

FIRST REPORT OF THE TECHNICAL COMMITTEE ON CONSTITUTIONAL ISSUES TO THE NEGOTIATING COUNCIL: 13 MAY 1993

1. INTRODUCTION

- 1.1 Our instructions require us to prepare systematic documentation to facilitate discussion in the Negotiating Council. It has been made clear to us that we are not ourselves to engage in negotiation. What is expected is that we should address the issues raised in the Codesa documents, the discussions in the Negotiating Forum and the Negotiating Council, and the submissions and inputs of the participants in the current negotiating process which are relevant to the terms of reference of our committee, and on the basis of such information prepare documentation for the Negotiating Council which will enable the debate to be taken forward in that forum. For that purpose we can also have regard to submissions that may be made to our committee in writing by individual experts and interest groups.
- 1.2 On one issue we have been asked to go beyond these instructions and to make recommendations to the Planning Committee. That issue concerns the process to be followed in dealing with the debate on the boundaries, powers and functions of regions. This is clearly a core issue in the negotiations and directly relevant to the disputes which exist in relation to the form of the state and self determination. The way in which this matter is dealt with will have a bearing on several matters that are included in our terms of reference.
- 1.3 We were asked to make our report to the Planning Committee by Thursday 13 May, and to deal with the process for taking the regional debate further in that report. We have done so.
- 1.4 We are of the opinion that the debates in the Planning Committee and the Negotiating Council will be facilitated by a brief analysis of the constitutional issues that have been identified in our instructions as being the concern of our committee. The issues are interrelated and reflect in particular the concerns of the different participants in respect of the legitimacy of the constitution making process, and the position of minorities in any new constitutional order. The process for determining the boundaries, powers and functions of regions could be crucial to finding an acceptable solution to these fundamental concerns.
- 1.5 The framework within which the earlier debates took place, and the particular issues that have been raised appear from the documents with which we have been briefed. They include three documents dealing with deliberations at Codesa. These are a bundle of Codesa agreements, a summary of these agreements and a consolidated document based on Codesa reports. We will refer to these documents as the agreements, the summary and the consolidated document respectively. We have also been briefed with a resolution on the transition process taken by the Negotiating Forum on the 1st and 2nd April, extracts from minutes of the Negotiating Council of the 26th April, 30th April

and the 7th May, the declaration of intent on the negotiating process made by the Negotiating Council on the 30th April, and a transcript of discussions held in the Negotiating Council of matters relating to the transitional process.

1.6 We have not yet received representations from all the participants in regard to these issues. Once we have the representations we will be able to identify the compatibilities and differences that may exist. We may then be able to suggest appropriate ways of addressing these matters.

2. We begin our report by setting out our views on the relationship between the questions concerning self determination and the form of state and the other issues which form part of our terms of reference. As directed, we have given consideration to each of the issues mentioned in our terms of reference, using the terminology thereof.

3. **SELF-DETERMINATION**

3.1 Self-determination, in the sense of making one's own choices, developing one's own potential, securing one's own well-being and of not being subjected to undue external pressures and domination, is certainly a very basic human need and aspiration. Similarly, it has to be conceded that nations and national sub-groups have similar aspirations. It is therefore only natural that the law, which is a normative system defining and regulating human freedoms and aspirations, should also give recognition to this very essential need. For this reason it is unproductive and not even necessary to contest the existence of the general right of self-determination of individuals, organised groups and nations. Stated succinctly, self-determination, being the expression of a basic urge to be master of one's own destiny, is recognised in law. What is of importance for the purposes of this report, is not the existence of such a right, but the **actual content, scope, application and protection of this right.**

3.2 In **international law**, the right of self-determination has been one of the strongest factors in promoting the liberation of countries and peoples from colonial rule, foreign subjection and external domination. In recent years some countries and peoples, especially in certain parts of Eastern Europe, have exercised their right of self-determination to liberate themselves from foreign rule.

3.3 In **national legal systems**, the right of self-determination manifests itself at different levels of society and of the life of the nation, as regards the individual as well as groups. It would be wrong to assert that the right of self determination is a right which finds application in only one sphere of life or pertains only to some individuals or groups. For this reason, it is more appropriate to speak of the **rights** of self determination. In order to understand the scope of the rights of self-determination and their manifestations in a national legal system, it is necessary to distinguish between the recognition and the protection of the rights of self-determination and, at the same time, to appreciate the limitations which

the law imposes on these rights (in the same way that all rights and freedoms have certain limits).

3.4 In a democratic constitutional system, the rights of self-determination are recognised in different ways:

3.4.1 Generally, when mention is made of the rights of self-determination, it is immediately thought of the rights of organised and other national groups to protect themselves from undue influence or coercion. It is often forgotten that the individual's rights to self-determination takes precedence and that virtually no collective rights of self-determination can be recognised effectively without ensuring the individual's rights to freedom, own choice and self-fulfilment. Individual self-determination covers a whole range of human activities: thus, the right to life, liberty and property and public freedoms of contract, conscience, movement, association, etc., all serve to secure the individual's overall right to self-determination, in one way or another. (It is noteworthy that the German Constitution goes even further and expressly recognises the right to the full development of every person's personality).

3.4.2 Collective rights of self-determination necessarily require preceding constitutional rights and freedoms such as freedom of association, assembly, conscience, etc. to give effect and meaning to these rights. It is self-evident that no group or groups will be able to maintain their identity and pursue their interests if they are not allowed to contract freely, associate at will, disseminate their views openly, etc. Collective rights of self-determination, either separately or conjunctively, are exercised in different ways: in the labour field, trade unions, either on their own, or with employers' organisations, exercise collective rights of self-determination by means of collective bargaining, the withholding of labour, etc.; in the civic field citizen organisations also exercise their collective rights of self-determination in various recognised forms of group activities, be they of social, cultural, linguistic or religious nature (as a matter of fact, it is through the exercise of these rights of self determination that the foundations for a civil society are established and fortified); in the political field collective rights of self-determination are best ensured by a pluralistic electoral system which allows free participation in elections and institutions of government.

(In this respect it might very well be necessary to have representative institutions on different levels of government to give greater opportunities of representation to political parties which enjoy less support on the national level, for effective representation, for it is clear that a political party with stronger regional support will feel more comfortable in the exercise of its right of self-determination if it is well-represented in the regional institutions where its support lies.) What needs to be emphasised, is that collective rights of self-determination in a democratic society are not singular, solitary rights which can be claimed and exercised as such, but entail a totality of specific legal rights and freedoms which groups can rely

on in the context of predetermined social, economic and political relationships.

3.4.3 The rights of self-determination of linguistic, cultural and religious groups are of particular importance, especially if these groups constitute minorities *vis-à-vis* the general population. These groups are often well-organised and influential and this allows them to exert influence and demand protection in all spheres of life and levels of society. This is not always the case, however, and especially in the face of an uncaring or unsympathetic and even hostile majority the law would require special recognition and safeguarding of linguistic, cultural and religious expression (e.g. allowing mother-tongue instruction, special schools, support of cultural activities, etc.). In this respect Article 27 of the International Covenant on Civil and Political Rights still provides the most useful criterion: " In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language. "

3.5 In a democratic state, individual and collective rights of self-determination (which are, as explained, a totality of multi-faceted rights and freedoms pertaining to individuals and groups) are protected and safeguarded by various legal instruments and state institutions, the most important being:

3.5.1 A justiciable bill of rights and an independent judiciary.

3.5.2 Watchdog bodies, such as ombudsmen, independent human rights commissions and generally a free press and an open society.

3.5.3 Regional and local institutions as well as national bodies in which collective interests can be accommodated.

3.5.4 Specially recognised and accredited linguistic, cultural and religious bodies of a representative nature and freely associated which can act in conjunction with governmental bodies and institutions to safeguard the interests of cultural, linguistic and religious groups.

3.6 Rights of self-determination, whether they are individual or collective, and which form the basis of a democratic society, have certain limitations. They may not be exercised in such a way that they impinge upon the rights and freedoms of others or endanger national safety or the integrity of the state. It is for this reason that international law is extremely hesitant to recognise any unilateral secession from national state territory. What is of the utmost importance is that the law will not recognise or enforce rights of self determination which may lead to discrimination or unequal treatment on the basis of colour, race, gender, etc. In other words, this means that the law does not recognise one person's rights of self-determination in such a way that it infringes on another's rights, particularly where issues of colour, race, gender, ethnic origin or creed are concerned.

3.7 Conclusion, The Committee is convinced that, bearing in mind what has been said about the contents, scope and limitations of these rights of self-determination, a much more fruitful and constructive discussion will follow in the Council if these rights are viewed and assessed under the headings of concrete topics such as the recognition and protection of fundamental rights and freedoms; regionalism and the form of state; representative institutions; free political activities; etc.

4. **FORM OF STATE**

The second report of the Planning Committee to the Negotiating Council (29/4/93) deals with the form of state in paragraphs 3.2.1 and 3.2.2. We are in substantial agreement with the views expressed in these paragraphs.

The form of state will be shaped by decisions taken in regard to the structures of the Constitution. Concepts such as the separation of powers, the entrenchment of fundamental rights, the powers of the judiciary, the boundaries, powers and functions of the regions, and the like, all have a bearing on the form of state. It seems to us that the most expeditious way of dealing with this matter is to deal with these component parts. By resolving them, the Negotiating Council will determine the form of the South African state. Our report on Regional Demarcation and Related Issues (13/5/93) to the Planning Committee is consistent with this approach and should serve to advance the debate on the form of state.

5. **CONSTITUTIONAL PRINCIPLES**

The process of developing constitutional principles has as its object the establishment of a broad framework within which a future constitution could be developed. The development of such a framework commends itself as a sensible mechanism for the promotion of a successful resolution of constitutional negotiations.

A multi - party agreement on constitutional principles would in the first place provide fundamental direction to the constitutional debate, and secondly, should they be formalised as a set of principles binding on further constitution making, they will give direction and security to all relevant interests. The adoption of a comprehensive set of constitutional principles could therefore be an expression of a national consensus on the constitutional way forward for South Africa.

From the documentation provided to this committee, it appears that a broad area of agreement has already emerged. Thus the notion of a constitutional state seems to enjoy wide acceptance, implying the establishment of a modern democracy based upon universal adult suffrage, the supremacy of the constitution, the separation of the legislative, executive and judicial powers and justiciable fundamental rights binding all organs of the state. Furthermore it has become clear that the idea of the constitutional distribution of governmental powers and functions between the different levels of

government has received general acceptance. These and other principles, when finalised and formalised, should serve as an important factor in the debate on the future form of state, the constitution making process and self determination.

The Committee therefore urges the Negotiating Council to discuss the content of a set of constitutional principles as a matter of urgency. As soon as this may be practicable, the Committee proposes to compile a report on the inputs received from all parties regarding constitutional principles in which it will identify areas of commonality, and issues which require further discussion and debate within the Negotiating Council.

6. **CONSTITUTION MAKING BODY/CONSTITUENT ASSEMBLY**

- 6.1 As appears from paragraph 5 of this report the principles are directed towards the development of a constitutional structure which would offer a democratic form of government, protection of minority interests, and safeguards against the abuse of power. They would provide guarantees in respect of such matters in an elected constitution making body/constituent assembly.
- 6.2 It appears to have been accepted by working groups 2 and 3 at Codesa that the final constitution would be drawn up by an elected constitution making body/constituent assembly within the framework of agreed constitutional principles, and that the body/assembly would also be vested with powers enabling it to act as a interim legislature. See: The report on the status of discussions in working group 2 at page 33 of the agreements, and paragraph 2 of the section dealing with the constitution-making process at pages 34 to 36 of the consolidated document.
- 6.3 The Declaration of Intent on the Negotiating Process adopted by the Negotiating Council on 30 April 1993 records a commitment by the Council to reach agreement on binding constitutional principles, the constitutional framework and the constitution making process in terms of which elections will be held. It contemplates that a date will be set before the end of May 1993 for an election to be held not later than the end of April 1994.
- 6.4 If the Negotiating Forum agrees in due course that the final constitution will be drawn up by an elected constitution making body/constituent assembly within the framework of agreed constitutional principles, then in addition to agreement upon the relevant principles, agreement will also be required on the following matters:

Constitution Making

- 6.4.1. How the constitution making body/constituent assembly will be structures, including whether it will it be unicameral or bicameral
- 6.4.2 How many members will it have.
- 6.4.3 What electoral system will be adopted.

- 6.4.4 Who will be entitled to vote.
- 6.4.5 How will decisions be taken.
- 6.4.6 Will time frames be set for the taking of decisions.
- 6.4.7 How will conflicts be resolved and deadlocks be broken.
- 6.4.8 How and by whom will questions concerning the application of the constitutional principles be resolved.

Acting as a Legislative Function

- 6.4.9 How will the body/assembly be composed, how will it function when it acts as a legislature.

A Transitional/Interim Executive

- 6.4.10 How will the transitional/interim executive be appointed, how will it be composed and how will it take decisions
- 6.4.11 A constitutional framework dealing with the above matters will be required. This will have to be done either through an amendment to the existing constitution or through the adoption of a transitional/interim constitution.

- 6.5 If the Negotiating Forum decided upon a process other than the one envisaged in 6.4, it should specify the details and constitutional and legislative framework which will be necessary to implement it.

7. TRANSITIONAL/INTERIM CONSTITUTION

- 7.1 A Transitional/Interim Constitution will be necessary if it is decided by the Negotiating Forum that the Constitution should be adopted by an elected constitution making body/constitutional assembly within the framework of agreed constitutional principles. The transitional/interim constitution will ensure constitutional continuity and provide the legislative framework for the functioning of a constitution making body/constituent assembly with legislative power.
- 7.2 If this process is adopted the Negotiating Forum will have to reach agreement on the structure of the transitional/interim constitution, which will require it to give consideration to and take decisions on the following matters:

- 7.2.1 The constitutional principles by which the constitution making body/constituent assembly will be bound.
 - 7.2.2 The constitutional framework governing the functioning of the assembly when it sits as a constitution making body.
 - 7.2.3 The constitutional framework governing the functioning of the assembly when it sits as a legislature.
 - 7.2.4 The way in which the transitional executive will be composed, what its powers will be and how it will function.
 - 7.2.5 Regional government, including the position of the self governing territories and the TBVC states prior to and subsequent to the election of the constitution making body/constituent assembly.
 - 7.2.6 Local government, including the periods prior to and subsequent to the election of the constitution making body/constituent assembly.
 - 7.2.7 Whether provision should be made in the transitional constitution for the protection of certain fundamental rights. This issue is being considered by the Technical Committee on Fundamental Rights in the Transition.
 - 7.2.8 Constitutional amendments during the transitional period.
 - 7.2.9 The structure, functioning and powers of the judiciary, including whether there should be a special constitutional tribunal or court to deal with matters arising out of the provisions of the transitional constitution.
 - 7.2.10 National symbols
 - 7.2.11 Miscellaneous provisions including transitional provisions needed to ensure constitutional and legal continuity and effective government. Under this heading would be included any special structures or procedures that the Negotiating Forum may require to be included in the interim constitution.
- 7.3 These matters will have to be addressed in the Negotiating Council as a matter of urgency if the commitment made in the Declaration of Intent is to be met.
 - 7.4 If we receive instructions to that effect we would be able to prepare a draft transitional/interim constitution for discussion and development by the Negotiating Council. The instructions should contain sufficient detail to direct us in regard to the main structures of the contemplated constitution.

8. **TRANSITIONAL REGIONAL/LOCAL GOVERNMENT**

This is dealt with in paragraph 7.2.5 and 7.2.6 above.

9. **FUTURE OF THE TBVC STATES**

If reincorporation takes place, it will be necessary to formulate the draft legislation according to which this will happen, and to address the practical implications of absorbing existing administrations into appropriate regional and local structures. The issue of the future of these states is closely linked to the demarcation of regions and regional powers. It requires urgent resolution, to facilitate the work of the Commission referred to in our report to the Planning committee on Regional Demarcation and Related Issues of 13 May 1993.

10. **Submissions by Parties**

As at 18h00 on 13 May we had received submissions from the following participants. These reports will be discussed as soon as possible.

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| 1. ANC | 12/O5/93 | Form of state and Constitutional principles |
| 2. AZANYU | 27/O4/93 | Demand for a constituent assembly |
| 3. AVU | 13/O5/93 | Constitutional proposals |
| 4. Bophutatswana | 12/O5/93 | Submission on constitutional matters |
| 5. Ciskei | 12/O5/93 | Constitutional Affairs |
| 6. Democratic Party | 12/O5/93 | Submission re constitutional Party matters |
| 7. Dikwankwetla | 28/O4/93 | Constitution making process |
| 8. IFP | 13/O5/93 | Heads of argument and positions on the form of state |
| 9. PAC | 29/O4/93 | Input on constitutional principles and the form of state |
| 10. SA GOVT | 12/O5/93 | Principles governing constitution making in South Africa |
| 11. Venda | 13/O5/93 | Position paper on the form of state |