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DEPARTMENT: LEGAL & CONST AFFAIRS

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MESSAGE : Please find enclosed COMMENTS ON CONSTITUTIONAL PRINCIPLES AND STRUCTURES and A BILL OF RIGHTS.

Regards.

CATHERINE

Comments on A.N.C. Discussion Document:  
Constitutional Principles and Structures  
for a Democratic South Africa

by John Omer-Cooper

PRINCIPLES

I strongly support the general thrust of the arguments embodied in these Statements of Principles. My one doubt is as to whether it is wise to place 'Representativity' before 'competence' and 'impartiality' in the definition of basic qualities for the Civil Service, the Defence Forces, Police, etc. I fully accept that in the light of distortions created by apartheid, a major exercise in positive discrimination will need to be undertaken immediately to make the State services more fully representative of the whole community and to enable them thereby to enjoy the public confidence which is essential to their effective functioning.

On the other hand, to give 'representativity' preference over 'competence' as a general principle could be very damaging and involve sacrificing the basic rights of the public at large and especially its least privileged members to the ambitious aspirations of members of the elite. Once the initial racial imbalances inherited from apartheid have been overcome, moreover, the priority given to 'representativity' could easily lend itself to the justification of the exercise of patronage in favour of particular ethnic groups on the excuse of 'ethnic balancing'. The disastrous and corrupting consequences of such procedures are too well known to require further comment.

I would therefore prefer to see the order changed with 'competence' being given pride of place. This would allow of an immediate drive towards 'Representativity' on the grounds that the services cannot function competently without the legitimacy of a more representative character. In the longer run, however, it would provide a basis for resisting the exercise of patronage at the expense of efficiency and the extension of such patronage to ethnic nepotism.

It would also, perhaps, make it easier, subsequently, to remove any of the beneficiaries of the initial exercise in positive discrimination

who may have proved less than fully competent or committed in the discharge of their offices.

My only other point in relation to Constitutional Principles is that they all appear to be posited on the assumption that South Africa will continue to develop for the foreseeable future as a classic late 19th early 20th Century territorial Nation State. The era of that model however is already waning. Western European states have already moved to what is in effect a form of Confederation with some Federal features. They seem likely to move to a more definitely federal system in the foreseeable future as well as taking in a number of East European States and eventually perhaps the Russian and Ukranian Republics together with some or all of the other Soviet successor states. If African states are to achieve a full place in the modern world and their people to achieve living standards comparable with the West, they must surely also transcend outdated territorial nationalism and the Balkanisation imposed on the continent by European colonialism. In South Africa's case, some form of politico-economic association must surely be offered to the 'enclave' states (most especially perhaps Lesotho) in the interests of elementary justice. Otherwise they will continue to suffer the fate of economic Bantustans.

In the longer term some wider associations with Zimbabwe, Zambia, Malawi and Mozambique (if not Angola and Zaire also) would seem to be desirable and may well prove essential to South Africa's own interests. It is not very probable that these states will agree in the long term to the subordination of their industries to the superior competitive power of South Africa's without such an association which, as in Europe, could allow this predominance to be offset by regional development policies.

I wonder therefore whether the Constitutional Principles should contain some statement of commitment to the Continent at large and the furtherance of wider political unity within it.

In the consideration of structures also it might be wise to bear in mind as possible future developments (a) the association or adhesion of other States with South Africa and/or (b) the participation of South Africa in a wider regional Confederal or Federal union.

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STRUCTURES

(3.2 - 3.4) issues concerning the Presidency.

In the interests of national unity I would favour the idea of the President being elected directly by the entire community. The President, so elected, should hold significant executive powers. The principle of the primacy of the Legislative should also however be maintained. In this regard the model provided by the present French Constitution might be worth examining. It allows President Mitterand considerable power as well as great prestige yet he has to govern with a Prime Minister and Cabinet who can command the support of a majority in the Assembly. He has even had to work for a time with a government of significantly different political persuasions from his own.

Provision for the limitation of Presidential tenure to two five-year terms seems wise as does that for the possible removal of a President by a 2/3rds Parliamentary majority.

One point that does not seem to have been addressed is the need for a Vice-President or some other designated Officer who would take over the Presidential role in the event of the death of the President or incapacity from other cause to fulfill the duties of that office. It would probably be wise, as in the U.S.A., to designate at least one further Officer in case of incapacity of the first.

(3.5 and G. 1 - 4.4) The National Assembly and the system of election to it.

The adoption of the principle of proportional representation to the National Assembly is of cardinal importance. The so-called first past the post system often operates unfairly and undemocratically. In multi-cultural societies it is a recipe for heightened ethnic antagonisms. In the new South Africa it would be an invitation to disaster. The method of proportional representation suggested under 4.1. - 4.5 strongly commends itself.

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## (3.6) The Senate.

The idea of an Upper house with delaying powers to check hasty legislation and give direct representation to specifically regional interests and concerns, has much to commend it. It is however a somewhat clumsy and expensive device. As a protection for individual and group rights it ranks below proportional representation, the independence of the Judiciary and a justiciable Bill of Rights. If there is to be an Upper House it should have a clearly defined representative function, i.e. the representation of territorial regions which are also units of Regional Government.

Constituted on that basis it might also, at some time in the future, have a role in the development of wider political unity in Southern Africa as suggested earlier. Would it be possible for the Upper House to initiate legislation as well as delaying it?

## (3.8)

To mitigate conflict between Executive and Legislative and between the two Legislative Chambers it would be desirable for them all to be elected at one time. Thought should be given however to whether the President should have power to dissolve Parliament before the end of its 5-year term. If so, would the President also have to resign and face re-election? Some flexibility may need to be provided e.g. provision for the President to call one mid-term election for either or both of the Chambers but preferably not more than that. In such an event a further election for both Houses and the President should still take place at the end of the normal 5-year cycle. Some thought should also be given to the exercise of Presidential powers in the actual election period. Experience suggests that the point at which a President still in office receives news of an adverse election result is one of the most hazardous for democracy.

## (5 and 6)

These are of such fundamental importance that without them there could be no real hope of a stable democratic future for South Africa. A serious problem does arise however with respect to the independence of the judiciary

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for this it is clearly essential that Judges and Magistrates be irremovable except by extraordinary political procedures. However the present membership of the judiciary all owe appointment to the apartheid regime. Some have demonstrated outstanding courage in support of liberal and humane principles. It would be surprising however if there were not some who have imbibed the racist principles of that system, incompatible as they are with genuine equity and justice. From the point of 'representativity' also the judiciary at present is seriously unbalanced. Might it be possible to require all holders of judicial office to seek re-confirmation (or replacement) at the inauguration of the new Constitution? Thereafter the normal process of recruitment and retirement would apply.

(7)

The development of vigorous systems of elected Regional Government is of great importance provided that the powers of Regional Government are clearly subordinated to the ultimate sovereignty of the National Legislature. The development of such Regional Government systems provides a means of transcending the arbitrary divisions imposed on such natural economic regions as the Rand by the policies of segregation and apartheid. The development of Regional Government could also provide institutional models which could be of value in relation to possible later expansion of scale of political organisation in Southern Africa as mentioned earlier.

(9.1, 9.6)

The provisions concerning the status of national languages admirably combine concerns for equity with those of practicality. It should be mentioned however that the attempt to define particular local languages as the media of instruction etc., in particular regions, is liable to create very complex problems. In Zambia the designation of Lusaka as a Ci Nyanja vernacular area led to Bemba home language students being instructed by Thonga-speaking teachers in a medium which neither teacher nor class could properly comprehend.

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(10 - 13)

I have commented earlier on these in relation to the Discussion Document on the Bill of Rights. In relation to the procedures of the Public Service Commission I would like to reiterate that it should be required to give high priority to considerations of competence and efficient functioning of the services concerned when implementing principles of positive discrimination. There should also be provision to appeal to the Ombudsman and, ultimately, the Courts, for individuals who believe themselves unfairly treated in the course of implementation of such principles. The Public Service Commission, or some other body specially created for the purpose, should have supervision of appointments at Regional and Local Government level both to ensure the implementation of uniform procedures with regard to race and gender equity and also to check possible abuse of patronage especially along race or ethnic lines.

(16)

The provision of alternative ways of achieving changes to the Constitution seems very wise. Thought needs to be given however as to the procedures for holding referenda. They should, I feel, require authorisation by a majority in the National Assembly (subject, as with other Legislation, to the possible exercise of delaying power by the Senate). It could be dangerous to allow the President the right to hold referenda over the heads of the Chambers.

Some Comments on 'A Bill of Rights for a New  
South Africa', A.N.C. Constitutional Committee  
Working Document

John Omer-Cooper

I am very impressed by the great deal of careful thought which has gone into the preparation of this document and the thorough and comprehensive approach that has been adopted to the issue of Rights in general. I find myself strongly in sympathy with the entire thrust of the document and the comments which follow are thus essentially marginal.

1. Although I appreciate that a great deal of thought has already gone into this matter I still share the concerns that were felt by members of the Drafting Committee over the advisability of combining statements of Rights enforceable by the Courts or which could be the subject of appeal to the Ombudsman, with others which are more like pronouncements on what the aims of future governments should be. To take an example, Clause 10 of Article 10 defines a Right which clearly is justiciable. Clauses 8 and 9 however, merely state policies which it should be the duty of the State to pursue. Not only would it be the very difficult, if not impossible, for an individual to bring a case against the State authorities on the grounds that, for example, he was still unable to obtain accommodation except in a single sex hostel four years after the introduction of the new Constitution, but it is also unclear whether the inclusion of aims such as those in Clauses 8 and 9 in the Bill of Rights gives them an absolute or even relative priority over other essential aims of the State, e.g. promoting general prosperity and economic growth, providing and maintaining roads and railways, suppressing crime, etc., etc.

Another example would be Clause 4 of Article 10. This is even more vague in that it merely allows government to undertake certain social policies which are surely comprehended under the normal concept of Sovereignty. The Clause does not even make the pursuit of comparable standards across the geographical extent of national territory a required aim of the State (and perhaps wisely, as it is far from clear whether such a policy of regional



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development would necessarily be the best way of using very scarce resources.)

I do not mean to suggest that statements defining social aims which it should be the duty of government to pursue ought to be excluded from the Constitutional document altogether but I do seriously question whether the Bill of Rights is the place for them since they do not in fact create Rights in the normal legal sense of the term. Some of these clauses it seems to me might better be included in a list of powers and duties of the State.

2. In relation to Article 9 I wonder whether it is desirable to include a right for every child to have a legal guardian(s)? This would of course normally be the parents, but in the case of orphans or children whose parents were unable by reason of mental or physical ill-health etc., to discharge this function, the State would be bound to ensure that some suitable adult held legal responsibility for the welfare of the child.

3. With the general intention of Article 13 Affirmative Action, I have the fullest sympathy. There can be no question at all that a substantive programme of such action embracing many aspects of social life and organisation including those detailed under Article 12; Positive Action should and must be undertaken. The entire Apartheid system was in one of its major aspects a monstrous exercise of State patronage in favour of whites in general and the marginally less privileged Afrikaners in particular. A just, equitable, stable and democratic society can hardly come into existence without wideranging positive action to redress the imbalances created by past racial discrimination. Yet while accepting this I do have serious doubts about the apparent intentions to reject any limitations to the operation of such programmes. My doubts arise after experience of the post-independence periods in Nigeria and Zambia where such programmes were implemented as indeed they rightly needed to be. A number of problems did however soon become clear.

(a) Where affirmative action is undertaken with respect to employment in the public sector without close regard to the comparability of

of levels of competence, the procedure can and in fact does, not infrequently lead to the public being denied their rights to the best possible services, instruction, etc.

- (b) Where individuals gain positions, retain them and secure future advancement to a significant degree on the basis of who they are rather than what they know and how they perform, they will in many cases tend to pay less than the fullest possible attention to the performance of their offices and more than desirable attention to political intrigue. This can compound the problem noted under (a) above.
- (c) While the intention of Article 13 no doubt is intended to apply to the immediate problem of redressing the gross imbalances created by the monopolistic situation provided for whites by apartheid (and also to the redress of gender-based inequities) ~~by the State~~, it could easily have many other applications not all of which would be desirable or conducive to social harmony. Not only could it easily be invoked to support positive action to secure the advancement of Africans over Coloureds or Indians but in the terms in which it is now phrased it could justify State patronage in favour of rural Africans over those born and raised in the towns. More sinister than this, it would be easy for a future government should it happen to be dominated by a coalition of particular ethnic interests, to advance the justification of this Article for the exercise of state patronage in favour of their own groups. The example of Malawi where Tumbuka and Ngoni from the Northern Province have been deliberately held back in favour of Cewa from the South on the grounds that northerners were educationally privileged, springs to mind.