

The Preliminary Nature of the Constitutional Document.

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Any constitutional document drawn up at this stage must of necessity be incomplete and provisional. It will be incomplete because we still await clear guidelines on questions such as economic policy and education, and because we lack ^{important} politico-demographic information.

Necessity Thus, the ~~the~~ political strategy to be adopted in relation to the mechanisms for the re-distribution of wealth will have a considerable bearing on what will probably be the most scrutinised part of the Constitution, namely, the rights and duties attached to property. Similarly, ^{though less fundamental,} the phrase in the Freedom Charter: "The law shall guarantee the right to all to educate their children" raises important questions

as to whether private or church schools should have constitutional protection (our feeling was against, nor did we feel that the constitution should expressly oblige nationalisation of all schools - but we await a report of the Education working group on the ~~question~~ ^{issue}). Lastly, it would be foolhardy to propose an electoral scheme without first having clear information on population distribution and likely voting behaviour amongst ^{the} different sections of the population in the different areas of the country.

The Constitution we draw up will also be incomplete in another important sense, namely, that it would have to be complemented by another document which attends to ~~the transitional~~ ^{the} arrangements necessary to ensure the transition

from the apartheid to the democratic constitutional order. To take one simple practical point: a voter's roll would have to be established covering the whole population. Arrangements for an interim government and for interim control of the armed forces and security would have to be made. There could even be provision for how the Constitution would come into effect. We could, for example, propose as an alternative to a National Convention that our Constitution be put to a referendum of the whole people; but this would not be in the Constitution itself.

Secondly, any document we propose must have a provisional character. If we had already succeeded in destroying the coercive power of the apartheid regime

and establishing popular organs of government throughout the country, we would be able to proclaim a new constitution corresponding to this new reality. Since, however, the ~~the~~ question of a new Constitution ~~is taken~~ ~~is~~ may well be placed squarely on the agenda before such stage is reached, we have to prepare a document consistent with a reality ^{somewhat} less favourable to our position. Our document accordingly would be provisional in the sense that if the situation were to advance dramatically and irreversibly in our favour before the new constitution were put into force, it would be possible to propose a new version ~~with~~ ~~containing provisions reflecting~~ ~~more~~ more advanced forms of popular power.

Home Key Questions

The Nature of the Problem.

All over the world think tanks and individual Experts are being commissioned to answer ~~the~~ ^a problem put ~~as~~ ^{in the} following terms:
How is it possible to devise a constitutional scheme ^{for South Africa} whereby power is equitably shared between black and white, where the rights of the majority are at last recognised but without prejudicing the rights of the minorities?

We do not accept the problem put in those terms. Just as in the ANC we do not have majorities and minorities, but only members subject to the same rights and duties, and just as the Freedom Charter conceives of a single non-racial citizenship and sovereignty belonging to the people as a whole, so in a free South Africa we will not have legally constituted majority

and minority populations. Majorities and minorities will constitute themselves - as in any other country - on the basis of voting preference and not on the basis of skin colour or origin. Even if voting behaviour happened to coincide exactly with race, which we know would not be the case, this would be on a voluntary basis and not in terms of an imposed and unalterable constitutional principle.

~~We feel the problem should~~

We feel the problem should be re-formulated in the following terms:

How is it possible to design a constitutional scheme that:

(i) grants to the oppressed majority their just national rights;

(ii) outlaws racial discrimination in all its forms;

(iii) ensures the complete dismantlement of apartheid structures and

(iii) their replacement by democratic ones;

(iv) Prevents the resurgence of racist policies and programmes, whether in their old form or new ones;

(v) Ensures a substantial re-distribution of wealth and opening up of access to facilities

(vi) Overcomes the effects of centuries of racial domination ^{and inequality} by ensuring a substantial redistribution of wealth and the complete opening up of access to facilities for all;

(vii) Encourages the active ^{involvement} ~~participation~~ of all sectors of the population ⁱⁿ ~~to~~ ~~in~~

~~government~~ ^{and to} economic and cultural ~~life~~ ~~in~~ government and ~~in~~ economic and cultural life;

(viii) ~~Creates~~ ~~condition~~ ~~for~~ ~~the~~ ~~speediest~~

achievement of these goals with the least disruption to the production of goods and services

(vii). ~~Encourages~~ ^{Promotes} the habits of non-racial thinking, ~~and~~ the practice of non-racial behavior and the acquisition of a genuine, subjectively-held patriotic consciousness;

(viii). Creates conditions for the speediest achievement of these goals with the least possible disruption to the tranquillity of the country and to the production of the goods and services necessary for a decent life for the community as a whole?

(ix). Guarantees the security necessary for the accomplishment of these aims?

Some Key Questions.

~~Three~~ ^{Four, Five} key questions emerged from the discussion.

The first related to how we should deal with the so-called problem of ~~the~~ power-sharing or the rights of 'minorities'; ~~and~~ associated with this is the problem of ^{existing} property rights.

The second is ~~whether~~ how to reconcile the principles of freedom ^{of speech,} ~~of organisation~~ and of electoral activity ~~with~~ with the need to combat the stimulation of racial and ^{tribal} division and hatred.

The third is how to devise an electoral system and appropriate structure of government that will ~~guarantee~~ give the best chance ~~of the elector~~ that the electoral process itself and the government elected will ~~be~~ encourage

~~the achievement~~ ^{achievement of the} the principles set out
in the Constitution.

Fourthly, how to devise forms of regional and local government that ~~will~~ will be consistent with the constitutional aims set out above.

Fifthly, how to establish mechanisms ^{and administrative} legal system for maintaining an ongoing legal system while rapidly dismantling the legal and institutional structures of apartheid.

ii The Problem of 'Power-Sharing' and the 'Rights of Minorities'

Our vision of a non-racial, ~~and~~ democratic and united South Africa, ~~has~~ and the constitutional scheme which will flow from it, has three great advantages over anything which the various Think Tanks can come up with. Firstly, it corresponds to the ~~wishes~~ needs

and wishes of the overwhelming majority of South Africans.

Secondly, it corresponds to internationally accepted democratic theory of ^{of} constitutional ~~type~~ matters.

Thirdly, it corresponds to the fact that ever since 1910 South Africa has been ^{relatively new} ~~united~~ governed as a single state (the Bantustan scheme never having achieved legitimacy either internally nor internationally).

In effect, what we are asking for is the ^{democratisation} ~~maintenance~~ of the basic ~~structure~~ constitutional structures that have existed since 1910, by making them truly representative of the whole population. As far as we are concerned, the basic guarantees that none will be oppressed, harassed or humiliated on the ^{PS} grounds of not belonging to the 'majority', are essentially political rather than legal.

They lie in the character of the Freedom Charter and of the ANC. Anyone seriously wishing to ensure that all South Africans, independently of race, colour or creed, have an honoured and active role in the new South Africa, can do no better than to support the campaigns led by the ANC for a democratic South Africa. Constitutions can be torn up or departed from, as we saw with Jan Smith's UDI and with the way the voters' roll in South Africa was manipulated ^{by the Nationalist party.} What is vital is to have a government committed to non-racialism and experienced in the practices of non-racialism, in other words, a government led by the ANC. In addition, there are objective factors which provide a material base for the development of non-racial government, namely, the economic interdependence of all the people of the country. ~~As for as the whites~~

are concerned, the technical and managerial skills which they ^{virtually} monopolize at present, give them ^{an important} capacity to make an input to the new South Africa and to contribute towards the social transformations necessary. ~~It will make~~ ~~problem will be to convert~~

political sense for any new government to do its utmost to maintain high levels of production and therefore to draw on the skills and managerial capacity of all sections of the population. This would facilitate the implementation of the social, economic and cultural transformations envisaged by the Freedom Charter.

In short, our basic position is that we believe in a constitution which guarantees democracy and equality and which seeks to prohibit the violation

of the fundamental human rights of any citizen, whether black, white or brown. In this sense, our Constitution could have the same non-racial character as the American Constitution, and like the latter, which has an Amendment expressly forbidding slavery or practices that ~~are~~^{bear} the badge of slavery, could include a section expressly forbidding apartheid or the practices of apartheid.

The other schemes being put forward are fundamentally different in concept. What they have in common is that they cannot break away from linking political rights and race (tribe). Race and tribe become the foundation of all political thinking, and their main constitutional problem is to devise a scheme that permits something that can be called universal suffrage (that is, everyone has

the vote, even if in different territories and only for people of their own race or tribe), so that it can be said that power is shared and all participate in government, thus producing a State that can be accepted by the world community. We may take it that the concept of partition and independent Bantustans will be progressively abandoned, although the Bantustans will continue to be given important roles in the new dispensation. The basic schemes for preventing what is called 'swamping' of the whites are as follows:

~~State independent~~
↳ tribally

Confederation - a voluntary association of and racially based states, having a loose central authority which represents them all internationally and is responsible for certain agreed matters, such as a common finance policy.

Federation - this is tighter than a confederation, in that the central government has far more authority and the federal

units, though sovereign in certain spheres,
are not independent states. Thus the
Soviet Union is a Confederation (the Ukraine
and Byelo-Russia are represented in the
General Assembly of the UN) and the
USA a Federation, even though both are
called a Union. In the South African context,

various versions of federation are projected.
There ~~is~~ ^{are, the various variants based on} the old race federation of the United

Party, that presupposed a ~~central authority~~
territorially united country but a federation
of races in a central authority. Whites would
~~vote for whites, blacks for blacks etc. and~~
~~all the members of Parliament~~

Parliament. A quadricameral Parliament
would be an example of a federation of this
kind. Another variant is to permit the
^(initially) selected members to function in the
same chamber, but to reserve certain
themes - called 'own affairs' - to certain

Members of a certain race or tribe only.
A further variant is to permit mixing
and voting on all issues by all members,
but to allow for ^{racial} group vetoes.

All these variants are anathema to the
ANC - voting according to race, legislation
according to race, vetoes according to
race. How any of these schemes can be
regarded as dismantling apartheid is
a mystery. It is not only that their
results will be bad, preventing the emergence
of any government capable of dealing with
the whole heritage of apartheid. The very
electoral and legislative processes will be
designed to encourage racial and tribal
identification and division and entrench
apartheid right at the heart of the Constitution.

More serious attention needs to be
given to three other mechanisms that

Regions.
Elect system.
Individ. Pt.

might be used to introduce racial
vetoes but indirectly rather than directly,
~~that is without referring to~~

that is, organising the governmental ~~and~~
structures, electoral system and scheme
of protected rights in such a way that
a de facto white veto exists. This is
a dangerous area where one can be sure
that the anti-ANC Think Tanks will
be well serviced with demographic and
opinion poll information. The least that
we can do is to avoid ourselves putting
forward schemes that will have the
result of denying these people a decisive
say in government and their just
share of the country's wealth. At the
same time we can confront the problem
of 'allaying minority fears' with our
own proposals so that the initiative

rests with us. What we can expect is an attempt at a regional sub-division of the country so that power is decentralised and the central government relatively ineffective; voting schemes designed to ^{aggregate} ~~accumulate~~ all the non- and anti-ANC forces; entrenched clauses which will require special majorities; ~~other clauses ^{mixed into} a Bill of Rights which~~ will be

other clauses of a social and political nature which will be disguised as relating to fundamental human rights ~~and which will permit a court~~ and as such) ~~will prohibit legislation~~ be inviolable by the Legislature even with a hundred per cent majority.

We believe that we can put forward a constitutional scheme that acknowledges and grapples directly with

the central problem. The basic problem is not that of political representation or of cultural identity. Democratic principle requires one person one vote, each vote to have roughly equal value. International conventions and universally recognised standards require non-racial criteria for the suffrage and the composition of legislative, executive and judicial bodies. There are no natural territorial divisions that correspond to areas of compact majority ethnic occupation, which could serve as the basis for a territorial federation made up of national states, ~~on the model, say, of Yugoslavia.~~ ~~The only possible candidate, namely the Transkei, has been~~ such an evident failure on the model, say, of Yugoslavia. Nor are there compact majority linguistic areas which could form the basis of linguistic ~~or~~ federations.

such as Belgium or Switzerland.

The real problem lies in ^{how} ~~reconciling~~
~~simultaneously~~ to combine implementation of
~~both~~ ~~guarantee~~ & the programme of
redistribution of wealth contained in the
Freedom Charter with active involvement
of the present dominant minority in
future political and economic life,
all the time encouraging a free and
active association of all citizens

with a view to creating a genuine common
citizenship. But another way, how is
it possible constitutionally to fulfill
the historic mission of restoring the
land and its resources to the people,
while ^{while at the same time} maintaining the economy at a high
level, so that what the people get
inherit is an ongoing affair and
not a memory of past riches? How

can one encourage the collaboration of ~~at~~
~~least a portion~~ working-class and
professional whites as well as of the
more enlightened sections of the capitalist
class, without postponing forever the just
~~claims~~ economic and social claims of
^{mass of the}
the people?

Our basic proposal is to combine
a Bill of Rights with a constitutional
requirement ~~to~~ on the State and all other
bodies to take affirmative action to
~~the extent possible~~ correct the accumulated
~~inequality~~ social and economic inequality
of the past. Certain rights, such as
the right to vote, to worship, ~~and~~ to
be free from racial insult shall be
inviolable. Other rights of a socio-economic
nature shall be protected but subject
to the overriding need to take affirmative

action to redress the inequality created by apartheid.

[The term 'affirmative action' was created by the US Supreme Court ~~as~~ as a device to correct manifest ~~and~~ inequality in US society based on race or sex. Sometimes called 'positive discrimination', it has been used to require employers to give more job opportunities to blacks, Mexican-Americans and women. It corresponds to requirements on local authorities to desegregate housing and on school boards to provide busing to bring about integrated education. Though its effects have been limited in the USA because of lack of government enthusiasm, in the South African context, given forceful pressure from the people and government, it could prove an

effective instrument for promoting substantive and orderly change] [It is worth noting that when it comes to setting out fundamental human rights, the African Charter on Human and Peoples Rights is a relatively advanced document which includes the so-called Third Generation of rights. The First Generation are the classical liberal rights contained in the UN Universal Declaration, the Second are the Social, Economic and Political Rights contained in UN Conventions of the 1960's and the Third includes the Rights of the Peoples to Peace, Development and a Clean Environment.]