

MCH 91-92-8-8

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.

The objective of these documents was not to produce blueprints or final talks. The objective was to assist our people in discussions around constitution-making to enable them to work out for themselves what they want to see in a new constitution and what they would like to see incorporated in a Bill of Rights.

A number of conferences, workshops and discussion meetings were also held over the last few months. Working papers on electoral systems, gender issues, local government, the land question etc were also prepared.

ALL THESE DOCUMENTS WERE WIDELY DISTRIBUTED TO ALL BRANCHES AND REGIONS AS WELL AS TRADE UNIONS AND OTHER FORMATIONS WITHIN THE BROAD DEMOCRATIC MOVEMENT.

Comments, criticisms and suggestions were invited. As a result of the discussions, inputs and responses received, the ANC Constitutional Committee has been able to formulate documents identifying PRINCIPLES and a possible structure for a new Constitution. These documents reflect the views and responses received thus far.

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 Prime Minister) answerable to parliament? The method of presentation of the issue in the documents does not mean that finality has been reached. The issue is open and must be discussed.
  - 2.2 How is the President to be elected? By direct elections? Or by Parliament?
  - 2.3 What provisions should be included to avoid over-centralization and ensure democratic participation in government at central, regional and local levels. Also, what provisions could be included to ensure structured accountability of all officials and organs of government?
  - 2.4 What should be the structure of parliament? Should it be Bicameral (two Houses eg National Assembly and Senate) or Unicameral (one House)?  
In either event, how will representatives be elected and what will be the function of the House/s.  
  
In the documents we make provision for two Houses but this also is still an open question.
  - 2.5 Judiciary and Administration of Justice.  
This has been a burning issue in our country. We have a judiciary and system of justice which are illegitimate. How to deal with these aspects represent a major problem. There is no final 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 WIDE LAYERS 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

3

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 principles. We need to ensure that principles are not imposed upon our people but arise as a result of popular participation.

The ANC appeals to all branches, trade unions, democratic formations and people generally to discuss these matters **NOW**. We invite comments, suggestions and criticisms. Send them to:

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AFRICAN NATIONAL CONGRESS

DISCUSSION DOCUMENT

ON

THE STRUCTURE OF A CONSTITUTION FOR A FREE SOUTH AFRICA

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 he should be elected by and answerable to Parliament. This is a matter on which there must be greater public debate.

3.3 The President will get through a Cabinet of Ministers led by a prime minister. The President will appoint a prime minister and other members of the Cabinet.

3.4 The President may only hold office for a maximum of two terms of five years each. He or she will be subject to removal only by a resolution passed for good cause by a two thirds majority of the National Assembly.

3.5 The legislative branch of government will consist of two houses of Parliament. The first house of Parliament will be the National Assembly which will be elected on the basis of proportional representation by

universal suffrage in which all persons will have an equal vote without regard to race, gender, ethnic origin, language or creed. The power of enacting legislation will primarily be vested in the National Assembly.

3.6 The second house of Parliament will be the Senate, which will also be elected according to universal suffrage without regard to race, gender, colour, ethnic origin, language or creed. The Senate will neither be a corporatist chamber made up of interest groups (youth, labour, women or business, traditional leaders, or other groups) nor will it represent ethnic or so-called "community" interest. The electoral system will, however, be different to that adopted for 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 designed 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 behind proportional representation lies in the following factors:

a) It encourages participation by groups which have significant followings. This is more satisfactory than forcing political or subversive activity outside parliament. Fringe parties would be excluded by imposing a threshold of a 3-5% of the vote.

b) Votes in excess of fifty percent would count and hence be an inducement to vote in areas where one party is dominant. Similarly 'loosing' parties votes in those areas would also contribute to their overall performance.

c) It leads to a more exact political reflection of the popularity of parties.

d) It avoids the time, expense and accusations of bias in the process of delimiting constituencies. This process can take months or years.

4.2 Proportional representation on the basis of a national party list system, may presents problems. Under such a system there is no way of ensuring adequate regional representation. Party bureaucracies benefit at the expense of local party structures or local sentiment. There is little direct accountability to constituencies.

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 preferred system of voting for Senate, regional and other elections.

5. It is important that there be a guarantee of free and fair elections and that procedures be enacted to see to this. It is therefore recommended that the conduct and supervision of all elections be vested in an independent electoral commission to oversee every aspect of elections from the printing of ballot papers to the adoption of regulations for access by parties to the public media and fairness to all political parties by the public media.

6. There will be an independent judiciary responsible for the interpretation of the Constitution and the application of the law of the land. The judicial power will include the power to review and set aside legislation and actions which are unconstitutional. A Constitutional Court, appointed by the President on the recommendation of a judicial service commission, or by other methods acceptable in a democracy, comprising of judges, practitioners and academics would be set up.

7. Provision will be made for elected local and regional government on the basis of universal franchise without regard to race, gender, ethnic origin, language or creed. Local and regional government will exercise delegated powers but will have wide discretions in regard to the priorities to 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 a alphabetical order the following Afrikaans, English, Sepedi, Sesotho, Seswati, Tsonga, Tswana, Venda, Xhosa, Zulu.

9.2 The State shall take all reasonable and necessary steps to protect, promote and enhance the language rights of all the people of South Africa in relation to education and culture and in the functioning of the State at local, regional and national levels.

9.3 The language policy of the state shall be directed towards promoting and encouraging multilingualism and preventing the use of any language or languages for the purposes of domination or division.

9.4 The State shall, however, be empowered to make reasonable provision by law for the use of one or more of the languages in different regions of the country, or for specific purposes.

9.5 The question may, of course be asked whether there should be one official language for the country. But if this choice is made it would mean the demotion of some languages or the promotion of a single one. Also, it would mean that the official language would be one which most of the people either do not speak or do not speak fluently.

9.6 It would seem therefore that the most appropriate thing to do is to give equal status to all languages subject to the right of the Government to give primacy to one or more languages in any region or throughout the



state as the language of administrative communication or judicial record, or 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. We do not propose to discuss here the formulation of each right and the enforcement of rights as this has already been done in a detailed fashion in a discussion paper The Draft Bill of Rights published in November 1990 by the African National Congress.

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.

11. Provision will be made for discrimination to be eliminated in substance as well as in form. At all levels of government the state will be empowered to pursue policies of affirmative action for the advancement of persons who have been socially, economically or educationally disadvantaged by past discriminatory laws and practices and in order to redress social, economic and educational imbalances in South Africa resulting from such discrimination with special regard to the maldistribution of land and the need for housing. Special provision will also be made to redress the

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7

added discrimination which has been suffered by women and the victims of forced removals.

12. All discriminatory legislation and all other legislation inconsistent with the Bill of Rights will be invalidated by the Bill of Rights. All other legislation will remain in force unless repealed by parliament or set aside by a court under its power of judicial review.

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 of 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 as to investigate allegations of com.

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 this will be subject to strict controls by Parliament as the Judiciary and 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 by two thirds of the votes cast at a national referendum.

April 1991

AFRICAN NATIONAL CONGRESS

DISCUSSION DOCUMENT

ON

CONSTITUTIONAL PRINCIPLES FOR A FREE 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.

A UNITED SOUTH AFRICA

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, nationhood, a common loyalty and one nation. We speak many languages, have different origins and varied beliefs, but we are all South Africans.

Thirdly, all apartheid structures must be dismantled and replaced by institutions of government - central, regional and local - which are truly non-racial and democratic. They must form an integrated and coherent whole, be drawn from all the people and be accountable to the whole community.

Fourthly, there must be a single system of fundamental rights guaranteed on an equal basis for all through the length and breadth of the country. Every South African, irrespective of race, colour, language, gender, status, sexual orientation or creed should know that his or her basic rights and freedoms are guaranteed by the Constitution and enforceable by recourse to law.

Fifthly, the flag, names, public holidays and symbols of our country should encourage a sense of shared South Africaness.

A unified South Africa requires a strong and effective Parliament capable of dealing with the great tasks of reconstruction, of overcoming the legacy of apartheid and of nation-building.

We believe that there is a need for strong and effective central government to handle national tasks, strong and effective regional government to deal with the tasks of the 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-bureaucratized 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.

Regional tasks would include development and the carrying out of the basic tasks of the government at a regional level, bearing in mind regional particularities and resources.

Without detracting from basic constitutional rights and freedoms, provision could be made for special recognition of languages in the different regions.

Local tasks cover all the day-to-day aspects of living which most directly and intimately affect the citizen in an integrated and non-racial local authority area. The active local involvement of all sections of the population will be necessary in the fulfilment of these tasks.

The central government has the responsibility for ensuring that there is a common framework of principles and practices applicable to the whole country and for seeing to it that all areas of the country have equitable access to national resources. However, it is not the function of central government to involve itself in each and every decision that has to be taken at the regional or local levels. Such functions should clearly be delegated to these authorities and performed by them.

Similarly, when we speak of a united South Africa we do not envisage the elimination of cultural, linguistic, religious and political differences. On the contrary, we regard the 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 voters should not be disadvantaged. The precise method of voting and electoral system can be negotiated within the framework of these universal principles. The African National Congress favours the system of proportional representation, with

regional and national lists.

Secondly, the legislature should be representative of the people as a whole, reflecting such differences of political views and interests as may be present in the community at any particular time.

Thirdly, the institutions of government should not be restricted to any language, religious, racial, ethnic or cultural grouping. The central, regional and local government structures including the law enforcement agencies and the administration of justice should reflect the composition of South Africa as a whole and draw on the talents and life experiences of all. Similarly, they should act in a fair and objective manner towards all, without fear, favour or prejudice.

Fourthly, government must be open. Apartheid South Africa has been a highly authoritarian society, characterised by arbitrary decision-making by officials and by excessive secrecy. All South Africans have the right to be informed about the issues and to know what the basis of governmental decisions is. 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.

#### NON-RACIAL

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. It presupposes a South Africa in which every individual has an equal chance, irrespective of his or her birth or colour. It recognises the worth of each individual.

A non-racial Constitution can be adopted rapidly but a non-racial South Africa would take many years to evolve. Yet although the massive discrepancies in education, health and

living conditions imposed by decades of racial discrimination cannot be eliminated by constitutional declaration, the Constitution must provide the positive means to reduce progressively the imbalances and inequalities and to ensure that everybody has an equal chance in life.

### NON-SEXIST

The new Constitution must reflect a commitment to full, free and equal participation in the new South Africa. Law and practice keep South African women out of their rightful place in helping to build democracy and enable a new nation to evolve, and deprive them of their human rights as individuals.

The new Constitution must therefore:

guarantee equal rights for women and men in all spheres of public and private life;

create mechanisms whereby the discrimination, disabilities and disadvantages 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.

### BILL OF RIGHTS

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.

It should create mechanisms for enforcing these rights. In particular, the courts should have a primary role in ensuring that the Bill of Rights is operative. A Constitutional Court that enjoys the respect of all South Africans, that draws on the experience and talents of the whole population, that is independent and that functions in a manifestly fair and objective fashion, accountable only to the principles of the

Constitution, should be created.

Similarly, a Human Rights Commission should be established to ensure that violations of human rights are investigated and appropriate remedies found, examine patterns of discrimination and make proposals for their elimination.

Finally, the post of Ombud should be created to deal with questions of abusive, arbitrary, capricious, discourteous and corrupt exercise of office by any official.

#### OPEN SOCIETY

The Constitution should guarantee the free articulation of differences within the framework of equal rights and tolerance.

An open society requires guarantees for the free functioning of non-governmental organisations, such as religious bodies, trade unions, sporting and cultural associations, subject only to respect for fundamental human rights as set out in the Constitution.

Non-governmental organisations should be encouraged to collaborate with the Government 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 SERVICE, THE ARMY, POLICE AND PRISON SERVICE

The three principal qualities of the civil service, the army, 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.

#### COMPETENCY

It is in the interest of the population of a free South Africa

that the standard and quality of service of the public service shall be as high as possible. To attain this goal and consistent with the principle of representativity, special programmes of training, retraining and advancement shall be undertaken to enable the best South Africans to give the best possible service to all their fellow citizens.

IMPARTIALITY

The organs of government shall be accountable to Parliament and to the whole community. It is not their function to serve the interests of any party or sectional grouping. Impartiality presupposes a balanced composition of the bodies concerned and a sensitivity to the needs and aspirations of all sections of the community.

There should be adequate control and supervision over the civil service, army, police and prison service, an effective machinery to investigate complaints against these services and the provision of redress.

ADMINISTRATION OF JUSTICE

Without interfering with its independence, and with a view to ensuring that justice is manifestly seen to be done in a non-racial way and that the wisdom, experience and judicial skills of all South Africans are represented on the bench, the judiciary shall be transformed in such a way as to consist of

women drawn from all sectors of South African society. In 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.

#### GUARANTEES OF OPPORTUNITIES FOR A DIGNIFIED LIFE FOR ALL

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.

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**MEMORANDUM ON TERMINOLOGY  
AND CONSTITUTIONAL CONVENTIONS**

1. Prior to 1983 the head of State in South Africa exercised all his or her powers on the advice of the Executive Council, which consisted of the Prime Minister and the cabinet. This was changed in the 1983 constitution which made provision for an Executive President and drew a distinction between "own affairs" and "general affairs".
2. Unlike the head of State under the previous constitutional order, who always acted on the advice of the cabinet, the Executive State President presided over the cabinet and participated in the decision making process. He was required to exercise executive authority concerning "own affairs" on the advice of the relevant Ministers' Councils, but had executive authority in relation to general affairs "in consultation with" his cabinet.
3. The phrase "in consultation with" was new and was presumably included to cater for the change from a nominal President to an executive President. In the constitution and other legislation there is now reference to the State President and other executive officers being required to exercise powers "on the advice of", "in consultation with", "after consultation with" and in some instances, without any apparent qualification whatever.
4. It is clear that where the President is required to act on the advice of another body - as is the case in respect of executive authority concerned with "own affairs" - he exercises the power nominally, and the real power vests in the body on whose advice he is required to act. Where he is required to act "after consultation with" a person or body the real power vests in him, but the prior consultation is a precondition to the exercise of that power. No specific form of consultation is required. All that is needed is for the consultation to be carried out in good faith and in a manner which is not manifestly unreasonable. R v Ntlemenza 1955(1) SA 212 R v Mbete 1954(4) SA 491 (E).
5. What is less clear is what the President's authority is in respect of matters which have to be exercised "in consultation with" his cabinet or when a statute vests the authority in him without any qualification.
6. The Government advisors at Codesa took the view that the phrase "in consultation with" implied a joint decision, whereas the phrase "after consultation with" carried no such implication. The choice of language became a matter of contention in working group 3 where the Government wanted to use the expression "after consultation" and not



"in consultation" so as to ensure that executive power remained with the State President and his cabinet. It was only with great reluctance and at the very last moment that they agreed to the words "in consultation with". Because it was accepted at working group 3 that the words "in consultation with" required a joint agreement, provision had to be made for a mechanism to resolve deadlocks. It was agreed that this would be done by referring disputed issues to the Independent Election Commission for a decision. In the context of the working group 3 agreement, it is clear that "in consultation with" implies a joint agreement with a deadlock breaking mechanism if agreement is not reached.

7. It is not clear, however, that this will necessarily be the interpretation put on the words in a different context. In Boesak v Minister of Home Affairs 1987(3) SA 665(C) it seems to have been accepted that the requirement in the constitution that the State President should exercise executive power "in consultation with" the cabinet requires him only to consult with his cabinet, but that having done so, he would be entitled to exercise the power personally. The comment was made in passing, and was not necessary for the decision in the case. It does, however, at the very least raise some doubt as to the meaning of the words "in consultation with".
8. There is also some doubt as to the way in which powers which are vested in the State President by statute are to be exercised, where the statute does not require the President to act in a particular manner. In Nkwinti v Commissioner of Police and Others 1986(2) 421(E) the court had to consider the power vested in the State President by the Public Safety Act to declare a state of emergency. It was held that the declaration of the state of emergency was a "general affair" and as such the power was to be exercised "in consultation with" the cabinet. There is no detailed discussion of the subject in the judgment, but it seems to suggest that powers to undertake executive action vested in the President by statute form part of the executive authority referred to in the constitution, and have to be exercised in accordance with the requirements of the constitution.
9. Certain powers vested in the President may fall outside of the category of executive powers. Thus in Boesak's case (supra) it was held that the prerogative powers of the President could be exercised by him personally, or be delegated by him to a cabinet minister, and were not required to be exercised "in consultation with" the cabinet. So too a discretion vested in the State President by statute, other than a purely administrative discretion,

would probably have to be exercised by him personally, and would not be regarded as part of the executive authority to be exercised "in consultation with the cabinet".

10. The way the government functions depends in some respects upon convention. Under the present constitutional structure, the convention is that after discussion in the cabinet the President decides what the "cabinet view" is on any issue, and then acts on that decision. Since the cabinet members hold office at his discretion they either go along with his summing up or resign. Constitutional conventions are ordinarily not legally enforceable. The only sanction for the breach of such a convention is usually a political sanction. In line with this, a court will not enquire into the way the cabinet functions (its proceedings are in any event confidential and cannot be referred to in evidence) or investigate whether consultation with cabinet members has been sufficient.
11. Parliament can pass laws incorporating conventions into formal law and in that event courts will enforce them. No South African court has ever been called upon to declare an executive action unlawful on the grounds that it was taken by the President unilaterally and not "in consultation" with the cabinet. In the nature of things such an issue is not likely to arise under the present system. When consultation is required with persons other than the cabinet, the position is different. A court has set aside an executive action by the President which had to be taken "after consultation", where the decision was in fact taken without such consultation. Government of the Republic of South Africa v Government of KwaZulu 1983(1) SA 164(A).
12. To sum up, the present position seems to be as follows:
  - (a) The phrase "in consultation with" depends on the context in which it is used, and in the present constitution, on convention as well.
  - (b) Constitutional conventions are not ordinarily enforced by courts.
  - (c) A court is not likely to interfere with the exercise of executive authority under the present constitution on the grounds of lack of consultation with the cabinet. In the first place it is unlikely ever to be raised by a cabinet member. Secondly, evidence cannot be given of discussions at cabinet meetings, and a court will not enquire into the discussions that have taken place there. In the unlikely event of the issue being raised in court, the President's view would almost certainly be accepted if he says that he acted

"in consultation with" the cabinet.

- (d) Where decisions by the President have to be taken "on the advice of" or "after consultation with" another person or body, a court would probably set aside an executive action if such advice was not given, or if such consultation did not take place. How it would act if there were to be a dispute of fact in relation to such issues is not clear, and there would presumably have to be clear evidence of the omission to persuade it to intervene.
13. A government of national unity has no precedent in our constitutional history. Statutes can override conventions, give jurisdiction to courts which they do not presently have, and make admissible either expressly or by necessary implication evidence which would otherwise be excluded under the present constitutional order. If it is considered necessary to make the functioning of the government of national unity subject to legal control and not merely to political understandings it will probably be necessary for the functioning of the government to be dealt with in greater detail in legislation than has been the case under previous constitutions.

AC/dma

31 March 1993