DISCUSSION DOCUMENT:
DRAFTING OF THE CONSTITUTION - TOPICS,DETAIL,LANGUAGE

CP108055.MEM

A.TOPICS & DETAIL

1INTRODUCTION

1.1The Constitution which is being drafted now has to be a lasting document. It will have to provide a framework in terms of which all the typical needs of the modern, democratic and constitutional state can be accommodated. In the words of a Canadian constitutional expert a constitution has to "provide the basis for the entire government of a nation over a long period of time".[1]

In addition the new Constitution will have to complete South Africa's constitutional transformation. For this to happen the new Constitution must reflect and build on agreements concluded earlier and which are binding on the present process. The Preamble to the Constitution of 1993 requires that a new Constitution shall be adopted "in accordance with a solemn pact recorded as Constitutional Principles". These Constitutional Principles deal with various technical aspects as well as with specific local needs and conditions.

As the constitution-making process proceeds the question whether a particular issue should or should not be included is raised repeatedly in Theme Committee meetings as well as in the Constitutional Committee. Often the questions are:

Should a particular matter be dealt with in the Constitution?
In what format and in how much detail should a constitutional provision be formulated?
Where in the Constitution does it belong?

The answers to these questions will have a fundamental effect on the Constitution as a whole and on its subsequent success or failure. What is decided now should determine and facilitate an acceptable constitutional and political direction for the future. These questions should not be answered in an ad hoc manner. What is endeavoured in this document is to provide a number of ideas which will hopefully form the basis for a discussion about what considerations should be taken into account in determining the appropriateness of including various matters in the final Constitution.

At present constitution-making is conducted in a fragmented fashion. Different Theme Committees deal with separate areas. No integration into a comprehensive and inter-related framework takes place while the drafting continues. There are good reasons why the new Constitution is being drafted in this way. It will hopefully ensure public participation and thorough deliberation.

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[1] Peter W. Hogg Constitutional Law of Canada 414.

However, we also believe that the constitutional debate should take place in a way which will look at the Constitution as a whole and in long-term perspective. It is not only an agreement for the moment.

A consequence of the present approach is that every separate theme discussed in a particular Theme Committee now becomes an end in itself and often an area of contest. It is often treated as a topic standing on its own, requiring extensive detail and numerous guarantees. This happens because the overall constitutional picture, the inter-relationship of all constitutional provisions and the effect of enforcement mechanisms and protections are not given full weight. This can be illustrated by the following example: A state of emergency involves the suspension of human rights and will therefore be dealt with comprehensively in that section of the constitution containing the Bill of Rights. This issue, however, also relates to the powers of the executive and the security forces and will therefore be dealt with in several other Theme Committees as well. That does not mean that the Constitution should contain 3 comprehensive chapters on a state of emergency. Constitutional formulations have specific technical consequences. To avoid confusion and technical uncertainty when particular provisions are interpreted and implemented (which could have serious political consequences) the present drafting must result in a correct and consistent document. What is needed is a recognition that the Constitution is supreme and binding in its entirety and that it will apply as a whole. It must be an integrated and inter-related document.

The particular problems that arise from a fragmented drafting process should also be kept in mind. The final Constitution is not drafted as a single coherent instrument. Parties are not submitting their own comprehensive drafts, which would make it possible to understand the impact of an agreement in one area on the total scheme of things.

Comparative study of constitution-making should be conducted in a manner that recognizes the relationship between the whole and its parts. Should we find it of interest to look at e.g. the USA in order to learn more about a subject such as the appointment of judges, their procedure will only be of value if evaluated within the overall framework of checks and balances and its various manifestations in their constitution.

1.2 The rest of this document attempts to:

* Develop criteria in terms of which questions relating to the contents of the constitution and the amount of detail it should contain can be answered.

* Justify the approach proposed.

* Identify and explain the basis of this approach. (Where do the criteria identified here, come from?)

* Explain the application of this approach to the present exercise in

constitution-making.

* Provide some examples demonstrating the application of these criteria.

1.3 What then is the aim? What should the Constitution contain?

Generally speaking only those principles and institutions which will ensure that the constitutional state will be provided for; that it functions effectively; and that the values underpinning this order will be enforced.

Properly equipped institutions which will allow effective and democratic government must be in place. Flexible responses must be possible. Control over the exercise of powers including checks and balances must be provided for.

The historical background is to be taken into account. Special needs flowing from the South African situation have to be addressed. Stability, effective government, legitimacy and socio-economic transformation ought to be primary goals.

2 THE NEED FOR CRITERIA

2.1 A well-balanced constitution will contain all those constitutional essentials (principles, instruments, powers, checks and balances) which will ensure effective, democratic government and a true constitutional state. It will exclude aspects better dealt with elsewhere or which will hamper the implementation of the goals of effective government, democracy and the constitutional state. The challenge is to find the correct mix.

2.2 It is not necessary to include every aspect of the broader constitutional order in the Constitution. The Constitution will be more difficult to amend than ordinary legislation and should contain essential provisions only. General aspects of the constitutional order, such as details concerning the procedures for the routine work of administrative organs, the salaries of members of local government, the jurisdiction of lower courts, etc, may be contained in ordinary legislation which can be changed relatively easily. (In Germany e.g. the following areas are dealt with in separate legislation, not in their constitution, the Basic Law: The Law on the Federal Constitutional Court, The Law on Political Parties and the Federal Electoral Law. Similarly most countries do not include details of citizenship law in their constitutions.)

2.3 It is important to realise that the Constitution is not a statute like any other. It is a constituent document which creates "the basis for the entire government of a nation over a long period of time".[2] It is also the supreme law of the land and

[2] Hogg 414.

provides a yardstick for determining the lawfulness of government action and for protecting individual rights. In order to provide for effective enforcement and protection, the Constitution is justiciable and self-executing. (The latter means that people will rely on the Constitution itself for protection. The courts will apply it directly.) The Constitution is value-based; it reflects the choices for the type of society we want to be. (These important characteristics are contained in the interim Constitution and the Constitutional Principles. See secs. 4, 7(1)(2), 98(4) and Constitutional Principles II and IV.)[3]

These unique characteristics mean that the Constitution is a document of principle and with a status different from that of statutes. It also is to be interpreted differently. (When older constitutions such as those of the USA and Canada were drafted, telephones, modern banking and motorcars did not exist. They could nevertheless later be regulated, where necessary, in terms of the original principles and through method of interpretation recognising the uniqueness of the constitution.)

A constitution cannot easily be amended. Frequent changes to it will affect its status and the stability of the society it is to govern. Technically constitutions are as a rule entrenched and special majorities are required in order to amend them. (The Constitution of 1993 requires, in Sec 74(2), a two-thirds majority for an amendment. Constitutional Principle XV stipulates that the new Constitution should be more difficult to amend than ordinary legislation: "Amendments to the Constitution shall require special procedures involving special majorities." Constitutional Principle II, in addition, provides for the entrenchment of the bill of rights. The Namibian Constitution (in Art 132) too requires a two-thirds majority for the amendment of constitutional provisions. Their bill of rights, however, is permanently entrenched. The amendment clause itself is entrenched against repeal or amendment. In Germany (Art 79 of the Basic Law) certain provisions concerning human dignity, democracy, federalism and the requirement that the Länder (states) are involved in adopting legislation are permanently entrenched. Other constitutional amendments require a two-thirds majority.)

It is obvious that such characteristics not only determine the unique nature of a constitution; they also provide principled protection which may make detailed technical elaboration unnecessary and perhaps even irreconcilable with the true nature of a constitution.

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[3] CP II: Everyone shall enjoy all universally accepted fundamental rights, freedoms and civil liberties, which shall be provided for and protected by entrenched and justiciable provisions in the Constitution, which shall be drafted after having given due consideration to *inter alia* the fundamental rights contained in Chapter 3 of this Constitution.

CP IV: The Constitution shall be the supreme law of the land. It shall be binding on all organs of state at all levels.

2.4 Basic criteria should be identified to serve as a yardstick for establishing what is to be included in the Constitution. The real difficulty is concerned with the identification of the criteria required for determining what constitute constitutional essentials and what not. An incorrect determination may either weaken the constitutional state or, on the other hand, overburden the constitution. It may also prevent a proper functioning of the legislative and executive branches of government. Effective government depends, inter alia, on the ability to respond to new developments, needs and requirements of a socio-economic or technical nature in a flexible and adequate manner. The constitutional and political transformation of South Africa will otherwise not materialize.

3 THE BASIS OF THIS APPROACH

The drafting of the final Constitution is not an open-ended process. It is to be guided by certain principles which are already established, or which by necessary implication flow from those established principles. We find these guiding principles in the following sources:

3.1 The preamble to the interim constitution explains that the constitutional embodiment of the changes in South Africa and the "new order" is to be found in the idea of a "sovereign and democratic constitutional state in which there is equality" and the ability to "enjoy and exercise ... fundamental rights and freedoms".

3.2 The Constitutional Principles are of particular importance. The final Constitution has to reflect and comply with them (sec 71(1)(a)). They should also constitute the broad basis against which the constitution can be measured for certification. In the Preamble to the present Constitution they are described as a "solemn pact" - the basis for the completion of our constitutional transformation.

This technique (to agree to basic principles before writing the constitution itself) has also been used in the process of drafting other constitutions. In the Namibia, Constitutional Principles were adopted prior to the drafting of their constitution. They also bound their constituent assembly.

3.3 Constitutional Principle II stipulates that justiciable, "universally accepted fundamental rights, freedoms and civil liberties" should be contained in the final constitution. The bill of rights in the interim Constitution contains an indication of these fundamental rights and freedoms: It must be interpreted to promote the values which underlie an open and democratic society based on freedom and equality" (Sec 35(1)).

3.4 Accommodating the socio-economic reconstruction of South Africa is equally valid and important. (The Epilogue on National Unity and Reconciliation stresses, among other things, "development opportunities" and the "well-being of all South Africans". Constitutional Principle V requires "the amelioration of the conditions of the disadvantaged...".)

The importance of socio-economic matters does not automatically mean that they can be accommodated in the same manner as the constitutional state. At the same time, however, because socio-economic concerns are so important in the

South African context, they should be addressed within a context of a constitution allowing for effective and flexible government. The government must be able to select the most effective means for achieving socio-economic development.

3.5 Several Constitutional Principles deal with the accommodation of cultural minorities and minority parties. (See e.g. Principles XII, XIV, XXXIV.) In order to agree on final formulations the application of the approach proposed here may be useful. Essential aspects only should be in the Constitution. The overall constitutional picture should be kept in mind in order to prevent repetition.

3.6 From the above (sec 3.1) it is clear that the concept of the constitutional state is of fundamental importance. It constitutes a basic guideline for determining how the new South African state should be equipped and what therefore should be in the Constitution. The following quotation will shed some light on what it means to have a constitutional dispensation based on this concept.

> In Rights and Constitutionalism - The new South African Legal Order (Juta 1994, 634-35) the following description is found:
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> "...These values find their embodiment in an important new constitutional concept, the Rechtsstaat or 'constitutional State' referred to in the Preamble. A 'constitutional State' provides a framework of rules and institutions which determines how state power has to be exercised....
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> "What are the formal and material characteristics of the constitutional state? In a formal sense the constitutional state will be based on separation of powers; individual human rights (with particular emphasis on equality); protection of the individual through an independent judiciary; the maxim nulla poena sine lege; the idea that all state action must originate in a formal legal source (legality); legal certainty and 'predictability' (through inter alia requiring proportionality for state behaviour and prohibiting retroactive legislation); and the existence of formal legal rules. This last requirement involves the participation of a popularly elected legislature in the enactment of legal rules; it lays down that the law should be of general application; and that the legislature too is bound by the law."[4]

4 CRITERIA: HOW TO DECIDE THE SELECTION ISSUE

4.1 The fundamental constitutional break with the past should be adequately

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[4] Kriele Einführung in die Staatslehre - Die Geschichtlichen Legitimatätsgrundlagen des Demokratischen Verfassungsstaates (1975) 14; Van Wyk Persoonlike Status in die Suid Afrikaanse Publiekreg (Unpublished LL D Dissertation, Unisa 1979) 72-76: Basson & Viljoen Suid-Afrikaanse Staatsreg 2ed (1988) 229-31.

reflected. We now have to establish a constitutional state (Rechtsstaat).

4.2 The new South African Constitution should be "complete". Completeness deals with the typical areas to be found in all constitutions - e.g. a bill of rights, executive, legislature, judiciary etc. (This is "technical" completeness.)

4.3 Completeness in a different sense also concerns the particular nature of the constitutional order which is to be established in SA. This is determined by the Constitutional Principles, political agreements, and the nature of the new constitutional order. Care should be taken to ensure that detail that is included is really necessary to address legitimate political and social concerns.

4.4 It is suggested that, on this basis, the following considerations might be borne in mind:

4.4.1 The new South Africa has to be a constitutional state.

4.4.2 The Constitutional Principles emphasize equality, freedom and civil liberties as important constitutional values which will have to be provided for in the final Constitution. They will require explanation and reference to means and instruments which will ensure effective protection and enforcement. (See further Constitutional Principles I, II and III.)[5]

4.4.3 It requires the establishment of sufficiently equipped institutions and instruments which will ensure effective democratic government and the effective implementation, enforcements and protection of the values underpinning the new constitutional order in the conditions prevailing in SA. For example, the protection of minorities should be dealt with in terms of both principles and instruments. Generally, only those needs not covered by other aspects of the constitution should be included. For instance, it must be taken into account that minorities will be given certain protection under the bill of rights.

4.4.4 The Constitution will also have to reflect the historical and political circumstances

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[5] CP I: The Constitution of South Africa shall provide for the establishment of one sovereign state, a common South African citizenship and a democratic system of government committed to achieving equality between men and women and people of all races.

CP II: Everyone shall enjoy all universally accepted fundamental rights, freedoms and civil liberties, which shall be provided for and protected by entrenched and justiciable provisions in the Constitution, which shall be drafted after having given due consideration to *inter alia* the fundamental rights contained in Chapter 3 of this Constitution.

CP III: The Constitution shall prohibit racial, gender and all other forms of discrimination and shall promote racial and gender equality and national unity.

in which it is drafted.

5. EXAMPLES

5.1 When it is debated whether a particular institution or right should be included in the Constitution, some questions which follow from the above criteria could serve as guidelines:

i) Does the implementation of democracy and the constitutional state, based on the values recognised in the Constitution, require its inclusion (either as an institutional necessity, or in view of the country's history and needs)?

ii) Is it necessary for effective and democratic government?

iii) Is it necessary in order to address a vital constitutional agreement reflected in a Constitutional Principle?

iv) Would it be conducive to an integrated approach, in other words is it not sufficiently dealt with or likely to be dealt with elsewhere in the Constitution?

5.2 The regulation of two institutions, as well as the entrenchment of one fundamental right in the 1993 interim Constitution could serve as examples (without coming to final conclusions on any of these).

5.2.1 The Constitutional Court (Sections 97-107)

The following issues have to be addressed:

(a) Should there be a Constitutional Court at all and, if so, should it be included in the Constitution?

(b) To what extent should detail as to its composition, the appointment of judges, their terms of office etc be regulated in the Constitution, or rather through an ordinary statute?

Ad (a)

Taking questions (i) to (iv) into account, it is clear that an institution such as an independent court, which enjoys legitimacy in the population, with the power of judicial review, is necessary for the functioning of a democratic constitutional state. It is furthermore necessary to ensure adherence to previously agreed Constitutional Principles.

The question as to whether a specialized Constitutional Court, or another court, is best suited to perform the functions of constitutional guardian, has to be

decided against the background of South Africa's history and needs, as well as relevant international experience. However, the responsible institution has to be recognized in the Constitution.

Ad (b)

Sufficient detail should be included to guarantee the basic characteristics of the court to enable it to perform its functions. These would include not only its relationship with the executive and the legislature, as well as its position in the hierarchy of courts, but especially its independence, long term integrity and representativity. The composition of the court, appointment mechanisms, salaries and terms of office, inter alia, must ensure the above. It could furthermore be argued that for the purpose of effective government, the executive has to be involved in some way in the appointment of judges, in order to prevent a possible constitutional breakdown which will follow if the court functions totally insulated from political realities.

Does this mean that, details relating to the appointment of Constitutional Court judges should be provided in the Constitution, or would a clause such as "judges shall be appointed and remunerated in such a manner as to ensure their independence" suffice, with a Constitutional Court Act then regulating the detail? The answer to this question is "no". The method of appointment of constitutional court judges is critical to achieving their independence, integrity and representivity. It is also central to establishing a state in which separation of powers is clearly reflected. An implication of this is that, should a Judicial Service Commission be the chosen method of making judicial appointments, its composition must be detailed in the constitution. If the composition of a JSC was left to legislation, no method of ensuring that it led to the appointment of an independent judiciary would exist: it would be anomalous for the constitutional court itself to judge the constitutionality of the body designated to appoint it. Similarly, if another method of judicial appointment is chosen, it should be detailed in the Constitution.

5.2.2 Human Rights Commission (Sections 115-118)

The same two questions could be asked:

(a) Should there be a Human Rights Commission and, if so, should it be included in the Constitution?

(b) To what extent should detail be included?

Ad (a)

In theory a constitutionally entrenched Human Rights Commission is not a necessity for a democratic constitutional state, or for effective government. Many democracies function without such a Commission, inter alia because some of its

functions may be the responsibility of other institutions. Others have Human Rights Commissions, provided for in ordinary legislation. (Germany, for example, does not have such a Commission at all. In Sweden its functions are largely the responsibility of the Parliamentary Ombudsman. India and Canada have Human Rights Commissions, but these are not included in their Constitutions. The 1992 Constitution of the Republic of Ghana (in Section 216) and the 1992 Constitution of the Fourth Republic of Togo (in Section 156) do recognize Human Rights Commissions).

In view of the South African state's unimpressive human rights history and the need for the promotion of and education regarding human rights and related values, a Human Rights Commission may well be very useful, or even essential, as a supportive institution, or an important checking mechanism to investigate policies and conditions which enhance or perpetuate discrimination and other systemic human rights violations. If the Human Rights Commission is to contribute actively to the functioning of the democratic and value-based constitutional order, in other words, if it is to be a constitutional role player, it has to be entrenched in the Constitution. If it is to be a body which merely serves as a useful social institution, more or less like art, sports or religious councils or boards, it would best be regulated elsewhere.

Ad (b)

If the Human Rights Commission is thus constitutionally entrenched, sufficient detail must be included to define and ensure its constitutional role. In view of the different meanings and roles which could be attached to Commissions of this kind, the Constitution has to clearly describe its main functions, e.g. with relation not only to the human rights promotion and education, but especially the investigation of alleged human rights abuses. A subsequent Human Rights Commission Act could then regulate detail as to the performance of these functions, e.g. procedures to be followed when investigations take place.

5.2.3 Equality (Section 8)

The questions could be the following:

(a) Should the right to equality and non-discrimination be included?

(b) How much detail should be included, e.g. should a list of "forbidden grounds" (e.g. race, sex, religion, disability etc) be specified and should it be closed or open-ended?

Ad (a)

A charter or chapter entrenching fundamental rights, which is an essential feature of a democratic constitutional state, obviously has to explicitly recognize the right to equality. This is all the more true with regard to South Africa.

Ad (b)

Although the basic principle involved is probably that unfair discrimination on any grounds irrelevant to a particular purpose is prohibited, South Africa's needs require the mentioning of specific grounds. Not only does this fulfil a legitimate emotional urge, but it could serve to eliminate confusion and mischievous interpretations in view of the fact that equality has not before been constitutionally recognized.

Whether the list should be comprehensive or open-ended, depends on whether one wishes to see the implications of changing socio-economic and political circumstances to be debated and decided, in the courts, or by those with the power to amend the constitution or to legislate.

B. PLAIN LANGUAGE

The need for the Constitution to be accessible to the community, in order to be understood and used and thus to enjoy legitimacy and become a "living document", is generally recognized. The complicated legal language of the interim Constitution is often mentioned as an obstacle in this regard. The question of language and style is a different one from the above-mentioned questions regarding topics to be dealt with and the degree of detail required.

Legal and especially constitutional language is notoriously complicated, formal, clumsy and archaic and often not conducive to effective communication at all. According to researchers, this is partly the result of lawyers having created - deliberately or unknowingly - inaccessible language for a variety of reasons (including the desire to be precise and even linguistic self-preservation of the profession, or the desire to disempower people) over a long period of time.[6]

On the other hand the need for certainty and accuracy often necessitates technical language which appears complicated and inaccessible, but which cannot easily be avoided. To simplify legal and constitutional language may be easier said than done. It is often stated that some typical characteristics of legal language could be changed without much difficulty, e.g. by avoiding long sentences and cross-references, as well as legal jargon which ordinary people often find peculiar.[7] The issue may be more complex, however. For example,

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6 See, eg, Glanville Williams "Language and the Law" 1945 & 1946 Law Quarterly Review (61) 71, 179, 293, 384, 387 and S. Stark 1984 "Why Lawyers can't Write" 1984 Harvard L Rev (97) 1389

7 A seminar on "Plain Language - the Law and the Right to Information" hosted by the Ministry of Justice took place in Cape Town in March. Foreign experts made presentations and looked at South African legislation. Some of the forthcoming ideas have been incorporated in drafts submitted to the Constitutional Assembly.

linguists argue that long sentences do not, as such, make language complicated, but rather practices like "centre embedding" and "nominalization".

An attempt to use more clear and simple language should be approached with care and in a scientific way, and could be partly experimental. Approaches such as "inter-actional socio-linguistics" and "speaking ethnography" could be explored. A possibility which perhaps deserves consideration, is to appoint a small committee consisting of linguists or similar experts, as well as lawyers, to revise and attempt to simplify the text of the Constitution, without altering the legal meaning of words and clauses.

To the extent that the Constitution will still be a lengthy and complicated document, as modern constitutions mostly are, Constitutional education (including the use of posters, brochures, workshops, etc) will have to play an important role in initiatives to make the constitution more open and accessible.

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