

NOTES ON A CONSTITUENT ASSEMBLY

1. The function of a constituent assembly is to negotiate the terms of a new constitution and to be given to the following factors:

Note by
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on future C.A.

1.1 How the constituent assembly will be brought into existence.

1.2 How the members of the constituent assembly will be chosen.

1.3. What the powers of the constituent assembly will be.

1.4 How the constituent assembly will function and conduct its business.

1.5 How the constituent assembly will take its decisions.

1.6 How the decisions of the constituent assembly will be implemented.

1.7 How the implementation of the decisions of the constituent assembly can be guaranteed.

NOTES ON A CONSTITUENT ASSEMBLY

1. The function of a constituent assembly would be to prepare the terms of a new constitution for South Africa. In negotiations for a constituent assembly, consideration will have to be given to the following factors:

1.1 How the constituent assembly will be brought into existence.

1.2 How the members of the constituent assembly will be chosen.

1.3. What the powers of the constituent assembly will be.

1.4 How the constituent assembly will function and conduct its business.

1.5 How the constituent assembly will take its decisions.

1.6 How the decisions of the constituent assembly will be implemented.

1.7 How the implementation of the decisions of the constituent assembly can be guaranteed.

1.8 How the country will be governed while the process of choosing, decision making, and implementing decisions is being carried out

1.9 Size (No.) of C.A.

2. There may be sharp differences between the negotiating parties in regard to whether or not there should be a constituent assembly. It is likely that the government will be opposed to a constituent assembly with an open mandate, because of a concern that it will lose all control over the negotiations and the shape of the constitution if it surrenders power to such an assembly. There may also be sharp differences in regard to each of the matters referred to in paragraph 1, since such matters all have political implications. The question which will have to be confronted during the negotiations is whether there is room for flexibility in regard to any of these matters, without compromising principles of importance. Each of the issues referred to in paragraph 1 is dealt with below.

3.HOW WILL THE CONSTITUENT ASSEMBLY BE BROUGHT INTO EXISTENCE

3. If the constituent assembly is to have binding powers it will presumably have to be constituted by legislation which will define what those powers will be, and how the constituent assembly will be chosen. If this is done it means that the constituent assembly will be the product of the tri- cameral

parliament.

4. HOW WILL THE CONSTITUENT ASSEMBLY BE CHOSEN

4.1 The fairest way would be by way of universal adult franchise with a common voters roll, and an election conducted according to a system of proportional representation. This would permit all views, that command a specified minimum of the votes cast, to be reflected in the constituent assembly, and at the same time, would give weight to those views that command the greatest support. A constitution should as far as possible, meet the reasonable needs of the people as a whole. The opportunity given to people with different political affiliations to have their views advanced in the assembly through their chosen representatives, not only involves a wide cross-section of the population in the negotiations, but also offers the prospect that the constitution that is ultimately adopted will be able to gain widespread acceptance. Having regard to the broad base of the ANC's support throughout the country, proportional representation is not likely to work to its disadvantage.

4.2 The disadvantage of this type of selection is that particular interest groups, as such, will not be represented in the assembly. There may be demands for groups such as labour, women, the youth etc. to be represented as such, so

that their views can be heard and taken into account. The difficulty in making provision for 'group representation' will be in the definition of the groups and the manner in which each group will choose its representatives. If there is a demand for labour to be represented, there will immediately be a demand from commerce and industry for representation as well; also, ethnic groups may seek separate representation on the grounds of their special interests, which would incorporate apartheid structures into the assembly itself. Any attempt to accomodate special interests is likely to give rise to more problems than it will solve. It would be better for any number of reasons for the assembly to consist of representatives of political parties, who will have regard to the special interests within their own constituencies in selecting their representatives.

4.3 The age at which people will qualify for the vote must be fixed. Presumably it will be 18, which is the age at which people presently qualify to vote in the tri-cameral elections. To fix a higher age would result in the disenfranchisement of some of these people. It would also be likely to provoke opposition from the youth. Other qualifications for the vote will have to be determined. Will the vote be given only to citizens? If so, how will the position of people who have been denationalised,

including 'citizens' of independent homelands, and exiles who may have lost their South African citizenship and children born in exile, be accommodated. If not, what will the qualification for voting for the constituent assembly be? Whatever decision is taken, it must cater for exiles.

4.4 The registration of voters and the compilation of a voters role will be required once these decisions have been taken. This will be a massive task, which will call for impartiality, and even for scrutiny.

4.5 Provision will have to be made for time during which campaigning for the elections will take place, and for the supervision of the election to ensure that it is free and fair.

4.6 All this will take considerable time. Added to this will be the time that the constituent assembly takes to conduct its deliberations. Throughout this period there is likely to be uncertainty, and the possibility of a high level of political conflict.

4.7 An alternative route to follow would be for the major parties to the negotiations to attempt to reach agreement on principles which will define the broad parameters of the constitution and within which an elected constituent

assembly would be required to function. This is what happened in Namibia. The advantage of this procedure was that the broad shape, though not the detail, of the new constitution was known before the elections were held for the constituent assembly. The assembly, functioning within a predetermined framework, was able to complete its deliberations within a comparatively short space of time. Once the principles had been accepted, there was a degree of certainty as to the future and it was possible to conduct the elections in a relatively peaceful atmosphere. All this was facilitated by the presence of the United Nations forces - a situation which is unlikely to occur in South Africa. The disadvantages were that the people as a whole did not participate through their chosen representatives in the determination of the broad framework of the constitution. There has been some criticism of the Namibian constitution on these grounds, but on the whole it seems to have gained widespread support within Namibia, and also to have commanded respect internationally. Conditions in South Africa are different to those which existed in Namibia when the settlement in that country was negotiated, but there were definite advantages which flowed from the process by which the Namibian constituent assembly was constituted and given its mandate. What needs to be decided is whether the advantages of attempting to agree on principles before the enactment of legislation and the convening of a constituent

assembly, outweigh the disadvantages of such a procedure. In the present political climate the government is unlikely to want to call an election in which its share of the vote could well be less than that of the conservatives. An approach which involves as an initial step, an agreement on principles, to be followed by the election of a constituent assembly, and then a referendum, may go some way towards meeting the objections that are likely to be raised by the government to the convening of a constituent assembly. This procedure is sufficiently close to the Harare Declaration to be acceptable in principle, and at the same time it offers a way around what might become an intractable obstacle to a 'settlement.' The government is more likely to be willing to agree to a constituent assembly and to vest power in it, if it knows in advance what the broad framework of the constitution will be, and has this recorded in legislation which provides that the draft constitution prepared by the assembly has to be approved by referendum. It also offers the practical advantage of permitting negotiations to continue and more rapid movement forward, than will be the case if voters roles have to be prepared and an election conducted.

5. WHAT WILL THE POWERS OF THE CONSTITUENT ASSEMBLY BE

5. Will the constituent assembly have power to settle the terms

of the constitution, or will it only have power to put forward a draft which will be made the subject of a referendum, or approval in some form by the negotiating parties? This raises questions posed in paragraph 4, and depends upon the answers to those questions. Approval through a non-racial referendum would establish popular support for the constitution. It would also add to the time and the uncertainty, which will be magnified if a general election has to be held once the new constitution has been adopted. Without making the error of rushing through the process to get a quick solution, there are advantages in the present political climate in attempting to reach a settlement as soon as this can reasonably be achieved. Reference has been made to the potential advantages of a procedure whereby principles have first to be agreed and recorded in legislation, which provides for the election of a constituent assembly to settle the terms of a constitution, which in turn has to secure the approval of a non-racial referendum. This is similar to the Namibian model, save that in Namibia no provision was made for the constitution to be made the subject of a referendum. In Namibia a constituent assembly was elected by proportionate representation to draft the constitution within the framework of agreed principles. It was decided by the constituent assembly that it would become the first National Assembly, and a provision to that effect was incorporated

into the constitution. In order to avoid a multiplicity of elections which are costly, time consuming and sometimes lead to conflict, a procedure similar to the Namibian model whereby the constituent assembly is converted into a parliament could possibly be devised for South Africa.

6. HOW THE CONSTITUENT ASSEMBLY WILL CONDUCT ITS BUSINESS

Should the assembly elect its own chairperson, or should an 'independent' chairperson be appointed to preide over the discussions? Should the discussions take place in public, or should they be in private. Publicity enables people to know what is being said, but there may be advantages in the discussions being in private and away from the pressures which will inevitably be placed on delegates if they know that whatever they say will be reported in the press. It may be that the initial drafting should be away from the glare of publicity and entrusted to a committe of the assembly, in the knowledge that the draft will be subjected to public debate in the assembly and approvaql by the assembly. This is what happened in Namibia. Although there was some criticism of this procedure, particularly by the press, it had the advantage of enabling the delegates to speak more openly than might have been the case if the discussions had been public. It also enabled the delegates to 'negotiate' deadlocks and find solutions to what might otherwise have been intractible problems. The question of how the assembly will

conduct its affairs can possibly be postponed for decision by the assembly itself; the question of a chairperson may, however, have to be decided upon in advance.

7. HOW DECISIONS WILL BE TAKEN

This is of fundamental importance. Will a specified majority, such as two-thirds or three-quarters be required, or will a simple majority be sufficient. It seems unlikely that the government will agree to a simple majority. It may argue for consensus, or at least for a defined majority. Difficulty over this issue could hold up the negotiations. If agreement can be reached on principles for the constitution, this difficulty could possibly be avoided, for if principles are determined the majority required to settle the details becomes less threatening to all concerned.

8. GUARANTEES AND INTERIM GOVERNMENT

These issues are closely related. If the government retains the reins of power until a new constitution comes into force, and particularly if it retains control over the police and the army, it may be in a position to influence elections and even to frustrate any agreement. Political forces and international opprobrium may make it impossible for the government to avoid the implementation of an agreed constitution; but the risk is always

there. There are obviously risks which have to be taken in any negotiated settlement; but there are also risks, possibly greater, in not reaching a settlement. In this context consideration may have to be given to the suggestion that there should be an interim 'coalition government' to supervise the elections for a constituent assembly and the implementation of the new constitution.