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SOUTH AFRICAN CHAMBER OF BUSINESS

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**SACOB
SABEK**

Reg. No/Nr. 05/20230/08

H/V EMPIREWEG & OWLSTRAAT, AUCKLANDPARK 2092

The Voice of Business/Die Sakestem

REF : EB.1

6 March 1992

CODESA Secretariat
P O Box 307
ISANDO
1600

Dear Sirs

SUBMISSIONS TO CODESA

- 1 The future constitutional principles that are being addressed by the various CODESA Working Groups are issues of vital concern to South Africans in general and the business community in particular. The nature of any new constitution will decide how political power will be distributed and deployed. But it is important to recognise that political and social stability are interdependent with economic stability. South Africa's future prosperity requires a constitution that will reconcile in its totality the political aspirations and economic ambitions of its people. The potential for future economic growth and the extent to which it is realised will depend to large extent upon the type of economic system and constitutional model that emerges from the present political debate. SACOB as the representative of business takes a very determined interest in the quality of the political system, i.e. "the rules of the game", and believes that the views of business must be made known to CODESA.
- 2 SACOB submits that any constitution must align itself to those basic tenets on which a market-driven economy depends. Any new constitutional model for South Africa will influence the perceptions of South African businessmen, and just as importantly the perceptions of foreign investors and bankers. Both wish to see the right blend of reform and stability. This is the real challenge facing CODESA in its efforts to establish appropriate constitutional principles.
- 3 Accordingly, the Terms of Reference of the CODESA Working Groups have been studied and four selected issues on which Business has formulated views have been isolated. These are submitted for the consideration of the Working Groups specified below :-

2/...

INCORPORATING:

Working Group 1

- Terms of Reference 1.1.4 [f] - Access to Media
[m] - Socio-economic conditions

Working Group 2

- First Assignment - Constitutional Principles.

4 WORKING GROUP 1

Two submissions are enclosed which focus on the following issues :-

4.1 Broadcasting Policy

This submission offers eight recommendations for incorporation into an overall Broadcasting Policy for South Africa. One of the most important of those recommendations is the establishment of a depoliticised Independent Communications Council.

4.2 Economic Options for South Africa

This submission provides an approach to the key economic issues which will have to be faced in the new socio-political environment. It is the view of business that economic growth and the employment generated from such growth can best be achieved under a market-driven system based on the principles of private ownership and freedom of choice. The submission gives emphasis to the creation of wealth together with the fair distribution of such wealth.

5 WORKING GROUP 2

5.1 A Charter of Economic, Social and Political Rights

This Charter outlines the basic essentials for promoting human rights and draws attention to the concomitant obligations on, and duties of, everyone to respect and honour the rights and freedoms of others. The Charter sets out twenty six fundamental rights and principles which cover various economic, social, civil/political and personal fields.

5.2 The Economic Aspects of a New Constitution for South Africa

Among the points made in this submission is that a constitution should -

5.2.1 promote stability

5.2.2 define and preclude authoritarian tendencies in government

5.2.3 uphold the rule of law.

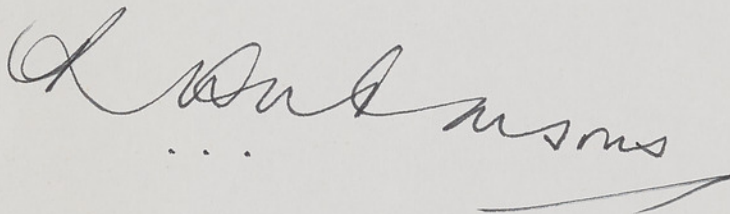
To these ends the constitution must -

- * entrench Common Law norms
- * guarantee the right to property
- * provide for a Bill of Rights.

The submission outlines certain other requirements for the attainment of good government.

6 It gives me pleasure in providing a business contribution to the deliberations of CODESA. SACOB would be prepared to enlarge on any one of the points made in these submissions should CODESA so determine.

Yours faithfully



R W K PARSONS
DIRECTOR-GENERAL

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SACOB
The Voice of Business

***BROADCASTING POLICY
FOR SOUTH AFRICA***

*A submission to CODESA
in respect of certain terms of reference
pertaining to the political neutrality of,
and free access to, State-controlled media*

No. 2/92

March 1992



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The Voice of Business/Die Sakestem

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BROADCASTING POLICY FOR SOUTH AFRICA

1 INTRODUCTION

The South African Chamber of Business [SACOB] comprises over 100 individual Chambers of Commerce and Industry. Some 35000 individual businesses and some 60 National Business Associations are directly or indirectly linked to SACOB. In the words of its mission statement, SACOB is the 'Voice of Business'. As both a consumer and a participant in broadcasting services, business has a definite view on future broadcasting structures and broadcasting policy in South Africa which is outlined in this memorandum. SACOB's general recommendations in respect of a policy on broadcasting in South Africa are supportive of the basic philosophy of the right to freedom of opinion and expression. This concept as expressed in Article 16.1 of the SACOB Charter of Economic and Political Rights incorporates the right to receive and impart information and ideas through any media. Furthermore, as expressed in Article 21 of the Charter, which advocates economic freedom and the promotion of the private enterprise ethic, SACOB maintains that the maximisation of competition and consumer choice must be paramount goals in broadcasting policy.

2 RECOMMENDATIONS

Towards the attainment of such goals, SACOB's recommendations in respect of broadcasting in South Africa are as follows :-

2.1 Independent Communications Council

That a depoliticised Independent Communications Council be established, the composition of which should reflect the widest possible spectrum of society including consumer and business interests.

2/...

2.2 Deregulation

2.2.1 Broadcasting in South Africa should be deregulated to as great an extent as possible. Such deregulation should commence by allowing independent local and regional radio stations to operate.

2.2.2 Programming and advertising content should as far as possible be subject to self-regulation by the broadcasters.

2.3 Public Service Broadcasting

2.3.1 SABC - The continuation of a national Public Broadcasting Service is essential. In this respect the SABC could continue to provide such a service but with a restricted number of channels thereby allowing greater scope for private enterprise to engage in the broadcasting system.

2.3.2 Financing - Public Service Broadcasting should be financed primarily by a licence fee and/or accountable public funding, and the balance from advertising revenue.

2.4 Independent Services

Independent commercial services should be granted access to the available broadcasting spectrum and would be market driven.

2.5 Competition

The promotion of competition across the full electro-magnetic spectrum of broadcasting should be vested in the Independent Communications Council in consultation with the Competition Board.

2.6 Delivery Systems

The selection and manner of broadcasting delivery systems must be determined primarily on commercial considerations.

2.7 Cooperation

Opportunities for cooperation and rationalisation of broadcasting facilities in Southern Africa should be explored.

2.8 Ownership

Cross ownership between the Media should be an issue to be considered by the Independent Communications Council in consultation with the Competition Board.

3 CONSIDERATIONS IN SUPPORT OF THE RECOMMENDATIONS

3.1 Depoliticised Independent Communications Council

In the communication of ideas by way of the electronic media, the authority of the State can be used either to promote or to restrain freedom of expression. Experience shows that it is necessary to question the authority exercised in democracy by those small groups of people entrusted with the functions of government. Specifically, SACOB submits that appropriate mechanisms/safeguards must be in place to restrain persons who have acquired the privileges and duties of government. Accordingly, the control and direction of the electronic media should not vest in the hands of politicians or political appointees.

3.2 Deregulation

SACOB advocates a policy of minimum State intervention and therefore a minimum degree of regulation. Programmes should conform to certain requirements that do not offend good taste or incite crime and disorder. The extent and level of regulation would be the subject of debate, but the obvious regulating body would be the Independent Communications Council. In certain areas such as programming and advertising, self-regulation would be the preferred technique. SACOB maintains that no one and no one group can lay claim to judging the broadcasting needs of consumers. The objective must be to provide multiple choice and to that end deregulation, which provides for sufficient freedom of entry, is required to ensure that consumer interests are best served.

3.3 Public Service Broadcasting and the Role of the SABC

There is a need for a Public Broadcasting Service and the SABC should fulfill that role. A Public Broadcasting Service would accommodate the broad needs of South African society and particularly the needs of that segment of society whose requirements may not be met by market driven broadcasting services. Programmes would have to accommodate a broad spectrum of interest [education, information, cultural, entertainment, minority interest, etc]. Such a service would have to be financed primarily by a licence fee, and/or accountable public funds and advertising. Such a service would operate alongside independent commercial services.

3.4 Competition

The growth in the market for the full range of electronic media products [VCR, encoded services, telephone services, data services, cable service, broadcasting and narrowcasting] confirms the consumer demand for greater choice. The aim of broadcasting must be to enlarge consumer choice and the opportunity for programme makers to offer alternative products to the public. In this respect, the role of the Competition Board in the promotion of competition is essential, for it is able to give a broad perspective to community interests. Responsibility for the allocation of the full broadcasting spectrum must fall under the jurisdiction of the Independent Communications Council. The growth in range of electronic media products [VCR, encoded services, telephone services, data services, cable service, broadcasting and narrowcasting] confirms the consumer demand for greater choice. The aim of broadcasting must be to enlarge consumer choice and the opportunity for programme makers to offer alternative products to the public.

3.5 Delivery Systems

Technological advances make it possible to deliver broadcasting services by a number of methods other than the conventional terrestrial techniques - VCR, cable, satellite and microwave. Furthermore, advancements in radio communications allow for a far greater efficiency in radio spectrum usage. The high capital costs of introducing some of these advanced technologies may well preclude their installation for universal use throughout South Africa for some years to come. Nonetheless, any regulatory framework should not inhibit the development and introduction of these transmission systems. The choice of delivery systems must be determined by market rather than bureaucratic considerations.

3.6 Cooperation

The improvement in South Africa's international political relationships makes it possible to consider cooperating with international electronic media agencies in the production and delivery of products. In Southern Africa attention could be given to exploiting opportunities for broadcasting and television cooperation. It is possible to visualise the sharing of facilities in ways which not only make economic sense but also widen viewer choice. For example, it should be possible to evolve arrangements which make it unnecessary - in this day and age - to block the TV signals from a neighbouring territory.

3.7 Ownership

The question of participation by the print media in the electronic media industry and the concentration of radio and TV services has evoked controversy. Limitations exist in many countries on cross ownership between the print and electronic media. However, it is argued that television is part of the electronic press whose function is identical with that of the printed press. A market-driven structure for the industry would provide it with appropriate technology to satisfy the needs of the broad information market. In South Africa, with its propensity for economic concentration, there is a possibility of the commercialised electronic media falling under the control of one or two large conglomerates. In relation to the size of the market these two competition issues should be the subject of examination by the proposed Independent Communications Council in conjunction with the Competition Board.

5 March 1992



SACOB
The Voice of Business

**THE ECONOMIC ASPECTS
OF A NEW CONSTITUTION
FOR SOUTH AFRICA**

**A South African
Chamber of Business View**

No 5/1991

12 JUNE 1991



From the Office of the Director-General

Van die Kantoer van die Direkteur-Generaal

INTRODUCTORY COMMENTS TO THE
RELEASE OF THE SACOB DOCUMENT

"ECONOMIC ASPECTS OF A NEW CONSTITUTION FOR SOUTH AFRICA"

BY

MR RAYMOND PARSONS

DIRECTOR-GENERAL

SOUTH AFRICAN CHAMBER OF BUSINESS

Last year SACOB indicated that it was addressing certain separate but interrelated economic and constitutional issues in several phases -

1. The first step was the issue in May 1990 of a SACOB Charter of Economic, Social and Political Rights.
2. The second step was to formulate a broad economic strategy to underpin political change, and which was published in September 1990.
3. The third step was the publication of a data base for the formulation of a new industrial policy for South Africa, which is a vital component of (2) above.
4. The fourth step was to define a SACOB view on the economic aspects of a new constitution for South Africa, and this document is being released today. (The document was prepared by a 15-person committee of economists and businessmen).

In addressing the various principles which SACOB believes are important in any new constitution it is essential to recognise the basic diversities inherent in the South African population. Groupings and organisations across the political spectrum appear to be agreed on this reality, even though the solutions offered may differ.

Although there have been temporary setbacks to the political negotiating process the constitutional debate has continued. In addition, the Minister of Constitutional Development, Dr Gerrit Viljoen, has confirmed that constitutional matters will have to be discussed by the all-party conference.

"The agenda of the multi-party conference should address the following matters -

- a) how the constitutional negotiating conference should function, and how it should be structured;
- b) the basic principles and fundamentals on which the new constitution should be based....."

(Dr Gerrit Viljoen, Pretoria, 25/5/91)

SACOB therefore sees the business contribution to constitutional debate as important. If businessmen and investors are going to take a vigorous interest in the quality of the political system - "the rules of the game" - then they will have to make their views known.

Right at the outset it should be accepted that a multi-party pluralist democracy will not be easy to create in South Africa. A balanced, self-restraining political system will not fall like "manna from heaven". The reciprocal dynamic - the checks and balances - will not necessarily emerge out of the fabric of our politics. It will have to be "crafted" in the process of constitution-making.

Given the diversities and tensions which lurk just below the surface of our society - as well as the importance of negotiating a viable constitution - we must try and get it right the first time around. Any quantum leap in constitutional thinking will require the ground to be well-prepared. We may not get a second chance to repair any serious mistakes if South Africa again locks itself into an unsuitable constitution.

It therefore behoves us to ensure that the framing of a new constitution harnesses the best brains in the country - and draws on a cross fertilisation of interests and disciplines in order to advise our political leaders on a new constitution. This includes inputs from the business sector on how it sees the "rules of the game" in a new constitution.

Business has to engage political and trade union leadership in dialogue about the nature of future political and economic structures. For South Africa we must certainly try to get away from the highly centralised "Westminster" model of government as an open-ended source of uncertainty for business. Predictability and trust in the political system are paramount. Here, too, the advice of international jurists could also be of invaluable assistance.

As an up-to-date public statement of SACOB's thinking on a new constitution for South Africa, the document is being sent to key opinion-formers in the public and private sectors. The State President, the Cabinet, all members of Parliament and the President's Council, the ANC, Inkatha and the PAC leadership, the trade unions, - all these and other interested parties will be receiving copies of the document shortly.

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JOHANNESBURG

12 June 1991

THE ECONOMIC ASPECTS OF
A NEW CONSTITUTION FOR SOUTH AFRICA

A SACOB VIEW

1. INTRODUCTION

1.1 On September 20 1990, SACOB released a document on economic options for South Africa in which, amongst other things, the challenge of poverty in South Africa and the related question of inequality of wealth were addressed. That document was the second stage of SACOB's express involvement in current socio-political issues, the first being the release in May 1990 of a SACOB Charter of Economic, Social and Political Rights. At the time of the release of the second document, it was announced that a third step of SACOB involvement would follow, namely a document setting out the SACOB view on the economic aspects of a new constitution for South Africa.

1.2 This was endorsed at the SACOB National Convention in Johannesburg in October 1990 when the following motion was passed:

"In the firm conviction that business has a vital stake in the outcome of political negotiations for the new South Africa, and with the object of ensuring that any future dispensation will inspire business confidence and attract further investments;

This convention calls for an active business role in the forthcoming negotiation process leading to a new constitution for South Africa and urges government and all political leaders to create the necessary mechanisms for this purpose".

1.3 In presenting its views on a new constitution for South Africa, SACOB recognises that the final decisions on a new constitution will be taken by the main political participants. On the other hand, it is SACOB's belief that economic factors will influence the actual writing of a new constitution. In its previous documents marking the first two stages of its involvement (namely, the Charter and the document on Economic Options), SACOB clearly conceptualised certain basic elements of a future constitutional and political order for South

Africa. This document is an elaboration and clarification of those thoughts. The views expressed in this document flow from and are indeed necessitated by SACOB's previous commitment to certain fundamental values and constitutional principles.

- 1.4 At the same time, SACOB wants to emphasize that it does not wish to be prescriptive as far as constitutional options and models are concerned. Constitutional bargaining and constitution-writing ultimately remain the responsibility of the representatives of political parties, movements and organisations. This does not, however, relieve SACOB of its own responsibility of stating clearly and unambiguously its convictions as regards the content and application of those basic constitutional principles which are contained and indeed emanate from the foregoing documents.

2. THE NEED FOR SOCIO-ECONOMIC UPLIFTMENT

SACOB believes that socio-economic upliftment in South Africa is urgently necessary and must be given a high priority. But SACOB is of the view that the immediate need for socio-economic development must be addressed separately from the fundamentals of a future political and economic system.

When constitutional negotiations eventually begin, the emphasis should be on the requirements of sound economic and political systems for the future South Africa. We should take what is best from constitutional models around the world and adapt that to our circumstances.

However, SACOB recognises that expectations have escalated against the background of what remains a relatively poor economic performance. The immense challenge of the mobilisation of resources and the delicate matching of priorities and available inputs can only be successfully achieved in a predictable political framework.

A proposal which could secure a favourable framework for meeting the challenges could run along the following lines. The negotiation process should be divided into two parallel processes: one short-term and one the "normal" expected process of negotiation about a new constitution.

The short-term process, in which organised business,

labour and other functional interests should most definitely be fully represented, would have as its goal the formulation of a ten-year "social accord", entered into between all major political, social and economic interests. The "accord" should be based on sound principles of policy, good government and mobilisation for socio-economic development for a fixed period of transition.

A common constituent to such a strategy is a pre-requisite for its ultimate success. Therefore all important constituents such as political bodies, business organisations and labour movements both at the local and national level should be drawn into the accord from the very beginning. It is also possible to visualise not one but several different accords to be established simultaneously.

If accepted and entered into on a broad representative basis, a process of this nature would separate the immediate needs for socio-economic upliftment from the fundamentals of a future economic and political system for South Africa. If we allow the constitutional negotiations to be bedevilled by redistribution issues, the risk of failure is likely to be much higher. It is better to address the questions of socio-economic upliftment in their own right.

Finally it may be necessary to establish a monitoring commission which will report on a regular basis to parliament on the progress made with the programme of social upliftment as it might be embodied in a "social accord".

3. THE STAKE OF BUSINESS IN THE CONSTITUTIONAL DEBATE

3.1 SACOB believes that, although it is not the function of employer organisations to get involved in the sphere of party politics, there are certain broad constitutional questions which the business community must address. Industry and commerce have a vital stake in the shape of a future constitution for South Africa, as it would like to see the right combination of change and stability.

Business and investor confidence requires as much broad predictability as possible in the social and political spheres. Political idealism and power competition have to be constructively balanced by sound economic judgement and experience if South Africa is to prosper.

- 3.2 SACOB also believes that this is more important for a country like South Africa which is in a period of transition, than for some of the First World countries. The business community in South Africa cannot avoid its responsibilities in this regard. The important stake which business, and society as a whole, has in these constitutional questions arises from five important considerations:

Firstly, the business sector would like to see the future political and constitutional decisions being settled by negotiation and not by violence.

Secondly, the business sector would like to see a future constitutional dispensation which upholds certain key values which are important to the business community and to society as a whole.

Thirdly, what matters to the business community is that there is trust in a new constitution and its ability to limit any possible abuse of political power.

Fourthly, business perceptions of the political process in South Africa and its future have a significant impact upon business confidence and hence upon long-term fixed investment in the private sector. This type of investment is essential for the future growth prospects of the country. SACOB believes that a sound and growing economy and political reform are interdependent.

Fifthly, although South Africa must ultimately decide its own constitutional future, a new constitution must also inspire confidence in foreign investors and bankers. To maximise economic growth in an open economy like that of South Africa requires political structures which are also perceived as legitimate internationally. The search for a new constitutional model for South Africa is not only a matter of importance to those who live here, but also for those countries with which we do business.

4. SACOB'S GENERAL VIEWS ON A NEW CONSTITUTION

Before the specific elements are addressed which, in

SACOB's view, should be contained in a future constitution, a few general remarks should be made about the nature and meaning of that constitution.

4.1 The Need for Stability

In the past, the South African constitution was either the result of a colonial heritage or the embodiment of the constitutional and political convictions of one dominant sector of South African society. The effect of this restricted constitutional order was that the constitution and the state institutions lacked general acceptance and legitimacy. A future constitution should have the broadest legitimacy possible and be the cornerstone of the entire constitutional and political order.

It must be realised, however, that a legitimate and stable constitutional order which is ultimately to be embodied in a constitution is in itself not guaranteed by such a constitution. Constitutional and political stability is very much the aggregate of the acceptance and legitimacy as well as the social and economic well-being of a society, coupled with traditions of civility, responsibility and tolerance.

Seen in that light, a constitution is more in the nature of a durable seal on an existing state of stability and peace than a prime instrument to bring about tranquility in times of turmoil and unrest. A constitution accepted by all, and legitimate in its operation, can achieve much to promote progress, unity and advancement and to create a favourable climate for economic growth. It cannot, however, in itself create these positive conditions; should these conditions fail to exist, no constitution, not even one with the best intentions and most solid principles, will stand the test of time.

One of the most important preconditions for establishing a stable constitutional order is a sound economy and a favourable economic climate. It is accepted that political and social stability are closely bound up with economic stability. This does not mean that all poverty and economic inequalities must be eliminated before the drafting and acceptance of a new constitution can be finalised.

What it does also mean is that a new constitution must not, via a system of rigidly devised state powers, limit entrepreneurial initiatives or worse, jeopardise existing rights and safeguards to such an extent that government under that constitution is perceived as a threat.

4.2 Strong but Limited Government

A future constitution for South Africa should explicitly define and preclude all authoritarian traits and tendencies in government, such as:

- * Excessive and uncurbed emergency powers; these powers must be exercised under clear limitations prescribed by law and must always be in proportion to the danger which they are intended to prevent; they must coincide with the time of actual emergency and must be under scrutiny of the legislature.
- * Centralised government powers which permit encroachment on fundamental rights and freedoms, the conferment of wide discretionary powers, the unbridled erosion of local autonomies and the installation of political appointees in the administrative hierarchy without scrutiny by independent bodies.
- * Legislative powers which permit retrospective legislation and the abolition of constitutional safeguards for the protection of minorities, freedom of association, the independence of the judiciary and the suspension of rights and freedoms as well as the passing of laws undermining or weakening the checks and balances which exist for the proper and controlled exercise of government powers.
- * A political system which curbs free party political formation, inspires one-party tendencies and promotes the creation of political appointments for life.
- * Excessive Government interference and undue influence in the economy.
- * Arbitrary restrictions on the civil liberties of individuals.

SACOB stands for a system of constitutional government which permits economic freedom and a private enterprise ethic (Article 21 of the Charter); it is self-evident that authoritarianism in government goes against such an ethic and, in effect, destroys the bases upon which free enterprise can be undertaken.

4.3 The Rule of Law

In SACOB's view, the Rule of Law must be a basic ingredient of our future constitutional order. In the past, the principle of the sovereignty of the law has been severely undermined and indeed denied by a political system which was dominated not by a set of fundamental legal principles, but by the supremacy of parliament which, in turn, acted in accordance with the policies and wishes of the government of the day. A new constitutional order must be founded upon a constitution which has the character of a supreme law. To achieve this, the process by which the judiciary is appointed needs to be safeguarded. This could be achieved through a process of public hearings.

Stated differently, SACOB wants a constitution for South Africa which prescribes and validates all government action and which cannot be amended through simple government majorities. A constitution which is entrenched and which has the qualities of a supreme law is, in SACOB's view, the only way to ensure government by law rather than government by men. The Rule of Law will acquire its true meaning and effect in such a constitution, fortified by an independent judiciary for its protection and enforcement.

What therefore needs to be emphasised is that there is no single mechanism which would be an adequate defence against any abuse of power. Checks and balances, such as a Bill of Rights, an independent judiciary, public hearings for all senior public appointments, devolution of power, and an Ombudsman would have to be spread throughout the political system to protect and uphold certain basic values. If this is accepted then the question of an appropriate constitution for South Africa can be addressed at several different levels.

5. A FUTURE CONSTITUTION MUST BE NEGOTIATED

5.1 Why Negotiations?

Article 19 of the SACOB Charter of Economic, Social and Political Rights states unequivocally: "The form of any new constitution shall be the subject of negotiation between interested parties", and at p 1 of its Economic Options for South Africa, it is repeated: "For it to come about a new constitution will need to be negotiated."

A negotiated constitution becomes a pact between the representatives of political parties, movements and organisations and constitutes the surest way of ensuring legitimacy. Of course, negotiations for a new constitution must be between the authentic representatives of political parties and groups on a basis of equality and without any duress. It speaks for itself that negotiations which are conducted between unequal partners without freedom of conviction or expression cannot be real negotiations.

Furthermore, if it is to have the maximum weight of authority and endorsement, it will be necessary that the outcome of constitutional negotiations be ratified by popular vote, either by way of referendum or by another means of popular endorsement.

5.2 The Negotiation Framework

Negotiations for a new constitution can take different forms. They may be organised in a multi-party conference which, through a process of agreement and popular support, adjusts and shapes the present constitutional order so as to arrive at a new constitution. There are various permutations which could successfully discharge this task.

5.3 The Need for Consultation with Outside Bodies

SACOB does not wish to be prescriptive as regards the methods, procedures and mediating mechanisms of constitutional bargaining. This is a choice which political parties and groups must exercise among themselves. Sound business practice and ethics which SACOB has gained through experience, and upon which it will always insist, require that honest successful negotiations and bargaining should be

conducted according to the following basic principles:

- * Wide participation by all relevant parties, movements and organisations who have the necessary mandate from their supporters and are free to negotiate according to their beliefs and convictions;
- * Agreements must be reached freely and fairly without outside interference, intimidation, duress or improper procedures;
- * Deliberations must be conducted in an atmosphere of an accommodating degree of openness and parties to the negotiations must subscribe to common procedures and a code of ethics;
- * The will and aspirations of minorities should be given due weight in the negotiating process.
- * Every assistance possible should be given to parties to be well-informed and prepared on all aspects of the negotiations.
- * Adequate and objective media coverage should be encouraged to ensure full public understanding and participation.

6. A NEW CONSTITUTION AND THE MARKET ECONOMY

While an economic system or policy as such cannot be entrenched in a constitution, certain concepts fundamental to a market economy and to business confidence need to be safeguarded. These include:

- * the law of persons;
- * the law of property;
- * the law of contract

The following separate but overlapping aspects will require to be addressed -

6.1 Entrenchment of Common Law Norms

The most obvious constitutional procedure would be to expand the present references in the preamble to the present constitution of the RSA to include

specific references to fundamental norms of common law regarding personal freedom, property rights and the law of contract. However, although such preamble has a certain legal value, it has no decisive legal significance since it plays no definitive role in the interpretation and application of the constitution. To acquire such direct constitutional meaning these principles would have to be taken up as specific articles of the constitution itself. Such articles should be seen inter alia as a "Bill of Rights" and should be entrenched, e.g. by the two-thirds majority procedure at present applicable to the official languages of the Republic (article 89 and 99 {2}).

To give proper effect to these intentions to entrench these common law norms, it will also be necessary inter alia to expressly entrench:

- * the independence of the judiciary,
- * the principle of equality before the law and
- * the principle of non-discrimination.

This will have to be done either in the constitution and/or in a Bill of Rights.

6.2 Property Rights

The rights of ownership, corporate and individual, including the ownership of the means of production are fundamental to a democratic social and economic order. Against a background in which everyone will have access to property rights, a new constitution should say that "no person or organisation shall be deprived of their property without due process of law and without just compensation". This entrenches the principle without making it totally inflexible.

6.3 A Bill of Rights

A future South African constitution should include a Bill of Rights which safeguards those human rights and freedoms which are today universally accepted to be of an inalienable nature, namely the rights to dignity, personal safety and security, personal freedoms, property and due process of law. These rights and freedoms must be protected on a basis of equality without any form of discrimination as was stated in SACOB's Charter,

par 24: "Everyone is entitled to all the rights and freedoms identified in this Charter, without distinction of any kind, such as race, colour, language, sex, religion, political or other opinion, ethnic or social origin, age, property, birth and economic or other status." The Bill of Rights, as an integral part of the Constitution, must be entrenched in such a way that existing rights and freedoms cannot be diminished and must, furthermore, be fully justiciable.

It is SACOB's firm belief that a fully justiciable Bill of Rights which is enforceable *vis-a-vis* the government not only forms the basis of the democratic state but also infuses the system of government with values and a sense of morality. It also, in a practical way, provides for a system of government which is limited not by external devices, but by lawful constraints flowing from the rights and freedoms of individuals.

In this respect, it is equally important to stress the concomitant duties and responsibilities of individuals towards one another and to the state and community at large. Rights and freedoms, SACOB believes, carry with them responsibilities and these responsibilities must also be reflected in a Bill of Rights.

SACOB stands for a system of constitutional government which permits economic freedom and a private enterprise ethic (Article 21 of the Charter); it is self-evident that authoritarianism in government goes against such an ethic and, in effect, destroys the bases upon which free enterprise can be undertaken. SACOB would therefore support structures and institutions which give effect to the practical constitutional safeguards which are necessary to achieve these ends.

6.4 Certain Economic Principles

A constitution provides the basic framework for lawful government action but does not prescribe specific policies. In a democratic state, it is for the democratically elected government to apply its economic policies - albeit within certain constitutional ground rules. Should these policies cause dissatisfaction and prove unsuccessful, it would be for the electorate to judge, and for the democratic process to take its course.

However, it must at the same time again be emphasised that there are many constitutional principles which, directly and indirectly, have a definite bearing on economic conditions and which can either promote or destroy economic prosperity and growth. These constitutional principles have already been emphasised in this document earlier and centre around the basic requirements for a democratic political system.

Thus, in Part 1 of its Charter, SACOB stressed the importance of:

- * the right to own property (which includes the right to due process of law and compensation in the case of expropriation),
- * the right to rewards for endeavours,
- * the right freely to employ labour,
- * the right to equal work opportunities and free choice of employment,
- * the right to fair remuneration,
- * the right to freedom of contract,
- * the right to equal pay for equal work, and
- * the right to form or join trade unions, or commercial, industrial or other associations with the concomitant right not to be compelled to join such union or association.

SACOB also believes that some of these rights need to be enshrined in a Bill of Rights that should form an integral part of the constitution.

7. OTHER REQUIREMENTS OF GOOD GOVERNMENT

There are other elements in a new constitution which will promote predictability and guard against the excessive concentration of political power. These include -

7.1 Maximum Devolution of Power

Support for the maximum degree of devolution of power to regional and local levels, on a completely

non-racial basis. This kind of geographic "pluralism" could complement what will hopefully be multi-party pluralism in introducing creative balance into the political system. Predictability will then be embodied in the self-balancing nature of the system rather than being vulnerable to open-ended political decisions. The State shall not be above the law but shall, through decentralisation and devolution of State powers and responsibilities, be close to the people and responsive to their needs. SACOB believes that such an approach will recognise the diversities of South Africa.

7.2 "Alarm Bell Procedures"

Open debate and clearly defined public mechanisms for handling legislation - known as "alarm bell procedures" - should be laid down in the constitution. A compulsory system of public hearings - such as in the US Congress - will subject all legislation to public scrutiny. This gives the Cabinet or the mover of legislation the opportunity, in the light of criticism, to modify the legislation or make out a better case for the original Bill. Another safeguard should be that no ex post facto or retrospective legislation shall be passed. The mere existence of these procedures may itself serve as a deterrent to prevent the introduction of legislation potentially harmful to basic interests.

8. INFLATION AND TAXATION

Notwithstanding constitutional constraints, there is no doubt that economic mismanagement could ruin a country. Rights of ownership can be usurped and rendered worthless by excessive inflation and high taxation. In other words, not only the fact of ownership as such, but the implications and benefits of ownership have to be safeguarded and respected within reasonable limits.

8.1 An Independent Reserve Bank

The main purpose of the Reserve Bank should be to protect the purchasing power of the country. This view is based on evidence which suggests that, internationally speaking, inflation tends to be lowest in countries in which the central bank enjoys the greatest degree of independence. However, it should be clearly understood that

inflation can only be kept under control if strict monetary policy is underpinned by an equally conservative fiscal authority.

In shaping a future South African constitution, the position of the Reserve Bank should be secured. It is important to accord the Reserve Bank a high degree of de facto autonomy in deciding monetary policy. It is interesting to note, in passing, that the most independent central banks exist in three federations - Germany, Switzerland and the United States.

8.2 The Tax Burden

The relentless increase in the tax burden through the expansion of government expenditures in many countries is largely a function of the weakening status of parliaments *vis-a-vis* their executives. As the central government assumes more and more functions in society which require ceaseless management rather than the mere laying down of basic rules of private behaviour, parliament, as the law maker, itself becomes relatively toothless.

Even maximum devolution of powers is, of course, no impenetrable shield against excessive taxation, as even taxpayers in federations such as Germany, Canada and the United States have experienced. Even in these countries strong voices have been raised in favour of the introduction into the constitution of a so-called "fiscal rule" that would constitutionally limit the level of taxation to a particular ratio of, for example, the gross domestic product.

It must however be pointed out that unlike the common law norms of personal freedom, opportunity and responsibility and the monetary norm of real limits to the creation of means of payment, the social order of South Africa and its counterparts in Western civilisation know no other principle of constraint on taxation than that of consent and representation. The introduction of a quantitative "fiscal rule", whatever its economic merits, would have to be regarded as a political innovation against the traditions of the South African order.

Once again, it may not be necessary to reach agreement on the particulars of the way in which the tax principle is entrenched as a precondition

to further constitutional negotiation - e.g. by such a quantitative rule, or by means of a broad norm and a supporting institutional structure. The primary issue is to gain consensus among the negotiating parties about the need for the entrenchment of some constraint as a precondition to proceed further along the road of political reform.

9. CONCLUSION

Although SACOB has emphasised those aspects of a new constitution which are of the greatest concern to business, its views are greatly influenced by a general interest in the quality of the political system and in "the rules of the game". SACOB wishes to see a constitution which is consistent with the basic tenets of the market economy.

What is clear is that the level and quality of future economic growth will depend to a large extent upon what type of economic system and constitutional model emerges from the political bargaining process. This is obviously a matter of great importance to business in South Africa.

While a constitution can protect citizens against individual excesses, a sound economic policy is essential to underpin economic growth and wealth creation in the best interests of the whole population.

Any new constitutional model for South Africa will also influence the perceptions of foreign investors and bankers overseas, who - like South African businessmen - want to see the right blend of reform and stability. This is the challenge facing the political negotiators who will be responsible for a new constitution.

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JOHANNESBURG
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