

THE CONSTITUTION-MAKING BODY

SOME PRELIMINARY NOTES

THE BASIC CONCEPTION

Rough agreement already exists that the CMB will be elected by universal suffrage on a common voters roll according to the system of proportional representation; that it will enshrine in the constitution basic principles as agreed at CODESA; and that decisions will be by a two thirds majority.

Within this basic framework, a number of questions as to the character and functioning of the CMB have to be answered.

If the objective were merely to produce a technically sound constitution as quickly as possible, a CMB that was rather small and very expert would be called for. In this way, a coherent and manageable constitution could swiftly be elaborated and adopted.

The role of the CMB is, however, much wider. The acceptability of the Constitution to the broad South African public and its relevance to public life will depend as much on the way it comes into being as on its content. If it is drawn up in a manner that is manifestly non-racial, non-sexist and democratic, its core principles of non-racialism, non-sexism and democracy will be re-inforced. Equally, if the CMB is clearly national in character, representing all the diverse groups and currents in our society, the Constitution will come to be seen as belonging to and protective of the whole nation, and accordingly a document to be defended by the whole nation.

In other words, we do not envisage the Constitution being drawn up by experts outside of the political process, nor do we see it as an ANC document rubber-stamped by an ANC majority in an elected body. We conceive of it emerging from a process which will be as inclusive as possible and in which we expect the ANC, as the most representative, experienced organisation with the longest record of fighting for equality and democracy, to make the most significant contribution. The ANC gives leadership not by expressing hegemonic commands, but by pioneering solutions to the country's problems.

The result will be a body that is broadly-based and large rather than small, that is participatory rather than passive, that is open in its functioning rather than secretive, that seeks to arrive at decisions by consensus rather than by automatic majorities.

At the same time, the CMB must be structured and must function in such a way that accountability to the people of South Africa as a whole must be respected. This means that it must both be created democratically and be democratic in its mode of operation. It will be representative in three respects: it will represent the nation in all its diversity; it will consist of persons with a mandate from the public; and its

composition will reflect the differing degrees of support given by the people of our country to the varying programmes and options put before them during the elections.

While every attempt should be made to avoid situations of either automatic majorities or automatic vetoes, and while the search for consensus should always be on, in case of total deadlock, a large majority [two-thirds] should win the day; conversely, a sufficiently sizeable minority [one third] should be able to block proposals unacceptable to it.

The proceedings must encourage a sense of shared responsibility and of national commitment to get the best Constitution for the country. At the same time, they should not be interminable, and provided that the basic principles agreed to at CODESA are not contradicted, they should be capable of being moved forward by a two-thirds majority.

SOME SPECIFIC AREAS WHERE DECISIONS ABOUT THE CMB WILL HAVE TO BE TAKEN

SIZE: In order to make the body as inclusive as possible, both politically and territorially, a figure like 400 would appear to be reasonable. This would not mean that all 400 would have to function in plenary in relation to every aspect of drafting; work could be delegated to a commission or various commissions. It would imply, however, that the overall control of the process would be in the hands of a large body, who could then report back on a large scale to the public.

ELECTIONS: The system of proportional representation [p.r.] and party lists is clearly indicated. The question is whether the electoral system should directly encourage regional representation. From one point of view, the elections are essentially national in character, being in effect a multiple choice referendum on basic political positions rather than the selection of legislators. A strong case can be made out, however, for building in an element of direct mandating at a regional level, both to avoid unseemly disputes in the drawing up of national party lists and to encourage a sense of active participation in the process throughout the country. If, as some have proposed, we go into the elections as part of a Patriotic Front list, regional lists reflecting regional support and commitment to campaigning might be easier to achieve than a national one.

There are at least two ways in which regional lists could operate. The one is as happened in the first Zimbabwe elections, in which the country was divided up into a number of provinces for electoral purposes, and the three main parties each put up lists in each province. The other would be to follow the proposal of the ANC Constitutional Committee in relation to elections for the National Assembly, namely, to have one vote which counts towards the party list for the nation and the list of the same party for the region. Thus, 200 seats would be filled according to the percentages received by the parties in the country as a whole, and the other 200 on a region by region basis according to the degree

of the party's support in each region; heavily populated regions would receive more seats than sparsely populated ones.

A major issue that would have to be resolved would be that of demarcating the regions. This is a question of constitutional relevance that should be determined by the CMB; yet the CMB could not come into existence [if the regional element were thought to be necessary] if the regions had not been defined. The answer might be for CODESA to agree on interim regions for electoral purposes, leaving it open to the CMB to make the definitive, constitutionalised determination.

LOCATION: In order to emphasise its sovereign character, and without in any way prejudging the question of where the legislature and executive are to be located in the future, it would appear that the CMB should function in the Houses of Parliament in Cape Town.

DURATION: A time limit for the drafting and adoption of a new Constitution should be set so as to encourage a sense of urgency, develop a momentum and put the pressure on for finding consensus where possible. A period of four to six months would appear to be appropriate. If direct public participation through hearings is felt to be appropriate, and if it is thought necessary to have periodic report-backs and direct accountability by representatives [something not facilitated by the list system, particularly if the lists are national only], then the period could be longer.

MANAGEMENT AND CHAIRING OF SESSIONS: It is proposed that the CMB elect a steering committee [with an appropriately dignified title] to work out basic rules of procedure and also that there be rotating chairs [or should it be the two judges?].

DRAFTING COMMISSION: A drafting commission such as functioned in Namibia with considerable success should be created from amongst the members of the CMB. Each party should have at least one representative; otherwise representation should be proportionate to strength in the CMB. The members of the Commission need not be lawyers or constitutional experts, but provision should be made for legal advisers to be present at sessions of the Commission. The Commission would make proposals to the Plenary and not have decision-making powers itself. It would seek consensus, but could entertain majority and minority reports.

DETERMINATION WHETHER PRINCIPLES AGREED UPON AT CODESA ARE ENSHRINED IN AND NOT CONTRADICTED BY THE PROPOSED CONSTITUTION: The manner in which the principles are couched should be such as to discourage disputes as to what CODESA intended. This is particularly important in relation to areas where there were no common positions at CODESA, and in relation to which vague language was deliberately chosen so as to get some consensus while leaving the basic issues open for the CMB itself to resolve [for example, re the powers of regional government and the possible role of minority parties in government - the report from CODESA on general

Voter Identification

18 - SA Fitzgens.

[We need criteria]

Voter Roll (?)

constitutional principles should make it quite clear that the CMB is free to decide for or against full regional autonomy, for or against overriding powers for the central government, for or against enforced coalition governments].

The CODESA report should act as the 'holy cow' in the same way as the 1982 Contact Group document did for the Namibian Constituent Assembly. The CMB will attempt to reach consensus on interpreting the CODESA report. Some mechanism might be needed, however, to deal with cases where no agreement could be reached. The objective should be to establish a body that would have the trust of the members of the CMB, operate swiftly and help solve problems. It is proposed that if 20% of the members of the CMB so request, a panel of five persons of standing in the legal community be established to determine the dispute. The panel should be chosen as a group, having the support of at least 80% of the representatives at the CMB [this type of procedure encourages the search for a reasonable balance, and is used in many Continental countries for the selection by Parliament of judges for the Constitutional Court]. There should be no appeal to the ordinary courts. Litigation would be disastrous. It would frustrate the work of the CMB, and place the courts as creatures of the apartheid era in a most invidious position.

1 - 50,000
Not regions

B-Town

3 months

fresh elects. if not
agreed.

Steering Committee - all parties - on hop-basis
Make rules & proceed. Simple
majority - (on management issues)

Steering Com. App. - Chair(s) from delegates.

Task to chair - not dispute resolution.

Drafting Com. - all parties - pop.

$\frac{2}{3}$ maj. for proposals

Determine that principle not
contradicted: 1) In dispute com →

to Steering Com.

if fails - Panel of persons of
integrity & competence

50%
maj.

II. SECTION I - THE FOUNDATIONS OF ANC POLICY

1. A NEW CONSTITUTION FOR SOUTH AFRICA

1 The ushering in of a new constitution for South Africa heralds a new era for all South Africa's people. We are about to remove the colonial and racist laws and practices which have deprived the majority of the people of citizenship in their own country. A new constitution for South Africa will, for the first time, recognise that all its citizens are free and equal; everybody will enjoy the vote on the basis of full equality; and South Africa will be regarded as a single and undivided country.

4 The new constitution will encourage flexibility and accountability in the national interest. It will do so through a system of proportional representation which favours electoral alliances and coalition governments. It will guarantee freedom of association and regular, free and fair elections, so that opposition parties can contest elections and become majority parties. It will permit regional governments, headed by parties that are not necessarily represented in the cabinet at the centre. It will guarantee space for strong organs of civil society which are independent, both of the state and of the ruling party, such as religious bodies, trades unions, employers associations, cultural groups, sporting bodies, and residents organisations.

2 It will be a constitution that promotes advancement and guarantees freedom, democracy and human rights for all.

3 South Africa has never had good government for all its people. Successive administrations have always favoured a small section of the population as against the majority. What we need is government that is representative, competent, impartial, and accountable to the whole community. These should become constitutional principles, binding on all future governments. Never again shall we have government that serves the interest of one section of the community at the expense of another. Never again should we have domination, whether of the majority or the minority of individuals.

THE VOTE

The central demand of the oppressed people has been for the vote. Agreement at CODESA that South Africa will be a united, non-racial, non-sexist, democratic country in which all will exercise the vote on the basis of universal suffrage and a common voters roll, represents the achievement of the essential political goals set out in the Freedom Charter in 1955.

We have long opposed the idea of entrenching race or ethnic group rights in the constitution. We feel that the diversity of our population will best be catered for by a system of non-racial democracy with appropriate checks and balances.

One result of this approach is that we favour a system of voting by proportional representation. Instead of voting for single candidates who represent people living in geographically defined constituencies, people will vote wherever they are for party lists. A party that gets a quarter of the votes will then receive a quarter of the seats. Our proposal is that the lists, which are of candidates in the order of preference of the parties, be organised on both a national and a regional basis. This will ensure that people in the regions have a strong say in the selection of candidates.

These lists need to be balanced also in terms of women's representation.

BICAMERAL PARLIAMENT

The ANC favours a two chamber parliament with powers of review and delay, and with special responsibility for encouraging regional development and for maintaining respect for the constitution. The ANC proposes an [executive] President as head of state. The President should either be directly elected or else chosen by parliament at its first sitting. He or she will have a fixed term of office, be available for re-election only once, and will have significant executive powers to be exercised in liaison with a prime Minister accountable to parliament.

EXECUTIVE

REGIONAL AND LOCAL GOVERNMENT

We will need strong and democratic central government to deal with the tasks of the nation as a whole, strong and democratic regional government to deal with problems of development in the regions, and strong and democratic local government to ensure active involvement of people at grass-roots level in determining how they live.

We propose that South Africa be divided into the following ten regions: Western Cape; Northern Cape; Eastern Cape; Ciskei-Border-Transkei; Natal; Orange Free State; Western Transvaal; Northern Transvaal; PWV; and Eastern Transvaal. Within those areas, the 1910 boundaries should apply. Small adjustments could, if necessary be made.

Regional Councils will be elected on non-racial and non-sexist principles. Their powers and their right to exist will be determined by the constitution. Such powers must be exercised within the framework of national legislation, and regional ordinances would not be able to over-ride or conflict with acts of the central parliament. In any event, the principles of the constitution and of a Bill of Rights shall apply throughout the land, so that no region will be capable of attempting to retain any form of apartheid.

Although each region will have some power to raise its own revenue, the key question will be to ensure social and economic equalisation between the regions by means of appropriate transfers of funds through the centre.

BILL OF RIGHTS

A central place in the Constitution will be occupied by a Bill of Rights which will set out the fundamental rights and freedoms which all South African irrespective of race, colour, creed or gender, shall be able to enjoy.

The Bill of Rights will guarantee that South Africa will be a multi-party democracy with freedom of speech and assembly. It will contain clauses acknowledging the diversity of the people of our country, by means of guarantees regarding religious, language and cultural rights. It will also contain provisions for the public's right of access to information and to the courts on issues of environmental concern. These would be subject only to a proviso that *no law, custom or practice that is discriminatory shall be held to be constitutional.*

The Bill of Rights will be enforced by courts, headed by a newly created Constitutional Court, which will have the task of upholding the fundamental rights of all citizens. The judges shall be drawn from all sectors of the community, including women, on the basis of their skills, life experience and wisdom.

The Bill of Rights must secure the rights of individuals to equality and protection from discrimination in all spheres of life. This includes:

- * The rights of the child,
- * The rights of disabled persons,
- * The right not to be discriminated against as a result of sexual orientation.

Religion

The great majority of South Africans are believers. Everyone should have the right to follow his or her Faith, and religious communities shall be free to organise themselves and maintain links with their brothers and sisters in other lands. The Bill of Rights will ensure that the state respects all faiths and denominations and co-operates with religious bodies in achieving the aims of the constitution without taking away from them the right to practice their faith.

Language

We feel that all the major languages spoken in our country should be regarded as the languages of South Africa (in alphabetical order: Afrikaans, English, Ndebele, Pedi, Sotho, Swati, Tsonga, Tswana, Venda, Xhosa and Zulu). Everyone should be free to use his or her language in dealings with the state, and this right will be actively promoted.

To overcome the practical problems of multi-lingualism, it will be possible to designate a single language or group of languages to be used for record purposes or for other special use, either at the national level or the regions. There would be a need for developing translation services, and there should also be respect for all other languages used in South Africa.

Equality of Women

Special emphasis will have to be given to the realisation of women's equality.

Women are discriminated against in every area of life, both public and private. They cannot walk freely in the streets without fear of being assaulted and, in many cases, they are not free from fear even in their homes. This is particularly important given the high incidence of domestic violence against women and the lack of legal protection for women against such violence, as a result of the privacy implications of the home and social values regarding matrimonial vows.

In marriage, guardianship should be shared and rape outlawed. The law must provide guarantees that women participate as full citizens in the new South Africa, free from discrimination, oppression and abuse. This must include steps to redress the fact that much of the work performed by women remains unrecognised and unpaid. The new constitution should include a charter which will assist women in claiming and exercising the rights in the constitution and Bill of Rights on an equal basis with men.

The Family

People shall be free to form families on a voluntary and equal basis and the law needs to help to repair the damage done to family life by decades of apartheid. None should be penalised or harassed because of being a single parent.

Workers Rights

The long struggle of workers for rights to form independent Trade Unions engaged in collective bargaining, and the right to strike, must be recognised by the constitution.

Property Rights

The property rights of the majority have been systematically ignored and violated by apartheid. A new system of just and secure property rights must be created. People should have undisturbed enjoyment of their personal possessions, and all should be protected against arbitrary interference with their property rights. Women shall have equal rights to property.

The Bill of Rights should establish the principles and procedures for ensuring that land rights are restored in a fair and equitable way to those who were unjustly dispossessed, *taking into* account the role of compensation for those whose present titles might be affected and not ignoring the importance of ensuring stable supplies of food from the land. The ownership of property implies obligations. Legislation will be required in the public interest to promote conservation and environmental protection, to prevent monopolies and cartels from restricting competition, and impose taxation. The law may also provide for the regulation of the use of property as well as for its acquisition by the public authorities in the public interest and subject to just compensation.

Minimum Standard of Living

The Bill of Rights should ensure that all future governments are committed to a programme of guaranteeing an expanding floor of minimum social welfare and educational rights for all. ***[what about question of these rights not being justiciable]*** We propose a framework for legislative action as a constitutional obligation at all levels of government in order to combat malnutrition, homelessness, unemployment and illiteracy, and to provide basic health and education services and social security. [Pensions should immediately be equalised on racial and gender lines and a vigorous programme embarked upon to ensure that every household has electricity, access to clean water, and the benefit of sewerage disposal.] (move to social welfare ???)

No!

Affirmative Action

The Bill of Rights should establish principles for ensuring that affirmative action, to overcome the effects of past structured racism and sexism, takes place both in the public and private spheres, and does so according to equitable principles and procedures.

Public Service

In general terms the whole of the civil service will have to be opened up and restructured so as to make it representative of all South Africans and not just of a minority. We envisage a single non-racial defence force, police organisation and prison service, composed of well trained, disciplined and loyal personnel, drawn from all section of South African society and answerable to the law and constitution.

Rule of Law

We look to the establishment of the rule of law in the context of democracy and equal rights. The law should be there to defend the rights of everybody, black, brown and white, male and female, young and old, Christian, Muslim, Hindu, Jew, urban or rural, speaker of any language. The constitution unites the nation by granting equal rights to everybody, without forcing anybody to give up his or her language, culture or beliefs.

There must be no areas of the country where the law does not operate. People should feel free to be out on the streets and to travel, without fear of being assaulted. People should be able to sleep securely in their homes without fear either of being raided by the police, or of criminal invasion. While we need an efficient, well-trained and well-disciplined police force, it can only combat crime effectively if it has the support of the community. This requires a police force that is representative of all population groups, including women, and which is accountable to the community.

CRIME

Freedom of Information and Ideas

of of being attacked by members of their own family.

We envisage an open society in which government is directly accountable to the people, and where there is free circulation of information and ideas, and exposure to different ways of seeing and interpreting the world. The right to information must be secured.

The public media should not be controlled either by the state or by any of the political parties but should be managed and directed by an impartial and independent broadcasting authority. There should be freedom of the Press. A commitment to ensuring non-sexism should be adopted.