

THE RESTORATION OF CITIZENSHIP

It is generally agreed that South African citizenship should be restored to TBVC citizens. The question is whether this should take place immediately, or whether it should await the 'testing of the will' of the people. For the reasons set out below, it is submitted that South African citizenship should be restored immediately. This submission is based on reasons of principle, on reasons of legal efficacy, and on reasons of political practicability.

1 About 7 million South African citizens were deprived of their citizenship by the Status Acts. This happened:

1.1 without any prior 'testing of the will'; and

1.2 en bloc, as a matter of law.

The people concerned did not have the right to renounce their new citizenship or re-assert their South African citizenship. The new citizenship was imposed on them, without the opportunity for individuals to 'opt out'.

2 These steps were taken as an integral and central part of the policy of apartheid, namely to create separate 'ethnic' South African states, with the aim that ultimately, as the then Minister of Information put it in 1978, there would be no black South African citizens (Hansard col 579, 7 February 1978).

3 There is widespread consensus that this policy failed, and must be rejected. The first step in constructing a new democratic South Africa must be to reverse the steps which were taken in the wrong direction. While some steps may in practice be difficult or even impossible to reverse, the deprivation of citizenship can readily be reversed by the same process which created it - by Act of the South African Parliament.

4 That Act can simply undo what was done, en bloc, by restoring South African citizenship to all of those who lost it as a result of the Status Acts.

5 However, there are two major differences between the proposed restoration of South African citizenship and the original deprivation:

5.1 No person will lose any rights as a result of restoration. In other words, if in the process South African citizenship is restored to some people who do not want it, they will not suffer any prejudice. The contrast with the initial deprivation is obvious.

- 5.2 Any people who do not want restoration will have an easy remedy: they can renounce their citizenship in terms of sec 16 of the South African Citizenship Act. Again, there is a sharp and obvious contrast between this situation and the deprivation, which allowed the people affected no remedy if they were dissatisfied.
- 6 The restoration of citizenship offers a rare opportunity to take a step which will immediately have critical symbolic and practical results. There are very few of the processes of apartheid which can be as easily reversed as the deprivation of citizenship.
- 7 What we are calling for is therefore nothing more than the restoration of the status quo.
- 8 This will permit all South Africans to participate on an equal basis in the process of constitution-making and in transitional arrangements. It is the most practical way to give effect to the statement in the Terms of Reference of Working Group 4 that 'the parties recognise the need to provide for the meaningful and democratic participation, of all the people living in the TBVC states in the process of drawing up and adopting a new constitution for South Africa as well as in all possible transitional arrangements'.

The question of dual citizenship

- 9 It has been suggested that the process which we propose will lead to practical problems arising out of dual citizenship. There are three reasons why there is no basis for this concern.
- 10 First: We already have widespread dual citizenship as a result of the Restoration of South African Citizenship Act, 1986. The people who claimed the restoration of their citizenship under that Act were not required to renounce their TBVC citizenship. The then Minister of Home Affairs estimated that 1 751 400 TBVC citizens would be entitled to the restoration of their citizenship as a result of the Act (Hansard (A) col 9375, 23 June 1986). There are thus already very many dual citizens. This has not created any problem.
- 11 Second: Some people seem to believe that the very fact of having dual citizenship would mean that the people affected would lose their South African citizenship, or be vulnerable to losing it. That is not correct. The South African Citizenship Act sets out the various circumstances in which a South African citizen will lose his or her citizenship. None of those circumstances applies to the situation where a person already has citizenship of another state, and then has South African citizenship conferred on him or her. (And of course even if restoration did create this

problem, it could be dealt with by the legislation which restores citizenship.)

- 12 Third: In any event, restoring citizenship after 'testing of the will' would lead to precisely the same situation of dual citizenship. The only way to avoid creating new dual citizens is to delay restoration until constitutional re-incorporation takes place. The effect of this would be to exclude TBVC citizens from the process of constitution-making and from transitional arrangements. This would be contrary to the Terms of Reference of the Working Group, and contrary to the Declaration of Intent. (It is of course technically possible to provide that TBVC citizens may participate in the South African constitution-making process. However, it would be an absurdity on the one hand to insist that the people concerned are aliens in South African law, and on the other hand to permit them to participate in the democratic process of constitution-making for South Africa.)

Practical results of restoration

- 13 The restoration of South African citizenship will primarily have political results. As set out above, it will enable those affected to participate on an equal basis in the constitution-making process. It will have few other practical results.
- 14 It will have no effect on movement between South Africa and the TBVC states. All TBVC citizens have been exempted from the requirement under sec 40(2)(a) of the Admission of Persons to the Republic Act 1972 (and now under the Aliens Control Act 1991) that aliens (ie non-South Africans) must have visas to enter South Africa.
- 15 It will have no effect on residence in South Africa. All TBVC citizens have been exempted under sec 7 bis of the Aliens Act 1937 (and now under the Aliens Control Act 1991) from the requirement to have a permanent or temporary residence permit to live in South Africa.
- 16 It will have no effect on work in South Africa. TBVC citizens do not require a work permit to work in South Africa.
- 17 It will have no effect on pensions in South Africa. TBVC citizens who live in South Africa already qualify for, and receive, South African social pensions. (We are informed that the Social Assistance Bill presently before parliament is to be amended to retain this position.) If they do not live in South Africa, they do not receive a South African social pension, whether they are South African or TBVC citizens.
- 18 Similarly, it will have no effect on unemployment insurance payments or any other social welfare benefits.

- 19 Restoration would therefore achieve its main purposes, reversing a core apartheid measure and facilitating democratic participation, with few if any 'side-effects' creating administrative problems.
- 20 Any problems which are created by the implementation of our proposal will also be created by restoring citizenship after 'testing of the will'. Again, the only way to avoid any such problems is to decide that restoration must await actual reincorporation. As we have pointed out, this would contradict the Terms of Reference and the Declaration of Intent.

Awaiting the Outcome of 'Testing of the Will'

- 21 The argument that restoration of citizenship should await 'testing of the will' seems to have a certain logic to it. However, on closer examination it is seen to create more problems.
- 22 If the testing of the will produces a result in favour of re-incorporation, citizenship will be restored. This is of course the result that would be achieved if restoration took place immediately.
- 23 If the testing of the will produces a result against re-incorporation, what will happen? It is surely not seriously suggested that in that event, none of the citizens of that TBVC state will be entitled to claim the restoration of their South African citizenship? This would be grossly and patently unfair, for a variety of reasons:
- 23.1 When the Restoration of South African Citizenship Act was enacted in 1986, the claims of the people concerned were not made subject to the veto of other people. They could not be held hostage by other citizens of the TBVC state concerned. Why should that be the case now? Why should someone who lost his or her South African citizenship against his or her will be deprived of the right to regain South African citizenship, simply because some other people do not want it?
- 23.2 The central requirement for restoration under the 1986 Restoration Act was permanent residence in South Africa (outside the TBVC state) at the time when the Act came into effect. Virtually the only people who could meet that requirement were those who had urban residential rights under the pass laws. Those who failed to meet this requirement were permanently shut out of the restoration process, because there was no way they could qualify later. They may at all times have wanted to regain their South African citizenship. First they were prevented from doing so by the pass laws. Now the preferences of other people will prevent them from doing so. This clearly can not be justified on any moral basis.

- 24 The only way to deal with this obvious injustice will be to provide that TBVC citizens will nevertheless, despite a vote against re-incorporation, be entitled to restoration of their own South African citizenship. If this is to be done in any event, why not restore South African citizenship now?

Weighing the Alternatives

- 25 The only possible 'negative' effect of restoration now is the possibility that some TBVC citizens may be given a South African citizenship which they do not want. As we have pointed out above, this

25.1 will not cause them any prejudice; and

25.2 can, if they want, be reversed by the simple process of renunciation.

(Of course, if the TBVC state concerned is subsequently incorporated into South Africa, then even this limited 'negative' effect will not result, because the TBVC state and its citizenship will no longer exist.)

- 26 If restoration is permitted only if the 'testing of the will' results in a vote for re-incorporation, we will perpetuate the past injustice by a new injustice:

26.1 People have been deprived of their citizenship against their will;

26.2 The pass laws prevented them from regaining their citizenship as a result of the 1986 Act;

26.3 Now - unlike the people who gained restoration under the 1986 Act - getting back their citizenship will be subject to a veto by other people.

- 27 If TBVC citizens will be entitled to regain their citizenship regardless of the outcome of the 'testing of the will', then it might as well be restored right away. Awaiting a testing of the will becomes fruitless for citizenship purposes.

- 28 Assuming that the fruitless exercise referred to in paragraph 27 is not intended, we therefore have to weigh up the relative inconvenience and injustice of these two alternatives:

28.1 If citizenship is restored immediately, some people who do not want South African citizenship will receive it. They will suffer no prejudice, and can easily renounce it.

- 28.2 If citizenship awaits the outcome of the testing of the will, some people who want their citizenship back will remain deprived of it. They will suffer great prejudice, and will be unable to remedy the situation.
- 29 We have no doubt that even disregarding the need in principle to reverse the false steps of apartheid, the balance is strongly weighed in favour of restoration now. When that argument of principle is taken into account, the argument for restoration now is overwhelming.
- 30 One final point: there is no reason in law why citizenship and re-incorporation should be linked in such a way that the one is dependent on the other. There are already South African citizens (most of them white) living in the TBVC states. There is no reason why black South Africans should be deprived of this option.

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Serving in the new SA



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Control over the new SA will be determined in the civil service and not necessarily at political level, according to a leader in the field, Prof Donovan Marais. Unless the civil service changes concurrently with the political/constitutional reform process, SA runs the risk of a new political dispensation inheriting a civil service that will be structured and staffed according to outdated policies. ANC civil service spokesman Patrick Fitzgerald says this could be fatal. The civil service is the implementing arm of government. As such, its power effectively to block political reform initiatives is vast.

The FM of August 30 reported that the CP was planning to use disaffected public servants to block reform. If one takes into account that in the 1988 Pretoria municipal by-elections the CP won nearly all of the city's northern and western constituencies, at least a portion of the present civil service's ability to veto reform becomes clear. This possibility is reinforced by the present swing among whites to the Right, as illustrated in Potchefstroom.

A look at the division of senior employment in the public sector by race and income (1989) illustrates the pre-eminence of whites (see table).

Finansies & Tegniek (April 24) reported that the ANC wished to see the top 1 500 jobs in the public sector reflect the composition of the population as a whole. If achieved, this means a shift from 80,5% white to 80,5% black.

According to Fitzgerald, the ANC has no directly formulated recipe for the organisation and reorganisation of the civil service for the new SA. He contends that the civil ser-

vice needs to be a clear and precise item on the negotiating agenda. These sentiments are echoed by Piet van der Merwe, chairman of the Commission for Administration, and Hans Olivier, president of the Public Servants' Association.

How is this to occur? Codesa is now dominated, and rightly so, by constitutional and political issues. The participants at Codesa are also predominantly politicians. Where then can the civil service debate find its rightful place? (see diagram)

The make-up of the new SA can already be visualised. It will be a nonracial democracy with certain powers, entrenched by the constitution, devolved to regional authorities. Regional boundaries will be drawn on geographic and economic lines and not ethnically, as is now the case. Great emphasis will be placed on redressing social and economic imbalances and government will have a more pronounced role in development.

Within this situation, the functions and make-up of a new public sector become apparent. It needs, progressively, to become representative of the whole population, accepted by the community and capable of implementing development-orientated policies.

But the civil service restructuring process needs to start now. It needs to be led by officials, working on the lead provided by politicians at Codesa. Even the process of restaffing and training of the new civil service (including the retraining and resociali-

sation of officials) needs to be negotiated and planned by personnel experts, not politicians.

The forum to ensure this debate must be separate from Codesa. It involves different people and different issues. It should consist of various different functional working groups addressing each level of governmental services provided, or still to be provided, in a new SA. Participants should include present civil servants in SA as well as the homelands, and representatives of other poli-



tical/liberation organisations.

The system needs to be co-ordinated by a neutral facilitating agent, not only capable of understanding the functioning of the present system, but also having the ability to comprehend the political sensitivities of a new order. One such agent co-ordinating all such functional areas will prevent the formation of various Codesas, each plugging its own cause. At this stage, forums for health and the economy have already been mooted.

There is a need also to deal simultaneously with black aspirations as well as white fears regarding their roles in a new SA. Blacks, for example, aspire to equal education opportunities, yet at the same time, whites fear decreasing education standards.

Although it is doubtful that SA will have an integrated civil service in the interim phase of the next three years or so, it is likely in the medium and longer term to take on a strong social welfare orientated approach.

These issues cannot wait for a new constitution. They require urgent attention.

SENIOR EMPLOYMENT IN THE PUBLIC SERVICE

Race and income category: 1989

R	White	Coloured	Asian	Black	% White
165 001+	29	0	0	0	100,0
120 000-165 000	3	0	1	0	75,0
110 001-120 000	91	1	0	0	98,9
87 001-100 000	720	5	5	2	98,4
74 001-87 000	1 945	17	55	12	95,9
49 001-74 000	13 596	1 509	1 055	397	82,1
38 001-49 000	21 809	2 147	1 952	814	81,0
29 001-38 000	42 048	4 974	3 389	3 119	78,6
Total	80 241	8 653	6 457	4 344	80,5

Source: Hansard, March 12 1990