

OUR OBJECTIVES IN DRAFTING A CONSTITUTION

Our primary objective in drafting a Constitution is to translate the principles and programme contained in the Freedom Charter into an operative constitutional document. The aim is to set out the constitutional foundations of a South Africa without apartheid. The new Constitution will in the first place, therefore, respond to the aspirations of the overwhelming majority of our people for a society and government free of the lure of racial domination. Such a document should be presented in accessible language and have a clarity and coherence of vision which makes it easily understandable to all our people. It should not only be race-free, but should denounce apartheid, and constitute a bulwark against racial tyranny and division in the future. It should also be firmly anti-racist in character in the negative sense of outlawing the promotion of racial hatred and division and in the positive sense of creating structures to encourage a sense of common citizenship amongst all the people.

A Constitution is intended to be a working document that defines the structures of the government, the principles in terms of which it functions and the relations between it and individual citizens. A Constitution is also an educational document that enshrines certain fundamental values of the society, and that serves as a positive point of reference for all institutions and individuals in the society. The Constitution we draft should respond to these requirements.

At the same time, the drafting now of a Constitution or a Constitutional outline serves other purposes. It is a signal to the international community of what is meant by a South Africa in which apartheid has been completely dismantled. Our Constitution will therefore be looked at by UN, the OAU, the non-aligned Movement, and by governments and non-governmental organisations all over the world. Anything we draft must have a quality of argument and presentation that carries conviction to all these bodies and that consolidates and increases support for our struggle. Naturally, getting the approval of the international community can never take precedence over

getting the approval of the people of South Africa, But in principle there should be no contradiction between the two.

Finally, we feel our Constitution should address boldly and clearly the problem of what is often referred to as 'allaying the legitimate fears of minorities'. It is this factor which has been responsible for the vast variety of constitutional schemes being put forward by 'experts', all designed to ensure that even if the people get the vote, they shall never really govern. This is the area of the Constitution that will receive the most attention, and will have to be drafted with special care. Our feeling is that while the aspect of allaying fears of minorities - whether legitimate or illegitimate - should never take precedence over guaranteeing the rights of the majority, the importance of not unduly alarming middle sectors, and of encouraging division in the ranks of the enemy should not be lost sight of.

THE FREEDOM CHARTER AND THE CONSTITUTION

Almost all modern constitutions have certain elements in common. They set out the main institutions of public power (government) define their competence and indicate how the leadership of the country is to be determined (election, hereditary succession,,religious position). In addition , many constitutions contain sections dealing with the general principles of the society, while it is even more common to find sections setting out the specific rights of citizens, sometimes in a section called a Bill of Rights.

The Freedom Charter is not a Constitution, in that it does not define the structures of government. But it is a document that has a constitutional character in that it lays down certain fundamental principles about the society that are meant to be legally binding. It is like the general principles and sections on citizens' rights rolled up into one, but without the framework of government within which these principles and rights are to be operative.

Thus, the Freedom Charter says nothing about what kind of legislature or executive the country should have, whether the government should be Presidential or Prime Ministerial in character, the territorial division of the country (for purposes of central, regional and local government), how many Chambers the legislature should have, or /whether elections should be by proportional representation or in single member constituencies. Nor does it deal with questions such as official languages, the flag, where the capital should be, or even with the name of the country, (at the time the Freedom Charter was adopted, South Africa was still a monarchy, the Charter did not require that it become a Republic).

The task of the Constitutional Committee is therefore to enlarge the significance of the Charter by transforming it from being ap programme for the future into being the centre-piece of a Constitution.

Various possibilities exist on exactly how the principles of the Freedom Charter can be incorporated into the Constitution.

One would be to distill its principles and introduce them in this way into the relevant parts of the Constitution.

Another would be to incorporate the full text of the ten provisions as they stand in a section of the Constitution entitled 'General Principles' (to be followed by structures of Government; and 'Individual Rights').

A third would be to disperse the actual text of the Charter throughout the Constitution, ^{loc} placing them where they belong, but not necessarily using the whole text.

The advantage of incorporating the text as a whole (shorn of its preamble and conclusion) is that it is a document that is well-known and balanced, that came from the people and is already part of the history of the people. It follows the approach adopted by many revolutionary constitutions of incorporating goals of the society as a programme binding on the state, but does so in a language that is acceptable to non-revolutionaries.

On the other hand, constitutional programmes are not part of the legal culture to which South Africans (or those interested in legal questions) are used. They are more familiar with constitutions that basically set out structures of government and possibly add a Bill of Rights. A further and perhaps more weighty objection is that to include the entire text is to encourage lawyers of all sizes and shapes to examine the details and create problems for the new government. In a separate report we deal with some of the concrete points that could cause trouble.