

THE LABOUR PARTY OF SOUTH AFRICAWORKING GROUP 2FIRST ASSIGNMENTGENERAL CONSTITUTIONAL PRINCIPLES(A) PRINCIPLES RELATING TO CONSTITUTIONAL AND POLITICAL PHILOSOPHY(1) Principles of Liberal Democracy

This must involve universal adult suffrage and the principles of limited government or constitutionalism. The constitution must give expression to the philosophy and the principles of liberal democracy as it has evolved in the great democracies of the world.

(2) Principles of Social Democracy

This should involve inter alia second generation rights, directives of state policy and affirmative action. Citizens must have rights to a certain standard of education, basic health and municipal services, unemployment benefits, social pensions and poverty relief. Social democracy will ensure that a new and compassionate society replaces the old apartheid society based on greed, racial arrogance and indifference to the needs of disadvantaged people. The constitutional enactment of the principles of social democracy and their successful implementation will constitute a powerful bulwark against revolutionary forces.

(3) Principles of Economic Diversity

The mixed economy to be formulated and devised for South Africa must be compatible with the theory of constitutionalism and in particular the rule of law. This will permit a social market economy and allow for the systematic upliftment of disadvantaged communities.

(4) Principles of Self-Determination and Recognition of Cultural Diversity

This will have to be fulfilled in a unified state with the recognition of regional, cultural and language diversity, and voluntary cultural association. The constitution should not tolerate cultural or language groups pursuing their aspirations in a way that is harmful to the interests of other cultural groups or the nation as a whole.

(B) PRINCIPLES RELATING TO THE NATURE OF THE CONSTITUTION

(1) Constitutional Autochthony

By this is meant that the constitution must in every sense be 'homegrown or sprung from the soil', and constitute a decisive break with the past, with the constitutions of 1909, 1961 and 1983, which were the respective products of colonialism, imperialism and apartheid and which institutionalized racism. Codesa, as a unique constitutional experience, could contribute to the autochthonous nature of the constitution.

(2) Sovereignty of the People

South Africa requires a social contract which is an agreement between the people and their legitimate leaders in terms of which the latter rule, in accordance with the constitution. Such a contract ensures that the electorate is the ultimate sovereign to whom the elected rulers are accountable.

(3) Political Legitimacy

Political legitimacy is a seminal requirement for a viable and enduring constitution. The constitution, its preamble, phraseology, its method of enactment and ratification must therefore reflect its political legitimacy. The South African nation must perceive the new constitution as one which they have struggled for, conceived, devised and ratified and not one which has been imposed on them.

(4) Rigidity of the Constitution

The constitution should be the fundamental law of the land and requires a special method of amendment. The constitution must be supreme and constitute the grundnorm. Thus a new constitutional paradigm is required. Parliament will no longer be sovereign and the judiciary (ie the constitutional court) will have the ultimate authority in regard to the interpretation of the constitution giving rise to judicial supremacy as opposed to the legislative supremacy of the Westminster paradigm.

(5) Justiciability of the Bill of Rights

The effective implementation of the bill of rights will be indispensable for the successful operation of the constitution. The bill of rights must be entrenched and enforceable and should greatly contribute to the establishment of a rights culture in South Africa.

(6) Separation of Powers

This doctrine should apply to the different branches of government and between the central and regional administrations. It forms the basis of the independence of the judiciary.

(7) Redress of Grievances

The constitution must be designed to effectively redress grievances. The office of ombudsman, enjoying constitutionally protected independence, should be established to facilitate the redress of the grievances that individual citizens have with all the branches of civil administration in order to ensure that justice prevails and that bureaucratic corruption is investigated and eliminated. An effective and independent auditor-general whose status and functions are constitutionally entrenched is essential to ensure that the executive branch of government is politically and financially accountable.

(8) Openness in Government

In a democratic body politic the electorate is the ultimate sovereign to whom the elected rulers are accountable. Without a reasonable disclosure of information such accountability remains a mere fiction. Democratic government therefore by its very nature requires an adequate measure of open government. Open government enhances participation by the citizenry and therefore increases the legitimacy of the system of government.

(C) PRINCIPLES RELATING TO THE TERRITORIAL NATURE OF THE STATE

(1) Undivided and Unified Nature of the State

The constitution must preserve and entrench the indivisibility of the nation state and its regional and cultural components. It must engender a sense of patriotism to the nation state, and simultaneously accommodate the cultural and linguistic heterogeneity of its population.

(2) Recognition of Regionalism and Regional Diversity

Appropriate constitutions for the regions compatible the national constitution should be devised simultaneously with the latter. Regional variations should be permitted to cater for the peculiar requirements of each region. For example the regional constitutions of the Western Cape and Natal will differ. In the former the traditional or indigenous African leaders will play very little or no part, but in Natal and certain other regions the role of the chiefs could find expression in the regional constitution that accords with their status and functions without making inroads into the fundamental principles of democratic government. Thus the constitution should reflect a process of constitution making that commences simultaneously from the national and regional levels of government ie from the top down and from the bottom up. This will involve the contribution of people at national, regional and local levels. The geographical demarcation of the regions should be based on demographic, economical and political considerations. The existing nine development regions constitute a basis for negotiation between the relevant parties in this regard.

(3) Entrenched Protection of Regional States and Rights

The central government must not have the power to unilaterally revoke or undermine the exercise of political power at a regional level. A formula will have to be devised for the equitable financing of all regions and the rehabilitation of economically weak ones.

(4) Co-ordination, Support and Encouragement of Local Government

Legitimate and effective local/metropolitan government is absolutely essential for peace and security in South Africa. Local/metropolitan government structures should in no way be neglected in the process of constitution making. Local leaders must be encouraged to contribute to and be involved to this aspect of constitution making. This will enhance the legitimacy of the constitution.

(D) PRINCIPLES RELATING TO THE STRUCTURE AND NATURE OF THE LEGISLATURE, THE EXECUTIVE AND THE JUDICIARY

(1) Bicameralism

A two chamber legislature could be effectively used as a method of power sharing and protection of regional diversity. The upper chamber should provide equal representation for the regions irrespective of their geographical and population size and economic power. Bicameralism facilitates government by negotiation and compromise when each house is elected on a separate basis and when the two houses enjoy joint as well as independent responsibility.

(2) The Head of State

The President or head of state should be a symbol of overriding national authority and legitimacy and thus should be elected by direct universal adult suffrage. Executive power must be shared between him, the Prime Minister and the cabinet. This should constitute a check on the abuse of executive power.

(3) Parliamentary/Presidential Executive

This should involve an extra parliamentary President on the one hand and a Prime Minister and cabinet responsible to parliament on the other hand. This will ensure political and financial accountability and preserve the finest and most meritorious aspect of the Westminster paradigm. Therefore an adaptation of the executive found in the French Constitution (5th Republic), which is a parliamentary/presidential one, should be seriously considered.

(4) The Cabinet

The President must be obliged to appoint a parliamentary political leader as Prime Minister who in turn can appoint a cabinet that enjoys majority support in the Lower House or National Assembly. The Prime Minister should be legally obliged to appoint at least one cabinet member from each region.

(3) The Judiciary

The role of the judiciary in the new constitution will be of fundamental importance as the guardian of the constitution. It should include a constitutional court as the final arbiter on constitutional matters. The judiciary must become representative of the South African nation as a whole and should be selected by a judicial service commission and not by the executive as is the position at the present time.

(E) ELECTORAL SYSTEMS

(1) The Principle of Proportional Representation

This is indispensable for accurate and democratic representation. Both national and regional lists should be used. Proportional representation does not refer to a specific electoral system but to an ideal or paradigm to which different systems endeavour to conform. The West German system is proportional except that any party which fails to secure 5% of the vote or at least three constituency seats is not given representation in the Bundestag. In the Netherlands, Israel and Italy greater proportionality prevails than in Germany and Sweden.

(2) The German Hybrid Model

Proportional representation that makes exclusive use of the list system does not however, appeal to persons who value single member constituencies on account of their smaller size and the direct link between the elected member and his/her electors. This is an important principle which ensures that political representatives remain in contact



with the electorate in their own constituencies. The German hybrid model combines the advantages of both the constituency model of representation with proportional representation. A judicial commission would have to be responsible for electoral demarcation. This system, known as the Additional Member System or an adaptation of it, should be seriously considered for adoption in South Africa. In this system each voter has two votes. He casts one for the candidate to represent him in his own constituency. The other is cast for a party list and cumulated locally or nationally. Seats are allocated according to party lists in such a manner that, together with the MP's elected from the single-member constituencies, each party will have the number of representatives proportional to the vote for its list, subject to a threshold qualification.