

11 FEB 1992WORKING GROUP 2

1. FIRST ASSIGNMENT

General Constitutional Principles

- (a) The Superiority of the Constitution over Ordinary Law
This requires that such a principle be established through mechanisms which will render the Constitution less easy to change or amend than ordinary laws and will require constitutional and practical adherence to the principle that the rules of the Constitution be regarded as more binding than other laws. The principle also implies that derogations from the Constitution will only be permitted in extra-ordinary and strictly defined circumstances. Adherence to this first principle leads to the second principle.
- (b) The Constitution will be Rigid
This contrasts the new Constitution with so-called "flexible" Constitutions which can be formally amended by the same procedures used to pass ordinary laws. The new Constitution may only be changed through special majorities with ratification of such amendments by way of special procedures, for example, referenda.
- (c) Equality before the Law
The Constitution will be founded on the principle of equality before the law, meaning that no legislation or executive or administrative act shall directly or indirectly favour or prejudice any person on the grounds of his or her race, colour, sex, religion, ethnic origin, social class, birth, political conviction and other views or disabilities or other natural characteristics.

- (d) The Ultimate Power of Interpretation of the Constitution will repose in the Judiciary
This principle requires elaboration on the hierarchy of the courts and the provision of a special Constitutional Court, if necessary. However, underlying this principle is acceptance of the proposition that the Supreme Court will have a justiciable testing power over the interpretation of the Constitution and the laws enacted under it.
- (e) Protection of the Separation of Powers - Horizontally
Insofar as it is possible in terms of modern government the Constitution, and State practice, will respect the division of trias politicas i.e. the separation of the State between the legislature, the executive and the judiciary.
- (f) The Principle of the Vertical Division of Competencies: Genuine Devolution of Power
The constitutional principle in issue here is an adherence to the genuine devolution of power between the central government and regional and local government formations. The Constitution will assign specific powers and duties to each level of government, which powers and functions will not be capable of recall save by special measures so elaborated upon in the Constitution. Without derogating from the generality of the foregoing principle, consideration will be given to the question of whether South Africa will be a federal or unitary state but regardless of the ultimate location of sovereignty, the aforesaid principle will apply in either case or in any other dispensation so agreed.
- (g) The Electoral System will be based on the Principle of Equal Franchise for Adults and the Principle of Proportionality
In this regard principles will be established: to guide the formulation of an electoral system to reflect best the principle of according representation in the legislature in proportion to support gained at the polls; and, in respect of the principle of safeguarding the rights of the individual, the right of citizens to enjoy a close or proximate relationship with their public representatives, and to have control over their appointment and removal.
- (h) The Legislature will be Divided Bicamerally and each House of Parliament will be Elected on a Separate Basis with each Enjoying Joint and Several Responsibilities
This principle will also require elaboration on the question of conflict-breaking and decision-making options.

- (i) A Justiciable Bill of Fundamental Human Rights will be Enacted
This Bill of Rights will contain guarantees for the rights of the individual against the State which will include all civil and political rights and those social and economic rights which are justiciable. The civil and political rights will at least include the following: equal rights guaranteed by the law and equal protection under the law; personal liberty save by due process of law in the ordinary courts of the land; freedom of speech and expression, of movement, of association, and of worship; the rights of peaceful assembly, to privacy of home and correspondence, to own, acquire, occupy and dispose of property, to compensation in the event of expropriation, and to start and carry on any lawful trade, business, profession or occupation; and the guarantee of regular and free elections. The Bill of Rights will be justiciable before the courts.
- (j) The Judiciary will be Independent and Enjoy Security of Tenure
Under this principle, consideration will be given to the nature of judicial appointments and to the question of impeachment procedures for members of the judiciary.
- (k) The Principle of Checks and Balances will be Enshrined in the Constitution and will be formulated to ensure that each arm of the State acts as an effective counterbalance of the other, including other sites of Government operating as a restraint on the central site of Government.
- (l) The Definition of Citizenship and principles relating to its acquisition and relinquishment.
- (m) The Principle of Accountability
This includes techniques for direct democracy (eg referenda and rights of recall) and the establishment of the rights of citizens' complaints through the office of ombudsmen.