

THE CONSTITUTIONAL GUIDELINES
OF THE AFRICAN NATIONAL CONGRESS:
A PRELIMINARY ASSESSMENT

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INTRODUCTION

The publication in mid-1988 of the Constitutional Guidelines (hereafter CG) of the African National Congress of South Africa (ANC) was an event of major significance. Comment and criticism over the past year has been sparse, tentative and confined, in the main, to the progressive press.¹ What follows is an attempt to situate the CG in their historical and social context, to present their major features, to comment on their strengths and inadequacies and to assess their significance for the future of constitutional government in South Africa.

In doing so, it is assumed that the exercise of government power should be discharged in an orderly, organised and predictable fashion by means of a 'constitution', a framework of legal and conventional rules laid down in advance and known and obeyed by both rulers and inhabitants. Furthermore, the concept of 'constitutionalism',² a 'government limited by the terms of a Constitution, not government limited only by the desires and capacities of those who exercise power',³ is regarded as an indispensable component of any governmental system. The words of De Smith,⁴ while apparently restricted to a certain type of political system, are of wide relevance and could be applied usefully in any context, including the present:

'A contemporary liberal democrat, if asked to lay down a set of minimum standards, may be very willing to concede that constitutionalism is practised in a country where the government is genuinely accountable to an entity or organ distinct from itself, where elections are freely held on a wide franchise at frequent intervals, where political groups are free to organise in opposition to the government in office and where there are effective legal guarantees of fundamental civil liberties enforced by an independent judiciary; and he may not easily be persuaded to identify constitutionalism in a country where any of these conditions is lacking.'

Thus, it is argued that the basic idea propagated in the passage quoted should constitute the fundamental principle of organised power in any state. In other words, any government which pretends to democratic values (informing whatever economic system is deemed apposite) must at least be broadly accountable in some effective way to those whom it rules and must respect and nurture certain fundamental rights of all its citizens, especially those who oppose the will of the majority.

That this point of view is not limited to liberal democratic commentators is quite clear. Bob Fine expresses similar thoughts² in regard to socialist democracy:

'Workers ... value the right to think and act for themselves as individuals, the civil liberties which protect them from arbitrary authority, the economic freedom to join a trade union and withdraw their labour, the political liberty to elect a government, protest against bad laws and remove from power those who oppress them.'

With this position as point of departure, let us consider the circumstances in which the CG were formulated and introduced.

BACKGROUND TO THE PROPOSALS

Although the ANC is one of the longest-established political groups in South Africa and has issued many policy statements

through the decades since 1912, it has only once before been party to an attempt to suggest comprehensively the form of its preferred governmental structure for South Africa. This occurred in 1955 in the document known as the Freedom Charter (FC), adopted after a process of widespread consultation among a cross-section of the population.⁶ The final stamp of approval was provided by a gathering of the 'Congress of the People' at Kliptown, Transvaal, the ANC being the progenitor of the idea and by far the major component of the Congress Alliance⁷ which organised the gathering and preceding campaign. The significance of the FC lies in its role as the foundation-stone on which the CG are constructed.

On one level the Charter was a product of its times. It represented the response of major political organisations to the National Party's vision of an apartheid society. As Albert Luthuli correctly observed:⁸ 'The Charter produced at Kliptown is line by line the direct outcome of conditions which obtain: harsh, oppressive and unjust conditions'. But on another level the Charter articulated a vision of an alternative South Africa. As Luthuli said:⁹ 'It is thus a practical and relevant document. It attempted to give a flesh and blood meaning in the South African setting to such words as democracy, freedom and liberty'.

The Charter presented an unambiguous, non-racial alternative to Verwoerdian apartheid in which there would exist a plurality of autonomous enterprises and collective bodies, democratically elected, each acting as an independent decision-making agency. This model of society is to be found in the Charter's provisions

that 'all advisory boards, councils and authorities should be replaced by democratic organs of self-government. ... The Courts shall be representative of all the people. ... The law shall guarantee to all their right to speak, organise and meet together. ... All who work shall be free to form trade unions.' The Charter recognises the existence of peasants whom 'the state shall help ... with implements, seed, tractors and dams' and different forms of ownership, for it provides for state control of mineral wealth but still recognizes that 'all shall have the right to occupy land wherever they choose'.

As is well known, the two decades subsequent to the adoption of the FC were extremely difficult years for the ANC. After being officially outlawed in 1960,¹⁰ it was confined largely to a role of exile agitation and small-scale armed infiltration until the Soweto uprising of 1976.¹¹ Events at that time and continued tensions and insurrection since then have ensured an infusion of vitality and support for the ANC both internally and externally. There can be no doubt that by the mid-1980s the organisation had come to be popularly regarded at home and in the world at large as the premier movement struggling for change away from apartheid, and that the FC enjoyed wide-ranging approval in all sectors of South African society.¹²

This revival and burgeoning of the fortunes of the ANC and the need to provide a clearer picture of what the FC would mean in practice led the organisation to set in motion a process of re-examination and reformulation of its constitutional demands at the Kabwe Consultative Conference of 1985.¹³ After much

research and discussion in all parts of the ANC both in South Africa and abroad, a draft document was analysed and debated primarily by the leadership and legal experts of the organisation at a seminar held in Lusaka in the first week of March 1988.¹⁴ The outcome of these deliberations appeared in the form of the 'Constitutional Guidelines for a Democratic South Africa', a four page document which was published by the ANC in August 1988. In addition, an important supplementary discussion paper 'Towards a Bill of Rights in a Democratic South Africa' was published in March 1988. Although this is not regarded as official policy of the ANC,¹⁵ there can be no doubt that it constitutes a vital additional indicator of the direction in which the debate about rights is moving.

Thus the organisational context of the CG. As far as world opinion is concerned, the document must be seen against the backdrop of the rapidly accelerating diplomatic acceptability of the ANC since 1984, its increasing stature in the eyes of the 'western' powers, and the corresponding lessening in the importance of the armed struggle relative to the other strategies pursued by the organisation. The CG clearly demonstrate to the world the ANC's seriousness of purpose and intention to participate in the future government of South Africa.

On the domestic national scene, the constitution of government has undergone substantial re-modelling, both formally and in substance, since 1983. On the formal front, the Republic of South Africa Constitution Act¹⁶ has attempted to co-opt the Asian and 'coloured' sectors of the black population by granting

them some form of autonomy over their 'own affairs', as defined,¹⁷ while denying them a say of any significance in the vital functions of any governmental process ('general affairs' such as defence, finance, foreign affairs, transport etc). More particularly and far more seriously in its consequences, the 1983 constitution initially proceeded on the basis that Africans were by definition forever excluded from participation at central governmental level, with continued adherence to the myth of the viability of the homeland ideal. The only sops thrown in their direction by an imperious ruling party was a token presence, at the whim of the State President, at provincial executive committee level,¹⁸ and some sort of charitable toleration in minimal numbers in the quadripartite regional services councils.¹⁹

Reaction to this summary exclusion came in devastatingly quick, deep-seated and often violent fashion throughout the country in the uprising of the period 1984-1986. At one level the ruling group attempted to defuse the situation by desperately casting around for models and channels which would appear to amount to participation without any real shift in the balance of political power.²⁰ None of these schemes has yet proved attractive to even an insignificant proportion of the African, indeed the black, population.²¹ As a result, at another level the reaction to the crisis of the last five years has been the accelerated development of a system of government parallel to that outlined in the Constitution Act, whereby the 'securocrats' in the National Security Management System rule the country

through the powers granted to them by Parliament²² and the executive.²³

At the same time, civil freedoms and basic rights have been usurped and eliminated on a scale never before experienced in South Africa. In the result, the minimum requirements for 'constitutionalism' as outlined by De Smith and quoted above have long since ceased to be met: in many senses, accountability to even a portion of the white population does not exist. The constitutional proposals of the ANC have to be assessed against this background, hostile to the ideals of freedom, justice and democracy.

OUTLINE OF THE MAIN FEATURES

Two factors must be stressed at the outset and always borne in mind in the consideration of the CG. First, the publication of the proposals marks a certain stage in the development of a new constitution for South Africa, in that the ANC is an indispensable part of any future negotiating process. However, this does not mean that the CG are the ANC's final word on the matter of constitutional development. Although the guidelines have already been extensively debated within the ANC, the fruits of this process are now being made known for all those who care about the future of South Africa to consider, criticise and suggest changes. Furthermore, the publication of the CG represents a significant step by the ANC in the process of constitution-making. So we read in the preamble:²⁴

'We ... submit to the people of South Africa, and to all those throughout the world who wish to see an end to apartheid, our basic guidelines for the foundations

of government in a post-apartheid South Africa. Extensive and democratic debate on these guidelines will mobilise the widest sections of our population to achieve agreement on how to put an end to the tyranny and oppression under which our people live, thus enabling them to lead normal and decent lives as free citizens in a free country.'

Two implications flow from this approach. Although the ANC claims leadership of the struggle to end white domination in South Africa, it seems as if it nonetheless recognizes the role of other organisations in a broad anti-apartheid front, and that the views of these bodies will be taken into account in formulating subsequent documents of this kind. In addition, the 'draft' nature of these proposals leads to the postponement of answers to many questions, both of substance and detail, on the basis that 'the people will decide'. The ANC argues that the final version of these proposals will have to be sanctioned by the people of a post-apartheid South Africa.²⁵

Second, the CG are apparently to be read as an extension of the FC, a partial conversion of that document 'from a vision for the future into a constitutional reality.'²⁶ The two documents must, therefore, be read together. Where there are apparent differences, it must be assumed that the FC, even though earlier in time, is authoritative, having been approved by 'the people', while the CG are put forward for consideration by the people.

The document consists of a preamble running to eight paragraphs, and the guidelines themselves, listed in 25 clauses.²⁷ It is imperative that the latter be read in relation to the former, for the preamble relates what has preceded the guidelines historically, in the form of the FC and its

objectives. More than this, however, the preamble, like the FC, sets out the ideal goals for which the ANC is striving, the achievement of which the guidelines are intended to facilitate. Among these objectives are:²⁸ 'to create a just and democratic society', 'the removal of discriminatory laws and eradication of all vestiges of the illegitimate regime', 'corrective action which guarantees a rapid and irreversible redistribution of wealth and opening up of facilities to all' and 'to promote the habits of non-racial and non-sexist thinking, the practice of anti-racist behaviour and the acquisition of genuinely shared patriotic consciousness'. In addition, the Constitution must guarantee 'equal rights for all individuals, irrespective of race, colour, sex or creed' and entrench 'equal cultural, linguistic and religious rights for all', without granting any protection for group rights, as this would lead to the perpetuation of the economic inequality and injustice of the status quo.²⁹ Finally, the preamble acknowledges that maximal participation of all 'sectors of the population' in all aspects of government and national life will largely determine the successful implementation of any future constitution.³⁰

The guidelines themselves are divided into ten sub-sections, some of them consisting of only one clause each. Those concerned with the state, the bill of rights and affirmative action, and the economy are the most extensive. While a careful reading of all the clauses is indispensable for a coherent understanding of the overall scheme, it is as well that certain features be highlighted.

The ANC envisages a unitary, democratic and non-racial state,³¹ in which all organs of government would be representative of and encourage participation by all the people.³² To this end, and for efficiency of administration, the central government will be permitted to delegate powers to 'subordinate administrative units'.³³ Governmental authority will be rooted in popular sovereignty,³⁴ by means of universal franchise,³⁵ and will be expressed through 'one central legislature, executive and administration.'³⁶ While the state should attempt to cultivate a single national identity, it should also be tolerant of linguistic and cultural diversity.³⁷

The state, through a Bill of Rights based on the FC with 'appropriate enforcement mechanisms',³⁸ shall be under a duty to eradicate racial, economic and social discrimination,³⁹ and to outlaw the 'advocacy or practice of racism, fascism, nazism or the incitement of ethnic or regional exclusiveness or hatred.'⁴⁰ The state shall furthermore guarantee 'basic rights and freedoms' (both civil-political and socio-economic in nature)⁴¹ and the participation of those political parties which respect the prohibition on discriminatory behaviour in all its forms, as outlined above.⁴²

While the state shall have the right 'to determine the general context in which economic life takes place',⁴³ a multi-sector economy is planned,⁴⁴ with constitutional protection of 'property for personal use and consumption'.⁴⁵ Economic reform is particularly contemplated in relation to the correction of the present maldistribution of land,⁴⁶ and there shall be

constitutional protection of workers' rights in general.⁴⁷ Similarly, the protection of the rights of women,⁴⁸ the family, parents and children⁴⁹ is contemplated.

Finally, South African membership of the non-aligned movement and the Organisation of African Unity and full re-admission to the United Nations are anticipated.⁵⁰

COMMENT AND CRITICISM

(The document is) not meant only for a post apartheid South Africa. It is an ideological instrument, a morale booster and a clarification of our objectives in our present struggle against apartheid.⁵¹

There is much that could be written about the CG - indeed, each facet outlined above evokes a myriad questions and reactions. The written response thus far within South Africa, as mentioned above, has been minimal, and is characterised by the inclination of the commentator to read into the guidelines what he or she wishes to find there. In some ways, the relative vagueness and cryptic quality of the 1988 proposals allow observers from different perspectives to agree that many of the requirements of each of them are met in the document. This quality has at the same time raised more questions than it answers, which, even in an avowed attempt to be non-prescriptive, is sometimes disconcerting and frustrating to the analyst, in that it is almost impossible to know what is intended by a particular clause. Most of the comment to date has, however, focussed on a relatively small number of issues. It would be useful to spell out some of the arguments in respect of each matter, for they raise questions of fundamental importance which need to be

confronted by all concerned with the future constitutional shape of this country.

The first issue which calls for response is the strongly centralised and unitary nature of the state contemplated in the CG, along with the intention 'to forge a national identity' and a rejection of all federal notions. The central authority will merely delegate powers to subordinate administrative units for greater efficiency and democratic participation. This leaves little scope for even partial autonomy at local or regional level and raises fears that the future system will be an example of the 'central steamroller model'⁵² so abused by the present government.⁵³ At the same time the extent of social engineering required to attempt to remedy some of the present inequalities calls for a fairly effective leadership role by central government, and fears of regional obstinacy frustrating the eradication of these problems must have been present in the minds of the drafters. There are certainly indications elsewhere in the guidelines⁵⁴ that the potential dangers of centralisation could be countered by guarantees of basic rights and multi-party status, for example. Such safeguards need further definition and expansion if the objective of 'limited government' is to be a possibility.

The relationship between a centralized Parliament and democratically elected local and regional bodies is of critical importance for the prospects of a democratic society. A concentration of power in a central government holds obvious dangers for the successful autonomous existence of democracy at

the local and regional level. Although South Africa's extra-parliamentary opposition has succeeded, to a significant extent, in expressing a common national political culture, having roots in a long tradition of political resistance, 'it remains clear that struggle is not unidirectionally aimed at national political rights'.⁵⁵ During the period 1982-1986 in particular, a range of community and rural organizations developed, each focussing on political and economic issues which were relevant to their respective communities. In a future South Africa such bodies would not necessarily wish to submerge their democratically formed existence under the absolute control of a central legislature. Hence the need for the CG to express clearly the relationship between such bodies and the central Parliament, and the extent to which local autonomy will be protected. Given the apparent emphasis on centralized government, the need to provide checks on the exercise of power becomes particularly important. Hence the significance of the Bill of Rights and the enforcement thereof.

Secondly, in the clauses dealing with the Bill of Rights, there is an inevitable tension between the protection of linguistic and cultural diversity on the one hand and the dismissal of the concept of group rights on the other.⁵⁶ There is also concern at the proposed prohibition of the incitement of 'ethnic or regional exclusiveness or hatred': will this prevent Tswana-speaking people founding their own social club, for example? While this may be unlikely, attention needs to be paid to giving further definition to this concept, as well as to what

constitutes 'racism, fascism, nazism'. There is a significant emphasis on 'first generation' rights among those listed, although socio-economic rights are also mentioned.⁵⁷ It seems, however, that the concept of 'third generation' rights⁵⁸ has still to find favour within the mainstream of ANC thought.

Thirdly, of greater concern in regard to the Bill of Rights is the absence of any specific suggestion as to mechanisms for their enforcement, other than that they be 'appropriate', as well as no mention of 'due process' rights.⁵⁹ While it is appreciated that it is premature to expect chapter and verse at this stage, there clearly needs to be much thought given to detailed means of facilitating individual insistence on claiming the rights due to them. As one observer has pointed out,⁶⁰ this matter is vital for the 'independent and far left': and, one could safely add, for all who are likely to oppose a future government from the right. In addition, are these rights to be non-derogable, even in a state of war or emergency?⁶¹ The situation in Zimbabwe emphasizes the need for clarity in this regard.

The issue of enforcement mechanisms is further complicated by the differences between first, second and third generation rights. First generation rights are traditionally enforced by a judiciary whereas it has been argued that second and third generation rights cannot be treated as legally justiciable rights in the strictest sense.⁶² That is, it is suggested that a right to housing cannot be realised should there be a shortage of the appropriate resources or technology. Furthermore, a traditional

judiciary does not deal comfortably with questions relating to allocation of resources and socio-economic policy.⁶³

ANC spokespersons⁶⁴ tend to respond to these issues by conflating the three 'generations' of rights and arguing that a traditional judiciary should be replaced by a type of Public Service Commission answerable to the legislature. Such a body would act as the supervisor of the implementation of any Bill of Rights adopted by Parliament.⁶⁵ Whilst such a Commission might be better suited to securing second and third generation rights, the proposed formula by which ultimate accountability is owed to (an admittedly popularly-elected) Parliament illustrates a reluctance to contemplate restrictions on the powers of that centralised law-maker.

This point is further underlined by the fact that the CG as published in Lusaka omit any reference to the judiciary, other than that, as an organ of government, it 'shall be representative of the people as a whole, democratic in (its) structure and functioning, and dedicated to defending the principles of the constitution'.⁶⁶ Locally-published versions of the CG have remedied this startling omission,⁶⁷ and one observer⁶⁸ has even commented favourably on the 'recognition given to the independence of the courts'. Two explanations have been given for this lapse:⁶⁹ that the judiciary was left out in error, and that it is such an obvious inclusion that it should be read in; or that the record of the South African judiciary over the past eighty years of segregationist and apartheid rule has inspired so little confidence in the concept of an independent judiciary as a

protector of basic rights that it was advisable not to mention it at this stage. It seems more likely, however, that the omission could be seen as indicative of the unwillingness of the central legislature and executive to be hindered by any third force, but this suspicion runs counter to the tenor of the document as a whole and the FC. An assurance has been given that an independent judiciary will form part of any future constitutional proposals,⁷⁰ but its status, composition and role need to be spelt out unambiguously.

Fourthly, there has been much speculation as to the extent to which the CG water down the demand for nationalisation of key industries which the FC made.⁷¹ It is true that there is no specific mention of nationalisation in the CG,⁷² and it is stated that the economy shall be a 'mixed one', with at least four sectors.⁷³ However, the pleasure of present property-owners might be tempered by the realisation that the state 'shall ensure that the entire economy serves the interests and well-being of all sections of the population'⁷⁴ and 'shall have the right to determine the general context in which economic life takes place and define and limit the rights and obligations attaching to the ownership and use of productive capacity'.⁷⁵ In addition, the 'private sector ... shall be obliged to co-operate with the state in realising the objectives of the Freedom Charter in promoting social well-being'.⁷⁶

If one then compares the sections of the FC which deal with socio-economic matters ('the people shall share in the country's wealth; the land shall be shared among those who work it; there

shall be work and security; there shall be houses, security and comfort'), it appears as though there has been little shift in approach in regard to economic system. The FC made a number of clear provisions for workers' rights, including the provision of unemployment benefits, a forty-hour working week, national minimum wages, paid annual leave, sick and maternity leave pay, and the guarantee of equal labour rights to miners, domestic workers, farm workers and civil servants. The CG contain little in the way of detail, save to provide that a workers' charter guaranteeing the right to form trade unions, the right to strike and collective bargaining shall be incorporated into the constitution.⁷⁷ The status of such charter and its relationship to the power of the centralised legislature will be critical to the substantive provision of workers' autonomy in a future society. The single clear improvement of the CG over the FC is the provision of the right to strike, which was absent in the latter document. Whether the FC and CG read together can promote a transformation to socialism is a different question, the answer to which will depend largely on the economic and political conditions during the period of transition to a post-apartheid state..

In the fifth place, certain issues have been too sketchily dealt with to be of any real assistance in discovering what is intended in substance. Here, one can mention the clauses on women's, family and children's rights. Is this an indication of the relative lack of importance of these matters when compared with those subjects more fully treated, or is it merely a

reflection of an unwillingness to prescribe so early on in the process of constitution-making? In regard to the franchise,⁷⁰ there is similarly no mention of the type of electoral system which would be preferred nor to the frequency and extent of elections or even referendums. There are indications that the simple majority system, leading to strong central government, is preferred. This is apparent from the contention of Kader Asmal,⁷¹ a leading lawyer in the ANC: '[The simple majority system] would enhanced the effectiveness of government, minimise the role of sectional parties unless they were regionally based, emphasize policy and ideology and hence allow for major swings in public opinion, and promote national integration.' This approach has disconcerted at least two commentators on the basis of its unsuitability for a heterogeneous society.⁷²

Finally, several matters, some more important than others, are not mentioned at all: for example, the age-qualification for the franchise, the difficulties posed by the urban-rural divide, the choice of official language and national symbols, structures of government bodies at non-central level, the future status of the 'independent homelands', the future position of members of the present public service (including the judiciary and magistracy), the means of accountability of the legal system, and the retention or abolition of capital and corporal punishment. Few draft constitutions can hope to be comprehensive and decisions on some of these matters have by definition to be postponed until a future post-apartheid government is in place,

but it would be as well to anticipate the disputes which will arise in this regard.

CONCLUDING ASSESSMENT

It may be instructive to take note of the reaction of some of the observers who have commented in print within South Africa on the proposals. So we read:

'The draft constitution decidedly tilts the ANC towards centrist politics where the majority of political groupings in South Africa are to be found, and where the constitutional future of this country will be decided.'

(Oscar Dhlomo, Secretary General, Inkatha)¹

'... a meaningful modernization and improvement of the original Freedom Charter.'

(Dr Zach de Beer, PFP)¹

'The so-called constitutional guidelines therefore leave us cold.'

(Information Department, Pan Africanist Congress of Azania)²

'What is worrying ... is a certain similarity between (the guidelines) and some aspects of National Party thinking.'

(Wynand Malan, NDM)³

'... it is disappointing that the guidelines fail to hold out a more radical vision of South Africa's longer-term economic future ... (One possible explanation) is that socialism has been abandoned as a serious goal for the foreseeable future ... Another ... is ... that the ANC document is merely a statement about the content of a 'national-democratic stage' of revolution, and that the democratic clauses contained in it have no particular relevance for the 'stage' of transition to socialism.'

(Daryl Glaser)⁴

'(The guidelines) represent an impressive effort to recapture the tradition of South African radical liberalism which is presently usurped by rightwing libertarians and Gradgrind free-marketeers.'

(Tom Lodge)⁵

The wide range of these reactions to the CG provides some clue as to their significance. There can be no denying the long process of deliberation which preceded their publication, nor the seriousness with which the ANC views this process and the comment and criticism of the proposals. For this reason and because of the ANC's undoubted role as chief representative of the movement which aims for fundamental change in South Africa, the document must be taken seriously.

In some respects, mainly in the civil-political sphere, the CG represent a distinct advance on the FC, in that they spell out in some detail what can be expected of a post-apartheid government dominated by the ANC. In other respects, the silence of the CG on several issues implies that the FC must still be taken to be valid policy - there is a strong sense of continuity between the underlying themes of the FC and CG, although the latter are expressed in more temperate and diplomatic language. In other words, it is suggested that we have here a shift in style of presentation rather than substance, in line with the realpolitik of the late 1980s.

The major concern about the CG when compared to the FC is whether the former foresee the kind of democratic pluralism envisaged in the latter. There is little indication in the CG, for example, as to how free 'democratic organs of self-government' will be in the future South Africa. The CG are also silent in respect of the role of unions in the process of democratic management. Only a resolution of the relationship between the central legislature and other bodies and the real

meaning of the clause that 'provisions shall be made for the delegation of powers of the central authority to subordinate administrative units for more efficient administration and democratic participation' will provide clarity as to whether the model of the society envisaged by the CG is the same as that contained in the FC.

Some have suggested that the CG represent a mere strategic intervention, 'honeyed words' designed to woo the 'useful idiots' who make up the liberal democratic caucus in 'western' countries and in South Africa, while its true colours are shown in violent attacks inside the country.⁶⁶ The ANC is obviously aware of the favourable effect its CG are likely to have in influential quarters in many parts of the world, and it would be foolish for them to ignore these benefits. On the other hand, there appears to be no radical break with past policy statements of that organization, which have consistently maintained that armed struggle is only one of the four main pillars of its strategy.

In some ways, the proposals reveal more about the ANC and its plans through what is not included than what is. The lack of specificity at various stages and the items omitted could be part of deliberate strategy for any number of reasons. In particular, they could indicate an unresolved tension within its ranks, which is not surprising when one considers the seniority and legalistic frame of mind of many of the most influential contributors to the drafting process over against the youthful mass militance of the thousands of exiles who make up the bulk of the membership. In this regard, it is helpful to compare the

eventual contents of the CG with a speculative report⁷ containing comment on the likely content from senior legal and executive officials of the ANC after their March 1988 seminar in Lusaka. Thus we read that 'third-tier representation in powerful, although not fully-autonomous, local government structures', 'a recognition of the necessity ... of access to the means to publish', and 'there appears to be a consensus within the ANC in favour of (an) executive presidency rather than a prime ministerial system', and so on, yet the CG contain no reference to such matters.⁸⁸

In sum, therefore, it is submitted that the CG represent an elaboration of the FC in several areas, though chiefly the civil-political; that they are broadly consistent with prior and present organisational policy; that they are likely to enjoy substantial support in many quarters in South Africa and abroad, but will fail to satisfy 'workerists' and 'Africanists', among others; that they fall short in several important respects, which need urgent attention, among them transitional measures, mechanisms of governmental accountability, and devolution of power; and that they are both a response to the reaching of a certain stage in the overthrow of apartheid and a stimulus for further organisation and action to this end. The words of the head of the Constitutional and Legal Department of the ANC⁸⁹ portray some of these thoughts clearly:

'The guidelines lay down broad and general principles of government structures and powers and the fundamental rights and liberties of the people. They are framed in a broad pragmatic and flexible style. It is this flexibility that make them a lethal weapon in the struggle against apartheid. They are a product of a

deliberate assessment of the present stage of our struggle. They are not only meant to spell out the rights of the people and the responsibilities of the individual to society, but are meant to keep pace with the developments of society and the times. For we regard constitutions as living documents dealing with real problems of our contemporary generation. They have been tabled for deep study, bold and realistic discussions by the broadest spectrum of our people. Through this debate we hope that they will be further enriched. Through them we hope to achieve the greatest mobilisation and organisation of all possible motive forces in the struggle against apartheid.'

If viewed within the context of 'constitutionalism' (as outlined initially) as a desirable objective of any constitution, there are sources of potential danger as well as support to be found in the CG. Unfortunately the incomplete, tentative and cryptic nature of the proposals reduce their value and do not allow definitive conclusions to be reached. The next instalment or version is awaited with interest.

ENDNOTES

- * B Com LL B (Cape Town) LL B (Cantab) D Phil (Oxon) Advocate of the Supreme Court of South Africa.
- + B Com LL B (Cape Town) M Phil (Cantab) Advocate of the Supreme Court of South Africa.
1. Chiefly to be found in the Internal Security Act, 74 of 1982, and the Public Safety Act, 3 of 1953, and its attendant regulations.
 2. See the treatment of this subject in B O Nwabueze Constitutionalism in the Emergent States (1973) Chapter 1.
 3. K C Wheare Modern Constitutions (1966) at 137.
 4. S A de Smith The New Commonwealth and its Institutions (1964) at 106.
 5. In Democracy and the Rule of Law (1984) at 211.
 6. See Raymond Suttner and Jeremy Cronin The Freedom Charter in the Eighties (1986) passim.
 7. Together with the Congress of Democrats, the South African Indian Congress, and the Coloured Peoples Congress. See Tom Lodge Black Politics in South Africa since 1945 (1983) at 69-74.
 8. Albert Luthuli Let My People Go (1962) at 142.
 9. At 142.
 10. By the Unlawful Organisations Act, 34 of 1960.
 11. Op cit note 7 particularly chapters 10 and 12.

12. See the range of speakers at the conference on the Freedom Charter held in Cape Town in July 1988 and reported in James A Polley (Ed) The Freedom Charter and the Future (1988).
13. For background see Tom Lodge 'The Lusaka Amendments' (1988) 7 Leadership (4) at 17-20.
14. Ibid.
15. This was stated at a conference held in Harare in February 1989, attended by the writers.
16. Act 110 of 1983.
17. In section 14 of the Act.
18. Only after the enactment of the Provincial Government Act, 68 of 1986.
19. Regional Services Councils Act, 102 of 1985.
20. For example the ideas of 'city states' for urban Africans, the National Council Bill of 1986 and the 'Great Indaba'.
21. The local government elections of October 1988 were marked by large-scale disinterest and stay-aways, despite attempts to outlaw such sentiments in the emergency regulations.
22. The Security Intelligence and State Security Council Act, 64 of 1972.
23. Mainly through the emergency regulations promulgated under the Public Safety Act, 3 of 1953, section 3.
24. Page 1 of the proposals, published by the ANC in Lusaka, paragraph 3 (authors' numbering from top).
25. This is implicit in the guidelines and was repeatedly stressed at the Harare conference (note 15).
26. Preamble, para 2.

27. The ANC document has mistakenly repeated the letters t) and u) in numbering the clauses - we have therefore renumbered the last four clauses v), w), x) and y).
28. Preamble, paras 4 and 5.
29. Ibid, paras 6 and 7.
30. Ibid, para 8.
31. Clause a).
32. Clause d).
33. Clause bii).
34. Clause bi).
35. Clauses e) and f).
36. Clause bi). The judiciary is not mentioned in the proposals as published in Lusaka, though it has been added in several versions of the guidelines which have appeared in South Africa. It is not known who has authorised such an addition (see discussion below at notes 63 - 67).
37. Clause g).
38. Clause h).
39. Clauses i) and j).
40. Clause k).
41. Clause l).
42. Clause m).
43. Clause o).
44. Clause q).
45. Clause t).
46. Clause u).
47. Clause v).

48. Clause w).
49. Claus x).
50. Clause y).
51. Zola Skweyiya 'The ANC Constitutional Guidelines - A Vital Contribution to the Struggle Against Apartheid' (unpublished paper presented at Harare conference, note 15) at 5.
52. David Welsh 'The Governing of Divided Societies: A South African Perspective' in Pierre Hugo (Ed) South African Perspectives: Essays in Honour of Nic Olivier (1989) at 52.
53. See Oscar Dhlomo and Zach de Beer in Weekly Mail, October 7-13, 1988 at 7 and 8.
54. At clauses g), h) and m).
55. Jeremy Seekings 'The Black Townships of the Transvaal' in Philip Frankel, Noam Pines and Mark Swilling (eds) State, Resistance and Change in South Africa (1988) at 199.
56. See Tony Mathews Weekly Mail (note 53) at 8.
57. At clause l).
58. These are the rights to peace, development and a clean environment, among others.
59. A point mentioned by Cassim Saloojee and Firoz Cachalia Weekly Mail (note 53) at 8.
60. Daryl Glaser 'Democracy, Socialism and the future' (1988) 56/57 Work in Progress 28 at 29.
61. A point made by Mathews (note 56) loc cit.
62. See André du Toit 'What Rights should be included as Human and Civil Rights in South Africa?' in Civil Rights League A South African Bill of Rights (1989) 50-55.

63. See Lon L Fuller 'Forms and Limits of Adjudication' (1978) 92 Harvard LR 353.
64. Such as Kader Asmal and Nathaniel Masemola.
65. Such proposals formed the thrust of their contributions to discussions on this matter in Harare (note 15).
66. Clause d).
67. See the Weekly Mail (note 53) at 7 and 'Constitutional Guidelines for a Democratic South Africa' (1989) published by IDASA.
68. Mathews (note 56) loc cit.
69. Both of them by ANC participants in the Harare conference (note 15) when this matter was raised.
70. At the Harare conference (note 15).
71. See De Beer (note 53) and Glaser (note 60), for example.
72. A fact welcomed by De Beer and Dhlomo (note 53).
73. Clause q).
74. Clause n).
75. Clause o).
76. Clause p), our emphasis.
77. Clauses v), w) and x), commented on by Glaser (note 60), Saloojee and Cachalia (note 59) and the Information Department of the Pan Africanist Congress, Weekly Mail (note 53) at 9, all of whom are critical of the lack of definition given in regard to workers' rights in particular.
78. Clauses e) and f).
79. See Lodge (note 13) at 18.
80. Welsh (note 52) at 58 and Dhlomo (note 53) loc cit.

81. See note 53 above.
82. Ibid at 9.
83. Now DP, loc cit.
84. See note 60 at 30.
85. See note 13 at 20.
86. See Bureau for Information RSA Policy Review October 1988 for this type of approach, as reported in the Weekly Mail (note 53) at 8. The words 'useful idiots' did not appear there, but were used by the then State President, P W Botha, to refer to South Africans who meet with the ANC.
87. By David Niddrie 'Building on the Freedom Charter' (1988) 53 Work in Progress 3-6.
88. See note 13. Lodge's analysis adds more detail about what was said by leading figures at that seminar, and provides further insights into the strategic thinking behind the words.
89. See note 51 at 10.