

OBJECTIONS TO CERTIFICATION OF THE NEW CONSTITUTION

by **Professor A C Cilliers**, Stellenbosch

GENERAL

I respectfully submit that the following provisions of the draft Constitution do not comply with provisions of the 34 Constitutional Principles, on the grounds as set out below.

The International Covenant on Civil and Political Rights 1966 (the 'ICCPR') is the closest approximation to all "universally accepted fundamental rights" referred to in Constitutional Principle II and is therefore used as criterion for determining whether or not the provisions of the Bill of Rights comply with Constitutional Principle II.

1) Preamble

The preamble places predominant stress on the "injustices of our past", thereby setting the scene for the interpretation of the entire Constitution in the light of the struggle against apartheid, instead of furthering the main aim of the new constitutional order, namely equality, non-discrimination and reconciliation in a democratic context.

The above-mentioned tenor of the preamble, which can be an aid to the interpretation of the new Constitution, is contrary to Principle III (the promotion, inter alia, of "national unity"), which implies (inter alia) reconciliation).

2) Founding provisions

Clause 6(3) (read with clause 6(4)) regulates the use of particular official languages for the purposes of government.

This clause, properly interpreted, is contrary to the provisions of Principle II, which requires that the diversity of language and culture shall be acknowledged and protected, and conditions for their promotion encouraged. The concept "official languages" implies, in the context of Principle II, that subjects are entitled to use any of such languages in their dealings with the government, and not that the government can use any official language in its dealings with subjects. This is so despite the fact that clause 6 is not contained in the Bill of Rights.

3) Bill of Rights

Clause 9(2) is aimed at the promotion of "the achievement of equality" before the law, as opposed to the provisions of Principle V, which is aimed merely at the "amelioration" of the conditions of the disadvantaged. Clause 9(2) (or any other constitutional provision) cannot, for instance, bring about the achievement of economic equality. Clause 9(2) goes beyond Principle V.

Clause 17 provides for freedom of assembly and demonstration, including the right to present petitions. The latter provision is contrary to article 21 of the ICCPR 1966, which reflects public international law in this regard. It places the recipient of the petition in an unfair bargaining position, in so far as some positive response to the petition is necessarily implied. I do not deny the existence of a right to petition, exercised by small groups of representatives on behalf of a large body of their principals, but to couple petitions with mass action such as demonstrations goes beyond universally accepted fundamental rights in public international law, as incorporated by reference in Constitutional Principle II.

Clause 21(1), providing for freedom of movement of "everyone" (as opposed to clause 21(3) and (4) - "citizens") is contrary to article 12(1) of the ICCPR, which applies only to "Everyone lawfully within the territory of a State", and accordingly contrary to Principle II (see GENERAL above). Clause 21 (1) should not apply to unlawful immigrants. (The same argument applies to a number of other provisions of the Bill of Rights, affording unlawful immigrants rights in contravention of Principle II, incorporating by reference, provisions of the ICCPR.)

Clause 29(3) (read with clause 29(4)) enables the state to determine that the establishment and maintenance of (particular) independent educational institutions could take place without state subsidies.

This clause contravenes Principle XI, which guarantees acknowledgement and protection of the diversity of language and culture. Clause 9(3) may possibly acknowledge the diversity of language and culture, but it certainly does not provide for the protection of such diversity, as the cost ("at their own expense") may be prohibitive for such institutions to make provision for "equitable" treatment of official languages, as is contemplated by clause 6(4).

Clause 30, it is submitted, is contrary to Principle XI, in so far as language and cultural rights are made subservient to specific other provisions of the Bill of Rights, instead of being overriding, according to the tenor of Principle XI.

In respect of clause 31 (providing for the rights of cultural, religious and linguistic communities, but subject to clause 31(2)), the same criticism can be raised as in respect of clause 30 above. Clause 31, it is submitted, is also an infringement of Principle XI.

Clause 36, providing for limitation of rights in terms of ordinary laws in circumstances where there is no necessity to do so, in effect emasculates the essence of entrenchment and accordingly contravenes Principle II.

4) The President and National Executive

Clause 83 requires the President to uphold, defend and respect the Constitution, but not "all other law of the Republic" (see Schedule 2, paragraph 1 - oath of the President) as well. Clause 83 is in conflict with the concept of a constitutional state, which appears from the Constitutional Principles as a whole.

5) Courts and administration of Justice

Clause 179 provides inter alia for a national Attorney General, who will in effect be under control of the executive. These provisions do not ensure "equality of all before the law and an equitable legal process", as is required by Principle V. The provisions of clause 179 as a whole, providing for a national prosecution policy and intervention by the National Director of Public Prosecutions, enables selective prosecutions in contravention of the spirit of Principle V and, possibly, that of Principle VI (separation of powers).

Clause 180 (c), authorising national legislation providing for the participation of "people other than judicial officers" in court decisions opens the door for adulteration that the judiciary should be appropriately qualified (Principle VII) .

6) General provisions

Clause 235 provides for self-determination of certain minorities within a territorial entity in the Republic 'or in any other way, determined by national legislation'.

It is submitted that this clause infringes Principle XXXIV, which uses the words 'or in any other recognised way'. The latter words require recognition either by international law or by a number of individual world states, not necessarily being the majority. National legislation in this context was not contemplated by Principle XXXIV.

CERTIFICATION OF NEW CONSTITUTIONAL TEXT

Thank you for your submissions of 27 May 1996.

I have been asked by the President of the Constitutional Court to inform you that your submission will in due course be taken into account by the Constitutional Court.

M NIENABER