

**GROUP A COMMISSION 5
ANC PERSPECTIVE ON MODELS
FOR SOUTH AFRICA'S FUTURE
CONSTITUTIONAL DISPENSATION**

AIM

The given aim of this commission is to assess different models and or guidelines for a constitutional dispensation for a future South Africa.

FIRST QUESTION: What models do members of the group think are appropriate for a future South Africa.

i. To do justice to this question we need do no more than quote from the ANC document, "The Constitutional Guidelines" which states:

"(a) South Africa shall be an independent, unitary, democratic and non-racial state". This presupposes an anti-fascist, anti-racist and anti-nazi constitutional model.

ii. The ANC arrived at this formulation after looking at various present-day constitutions. Its constitution committee, established by President O R Tambo on 8 January 1986 to conduct the research, took ideas from some but found not that could serve as a model for the following reasons:

a) Unlike the experience of most African states, the liberated South Africa will not receive a constitutional blue-print from a colonial power, and will consequently be free to draft its own in keeping with the aspirations and conditions of the majority of South Africans.

b) Some of the spade work has already been done, partly in writing the Freedom Charter, which was adopted by popular acclaim at Kliptown in 1955.

c) The broad principles of the Charter have been incorporated in the Constitutional Guidelines, now being widely circulated for critical scrutiny, comment and amendment.

iii. The unitary state of liberated South Africa will have a centralised legislature, executive, administration and judiciary.

iv. In implementing its policy in terms of the Freedom Charter, the new democratically elected government will fulfil the whole complex of reconstruction through other democratic organisations and institutions besides the state, hence clause b(1) of the Constitutional Guidelines states: "Provision shall be made for the delegation of powers of the central authority to subordinate administrative units for purposes of more efficient administration and democratic participation."

The formation of democratically elected local governing structures accountable to the people, that will help in the implementation of the central governing structures, is seen as ensuring active participation at grassroots level.

v. All organs of government, including the institution of hereditary chiefs, shall be transformed to serve the interests of the people as a whole.

THE LEGAL SYSTEM

South Africa professes to be a civilized state with a western legal system based on Roman-Dutch and English law. These foreign legal principles were used to supplant the indigenous and customary law of the majority of the people in South Africa. The imported Roman-Dutch and English legal systems were further used to dispossess Africans of land and introduce title deeds to force them into the labour market.

Built into these foreign legal principles is a labyrinth of apartheid legislation. The Roman-Dutch and English legal principles themselves are based on ground rules of late nineteenth century laissez-faire capitalism.

So oppressive has been our legal system that it would be unthinkable for the future non-racial judiciary to uphold the rules of procedure, precedents and judicial ideologies of the racially biased courts.

The present judiciary is effectively used to suppress the opponents of apartheid as evidenced by the spate of death sentences it is handing down.

People in South Africa are being sentenced to death at the rate of 10 per month. We should call upon those judges who still have conscience to resign.

It is recommended that:

- a) Our future law should be codified.
- b) We should dispense with formalism and technicality when drafting legislation of any kind.
- c) Our judiciary should not be bound by the South African precedent system which is based on injustice and racism.

SECOND QUESTION: What are the advantages of a federal as opposed to a unitary state?

i. It is argued on behalf of federalism that in a plural society marked by sharp cleavage between social classes, races and ethnicity, that form of political association that would enable each major grouping to look after its internal affairs within the unity as a whole is preferred. Only so can the mutual antagonism or even hostility inherent in cultural, racial or linguistic differences and the disparity in the level of economic development be checked and minimised.

ii. That might be true in other countries but the South African situation is different for the following reasons:

- a) South Africa has been a unitary state since 1910. Through the apartheid law and policies, 87% of the land and 95% of the

instruments of production of the country are effectively in the hands of the ruling class, which is drawn solely from the white community.

In other words we have now two South Africas. Whites own and occupy 87% of the land and Blacks occupy 13% of the land in agriculturally backward and industrially underdeveloped surface areas that hardly have minerals. Now how do you identify federal states in such a set up without perpetuating centuries old injustices and further entrenching the already existing privileges?

b) Because of the historical nature of racism and apartheid system and the policy of divide and rule practised over years, a federal option will give primacy to diversity as against unity. Federalism would destroy the unity which in an emergent state should be given priority.

c) Federalism in emergent states has a tendency to place the centre of gravity in political and economic activity in the regions, relegating the centre to a subordinate position. The end effect is that the centre lacks sufficient inducement and attraction for leaders of the major parties who tend to choose to remain in the regions from where they try to control the actions of their lieutenants at the centre. (See in this regard the formula of the Federated Chamber of Industries Charter).

d) In summary we need a unitary state for the following:

- i. To promote a powerful central organ to redress decades of colonial rule;
- ii. To address the national question and work towards a single nation;
- iii. To ensure the overall development in particular of those people who have been deprived and undeserved;
- iv. To ensure an equitable distribution of resources;
- v) To empower people through local government structures that are democratically elected on a non-racial basis;
- vi) There are no natural territorial divisions in South Africa that are settled by compact majority ethnic communities, which would serve as the basis for a territorial federation made up of national states on the model of, say, Yugoslavia.
- vii) Nor are there compact majority linguistic areas which could form the basis of linguistic federations such as Belgium or Switzerland.

THIRD QUESTION: Should there be minority rights or protection for certain communities in a future South Africa?

- i. Which minorities are worried about their rights and ask for their protection?

The Black national groups do not consider themselves as minorities, but have found home in the ANC and the mass democratic movement structures. The houses of Delegates and Representatives lack legitimacy and are therefore not representative of the Coloured and Indian national groups.

From this process of elimination it becomes clear that the Whites

who are now enjoying political, civil and economic rights and privileges are entertaining some fears of losing them.

ii. ANC is committed to an entrenched Bill of Rights in its Constitution. (See (a) Bill of Rights attached to African Claims drafted in 1943 by a Commission set up by the President-General under the chairmanship of Cde Moses Kotane and (b) January 8, 1987 Statement of NEC delivered by Cde President O R Tambo).

Our proposed Bill of Rights will be aimed at protecting individual rights and not group privileges. At the same time, the state will recognise the linguistic and cultural diversity of the people and provide facilities for free linguistic and cultural development (See Clause "g" of our Constitutional Guidelines).

QUESTION 4: Should there be a Bill of Rights, what should be the role of such a Bill of Rights?

i. Our Constitution shall include a Bill of Rights based on the Freedom Charter.

ii. Linked to that Bill of Rights will be affirmative action to ensure the implementation of the provisions of the Bill of Rights.

iii. The implementation process will not be the obligation only of the state. All social institutions, individuals and organisations shall be under a constitutional duty to eradicate race discrimination in all its forms.

For further elucidation about the role and practical implementation refer to the Freedom Charter and Constitutional Guidelines.