

Introductory notes on what is not in the Constitutional Guidelines

In law, like in social science, nothing is self-evident until attention is drawn to it. This principle applies to documents even as crisp and new and as meaningful to us as the ANC Constitutional Guidelines. At first glance, and even at second and third, they appear to be sweeping and comprehensive in character, some would argue too extensive for a constitutional document. Yet nothing is said about the name of the country, once called the Union of South Africa, now referred to as the Republic of South Africa, nor about issues such as the flag (all that can be said about the present flag is that it is impossible to draw it and no-one likes it), or the anthem (many more people now sing Nkosi Sikelele i' Afrika than the official anthem);

there is complete silence on whether to continue with the present arrangement whereby Pretoria is the executive capital, Cape Town the legislative and Bloemfontein the judicial capitals, or, to take one case only, whether the most vital urban centre in the country should carry on having the most undistinguished and meaningless name of Johannesburg;

there is no mention as to whether the active head of government should be a President elected directly by the people, or a Prime Minister chosen by the party that commands a majority of seats in Parliament;

no indication is given as to whether elections should be on a constituency basis, with one or two rounds of voting, or on the basis of national lists and proportional representation;

the document does not refer to the structure of Parliament (whether to have a Senate) or of the Executive or of the Judiciary (whether to have a constitutional court);

no mention is made as to whether at the international level South Africa, under whatever denomination, will seek to re-enter the Commonwealth;

there is not even a hint as to whether the legal system will continue to be, as it is said, based on Roman Dutch law.

All these gaps which become so patent once they are pointed out, have one thing in common - they are important at both a symbolic and a practical level, but they do not raise fundamental questions of principle about the foundations of government in a post-apartheid South Africa. In my view, the essence of the Guidelines can be expressed in four basic themes, coupled with a concept of the nation:

South Africa shall belong equally and entirely to all who live in it;

Government shall be by the people, for the people, of the people;

Fundamental human rights and freedoms shall be protected by a Bill of Rights and an independent judiciary;

Appropriate constitutional mechanisms for affirmative action shall be created to correct the injustices and inequalities established by apartheid.

Implicit in the Guidelines is the vision of working toward the creation of a single multi-cultural and multi-faith South African nation; the cultural inputs from all the diverse communities will be like many spread-out roots feeding into a single tree, each enriching and contributing to the strength and splendour of the whole.

These are the foundations of government in a free South Africa, unassailably democratic and fair in character, leaving, as I see it, no room for negotiation if the objective is to dismantle and not perpetuate apartheid. What can be negotiated are firstly, the transitional

arrangements for moving the country from apartheid to democracy, including the procedures whereby a new constitution can be adopted, and, secondly, the precise institutional arrangements to give structure and symbolic harmony to the agreed principles.

Thus, questions of denomination, flag and anthem, of capital city, of Parliamentary, executive and judicial structure, of precise electoral system, do not demand immediate attention [though we must prepare for them]. Logically and sequentially, their solution depends on accepting the framework of principles as set out above. The ANC leadership wisely decided to focus on the prior questions of principle and leave open its position on the other issues until such time as they should appropriately be placed on the agenda.

Unwisely, I will rush in where the leadership declined to tread, but only in relation to the question of the future of RDL in South Africa, and very much in my capacity as a professor of law throwing out a few ideas in response to a request, and not as someone reporting an agreed ANC position.

I will, then - if, as a non-military person who did not go to the armed struggle but to whom the armed struggle came, I may use the phrase - fire just a few preliminary shots.

Some extra notes.

The objective must be simultaneously:

1. correct the injustices of the past
2. develop the economy
3. build the nation.

If properly attended to, these need not be mutually contradictory. The nation cannot be built if the injustices of the past remain. On the contrary, it is the very process of correcting these injustices, a process which hopefully will involve the whole community, that creates the conditions for the nation to emerge.

Similarly, the economy should function better if the talents and energies of the whole population are directed towards construction rather than division and mutual hatred. Our country has already passed through the agonies of the industrial revolution - now we have reached the stage where the fruits of this terrible process can be enjoyed by all.

White is beautiful. It was a Mozambican who told me this. His grandmother was African, his grandfather Portuguese. Black is beautiful, brown is beautiful, white is beautiful, he said.

The whites in South Africa made themselves ugly by saying black was ugly. They had the chance to build a nation, but they refused. Now it is black South Africa that will build the nation. The whites will be a part, can even be a beautiful part, certainly a self-confident part. They can

*dupl.*

Introductory notes on what is not in the Constitutional Guidelines

In law, like in social science, nothing is self-evident until attention is drawn to it. This principle applies to documents even as crisp and new and as meaningful to us as the ANC Constitutional Guidelines. At first glance, and even at second and third, they appear to be sweeping and comprehensive in character, some would argue too extensive for a constitutional document. Yet

nothing is said about the name of the country, once called the Union of South Africa, now referred to as the Republic of South Africa, nor about issues such as the flag (all that can be said about the present flag is that it is impossible to draw it and no-one likes it), or the anthem (many more people now sing Nkosi Sikelele i' Afrika than the official anthem);

there is complete silence on whether to continue with the present arrangement whereby Pretoria is the executive capital, Cape Town the legislative and Bloemfontein the judicial capitals, or, to take one case only, whether the most vital urban centre in the country should carry on having the most undistinguished and meaningless name of Johannesburg;

there is no mention as to whether the active head of government should be a President elected directly by the people, or a Prime Minister chosen by the party that commands a majority of seats in Parliament;

no indication is given as to whether elections should be on a constituency basis, with one or two rounds of voting, or on the basis of national lists and proportional representation;

the document does not refer to the structure of Parliament (whether to have a Senate) or of the Executive or of the Judiciary (whether to have a constitutional court);

no mention is made as to whether at the international level South Africa, under whatever denomination, will seek to re-enter the Commonwealth;

there is not even a hint as to whether the legal system will continue to be, as it is said, based on Roman Dutch law.

All these gaps which become so patent once they are pointed out, have one thing in common - they are important at both a symbolic and a practical level, but they do not raise fundamental questions of principle about the foundations of government in a post-apartheid South Africa. In my view, the essence of the Guidelines can be expressed in four basic themes, coupled with a concept of the nation:

South Africa shall belong equally and entirely to all who live in it;

Government shall be by the people, for the people, of the people;

Fundamental human rights and freedoms shall be protected by a Bill of Rights and an independent judiciary;

Appropriate constitutional mechanisms for affirmative action shall be created to correct the injustices and inequalities established by apartheid.

Implicit in the Guidelines is the vision of working toward the creation of a single multi-cultural and multi-faith South African nation; the cultural inputs from all the diverse communities will be like many spread-out roots feeding into a single tree, each enriching and contributing to the strength and splendour of the whole.

These are the foundations of government in a free South Africa, unassailably democratic and fair in character, leaving, as I see it, no room for negotiation if the objective is to dismantle and not perpetuate apartheid. What can be negotiated are firstly, the transitional arrangements for moving the country from apartheid to democracy, including the procedures whereby a new constitution can be adopted, and, secondly, the precise institutional arrangements to give structure and symbolic harmony to the agreed principles.

Thus, questions of denomination, flag and anthem, of capital city, of Parliamentary, executive and judicial structure, of precise electoral system, do not demand immediate attention [though we must prepare for them]. Logically and sequentially, their solution depends on accepting the framework of principles as set out above. The ANC leadership wisely decided to focus on the prior questions of principle and leave open its position on the other issues until such time as they should appropriately be placed on the agenda.

Unwisely, I will rush in where the leadership declined to tread, but only in relation to the question of the future of RDL in South Africa, and very much in my capacity as a

### **Workers**

- t) A charter protecting workers' trade union rights, especially the right to strike and collective bargaining shall be incorporated into the constitution.

### **Women**

- u) Women shall have equal rights in all spheres of public and private life and the state shall take affirmative action to eliminate inequalities and discrimination between the sexes.

### **The Family**

- v) The family, parenthood and children's rights shall be protected.

### **International**

- w) South Africa shall be a non-aligned state committed to the principles of the Charter of the Organisation of African Unity and the Charter of the United Nations and to the achievements of national liberation, world peace and disarmament.

## **CONSTITUTIONAL GUIDELINES FOR A DEMOCRATIC SOUTH AFRICA**

The Freedom Charter, adopted in 1955 by the Congress of the People at Kliptown near Johannesburg, was the first systematic statement in the history of our country of the political and constitutional vision of a free, democratic and non-racial South Africa.

The Freedom Charter remains today unique as the only South African document of its kind that adheres firmly to democratic principles as accepted throughout the world. Amongst South Africans it has become by far the most widely accepted programme for a post-apartheid country. The stage is now approaching where the Freedom Charter must be converted from a vision for the future into a constitutional reality.

We in the African National Congress 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.

The immediate aim is to create a just and democratic society that will sweep away the centuries-old legacy of colonial conquest and white domination, and abolish all laws imposing racial oppression and discrimination. The removal of discriminatory laws and eradication of all vestiges of the illegitimate regime are, however, not enough; the structures and the institutions of apartheid must be dismantled and be replaced by democratic ones. Steps must be taken to ensure that apartheid ideas and practices are not permitted to appear in old forms or new.

In addition, the effects of centuries of racial domination and inequality must be overcome by constitutional provisions for corrective action which guarantees a rapid and irreversible redistribution of wealth and opening up of facilities to all. The Constitution must also be such as 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.

The Constitution must give firm protection to the fundamental human rights of all citizens. There shall be equal rights for all individuals, irrespective of race, colour, sex or creed. In addition, it requires the entrenching of equal cultural, linguistic and religious rights for all.

Under the conditions of contemporary South Africa 87% of the land and 95% of the instruments of production of the country are in the hands of the ruling class, which is solely drawn from the white community. It follows, therefore, that constitutional protection for group rights would perpetuate the status quo and would mean that the mass of the people would continue to be constitutionally

trapped in poverty and remain as outsiders in the land of their birth.

Finally, success of the constitution will be, to a large extent, determined by the degree to which it promotes conditions for the active involvement of all sectors of the population at all levels in government and in the economic and cultural life. Bearing these fundamental objectives in mind, we declare that the elimination of apartheid and the creation of a truly just and democratic South Africa requires a constitution based on the following principles:

### **The State:**

- a) South Africa shall be an independent, unitary, democratic and non-racial state.
- b) i. Sovereignty shall belong to the people as a whole and shall be exercised through one central legislature, executive and administration.  
ii. Provision shall be made for the delegation of the powers of the central authority to subordinate administrative units for purposes of more efficient administration and democratic participation.
- c) The institution of hereditary rulers and chiefs shall be transformed to serve the interests of the people as a whole in conformity with the democratic principles embodied in the constitution.
- d) All organs of government including justice, security and armed forces shall be representative of the people as a whole, democratic in their structure and functioning, and dedicated to defending the principles of the constitution.

### **Franchise**

- e) In the exercise of their sovereignty, the people shall have the right to vote under a system of universal suffrage based on the principle of one person, one vote.
- f) Every voter shall have the right to stand for election and be elected to all legislative bodies.

### **National Identity**

- g) It shall be state policy to promote the growth of a single national identity and loyalty binding on all South Africans. At the same time, the state shall recognise the linguistic and cultural diversity of the people and provide facilities for free linguistic and cultural development.

### **A Bill of Rights and Affirmative Action**

- h) The constitution shall include a Bill of Rights based on the Freedom Charter. Such a Bill of Rights shall guarantee the fundamental human rights of all citizens irrespective of race, colour, sex or creed, and

shall provide appropriate mechanisms for their enforcement.

- i) The state and all social institutions shall be under a constitutional duty to eradicate race discrimination in all its forms.
- j) The state and all social institutions shall be under a constitutional duty to take active steps to eradicate, speedily, the economic and social inequalities produced by racial discrimination.
- k) The advocacy or practice of racism, fascism, nazism or the incitement of ethnic or regional exclusiveness or hatred shall be outlawed.
- l) Subject to clauses (i) and (k) above, the democratic state shall guarantee the basic rights and freedoms, such as freedom of association, expression, thought, worship and the press. Furthermore, the state shall have the duty to protect the right to work, and guarantee education and social security.
- m) All parties which conform to the provisions of paragraphs (i) to (k) shall have the legal right to exist and to take part in the political life of the country.

### **Economy**

- n) The state shall ensure that the entire economy serves the interests and well-being of all sections of the population.
- o) The state 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.
- p) The private sector of the economy shall be obliged to co-operate with the state in realising the objectives of the Freedom Charter in promoting social well-being.
- q) The economy shall be a mixed one, with a public sector, a private sector, a co-operative sector and a small-scale family sector.
- r) Co-operative forms of economic enterprise, village industries and small-scale family activities shall be supported by the state.
- s) The state shall promote the acquisition of managerial, technical and scientific skills among all sections of the population, especially the blacks.
- t) Property for personal use and consumption shall be constitutionally protected.

### **Land**

- u) The state shall devise and implement a Land Reform Programme that will include and address the following issues:
  - i) Abolition of all racial restrictions on ownership and use of land.
  - ii) Implementation of land reforms in conformity with the principle of Affirmative Action, taking into account the status of victims of forced removals.

### **Workers**

- t) A charter protecting workers' trade union rights, especially the right to strike and collective bargaining shall be incorporated into the constitution.

### **Women**

- u) Women shall have equal rights in all spheres of public and private life and the state shall take affirmative action to eliminate inequalities and discrimination between the sexes.

### **The Family**

- v) The family, parenthood and children's rights shall be protected.

### **International**

- w) South Africa shall be a non-aligned state committed to the principles of the Charter of the Organisation of African Unity and the Charter of the United Nations and to the achievements of national liberation, world peace and disarmament.

## **CONSTITUTIONAL GUIDELINES FOR A DEMOCRATIC SOUTH AFRICA**

The Freedom Charter, adopted in 1955 by the Congress of the People at Kliptown near Johannesburg, was the first systematic statement in the history of our country of the political and constitutional vision of a free, democratic and non-racial South Africa.

The Freedom Charter remains today unique as the only South African document of its kind that adheres firmly to democratic principles as accepted throughout the world. Amongst South Africans it has become by far the most widely accepted programme for a post-apartheid country. The stage is now approaching where the Freedom Charter must be converted from a vision for the future into a constitutional reality.

We in the African National Congress 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.

The immediate aim is to create a just and democratic society that will sweep away the centuries-old legacy of colonial conquest and white domination, and abolish all laws imposing racial oppression and discrimination. The removal of discriminatory laws and eradication of all vestiges of the illegitimate regime are, however, not enough; the structures and the institutions of apartheid must be dismantled and be replaced by democratic ones. Steps must be taken to ensure that apartheid ideas and practices are not permitted to appear in old forms or new.

In addition, the effects of centuries of racial domination and inequality must be overcome by constitutional provisions for corrective action which guarantees a rapid and irreversible redistribution of wealth and opening up of facilities to all. The Constitution must also be such as 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.

The Constitution must give firm protection to the fundamental human rights of all citizens. There shall be equal rights for all individuals, irrespective of race, colour, sex or creed. In addition, it requires the entrenching of equal cultural, linguistic and religious rights for all.

Under the conditions of contemporary South Africa 87% of the land and 95% of the instruments of production of the country are in the hands of the ruling class, which is solely drawn from the white community. It follows, therefore, that constitutional protection for group rights would perpetuate the status quo and would mean that the mass of the people would continue to be constitutionally

trapped in poverty and remain as outsiders in the land of their birth.

Finally, success of the constitution will be, to a large extent, determined by the degree to which it promotes conditions for the active involvement of all sectors of the population at all levels in government and in the economic and cultural life. Bearing these fundamental objectives in mind, we declare that the elimination of apartheid and the creation of a truly just and democratic South Africa requires a constitution based on the following principles:

### **The State:**

- a) South Africa shall be an independent, unitary, democratic and non-racial state.
- b) i. Sovereignty shall belong to the people as a whole and shall be exercised through one central legislature, executive and administration.  
ii. Provision shall be made for the delegation of the powers of the central authority to subordinate administrative units for purposes of more efficient administration and democratic participation.
- c) The institution of hereditary rulers and chiefs shall be transformed to serve the interests of the people as a whole in conformity with the democratic principles embodied in the constitution.
- d) All organs of government including justice, security and armed forces shall be representative of the people as a whole, democratic in their structure and functioning, and dedicated to defending the principles of the constitution.

### **Franchise**

- e) In the exercise of their sovereignty, the people shall have the right to vote under a system of universal suffrage based on the principle of one person, one vote.
- f) Every voter shall have the right to stand for election and be elected to all legislative bodies.

### **National Identity**

- g) It shall be state policy to promote the growth of a single national identity and loyalty binding on all South Africans. At the same time, the state shall recognise the linguistic and cultural diversity of the people and provide facilities for free linguistic and cultural development.

### **A Bill of Rights and Affirmative Action**

- h) The constitution shall include a Bill of Rights based on the Freedom Charter. Such a Bill of Rights shall guarantee the fundamental human rights of all citizens irrespective of race, colour, sex or creed, and

shall provide appropriate mechanisms for their enforcement.

- i) The state and all social institutions shall be under a constitutional duty to eradicate race discrimination in all its forms.
- j) The state and all social institutions shall be under a constitutional duty to take active steps to eradicate, speedily, the economic and social inequalities produced by racial discrimination.
- k) The advocacy or practice of racism, fascism, nazism or the incitement of ethnic or regional exclusiveness or hatred shall be outlawed.
- l) Subject to clauses (i) and (k) above, the democratic state shall guarantee the basic rights and freedoms, such as freedom of association, expression, thought, worship and the press. Furthermore, the state shall have the duty to protect the right to work, and guarantee education and social security.
- m) All parties which conform to the provisions of paragraphs (i) to (k) shall have the legal right to exist and to take part in the political life of the country.

### **Economy**

- n) The state shall ensure that the entire economy serves the interests and well-being of all sections of the population.
- o) The state 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.
- p) The private sector of the economy shall be obliged to co-operate with the state in realising the objectives of the Freedom Charter in promoting social well-being.
- q) The economy shall be a mixed one, with a public sector, a private sector, a co-operative sector and a small-scale family sector.
- r) Co-operative forms of economic enterprise, village industries and small-scale family activities shall be supported by the state.
- s) The state shall promote the acquisition of managerial, technical and scientific skills among all sections of the population, especially the blacks.
- t) Property for personal use and consumption shall be constitutionally protected.

### **Land**

- u) The state shall devise and implement a Land Reform Programme that will include and address the following issues:
  - i) Abolition of all racial restrictions on ownership and use of land.
  - ii) Implementation of land reforms in conformity with the principle of Affirmative Action, taking into account the status of victims of forced removals.