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**Title:** The Future Constitutional Position of White South Africans in a Democratic South Africa

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# THE CONSTITUTIONAL POSITION OF WHITE SOUTH AFRICANS IN A DEMOCRATIC SOUTH AFRICA

What used to be called the black problem has now become the white problem. It is not easy to accept that even in relation to the demise of apartheid, it is the whites and their anxieties that dominate. Justice would require that the central issue be how to guarantee to the oppressed majority that their political rights be restored and the effects of centuries of colonial and racial domination removed. Negotiations should exclusively be about how to dismantle the structures of apartheid, establish democracy and correct the injustices of the past. Yet what is being projected as the central issue is the constitutional future of the whites.

In principle, this should be no problem at all: the whites will enjoy full democratic rights like all other citizens. Whiteness will become a constitutionally irrelevant category. Those people who are today classified as white will cease to enjoy the special privileges that go with this attribution and become ordinary members of society. The fact that their whiteness disappears as a constitutional fact does not mean that they vanish as people. On the contrary, once the system of white supremacy is destroyed, their true interests as citizens, no better or worse than anyone else, can be protected, and this includes their interests both as individuals and as members of cultural, religious and other groups.

What those who regard themselves as white and who are anxious about their future should therefore be demanding is guarantees that the constitution be democratic and that the fundamental rights and liberties of all be respected, without consideration of race, colour, gender or creed. Yet what they are in fact asking for is precisely that the constitution be non-democratic rather than non-racial and that every consideration be given to race, colour and possibly to creed [the gender issue is simply too much for them].

Sometimes they claim to be speaking in defence of the rights of

all minorities. On other occasions the issue is put as being how to prevent domination of one racial group over another. A further formulation is how to protect civilised standards, or, more fashionably these days, uphold first world standards. Much is said about defending group rights.

What it comes down to is that the whites at present control the whole apparatus of government and repression, they are given by law 87 per cent of the surface area of the country, they completely dominate the economy, they have acquired the habits and culture of the master race and they are reluctant to give up even the slightest of their privileges. At the more positive level, they are part and parcel of the history and culture of South Africa, they have skills and aptitudes which could be beneficial for the whole country, and in increasing numbers they are beginning to break away from racist ideas and practices.

They have the capacity to do enormous harm to the country, and also the possibility of transforming themselves as they take part in the process of transforming South Africa. Building a new nation in South Africa requires solving the white problem. that is, destroying the system of white supremacy and establishing the means whereby the whites become ordinary citizens participating actively in the life of the society, neither more nor less privileged than anyone else.

If problems were solved simply by finding acceptable formulae, then the question of the future constitutional order in South Africa could already be regarded as largely settled. Those who have traditionally defended apartheid are now saying that they accept the following core principles:

> an undivided South Africa,
> no domination of any group over any other group, and
> universal suffrage.

At first sight these principles appear to meet the basic claims of the anti-apartheid forces. The moment they are converted into concrete constitutional proposals, however, it becomes clear that they cover conceptions of government and human rights that are not only different from but incompatible with those of the anti-apartheid movement. The basic difference is the saliency given to race. The anti-apartheid position is to eliminate race as a constitutional deter-

minant, while the approach of the authorities is to make race the fundamental factor.

Thus, the undivided South Africa could be a united country, or it could be a jumble of loosely related, race-based bantustans, cantons and federal states. Similarly, the principle of non-domination can be maintained by accepting majority rule subject to a Bill of Rights guaranteeing fundamental rights and liberties, or, alternatively, by establishing a system of racial 'own affairs' and race-group vetoes in Parliament. Finally, there can be one person one vote on a common voters' roll, or one person one vote on separate racially constituted rolls; the suffrage could be universal and undivided or universal but separate.

The differences are not merely ones of degree, capable of being settled by a reasonable amount of give and take on both sides. There just cannot be co-existence between racial group rights and non-racial democracy. It would be like saying that just a little bit of slavery would be allowed, not too much, or that the former colonial power would exercise just a small amount of sovereignty over the newly independent state, not a lot. While the phased replacement of race rule by non-racial democracy can be contemplated, the constitutional co-existence of the two is philosophically, legally and practically impossible.

A number of assumptions can be made about South African historical and cultural reality which are relevant to any constitutional proposals. The first is that the system of apartheid is unjust, hated by the majority of the population, and beginning to disintegrate under pressure. Second, South Africa is multi-lingual, multi-faith and multi-political. Third, there are vast social and economic inequalities that have been established by apartheid laws and practices. Fourth, it is in the interests of all South Africans to prevent the collapse or serious impairment of productive capacity or public utilities. Fifth, there are certain universally accepted rights and freedoms which are as relevant to South Africa as to any other part of the world. Finally, the process of nation-building and overcoming past traumas will require constant and sensitive attention.

The argument that follows is that, difficult though the initial adjustment might be, a non-racial democracy in fact provides far

more effective guarantees to the whites [as to all South Africans] than does any system based on racial group rights.

## I. DIRECT ENTRENCHMENT OF WHITE PRIVILEGE - THE GROUP RIGHTS SCHEME

The group rights approach is based upon the assumption that as far as political rights are concerned, the fundamental unit in the constitutional structure is the race group and not the individual citizen. The group concept reflects itself in a number of different dimensions.-. territorially, electorally, thematically, procedurally and institutionally. The territorial materialisation of group rights takes the form of schemes for fracturing sovereignty on a spatial basis [federal variants]. The electoral manifestation is through separate voters' rolls. The thematic dimension is via the concept of 'own affairs' in Parliament, which has as its Siamese twin the procedural concept of race group vetoes. The institutional aspect relies on constitutionalising private law devices for maintaining segregation.

### FEDERAL OPTIONS

One of the main issues facing the National Convention that drafted the Union of South Africa Act was whether the Cape, Natal, Orange River and Transvaal colonies should be brought together in a Union or a Federation. The initial assumption was that the new state would be a federation, but the delegates resoundingly opted for a union, insisting that there was no part of the sub-continent that was so separate in character, history or economy as to justify any form of restricted sovereignty. The boundaries between the former colonies were accordingly dissolved, and provincial councils with delegated rather than exclusive powers set up. For nearly eighty years, to quote the official motto, Unity has been Strength. Only now that the prospect of universal suffrage is on the near horizon does Unity suddenly become Weakness. It is difficult to escape the conclusion that the underlying premiss is not constitutional principle but how best to defend white supremacy. In 1910 the objective was unity of

what were called the white races; today it is disunity of what are termed the black races.

As a matter of pure principle, there are arguments for and against union just as there are in relation to federation. A number of liberals in South Africa have over the years argued in favour of federation simply as a means of preventing over-centralisation of power. The federal idea was coupled with the concept of a Bill of Rights. Had they left it at that and campaigned for universal franchise, their arguments might today have achieved considerable strength inside the broad anti-apartheid movement. The fact is that, with a few honourable exceptions, until quite recently they added a third check and balance that was manifestly racial in character, namely, that of a qualified franchise which effectively excluded the majority of blacks from the vote. The federal concept thus came to be associated with the paternalistic notion that blacks were almost but not quite good enough to take part in governing the country.

The problem today is not one of terminology but of legal substance. The United States of America is a federal republic, despite its name, while the Union of Soviet Socialist Republics is constitutionally a confederation. Nigeria is a Federation, India a Union, Australia a Commonwealth.

What matters is not the description, but the relationship between the central authority and the regions. If the different territorial units are in effect sovereign and self-governing units that entrust certain functions appertaining to their sovereignty to a common authority, such as defence and international relations, then they associate with each other in a confederation. To the extent that the central authority takes over functions of internal control so does the confederation shade into a federation, and thereafter as the sovereignty of the separate states progressively diminishes, the federation becomes a union. Thus the states that came together to form the USA reserved certain powers to themselves, including the right to elect state governments with sovereign authority in relation to large areas of law, subject only to certain fundamental rights and liberties as set out in the Amendments that formed the Bill of Rights.

The processes of state formation are as multiform as the very states themselves, yet as a general rule federations have come into

being as a result of smaller states coming together to form a larger state rather than through larger states devolving power from the centre to regional entities. Thus the states that constitute the federation normally have an already existing distinctive historical and legal personality which serves as the repository for a residual or continuing sovereignty. The Federal Republic of Germany is one of the few exceptions. Established in federal form after the Second World War, its constitution was designed to eliminate rather than moderate the scourge of nazism, unlike federation for South Africa which would inevitably modify rather than dismantle apartheid. In the case of West Germany a natural territorial basis for devolution of power existed in the form of the ancient states and principlalities which had preceeded German unification.

The problem that supporters of federation have in South Africa is that no such state entities exist, unless, that is, one dignifies the Bantustans with either embryonic or residual statehood. The question of cultural rights and the future of traditional authorities can be dealt with in a way far more favourable to the people living in these areas than by imposing upon them an orphan statehood that would keep them poverty-stricken and cut off from the mainstream of South African development. In any event, most of them are far too fragmented to be seriously considered for any form of meaningful territorial autonomy.

The case of Kwa Zulu - Natal is somewhat different in that the claims made in that region for a form of federal statehood are based upon notions of power-sharing between a tribally-based authority and a neighbouring white-dominated one. Patched together in a particular historical context, it might at a certain moment have been seen as a means of detaching a part of the country from apartheid. In the context of current moves to dismantle the system of white domination as a whole, however, it appears left behind by history and could result in opting out of democracy instead of opting out of apartheid. There is no reason why prominent personalities from the area could not play their role in national life by running for office in the democratic way; the Zulu language and culture would receive constitutional protection like all the other aspects of South Africa's rich cultural heritage; and there would, hopefully, be vigorous local and regional government to ensure that the interests of the people in

the area were looked after. The key problem is how to harmonise culture and way of life with general democracy, not how to keep them apart.

A further difficulty exists. Even if a case could be made out for some degree of separate statehood for Natal - and this would be strongly contested by many in the area- there would be no brother or sister states in the rest of South Africa to keep it company in a federation. Such states would have to be manufactured, and it is difficult to see what historically meaningful criteria could be used to do so.

All the evidence suggests that black South Africans wish overwhelmingly to opt in rather than out of a common society, and that the thrust for federation comes from whites who, fearful of losing their hegemony, seek to opt out. From an economic point of view, South Africa has long been a common society. There are no autonomous or self-sufficient areas. The Bantustans and the towns are closely if unequally tied by migrant labour and economic dependency. Over eighty per cent of the population, black and white, regard themselves as Christian. The ANC was formed in 1912 precisely to overcome tribal and regional divisions among the African people. Trade unions are countrywide. From the side of authority, the army, the police, the prison services are organised on a nation-wide basis; so are transport and telecommunications; there is one Stock Exchange for the country, one basic electricity grid, an integrated system of water supply and a single time zone. Companies have one head office and even the sporting unions are national in character.

Drawing boundaries would accordingly be a highly artificial exercise. Far from corresponding to natural historical, cultural and economic divisions, they would cut through highly integrated areas and populations. Whatever its merits in another context, federation in the context of current South African realities means two things: legitimising and perpetuating the structures of the Bantustans, and carving out pockets of continuing white domination in areas which, by fortuitous coincidence, happened to contain the great bulk of the country's wealth.

The federal idea has been subject to concertina-like expansion and contraction over the years. At one stage even the concept of

confederation was seen as too tight, so the term constellation was imported to convey the idea that there would be some but not too much constitutional rubbing of shoulders. The constellation of Southern African states was to be a loose grouping of Bantustans and of truly independent African states to the north, revolving around a central white South African state. Since then there has been progressive territorial retraction; a constellation stretching up to the lakes of Central Africa gave way to the notion of a confederation between the Bantustans and so-called white South Africa within South Africa's borders; the confederation idea was then transformed into the notion of a federation of six, or eleven or thirteen compact South African states [no-one can agree on the number or on the location]; finally, the focus has now shifted to the creation of a series of micro-states referred to as cantons, scores or hundreds of which would in their conjunction make up the state of South Africa.

Whether macro, medium or micro, the idea is not only to ensure that sovereignty is territorially fragmented, but to see to it that a weak central government is accountable not to the electorate as a whole, but to a multitude of separate regional structures, many bearing a distinct resemblance to the present Bantustans and white-dominated regional authorities. Federalism thus could mean no direct elections for President and no national elections for Parliament, or, alternatively, an Upper House in which ethnically and racially based statelets are grossly overrepresented and the normal principles of democratic accountability grossly violated.

In dealing with the whole question of federalism, it is useful to remember that different objectives might be wrapped up in the same concept. For some, federalism is meritorious in itself inasmuch as it prevents excessive concentration of power in any single authority and at the same time encourages respect for genuine regional differences. For others it is a way of depriving majority rule in South Africa of any meaning; by virtue of drawing boundaries around race and ethnicity, it will prevent the emergence of a national government, keep the black population divided, prevent any economic restructuring of the country and free the economically prosperous areas of the country of any responsibility for helping develop the vast poverty-stricken areas. As far as the second group of pro-federation-

up as principle, and will have to be dealt with on that basis.'

As far as the former and more principled group are concerned, however, their anxieties about checks and balances could perhaps be met by other constitutional arrangements which did not have the effect of challenging the basic principle of equal citizenship in a united South Africa. The role of a Bill of Rights in the context of a separation of powers will be referred to later. At this stage it is worth mentioning that concern about the importance of maintaining grass-roots democracy and avoiding the emergence of an over-centralised and unduly bureaucratic state has come strongly from community-based sections of the anti-apartheid movement, giving rise to the possibility that strong forms of local democracy can be found without dividing the country up into a myriad of political group areas.

Instead of posing the question in the form of: how can we weaken central government? we may ask: how can we strengthen local government? How can we encourage direct community involvement, grass-roots empowerment, immediate accountability of those in authority? How can we promote the organic structures of civil society, and prevent the emergence of a remote, office-bound and potentially authoritarian state? Such an approach would seek to harmonise rather than counterpose strong local democracy with large national goals. It would help in detaching the question of protection against over-centralisation from the question of keeping the people divided along racial and ethnic lines and in ensuring that any delegation or devolution of power was not a constitutional device for preserving enclaves of white privilege. Elements of the federal idea could be retained, but shorn of their entanglement with apartheid.

## SUFFRAGE: UNIVERSAL BUT SEPARATE

No-one seriously argues today that whites can continue to have the vote and blacks not. The principle of universal, or, rather, of generalised suffrage, is no longer contested. Even the most conservative sections of the whites accept that all blacks should have the vote. The question is how the vote should be exercised.

Classical apartheid would permit Africans to vote only in independent tribal Bantustans. Reformed apartheid would add that so-called urban Africans could elect statutory bodies which would then link up with the Bantustans and the Tricameral Parliament to create a confederal superstructure for the country as a whole. Multi-racial apartheid would go a step further and permit elections for a single government, but voting would be done on separate racial rolls.

In all these cases there would be universal franchise in the sense that all adult South Africans, black and white, would have the right to vote. Yet in each case the very way in which the franchise is exercised would perpetuate rather than help dismantle apartheid.

The issue of a separate or a common voter's roll has deep symbolic as well as practical significance in South Africa. The right of black voters in the Cape to stay on the common voters' roll was entrenched in the South Africa Act of 1910, but first African voters were removed and then coloured voters, the latter by means of what one judge referred to as legislative fraud. One may say that just as the US Supreme Court held that school segregation was per se racist and stigmatising, whether or not the facilities in a particular case happened to be equal, so do separate voters' rolls in South Africa imply a degree of stigma, even if there was no weighting of seats in favour of the whites.

It is thus not just a question of the quantitative aspects of democracy being satisfied - majority rule and accountability to the electorate - but of the qualitative essence being respected, namely, the equal worth and dignity of each individual in the society. Separate kraals for the voters, even if not linked to separate representation, own affairs and racial vetoes, imply some inherent indecency or impropriety in having a common citizenship. It suggests that the whites are not prepared to share power in the true sense of the phrase, but only to divide power, that they wish to retain an area [which by sheer good luck enables them to command the economic, residential and educational heights of the country] over which they exercise domination, and then to leave all the heavy social problems to the blacks. It negates the idea of a common citizenship, a common loyalty, a common patriotism. It preserves the notion that the whites have to be dominant somewhere, even if in the narrowed down shere

of an inviolate bloc of voters and members of Parliament.

The symbolic aspect of equal citizenship cannot be separated from the practical aspect of political power.

The objective of racial rolls is not simply to ensure that whites are represented in the legislature in proportion to their numbers -if this were a necessary goal, it could be achieved by other means, such as proportional representation, or delimitation of constituencies according to existing residential patterns. It is to lay the foundation of a Parliament divided against itself, in which whites sit as whites defending white interests, blacks as blacks, and so on. The objective is precisely to negate the principle of universal and equal franchise. Equality will exist between racial blocs, independently of size, and not between individual voters. In effect, each white vote will be worth six and two thirds as much as each black vote; worse still, the white votes will count to the power of infinity, since those elected to represent the whites will have the capacity to veto entirely any legislation called for by representatives of the rest of the country.

The implications of having separate voters' rolls reach well beyond the composition and functioning of the legislature. They both ensure that elections will never be fought on a national but always on a sectional basis, and require that the population of the country continues to be officially classified according to race. In order to be placed on his or her particular roll, each voter will have to satisfy the registering officer that he or she belongs to the relevant racial group. Provision will have to be made for so-called borderline cases and criteria will have to be established for classifying persons of mixed ancestry. In other words, one of the key and most odious of apartheid statutes, the Population Registration Act, formerly the Race Classification Act, will have to remain on the statute book. Registration officers will have the task of looking at people's hair and noses and judging skin tints or giving language or cultural history tests.

The suggestion has been made that race classification for the purpose of voting be made purely voluntary, that is, that people adhere to the group with which they wish to be identified, and that a special non-racial or South African category be created for those who do not wish to be classified. Apart from the absurdity of creating

yet one more group, this time the non-group group, or the non-racial race group, presumably with non- own affairs and a bland and targetless veto, the so-called voluntary principle of group association does not deal with the question of how the groups are to be defined and what the criteria for individual admission are. If the groups define themselves purely on a subjective basis, then there would be no limit to their number. Any five or ten people could constitute themselves into a group and demand a separate voters roll. It could theoretically end up as one person one vote one roll.

If there is a limited choice of categories, people might object that none of them corresponded to the group with which they wished to identify. Alternatively, people might shop around from group to group, not in order to defend any historical or cultural interest, but to find the easiest way into Parliament. What would the criteria be?

If, as has been canvassed, one of the voluntary groups were to be that of Afrikaners, would that include only white Afrikaans-speakers, or also Afrikaans-speakers who today are classified as coloured and put on a separate voters' roll? Could the many Africans who use Afrikaans as their mother tongue qualify? Who would decide the principles, and who would determine in any particular case if an individual who sought voluntarily to associate with the group should be permitted to do so? Would existing members of a group be able to exclude new members? One can imagine the situation in which a candidate had a narrow majority and his or her opponent immediately sought to impugn the result by attempting to disqualify voters as not belonging to the appropriate category.

The idea of special votes and reserved seats is not totally unknown in constitutional law, but almost invariably it is conceived of in terms of a form of affirmative action to strengthen the representation of groups that historically have been grossly discriminated against. They do not constitute the very foundation of the electoral system; in any event, not even the most ardent defenders of the status quo in South Africa would argue that the whites [who are the proponents of separate voters' rolls] would qualify today for requiring the benefits of affirmative action.

What South Africans need above all is to acquire the habits and practices of living together, working together and voting together,

and doing so as equals. A common voters' roll is the most fundamental indication of a shared citizenship and shared loyalty. It is the equivalent of independence for the former colonies. It is the mark of sovereignty, which for the first time will be coextensive with the people as a whole. Universal franchise on a common voters' roll will not in itself end apartheid, which is an intricate and all-pervasive system with institutional, economic and psychological dimensions, but it will be both an historical acknowledgement of the fundamental equality of all South Africans, and the means whereby the inequalities and injustices of the past can be overcome in an orderly, law-governed and democratic way.

## OWN AFFAIRS - THEMATIC APARTHEID

The idea of separate states gave way reluctantly to that of separate Parliaments. Now separate Parliaments are being superceded by separate themes. The members will all sit together in the same chamber, even eat and perform all their natural functions together, but the issues which they discuss will be segregated.

The concept of own affairs presupposes the race classification not of people but of themes. The constitution will define a whole range of questions that will be regarded as falling peculiarly and exclusively within the domain of certain race groups. These would include not only matters such as language, where group rights could be entertained, but residential, health and educational issues, with massive implications for taxation, finance, insurance, construction, land ownership and even for security.

Any attempt to build a national health service, even in conjunction with a private medical sector, will be confronted by what will in effect be extensive legislative no-go areas; skills and resources would be locked into one area, with no possibility of policies designed to ensure a more equitable or even a more efficient spread. Similarly, attempts to equalise educational opportunities or to develop fair housing programmes would strike the rock of impermeable white schools, white suburbs and white control of building activity. Privilege will reproduce itself from generation to generation. Development of the poorer regions of the country will be

impeded. Inequalities based on race will continue, with the whites dealing with the problems of wealth as their major own affair, and the blacks with those of poverty as theirs.

The own affairs concept is not only morally offensive, it is inherently clumsy and incapable of simple application. Special procedures with special adjudicatory panels would have to be established for determining what affairs are own and what are general; there would inevitably be legislation that would be regarded as part own and part general, and also proposed laws that affected own affairs but only indirectly or tangentially. Instead of attending to the myriad problems the country faced, Parliament would be locked into endless procedural and definitional disputes, with race groups battling selfishly with each other all the time to stake out as much territory as possible.

## RACE GROUP VETOES AND THE PRINCIPLES OF CONSOCIATIONAL DEMOCRACY

Control over own affairs can be exercised either offensively, in the form of exclusive right to legislate in relation to certain themes, or defensively, by virtue of the right to nullify or veto legislation touching on own affairs. The racial group veto is being projected as the ultimate safeguard that group rights will be respected. It is a fallback position, but one of an absolute kind. It is not only objectionable in principle, it would be disastrous in practice, and particularly so for the whites whom it is intended to protect.

The race group veto is fundamentally offensive because it perpetuates racism right at the heart of the constitution. Yet it is not illegitimate to point out that even in terms of its own racist logic, the veto is the poorest guarantee that the whites could have of tranquillity in the future. On the contrary, its existence would highlight the fact that fifteen per cent of the population had a say equal to that of eighty five per cent, and its use would invite every kind of racial counter-mobilisation. The only guarantee it would offer would be that attention was sharply focussed on the extent to which whites enjoyed a privileged existence outside of and at the expense of the rest of the society. Parliament would be in a state of permanent stress, with the

whites taking on the provocative role of opponents of a national vision and defenders of sectional privilege.

One only has to imagine the concrete situations that would arise to see how vulnerable the whites would become if they sought to rely on repeated use of the veto to block legislation with which they disagreed. The government puts forward a programme for comprehensive re-shaping of the educational system with a view to encouraging equal opportunity and promoting a spirit of mutual respect and tolerance amongst the children. The whites block it because they prefer to keep schools segregated and because they want to continue teaching their children that God sent the whites to Africa to civilise the blacks. The veto would be seen for what it was, a flagrant means of preserving values and interests condemned throughout the world and by most South Africans. Anyone genuinely concerned about the future of the country and of all its people, black and white, can only reject the veto as a constitutional mechanism, and seek to find more principled and effective methods of meeting genuinely held fears.

The devices of own affairs and mutual vetoes are in fact derived from the principles of what has been called consociational democracy. In essence, supporters of consociational democracy argue that the unqualified application of majority rule in countries torn by severe cleavages of language, religion, political allegiances or national origin, is undemocratic and leads to governmental paralysis; it is undemocratic because the 'winner takes all' principle means that nearly half the population is excluded from government, and it paralyses public administration because all social energies are directed towards capturing total power for one's own group and keeping the other group permanently out of office.

Rather than permit the country to be torn apart as the parties compete for the necessary 51 per cent of the votes, they continue, the constitution should encourage an accommodation between the respective elites on the one hand, and the demobilisation of fervent followers on the other. This can only be done by taking the vital interests of the competing groups out of the electoral arena and creating appropriate mechanisms to ensure that all groups are represented in government and able to defend their interests. Countries where consociational democracy has been tried or for which it has

been proposed include Belgium [language divisions], the Netherlands and Austria [church-secular tensions], Colombia [political strife], Cyprus [national origin] and the Lebanon [religious differences], with manifestly mixed results.

About a decade ago, consociational democracy was talked about as a means of ensuring the representation of all South Africans in government. The argument ran that once the whites were guaranteed that their vital interests would be protected against the effects of majority rule, they would voluntarily relinquish their monopoly of power.

It is interesting but not very fruitful to speculate about how South Africa would have evolved if the authorities had at that time taken determined initiatives to introduce what was called power-sharing with guarantees against domination of one group over another. The fact is that what they produced was the Tricameral Parliament, which proved that in the South African context consociationalism would inevitably be linked up with apartheid [and, incidentally that it would inflame rather than demobilise 'followers'].

It would seem that consociational democracy has a chance of succeeding in a country where there is rough parity between the contending parties, but that it is doomed where the inequalities are enormous, as in South Africa. The Tricameral Parliament was repudiated by the original supporters of consociationalism as a parody of what they had in mind, but the consociational principle continued to have some significance inasmuch as it was appealed to as justifying the proposals of the Buthelezi Commission and later of the so-called Kwazulu - Natal Indaba. The currently hinted at race-based electoral procedures, the concept of own affairs and the race-group vetoes, all purport to have their intellectual origins in consociationalism, which is projected as a principled and democratic answer to majoritarianism.

South Africans have a duty to study all political and constitutional schemes which might be useful in ending apartheid. Consociational democracy certainly requires serious and objective analysis - it is not per se racist and supportive of inequality, even if in South African conditions it inevitably gets locked into the defence of apartheid and

minority privilege. The debate which it provokes leads to interesting and productive conclusions. What is important is to look at the objectives that it seeks to achieve rather than the specific mechanisms that have been proposed. Thus everyone could support the idea of taking the race factor out of the electoral arena as much as possible, and of ensuring that all sections of the South African population felt themselves represented in the government and protected by the constitution. This would be consistent with one aspect of the consociational objective, without being tied to specific consociational structures.

International law and, to some extent, constitutional law, have long recognised that minorities have rights against majority populations. The right to dominate or to preserve special social and economic privileges, has certainly never been one of these rights, but the right not to be discriminated against has been, as well as the right to have one's language and customs respected. More recently, the right to specially favourable treatment to overcome the effects of past discrimination has received some measure of recognition.

The rigid, race-fixated structures of South African consociationalism would seem to be the worst means of securing these rights, even if only because they would induce massive distrust rather than trust, which is the foundation of the consociational compact. Yet it should not be impossible to devise constitutional mechanisms consistent with the principles of non-racial democracy and equally with the goals of consociationalism and internationally accepted norms in relation to protection of minority rights.

Attention would have to be focussed on what was meant by a minority. Here it is important to distinguish between defensive and affirmative, negative and positive, aspects of being in a minority. In a negative sense, any group singled out for attack or persecution could be regarded as a minority. If the basis of the attack or the means used are illegitimate, then all persons at risk have the right to claim legal protection. This is the principle of non-discrimination, which is the twin brother or sister of the principle of equal rights. In this sense, whites could be considered as a minority group entitled to protection against any forms of harassment, abuse or arbitrary action aimed at them because they are whites.

The interests to be protected are identical to those of all other citizens, the negative interest of not being singled out on the basis of skin colour for unfavourable treatment. Whiteness has constitutional relevance in terms of its inappropriateness; it is relevant purely because it is irrelevant. It should not be used today as a justification for privilege and domination, nor should it be used tomorrow as the basis of humiliation and vengeance.

This is quite the opposite of saying that whiteness is a value in itself which merits constitutional regard. It is not the quality of being white that receives protection, but the quality of being human, of being a citizen. It amounts to saying that the constitution will not permit your whiteness from being held against you in any way; it is not declaring that your whiteness confers on you any special constitutional glow or immunity.

The situation is quite different with regard to groups identifying themselves by means of language, religious belief or custom. While there is no such thing as a legal right to whiteness, there is such a thing as the right to belong to a group with a distinctive cultural or religious character. These rights are positive or affirmative. The extent to which they are recognised as express constitutional rights, with appropriate mechanisms for enforcement, varies from country to country.

There is no reason why a democratic South African constitution should not contain explicit references to such rights, with appropriate machinery to guarantee their realisation. The Freedom Charter has long recognised that cultural, linguistic and religious pluralism are not only permissible but desirable - South Africa is a better not a worse country for being populated by people of many languages, traits and creeds. Furthermore, the Charter implies that there shall be no single cultural formation or language or religious belief which shall be regarded as superior to any other. This would be particularly important in relation to language policy.

The use, say, of English as the language of international communication and of official business in the central government, would not mean that other languages lost their equal status. On the contrary, the right to use one's mother tongue in Parliament or the courts, at the post office or in shops should be guaranteed, as should the right to

learn and develop one's language at school.

Rather than permeate the whole constitution with strange and complicated mechanisms for keeping the racial principle alive, this is what the supporters of consociational democracy should be turning their attention to. Cultural sensitivity can never be achieved by constitutional insensitivity. The focus would not be on racial groups but on groups united by language [which would often cut across race], by religion [which would usually cut across race] and by custom. Not all customs would merit constitutional protection - for example, the custom of requiring blacks to use the back door would certainly not only not be defensible, it would give rise to constitutional remedies. Similarly, there are many customs associated with aspects of traditional family law or the rights of traditional leaders that would have to be reviewed.

There is one last area where consociational principles might in fact play a useful role, and that is in facilitating the transition from white minority rule to non-racial democracy.

If one of the objectives of a constitutional dispensation is to encourage a common commitment of culturally and politically diverse groups to governmental institutions, then a sober analysis needs to be made of the fears and suspicions that keep them apart. From this point of view, what matters is not whether the fears that exist have their basis in objective reality, but whether they are genuinely held. Similarly, in this context the fact that those persons who are fearful are the very ones whose unconscionable behaviour in the past gave rise to the divisions and tensions underlying their apprehension, is only partially relevant. What is important is that the fears do exist and that they impede the movement towards non-racial democracy.

Confidence-building measures based on consociational notions and of a temporary kind would not be inconsistent with the goals of democracy; on the contrary, provided their short-lived character was clearly understood, and the goal of non-racial democracy was always kept firmly in mind, they could be seen as positive in the South African context. A caretaker administration based to some extent on consociational forms of representation could in fact be one of many possible means for creating conditions for the introduction of full,

non-racial democracy.

## GHETTOES IN GOVERNMENT

The principle of race representing race with guaranteed positions and blocking powers would extend into the government itself.

This raises some problems in relation to the Presidency. If it were possible to apportion sections of the body along racial lines, this would surely be done, with the head no doubt being white to take the decisions and the arms black to do the work; one can only speculate as to who would get the other parts. What the biological scientists cannot achieve, the constitutional experts are trying to accomplish. Instead of allowing the people of the country to choose their president in fair and open elections, they are proposing a complicated scheme of indirect choice based upon a racially constituted college.

There are any number of other variants possible. They could have a black president in the mornings and a white one in the afternoons, or else do so on alternate days, weeks or months, with perhaps a non-racial president on Sundays to keep the voluntary principle alive. They could create a presidential chorus with different voices being given to the different members in the form of presidential own affairs. Alternatively, there could be a rainbow of vice-presidents each with blocking power in relation to the exercise of presidential functions.

The same approach of racial representation, quotas and blocking powers would apply to the government itself. The new South African constitution could become the first one in the world to have a computer programme written into it as article one or two. Only in such a way could all the permutations and combinations of ministers, deputy ministers, cabinet committees and racial groups be catered for. The question of how the persons would be appointed also becomes complicated. Presumably the idea would be to make each racial fraction answerable to the relevant group of members of Parliament. The possibility would exist of having at least four and

possibly twelve Prime Ministers, one for each racial or ethnic group. [One cannot help feeling that if the process were extended there literally would be no distinction between the governors and the government, since the whole of South Africa would be in the government and the ultimate in democracy achieved].

What lurks behind these eccentric proposals is a far from bizarre notion that the main function of government is precisely not to govern. The head of state can head the state, and Parliament can have any amount of freedom to debate any topic under the sun, but neither the people nor the government shall govern. What appears to be the extreme free marketeer's nightmare, namely more government than anywhere else in the world, turns out to be his or her golden dream, since there will be less governing than in any other country. It will be a case of all check and little balance. Government will be paralysed by systems of race group accountability, and the market, theoretically non-racial but in practice white-dominated, will rule.

## II. INDIRECT ENTRENCHMENT OF WHITE PRIVILEGE

There are non-racial as well as racial ways of entrenching white privilege. The racial way is to construct the constitution around categories of race. The non-racial ways are two-fold; the one is constitutionally to freeze the economic and social status quo, the other to ensure constitutional protection for privatised apartheid. Both schemes fit in with the idea of Parliament being a place where blacks can talk as much as they like, but only act in relation to their own affairs, namely, the Bantustans, the urban slums and the overcrowded schools and hospitals. Even in this limited sphere they will be emasculated, since the resources needed to bring about any major improvements would be constitutionally under white lock and key.

### CONGEALING VESTED RIGHTS

An apparently race-free clause in the constitution would protect

what would be termed vested interests from any governmental interference. There would either be an absolute bar, or the terms for any intervention would be so onerous as to make change virtually impossible. As a result of the extraordinary coincidence previously referred to, the persons making this proposal happen to own 87 per cent of the land and about 95 per cent of productive capital; they live in the best residential areas, send their children to the best-equipped schools and have the best medical attention at their beck and call; they occupy all the top jobs in both the public and the private sectors and positions of command in the armed forces, police and prison service; they are literally the prosecutors, judges and executioner. To adapt Anatole France's famous statement, any such constitutional device would, in its democratic and non-racial way, protect with equal majesty the vested interest of blacks to live in compounds, to migrate from the Bantustans, and crowd the townships, hospitals and schools, and of the whites to occupy the suburbs and take trips to Hong Kong.

With a view to encouraging an orderly and peaceful transition to democracy and minimising the prospects of sabotage and disruption, provision could always be made for reducing the anxieties of those who fear that majority rule will drastically affect their standard of living and shatter their personal security. All sorts of arrangements could be made relating to pension rights [which seem to count well above the franchise and freedom of speech in the order of priorities], as well as to job security. A comprehensive programme could be worked out to prevent arbitrary seizure of assets, and the question of compensation for property taken in the public interest could be dealt with. Appropriate mechanisms could be created to ensure that any such agreements were honoured.

None of this requires generalised constitutional treatment, however, except possibly in an explicitly transitional and short-life way. If defenders of the grossly unequal and manifestly inequitable status quo wish to wrap their apartheid-derived privileges in constitutional provisions one hopes at least that they will have the grace not to do so in the guise of defending fundamental human rights; they should not be surprised, too, if advocates of radical transformation insist with equal force on a clear constitutional programme designed to correct the economic injustices of the past.

## PRIVATISING APARTHEID

The ultimate defence of white privilege is to take it out of the domain of public law altogether and protect it as a private matter. This would be done by means of an apparently innocuous constitutional provision which simply acknowledged the inviolability of contracts and freedom of association. If necessary the old Latin phrase pacta sunt servanda - agreements must be honoured -can be utilised.

Apartheid as a system of public law would be dead. The statutory division of the population on the grounds of race would be over. There would be no legalised discrimination, no official segregation of facilities, no racial group areas, no system of separate schooling, no apartheid in hospitals or swimming baths or golf courses. All that would exist would be a clause in the constitution permitting people to form private associations on a voluntary basis, and then another clause upholding freedom of contract. People could then get together and by virtue of pacts or restrictive covenants create racially exclusive residential areas, establish racially exclusive schools and hospitals and swimming pools and golf courses.

They would not have to start from scratch. They could merely club together and convert the whites-only group areas in which they presently live into whites-only residential suburbs. Any black person wishing to move into such an area and claiming that his or her constitutional rights to equal protection were being violated would be met by the defence that such protection only extended to the public and not to the private sphere. The constitutional right that would be recognised by the courts would be that of voluntary association and freedom of contract.

There would be some differences from the present position, the two most important being that the whites would have to finance any expenditure themselves and that individuals who did not wish to participate could refuse to do so. Yet the result would be to tie up massive resources in racially exclusive undertakings and to reproduce all the present patterns of a racially divided society, even if under a different legal guise.

## CONCLUSION

Six different constitutional schemes are being prepared with the common objective of preserving a privileged position for the whites in a future South Africa. They are intended to operate as a package, and yet each single one on its own could have the effect of frustrating the development of non-racial democracy in South Africa. The basic argument used to justify them all is that whites would be swamped by the black majority unless they received special constitutional protection.

It is contended that this argument is false, and that non-racial democracy offers a far more secure position for all South Africans, the whites included, than do any of the special schemes.

## III. WHITE SOUTH AFRICANS IN A NON-RACIAL DEMOCRACY

The virtues of non-racial democracy would seem to be self-evident in South Africa, and yet experience shows that they have to be spelt out. The basic scheme is a simple one. It represents the application in South Africa of universally held views and corresponds to the vision long projected in the Freedom Charter.

In essence, it presupposes a constitutional structure based on the following inter-related principles:

i) equal rights for all South African citizens, irrespective of race, colour, gender or creed;

ii) a government accountable at all levels to the people through periodic and free elections based on the principles of universal suffrage on a common voters' roll;

iii) political pluralism, a multi-party state and freedom of speech and assembly;

iv) a mixed economy;

v) protection of fundamental rights and freedoms through a justiciable Bill of Rights;

vi) a separation of powers including an independent and non-racial judiciary entrusted with the task of upholding the rule of law and the principles of the constitution.

In the light of the pro-democracy upsurge in many parts of the world, such positions should be regarded as axiomatic and unassailable. Yet, against the background of what can only be described as racist assumptions, all manner of excuses are offered for departure from these principles in the case of South Africa.

For the purposes of analysis, it will be accepted that the prospect of majority rule, even if subject to a justiciable Bill of Rights, is alarming to the great majority of those who choose to classify themselves as whites in South Africa today. The argument will be that the best way to allay these fears is to ensure that democracy and its institutions are firmly planted in South Africa; the worst way is to undermine democracy from the start and subvert it with a complicated and unworkable set of institutions based on notions designed to keep racially defined groups locked in endless battle.

From a purely moral point of view, it is not easy to accept that the fears of the white minority in South Africa should merit special attention. It is they who made the bed in which they are now so unwilling to lie. If they are cut off from their fellow South Africans, it is because this was their choice. If they feel exposed because of their conspicuously high standard of living in the midst of much poverty, homelessness and hunger, this was the gap they passed laws to maintain. If they are concerned at the tendency to solve political question by force, they should recall that it was they who siezed the country by forceful invasion, ruled it by force and then outlawed peaceful protest and opposition.

Nevertheless, if we are to build a new nation on the ruins of apartheid, we have to address ourselves seriously to all the preoccupations of all the people, whatever their past roles might have been. The abstract defence of democracy is easy; its concrete application is difficult, especially in a country where it has been much talked about and little practised.

When racists and democrats meet it is difficult for the racists not to be authoritarian and for the democrats not to be patronising. Bearing that in mind, three areas will be selected out for discussion on the basis that they are the most sensitive, controversial and difficult. They are:

- loss of identity,
- collapse of the economy,
- loss of freedom.

## THE QUESTION OF IDENTITY : THE RIGHT TO BE THE SAME AND THE RIGHT TO BE DIFFERENT

### 1. Political rights and cultural rights

We are struggling in South Africa for the right to be the same. We are also fighting for the right to be different. No question has caused so much confusion as this one, perhaps because in the past the issues have been deliberately obscured.

The struggle for the right to be the same expresses itself as a battle for equal citizenship rights, as a struggle against being treated differently because one is black or brown or white or Christian or Moslem or Jewish or Hindu or female or male or Tswana-speaking or Afrikaans-speaking. We are all South Africans, human beings living in and owing loyalty to the same land. The country belongs equally to all of us, and we belong equally to the country. There should be no differentiation whatsoever of citizenship or nationality between us. Nobody is worth more or less than anybody else because of his or her appearance, or origin, or language, or gender, or beliefs.

This is the principle of equal rights for each and every individual. In affirmative terms, it gives each South African the right to vote, to be educated, to travel and to take part in the life of the nation. Expressed negatively, it is the right not to be discriminated against. No individual may be treated advantageously or disadvantageously because she or he belongs to a certain racial, linguistic or religious group, or is of a certain gender. The protection applies not only to individuals but to groups; they shall neither be discriminated against nor shall they receive the benefits of discrimination against others.

The constitution must expressly and unequivocally guarantee the fundamental equality of all citizens, and establish appropriate mechanisms to make this guarantee a reality. The law must ensure

that in all spheres of public life - education, health, work, entertainment and access to facilities -no-one is discriminated against because of colour, language, gender or belief.

In South Africa today, physiognomy is destiny; your skin colour determines what your rights and duties are and how and where they shall be exercised. From a legal point of view, therefore, the struggle against apartheid is precisely a struggle against separateness and a struggle to be the same.

Sameness, however, should not be equated with. Sameness relates to one area of life, identity to another. Sameness refers to one's status as citizen, voter, litigant, scholar, patient or employee. In this capacity, one's appearance, origin and gender are totally irrelevant. Identity relates to personality, culture, tastes, beliefs and ways of seeing and doing things. Here we struggle for the right to be different.

The objective of non-racial democracy is not to create a society of isdentikit individuals, all looking the same, dressing in the same way, eating the same food, speaking the same language, voting in the same way and doing the same dance steps to the same band [the so-called civilised person of earlier British assimmilationist policy, who happened to be male, English-speaking, with a neat crease in his trousers and a penchant for tomato sauce].

Equality, or the sameness of political rights, does not mean homogeneity or cultural blandness. As feminists and others have pointed out, to be equal in a hegemonic culture means to take on the culture of your oppressors. Non-racial democracy presupposes just the opposite. Political equality becomes the foundation for cultural diversity. Once the problem of basic political rights is solved, cultural questions can be treated on their merits. Liberated from the blockages and perversions imposed by their association with domination and subordination, the different cultural streams in South Africa can flow cleanly and energetically together, watering the land for the benefit of all.

The very concept of equality presupposes equal rights between those who are different. The aim is not to eliminate the different personal and cultural characteristics, not to get people to deny or be ashamed of (nor to over-glorify) who they are, but to ensure that

these differences are no longer used for purposes of exploitation, oppression, insult or abuse.

Language is a good example of an area where the principles of equality and diversity need to go together. No citizen should be entitled to more or subjected to less favourable treatment because of the language that he or she speaks; . no language should be regarded as inferior or superior to any other language; there should be a policy of encouraging the development of South Africa's many languages.

Afrikaans writers and linguists have raised many questions about the future of the Afrikaans language in a non-racial, democratic South Africa. They are entitled to a clear answer from the constitution, bearing in mind that the ultimate guarantee is not that it is protected by the barrel of a gun, but that it is spoken by millions of South Africans, for whom it is the vehicle of their most intimate thoughts and feelings. Yet the question is not just how to secure the free exercise and development of Afrikaans, but how to guarantee full recognition of Zulu and Tsonga and Sipedi and all the South African languages disdainfully referred to as vernaculars, extending to them the status, dignity and means for development that such recognition implies.

It will not be necessary for the constitution to attend directly to all the myriad problems associated with a democratic language policy. There will be questions relating to language use in Parliament, the courts and the public service, in the police force and army and at the level of local government. There will be the matter of medium of instruction at schools and universities, of the language of broadcasting, books, films and newspapers, of place names and street signs. Special questions might arise in relation to languages spoken by smaller communities, or used for religious purposes, such as Gujerati, Portuguese, Greek, Arabic and Hebrew.

The constitution would not necessarily have to respond to all these detailed questions, but it should frame broad operative principles, and indicate the mechanisms, including the courts, which will have the function of ensuring that these principles are adhered to.

Just as the constitution can guarantee language rights, so it can create secure space for free cultural expression in the broader sense

the mix whereby persons regard themselves as members of a specific community. Religion might enter, as well as a variety of practices and traditions built up over the years and passed down from generation to generation. As has been said, folkways are often stronger than law ways. Frequently the transmission is unconscious, affecting such things as speech styles and body language. South Africa is the richer for having persons drawn from three continents, for being multilingual and muti-faith and multi-political, for having pap and curry and roast beef, watermelon and grape.

The new South African constitution will accordingly favour diversity and an open society. It will recognise that the emerging South African nation will be made up of many different groupings with a multiplicity of languages and historical experiences. Cultural diversity and political pluralism are both desirable constitutional objectives. Each is important in itself, and each complements the other. What should be avoided at all costs, however, is the merging or conflation of the two. Basing political rights on cultural formation is to guarantee that the voting public will fragment themselves into warring racial and ethnic blocs. It is also to ensure that true cultural expression is subordinated to shallow and opportunistic posturing of a chauvinistic kind.

## 2. The public domain and private rights

There is another dimension to the question of the right to be the same versus the right to be different, and that is in relation to where the public domain ends and the private sphere begins. In constitutional language, this means determining the point of intersection between the fundamental right to equal protection and the fundamental right to personal privacy.

We cannot imagine a constitution which sought to prescribe whom people should marry or not marry, or whom they should have as their friends or dinner guests or companions. Nor should it permit any state official to dictate such matters. These are questions that belong exclusively to the individuals concerned, and the constitution will guarantee to him or her such rights of privacy. At the same time, a democratic constitution could not acknowledge a right to bar people from hotels or restaurants or taxis or sports facilities because

of the personal prejudices of the managers. In the former case the right to privacy would take precedence, in the latter the right to equal protection would prevail.

Considerable experience exists in many countries as to where to draw the line and as to what procedures should be followed in dealing with violations. It is clear that law by itself can do little to eliminate discrimination, but that in a climate of general social awareness and in a context of broad education in favour of equality, sensitively drawn legislation can play a significant role.

What would be disastrous in South Africa would be to convert the right to privacy into an instrument for permitting organised discrimination. The law should never be utilised as a mechanism for barring people from exercising their fundamental rights. It is one thing to say that the state shall never interfere with matters that are truly intimate and personal. It is another to say that the state should defend the right to exclude people from neighbourhoods or schools or jobs because they are blacks or whites or of Asian origin or Jews. This is an example of the situation where the right to be the same, that is not to be discriminated against, must override the right to be different.

The right to be different does not include the right to discriminate against others because they are different. Nor does it include the right to impose difference on others against their will. It is a right of personal expression that can be exercised by individuals and groups for their own well-being and satisfaction; it should never be used aggressively to curtail the rights of others.

### 3. La différence - the gender question

The question of the constitutional rights of women and men is a complicated one that requires extensive and special treatment. Suffice to say at this point that the issue of the right to be the same and the right to be different would appear to be fundamental in any analysis. In terms of general political and civil rights men and women have the right to be treated in the same gender-free way. The equal rights clause in a new South African constitution should be unambiguous in outlawing any discrimination or exclusion based on

gender.

At the same time, many feminists argue that women are not simply men without penises, just as men are not simply women who cannot have babies. They want equality with men, but not necessarily according to the norms that men have created for society as a whole. Thus they do not wish for equality if that means they must be female men. True equality connotes a joint input into determining the generalised norms, as well as acknowledging the right of women and men each to speak in their own voices.

There are others who put the emphasis on choice. Women and men should have the choice to decide whether to accept masculine and feminine roles, and neither should be penalised for wishing to be the same as the other nor for preferring to be different.

The related question of rights of sexual preference could also be tackled as one essentially of privacy and choice. On the one hand, there should be no discrimination against lesbian women and gay men because of their homosexuality [the right to be the same] on the other their private behaviour is a matter for them alone and not for the state [the right to be different].

## THE QUESTION OF PROPERTY

### 1. The new ideologues

Once upon a time it used to be the dispossessed who were heavily ideological and the possessors who were flexible and pragmatic, at least so they claimed. Nowadays it is the property-owners who wish to submit society to pre-determined schemes, certain as a matter of principle of their correctness and oblivious to evidence one way or the other.

Not long ago, too, it was what was called the left in South Africa that argued for collective or group rights while the right claimed to be defenders of individual rights. Today it is the broad democratic movement which is laying stress on the importance of looking at South Africans as individuals and not as members of groups, while it is the right that is hanging on to the principles of group rights.

These considerations are relevant to the different approaches being adopted to the question of property rights in a new constitution. People who traditionally have favoured the establishment of a precisely defined economic framework in the constitution, now argue for an open constitution which leaves the issue of economic policy to the wishes of future electorates and the good sense of future governments. Persons who formerly opposed any reference to economic matters in the constitution, now wish to load the constitution with economic clauses.

Thus the latter demand that elaborate clauses be put into the constitution to protect private property, promote privatisation and entrench free market principles. In other words, after years of criticising socialist countries for putting ideologically motivated programmes into their constitutions, and thereby removing the issues from public debate, they are now themselves planning to do just that, though from the opposite point of view.

The reality is that what is at issue in South Africa today is not whether to have a market economy or a centrally planned one, capitalism or socialism. The basic problem is what to do about the fact that as a result of apartheid the whites today own 87 per cent of the land and 95 per cent of the country's productive capital; that as a consequence of generations of legally segregated schools and hospitals, health and education services for whites are vastly superior to those of blacks; that in a country where tens of thousands of whites have private swimming pools, millions of blacks do not even have piped water.

Once the principle of a mixed economy is accepted, as it has been by all the major components of the broad democratic movement, the constitutional issue falls away. What remains is the question of what to do about apartheid-induced inequality. Economic clauses apparently designed merely to guarantee the continuation of a system of free enterprise, in fact have the effect of preserving a system of grossly unjust division of access to economic goods, that is, much enterprise and little freedom.

At a constitutional level, then, the real issue is the competence of Parliament to deal with the totally skewed property relationships produced in South Africa by centuries of colonial dispossession and

apartheid law.

The range of options is wide.

The constitution could sanctify the existing patterns of ownership and control, forbidding any public intervention at all.

It could, on the model of the European Convention of Human Rights, say nothing at all on the question, recognising that it is a matter which permits of different views, and that ultimately the issue is one to be determined by the electorate.

On the other hand it could expressly permit taking of property, but only in the public interest and then subject to the payment of prompt and adequate compensation.

A variant of the last-mentioned scheme would be to allow intervention in the public interest, but to have a qualified form of compensation, in terms of which market valuation would not be the sole determinant. Affirmative action principles could enter the picture, in terms of which, under broad equal protection principles, historical, social and family factors could be taken into account, as well as the need to ensure continuity of productive use; there could be flexibility in terms of the modalities of payment and a wide variety of transitional arrangements and forms of mixed interests could be permitted.

Finally, at the other end of the spectrum of possibilities, the constitution could expressly lay down a programme of economic reform, starting, say, with a declaration that the soil, sub-soil and all the resources contained therein belonged to the state, which could then determine their use.

What seems to be clear is that simplistic global solutions are not helpful, and that casting the issue in bald "free market versus central planning" terms will not be helpful. In fact such polarisation of the question at this stage merely facilitates evasion of the most pressing issues. There are indeed a number of highly relevant factors which cannot be slotted into the equation if so put.

There is the question, for example, of the way apartheid laws and practices have deformed not only the market but the whole area of entrepreneurial activity. Blacks have effectively been excluded as

significant actors in the spheres of finance, production and services. Backed directly and indirectly by the law, whites have exercised unconscionable degrees of monopoly control; trading has been manifestly unfair and racially based restrictive practices have abounded. Far from barring the taking of steps to break this legal and de facto racist monopoly, the constitution should, in line with its general commitment to equal opportunity, facilitate them.

Then there is also the matter of the degree to which, even within the white community, economic control has been vested in fewer and fewer hands, with the result that today four fifths of the shares quoted on the Johannesburg Stock Exchange belong to only four major conglomerates. The application of anti-trust legislation such as exists in the United States, where state agencies can compel the break-up of monopolies, could in fact have more dramatic implications than a drive towards nationalisation. The new constitution would presumably permit and even facilitate the opening up of competition at presently being blocked by this extraordinary degree of monopolisation.

Should South Africa be fortunate enough to have entrepreneurs who voluntarily back the creation of competitors, and monopolists who of their own volition relinquish economic control, then it really has something to show the world, and we should all be proud. State intervention in these circumstances would be most unkind. On the off-chance, however, that the present managers of capital, or the shareholders they represent, are not so altruistic and pure, it might be useful to have the constitutional freedom to exercise a little pressure in favour of opening up the economy. Indeed, it might even be regarded as unfair to expect them all on their own to be responsible for levelling the economic playing field.

It is suggested, then, that the constitution should neither require nor foreclose specific economic policies. It is not necessary or even desirable for the constitution to be committed to any particular economic programme or philosophy. What the constitution should do, and this is the task of constitutions, is guarantee as much general fairness as possible, whatever economic policies are followed.

Fairness in South Africa would have three fundamental components:

it would necessitate at least some degree of redistributive action to make up for past dispossession and discrimination, for example, special investment in housing, training, health and education, not to speak of a policy to facilitate just access to the land;

it would demand the opening up of the economy in the face of racial and other restrictive practices; and

it would require that any intervention be governed by law, be subject to the principles of public interest, and be controlled by manifestly just procedures, that is, that both the criteria and the procedures be just.

One further element can be added, namely that conditions for free and open debate on economic questions exist. The context of respect for the fundamental rights and freedoms of citizens must be maintained, whatever economic policies are followed. Economic programmes should never be steamrollered through, but adopted after well-informed discussion.

Granted that these principles are entrenched, the worst thing that could be done would be to block off any means of lawfully achieving redistribution. It is far more realistic and sensible, and in the interest of all South Africans, to aim at policies that acknowledge the need for structural adjustment away from apartheid, and then provide for manifestly fair procedures to accomplish this goal.

Guarantees could then comfortably be given that personal property, which has so much meaning in the day-to-day lives of the people, would be immune to any form of expropriation other than that normally authorised by law; the principle of one person one vote could easily be supplemented by the principle of one person one home, one person one dog, one person one bank account, and so on, even if, as a constitutional norm, it did not reach up to one person one gold mine.

## 2. What about the workers ?

It is not necessary to speculate about what workers' rights should be in a democratic South Africa - the workers themselves are speaking, and a clear set of principles is beginning to emerge. South

Africa has a long and complicated history of workers' struggles, the last decade having been particularly rich in experience. The demand has now gone up for the elaboration of a Charter of Workers' Rights which would consolidate the advances made by the workers especially in this recent period, and set out their perspectives for the future.

The possibility therefore exists of a hierarchy of legal provisions relating to workers' rights in a democratic South Africa. The foundation would be the constitution, which would guarantee the right to form trade unions, the right to collective bargaining and the right to strike.

In addition to reiterating these principles and giving them more precision, the Workers Charter would itemise principles and procedures dealing with a large range of issues such as equal opportunity, working conditions, safety, holiday rights, compensation for injury, pensions, gender-related matters, training and promotion, unemployment and dismissal. The Charter could also contain clauses dealing with information that employers must provide workers, and the possibilities of workers being involved in planning decisions by enterprises.

As citizens, the workers would be able to campaign for socialism and support existing organisations dedicated to socialism, or form new ones, if that were their wish. The Charter could re-state this right, or it could be left to the general clauses of the Bill of Rights, which, would, of course, permit workers or anyone else to campaign against socialism.

Depending on its form, the Charter could be given an entrenched legal status, in terms of which it could not be amended as easily as ordinary legislation; it would serve as a point of reference for any specific legislation or executive action in relation to the matters within its purview. Any such legislation or actions would be invalid to the extent that it conflicts with the terms of the charter.

Finally, there could be specific statutes and regulations dealing with the concrete aspects of implementing the Charter. These could all be collected together in the form of a Code of Labour Law.

## 3. Affirmative action

In a sense we already have affirmative action in South Africa, but it is affirmative action in favour of the whites. The state today spends about five times as much on the education of each white child as it does on each black child, and the disproportion in the sphere of health services is the same. The Land Bank advances billions of rands to white farmers in terms of loans that are not called in, while the amount available to black farmers is paltry. Figures have been produced to show that the inhabitants of Soweto are in fact subsidising municipal services for the luxurious white suburbs of Johannesburg.

Thus before we even arrive at affirmative action for the dispossessed, there is a lot of equalising out that can be done [in a sensible and orderly way, of course] simply by removing subsidies in favour of the privileged.

In essence, affirmative action in the normal understanding of the term is a strategy which sets out a series of special efforts or interventions to overcome or reduce inequalities which have accumulated as a result of past discrimination. It acknowleges that the ordinary processes of law or of the market or of philanthropy or benevolence are insufficient to break the cycle of discrimination, which replicates itself from generation to generation. Sometimes it is called positive discrimination, sometimes corrective or remedial action. The most widely employed phrase, however, is affirmative action.

The term affirmative action was invented in the United States in the 1960's to cover an important aspect of newly adopted Civil Rights legislation. Conceived of as a means of materialising the principles of the equal protection clause introduced into the American constitution after the defeat of the slave-owning states in the Civil War, affirmative action programmes have had some measure of success in forcing employers to open up jobs and promotions to blacks, Spanish-speakers and women. Their impact on education has been uneven, and in general one can say that affirmative action is highly controversial in the USA, with conservative forces generally being opposed to it.

Other countries which include affirmative action in their legislative programmes are India, where it operates to guarantee positions in public life to Untouchables and members of what the constitution calls native tribes, and Malaysia, where it functions as a mechanism for requiring the progressive transfer of control of economic enterprises from members of the minority Chinese population to the majority Malay community.

Clearly, affirmative action takes on different forms and has different meanings in different countries. South Africa could not simply take over experience from, say, the United States and expect it to work. The term is already being used today to cover pallid attempts to train and promote blacks within white-dominated enterprises. Useful though any advancement programmes might be, they fall far short of what affirmative action could mean in the country - in reality they are at present little more than the normal programmes of in-service training and promotion that any moderately forward-looking enterprise would go in for.

Considerable attention will have to be paid to the question of harmonising affirmative action with non-racial democracy. Non-racism presupposes a clour-blind constitution; affirmative action requires a conscious look at the realities of the gaps between the life chances of blacks and whites. The right to be the same takes on an additional meaning - it is the right to have the same opportunities, and if these are blocked because of the heritage of past discrimination, then it includes the right to special intervention to remove the disadvantages.

In fact it is difficult to see how a truly non-racial society can be built in South Africa without at least one generation of accelerated progress being achieved under the principles of affirmative action. The promulgation of a non-racial constitution will clearly be vital, both at the symbolical level and in terms of guaranteeing equal political rights. Yet a non-racial society cannot be declared. It has to be built up, over the years, so that all vestiges of inequality on the basis of race etc are removed.

Affirmative action, or some equivalent, will accordingly be required in the public service, in the security sector, in health, education and housing, in relation to the land, and in respect of both

the public and the private sectors of the economy.

As far as jobs are concerned, it is not a system of simply promoting blacks because they are blacks, but rather of making a special effort to improve black qualifications so that standards of performance are maintained while the rich life experiences of all South Africans are brought into the work situations. In respect of land and entrepreneurial activity, it is not just a procedure for taking away from the whites and giving to the blacks, but one of working out comprehensive programmes of training, finance and transitional arrangements, in which many legal forms are possible, ranging from joint ventures to purely private undertakings, to cooperatives, to village industries.

It would not be necessary to determine in advance in the constitution all the details of the scheme, or even whether there should be one comprehensive set of principles and institutions to cover the whole of South African life, or different sectorial arrangements. What could be laid down are certain principles which would govern the application of affirmative action as a modality for change wherever it was applied.

One such principle could cover the criteria justifying or requiring affirmative action in any particular area. Another could specify the importance of seeking solutions as close to the ground as possible. The principle of open hearings and of participation by all interested parties could also be established. The principle of the least onerous and disruptive remedy could be adopted; for example, if it were determined that within x number of years health facilities in a certain metropolitan area had to be extended so as to ensure equal service to all within that area, then those responsible for the improvements should opt for the least onerous method of achieving that goal.

The courts would not, then, analyse each and every programme in terms of its merits, but see to it that the proper criteria and procedures were followed in each case.

While there will inevitably be many points of overlap between American and South African experience, there will be one central difference. In the United States affirmative action inevitably has a paternalistic quality inasmuch as it relies upon sectors of the majority population agreeing to take action to open up possibilities for the

minority. In South Africa, on the other hand, affirmative action will favour the majority of the population who can be expected to have strong positions in the legislature to back their claims.

One may fairly ask why have affirmative action at all if Parliament is there with the power through ordinary legislation to correct the injustices and inequalities created by apartheid. There would appear to be two good replies.

In the first place, it is necessary to clarify that the principles of equal rights and non-racism in the constitution should not be understood as blocking programmes aimed at eliminating the massive inequalities inherited from the past. Whites who have benefitted so much from apartheid should not be able to come to court to complain that their constitutional rights are being violated because there are special programmes to deal with homelessness amongst blacks. [Possibly non-racial criteria could be found, so that affirmative action would favour groups defined in a non-racial way, for example, the homeless, the sick, the under-educated, the landless. In effect, but not absolutely and not as a principle, this would help blacks rather than whites, but would not be posited in that way. The problem would still exist at medium and higher levels of the economy or the public service, where it would be difficult to find race-free criteria for overcoming a situation that cannot be defined simply in social terms].Affirmative action could be constitutionally recognised as a legitimate complement to the general principle of non-racism.

There is also the need to anticipate a tendency on the part of the judiciary to interpret the Bill of Rights as a conservative or blocking instrument designed to prevent any government interference with the status quo.

The concept of respecting vested interests is deeply rooted in South African judicial ideology. Indeed, it has been used on occasion to defend pockets of black land ownership against intrusion by the apartheid executive. In the absence of clear constitutional provisions, all future legislation and executive action designed to eliminate inequality in South Africa, could be subjected to highly restrictive judicial scrutiny. The vast privileges vested in the whites by forced removals, the successive Land Acts and the Group Areas Act,

would be protected by the judges. Society would remain divided according to race, there would be a war of attrition between the legislature and the courts, and the constitution would fall into disrepute. Far better to draft the constitution in such a way as to make it clear that the peaceful and orderly elimination of inequality is one of its principal goals, and that all legislation should be interpreted with this in mind.

The second reason for specifying criteria and procedures for affirmative action in the constitution [whatever its name and final form] is perhaps more fundamental. It is based upon a certain conception of South Africa and of the nature of any future constitutional dispensation.

It looks upon South Africa not as a country of majorities and minorities, each seeking selfish advantages as against the other, but as a land of diverse people sharing a common humanity and embarking on the difficult road of establishing a common loyalty and patriotism.

Similarly, its vision of the constitution is not that of a document drawn up by victors over vanquished, nor that of a tawdry share-out of spoils between contenders for power on a fifty-fifty basis. It envisages the constitution as a solemn compact, a document based on trust and realism, which establishes in advance the ground-rules whereby all can live together in peace and dignity.

Such a constitution would command the respect of all, since it would guarantee to the have-nots that there will be active moves to eliminate inequality, and to the haves that the process will be governed by law and operate according to manifestly fair and efficient procedures.

## CONCLUSION - FREEDOM FOR ALL

The one theme that unites all the above discussion is that the guarantees referred to are really not guarantees to the whites at all, but guarantees to the whole population. This really is the guarantee of guarantees. What is being suggested is not a set of privileges for one section of the community to be defended by special constitutional

mechanisms, and ultimately by force of arms or by outside intervention. Rather it is a constitutional arrangement created by South Africans for South Africans in a common determination to move away from the hatreds, divisions and injustices of the past. A justiciable bill of rights becomes central to the defence of liberty for all.

It is in the interest of everybody to feel free and at home throughout the length and breadth of the country. It benefits everybody to have the vote and the right of free speech and assembly and the possibility of throwing out a government that no longer commands respect. It is to the advantage of all to be able to worship freely, speak one's language and express oneself in the way one feels most comfortable. Everyone gains if the process of bringing about true equality is an orderly and peaceful one. The rule of law helps everybody.

This is really the guarantee of guarantees for the whites, as for everyone else, namely that their deepest interests coincide with the deepest interests of their fellow citizens. What all South Africans should be trying to do is to strengthen the institutions of non-racial democracy, so that they become deeply implanted in the country and part of its general culture. Only in this way can the conviction grow in the whole population that the constitution is their shield, since it enshrines the principle at the heart of all democratic constitutions, namely that an injury to one is an injury to all.

This is the first draft of a paper intended to provoke thought about aspects of a future constitution, and about what should be done now to prepare the way for change. Readers are invited to send their comments to me care of:

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