for a constituent assembly is ultimately inescapable, however. Without it, the government will be unable to guarantee its own constitutional aim - a water-tight Bill of Rights to control the future system of government.

Dangers of:

16 - too long time frame.

resp. sans control.

- Need oversight mechanisms.

Role of Intl. Community -
vital

Control with responsib.

Denis Worrall

Dr Denis Worrall is the Democratic Party Member of Parliament for Berea, and the DP's spokesperson on constitutional issues.

"If Rousseau were approached today by some liberal-minded South African and asked for advice of the kind he gave to Poland and Corsica, he would be at a loss where to begin, for he would not be facing one nation trying to modify its institutions, but several peoples, with diverse traditions, each trying to keep or gain its freedom of power."

- Jacques Barzun

The ANC is the first political organisation to put its views of the government of the new South Africa on paper, and for this it deserves to be congratulated. The proposals may be described as reasonable, both in a classic liberal democratic way and from a practical party political point of view.

These proposals confirm the wide consensus between the major political actors in South Africa on constitutional principles. But this is not to say that they won't generate argument and controversy.

The ANC has said that it has released these proposals to encourage debate and discussion, and it is in this spirit that I would make the following comments on specific features of the proposal.

The suggestion of a dual executive (a President and Prime Minister along the lines of the French Fifth Republic) is welcome. In a "politic of reconciliation", it opens the way for wider political representation in the executive. Depending also on how the executive function is divided between the two offices, it could give the President, as head of state, a unifying and reconciling role.

If this is indeed how the ANC envisages the executive, what method of election will reduce the party politicisation of the office? Would it be preferable that the President be indirectly elected by parliament (as De Gaulle was originally elected in the Fifth Republic) and as Arend Lijphart suggests? Or directly elected (as in the US) as Donald Horowitz seems to argue?

The suggestion that the legislature be bicameral is also to be welcomed. While the document is narrowly prescriptive as to representation in the Senate, of some importance is the fact that the ANC wants to make provision for regional representation.



Two interesting innovations proposed by the ANC are the establishment of an independent Electoral Commission to supervise all elections; and the appointment of a Constitutional Court to deal with questions of constitutional interpretation. Although the ANC does not say this, its proposals clearly imply the supremacy of the constitution (the rule in most modern constitutional democracies), as opposed to the Westminster doctrine of "parliamentary sovereignty". And the proposed ombuds system is something which many civil liberty lawyers have long campaigned for.

The ANC's acceptance of proportional representation is important because, aside from anything else, it implies that the ANC is reconciled to the existence of a strong multi-party system. The ANC's rationale for proportional representation includes all the usual considerations which are generally mentioned, namely that it ensures a more accurate reflection of the popularity of political parties; that it avoids the time, cost and (often) controversy surrounding the delimitation of constituency; and that it encourages participation for all groups which have a significant following. (The ANC's cut-off point for representation would be a threshold - as it is in Germany - of 5% of the vote.)

Hoare Deal. + UN -
on IG.

The IG. may remain in place for
a no. of years. Great practical
problems. By its nature, will be
weak, subject to great tensions.

Decisions by consensus?

Prefer independ. commissions to run
police etc.

Can we trust DeKlerk admin. to
create legal machinery?

How to structure it so that
major parties are not hamstrung,
but incentives to min. parties
to go along?

We need mechanisms for breaking
a deadlock.

IG - that portion of govt. responsible
for bringing about fund. change,
not for day to day running of country.

What is original thinking in the South African context is the ANC's suggestion that the electoral system combine a national list with regional accountability - so ensuring that regions are also represented on a proportional basis.

The ANC proposes the inclusion in the constitution of a justiciable bill of rights (in other words, it will be enforceable by the courts), "leaving the way open for legitimate state action but affirming and protecting internationally-recognised rights and freedoms". A significant omission from the ANC's list of rights is an explicit right to private property. This is bound to be a point of debate.

Also welcome is the ANC's commitment to a considerable measure of decentralisation to local and regional government. Functions presently vested in provincial administrations and in regional authorities will be delegated to regional governments. The constitution, therefore, is clearly a unitary rather than a federal one.

While these proposals are reasonable and will enjoy wide acceptance, the main points of argument will turn on whether some special provision should be made for the proportional representation of parties in the cabinet; whether provision should be made for communities of interest within the senate; how the regions are to be defined; and how flexible the relationship between the central and regional governments should be.

This latter point is an important one - as South African constitutional history shows: despite the National Convention's determination in 1909 to give the provinces within Union a measure of autonomy, provincial functions and powers withered down the years, as central government grew.

So much for specific comments on particular features of these proposals. There is a more general issue which needs to be faced.

In a superb essay that speaks to democrats and would-be democrats everywhere, Jacques Barzun reminds us just how demanding democracy can be: "It is easy enough to copy a piece of actual machinery, such as a computer or even a nuclear weapon. It takes only a few bright, well-trained people with a model in front of them. But to copy a government is not something that a whole population can achieve by merely deciding to do it."

These are wise words, as the many failed post-World War II experiments in democracy show. Democracy in South Africa faces some very real problems.

In the first place, South Africa lacks virtually all the proven pre-conditions for liberal democracy - a high rate of

industrialisation, highly developed voluntary organisations, overlapping and cross-cutting social affiliations, widespread literacy, adequate and equitably distributed personal income, and, perhaps most important, a widely shared sense of national identity.

Secondly, South Africa is a "divided society", and, like divided societies elsewhere, poses particular difficulties for democracy. Democracy depends on alternating or shifting majorities, which are the product of individual votes. In divided societies, however, individual political preferences are determined mainly by group affiliation.

As a result, majorities do not alternate, the minority tends to become a permanent minority, and political competition, far from being the healthy give-and-take of orthodox democracy, leads to frustration, intense conflict, and - at times - violence, repression, and the breakdown of democratic order.

And third, South Africans are weak on political theory. The fathers of American democracy understood their John Locke and Montesquieu. Even in the course of writing their constitution, they actively developed new political theory. By contrast, the democratic culture in South Africa is only skin deep.

Perhaps, because of these reasons, most writers about the constitutional future of South Africa, as Donald Horowitz says, have "focused either on the need for institutions that will disperse power so as to avoid destructive conflict at the centre or on the need for institutions that will concentrate power sufficiently to cope with the country's urgent problems of inequality".

Horowitz says that it is possible to have both - to have enough dispersion to avoid mutually exclusive outcomes, and enough concentration to devise and implement effective policies to ameliorate discontent.

This, it seems to me, is the measure which should be applied to all constitutional models for the future South Africa.

To fairly judge the ANC's proposals against this yardstick requires more information. For example, we need to know more about how the ANC interprets the executive function; what the division of functions will be between the central and regional authorities; and how "fixed" power relationship between the different levels of government will be. But, certainly, this document deserves wide publicity both because it emanates from the ANC and because it is a good starting point for the constitutional debate.

1. Govt. - How achieve?
Who appoints?

Finance
Interior
ISI - Affairs
Defence.

Leg power & exec?

Tri-General - suspended?

How are decisions taken?

~~Is there~~ Is there collect respn?

Accountability to sponsoring
bodies.

What is its role?

Coloured by objective of transit
(dem const)

From this - its functions

From this:

Media
elects.

From this - structures

Then - when clear: legalise all
the way to CA, new transit,
in democracy.

Robert van Tonder

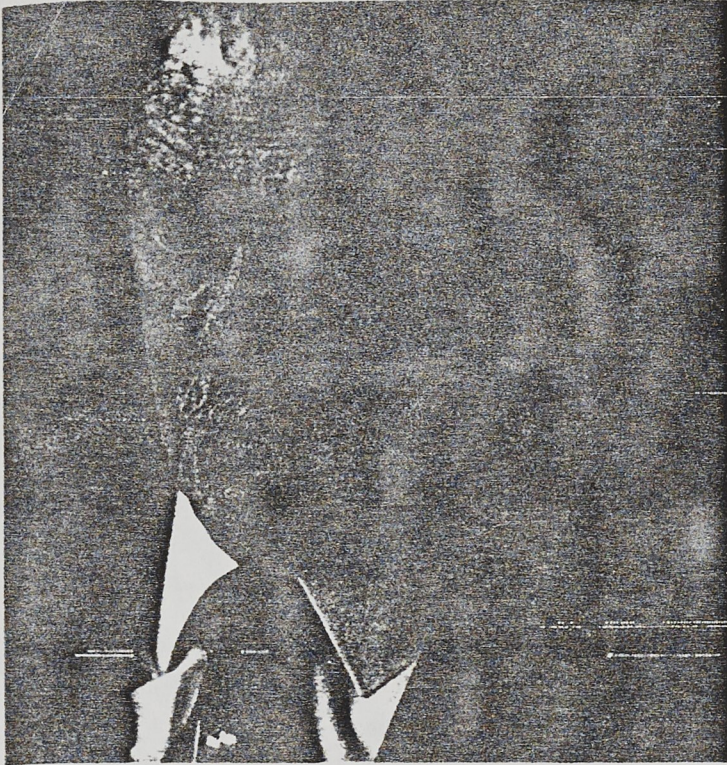


Photo: David Goldblatt

Robert van Tonder is leader of the Boerestaat Party, a right-wing party proposing a continued "whites-only" franchise in the "Boerestaat" - what is now the Transvaal, Orange Free State, Northern Cape and Northern Natal.

If the ANC is not altogether communist in outlook it is certainly suffering from a strong communist hangover from its former days. From its utterances on policy issues we have learnt that the ANC favours nationalisation and a socialist economy. After strong criticism, not from the right only but very emphatically from the liberal-NP establishment the ANC changed its tune to a private enterprise economy and minimal nationalisation.

In its constitutional proposals the communist bias again manifests itself very strongly. They declare that ethnicity (volkskap) may not be promoted in the political arena. This they term 'discreet hidden apartheid' and this basic position of the ANC will lead to the most serious and detrimental consequences to the country and all its peoples.

Firstly:

The English language has no translation for the Boer word 'volk'. A 'volk' is not a nation. A 'volk' is a people with its own unique history, its own state (territory), own language, own traditions, anthems (volksliedere), own flags and symbols, own national festivals and own political institutions. A NATION IS A COLLECTION OF PEOPLE UNDER ONE GOVERNMENT BE THEY WHATEVER NUMBER OF VOLKE. The RSA and Soviet Russia are nation states, not volk-states. Volke are ethnic groupings and if the ANC is going to try to abolish volke by prohibiting their promotion and safeguarding of

their volkskap by democratic political means it is heading full speed to the bloodiest civil war Southern Africa has ever witnessed. Its policy position on this matter means that no volk in the RSA, be it Zulu, Xhosa, Venda, Shangaan, Sotho, Ndebele, Boer, Coloured, Swazi, Cape Dutch, Tswana will ever be permitted to further and protect their identities. In other words, they must all of a sudden cease to exist as volke. They must stop speaking their own languages. They must bury their cultures and give up their land.

This idiotic stance of the ANC will cause the entire Southern African sub-continent to explode in an unheard of cataclysm of civil war and chaos.

Secondly:

In its attempt to destroy national boundaries and identities the ANC is copying the failed policies of the hardline communists, Lenin and Stalin. The political tendency of the second half of our century is the return to small nation states and the final liquidation of the old holistic empires of the nineteenth century. The British, Portuguese, French and Belgian empires have all ceased to exist and only two empires still survive in our times i.e. Soviet Russia, with 15 republics in its state structure and the RSA with 15 volke in a unitary state.

Soviet Russia is disintegrating to the applause of the entire world because the times of the great empires are gone forever.

However, in South Africa, both Nelson Mandela and F W de Klerk intend to perpetuate the outdated archaic unitary state system which the entire world is discarding.

In this regard the ANC displays its communist bias and a total disregard for modern political developments. Apart from the gradual demise of the Soviet conglomerate state the ANC overlooks the fact that in Africa alone 53 new nation states came into being since 1956.

The Language Issue

The Boerestaat Party does not for a single moment trust the ANC's nice sounding assurances on language rights. In the very same declaration they state the 'government will decide which languages will be national languages and which will be official languages'.

It is very obvious who is going to be the government in a unitary South Africa where the black element will have an eighty percent majority in parliament. We Boere are not fooled. We have seen our language abolished in Namibia by a mere stroke of the pen.

We give a resounding thumbs down to the ANC's and the NP's 'New South Africa!'.

~~Patrolie Front~~

~~APC - Parts.~~
~~Consist Principles.~~

~~COSATU & Con Com.~~

~~Germany -~~
~~Workshops~~

- ① Consist princs. - B of Rts. Dullah
- ② 1. Govt. - Albie
- ③ Role-Int'l. Com. - Pius
- ④ Consist. continuity. - ~~Albie~~ Dullah

APC - Essa

Peace accord - Fink.

in by Mon. 26.

Bill of Rts. - Kader / Albie
By end of October