

MCH91-05-3-19

ANC STATEMENT ON DEMOCRACY AND CONSTITUTIONAL GUARANTEES FOR ALL SOUTH AFRICANS

African National Congress
Constitutional Committee



Published by the
Centre for Development Studies
University of the Western Cape



Private Bag X17
Bellville
7535

INTRODUCTION

The principal task of the Constitutional Committee, operating under the guidance of the NEC, has been to find appropriate constitutional formulations to give effect to the long-standing aim of our organisation to end apartheid and introduce non-racialism, non-sexism and democracy thereby truly guaranteeing equal rights for all in South Africa. We are guided by the Freedom Charter and various other documents produced over the years by our organisation. Since these documents reflect universally held values, we are able to benefit from international documents produced in decades of struggle by all humanity against oppression and injustice.

The main argument used against us is that, in the conditions of South Africa, what is called simple majority rule will inevitably lead to oppression of minorities. Accordingly, it is said, there have to be special safeguards for minorities in the Constitution, even if this requires departures from the normal principles of democracy. What is our answer?

ANC Standpoint

In the first place, we in the ANC have always been against all forms of oppression. Our fundamental position is that South Africa belongs to all who live in it. We are not seeking to abuse and humiliate others in the way successive South African regimes have done to the majority of our people. Rather our aim is to eradicate the whole system of apartheid, whereby people are treated differentially on the grounds of their race and not as human beings. What is required is the ending

Constitutional Guarantees for all South Africans

of white privilege and arrogance, not the ending of white people, nor the denial of their rights.

Secondly, we believe that a Constitution will have a crucial role to play in achieving this end. Trust and goodwill are important but they are no substitute for clear and precise legal arrangements. We want a written Constitution that sets out in clear and precise terms the way our government in the future shall be chosen, how it shall be constituted and the manner in which it shall function. In addition, we wish to set out in the Constitution certain core values of our new society which can become the basis for building a new South Africa in a manifestly just and equitable way.

Thirdly, our view is that the best guarantees against oppression or domination lie in strengthening democracy, not weakening it. Any attempt to introduce special electoral or governmental privileges for any section of the population will turn out badly for that section by highlighting their exclusion from the mainstream, and hence their vulnerability. It will also undermine respect for the Constitution as a whole by reducing its principled coherence and integrity. We do not want an egg that is good in parts and rotten in others; the whole egg must be good.

Fourthly, Parliament must, in our view, be able to rule through an elected non-racial majority. We reject the notion of a racially based Senate or Second Chamber of so-called Minorities. No so-called minority should have the right to frustrate majority rule.

Basic Protections For All

We in the ANC have identified a number of principles as being basic to the idea of democracy. We believe that these principles are basic to modern democracies and, as such, provide firm and effective guarantees against oppression or domination. Because these are built into the very heart of the Constitution, they are sometimes referred to as institutional or structural safeguards.

They may be listed as follows:

(a) A separation of powers in government

Virtually all governments accept that governmental power shall be divided between the organs of the government namely the legislature which makes basic law, the judiciary which enforces it and the executive which makes and implements policy. The ANC has spent much of its time trying to find ways of ensuring that a democratically elected legislature is a vigorous and respected body that is not a mere rubber stamp for the executive. Similarly, constitutionalism implies a strong role for a representative and independent judiciary that will prevent the executive from behaving in an arbitrary way and ensure that Parliament functions within the letter and the spirit of the Constitution that has brought it into being.

(b) Territorial division of the country into regions and local authorities in the context of a Unitary State

It is obvious that an over-centralised government in which all decisions are taken at the top and the people are left out of the process is not good government. We favour effective and accountable unitary national government for national tasks, effective and accountable regional government for regional tasks and effective and accountable local government for local tasks. We favour decentralisation, local participation and local initiative. What we are against is schemes to lock the riches of the country, the beautiful suburbs and industrial areas, into autonomous territorial units while the majority of the people are forced to live in squalor in the country's backyards. We reject, therefore, an artificial federation or constitutionally entrenched separation of local authorities from the national structure which would weaken central government. We believe in the legitimate restrictions on the power of the government, but not in its immobilisation.

(c) Election by proportional representation

We believe that we are the first major political movement in the country to come out unequivocally for proportional representation. Our reasons are partly practical, the most important of which is that Proportional Representation is a relatively simple system to operate. It is also suitable for a country where many people are illiterate, which is the case in South Africa. It does not require the drawing up of constituencies which is a disadvantage in our case because we have a very long history of racially based territorial

partitioning. Yet our main consideration is a principled one, namely, that we wish to see all significant currents of opinion in our country represented in Parliament [and all the other law-making bodies]. Experience in Namibia proved that Proportional Representation contributed strongly to national unity - without damaging the interests of democracy. It ensured that all meaningful groupings in the country were represented in the Constituent Assembly, which has now become that country's first Parliament. We would rather do battle with our political opponents by debates inside Parliament.

(d) Bill of Rights

We are the only political organisation to have published a draft Bill of Rights for analysis and discussion by our members, as well as by all South Africans and also by the international community at large. As a part of the Constitution, the Bill of Rights becomes part of the basic law of the country. It establishes a framework of values and principles within which the legislature and executive have to operate. It cannot easily be amended. It is the most direct safeguard against any form of oppression and abuse of individuals and minorities. Instead of proposing bizarre schemes for special voters rolls or proportional representation in the Cabinet or part-time Presidents or veto powers in the Senate or decisions by "consensus", persons concerned with minority rights should be looking closely at the Bill of Rights and see to it that it is strengthened.

The draft that we have presented not only guarantees all the universally accepted political, civil, socioeconomic and cultural rights, it expressly outlaws any form of domination on the

Constitutional Guarantees for all South Africans

grounds of race, colour, creed, etc. It also gives strong guarantees in relation to language rights and rights related to religious belief and practice. Finally, it secures space for what have been called organs of civil society, that is for social, cultural, religious, trade union and other voluntary, non-governmental organisations which, in addition to constituting a vehicle for community expression, serves as a guarantee against monopolisation of public life by the government or the ruling party. Protection of freedom of association is the guarantee of democracy. The so-called right to dissociate as proposed by the South African Law Commission is a recipe for privatized apartheid.

(e) An independent and representative judiciary

Once more, in our search for a just system which will ensure that the Constitution is interpreted in a way acceptable to the broadest strata of South Africans, we have proposed the establishment of a representative and independent Constitutional Court. The present non-independent judiciary which is lily white and male dominated needs to be transformed to reflect the people of South Africa as a whole. Its independence should be constitutionally guaranteed.

(f) Civil Service

A civil service, army and police force that functions according to the principles of representativity, competence, impartiality and accountability is central to the democratic administration of future post-apartheid South Africa. In addition, we propose the establishment of an Ombud, a guarantor of citizens' rights who

can provide redress from the arrogant and arbitrary use of public power, and investigate and correct allegations of corruption and bribery. Further we propose the setting up of a Human Rights Commission to safeguard the basic human rights of all. Uniquely, we have suggested that all elections be organised and supervised by an independent Electoral Supervisory Commission, thus for the first time ensuring that elections would be fair and free in South Africa.

CONCLUSION

It is our belief that this is the route South Africa should follow. All South Africans should therefore support constitutionally structured guarantees acknowledged in all democratic societies as being appropriate and effective protections against oppression or domination. Their strength comes precisely from the fact that they are not specifically designed to protect the privileges of any groups, but intended to secure the fundamental rights and freedoms of all South Africans, including whites.

The objectives of all arrangements - transitional or permanent must be to enable us to move from apartheid to democracy, not to tie apartheid notions forever into the Constitution. Up to now, the provisions of international and national texts of human rights have attempted to protect minorities from the dominant legal authority of majorities. In our country, the dominant legal economic, political and military force has been the minority. It is to remove this oppression that we demand democracy and majority rule with fairness, equality and justice for all entrenched in a Constitution.