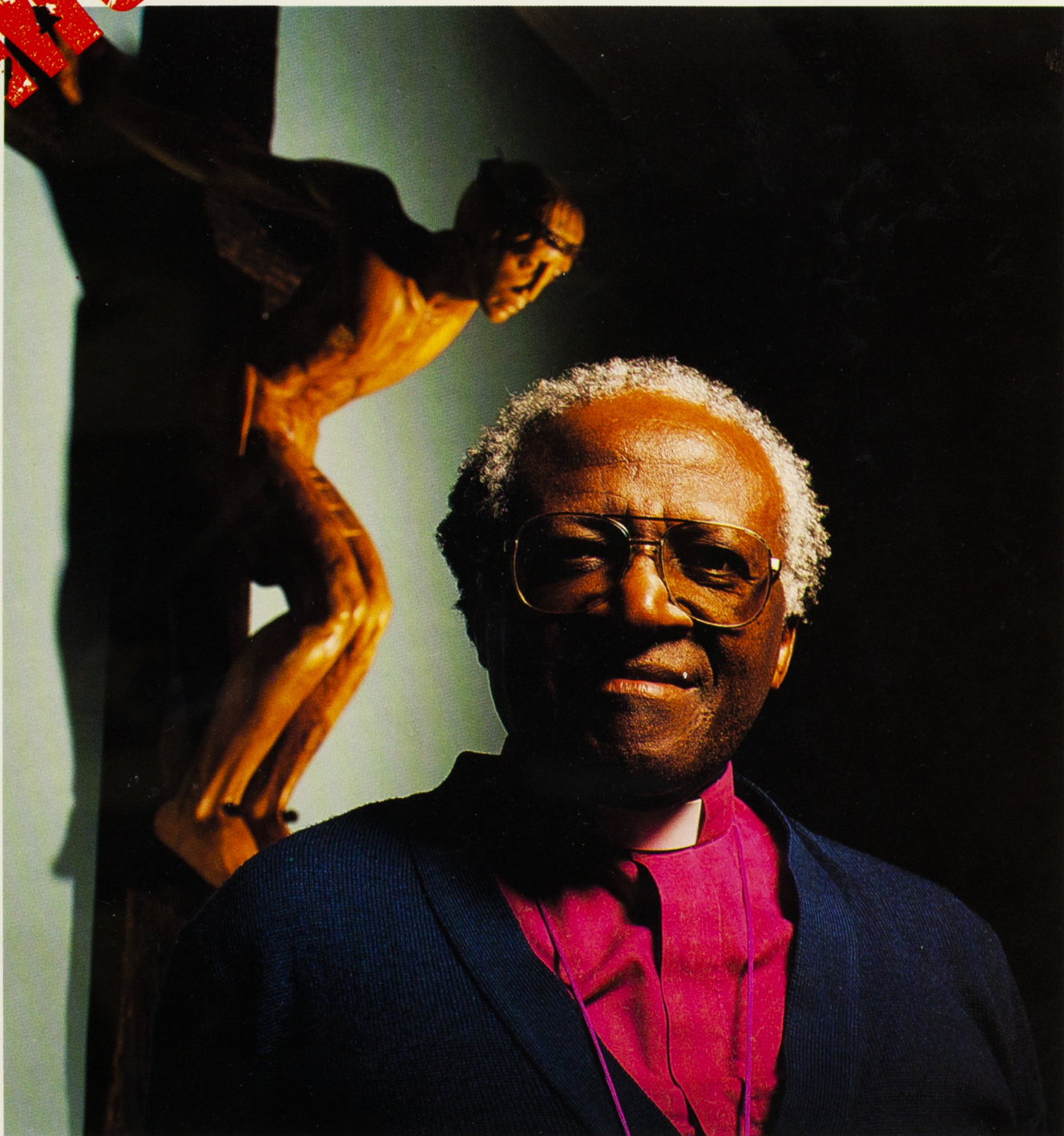


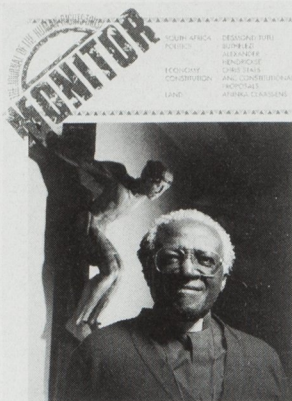
THE JOURNAL OF THE HUMAN RIGHTS TRUST
HUMAN RIGHTS

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POLITICS : BUTHELEZI
ALEXANDER
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CONSTITUTION : ANC CONSTITUTIONAL
PROPOSALS
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JUNE 1991



Published by:
Monitor Publications (Pty) Ltd

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Printed by:
Cadar cc - Port Elizabeth
South Africa

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[All advisory editors serve voluntarily and are not responsible for either editorial policy, or the contents of Monitor. The publisher is solely responsible for all contents.]

Subscriptions:
RSA - R40.00
USA - \$50.00
UK - £ 25.00
for 3 editions - 1 year

Subscriptions and Accounts:
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CONSTITUTIONAL PRINCIPLES FOR A DEMOCRATIC SOUTH AFRICA

The African National Congress has presented a range of Constitutional Proposals for a post apartheid South Africa. To encourage the debate, we reprint them in full, with a selection of comments hereafter.

Part 1

The African National Congress envisages a united, democratic, non-racial and non-sexist South Africa, a unitary State where a Bill of Rights guarantees fundamental rights and freedoms for all on an equal basis, where our people live in an open and tolerant society, where the organs of government are representative, competent and fair in their functioning, and where opportunities are progressively and rapidly expanded to ensure that all may live under conditions of dignity and equality.

A UNITED SOUTH AFRICA

When we speak of a united South Africa, we have in mind in the first place the territorial unity and constitutional integrity of our country. South Africa must be seen, as recognised by the international community, as a single, non-fragmented entity including Transkei, Bophuthatswana, Venda and Ciskei.

Secondly, we envisage a single citizenship, nation and a common loyalty. We speak many languages, have different origins and varied beliefs, but we are all South Africans.

Thirdly, all apartheid structures must be dismantled and replaced by institutions of government - central, regional and local - which are truly non-racial and democratic. They must form an integrated and coherent whole, be drawn from all the people and be accountable to the whole community.

Fourthly, there must be a single system of fundamental rights guaranteed on an equal basis for all through the

length and breadth of the country. Every South African, irrespective of race, colour, language, gender, status, sexual orientation or creed should know that his or her basic rights and freedoms are guaranteed by the constitution and enforceable by recourse to law.

Fifthly, the flag, names, public holidays and symbols of our country should encourage a sense of shared South Africanness.

A unified South Africa requires a strong and effective Parliament capable of dealing with the great tasks of reconstruction, of overcoming the legacy of apartheid and of nation-building.

We believe that there is a need for strong and effective central government to handle national tasks, strong and effective regional government to deal with the tasks of the region, and strong and effective local government to ensure active local involvement in handling local issues.

All such governmental structures and institutions shall be based on democratic principles, popular participation, accountability and accessibility. A unified South Africa shall not be an over-centralised, impersonal and over-bureaucratised country. The precise relationship between central, regional and local governments can be worked out on the basis of acknowledging the overall integrity of South Africa and the existence of fundamental rights for all citizens throughout the land.

The regions should not be devised as a means of perpetuating privilege, ethnic or racial divisions along territorial zones but should be based upon the distribution

of population, availability of economic resources, communications and urban/rural balance.

National tasks would include external links and representation, defence and ensuring the basic security of the country, general economic, fiscal and tax policy, the creation of national policy framework and the furnishing of resources for eradicating racism and racial practices and for the tackling of the vast problems of education, health, housing, nutrition, employment and social welfare.

Regional tasks would include development and the carrying out of the basic tasks of the government at a regional level, bearing in mind regional particularities and resources.

Without detracting from basic constitutional rights and freedoms, provision could be made for special recognition of languages in the different regions.

Local tasks cover all the day-to-day aspects of living which mostly directly and intimately affect the citizen in an integrated and non-racial local authority area. The active local involvement of all sections of the population will be necessary in the fulfilment of these tasks.

The central government has the responsibility for ensuring that there is a common framework of principles and practices applicable to the whole country and for seeing to it that all areas of the country have equitable access to national resources. However, it is not the function of central government to involve itself in each and every decision that has to be taken at the regional or local levels. Such functions should clearly be delegated to these authorities and performed by them.

Similarly, when we speak of a united South Africa we do not envisage the elimination of cultural, linguistic, religious and political differences. On the contrary, we regard the multiplicity of opinions, beliefs, faiths, tastes, cultures and preferences as contributing towards the richness and texture of South African life. What the new constitution should avoid at all costs is vesting political rights in different linguistic, cultural, ethnic or religious groups.

A free South Africa must therefore ensure that those differences do not become the source of division or conflict or the means of perpetuating and promoting domination or privilege.

The new constitution must consistently and clearly affirm the fundamental principle of equal and undifferentiated citizenship so that the differences of culture, interest and personality can then express themselves in a constructive, free and non-conflictual way.

DEMOCRATIC

The government must be democratic in the universally accepted meaning of the term. It must be the government of the people, by the people, for the people. It must be chosen by the people in free, fair and regular elections. It must be removable if it loses the confidence of the voters. Elections must be based on the principle of universal and equal suffrage on a common voters' roll without distinction as to race, language, creed, class, social position, birth or gender. Illiterate voters should not be disadvantaged. The precise method of voting and the electoral system can be negotiated within the framework of these universal principles. The African National Congress favours the system of proportional representation, with regional and national lists.

Secondly, the legislature should be representative of the people as a whole, reflecting such differences of political views and interests as may be present in the community at any particular time.

Thirdly, the institutions of government should not be restricted to any language, religious, racial, ethnic or cultural grouping. The central, regional and local government structures, including the law enforcement agencies and the administration of justice, should reflect the composition of South Africa as a whole and draw on the talents and life experiences of all. Similarly, they should act in a fair and objective manner towards all, without fear, favour or prejudice.

Fourthly, government must be open. Apartheid South Africa has been a highly authoritarian society, characterised by arbitrary decision-making by officials and by excessive secrecy. All South Africans have the right to be informed about the issues and to know what the basis of governmental decisions is. There is far too much fear of the government. We must secure constitutional barriers to detention without trial, to spying on citizens, secret files, dirty tricks departments, disinformation and the use of government money to promote party political objectives.

Fifthly, government should be based on the principle of active involvement of the people. The existence of civic associations, religious bodies, ratepayers' organisations, trade unions and other independent bodies should be encouraged. Similarly, government should collaborate with non-governmental organisations, without interfering with their autonomy.

Finally, government should reflect the will of the majority, be effective but not all-powerful. It should operate within the framework of the constitution, acknowledging a

separation of powers and the existence of fundamental rights and freedoms as guaranteed in a Bill of Rights.

NON-RACIAL

A non-racial South Africa means a South Africa in which all the artificial barriers and assumptions which kept people apart and maintained domination, are removed. In its negative sense, non-racial means the elimination of all colour bars. In positive terms it means the affirmation of equal rights for all. It presupposes a South Africa in which every individual has an equal chance, irrespective of his or her birth or colour. It recognises the worth of each individual.

A non-racial constitution can be adopted rapidly but a non-racial South Africa would take many years to evolve. Yet, although the massive discrepancies in education, health and living conditions imposed by decades of racial discrimination cannot be eliminated by constitutional declaration, the constitution must provide the positive means to reduce progressively the imbalances and inequalities and to ensure that everybody has an equal chance in life.

NON-SEXIST

The new constitution must reflect a commitment to full, free and equal participation in the new South Africa. Law and practice keep South African women out of their rightful place in helping to build democracy and enable a new nation to evolve, and deprive them of their human rights as individuals.

The new constitution must therefore:

guarantee equal rights for women and men in all spheres of public and private life;

create mechanisms whereby the discrimination, disabilities and disadvantages to which women have been subjected are rapidly removed;

give appropriate recognition to reproductive and birth rights;

guarantee constitutional protection against sexual violence, abuse, harassment or defamation;

ensure that women are heard in all issues and participate actively in all levels of society.

BILL OF RIGHTS

A bill of rights based on universally recognised principles of human rights should form an integral part of the new constitution. In particular, it should guarantee all South Africans against the violations of human rights associated with apartheid and stress the principle of the equal dignity and worth of all South Africans.

The bill of rights should in clear and unambiguous language guarantee the rights of personal freedom and political expression. It should also protect and enhance rights of the individual to practise her or his religion and culture and speak her or his language. It should acknowledge the importance of securing minimum conditions of decent and dignified living for all South Africans.

It should create mechanisms for enforcing these rights. In particular, the courts should have a primary role in ensuring that the bill of rights is operative. A Constitutional Court that enjoys the respect of all South Africans, that draws on the experience and talents of the whole population, that is independent and that functions in a manifestly fair and objective fashion, accountable only to the principles of the constitution, should be created.

Similarly, a human rights commission should be established to ensure that violations of human rights are investigated and appropriate remedies found, examine patterns of discrimination and make proposals for their elimination.

Finally, the post of Ombud should be created to deal with questions of abusive, arbitrary, capricious, discourteous and corrupt exercise of office by any official.

OPEN SOCIETY

The constitution should guarantee the free articulation of differences within the framework of equal rights and tolerance.

An open society requires guarantees for the free functioning of non-governmental organisations, such as religious bodies, trade unions, sporting and cultural associations, subject only to respect for fundamental human rights as set out in the constitution.

Non-governmental organisations should be encouraged to collaborate with the Government in furthering the aims of the constitution, without thereby compromising their identity or independence.

All men and women shall be entitled to all necessary information to enable them to make effective use of their rights as citizens, workers and consumers and to impart such information.

There should be freedom of the press, and the media should be open, accessible and respond to all the views, opinions and interests of the community.

THE CIVIL, THE DEFENCE, POLICE AND PRISON SERVICES

The three principal qualities of the civil service, the defence, police and prison service shall be:

representativity, competence and impartiality.

Representativity

All organs of government shall draw on the life experience and talents of all sectors of the community in such a manner as to instil a common South African perspective of public service. The present barriers based on race shall be eliminated and special steps shall be taken to redress patterns of discrimination attributable to apartheid.

Competency

It is in the interest of the population of a free South Africa that the standard and quality of service of the public service shall be as high as possible. To attain this goal, and consistent with the principle of representativity, special programmes of training, retraining and advancement shall be undertaken to enable the best South Africans to give the best possible service to all their fellow citizens.

Impartiality

The organs of government shall be accountable to parliament and to the whole community. It is not their function to serve the interests of any party or sectional grouping. Impartiality presupposes a balanced

composition of the bodies concerned and a sensitivity to the needs and aspirations of all sections of the community.

There should be adequate control and supervision over the civil service, defence, police and prison service, an effective machinery to investigate complaints against these services and the provision of redress.

Administration of justice

Without interfering with its independence, and with a view to ensuring that justice is manifestly seen to be done in a non-racial way and that the wisdom, experience and judicial skills of all South Africans are represented on the bench, the judiciary shall be transformed in such a way as to consist of men and women drawn from all sectors of South African society.

In a free South Africa, the legal system shall be transformed to be consistent with the new constitution.

The courts shall be accessible to all and shall guarantee to all equal rights before the law.

GUARANTEES OF OPPORTUNITIES FOR A DIGNIFIED LIFE FOR ALL

A new South Africa can never evolve if the white part of the population lives in relative luxury while the great majority of black South Africans live in conditions of want, squalor and deprivation.

Appropriate constitutional expression must therefore be found to guarantee basic human rights in relation to nutrition, shelter, education, health, employment and welfare. Government should be under a constitutional duty to work towards the establishment of a guaranteed and expanding floor of social, economic and educational rights for everybody.

It is particularly important that the constitution facilitate access to education, employment and land, so that people have real and effective opportunities for improving their situation and pursuing happiness.

THE STRUCTURE OF A CONSTITUTION FOR A DEMOCRATIC SOUTH AFRICA

PART 2

1. South Africa shall be reconstituted as a non-racial, non-sexist, democratic and unitary republic.

2. South Africa shall consist of the whole territory recognised by the international community as South Africa and shall include the Transkei, Ciskei, Venda and Bophuthatswana.

3.1 Provision will be made for the three branches of government: the executive, legislature and the judiciary.

3.2 The head of the executive will be an elected President who will also be the Head of State. The question that arises is whether the President should be elected directly by the public and vested with greater executive powers, or whether s/he should be elected by and answerable to Parliament. This is a matter on which there must be greater public debate.

3.3 The President will act in consultation with a Cabinet of Ministers headed by a Prime Minister. The President will appoint a Prime Minister and other members of the Cabinet.

3.4 The President may only hold office for a maximum of two terms of five years each. He or she will be subject to removal only by a resolution passed for good cause by a two thirds majority of the National Assembly.

3.5 The legislative branch of government will consist of two houses of Parliament. The first house of Parliament will be the National Assembly which will be elected on the basis of proportional representation by universal suffrage in which all persons will have an equal vote without regard to race, gender, ethnic origin, language or creed. The power of enacting legislation will primarily be vested in the National Assembly.

3.6 The second house of Parliament will be the Senate, which will also be elected according to universal suffrage without regard to race, gender, colour, ethnic origin, language or creed. The Senate will neither be a corporatist chamber made up of interest groups (youth, labour, women or business, or other groups) nor will it represent ethnic or so-called "community" interests. The electoral system will, however, be different to that adopted for the

election of the National Assembly, and will make provision for representation on a regional but not on an ethnic basis.

3.7 The Senate will be the guardian of the Constitution, with power to refer any dispute concerning the interpretation or application of the constitution to the appropriate court for its decision and the power to review. Where appropriate the Senate may delay the passage of legislation passed by the National Assembly, but it will not have the power to veto legislation.

3.8 Elections for the Presidency, National Assembly and the Senate will be held by secret ballot at periodic intervals of not more than five years and procedures will be enacted to ensure that the elections are genuine and are conducted in accordance with the principles and procedures consistent with those obtaining in a democracy.

3.9 All South Africans shall be entitled to stand for election as President, to Parliament and to other elected offices. Elections will be supervised by an independent Electoral Commission, and conducted in accordance with the standards designed to ensure that the elections are fair and free.

4.1 The National Assembly will be elected on the basis of proportional representation. The rationale behind proportional representation lies in the following factors:

a) It encourages participation by groups which have significant followings. This is more satisfactory than forcing political or subversive activity outside Parliament. Fringe parties would be excluded by imposing a threshold of a 5% of the vote.

b) Votes in excess of fifty percent would count and hence be an inducement to vote in areas where one party is dominant. Similarly 'losing' parties' votes in those areas would also contribute to their overall performance.

c) It leads to a more exact political reflection of the popularity of parties.

d) It avoids the time, expense and accusations of bias in the process of delimiting constituencies. This process can take months or years.

4.2 Proportional representation on the basis of a national party list system, may present problems. Under such a system there is no way of ensuring adequate regional or local representation. Party bureaucracies benefit at the expense of local party structures or local sentiment. There is little direct accountability to constituencies.

4.3 Accordingly the ANC favours incorporating elements of a national list and regional accountability into the electoral system. This could be done most simply by combining a national list with a regional list. For example: regions could be allocated say half of the total seats, to be divided between the different regions in proportion to the registered voters in each region. The remaining half of the seats could be allocated on a national basis. Voters would vote for a party within their region and the regional seats will be allocated between the parties according to the percentages obtained by each party in each region. The second stage would be for regional votes to be aggregated so as to determine the national percentage of the total vote of each party. Each party would then be entitled to nominate from its national list, the additional members needed to make up its total entitlement of seats.

4.4 The end result will be the representation of each party in the assembly in proportion to its total votes, but reflecting a regional choice of members as well. The system requires the electorate to cast one vote only. It will be easy to administer and easy for the voters to follow.

4.5 It is recommended that proportional representation, based on the list system be the preferred system of voting for Senate, regional and other elections.

5. It is important that there be a guarantee of free and fair elections and that procedures be enacted to see to this. It is therefore recommended that the conduct and supervision of all elections be vested in an independent electoral commission to oversee every aspect of elections from the printing of ballot papers to the adoption of regulations for access by parties to the public media and fairness to all political parties by the public media.

6. There will be an independent judiciary responsible for the interpretation of the Constitution and the application of the law of the land. The judicial power will include the power to review and set aside legislation and actions which are unconstitutional. A Constitutional Court, appointed by the President on the recommendation of a judicial service commission, or by other methods acceptable in a democracy, comprised of judges, practitioners and academics would be set up.

7. Provision will be made for elected local and regional government on the basis of universal franchise without

regard to race, gender, ethnic origin, language or creed. Local and regional government will exercise delegated powers but will have wide discretions in regard to the priorities to be pursued at these levels, provided always that such policies do not conflict with national policies. Functions presently vested in the provincial administrations will be vested in the regional government. The boundaries of local and regional districts will be determined with due regard to economic and development considerations and without regard to race, colour, ethnic origin, language or creed.

8. Provision shall be made for one common and equal citizenship acquired by birth, descent and naturalisation in accordance with conventional standards. Provision will also be made for the restoration of South African citizenship to persons who have lost their citizenship as a result of the denationalisation process through the homelands policy, or as a result of having gone into exile for political reasons, and provision will also be made for the acquisition of South African citizenship by the spouses and children of such persons.

9.1 All languages of South Africa will have equal status. They will be set out in a Schedule to the Constitution and will include in alphabetical order the following: Afrikaans, English, Sipeedi, Sesotho, Seswati, Tsonga, Tswana, Venda, Xhosa, Zulu.

9.2 The State shall take all reasonable and necessary steps to protect, promote and enhance the language rights of all the people of South Africa in relation to education and culture and in the functioning of the State at local, regional and national levels.

9.3 The language policy of the State shall be directed towards promoting and encouraging multilingualism and preventing the use of any language or languages for the purposes of domination or division.

9.4 The State shall, however, be empowered to make reasonable provision by law for the use of one or more of the languages in different regions of the country, or for specific purposes.

9.5 The question may, of course be asked whether there should be one official language for the country. But if this choice is made it would mean the demotion of some languages or the promotion of a single one. Also, it would mean that the official language would be one which most of the people either do not speak or do not speak fluently.

9.6 It would seem therefore that the most appropriate thing to do is to give equal status to all languages subject to the right of the government to give primacy to one or

more languages in any region or throughout the State as the language of administrative communication or judicial record, or for other purposes either throughout the State or in any area, but everyone should be entitled to use her or his language for purposes of communicating with the public service.

10.1 There will be a justiciable Bill of Rights leaving the way open for legitimate State action but affirming and protecting internationally recognised rights and freedoms including equality before the law; freedom from detention without trial; protection against arbitrary arrest and detentions; protection against arbitrary search and seizure; the prohibition of forced labour; the right to fair trial; the prohibition of cruel and unusual punishment; protection of life including the abolition of the death sentence; protection of women's rights; protection of children; freedom from discrimination; the right to privacy; freedom of expression including a free press; the right to information; freedom of religion and conscience; freedom of assembly; freedom of association; freedom of movement including the right of citizens to leave and return to South Africa; trade union rights including the right to work and the right to strike; the right to form political parties; the right to education, welfare and health care consistent with the needs of the people and the resources of the State; environmental rights; family and cultural rights, and providing for just compensation to be paid for property taken by the State.

10.2 We do not propose to discuss here the formulation of each right and the enforcement of rights as this has already been done in a detailed fashion in a discussion paper, The Draft Bill of Rights, published in November 1990 by the African National Congress.

11. Provision will be made for discrimination to be eliminated in substance as well as in form. At all levels of government the State will be empowered to pursue policies of affirmative action for the advancement of persons who have been socially, economically or educationally disadvantaged by past discriminatory laws and practices and in order to redress social, economic and educational imbalances in South Africa resulting from such

discrimination, with special regard to the maldistribution of land and the need for housing. Special provision will also be made to redress the added discrimination which has been suffered by women and the victims of forced removals.

12. All discriminatory legislation and all other legislation inconsistent with the bill of rights will be invalidated by the bill of rights. All other legislation will remain in force unless repealed by Parliament or set aside by a court under its power of judicial review.

13. There will be a public service commission charged with the responsibility of overseeing the recruitment, promotion and dismissal to and from posts in the civil service. Such a commission will also be required to implement an affirmative action programme in regard to appointments to senior positions in order to redress existing race and gender disparities. Provision will be made for a representative structuring of the public service, the police service and the defence services and to ensure that the public service will be accountable for its actions.

14. There will be an independent Ombud with powers to investigate complaints against members of the public service including the police and other holders of public and private power and to investigate allegations of corruption.

15. The Constitution will also make provision for a state of emergency to be declared when the life of the nation is threatened. Such a power will be subject to strict controls by Parliament and the judiciary. The Constitution will provide for the recognition and protection as far as possible of fundamental rights during the period of emergency.

16. The Constitution will be subject to amendment only if a majority of two thirds of the National Assembly approve of the amendment or if approved by two thirds of the votes cast at a national referendum.

April 1991.

COMMENTS ON THE ANC'S CONSTITUTIONAL PROPOSALS

Tertius Delport

Dr Tertius Delport is Deputy Minister of Constitutional Development and of Provincial Affairs, and is Member of Parliament for Sundays River Valley.

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

Donald Leyshon is lecturer in constitutional law at Rhodes University.

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.

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.)

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.

Robert van Tonder

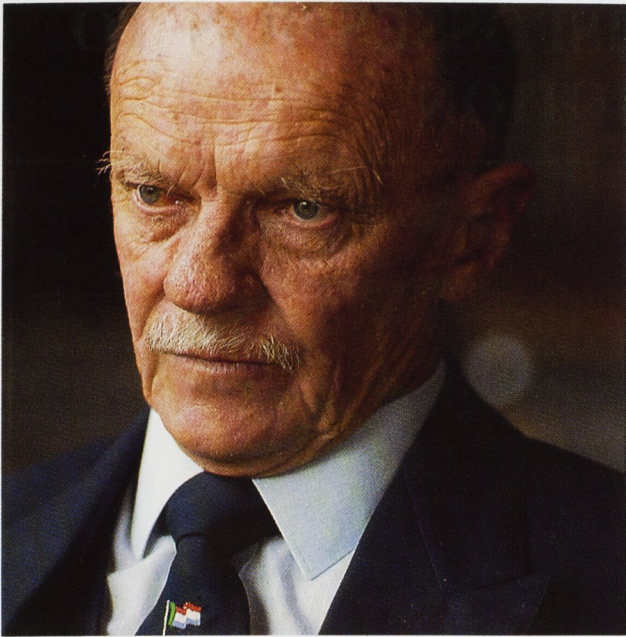


Photo: David Goldblatt

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!'.