

Equality and corrective action

*Adopted DA Federal Council
Feb 2005 Author Dene Smuts MP*

The DA believes every South African is equal in worth and dignity and we reject any system or policy that allows the State to grant rights and privileges to any one group on the basis of ethnic or racial nationalism while withholding them from others.

The State derives its power from the freely expressed choices and consent of individual citizens, whose fundamental rights and freedoms form the basis of our constitutional order. The State may never unfairly discriminate between categories of people. That is why the right to equality is the cornerstone of a rights-based democracy.

In South Africa, "equality includes the full and equal enjoyment of all rights and freedoms". To promote the achievement of such conditions, "legislative and other measures designed to protect or advance persons or categories of persons disadvantaged by unfair discrimination may be taken" (Section 9(2) of our Bill of Rights.) The Constitution does not treat corrective action as a qualification of the right to equality – rather, "the achievement of equality is a process", in the words of Deputy Chief Justice Dikgang Moseneke (Johannesburg, 28 May 2005).

The substantive equality enshrined in the Constitution recognises that identical treatment can result in inequality in circumstances where people start off from a position of disadvantage. The repeal of formal legislated barriers preventing the enjoyment of equal rights and opportunities does not yet give people the qualifications or experience to compete equally, and prejudice against categories of people likewise puts obstacles on their path. Measures designed to protect or advance them must be characterised by a rational relationship between means and ends, however: they must be capable of achieving their purpose; as well as proportionality: they may not have a disproportionate impact on those affected. The Constitutional Court has repeatedly ruled that the ultimate goal of equality must be furthered. In other words, corrective action cannot take the form of the arbitrary advancement of a set of interests. It cannot create or entrench a new inequality.

THE ANC'S TRANSFORMATION POLICIES CONFLICT WITH THE CONSTITUTIONAL VISION AND ARE NOT TRULY ROOTED IN EQUALITY AT ALL

The Constitution nowhere uses the term "transformation". It does not provide for the numbers-based quantitative approach espoused by the ruling party in the name of affirmative action, and nor does it anticipate race as the overriding determinant of advancement.

THE CONSTITUTIONAL TREATMENT OF REPRESENTIVITY

The ANC has set a requirement of demographic representivity in its employment laws, sets race based ownership and management percentages in empowerment codes under the Black Economic Empowerment Act, and has openly advocated since its

Mafikeng Conference in 1997 the installation of African leadership to operate "the levers of power" through the deployment of its cadres to lead all public institutions, even those Constitutionally required to be independent. This programme is not, in fact, affirmative action at all, and neither is it truly rooted in the ideal of equality. The goal is control by a movement that defines its "motive forces" as black South Africans, together with the transfer of wealth largely to the political elite.

By contrast, the Constitution requires only that CONSIDERATION should be given by appointing bodies to the BROAD REFLECTION of the race and gender composition of institutions. The equal right of all South Africans to serve, and be chosen for appointment, is upheld. The Constitution goes no further than endorsing racial and gender diversity. The qualifications and suitability of incumbents remain the primary consideration, not their race, which in the ANC's definition of our polity also determines their political allegiance.

The Constitution gives expression to its foundational value of non-racialism and non-sexism by encouraging diversity as follows:

The Judiciary

Section 174 (2)

"The need for the judiciary to reflect broadly the racial and gender composition of South Africa must be considered when judicial officers are appointed."

Chapter 9, State Institutions Supporting Constitutional Democracy

Section 193 (2)

"The need for a Commission established by this Chapter to reflect broadly the race and gender composition of South Africa must be considered when members are appointed."

Public Administration

Section 195 (1) (i)

Public administration **MUST** be **BROADLY REPRESENTATIVE** of the South African people, with employment and personnel management practices based on ability, objectivity, fairness, and the need to redress the imbalances of the past to achieve broad representation

Here, broad representivity becomes mandatory, and explicitly addressed not only unfair discrimination but the imbalances of the past. Even in this case, representivity remains "broad" as opposed to following the present policy of demographic determinism; while ability to do the job is kept in view and fairness ensures that the end goal of equality is not lost from sight.

Procurement

Section 217

Affirmative procurement practices are dealt with as a qualification permitted under a system which in the first place must be "fair, equitable, transparent, competitive and cost-effective". The qualification allows the three spheres of government or other institutions identified in legislation to implement policies providing for categories of preference in the allocation of contracts, and the protection or advancement of persons or categories of persons disadvantaged by unfair discrimination.

THE CONSTITUTIONAL TREATMENT OF GENDER

Non-sexism throughout the Constitution is valued as the equivalent of non-racism. This applies from the section 1 characterisation of the State – the only section that can be amended by only by a 75% vote of the National Assembly with six provinces - right through to every section dealing with unfair discrimination and the ideal of achieving broad representation. This is because racism and sexism are identical forms of discrimination which have historically excluded individuals from the full exercise of their inalienable rights on the basis of immutable personal characteristics.

So seriously does the Constitution take the issue of gender that not only was the offensive legal convention under which the female was considered to be included with the male forever abandoned, but “woman” was placed before “man” in every relevant section. For example: “the President as head of the national executive must appoint a woman or man s the National Commissioner of the police service...”

Gender under ANC policy no longer stands alongside race, but has been superseded by it. Together with the ruling party’s numbers-based race policies, its treatment of women is the clearest proof that it has abandoned the Constitutional vision and is not pursuing equality at all. White, Coloured, Indian or other women do not feature in its schemes, except where “black” is broadly defined to include coloured and Indian persons. Even then, black, including African, women have been an afterthought in its empowerment policies.

Former Deputy Finance Minister and Deputy Reserve Bank Governor Gill Marcus has protested against the exclusion of white women from black economic empowerment. She argues that BEE should be about fundamental transformation – but the very fact that it is race-driven shows up the contradictions between so-called “transformation” and the true achievement of equality. Black empowerment is exactly what it says it is: it is about racial power.

TRUE EMPOWERMENT: THE QUALITATIVE APPROACH

The DA believes true empowerment is something only individuals can achieve, to the ultimate benefit and enrichment of our whole society.

Dr Mamphela Ramphele has stated: “Society has a responsibility to create an equitable framework but successful performance under such conditions is the responsibility of individuals. The right to equal opportunities does not mean the right to successful outcomes.” (Democracy in Action, April 1995)

To attempt to achieve an “equality of outcomes” through quotas and other quantitative criteria can actually work against equality. Gill Marcus points to the fact that women compete against each other for the number of positions set aside for them at Board, executive or management level in the business sphere, instead of competing against the men. As an adherent of the quota system, she considers this an unintended consequence – but it is in fact illustrative of the way in which the numbers game

entrenches inequality and the stratification of society into layers of disadvantage on the basis of race and sex.

The quantitative approach is also destructive of the efficiency which the Constitution takes care to keep in view wherever it deals with representivity. A trend is discernible in government departments where vacant posts remain unfilled because the only qualified applicants do not match the colour-coded demographically based staffing quotas. The SA National Defence Force retired 76 white colonels as surplus on racial profiling criteria this year. The SA Police Service is deploying black personnel from the Eastern Cape to Afrikaans-speaking, Coloured-dominated Northern Cape for the same reason. In sport, the idea of actually winning contests has long been rendered subservient to the idea of scoring goals on the demographic scorecard.

“There is no rational connection between equitableness of representation and demographic representivity. Yet the achievement of one by recourse to the other is postulated...” as has been observed in the context of sport, an observation applicable to the whole field.

To enable individuals to achieve their personal potential and in so doing, enrich our society, the DA believes in equitable programmes of admission, recruitment and appointment in all spheres. Equity means fairness. It means no-one may be excluded from competing for places on the basis of any of their immutable characteristics except where differentiation is just and equitable: a near-sighted person cannot expect to be trained as a pilot. But in order to advance the goal of equality and the reflection of the full diversity of our society in terms of race, ethnicity, sex, belief, culture and able-bodiedness, underrepresented categories should enjoy “plus points” or favourable consideration when they are as well qualified for appointment as the next man or woman; or when they show comparable promise. To pretend that qualifications on paper, in examinations, in Curricula Vitae or on job performance scorecards are the only appropriate or conventional criteria for eligibility for admission, appointment, selection, promotion and the like in any sphere of activity can potentially be as mechanical as a demographic determination.

We should be clear as a society – and in our specific case, as a voluntary association of South Africans working for the well being of our society on the basis of our belief in the individual fundamental freedoms – that diversity is desirable. By that we do not mean that ethnic or cultural groups deserve to have representation in the institutions of society, but that individuals from diverse backgrounds should lead, participate and form part of all spheres of activity.

In the United States, after many decades of contestation about the effects of affirmative action, there is in the words of the eminent legal scholar Ronald Dworkin “a significant shift in public attitudes: a developing conviction that racial diversityis necessary not as compensation to minorities for past discrimination against them, BUT AS A CRUCIAL PRACTICAL CONTRIBUTION TO THE ENTIRE COMMUNITY’S FUTURE.” In the course of a recent court case around the subject of affirmative admissions to university in that country, it was notable that 65 of the best known American corporations urged the court to uphold university admission policies that created opportunity because they “need the talent and creativity of a workforce that is as diverse as the world around it”. In addition, 29 retired military

and civilian leaders including Generals Wesley Clark and H. Norman Schwarzkopf argued in an amicus brief that racial imbalances between the ranks during the Vietnam war affected the armed forces' ability to fight and that the military cannot achieve an officer corps that is both highly qualified and racially diverse without race-conscious recruiting and admissions policies at service academies.

Because its immediate goal is control, the ruling party is not interested in giving individuals a fast-tracked opportunity to progress through the ranks and then to have the satisfaction of knowing that they have beaten the competition on merit.

The DA believes that opportunity must be fast-tracked to release the untapped talent in our country, to counteract the prejudice that still operates against a range of categories of South Africans and to correct the unequal life chances created by past policies.

A quantitative quota approach cannot deliver equality or effective institutions in our circumstances. Instead, it can destroy human beings who are promoted beyond their present competence and it can exacerbate racial tension.

But to deny the need for speed in fast-tracking the achievement of equality is to defend the indefensible: past privilege created by an unjust order.

The DA believes it is appropriate to encourage and to incentivise institutions across society to set their own targets for achieving diversity based not on racial groupings but on the full range of SA's colours and creeds.

CORRECTION VERSUS COMPENSATION

It is important to note that our Constitution does not base the protection and advancement of disadvantaged persons on past or historic discrimination, but on the concept of unfair discrimination.

The DA believes with Dworkin that "it is doubtful that affirmative action can ever be justified as compensation, because compensation is a matter of individual, not group entitlement, and allowing black applicants to have preference now cannot compensate generations of blacks who suffered injustice in the past. But the forward-looking goal is very different: it justifies sensitivity to race not on the basis of any compensatory theory, but on the pragmatic assumption that securing a better racial balance in positions of prestige and influence benefits the community as a whole."

(In The Court and the University, New York Review of Books, 15 May 2003)

The ANC drives a compensation discourse especially in the context of black economic empowerment policies. When ANC presidential spokesperson Smuts Ngonyama benefited from the acquisition by the Elephant Consortium of a sizeable portion of the equity of Telkom, he said: "I did not struggle to be poor".

The DA believes that the culture of entitlement bred by the compensation discourse is damaging to the spirit of enterprise which we need to inculcate in order to grow the

economy. Without economic growth, no affirmative action programmes can work, as was found in Malaysia.

Economic empowerment in SA moreover takes the form not of the transfer of wealth from the rich to the poor, but from white to black, as Economist Africa specialist Robert Guest has pointed out. The two things are not the same. And to make matters worse, the blacks benefiting from the transfer of wealth are not those who are poor but a small, politically well-connected and serially-enriched black elite.

The DA believes programmes to deal directly and on an expedited basis with South Africa's inequality of income are as necessary as programmes to deal with inequality of opportunity. We therefore encourage and support broad-based ownership expansion schemes including employee share ownership programmes and public offerings in which shares are sold at a discount to poor people.

THE CHALLENGE

The challenge for the DA now is not only to counteract the ANC's destructive policies and encourage our society to take true corrective action because it is right and because it is good for all of us, but also to undertake such action ourselves.