

MCH 91-117-1-3

mjfh15c

WORKING DOCUMENT ON MINIMUM CONSTITUTIONAL PRINCIPLES FOR A SOUTH AFRICAN CONSTITUTION

CONFIDENTIAL

South Africa shall be a unitary non-racial, non-sexist, democratic and sovereign state. The constitution shall reflect this by providing that:

1. There shall be one common and equal citizenship for all and all shall be entitled to participate in the government of South Africa.

2. The sovereignty of the people shall be exercised through their right to vote for the legislature of South Africa on the basis of universal suffrage, on a common voters roll, in which each person of voting age shall be entitled to an (equal) and secret vote in periodic elections. The Executive branch of government shall be responsible to this legislature.

3. All forms of discrimination on the basis of colour, race, gender, ethnic origin, creed, religion, or language, shall be eliminated or proscribed, save that the constitution shall permit the enactment of policies aimed at redressing the inequalities and imbalances which are the legacy of past discriminatory practices.¹

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4. All shall be equal before the law.
5. An entrenched and justifiable bill of rights shall protect the fundamental rights of all South Africans, including the rights to life; personal liberty; freedom of movement; freedom of conscience; freedom of expression; freedom of assembly and association, including political parties and trade unions; to protection from arbitrary deprivation of (personal and private) property ² and such other rights as are consistent with the United Nations Declaration of Human Rights and the United Nations covenants on civil and political economic and cultural rights.³
6. There shall be an independent judiciary ⁴ (which shall be responsible for interpreting the constitution and adjudicating on the constitutional rights of all South Africans.)
7. There shall be constitutional protection of the language, *religious* and cultural rights of all South Africans.

8. *Local govt* -----

8. Any derogation from the rights enshrined in the constitution shall only be permitted where such derogation is objectively necessary in a time of emergency, to as limited an extent as is possible, and be subject to both legislative and judicial review.

NOTE 1

These principles are proposed with a view to promoting the constitution-making process. They constitute an 'open' or 'permissive' set of principles rather than a 'prescriptive' set of guidelines. They are premised on the assumption that these guidelines should only serve to guarantee the democratic execution of the people's will rather than anticipate the content of the constitution or our actual policies, which will be established later with the necessary political mandate. In this regard the 'principles' should not foreclose on possible constitutional or political policy options, such as: affirmative action in regard to land, education, housing and economic resources; a prohibition on the exercise of 'fundamental' rights which are used to promote racism. In regard to the latter a qualification may need to be added to clause 5. In regard to the former the Constitutional Committee discussed the inclusion of an explicit reference to the need to redistribute the land, but decided not to do so. A similar issue which needs consideration is that of the 'balanced' structuring of the civil service. An

unqualified commitment to 'equality' could be used to prevent subsequent constitutional provisions (or executive actions) which seek to implement corrective measures.

NOTE 2

There will, undoubtedly, be an attempt to obtain the ANC's consent to a property protection clause. In this regard a response needs to be formulated which would address the issue of the form and amount, if any, of compensation.

NOTE 3

These covenants encompass economic (2nd generation or 'red') and political (1st generation or 'blue') rights.

NOTE 4

The Deputy President and many others have gone on record as committing the ANC to an 'independent judiciary, however it is unclear whether this is ANC policy, and whether this commitment excludes a politically appointed, but independent, constitutional court.