

CONSTITUTIONAL OPTIONS: ECONOMIC PROVISIONS

Prepared for the Centre on International Cooperation at New York University.
May 2003.

Dr Clive J Napier
Senior Lecturer
Department of Political Sciences and Philosophy
University of South Africa (Unisa)
PO Box 392
Unisa 0003
Pretoria, South Africa

Tel 012 429 6564
Fax 012 429 3221
E mail: napiecj@unisa.ac.za

CONSTITUTIONAL OPTIONS: ECONOMIC PROVISIONS

INTRODUCTION

Constitutions often include provisions that may affect the production and distribution of wealth. Older constitutions differ from newer constitutions with regard to which economic institutions are included. Newer constitutions like those of South Africa and Namibia, generally include a greater number of economic institutions in line with current thinking on the need to link political and economic performance.

The economic provisions generally included in constitutions or considered by constitutional experts suitable for inclusion are the following:

- a central bank;
- taxation provisions, which include the collection of revenue and the re-distribution of that revenue
- fiscal policy determination and management,
- private and public property and land use rights;
- labour and professional organisations;
- freedoms to trade, form associations and pursue commercial, industrial and professional activities;
- mineral rights; water rights; and environmental protection.

CENTRAL BANKS

In very broad terms, the role of central banks is to supply and maintain the value of a currency -- that is to manage and administer monetary policy, whereas governments through their treasury or finance departments administer and manage fiscal policy.

Constitutional provisions - sample constitutional texts

The Bonn Agreement on Afghanistan

The Bonn Agreement on Afghanistan states (III.C.4):

Upon the official transfer of power, the Interim Administration shall have full jurisdiction over the printing and delivery of the national currency and special drawing rights from international financial institutions. The Interim Administration shall establish, with the assistance of the United Nations, a Central Bank of Afghanistan that will regulate the money supply of the country through transparent and accountable procedures.

This article provided the basis for the issuance of a reformed currency by Da Afghanistan Bank and for the reform of that bank. Given the positive effects of this reform, it is important to retain it in the new constitution as well.

The German Central Bank

Article 88 of the German Constitution or Basic Law of 1949, as amended, provides for the creation of a 'Federal Bank.' Article 88 stated, 'The Federation shall establish a note-issuing and currency bank as the Federal Bank (Bundesbank). Its functions and competences may within the framework of the European Union be transferred to a European Central bank which is independent and bound to the primary aim of ensuring price stability.'

The American Central Bank

The constitution of the United States of America does not provide specifically for a central bank. Through ordinary Congressional legislation, the American Federal Reserve was created and amendments have been made over time as to its role and functioning and continued independence.

It is generally believed that the Deutsche Bundesbank (the German central bank) and the American Federal Reserve are two of the most independent central banks in the world.

The South African Central Bank

The Constitution of the Republic of South Africa, 1996 provides for a central bank. The relevant provision states the following:

“Establishment

223. The South African Reserve Bank is the central bank of the Republic and is regulated in terms of an Act of Parliament.

Primary Object

224(1) The primary object of the South African Reserve Bank is to protect the value of the currency in the interest of balanced and sustainable economic growth in the Republic.

(2) The South African Reserve Bank in pursuit of its primary object, must perform its functions independently and without fear, favour or prejudice, but there must be regular consultation between the Bank and the Cabinet member responsible for national financial matters.

Powers and functions

225. The powers and functions of the South African Reserve bank are those customarily exercised and performed by central banks, which powers and functions must be determined by an Act of Parliament and must be exercised or performed subject to the conditions prescribed in terms of the Act.”

The Namibian Central Bank

The Constitution of Namibia, 1990, Article 128 provides for a Central Bank. the relevant

provisions state the following:

“(1) There shall be established by Act of Parliament a Central Bank of the Republic of Namibia which shall serve as the State’s principal instrument to control the money supply, the currency and the institutions of finance, and to perform all other functions ordinarily performed by a central bank.

(2) The governing Board of the Central Bank shall consist of a Governor, a Deputy-Governor and such other members of the Board as shall be prescribed by Act of Parliament, and all members of the Board shall be appointed by the President in accordance with procedures prescribed by such Act of Parliament.”

Commentary and suggestions.

The inclusion of a provision for a central bank and the role of that bank in terms of a constitution is a matter which is debated vigorously. The value of money is at risk at all times and countries prosper or fall by the value of their money. Governments do find ways of financing public spending by devaluing their currencies and their actions can result in inflation - that is the loss of the purchasing power of their respective currencies. There is no ideal way of maintaining the value of money and solutions must be found which are politically appropriate and feasible in practice. There is a tendency in all democracies to extend the political sphere and the role of policy-makers into all areas of life. The ideal then is to deprive the legislature of some of its policy-making authority and place the protection of the currency in a neutral or independent institution which pursues the goal of monetary stability and actively stands up for it. The independence of a central bank is a necessary condition but not a sufficient condition to ensure the maintenance of the value of money.

The provisions in the South African constitution leave a great deal of scope for the legislature to regulate the functioning of the Reserve Bank as well as determine the officials who may be appointed to operate the bank. Terms such as ‘balanced and sustainable economic growth’ and ‘regular consultation’ are open to interpretation.

As with the traditional notion of the separation of powers where broadly the powers of a legislature, executive and judiciary are separated to resist tyrannical rule, so should the making of fiscal and monetary policy be separated. Central banks should then through constitutional provisions and ordinary legislation be guaranteed a degree of independence. The question then is how to provide for in a constitution, a trade off between influence on monetary policy by policy-makers and that of a central bank.

To ensure a degree of independence, at a minimum, the tenure and remuneration of the head or governor of the central bank should be guaranteed so as to ensure that he or she cannot be removed for party political or trivial reasons.

A suggested constitutional option to ensure a degree of independence for a central bank would read as follows:

“1. A central bank shall be established to regulate money supply and maintain the value of the currency.

2. Through ordinary statute the structure of the central bank shall be determined.
3. Parliament shall appoint a citizen to head the central bank who has a reasonable acquaintance with monetary policy. The person so appointed shall serve for a renewable term of six years and shall not be removed from office except in circumstances where a serious misdemeanour has been committed or the person has become incapacitated, as defined in ordinary statutory law.
4. To central bank shall act in an accountable and transparent manner and shall report quarterly to the national assembly”.

As with all the sample constitutional texts referred to above, the provisions in a constitution for a central bank need to be supplemented by ordinary legislation.

FISCAL AND MONETARY POLICY DETERMINATION AND MANAGEMENT

The determination of fiscal and monetary policy is the responsibility of central governments. Fiscal authorities find it less easy to respond to a need for restraint or authority when it comes to tax reductions or expenditure increases. Monetary authorities (central banks) if insulated from public pressures - that is if they are awarded a degree of independence - are in a better position to respond to the need for restraint. Their independence from the electoral process gives them more freedom to introduce austerity measures when needed.(Keech 1995:203)

Some also argue for granting some independence to fiscal policy decision making. Since an independent central bank may set monetary policy and is not subject to political pressures, it is more likely to give preference to price stability, lower inflation and more stable growth. By contrast, short-sighted politicians who control fiscal policy and whose future depends upon being re-elected to office, all too often are tempted to reduce for example, tax rates ahead of an election - which can cause inflation.

Fiscal policy is seen in many countries as being less effective than monetary policy in steering and economy. Some argue that a tax system would be simpler and more efficient were an independent agency to manage it. Tax policy could be altered more quickly by an independent agency than by parliament. In many parliamentary democracies, tax reductions or increases have arrived too late. Countries such as Australia and New Zealand have made fiscal policy more transparent and accountable. The Business Council of Australia for example, proposed that an independent structure be established and be given the power to make small adjustments to tax rates in response to the state of the Australian economy without parliamentary approval. In the eyes of many, the latter proposal might be considered radical but could perhaps be a useful innovation to include in a set of economic structures for a new constitution.

A constitutional option to provide for an independent taxation authority might read as follows:

“1. A tax administration authority shall be established to periodically make limited adjustments to tax rates as defined by statutory law.

2. Through ordinary statute the structure of the taxation authority shall be determined.
3. Parliament shall appoint a citizen to head the taxation authority who has a reasonable acquaintance with fiscal policy. The person so appointed shall serve for a renewable term of six years and shall not be removed from office except in circumstances where a serious misdemeanour has been committed or the person has become incapacitated, as defined in ordinary statutory law.
4. The taxation authority shall act in an accountable and transparent manner and shall report quarterly to parliament”.

Raising of tax revenue

Legislation in the form of a taxation bill is necessary to raise revenue. Generally in legislatures, tax bills are treated in a slightly different manner than other legislation. In bi-cameral parliamentary systems, the second chamber has limited powers to block tax legislation. A maximum time limit is usually placed on the second chamber during which it can delay tax legislation. Tax legislation is normally passed by a simple majority in a legislature.

A constitutional option on tax legislation may include the following:

“(1) The national assembly shall raise revenue either through the imposition of personal taxes, company taxes, value added taxes, customs duties and excise duties.

(2) An act of the national assembly shall stipulate the rates at which taxes are to be imposed and such legislation shall take precedence over other legislation and shall be passed by a simple majority.”

Distribution of tax revenue

Besides the administration of tax policy the equitable distribution of tax revenue is also a key function of government.

Chapter 13 of The Constitution of the Republic of South Africa, Act 108 of 1996 provides for, “Equitable shares and allocations of resources”.

This provision states the following:

“214 (1) An Act of parliament must provide for -

- (a) the equitable division of revenue raised nationally among the national, provincial and local spheres of government;
- (b) the determination of each province’s equitable share of the provincial share of that revenue; and
- (c) any other allocations to provinces, local government or municipalities from the national government’s share of that revenue, and any conditions on which those allocation may be made.

In terms of this constitution, a Financial and Fiscal Commission is to be established. Chapter 13 Finance states the following:

220(1) There is a Financial and Fiscal Commission for the Republic which makes recommendations envisaged in this Chapter or national legislation, to Parliament, provincial legislatures and any other authorities determined by national legislation.

(2) The Commission is independent and subject only to the Constitution and the law and must be impartial.

(3) The Commission must function in terms of an Act of Parliament and in performing its functions must consider all relevant factors including those listed in section 214(2).

Appointment and tenure of members

221 (1) The Commission consists of the following women and men appointed by the President as head of the national executive:

(a) A chairperson and a deputy chairperson who are full-time members;

(b) nine persons each of whom is nominated by the Executive Council of a province, with each person nominating only one person;

(c) two persons nominated by organised local government in terms of section 163; and

(d) nine other persons.

(2) Members of the Commission must have appropriate expertise.

(3) Members serve for a term established in terms of national legislation. The President may remove a member from office on the grounds of misconduct, incapacity or incompetence.

The Constitution further stipulates that applicable legislation must take into account factors such as the developmental needs of provinces and local authorities, economic disparities within provinces and the desirability of stable and predictable allocations of revenue shares.

Commentary and suggestions

The redistribution of resources is a contested issues in many countries. If resources are not re-distributed equitably, instability can result which in turn can have major implications for economic performance. Where provincial, regional and local authorities might have taxation powers, the equitable distribution of resources becomes even more important. Regions richly endowed with natural resources could have a larger tax base and thereby be able to promote economic development whereas other areas may not and would require financial resources from elsewhere.

A constitution may make the following provision for a financial commission:

“1. A financial commission shall be established to oversee the equitable distribution of financial resources to provincial/regional/local authorities in terms of applicable statutory law.

2. The commission shall include one member from each province and region of the country, plus an equivalent number to represent special interests and local authorities.

3. A chairperson with the necessary expertise in fiscal matters shall be appointed by the national assembly for a six year renewable term to manage and administer the activities of the commission.

4. The National Assembly may remove a member of the commission on the grounds of incapacity, misconduct or incompetence”.

PROPERTY - PUBLIC AND PRIVATE

Chapter 2: Bill of Rights of the Constitution of the Republic of South Africa, 1996 states the following:

25(1) No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property.

(2) Property may be expropriated only in terms of law of general application -
 (a) for the public purpose or in the public interest; and
 (b) subject to compensation, the amount of which and the time and manner of payment of which have either been agreed to by those affected or decided or approved by a court.

(3) The amount of the compensation and the time and manner of payment must be just and equitable, reflecting an equitable balance between the public interest and the interests of those affected, having regard to all relevant circumstances including -

(a) the current use of the property;
 (b) the history of the acquisition and use of the property;
 (c) the market value of the property;
 (d) the extent of direct state investment and subsidy in the acquisition and beneficial capital improvement of the property and
 (e) the purpose of the expropriation.

This provision continues by referring to the need to bring about equitable access to natural resources and that the state must take reasonable legislative and other measures to foster conditions which enable citizens to gain access to land on an equitable basis.

The Fourteenth Amendment of the United States constitution states that, ‘No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction equal protection of the laws.’ (Siegan 1994:108)

A suggested formulation for inclusion in a constitution:

“Property, land and intellectual property rights

1. All citizens of the country shall have reasonable access to land for settlement, commercial,

pastoral and agricultural purposes. Security of tenure shall be granted. The abrogation of these rights may only be done under conditions defined by statutory law.

2. The property and land adjudication and restitution court shall be empowered to investigate claims and make awards to claimants
3. All citizens have exclusive rights to their writings and discoveries.”

Constitutional draftsmen who wish to secure property and economic rights may consider the following option:

‘Private property and economic interests shall be secure from acquisition, control, possession, damage, or diminution by any branch, commission, agency, official, or officer of government, as follows:

Property rights. Every person has the right, individually or in combination with others, to purchase, acquire, rent, own, use, mortgage, sell, lease, transfer, bequeath, and inherit private property, or any part or portion thereof. Private property includes any asset or thing of value, whether tangible or intangible, real or personal.”

Property and foreign investors

All countries are dependent upon foreign investment. In this regard the Namibian constitution, Article 99, Foreign Investments states the following:

“Foreign investments shall be encouraged within Namibia subject to the provision of an Investment Code to be adopted by Parliament.”

Property and land use rights are a complex issue and depend very much upon historical and other circumstances within a country. Security of tenure is important for individuals to enter into economic activity.

For local and foreign investors to invest in an economy, their property must be secure from possession by others from confiscation. This is a requirement for both private and public property. Property owned by either party must be secure. Moreover, prospective investors need certainty as to what their rights and obligations are concerning taxation, tenure and the repatriation of profits. These issues should be dealt with in a negotiated investment code.

In the South African experience, many of its citizens were deprived of access to land in the past. In many instances, private property has simply been possessed by squatter populations and onerous legal obstacles have been placed in the way of those who wish to have the squatting population removed. Hence there is a need to make land accessible. In Afghanistan the major problem is unclear land titles and multiple claimants. Some basic principles of adjudication and a special court may be necessary. Depending upon national circumstances a constitution drafter can be more precise when referring to property deprivation and compensation.

Intellectual rights and discoveries need protection so as to encourage those in possession of

such rights and discoveries to develop them.

In most countries there are many issues which come before the courts and perhaps more so in a developing country which has experienced a period of upheaval. The tendency in many parts of the world is to establish specialised courts for various purposes. Property, land mineral, water, environmental and intellectual rights are increasingly in dispute and a specialised court provided for in a constitution might address this need. A constitutional option might be worded as follows:

SPECIALISED COURT

Adjudication and restitution court.

“1. A court shall be established comprising specialised divisions for the adjudication of disputes and restitution of claims in the following areas: property, land and agricultural rights, mineral reserves, water resources, and environmental management.

2. The adjudication and restitution court shall be headed by suitably qualified judicial officials who shall be guaranteed tenure of office by ordinary statutory law.

3. The structure and functioning of the court shall be provided for by ordinary statutory law.”

LABOUR AND PROFESSIONAL ASSOCIATIONS

Chapter 2: Bill of Rights of the Constitution of the Republic of South Africa, 1996 states the following:

23 (1) Everyone has the right to fair labour practices.

(2) Every worker has the right-

(a) to form and join a trade union;

(b) to participate in the activities and programmes of a trade union; and

(c) to strike.

(3) Every employer has the right -

(a) to form and join an employers' organisation; and

(b) to participate in the activities and programmes of an employers' organisation.

(4) Every trade union and every employers' organisation has the right-

(a) to determine its own administration, programmes and activities;

(b) to organise; and

(c) to form and join a federation.

(5) Every trade union and every employers' organisation and employer has the right to engage in collective bargaining. National legislation may be enacted to regulate collective bargaining.

This latter provision must comply with section 36(1) which in turn states that no rights as contained in the Bill of rights may be limited.

(6) National legislation may recognise union security and arrangements contained in collective agreements. To the extent that the legislation may limit a right in this Chapter, the limitation must comply with section 36(1) referred to above.

Suggested options for inclusion in a constitution:

Economic rights

“Every person has the right, individually or in combination with others, freely to practice the occupation, profession, or trade of his or her choice, freely to establish, maintain, and operate a commercial enterprise, and freely to produce and distribute goods and services”.

Contract rights

“Every person has the right, individually or in combination with others, to enter into binding agreements containing any and only provisions of their choice.’

Commentary

For a free market or a mixed economy irrespective of the level of development, to perform with a maximum degree of success, certainty and predictability is necessary. Arbitrary actions on the part of a decision-making authority do not promote economic activity. Entrepreneurs must be granted the space to make their own choices and when entering into contracts and those contract must be upheld and be enforceable through a legal system.

Suggested inclusion

Right to association and organisation

“Every person has the right to associate and to organise or to belong to or not to belong to any labour, professional or employer organisation that he or she so chooses.”

Commentary

The opportunity to join a union and to organise in the labour field or to become a member of an association whether it be labour based, employer based or professional based, is critical to the functioning of the economic system in a country irrespective of the level of development. Although a country may not be highly industrialised, the freedom to associate is important in the longer term for the prospective investor or professional who might wish to do so in the future.

Another precedent for the inclusion of economic rights in a constitution is the Basic Law for the Federal Republic of Germany of 23 May 1949 as amended by the Unification Treaty of 31 August 1990, Article 9 (3) for example, states that, ‘The right to form associations to safeguard and improve working and economic conditions shall be guaranteed to everyone

and to all occupations' and the right to choose an occupation is provided for in Article 12. Property, right of inheritance and restraints on the taking of property is provided for in Article 14.

A number of economic rights and freedoms are included in the constitutions of emergent east European states. They include the rights to private property and the rights of employees to, for instance employment and influence in working life. The Slovak constitution lays down that everybody has the right to own property and the right of inheritance is guaranteed. The Hungarian constitution states that the country has a market economy and public and private property is to receive equal consideration and protection under the law. The Hungarian constitution also recognises the right to enterprise and freedom of economic competition. In the Romanian constitution, it states that no property may be expropriated except on the grounds of public utility, and this may only take place in terms of the law and just compensation shall be paid in advance.(Lane 1996:126)

Agricultural rights

“1.Agricultural land within the country shall be conserved for all those who wish to use it productively.

2. Agricultural activity shall be protected wherever practical.

3.Security of tenure on agricultural land shall be granted.

4. The regulation of this provision shall be done by statutory law”.

Commentary

Agricultural rights are also complex issues. For individuals to pursue agricultural activities they require security of tenure on their land and certainty in order to pursue long term plans and goals. Statutory provisions must also regulate these rights and a special court might also adjudicate on these rights.

Mineral rights

Suggested inclusion

“Public enterprises and private individuals and enterprises shall have reasonable access to the mineral resources of the country. The regulation of this provision shall be done by statutory law.”

Commentary

Mineral rights can involve many valuable and highly sought after resources. Also those who have already or are granted access to mineral rights require security of tenure and certainty in order to benefit economically from those rights. The determination of who owns these rights should be done by statutory provisions which must also regulate these rights. A special court

as suggested above might be established to adjudicate on these rights.

Water rights

Suggested inclusion

“All residents of the country shall have reasonable access to water resources for industrial, agricultural and domestic purposes. The regulation of this provision shall be done by statutory law.”

Commentary

Water is a key resource for all humanity. Access to water must be carefully considered in statutory law. Similarly a specialised court should be set up to adjudicate on these rights.

Environment

The Constitution of the Republic of South Africa, 1996 includes the following:

24 Everyone has the right -

- (a) to an environment that is not harmful to their health or well being and
- (b) to have the environment protected for the benefit of present and future generations through reasonable legislative and other measures that -

- (i) prevent pollution and ecological degradation,
- (ii) promote conservation; and
- (iii) secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development.

Commentary and suggestions

I would suggest that the extract from the South African constitution is sufficiently broad enough to be included as is in another constitution.

Environmental issues have come into focus in ordinary legislation since Agenda 21 which resulted from the Summit on Sustainable Development held in Rio de Janeiro in 1992 and the World Summit on Sustainable Development (WSSD) held in Johannesburg, South Africa in 2002. The South African constitution is one of the few constitutions in the world to include provisions on the environment. The current thinking in many parts of the world is that pollution whether it be of land air or water can be detrimental to economic performance. Further, tourism is believed to be an important generator of economic wealth and the conservation of the environment is important in assisting in its development..

CONCLUDING OBSERVATIONS

Increasingly in the literature on constitution drafting, links are being made between politics and economics and more particularly a relationship is being established between constitutions, institutions and economic performance. Proponents of this line of thought argue that the material progress of human kind is as affected by the choice of economic, legal and political institutions as by its resource endowment and technological progress.

This submission identified a number of key economic institutions, mostly those already provided for in selected constitutions of the world, which may be included in a constitution which affects the production and distribution of wealth. The economic rules included in a constitution should be seen as only the top layer of a whole series of economic rules and institutions, which includes simple legislation, court interpretations and also institutions in the private sector such as investment codes which are not backed at all by the state.

It must also be re-emphasised that normative economic provisions included in a constitution do not suffice as the only prerequisites necessary for the production and distribution of wealth. Political provisions such as for example, the franchise, restraints on the exercise of political power, and human rights matters can affect the production and distribution of wealth. A disputed election result produced by for example, an improperly managed election, can lead to political instability and can have major implications for the production and distribution of wealth. The inclusion then of economic provisions, no matter how they might be identified, is not a sufficient guarantor of the production and distribution of wealth.

These are some of the considerations which must be taken into account by constitution drafters when including economic rights and structures. There is no optimal constitution that provides for all eventualities and remains unchanged. One cannot provide for all eventualities in a constitution. a constructional document would become too bulky and inaccessible. Ultimately, a constitution must be designed to meet the needs and aspirations of the majority of the people who live under them. This is the goal for which constitution drafters must strive.