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Supremacy of the Constitution

Submission to Theme Committee 1

Block 3

Guiding principles

- 1 The ANC submits that the following guiding principles are relevant for the question of the supremacy of the constitution and should be reflected in the context in which the supremacy of the constitution is formulated.,
 - 1.1 The character of the state shall be a multi-party democratic state based upon democratic majority rule.
 - 1.2 There shall be a bill of rights guaranteeing all accepted human rights including socioeconomic right and which shall, where appropriate, be applicable against all sources of power.
 - 1.3 Parliament shall, subject to the Constitution, be the supreme law maker, and the expression of the will of the people. The executive will be accountable to it.
 - 1.4 Parliament shall not be limited in its capacity to legislate so as to address the legacy of the past including such issues as land restoration, re-distribution, and affirmative action.
 - 1.5 Separation of Powers between the organs of state shall be provided for in a manner consistent with the accountability of the executive to Parliament.
 - 1.6 All provisions of the final constitution shall be capable of amendment subject only to the constitutional prescribed majorities and procedures.

The democratic constitutional state

2. The South African state should have the character of being a democratic constitutional state expressing the balance between democratism and constitutionalism.
3. The concept of the democratic constitutional state(1) should be a normative guide and not a mere political programme, and should in an harmonious way encompass the following:

- 3.1 *The principle of democracy:* The right of the people of South Africa to exercise state power through the vote as well as state organs and institutions.
- 3.2 *The principle of constitutionalism:* The national lawgiver (Parliament) should be bound by the Constitution except and in so far as the Constitution may be amended in the prescribed way, whilst the executive and judiciary should be bound by written and unwritten law.(2)
4. It follows from 3 that the principle of constitutionalism should be formulated in the context of, and will be influenced by:
- 4.1 The doctrine of the separation of powers, and
- 4.2 a fair balance between rigidity and elasticity regarding amendment of different parts of the constitution.

The harmonisation of democratism and constitutionalism

5. The central problem which the Constitution should solve is the apparent antinomial relation between freedom and equality. Whilst the idea of freedom eventually leads to constitutionalism in the sense of (3) "limited government", the idea of equality is the point of departure of democratism.
6. Extreme constitutionalism may give rise to the fear that the exercise of legitimate democratic powers of the people may be subjected to unacceptable and inappropriate limits.(4)
7. In the same way democracy unconstrained by rules guaranteeing equality of citizenship and a fair contest between parties may lead to the arbitrary exercise of state power and anarchic conditions.
8. The solution for a moderated constitutionalism and democratism should be sought along the following lines:
- 8.1 Democracy should be seen as the supremacy of the people through the supremacy of law/the constitution: the idea of democratic constitutionalism. There should be no democracy without constitutionalism, and no constitutionalism without democracy.
- 8.2 Constitutionalism should be legitimate, and it is legitimate when it is seen against the background of democratic law-making and the democratic law-making and the democratic system of responsible and accountable government.
- 8.3 The distinction between judicial and political questions which is required for an unacceptable statement of the supremacy of the constitution should be made within the context of the basically undivided unity of law-making and politics in a system of democratic governance.
- 8.4 The supremacy of the Constitution could accordingly and against this back-ground be seen as meaning that democratic decisions should, with regard to material content and procedure, only be

legally possible within the limits set by the Constitution, and thus in accordance with the Constitution.

- 8.5 The supremacy of the constitution should not be a system against the state, but it should be a system for the democratic state, to guard against the state degenerating into anarchy, arbitrariness and illegality, without a framework of rules. Such a state would undermine democracy and democratic practices.

The role of the judiciary

9. It follows from the above that the underlying assumption in Constitutional Principle XXIII should be accounted for in the final constitution, i.e. that the judiciary should not assume a legislative role in the sense of having to decide on the desirability or necessity of legislative.
10. The judicial determination of the constitutionality of legislation should be restricted to establish the formal and material legal compatibility of national or provincial legislation with the Constitution, or the compatibility of provincial legislation with other national legislation, and not the political desirability of the same.

Notes:

(1) To be included at least in the Preamble of the Constitution

(2) It follows that all organs of state at all levels of government are to be bound by the constitution, including Parliament, but only Parliament may amend the Constitution in the prescribed way.

(3) As in the constitutional history of the USA.

(4) Sometimes more strongly expressed in the terms that extreme constitutionalism, or "limited government", may be an elitist orientation discourse technique to transcribe an anti-democratic attempt. Giving too much weight to, or over-stating, the supremacy of the constitution may be used to make highly relevant democratic/political questions appear as legal/constitutional questions and thus as unpolitical questions. These political questions are thus restylised and relegated to the legal-scientific sphere, where non-elected experts decide.