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Discussion Document:

*Constitutional Principles
and Structures for a
Democratic South Africa*

*AFRICAN
NATIONAL
CONGRESS*

*Constitutional
Committee*



A Discussion Document on Structures and Principles of a Constitution for a Democratic South Africa

Introduction

Right of all South Africa's People to Participate in Constitution-Making

The African National Congress believes that all the people of South Africa should participate in the process of drawing up and adopting a new Constitution for the country. This principle is enshrined in the demand for a Constituent Assembly made up of mandated representatives of the people elected in non-racial elections.

To assist this process of popular participation and ensure that discussion is not restricted to so-called experts, the ANC Constitutional Committee, on the instruction of the NEC, published various documents, inter alia:

- 1. What is a Constitution? - To identify issues in the Constitution-Making process.*
- 2. A Draft Bill of Rights - To identify fundamental human rights which should be enshrined in a Bill of Rights.*

In this package therefore will be found two documents:

1. "Discussion Document on Constitutional Principles".

2. "Commentary on the Structure of a Constitution for a Democratic South Africa".

We also make the following observations:

1. While the documents reflect the broad thinking within the ANC and allied organisations, *they are not put forward as final positions or blueprints.* They are meant for *discussion and debate* within the ANC branches, trade union movement and allied organisations - and indeed amongst all South Africa's people. We want to see our people, through their organisations, grapple with the ideas contained in the documents and come up with their own suggestions and criticisms. This will enable the ANC to arrive at a set of proposals based on the will of the people.

2. Specific attention is drawn to some areas of discussion:

- 2.1 Should South Africa have a ceremonial President plus a Prime Minister answerable to parliament? Or an executive President (without a

answer to this and the discussion in our documents represent an attempt to grapple with the problem.

It is imperative that branches, regions, trade unions, democratic formations generally, as well as a broad spectrum of our people - sympathetic or unsympathetic - discuss the issues raised and submit comments, criticisms and suggestions.

The question may be asked: Why not leave all these discussions to a Constituent Assembly? Are we not pre-empting the Constituent Assembly? Our answer is that we do see the Constituent Assembly as the mechanism which must adopt a new Constitution. However, discussion on all constitutional issues must take place now to ensure that representatives to a Constituent Assembly are fully informed and mandated, and that popular participation in constitution-making is real. To postpone discussion on all these important issues until a Constituent Assembly is convened, will in reality mean that people would not be participating in the process.

In addition, it is clear that in the negotiation process, the various parties will be meeting to discuss the *principles* on which a new Constitution should be based. In Namibia the principles were imposed by the Contact Group and the Constituent Assembly was bound to work within the framework of those

Constitutional Principles for a Democratic South Africa

PART 1

A UNITED SOUTH AFRICA

The African National Congress envisages a united, democratic, non-racial and non-sexist South Africa, a unitary State where a Bill of Rights guarantees fundamental rights and freedoms for all on an equal basis, where our people live in an open and tolerant society, where the organs of government are representative, competent and fair in their functioning, and where opportunities are progressively and rapidly expanded to ensure that all may live under conditions of dignity and equality.

When we speak of a united South Africa, we have in mind in the first place the territorial unity and constitutional integrity of our country. South Africa must be seen, as recognised by the international community, as a single, non-fragmented entity including Transkei, Bophuthatswana, Venda and Ciskei.

Secondly, we envisage a single citizenship, nation and a common loyalty. We speak

region, and strong and effective local government to ensure active local involvement in handling local issues.

All such governmental structures and institutions shall be based on democratic principles, popular participation, accountability and accessibility. A unified South Africa shall not be an over-centralised, impersonal and over-bureaucratised country. The precise relationship between central, regional and local governments can be worked out on the basis of acknowledging the overall integrity of South Africa and the existence of fundamental rights for all citizens throughout the land.

The regions should not be devised as a means of perpetuating privilege, ethnic or racial divisions along territorial zones but should be based upon the distribution of population, availability of economic resources, communications and urban/rural balance.

National tasks would include external links and representation, defence and ensuring the basic security of the country, general economic, fiscal and tax policy, the creation of national policy framework and the furnishing of resources for eradicating racism and racial practices and for the tackling of the vast problems of education, health, housing, nutrition, employment and social welfare.

multiplicity of opinions, beliefs, faiths, tastes, cultures and preferences as contributing towards the richness and texture of South African life. What the new Constitution should avoid at all costs is vesting political rights in different linguistic, cultural, ethnic or religious groups.

A free South Africa must therefore ensure that these differences do not become the source of division or conflict or the means of perpetuating and promoting domination or privilege.

The new Constitution must consistently and clearly affirm the fundamental principle of equal and undifferentiated citizenship so that the differences of culture, interest and personality can then express themselves in a constructive, free and non-conflictual way.

DEMOCRATIC

The government must be democratic in the universally accepted meaning of the term. It must be the government of the people, by the people, for the people. It must be chosen by the people in free, fair and regular elections. It must be removable if it loses the confidence of the voters. Elections must be based on the principle of universal and equal suffrage on a common voters roll without distinction as to race, language, creed, class, social position, birth or gender. Illiterate

NON- RACIAL

There is far too much fear of the government. We must secure constitutional barriers to detention without trial, to spying on citizens, secret files, dirty tricks departments, disinformation and the use of government money to promote party political objectives.

Fifthly, government should be based on the principle of active involvement of the people. The existence of civic associations, religious bodies, ratepayers organisations, trade unions and other independent bodies should be encouraged. Similarly government should collaborate with non-governmental organisations, without interfering with their autonomy.

Finally, government should reflect the will of the majority, be effective but not all-powerful. It should operate within the framework of the Constitution, acknowledging a separation of powers and the existence of fundamental rights and freedoms as guaranteed in a Bill of Rights.

A non-racial South Africa means a South Africa in which all the artificial barriers and assumptions which kept people apart and maintained domination, are removed. In its negative sense, non-racial means the elimination of all colour bars. In positive terms it means the affirmation of equal rights for all.

BILL OF RIGHTS

to which women have been subjected are rapidly removed;

give appropriate recognition to reproductive and birth rights;

guarantee constitutional protection against sexual violence,

abuse, harassment or defamation;

ensure that women are heard in all issues and participate actively in all levels of society.

A Bill of Rights based on universally recognised principles of human rights should form an integral part of the new Constitution. In particular, it should guarantee all South Africans against the violations of human rights associated with apartheid and stress the principle of the equal dignity and worth of all South Africans.

The Bill of Rights should in clear and unambiguous language guarantee the rights of personal freedom and political expression. It should also protect and enhance rights of the individual to practise her or his religion and culture and speak her or his language. It should acknowledge the importance of securing minimum conditions of decent and dignified living for all South Africans.

ment in furthering the aims of the Constitution, without thereby compromising their identity or independence.

All men and women shall be entitled to all necessary information to enable them to make effective use of their rights as citizens, workers and consumers and to impart such information.

There should be freedom of the press, and the media should be open, accessible and respond to all the views, opinions and interests of the community.

THE CIVIL, THE
DEFENCE, POLICE
AND PRISON
SERVICES

The three principal qualities of the civil service, the defence, police and prison service shall be:

representativity, competence and impartiality.

Representativity

All organs of government shall draw on the life experience and talents of all sectors of the community in such a manner as to instil a common South African perspective of public service. The present barriers based on race shall be eliminated and special steps shall be taken to redress patterns of discrimination attributable to apartheid.

GUARANTEES
OF
OPPORTUNITIES
FOR A
DIGNIFIED
LIFE FOR ALL

transformed in such a way as to consist of men and women drawn from all sectors of South African society.

In a free South Africa, the legal system shall be transformed to be consistent with the new Constitution.

The Courts shall be accessible to all and shall guarantee to all equal rights before the law.

A new South Africa can never evolve if the white part of the population lives in relative luxury while the great majority of black South Africans live in conditions of want, squalor and deprivation.

Appropriate constitutional expression must therefore be found to guarantee basic human rights in relation to nutrition, shelter, education, health, employment and welfare. Government should be under a constitutional duty to work towards the establishment of a guaranteed and expanding floor of social, economic and educational rights for everybody.

It is particularly important that the Constitution facilitate access to education, employment and land, so that people have real and effective opportunities for improving their situation and pursuing happiness. □

The Structure of a Constitution for a Democratic South Africa

PART 2

1. South Africa shall be reconstituted as a non-racial, non-sexist, democratic and unitary republic.

2. South Africa shall consist of the whole territory recognised by the international community as South Africa and shall include the Transkei, Ciskei, Venda and Bophuthatswana.

3.1 Provision will be made for the three branches of government: the Executive, Legislature and the Judiciary.

3.2 The head of the Executive will be an elected President who will also be the Head of State. The question that arises is whether the President should be elected directly by the public and vested with greater executive powers, or whether s/he should be elected by and answerable to Parliament. This is a matter on which there must be greater public debate.

the election of the National Assembly, and will make provision for representation on a regional but not on an ethnic basis.

3.7 The Senate will be the guardian of the Constitution, with power to refer any dispute concerning the interpretation or application of the constitution to the appropriate court for its decision and the power to review. Where appropriate the Senate may delay the passage of legislation passed by the National Assembly, but it will not have the power to veto legislation.

3.8 Elections for the Presidency, National Assembly and the Senate will be held by secret ballot at periodic intervals of not more than five years and procedures will be enacted to ensure that the elections are genuine and are conducted in accordance with the principles and procedures consistent with those obtaining in a democracy.

3.9 All South Africans shall be entitled to stand for election as President, to Parliament and to other elected offices. Elections will be supervised by an independent Electoral Commission, and conducted in accordance with the standards design to ensure that the elections are fair and free.

4.1 The National Assembly will be elected on the basis of proportional representation. The rationale

4.3 Accordingly the ANC favours incorporating elements of a national list and regional accountability into the electoral system. This could be done most simply by combining a national list with a regional list. For example: regions could be allocated say half of the total seats, to be divided between the different regions in proportion to the registered voters in each region. The remaining half of the seats could be allocated on a national basis. Voters would vote for a party within their region and the regional seats will be allocated between the parties according to the percentages obtained by each party in each region. The second stage would be for regional votes to be aggregated so as to determine the national percentage of the total vote of each party. Each party would then be entitled to nominate from its national list, the additional members needed to make up its total entitlement of seats.

4.4 The end result will be the representation of each party in the assembly in proportion to its total votes, but reflecting a regional choice of members as well. The system requires the electorate to cast one vote only. It will be easy to administer and easy for the voters to follow.

4.5 It is recommended that proportional representation, based on the list system, be the

be pursued at these levels, provided always that such policies do not conflict with national policies. Functions presently vested in the provincial administrations will be vested in the regional government. The boundaries of local and regional districts will be determined with due regard to economic and development considerations and without regard to race, colour, ethnic origin, language or creed.

8. Provision shall be made for one common and equal citizenship acquired by birth, descent and naturalisation in accordance with conventional standards. Provision will also be made for the restoration of South African citizenship to persons who have lost their citizenship as result of the denationalisation process through the homelands policy, or as a result of having gone into exile for political reasons, and provision will also be made for the acquisition of South African citizenship by the spouses and children of such persons.

9.1 All languages of South Africa will have equal status. They will be set out in a Schedule to the Constitution and will include in alphabetical order the following Afrikaans, English, Sipeedi, Sesotho, Seswati, Tsonga, Tswana, Venda, Xhosa, Zulu.

9.2 The State shall take all reasonable and necessary steps to protect, promote and enhance the

for other purposes either throughout the State or in any area. But every one should be entitled to use her or his language for purposes of communicating with the public service.

10.1 There will be a justiciable bill of rights leaving the way open for legitimate state action but affirming and protecting internationally recognised rights and freedoms including equality before the law; freedom from detention without trial, protection against arbitrary arrest and detentions; protection against arbitrary search and seizure; the prohibition of forced labour; the right to fair trial; the prohibition of cruel and unusual punishment, protection of life including the abolition of the death sentence; protection of women's rights; protection of children, freedom from discrimination; the right to privacy; freedom of expression including a free press; the right to information; freedom of religion and conscience; freedom of assembly; freedom of association; freedom of movement including the right of citizens to leave and return to South Africa; trade union rights including the right to work and the right to strike; the right to form political parties; the right to education, welfare and health care consistent with the needs of the people and the resources of the state; environmental rights; family and cultural rights, and providing for just compensation to be paid for property taken by the state.

13. There will be a public service commission charged with the responsibility of overseeing the recruitment, promotion and dismissal to and from posts in the civil service. Such a commission will also be required to implement an affirmative action programme in regard to appointments to senior positions in order to redress existing race and gender disparities. Provision will be made for a representative structuring of the public service, the police service and the defence services and to ensure that the public service will be accountable for its actions.

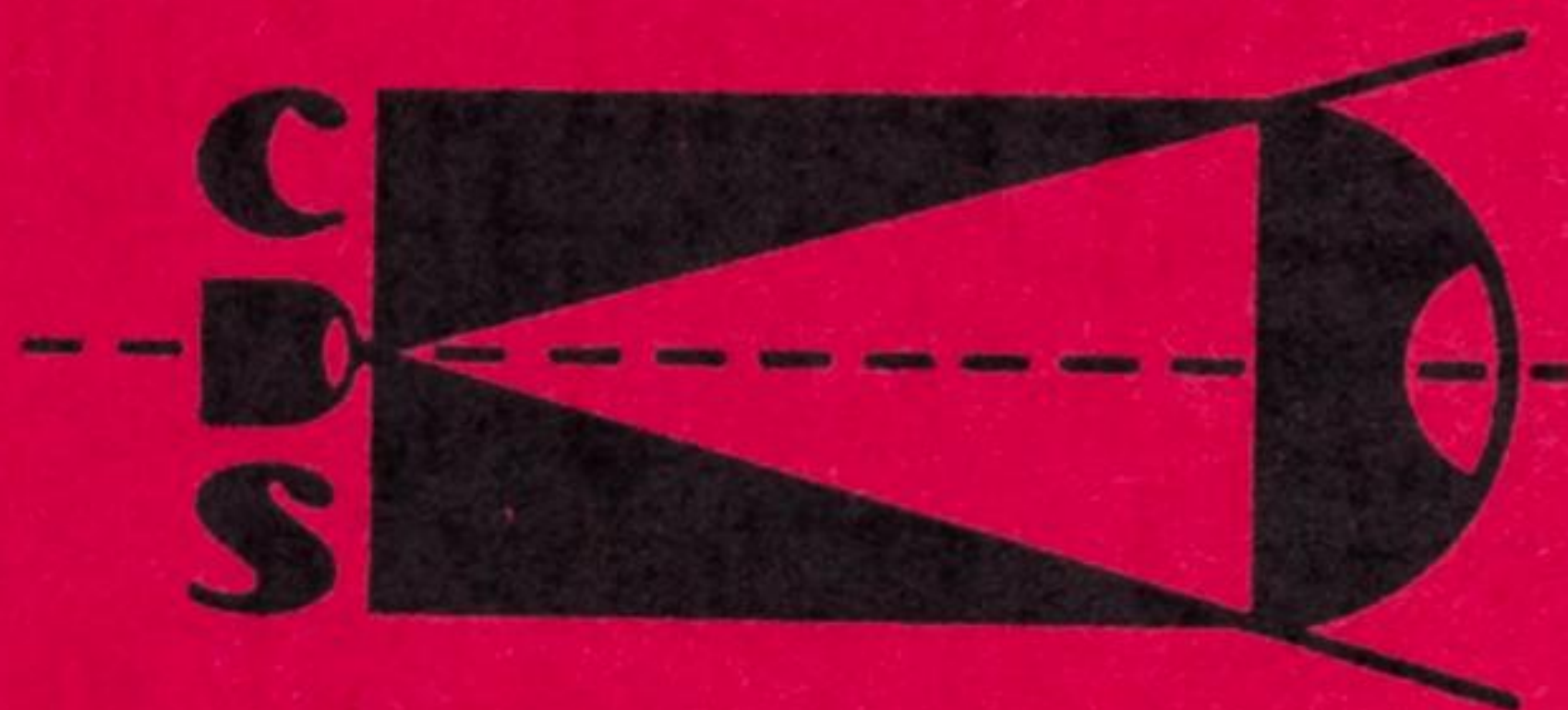
14. There will be an independent Ombud with powers to investigate complaints against members of the public service including the police and other holders of public and private power and to investigate allegations of corruption.

15. The Constitution will also make provision for a state of emergency to be declared when the life of the nation is threatened. Such a power will be subject to strict controls by Parliament and the judiciary. The Constitution will provide for the recognition and protection as far as possible of fundamental rights during the period of emergency.

16. The Constitution will be subject to amendment only if a majority of two thirds of the national assembly approve of the amendment or if approved

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