

What Is A Constitution

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the national anthem • the president • children • cabinet
• women • the legislature • torture • employment • privacy
• association • education • punishment • gender • age
• equality • expression • electoral systems • pensions •
movement • groups • bill of rights • empowerment • the
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housing • religion • life • employment • constitutional
rights • law • press • democracy • economics • judiciary
• human rights • social justice • environment • civil service

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ANC CONSTITUTIONAL COMMITTEE

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WHAT IS A CONSTITUTION?

A discussion document prepared by the
Constitutional Committee of the
African National Congress of South Africa
to encourage and promote discussion
on the structure and content
of a new, non-racial non-sexist
and democratic constitution
for South Africa

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INTRODUCTION

The African National Congress calls upon the people of South Africa, which includes all the homelands, to initiate and participate in discussions on a future Constitution for South Africa. The ANC calls on all our people to debate and discuss what they want in a new Constitution.

In 1955 at the Congress of the People, the Freedom Charter was adopted, setting out the aspirations of our people.

In 1986 the ANC published the ANC Constitutional Guidelines, not as a blueprint, but to facilitate democratic discussion inside South Africa on a future Constitution. The ANC has always been of the opinion that the adoption of a Constitution for the country is properly the task of the people of South Africa through their elected representatives in a Constituent Assembly.

In the three years that have elapsed since the publication of the Guidelines, numerous organisations, including trade unions, civic organisations, women's organisations, organisations in the health and other sectors have held seminars

and workshops on the Guidelines, and have themselves come up with proposals on the kind of principles which they want to see enshrined in a new Constitution.

Events have moved rapidly since then and the time has come for us to move beyond the statement of principles. We need to say clearly in concrete terms what we want in a new Constitution. We need to do so now!

The demand of our people that a Constituent Assembly be convened is vital to our struggle. This is the correct way to decide, democratically, who should draft a Constitution and what it should contain. That demand must be popularised and fought for! We will only get a Constituent Assembly if that demand is made irresistible in actual struggle.

By looking at Constitutional options now, does this not mean that our position has changed in any way? Are we not by-passing the Constitutional Assembly? On the contrary, looking at various Constitutional issues now is designed to facilitate and make easier the whole process. Let us assume that we do win a Constituent Assembly and such an assembly is convened: how are we going to make sure that the views

of the people of South Africa are reflected in it? In other words, if we do not discuss and formulate actual proposals now, then when the Constituent Assembly is won and is convened, there will be little opportunity or time to discuss what we want in a new Constitution. There will also be no time to take mandates. That process must therefore begin now.

The ANC therefore calls on all our people and organisations to work out in concrete terms what they want to see in a new Constitution. The Constitutional Committee of the ANC has produced this document to enable this discussion and formulation to take place on an organised basis. The many questions in this book are not aimed at testing your knowledge. They are there to aid debate and discussion.

The ANC is not prescribing what should be in a new Constitution. It is placing certain suggestions before the people which the ANC thinks should be discussed. It is the people, through their organisations, who must come up with their proposals.

What is more, the whole exercise of constitution-making is not meant for members and supporters of the ANC only. We believe it

is a prerogative of all the people of South Africa to participate in the process. The Constitution which we should produce must be a Constitution for all South Africans - not only for the ANC.

It is in this spirit we raise the Constitutional issues in our discussion document on 'What is a Constitution ?'

Please discuss this booklet in all your structures.

Send your responses to :

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CHAPTER 1

WHAT IS A CONSTITUTION?

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WHAT IS A CONSTITUTION?

The Struggle for a New Constitution

"The South African Constitution excludes the blacks. They are outside the Constitution. There is nothing they can do about the decisions, the policies of the South African regime. This is not a civil rights struggle at all. If we were part of the Constitution, if we were citizens like any other, then of course there would be rights to fight for, as there are rights to fight for in the United States. But in South Africa, the position is different. Our struggle is basically, essentially, fundamentally a national liberation struggle" *(Oliver Tambo)*

A democratic Constitution is a product of struggle. The first modern Constitutions emerged from revolutionary anti-feudal

struggle in the United States and France. The American colonists fought for independence from England. They declared their independence and embodied their new found liberty in a document which they called a Constitution. The oppressed people of France rose up against the tyrannical rule of the French monarchy and set out the principle of liberty, equality and fraternity in the Declaration of the Rights of Man and the Citizen. As the peoples of Africa and Asia achieved their independence from colonisation each adopted a new Constitution.

We in South Africa must celebrate and consolidate the freedom which we are fighting for in a new non-racial Constitution which will signal the achievement of self-determination for all South African. It should signal the achievement of liberty and equality for all South Africans. The Constitution adopted in 1910 when the Union of South Africa was created was a racist Constitution which acknowledged the rights of the white minority only. The majority of the population was excluded, on the grounds of colour and denied the right to vote. The 1983 Constitution granted limited rights to ethnic groups and excluded Africans completely. The imposition

of this Constitution was an attempt to perpetuate apartheid in a new form.

Our new South African Constitution should acknowledge and guarantee the rights of all South Africans, regardless of race, religion, sex or political opinion. It should establish the unity of the South Africa nation and the equality of all South African citizens. It should recognise the diversity of the South African people but declare that within that diversity there will be fundamental rights for all. Our aim is that the Constitution will be the document which acknowledges the worth and dignity of every South African - black, white or brown, male or female, English speaker or Zulu speaker. It will be highest legal achievement of our long struggle for democracy and the foundation for rebuilding our country on the basis of equality and a common nationhood.

The Constitution is the basic law of the land.

A Constitution is a written document which sets out the legal framework of the government. It describes how the government will be elected and how the courts will work, what rights the citizen will have, and what

powers the government can and cannot exercise. The Constitution may also say what the official name, flag, anthem, religion and language of the country shall be.

The Constitution is the most important law of a country - it sets out the rules as to how the laws will be made. A democratic Constitution applies to everybody on an equal basis. Nobody is above the Constitution. Even the most important person in the land cannot operate outside of the Constitution. Parliament itself functions within the Constitution. The laws are made within the framework of the Constitution. The judges apply the laws in terms of the Constitution. The army functions according to the Constitution. Each individual citizen can look to the Constitution to establish what his or her rights are.

What is in a Constitution?

We can expect a Constitution to be divided into two basic parts. The first will deal with how power will be exercised in the country. It will set out the way in which the government will be elected and define the institutions through which government will be carried out. Most Constitutions in the world provide for three basic organs of government - namely:

- ❑ The legislature, that is the law-making body;
- ❑ The executive, which is the body that does the actual governing in terms of the law;
- ❑ and the judiciary, that is the body that ensures that the law is obeyed both by all citizens as well as by the government itself.

The other part of the Constitution to which the ANC is committed is a Bill of Rights. This will enshrine the fundamental rights and freedoms of the people of South Africa. Ever since the adoption by the United Nations of the Universal Declaration of Human Rights in 1948, there has been universal acceptance of the principle that there are certain fundamental rights which all human beings are entitled to enjoy. South Africa which has violated these rights through its apartheid policies was one of the few countries that refused to except this Declaration.

The Bill of Rights will be a means of incorporating these universal rights and freedoms into the law of South Africa through the Constitution. They should be adapted to the South African situation with a view to dealing with the special forms of oppression that apartheid has been responsible for as well

as with the particular fears and anxieties that certain sections of the population may have. The Bill of Rights is the mechanism which enables all South Africans to feel secure. It is also a means of ensuring that the language, cultural and religious diversity of the population is recognised in a way that does not involve the oppression and artificial separation imposed by apartheid. Nowadays, a Bill of Rights will include the traditional rights - rights to speech, opinion, privacy, association, to form or join trade unions - and economic and cultural rights - such as the right to education, health and social security - and even 'collective' rights which we, as citizens, are entitled to enjoy such as a good and clean environment.

What a Constitution will not contain

The Constitution is not the only law. It does not deal with every aspect of our life. It will not set out how exactly people will work or be paid, go to school or how much they will pay for electricity or food, how transport or traffic will be organised or what crimes the courts will punish. These laws, which are made by the representatives of the people in parliament, must however be made in accordance with the principles enshrined in the Constitution.

Questions

1. What flag and anthem should a new South Africa have?
2. Should there be an official or national language? Or, should a number of languages be recognised for different purposes in different parts of the country?
3. Should the Constitution deal with many issues in full detail or should it be brief only setting out principles?

How a Constitution is amended

Some Constitutions are "flexible", and can be changed in the same way as any ordinary law, that is by simple majority (50% plus 1 of those entitled to vote). Other Constitutions are "inflexible" because they prescribe a special procedure for their amendment, for example a two thirds majority in both houses of a two chamber parliament. An entrenched Bill of Rights is a protection for the people and therefore more than a mere simple majority should be required to effect any change in the content of the Bill of Rights. The Constitution therefore gives security to all citizens and is protected from temporary and short term changes of opinion.

How is a Constitution created?

The process by which a new Constitution is adopted can vary considerably from one situation to the next depending on (1) the kind of political system that existed before, (2) the nature of struggle waged by the people (3) the demands made and (4) who has the power to draw and adopt the Constitution.

In many ex-colonies, the colonial power negotiated new Constitutions with leaders of colonised peoples which were often modelled on those of Britain, France or Germany. These Constitutions were only considered legally binding once they had been ratified by the parliament of the colonial power. In countries like Portugal and Namibia where protracted struggles were waged or which had been involved in civil or wars of national liberation, the process of adopting a new Constitution has been more democratic. In Portugal for example, the people elected representatives to sit in a constituent assembly or national assembly to draft a Constitution. In Namibia, elections were held for a constituent assembly which adopted a new Constitution for a free Namibia.

What is clear is that the process of forming a

Constitution is vital in determining its success and its support. Where Constitutions are imposed without the participation and discussion of all the citizens, they lack popular support and legitimacy. There can be, at the least, three forms of such participation. The first is the process of discussions already under way within our mass organisation about the Constitution and what measures it should contain. The second is the election of the persons to a Constituent Assembly that devises and drafts the Constitution. The third is the ratification of the Constitution by the people, either by a referendum or by their representatives sitting as the first parliament.

Interim Administration

One problem in the process of changing from one Constitutional order to another is the continued existence of the old regime during the period of transition. In South Africa, the majority of the people regard the government as illegitimate. Can the old government be trusted to supervise and administer elections for a new government fairly? Can it be both referee and player at the same time? What are the implications of its continued control of the army, the police, broadcasting and the civil service?

One method of dealing with this problem is to involve an external agency such as the United Nations to supervise the elections. But this method is expensive for other states and depends on the willingness of the UN to agree to such a proposal. Another method is to form an interim administration of elements from all major representative parties in our society. This proposal is not without its problems because the interim government will have to administer the laws of the old government. Some of the laws would have to be changed - such as the Internal Security Act - to allow for a free and fair election process.

What is clear is that we need a fair & impartial body to supervise the process of transition and to guarantee free & peaceful political activity. One method of doing this is to establish a powerful "Electoral Commission" made up of respected people acceptable to all South Africans, which will have wide powers to supervise and administer all aspects of the elections.

Questions:

1. Should there be an interim administration to organise the first fair and free elections?
What form should it take?

2. Should there be an Electoral Commission to perform this task?
3. How can the Constitutional debates be extended?
4. Have you read the ANC's Constitutional Guidelines?
5. Who should draft a new South African Constitution?

CHAPTER 2

DEMOCRACY, REPRESENTATION AND PARLIAMENT

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A democratic system tries to ensure that there is a system of representation under which policy decisions are as far as possible made in accordance with the popular will. In a representative democracy, individual citizens have the right to elect representatives to their national assembly or parliament. In such a system, individual citizens participate in policy making through their exercise of voting rights and by electing their representatives.

Representative Democracy

In a representative democracy, all citizens should have the right to vote, without reference to race, gender, education or property. The names of all persons qualified to vote should be accurately entered in a register of electors and all voters should be registered. Elections should be held frequently and at regular intervals. All eligible candidates

should be allowed to stand for election without hindrance. Voting must be by secret ballot so that the voter exercises his or her choice without fear. Voters should have a free choice of candidates, policies and political parties. This recognition of political pluralism unites all strata of the population under the Constitution and ensures that the elected government is regarded as legitimate by all citizens, including those who are opposed to its policies.

But democracy is not limited to voting for your representative every few years. Parliament must be receptive to the needs of people - interest groups, trade unions, consumers, tenants, etc - and there must be controls over the civil service so that government is accountable to the people between elections. There is also a view that representatives in the legislature executive bodies should be recallable.

Questions:

1. How can we ensure that parliament is representative?
2. How can representatives be held accountable?

3. How can we ensure that a level of political awareness and participation remains high between elections?
4. How frequently should elections be held?
5. What do you understand by the term political pluralism?
6. What is the role of political parties in a representative democracy?
7. Should we have a multi-party system?
8. Do you think provision should be made in the Constitution for forms of representation in addition to parliamentary representation? If so, how?

The Vote

Apartheid has denied the vast majority of our population the right to vote and to stand as candidates for all bodies which make laws. The heart of our struggle has therefore been for the right to vote.

The Constitution of a free South Africa should therefore guarantee to every South African citizen the right to vote under a system of universal suffrage based on the principle of one person one vote. The names of all citizens over the voting age should be recorded in a register of voters and they should be eligible to vote. The overwhelming majority of countries

now provide that everyone over the age of 18 can vote.

The ANC believes that in a democracy, citizens should be able to choose their representatives without reference to race, colour or gender or any property or educational qualification. Bodies such as the tricameral 'parliament' elected on a basis of separate racial voters rolls in which race groups separately elect their 'own' representatives are inconsistent with this view and must be replaced by national, regional and local bodies elected by the people as a whole.

Questions:

1. Should there be compulsory voting?
2. What should the voting age be?
3. How often should elections be held?

One-vote, one-value

It is a democratic principle that the value attached to each vote should, as far as practicable, be equal. This means that a member of parliament should be elected in such a way as to represent constituencies with nearly the same number of voters. At present, there are a number of ways in which the value of a vote can be diminished. Where voting is

done in Constituencies. constituency boundaries may be drawn in such a way that the number of voters in each constituency may vary. Also, rural areas enjoy what is called 'loading' in their favour so that fewer voters elect a member of Parliament, compared to urban areas.

Question:

Do you think that it is fair that one vote is worth more in one constituency, compared to another?

The Electoral System

The electoral system determines the way in which voters cast their vote and the allocation of political power on the basis of these votes.

1. Non-proportional Systems

The single-member constituency is the oldest and second-most widely-used method for electing a parliament (in Britain, the United States, India and other parts of the Commonwealth). The electorate is divided into constituencies each of which elects one member of parliament.

Since 1910 the white voters have used the 'first-past-the-post' system under which voters

place an X against the name of the preferred candidate in their constituency. The candidate who obtains the highest vote is elected, even if the winner has the support of fewer than the votes of the combined opposition i.e less than 50% of those who have voted.

It is a simple method, establishing a link between the representative and the voter. It has been used in unicultural societies and even deeply divided societies. It promotes strong national parties with national policies and minimises the role of parties based on race, caste or ethnicity.

But there are drawbacks. Constituency boundaries can be manipulated or 'gerrymandered' to ensure safe majorities for the government in power. A representative may be elected without obtaining the majority of the votes (eg.. in the 1948 white election, the National Party received less than 50% of the votes but won the majority of the seats). Independents and minorities may find it difficult to obtain representation. There is no clear relationship between the votes a party gets, and how many seats it will win.

There are other non-proportional voting

systems which should be considered. In France, if the election in a constituency does not produce an overall winner, there is a second election a week later between the most popular candidates. A similar system, called the exhaustive ballot is used in some Eastern European countries. The lowest polling candidates is eliminated and another vote held. This continues until a candidate wins at least half the votes. This is an expensive system.

The Australian Alternative Vote System means that a voter numbers the candidates 1,2,3...in order of preference. If no one has more than 50% of the number of 1 votes, the candidate with the fewest votes is eliminated. These votes are transferred to the voters' next available preference. This continues until one candidate has over half the votes, and is declared elected. This is a complicated system, particularly where many voters are illiterate.

2. Proportional representation

Proportional representation attempts to closely relate the number of votes to the number of seats. This system is also used in most democracies outside the English-speaking world.

In the most basic form, each party presents a list of candidates. Voters generally vote for the parties but not individuals. If a party wins 51% of the votes it is given 51% of the seats. In a parliament of 100 MPs the first 51 people on that party list are elected. This was the method adopted in Zimbabwe (in 1980) and in Namibia (in 1989). In countries with a high degree of illiteracy a system which allows you to vote for a symbol makes for simplicity.

Lists are often presented at a national or regional level, and local interests are not represented. The national organisation can become very powerful. But minority parties will also be able to make an impact.

There are however a great many variations on the basic theme. Some give the voter a limited opportunity to alter the order of names on the party list or to vote for an individual and the party. There can be a threshold of votes (say 5%) to stop a large number or small parties from getting representation.

3. Combination

The additional member system combines two different systems and is similar to the West German voting system. Half of the MPs are

elected from single member seats: the remaining MPs are chosen from a national list so as to adjust the disproportionate result which results from the "first-past-the-post" system.

Secret Ballot

The Constitution usually lay down that voting shall take place by secret ballot. Assistance could be given to voters impartially in order to enable voters who need help to vote. But voting ordinarily has to take place in person, except for those unavoidably absent from their voting districts or because of illness or invalidity.

Questions:

1. Should voters be allowed to vote through the post? If so, which voters?
2. Should voters be guaranteed that their vote will be secret? Why?
3. Should the Constitution provide all the details about the electoral system?
4. Should the first free and democratic election be a country-wide election under proportional representation to determine the strength of political organisations?
5. How simple should the electoral system be to be fair to minorities?

6. Should the electoral method be simple?
7. What principles should underline the first electoral system? "First past the post" system? National List System of Proportional Representation? Or what?

Political Parties

In a democracy, the interests of people are reflected and pursued by political parties. Therefore there must be a Constitutional right to associate and form parties. The ANC supports the right of interest groups to form parties of their choice and the Constitution that protects this right.

The Constitutional Guidelines adopted by the ANC in 1988 propose that parties must not promote racialism. In other words, as in a number of democratic countries, parties which advocate or practice racism, fascism, nazism or incite ethnic or regional exclusiveness or hatred shall not have the legal right to exist or take part in the political life of the country. However, this could drive these parties underground and education is a better way of dealing with this problem. It may be better to prosecute, not parties, but the individuals who promote racial hatred, rather than to ban political parties.

Question:

Do you think that parties that promote racism should be allowed? Who should decide whether a party promotes racism? Will banning such parties stop them from operating?

Referendum and Initiative

The ANC believes that the people of South Africa should have the right to participate to the greatest possible extent in the life and governance of the country. There should, therefore, be greater opportunities for citizens to express their views about laws and policies. Participation in an election every four or five years may not be sufficient: provision could be made for the holding of referenda on important issues. A referendum is a method of involving all citizens directly in political decision-making. Each citizen is entitled to vote on a matter of importance which is a subject of a public debate. The decision of a simple majority, or on some matters a 2/3 majority has the force of law. Because this is an expensive process, it is usually subject to some controls. A referendum can be initiated by a popular petition of, for example, 500 000 signatures. A referendum is sometimes used to amend the Constitution or insert a new clause

into it. Other countries allow Parliament - usually both houses - to amend the Constitution by a special majority e.g. three quarters of the total membership of each house.

Questions:

1. Should the Constitution allow referenda?
In what circumstances should a referendum be required?
2. How many signatures should be required to initiate a referendum?

Constitutional Amendments

Since the Constitution is the basic document enshrining fundamental law, it is normally felt that parliament should not be able to change its provisions, even with a weighted or special majority.

Questions:

1. What majority in Parliament should be required to change the Constitution?
2. Should some fundamental provisions of the Constitution only be changed by all the people voting in a referendum? Which provisions?
3. Should a simple majority of those voting in

a referendum be enough for changing the Constitution or should there be a special majority (say, three quarters of those voting) to add to or amend the Constitution?

CHAPTER 3

THE STRUCTURE OF GOVERNMENT

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There are three branches of government, usually described as the legislature and the judiciary.

A. The Legislature

In a representative democracy, the people are represented by a popularly elected assembly called Parliament. The members of Parliament are responsible to those who have elected them. Parliament's primary function is to make laws. Draft laws called bills are introduced, usually by a Minister, debated, examined in committee and then placed before the executive head of state for signature. On signing, a bill becomes law. It is then published in the Government Gazette.

Some laws take the form of delegated legislation. These are laws which give ministers, officials and other bodies the power to make subordinate laws.

Example:

The Public Safety Act, an Act of Parliament which was passed in 1953, gives the State President the power to declare a state of emergency and to make regulations. She or he in turn, may delegate the legislative power given to him or her by Parliament to subordinate officials like the divisional commissioner of police for instance, to make orders.

This form of legislation increases the power of the executive and of officials. It is therefore crucial that parliament should be a strong institution, able to control the executive and its power to make rules, in particular.

The Legislature and the Executive

In the British "Westminster" system, government is based on the party which enjoys a majority in parliament. The Prime Minister and his or her ministers are members of parliament and therefore responsible to parliament. The government governs so long as it retains the confidence of parliament. In a "Presidential" system like the United States, the president is independently elected by the people. The President can be removed only for serious misconduct, but otherwise remains in office for his full term even if he or she loses

the confidence of the legislature. The relationship between the President and parliament is regulated by a system of "checks and balances", so that neither the Executive nor the Legislature is too powerful. 'Checks and balances' mean that each branch of government can supervise or control the exercise of powers by other branches.

Bicameralism

In some countries, such as Sweden and New Zealand, the legislature consists of only one house elected by the people. Other countries, such as India, the United Kingdom and United States and the Soviet Union, have bicameral legislatures i.e. parliament is divided into two chambers. The lower house is always democratically elected. The Upper house, however, may be constituted by the application of one or more of several methods including the hereditary principle (i.e. Lords or Chiefs'), nomination by the executive head of state, indirect election by an electoral college, or even popular election, but then on a different basis from the lower house.

Until 1980, South Africa had a senate which was elected by parliamentarians and provincial councillors. Before 1948 provision was made

for the nomination of a small number of whites to be appointed to the senate to represent the interests of sections of the disenfranchised population.

Some argue that the senate should have representatives from races or ethnic groups. Is this desirable in a new South Africa?

Powers of the two chambers

In bicameral systems, the lower popularly elected house represents the population. It is usually more powerful, retaining for itself control over money matters and able in the case of conflict to overrule the decision of the upper house.

The upper house can have an important role to play in the process of law making. The upper house usually has the power to delay hastily conceived legislation and can assist the lower house by reviewing, correcting and improving the large volume of bills passing through the lower house. It usually does not have the power to frustrate the will of the lower house. The more democratic the upper house is, however, the more powers it will claim for itself. The American Senate for instance, which is directly elected, has legislative

powers which are similar to those of the house of representatives. This means that a bill must pass through both houses of the legislature before it can become law. The Namibian Constitution, on the other hand makes provision for an indirectly elected upper house with the power to delay but not to overrule the decisions of the lower house.

Countries which have federal Constitutional systems usually have bicameral legislatures. In such systems the lower house represents the population as a whole and the upper house the different parts of the federation.

The South African Debate

Some advocates of bicameralism argue that it is necessary to create representative institutions to reflect interests other than those of individual citizens. In the South African context proposals have been made in different quarters and with very different objectives for representation of special interests in an upper house. In the early 1980's a report produced by the KwaNatal Indaba argued that provision should be made for the representation of specified racial groups in an upper house and for any one group to veto legislation.

President De Klerk's government is considering a directly elected, regionally based upper house with the same legislature powers as the assembly. Such an upper house could include special representation for groups. Some bills on certain matters may require a weighted majority (say two-thirds) in the upper house to become laws. It is obviously hoped, in this way, to make strong provision for the protection of "minorities".

The ANC is opposed to proposals which will have the effect of Constitutionalising ethnicity, and is opposed to special powers which entrench unequal power and privilege in the hands of racial groups.

Questions:

1. Should a future South African parliament have an upper house? If yes, then should the members be directly elected by the population, indirectly elected by an electoral college, or be nominated by the head of state/government?
2. What powers should the upper house have? What powers should it not have?
3. Should provision be made for any form of special representation for groups defined on a racial or voluntary basis? Should

traditional chiefs or any other special interest groups be represented in parliament?

Majorities and minorities in a parliamentary context

Every election produces an electoral majority and a minority. The relationship between majority and minority may change in every election. Both the majority and the minority form part of the nation and should be accommodated.

Political majorities and minorities have an important role to play in a Constitutional democracy. The elected representatives of the majority should have the right to decide. Effective government is not possible without an acceptance of this principle. The minority on the other hand, should have the right to organise and participate in elections and in this way become the majority, express minority opinions and be represented in parliament. Both the majority and the minority have the potential to abuse their powers and must be restrained. The majority should not be able to ride roughshod over the Constitutional rights of citizens and the minority should not

have the power to prevent the government from legislating.

The Sovereignty of Parliament

This concept is associated with the English Constitutional tradition which embraces two distinct ideas. Firstly, according to this doctrine the sovereign parliament has the power to legislate on any matter that it pleases. Secondly, an Act of a sovereign parliament will not be repealed except by parliament itself. Many modern Constitutional thinkers are critical of the doctrine of unlimited parliamentary sovereignty because, as in Apartheid South Africa, it confers on parliament the power to violate fundamental human rights. The ANC has decided that parliament should not have the power to enact any law however unjust and in any manner it pleases. The Constitutional Guidelines make provision for an entrenched and justiciable Bill of Rights. This means that no party with a simple majority in parliament can repeal the Bill of Rights and further that parliament must respect the fundamental rights and freedoms. Some countries have set up separate courts called Constitutional Courts to decide on all issues concerning the

Constitution and especially concerning the protection and enforcement of the Bill of Rights.

Questions:

1. Should judges have the power to set aside legislation passed by the elected representatives of the people in parliament, but which violates fundamental constitutional freedoms and rights?
2. Should there be a Constitutional Court, separate from the ordinary courts, to decide on Constitutional issues?

B. The Executive

The Executive branch of government is responsible for governing the country.

There are broadly two systems of executive government, namely a 'Prime Ministerial' (sometimes called parliamentary) or a 'Presidential system'. In the former, the chief executive (Prime Minister) and cabinet are selected by the legislature from among its members, and in the latter the executive and the legislature are separately elected and constituted.

In a 'Prime-Ministerial' system the Prime Minister is the head of the government. He or she presides over the cabinet and selects the members of the cabinet, usually from the ranks of his or her own party in parliament. Where however, no party wins an overall majority of seats in an election, the Prime Minister will be obliged to form a coalition-government. The cabinet will then be made up of members of parties forming part of the coalition. In a 'presidential' system, such as exists in the United States and Namibia, most of the executive power is vested in the President alone, and parliaments. Powers are confined mostly to making the laws.

The President

He or she is the Head of State. The President may be elected directly by the people or indirectly by an electoral college, often by the Lower House or National Assembly. He or she is elected for a fixed term, and usually may not stand for longer than two terms. This restriction is aimed at controlling the abuse of executive power in a democratic society.

The President's wide powers sometimes include the power to veto acts passed by the legislature and to make important

appointments and to initiate legislation. And in some Constitutions Parliament can override the Presidents veto. He or she is not usually made responsible to parliament for the exercise of his powers. The President may be able to dismiss or dissolve parliament. In some countries, if he or she does this, his or her own term of office may also come to an end.

It should be noted that in some systems the President is merely a figurehead with ceremonial power or limited authority. Germany, for instance, has a purely ceremonial president, who presides at official functions. Real power, however, rests with the Prime Minister or head of government who has powers comparable to that of an executive president.

Questions:

1. Should South Africa adopt a "Prime Ministerial" or a "Presidential" system?
2. The South African government has made proposals to rotate the office of the Prime Minister. Is this feasible or desirable? Should small parties be represented in the cabinet?
3. What power should an executive head of state have?

4. Who should elect the head of state?
5. Should parliament be able to remove the president?

The cabinet

The cabinet consists of the Prime Minister or the President and various ministers and deputy ministers.

Functions of the cabinet

Each minister is a head of a government department, and is responsible for ensuring that civil servants implement policies in accordance with cabinet decisions and the laws passed by parliament.

All ministers are also collectively responsible for the decisions of the cabinet. This means that once a decision has been reached, all the ministers are obliged to defend it in public, even though he or she does not agree with it.

Cabinet ministers are accountable to parliament in a Prime Ministerial system and are expected to advise parliament on policy issues affecting their ministries. They are therefore expected to attend parliament. In a Presidential system they are accountable to the President.

The civil service

In every state, there is a body of officials responsible for advising the government on policy issues, and implementing decisions reached by the government. They carry out the functions of government. In South Africa, because of apartheid, the civil service, is dominated by whites. In some countries there are special bodies to appoint civil servants. This takes away the right of appointment from politicians. However, many countries allow ministers to bring their own advisers to counter-act the influence of the permanent civil servants.

Questions:

1. Should the members of the civil service be independent of the ruling party?
2. Should they be allowed to join any party?
3. How should the work of the civil service be monitored?
4. How should the civil service be restructured at all levels?

The Ombudsman

The concentration of power in the executive and administration could lead to corruption or

the abuse of power. The citizens may be able to air their grievances or obtain remedies because his or her own legal rights may have been violated. It is therefore essential to establish mechanisms for the control of the exercise of power. One way of doing this in a democracy is by setting up the office of the Ombudsman.

An Ombudsman has the power to investigate complaints made by aggrieved citizens against officials, and to recommend remedies such as compensation or a change in the official's term. In this way, the ombudsman plays a role in ensuring honest, fair and efficient administration, preventing corruption and protecting individual citizens from rudeness, officious behaviour or from a wrong decision.

It is therefore necessary that the Ombudsman should be independent from the executive and from parliament. The Ombudsman will usually be a person with legal qualifications, but does not have to be a judge or lawyer.

Police and Army

The constitution does not normally deal with the way the army and the police are organised or may say who shall appoint the most senior

officers to run these services. The constitution may however say who will be in charge of these bodies, and what bodies may control them. A Bill of Rights may also limit their powers. Law enforcement in South Africa has not enjoyed any legitimacy as the police and the army have been part of the violence of apartheid against the majority. To ensure that they represent the people, they will have to stop enforcing sectarian laws. If the police can more accurately reflect the racial and sexual composition of the country they will also be closer to the people, and more sympathetic to their problems. The Constitution should therefore provide for the restructuring of the security forces, as it has done in Namibia. In addition, many countries provide for independent investigation of complaints against the police. Also, in order that law enforcers see themselves as part of a democratic society, some countries allow their soldiers and police to join trade unions but without the right to strike.

Questions:

1. Should the security forces be politically committed to a specific government and its programmes or should the first loyalty of the security forces be to the 'Constitution'?

2. Should local communities or their councils control or influence police agencies in their area?
3. Should the Constitution provide for mechanisms for bringing complaints?
4. Can a Constitution prevent a coup from taking place? How could it do so?

C. Judiciary

In a democratic society based on the rule of law, the courts are important institutions. It is their function to apply the law, to resolve disputes between individual citizens, and between citizens and the state. They are also the guardians of our freedom. This is why the courts should be independent of the two other main branches of government, the executive and the legislature.

The South African courts have been part of white rule (although their powers have been limited by the doctrine of parliamentary sovereignty). In cases dealing with racially discriminatory legislation and in security cases, the courts have often given conservative decisions. Magistrates are civil servants at present and nearly all senior judges are middle aged white males. In considering the changes

that will be necessary in our judicial system as our society changes, it will be necessary to look more deeply at the structure of our legal system, the bias of our legal rules and who will be chosen as judges. We will also have to examine ways in which we can improve access to the legal system. Poverty prevents most people from getting legal assistance in the courts. Most of those charged with criminal offences cannot afford lawyers and at present must defend themselves.

The adoption of a bill of fundamental human rights will give the courts new powers as the guardians of the Constitution and rights of citizens. The courts will have the power to set aside legislation, executive acts and the decisions of officials. A number of countries have separate divisions or even courts to hear Constitutional, labour, family matters. The Constitution may also have to deal with customary law.

Many countries have a system which allows ordinary people to participate in the judicial system. This can be done by having ordinary people sit with the judges and give decisions on cases, or by having neighbourhood or family courts to hear minor matters. Others

provide for jury trial, 10 or 12 people chosen at random who decide the facts and determine guilt or innocence.

A restructured system of justice and the judiciary must be: independent, legitimate, provide democratic or popular participation, and be accessible to ordinary people.

Questions:

1. Should there be a separate court for Constitutional matters?
2. Should there be a separate court to hear labour, family and customary law matters?
3. How should judges be chosen? Who should appoint them? How can their independence be guaranteed?
4. Should ordinary people (i.e. non-lawyers) also sit and hear matters? As judges? As assessors advising the judge? As members of a jury?
5. Should everyone have the right to a lawyer at the state's expense?
6. If this right is very expensive for the country, in what cases must people have a right to a lawyer? And in what cases should they not have such a right?
7. Should there be one system of justice based on the Constitution? Or should there be a

separate system for customary law disputes?

D. Regional and Local Government

The Central Government cannot possibly deal with every detail of administration. Some devolution of power to regional and local bodies is therefore necessary to promote efficient government. Devolution also helps harmonise local and regional loyalties with national ones and involves ordinary citizens more directly in government. A balance must be struck however. Local and regional authorities should not develop into rival governments, thereby weakening the Central Government.

The functions devolved to regional governments usually relate to such matters as education, housing, and transport, control of the environment, physical planning. Less important matters like refuse removal, libraries and sport facilities will usually be the responsibility of local government.

Devolution usually occurs through the statute law. The National Parliament passes laws giving specific powers to regional and local

authorities. These bodies can then legislate on specific matters.

Example:

A local authority may pass a by-law, having the full force of law within its area, forbidding dogs in public parks or preventing 'squatting'. Such laws would have to be supervised by a higher authority.

The Constitution itself will deal with powers and functions of local and regional governments only in general terms. Some proposals made by the present government would provide local and regional bodies with 'inherent' powers which could not be changed by the National Parliament. This is an attempt to limit the government's powers to deal with inequality in education, housing, etc.

Local and regional governments cannot function effectively without adequate finance. The main source of revenue for local authorities are the rates levied on owners of business premises, shops and factories within the area of the local authority. It is in this context that the demand for a single tax base must be understood.

Questions:

1. Should local and regional authorities be elected by the same method as the National Parliament?
2. What powers should be devolved to the regional and local authorities?
3. What should the relationship be between local authorities and civics?

CHAPTER 4
THE BILL OF
RIGHTS

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THE BILL OF RIGHTS

A Bill of Rights sets out in broad language what the rights and freedoms of the people are. It also establishes specific mechanisms for ensuring that those rights and freedoms are respected. The courts play a particularly important part in this process. A Bill of Rights becomes effective when the country has an independent non-racial and representative judiciary to ensure that its principles are respected.

Once rights are included in a Bill of Rights they are regarded as fundamental. They are part of the Constitution and cannot be interfered with by parliament. In all parts of the world a Bill of Rights includes protection against the arbitrary invasion of the rights of the citizens. It lays down principles controlling the way in which the police and the military can act. It defends the privacy of the home and of the person. It guarantees freedom of movement. It establishes that people can only be sent to prison or punished in other ways

after a fair trial. It also guarantees freedom of association and the right to express ones political opinions. It protects freedom of the press and should also guarantee the right to receive and impart information so that government is not carried out in secret. It recognises freedom of conscience and the right of religious organisations to function in terms of their own principles and beliefs. It acknowledges the right of people to form political parties, to campaign for their views and to compete for positions in the legislature and the government.

In the case of South Africa a Bill of Rights can be expected to give special attention to language, cultural and religious rights, as well as to worker's rights and to the rights of women. The question of the environment can also be expected to receive particular attention.

Some of the rights that our Constitution might include:

1. The right to education

Should it be free?

Should it be compulsory?

To what age?

2. The right to associate

The right to join any political party of your choice. This is a right to join any organisation, union or political party of your choice.

Should the Constitution prescribe which union or party will be officially recognised?

Should workers and management be allowed to enter into closed shop agreements?

Should racist parties be banned?

3. The right to express your opinions

Should the government ensure that you not only have the right but the means to express your opinion?

What should happen to the SABC?

What do you think about the daily press and the fact that it is owned by a few private companies?

Do you think that the press in South Africa is free?

Explain your point of view.

4. The right to assemble and to demonstrate without arms

Are there circumstances when the right should be subject to official approval, of i.e. the traffic authorities or a magistrate?

5. The right to a fair trial

What is a fair trial?

Should an accused person be entitled to be informed of the charges against him or her prior to the trial?

What factors should a court consider when deciding on an appropriate sentence?

Should everyone have the right to a lawyer free of charge?

Should whipping be abolished as a method of punishment?

What reforms would you suggest should be introduced in the prison system?

6. Freedom from discrimination on grounds of race, sex, ethnicity, birth or religion.

An affirmative action programme is an exception to the equality principle. It provides for unequal treatment by enabling a government, local authorities or even private bodies to take positive action -quotas in employment, allocation of resources. This is in order to give an advantage to those who have been victims of past policies, based on race or sex discrimination and thereby to achieve equality.

Question:

Should there be affirmative action in favour of racial or ethnic groups?

Women?

In what areas of life?

7. Right to life

Should the death sentence be abolished?

Should a policeman be entitled to use firearms?

If so, in what circumstances?

Should he be entitled to kill in order to protect property?

8. Right to strike

Should this right include protection from dismissal?

Should this right be limited to essential services?

What other workers rights should be protected?

Should the Constitution outlaw slavery and forced labour?

Should the Constitution prescribe safe working conditions in all places of work?

What collective bargaining rights should be in the Constitution?

Should the Constitution deal with issues such as access to company premises, union

subscriptions, deductions, rights of shop stewards, etc?

Should the Constitution protect the closed shop (compulsory union membership and subscription deductions)?

Should the Constitution require the state to establish national disability compensation schemes?

Should the Constitution guarantee access to company information?

Should the Constitution bind any South African Government to ratify international labour accords and agreements?

Should the Constitution require Union Registration, or require Unions to conform with democratic principles, or guarantee union autonomy?

9. Right to culture, language and religion

How can the state protect different religions, cultures and languages?

Should the state **promote** different languages and religions?

Should there be one official language or should all our national and indigenous languages be protected?

Which language or languages?

Should different regions have different official languages?

Should Afrikaans and English be retained in their positions as official languages or should all the other languages be promoted to the same status?

10. Rights to information

Should every citizen have a right to be informed of all government decisions and the reasons for them?

What matters should citizens have no right to know about?

11. Right to pensions and social welfare

How much should the state pay to the old, unemployed and disabled?

Should citizens be able to demand information from private bodies such as companies?

Should workers be entitled to information from management regarding economic performance of the enterprise?

12. Right to housing

What kind of house can everyone expect the state to provide?

Should the homeless be able to go to court for an order compelling the state to give them a house?

13. Right to employment

Should the state be forced to give everyone a job? If it can't what should the state give to the unemployed?

14. Right to privacy

Should the police be able to enter your house without a warrant or tap your phone or interfere with your post?

If so, when?

15. Freedom from torture, cruel unishment or treatment and detention without trial.

Should all individual be protected from torture?

16. Women's rights

What are women's rights?

How can women's rights be guaranteed both in the workplace and in the home?

Should the Constitution guarantee the equality of women in marriage? If so what should the status be of religious customary laws that relegate women to a lesser position than men?

17. Children's rights

What rights of the child should the Constitution guarantee ?

Should the Constitution abolish child labour ?

18. Rights to health care

Should health care be free ?

19. Right to property

Most Constitutions provide that the state cannot take a citizen's possessions without compensating him. In what areas should the state be able to expropriate ?

Should it compensate those who own the expropriated property ? Should the state enforce the return of land to those communities forcibly removed in terms of Apartheid policies ?

Is there a difference between personal productive property and other property ?

Should the Constitution allow for nationalisation of some industries or the land ?

How can these rights, especially economic rights, best be enforced ?

Affirmative action

In South Africa, a Bill of Rights would have to be structured around a programme of affirmative action. Positive and effective steps would have to be taken to ensure that the disadvantages suffered by the majority of the population as the result of past oppression are overcome within a reasonable period of time.

Affirmative action has been applied in the USA to uplift the blacks who have been victims of racial discrimination. In India affirmative action policies have been implemented to improve the socio-economic position of marginalised Indian castes.

The Constitutional guidelines of the ANC advocate affirmative action policies to redress the effects of centuries of apartheid policies and practice. It is envisaged that affirmative action will benefit victims of racist policies, and black women.

The ANC proposes the following programme of affirmative action:

a) Political empowerment

Visible and effective participation and representation of blacks in decision and policy making structures of a non-racial and democratic South African State. This would require a restructuring of the composition of public institutions.

b) Economic Empowerment

Access to economic management and to decision making in the corporate world as well

as access to employment for both black women and men.

c) Education

Affirmative action in education is one of the areas which need urgent attention. The ANC regards affirmative action in education as one of the priority areas.

Affirmative action in education includes the right to compulsory education up to a certain age as well as providing blacks with access to more and better equipped schools. To eradicate the legacy of discrimination between white and black education, more not less funds should be allocated to black pupils.

Affirmative education in schools should include a deliberate effort to educate more women in skills and professions traditionally reserved for white men.

d) Housing

Millions of Black South Africans are either homeless or live in houses unfit for human occupation. The ANC believes that everyone should be entitled to livable and affordable homes, to water and electricity.

e) Health

Affirmative action is required to provide our people with adequate health facilities.

Health facilities should be accessible and affordable. Primary health care should be guaranteed. Special health facilities should be provided for women and children.

Questions:

1. Do you agree that affirmative action is necessary to uplift the victims of apartheid?
2. What campaigns in your community or organisations demand a programme of affirmative action?
3. What do you think would be the best mechanisms to ensure that affirmative action is effective?
4. Do you think there are other ways of ensuring equal participation?

Positive action and gender

Black women in South Africa have suffered triple oppression under successive South African Regimes. The nature of the triple oppression has been political, social and economic, eg. women occupy the lowest ranks in employment.

Women want to be involved in decision making structures of government and the economic sphere in the future South Africa. To achieve this objective, effective mechanisms will have to be evolved. Some countries have implemented a quota system of employment of women in decision making structures.

Women in the ANC are calling to repeal laws which discriminate on the basis of race and those which discriminate against women. They are calling for effective Constitutional protection of women's right and are mobilising for a charter of women's rights.

Questions:

1. How best can we ensure the equality between the sexes?
2. What rights of women should be protected in a charter?
3. How can the participation of women in decision making structures in the political and economic spheres be promoted?

Providing for the Suspension or Limitation of Constitutional Rights in an Emergency

Most Constitutions, and even International Human Rights conventions envisage, and provide for, a situation where the citizens' rights might be limited or even removed. In cases of war or national disasters, such as floods, famine or earthquakes, it may be impossible to follow normal legal procedures and recognise normal human rights. Such situations are generally dealt with as 'states of emergency'. For example, it may be absolutely necessary to impose curfews, take action against looters, prevent persons from entering dangerous areas. In such cases the suspension or limitation of Constitutionally protected rights is called a derogation. A derogation may be provided for even where there is no state of emergency. For example, the African Charter of Human and People's Rights recognises the right to meet and assemble only where the exercise of this right is not a threat to public security.

On the one hand it is important to recognise that such emergency situations or dangers to public safety could occur, and to make provision for it. Failure to do so in the Constitution may lead to regular - even

necessary - breaching of the Constitution and the imposition of martial law outside the safeguards of the Constitution, as has happened throughout the history of apartheid South Africa, where a 'State of Emergency' has been a permanent feature of our land as far as the blacks have been concerned. Emergency powers are, in essence, powers for the protection of democracy and democratic institutions. On the other hand it is necessary to impose safeguards and checks against the abuse of emergency powers and to ensure that the people can regularly determine whether the emergency powers are necessary. Many countries have imposed emergencies and never lifted them even though the war or disaster is a thing of the past. It is easier to impose an emergency than to lift it. It is better for people to discuss and decide what powers their government must have, and how their powers can be tested, in a crisis situation before that crisis occurs. In the heat of a crisis people are not in the best position to determine what rules should apply to deal with the crisis. The same consideration applies to all limitations on fundamental rights and freedoms. The Constitution should spell out exactly what circumstances should exist before a meeting or a publication or a strike can be banned, who

should make this decision, and whether any body can review such a decision.

Here are some of the powers that should never be granted to the executive even in an emergency:

- the power to execute or sentence people without trial;
- the exercise of emergency powers in a racially discriminatory or arbitrary manner;
- the power to suspend elections;
- torture;
- to make retrospective laws or to increase penalties retrospectively.

On the other hand some Constitutions do allow for emergency powers that limit freedom of movement, expression and assembly as well as powers to detain persons without trial for short periods.

Questions:

1. When should a meeting or demonstration be prohibited? If a demonstration or march will disrupt traffic should it be restricted, and if so, who should decide how - and if - the march can take place?
2. When should a state of emergency be declared?

3. Who should decide if a war, or civil revolt, or natural disaster requires that an emergency be declared?
4. Should his or her decision be reviewed?
5. If so, should the decision be reviewed by a court, or by the peoples' elected representatives, or both?
6. What powers should the executive or the police never have in an emergency?

In 1986 the ANC published the ANC Constitutional Guidelines not as a blueprint, but to facilitate democratic discussion inside South Africa on a future Constitution. The ANC has always been of the opinion that the adoption of a Constitution for the country is properly the task of the people of South Africa through their elected representatives in a Constituent Assembly.

In the three years that have elapsed since the publication of the Guidelines, numerous organisations, including trade unions, civic organisations, women's organisations, organisations in the health and other services have held seminars and workshops on the Guidelines, and have themselves developed proposals on the kind of principles which they want to see embodied in the new Constitution.