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TC2/26(1)

CONSTITUTIONAL ASSEMBLY
THEME COMMITTEE 2
STRUCTURE OF GOVERNMENT

Thursday
10 August 1995
14h00-18h00
M46

DOCUMENTATION

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CONSTITUTIONAL ASSEMBLY
THEME COMMITTEE 2
STRUCTURE OF GOVERNMENT
THEME COMMITTEE MEETING

Please note that a meeting of the above Committee will be held as indicated below:

Date : Thursday 10 August 1995
Time : 14h00-18h00
Venue : M46

AGENDA

- 1. OPENING AND WELCOME**
- 2. MINUTES OF PREVIOUS MEETINGS**
- 3. REPORT ON SELF-DETERMINATION**
(see this documentation pack pp 2-10)

Decision required:
Approval and referral to Constitutional Committee

- 4. ANY OTHER BUSINESS**
- 5. CLOSURE**

HASSEN EBRAHIM
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CONSTITUTIONAL ASSEMBLY

THEME COMMITTEE 2

STRUCTURE OF GOVERNMENT

SELF-DETERMINATION / VOLKSTAAT

First Draft Progress Report of the Ad hoc Committee on Self-determination

4 August 1995

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1. Overview

1.1 The mandate is set out in Principles XII and XXXIV (Schedule 4) and Section 184B of the 1993 Constitution, as amended.

1.2 The specifics of this mandate are:

- Should the final Constitution provide for self-determination?
- If so, should this take the form of a territory, Volkstaat, for example - or are there other recognised ways of expressing such a desire?
- What types of community could be said to share such a heritage so as to justify a form of self-determination?
- What level of support should be shown within a community as a prerequisite for self-determination?

1.3 The Volkstaat Council (established in terms of the 1993 Constitution, Section 184B) recently published its First Interim Report in May 1995. It was officially referred to this Ad hoc Committee of Self-determination for further consideration. This was made available at the time of the In-House Workshop on Self-determination.

1.4 An In-House Workshop on Self-determination took place on Monday 26 June 1995.

2. Issues

Current constitutional issues and the 1993 Constitution which govern them, are:

2.1 "Self-determination" is not listed as a fundamental right in Chapter 3.

2.2 Citizenship : Section 5, 20 and 33(1) of the Constitution are relevant.

Section 5: There shall be a South African citizenship, the right to which (including the loss of citizenship), shall be regulated by an Act of Parliament, subject to sections 20 and 33(1).

Section 20 : Every citizen shall have the right to enter, remain in and leave the Republic, and no citizen shall, without justification, be deprived of his or her citizenship.

Section 33(1) : The rights entrenched in the Constitution may be limited by law, but only in prescribed ways.

2.3 Language, Culture and Community : Sections 3, 31 and 32 are relevant.

Section 3: Afrikaans is one of the 11 official languages at the national level and conditions must be created for the promotion of their equal use and enjoyment. Rights relating to language must not be diminished and an Act of Parliament must make provision for rights relating to language and the status of languages existing only at regional level to be extended nationally.

An Act of Parliament will establish an independent Pan South African Language Board to promote these goals.

Section 31: Every person shall have the right to use the language and to participate in the cultural life of his or her choice.

This section should be read in conjunction with the right to freedom of association (section 17), the limitations clause (section 33(1)) and the existence of no less than 11 official languages (section 3).

Section 32: Every person shall have the right to basic education, equal access to education, instruction in the language of choice (where it is reasonably practical), but there shall also be a right to educational institutions based on a common culture, provided that there shall be no discrimination on the grounds of race.

These rights should be read in conjunction with the provisions on equal treatment (s8(2)), affirmative action (s8(3)(a)), and the right to establish private schools (s32(c)), provided these are inclusive and non-discriminatory (s 32(c)).

2.4 Self-determination and the Volkstaat as an integral (provincial) part of South Africa: Sections 48, 50, 61 and 62 are relevant.

Section 48(1): The Senate shall be composed of an equal number of senators from each province, nominated by the parties represented in a provincial legislature.

Section 50: No person shall be qualified to become or remain a senator unless he or she is qualified to become a member of the National Assembly.

Section 62: Any Bill amending the Constitution shall, for its passing by Parliament be required to be adopted at a joint sitting of the National Assembly and the Senate by a majority of at least two-thirds of the total number of members of both Houses. For the amendment of sections 126 (on the legislative competencies of provinces) and 144 (on the executive authority of provinces), separate passage by both Houses by a two-thirds majority of each House is required for amending the constitution: provided that the boundaries and legislative competences of a province shall not be amended without the consent of a relevant provincial legislature.

- 2.5 Provincial boundaries:** Section 62, Chapter 9, and Schedules 1, 4 and 6 are applicable.

Section 62 prescribes the procedures for the amendment of the constitution (see 2.4 above).

Chapter 9 contains extensive provisions on provinces, provincial legislative authority, provincial executive authority, finance and fiscal affairs, provincial constitutions and a Commission on Provincial Government.

Schedule 1 defines the boundaries of each of the nine provinces.

Schedule 4 sets out 34 principles which are to serve as norms for the finalisation of the new constitution to be written by the Constitutional Assembly. This is to be read in conjunction with sections 71-74 of the Constitution.

Schedule 6 lists the competences of provinces, which, read in conjunction with other provisions in the Constitution (s 126), imply concurrent rather than exclusive powers.

- 2.6 Provincial constitutions:** Sections 160-162 are relevant, and refer to the adoption of provincial constitutions, the development of provincial dispensations and the election of new provincial governments. However, no mention is made of a Volkstaat (i.e a different kind of province), but there is nothing that prohibits the creation of another province, subject to provisions set out in the Constitution (e.g another province in the Eastern Cape).

- 2.7 Popular support:** what level of support should be shown within a community as a prerequisite for self-determination?

Principle XXXIV(2) is relevant where it stipulates that the Constitution may give expression to any particular form of self-determination provided there is substantial proven support within the community concerned for such a form of self-determination.

- 2.8 Incrementality:** is enough scope provided for in the case of an incremental approach to self-determination, e.g minority autonomy and/or cultural or community councils and/or corporate self-determination and/or ethnic self-determination and/or Cultural Councils and/or local and regional councils and/or tenth province and/or relations with other institutions and/or autonomous Volkstaat, its territory and boundaries?

Sections 1(1), Chapters 3 and 9, and Principle XXXIV are relevant.

Section 1(1), read in conjunction with Principle XXXIV, does not provide for secession, be that ethnic or otherwise. Self-determination is therefore, in terms of the 1993 Constitution, to be exercised only within the existing boundaries of a single, sovereign South African state.

Chapter 9 and **Principle XXXIV** apply to processes of federalisation/provincialisation (i.e sub-national autonomy), but without providing for "escape clauses" e.g secessionism.

Chapter 3 on fundamental rights, likewise, stops short of legitimising ethnic self-determination (it does however provide for freedom of association and political rights). Minority rights in the form of religion, language and culture, are expressly recognised in the sections on basic human rights in the 1993 Constitution.

- 2.9 Contextual Comment:** The central issue in this report as well as in the submissions received so far (see 3 hereunder), related to the question of "self-determination" in South Africa.

In the light of hereof, many proponents of self-determination / Volkstaat in their submissions to the Constitutional Assembly pointed out that Principle XXXIV was included in the 1993 Constitution at a late stage, without amending the rest of the Constitution in any significant way, except for the inclusion of sections 184A and B, providing for the establishment and functions of the Volkstaat Council.

The interpretation of the list of issues (2.1 to 2.8 above) should therefore be seen in this light. Hence our proposal in paragraph 6, where an "open-ended" approach is suggested. The implication of this is that other Theme Committees should also be notified about this problem, otherwise coherence may be lost.

3. Submissions

In response to Constitutional Assembly invitations for submissions on self-determination / Volkstaat, the following have been received (as at 25 July 1995):

3.1 Individuals

A total of 68 individuals have responded as follows:

- * approximately one-third said "No" to self-determination / Volkstaat;
- * approximately two-thirds gave a qualified "Yes":
 - over half of those proposed an Afrikaner Volkstaat;
 - approximately one-third of those proposed self-determination, (i.e. stopping short of a Volkstaat); and
 - a few made diverse, non-related, proposals e.g. two said apartheid should be re-introduced; one requested a Zulu Volkstaat; one a Griqua Volkstaat; and one said something about vehicle registration numbers.

3.2 Organisations

Three organisations have responded so far: the Afrikanerbond; the Afrikaner Freedom Foundation; and the Volkstaat Council.

3.3 Political Parties

Three political parties in Parliament have responded so far: the ANC, the National Party and the PAC. The Conservative Party (not represented in parliament) also responded.

4. Agreements

4.1 There are very few non-contentious issues, between individuals, organisations and parties.

4.2 Those who agree that there should be no self-determination / Volkstaat in whatever form, are approximately one-third of the individuals and the PAC.

4.3 Those who agree that the process of seeking solutions to self-determination / Volkstaat should or could continue, include 38 of the 68 individuals, the Afrikanerbond, the Afrikaner Freedom Foundation, the Volkstaat Council, the ANC, the NP and the Conservative Party. However, they all differ on details.

4.3.1 Agreements on an Afrikaner Volkstaat:

A total of approximately one-third of the 68 individuals, the Afrikaner Freedom Foundation, the Volkstaat Council (not the Afrikanerbond), and the Conservative Party, proposed a Volkstaat. On substance, however, there is very little agreement, except that they all tend to say that a Volkstaat (as an expression of self-determination) is a fundamental right, also linked to the rights to language, culture and community and the freedom of association. This would imply separate Volkstaat citizenship. The Conservative Party made extensive proposals on citizenship.

Otherwise there are very few, or no agreements on boundaries, the details of a Volkstaat constitution, required degrees of popular or proven community support, and whether the Volkstaat could be introduced incrementally. The Volkstaat Council is the only body that provides for incrementalism. It is also implicit in the proposals of the Afrikaner Freedom Foundation.

4.3.2 Agreement of self-determination : Cultural Councils

A total of approximately one-sixth of the 68 individuals, the Afrikanerbond and the National Party, agreed that self-determination (without a Volkstaat) should be investigated further.

The Afrikanerbond and the National Party propose the establishment of Cultural Councils, as an expression of self-determination in respect of language, culture and community. Their proposals have no implications for citizenship, boundaries, provincial constitutions, popular support or incrementality. They emphasise the voluntary aspect, but do provide for statutory recognition.

The proposals of the Afrikanerbond are the most comprehensive, and include

not only the question of Cultural Councils, but other aspects of the new Constitution as well. It does however not provide for the listing of self-determination as a fundamental right in the chapter on Fundamental Rights.

While the NP also proposes Cultural Councils, the details are different from those of the Afrikanerbond.

5. Disagreements

- 5.1** The biggest disagreements relate to the position on (a) no self-determination in the ethnic and/or cultural sense at all; (b) proposals on cultural self-determination, and (c) proposals on territorial self-determination, including secession.
- 5.2** The ANC tends to say "let the process develop", while neither opposing self-determination / Volkstaat, nor endorsing any specific form of it.
- 5.3** On the form of self-determination, the major disagreements are between the proponents of cultural self-determination (e.g Afrikanerbond and NP) and the proponents of territorial self-determination (e.g Afrikaner Freedom Foundation, Volkstaat Council and the Conservative Party).

5.3.1 Cultural Councils: The Afrikanerbond provides for voluntary Cultural Councils, linked mainly to language communities. Councils are appointed, not elected, and their functions are mainly advisory. There may be provincial and local councils. Councils ought to be recognised by statute.

The NP's proposals are slightly different. Under NP proposals, Councils shall generally be elected, not appointed, and in addition to advisory functions, also have decision-making powers on a specified list of culture-related competences.

5.3.2 Volkstaat: Two models are proposed: a Volkstaat as part of South Africa, i.e in a federal-type set-up (e.g the Volkstaat Council); and a Volkstaat outside South Africa, i.e proposals in favour of a sovereign, secessionist state (e.g Afrikaner Freedom Foundation and the Conservative Party). However, the CP proposes a confederal framework for the relations between the Boer Republic (see hereunder) and South Africa.

The Volkstaat Council rejects the idea of a tenth province. It proposes, instead, the establishment of a constituent Afrikaner state within the existing South African boundaries. It emphasises strongly that this is not corporate self-determination either. Eventually an independent Volkstaat must be pursued - whether inside or outside South Africa is not quite clear. The proposals also provide for boundaries.

In the light hereof, the Volkstaat Council's proposals may be seen as incremental.

The other model, that of immediate partition, is proposed by the Afrikaner Freedom Foundation and the Conservative Party.

The Afrikaner Freedom Foundation addresses the issues of an own Volkstaat citizenship, relations with the RSA, a Bill of Rights, the position of Afrikaners not residing within the borders of the Volkstaat, and finally, takes the Northern Cape as the region in which the Volkstaat should be considered.

The Conservative Party proposes a sovereign Boer Republic (within a South African Confederation), with its own citizenship, legislative authority, executive authority, President, public service, judiciary, military and local government. The proposals make no mention of specific Volkstaat boundaries, nor of how much popular support will be necessary for the establishment, or whether incrementally is acceptable.

6. Possible approaches relating to conflicting positions

In the light of the issues identified in paragraph 2.1 to 2.8, especially 2.9, as well as the nature of the submissions received (see paragraphs 3, 4 and 5), the Ad hoc Committee on Self-determination / Volkstaat is not in a position to formulate consensus positions.

The Committee therefore proposes:

- a. that the political process continues; the Constitutional Assembly should issue guidelines in this respect;
- b. that the constitution-makers adopt an open-ended approach to the issue of self-determination, while further deliberations take place, including the formulation of positions on self-determination that may assist in expediting the draft constitution;
- c. since the deadline for the publication of the draft final constitution is approaching fast, other Theme Committees ought to take note of the thinking and implications emanating out of our deliberations so far; and
- d. if the deadline is reached without further clarity on the issues concerned, the Constitutional Assembly should perhaps consider, as an interim measure (i.e. before the final constitution is adopted in 1996), that Principle XXXIV be retained, in some form, depending on the outcome of a, b and c above. And, if so, reference(s) should be included, somewhere in the text, substantiating this principle.

PROF W J BREYTENBACH

Convener Ad hoc Committee (after consultation with Professors Corder and Raath)

9. SUMMARY

ISSUES	CONSTIT. PRINCIPLES	AGREEMENTS	DISAGREEMENTS	OUTSTANDING
1. Self-determination	XII & XXXIV	Few	Various	See, par 2.9 and 6 of First Report
2. Citizenship	I	Retention: if Cultural Councils & Volkstaat within South Africa	1) CP & AFF Proposals 2) Secession : own citizenship	Changes only if Volkstaat is pursued
3. Language, Culture and Community	II, XI	Most consensus so far	Virtually none	Status quo?
4. Within South Africa	I, XVI	If Cultural Councils and/or Afrikaner state (VSC)	1) If, secession and/or confederal framework	Cultural Councils; Afrikaner state within South Africa, secession, and confederal frameworks
5. Boundaries	I, XVIII(1) + (3)	None on details	Various	Tenth entity and/or sovereign volkstaat: parties must investigate further
6. Constitutions	None	Few	Various proposals	Only if territorial expression prevails
7. Support	XXXIV(2)	Not expressed by parties	Not expressed by parties	Parties must formulate support levels
8. Incrementality	XXXIV	Few	Few	Parties must formulate positions