

28 September 1994

THE PROCESS OF DRAFTING A NEW CONSTITUTION

SUBMISSION BY THE DEMOCRATIC PARTY

General

This submission on "The Process of Drafting a new Constitution" must be read in the context of the "Process and Framework for the drafting of the new Constitutional Text" agreed to by the Constitutional Assembly on 5 September, 1994.

2. Sequence of steps in the process

The steps outlined below will have to be taken in an integrated way by the various structures forming the constitution-making process i.e., the Theme Committees, the Constitutional Committee and the Constitutional Assembly

- 2.1. Analysis and evaluation of the detailed themes referred to the six Theme Committees.
- 2.2. Gathering of information and of inviting inputs on the content of the various theme issues.
- 2.3. Discussion and evaluation of the information and inputs received.
- 2.4. Formulation of drafts on specific elements for furthering discussion.
- 2.5. Obtaining of further inputs in relation to draft proposals.
- 2.6. Evaluation of these further inputs.
- 2.7. Co-ordination of drafts on various themes into a single comprehensive draft constitutional text.
- 2.8. Final decision on new Constitutional Text.

Note: In following the above sequence cognisance must be taken of the fact that the present constitution requires the following:

- 161 (1) "The development of a system of provincial government shall receive the priority attention of the Constitutional Assembly, and in this regard it shall take into consideration any recommendations of the Commission on Provincial Government and any comments thereon by the respective provincial government.

- 164(1) "The object of the Commission is to facilitate the establishment of provincial government, and the Commission shall for the achievement of that object be competent -
- (a) to advise the Constitutional Assembly on the development of a constitutional dispensation with regard to provincial systems of government; 11

3 More detailed development of steps (2.1.) and (2.2.)

3.1. "Analysis and evaluation of the detailed themes referred to the six Theme Committees" (2.1.)

This will involve determining, inter alia:

- 3.1.1 Whether any sub-themes should be dealt with on a priority basis,
- 3.1.2. Whether any sub-themes overlap with those referred to other Theme Committees, and, if so , how these sub-themes should be dealt with in collaboration with the other relevant Theme Committee(s).
- 3.1.3. Whether any sub-themes should be referred to Commissions for detailed information gathering.
- 3.1.4. Which statutory bodies should be consulted for an input on specific sub-themes at this stage,
e.g.: - Commission on Provincial Government,
- Provincial Governments,
- Local Authorities,
- Volkstaatraad,
- Council of Traditional Leaders,
- other Statutory Bodies functioning in terms of the present Constitution.
- 3.2. "Gathering of information and of inviting inputs on the content of the various theme Issues" (2.2.)
- 3.2.1. Information and/or inputs will have to be obtained from the following:
- the public, including relevant N.G.O's and specialist interest groups,'
- the political parties
- Commissions (see 3.1.3.)
- Statutory bodies (see 3.1.4.)

- 3.2.2. - To avoid overlapping of work and duplication of effort the Management Committee/ Constitutional Committee in conjunction with the Theme Committees will have to determine an overall programme and timetable including in particular a media campaign and procedures for involving the public.

(Refer to attached memorandum headed: "Proposals on Public Participation in the Constitution-making process")

4. Timetable for above processes:

4.1. The objective should be to complete the information and initial input gathering phase by 30 June 1995.

4.2. This does not preclude the reality of elements of this phase taking longer, nor the appropriateness of Theme Committees// Constitutional Committee/ Constitutional Assembly proceeding with elements of (2.3.) discussion and evaluation of the information and inputs received prior to 30 June 1995.

4.3. It will be extraordinarily difficult, and, indeed, for certain reasons undesirable, to complete the whole process and adopt a new Constitutional Text by 9 May 1996, the date set in the present constitution.

4.4. Factors relevant to the above are:

- the need to involve the public at all phases in the constitutional making process,

- the current view of the Constitutional Committee that the text of the current Constitution should not be used as an initial draft or as source material for the Constitutional Text means that this new Constitutional Text will have to be drafted de novo.

- the fact that members of the Theme Committees, Constitutional Committee and Constitutional Assembly are all members of the National Assembly or the Senate and as such will be engaged, concurrently with the constitution-making process, with their legislative duties in parliament and its more than forty select committees, will result in them having limited time available for the work of the constitution-making process.

- some key structures and processes embodied in the present constitution will not be functioning fully or long enough for the Constitutional Assembly to be able to evaluate their merits or demerits and thus determine whether these structures and procedures should be discarded or incorporated in their present or amended form in the new Constitution.

- 4.5. Time pressures caused by a rigid time-table, should not dominate over the need for the next Constitution to be drawn up through a proper and thorough constitution-making process.
- 4.6. Accordingly, the time-table set for the adoption of the new Constitutional Text should be re-assessed before the end of 1994 and certainly not later than 30 June 1995.

CAPE TOWN
28 SEPTEMBER 1994

PROPOSALS ON PUBLIC PARTICIPATION IN
CONSTITUTION-MAKING PROCESS

(Prepared by Dene Smuts on behalf of the Democratic Party)

- 1.1. The public must be drawn into the process, however, it is impossible to quantify public response during participative consultative processes and the duly elected members of the Constitutional Assembly are ultimately responsible for decisions.
- 1.2. It serves the democratic ideal to consult as widely as possible and it is a healthy fact of democratic life that politicians' antennae will pick up discernable trends: it is their job to "hear" silent majorities and articulate minorities and to compute views against their consciences and convictions.
- 1.3. It may prove to be desirable to hold a referendum the one quantifiable mechanism - on a few very specific questions such as abortion and capital punishment.
2. Consideration should be given to creating or commissioning a structure separate from the current Constitution-making bodies by the CA/CC for this purpose.
 - 2.1. If the C.C. or the Theme Committees took on this additional task, fragmentation would result. It is in the nature of the process that a constitution does not unfold chronologically or even, superficially seen, logically. If we wish to establish a Rechtsstaat and rights-based order in the minds of the people and not only on paper, skilled communication will be necessary to create the context of discussion on any given issue.

- 2.2. Those engaged in negotiation (as well as legislative and Ministerial Work) cannot hope to do justice to the task by way of media invitations/ releases/ appearances and occasional forum appearances.
- 2.3. Two options exist:
 - 2.3.1 The creation of a communications branch: the C.C. could set up a Communications arm comprising communications and constitutional experts whose task it would be to drive media campaigns (especially radio to reach illiterate people) and convene and address forums. There may be a role for the panel of constitutional experts, who will be duly appointed by the C.A. but may not be fully employed if difficulties never arise.
 - 2.3.2. The commissioning of SACS: SACS is already engaged in participative processes on the RDP, has performed communications functions with the interim Constitution and could use a constitution-making campaign as a logical basis of experience for its future work, which in terms of its new mission comprises the involvement of the public in the process of governance, and not just an information function. Much of the policy and legislation at present and in future will flow from the constitution. If a special communications arm is set up by the CA/CC, its experience could go to waste in future. Constitutional experts could be employed on a consultancy basis, and should liaise with constitutional experts could play a role.
3. The organised informed lobbies will submit their views without encouragement. It is the broad public that must be reached. Real expertise will be required for constitutional concepts to take root, and to produce fruitful debate not on general political desires, but on the constitutional concepts that will regulate their realisation.
 - 3.1. It is common cause that citizens want the essentials of life. This does not mean there is a majority in favour of justiciable 2nd generation rights. The subject of participative discussion would therefore be, for example: should a given township be able to go to court if a local authority cuts off its water as a result of non-payment? What happened in India? It is clearly desirable that all sides of an argument should be aired.
 - 3.2. It would be desirable to create some mechanism whereby feedback, although unquantifiable is received by the CA. Media coverage, especially by means of radio phone-in discussions on (hopefully) all eleven language stations will doubtless reach political parties; but coverage cannot be expected in the case of fora, in the non-metropolitan areas where the demand (according to SACS) is greatest. Report-back sessions with the Constitutional consultants who act as and workshop-leaders may be necessary.