

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 a 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 structure of Government; and 'Individual Rights').

A third would be to disperse the actual text of the Charter throughout the Constitution, locating 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.