

MINUTES OF THE CONSTITUTION
COMMISSION PROCEEDINGS

8th January 1986

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Cdes Zola Skweyiya, P. Maduna, Kader Asmal,
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Further notes on
Con-com's tasks

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Vice-Chairman:
Secretary: Z.N. Jobodwana

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- (i) The movement should try and anticipate the current developments in the country and its political effects
- that efforts are being made by racist S.A., the USA, United Kingdom to look for what sort of a constitution (which in their view) will be acceptable for the future South Africa.
- their constitution will, of course, be structured in such a way as to avoid a future S.A. envisaged in the Freedom Charter - a constitution that entrenches the former positions of the oppressors.

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Cde Albie Sacks would be arriving in the evening from Maputo.

Cde N

Comrade Nzo - Secretary General in his opening remarks advised the meeting that the group was set up by the National Executive Committee of the ANC and is not the legal Unit of the ANC.

The administrative officials of the group are as follows:-

Chairman: Jack Simons
Vice-Chairman: Zola Skweyiya
Secretary: Z.N. Jobodwana

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- So the effort and recommendations of various research groups and committees of think tanks set up by the regime should not catch us unprepared.
- We should not be found responding to initiatives brought to us by other people.
- The group will have to investigate various constitutional proposals and look even beyond the Freedom Charter.
- The group will be expected to draw a constitutional proposal and look beyond the Freedom Charter.
- The group will be expected to draw a constitutional framework which shall not be a blueprint prescription of the future constitution of S.A.
- The group's task is to assist the NEC in tackling some of the major constitutional problems it might be required to solve from time to time.
- The work of the group will be confidential between itself and the NEC.

The group will consult and cooperate closely with the NEC on various important issues.

- Democratic lawyers at home will have to be consulted from time to time as their input will be necessary and important.

After the President's introduction the comrades of the group participated in discussing the nature and scope of the task. It was pointed out that this was an Ad Hoc, unique exercise, anticipated to work very rapidly; it had no precedent in the history of the movement.

It was the feeling of people that the end of apartheid is not very far away. The USA and the racist S.A. were interested in constitutional arrangements because they would not like decisions arrived at to be against their own interests. In all our discussion the Freedom Charter has to be the group's point of departure. The group will have to investigate whether the

Freedom Charter could be interpreted as providing a Unitary State for S.A. or Federalism - what economic model of government is implied in the Freedom Charter.

9th January, 1986

Present: A. Nzo Secretary General, Cdes Jack Simons, Zola Skweyiya, P. Maduna, Kader Asmal, Albie Sacks, Jobs.

- Cde Jobs briefly introduces Cde Jack & Albie and sketches out the proceedings of the previous meeting.
- S.G. officially advised Cde Jack of his appointment as the chairman of the group.
- Cde President joins.
- Chairman enquires from Cde President whether the group has a name. It is agreed that the group be simply referred to as the 'CONSTITUTION COMMITTEE'.
- The chairman promises that a Preliminary Report will be made available to the NEC on Tuesday 14th January, 1986 - even if it is a question of saying tentatively what the group has to do. Further a Memo of questions for the attention of the NEC will be incorporated and be in the hands of the SG on Tuesday.
- The period of existence of the group has not been determined - the group is starting from scratch.
- The further requirements of the group were discussed and include
 - (a) Secretarial back up;
 - (b) Funds;
 - (c) Accommodation;
 - (d) Furniture and stationery - and other office equipment.

9/1/1986 - 3 p.m.

The chairman called upon the comrades to assist the NEC present our people in S.A. with an idea that will catch them, an innovative idea that will take into account the realities of our society.

- Our country has got a variety of human types belonging to different cultural backgrounds.
- The tribal and national groups in our country will have to be accommodated side by side in a way that expresses the ambitions of our people.
- The constitution will have to state boldly certain basic aims, inter alia
 - i) Equality
 - Majority Rule
 - One country - One People
- It was stated that the second characteristic of a revolutionary constitution will be two.
 - ii) Its affirmation and respect of the identities of its people.
- That we must recognise that S.A. is a multi-national society - a Plural Society.
- Therefore we must assure its people that the Constitution will respect their identities and that these will be safeguarded in one way or the other.
- Of course this will give rise to territorial claims which were brought about by history.
- The group must also take into account the rightist ideas and thinking of Afrikaner leaders like Terreblanche who plans to preserve the Boer Republics: Transvaal and Orange Free State, to establish a corridor from Limpopo down to the Cape Agulhas.

- It can be observed from such conclusion that even the racists cannot make exclusive territorial claims in our country.
- We need a group of experts to work out various possibilities regarding the geographical configuration of S.A.
 - how the country will be set out under the revolutionary take-over.
- One problem that will be facing the group is that it is called upon to work out a constitutional basis when infact they cannot as at the present moment foresee whether the seizure of power will be revolutionary or through negotiation.
- One basic issue which has to be resolved is whether we need a constitution for a unitary or federal state.
- The Union of South Africa was forced upon the people by an external colonial force.
- Britain had betrayed the sacred trust it held.
- Political Power was transferred to the white minority.
- Majority having been excluded.
- Mention was made of a Federal type of constitution.
- The question was asked as to - what would we be federating.
- Federation it was argued weakens the central government, it would enable certain groups to entrench their former positions.
- Suggestion was made that a bicameral parliament be considered with
 - (a) A house of nationalities representing members from territorial entities and
 - (b) A house of Deputies that will be elected on the basis of one man one vote.

- A voting system: this should be carefully investigated.
- The name of the new country state has to be decided upon, e.g. Federation of S.A./Federation of Africa South/ simply South Africa.
- Other problems which are likely to emerge were discussed:
 - (a) Relationship between ANC as the ruling party and SACP.
 - (b) The status of SACTU or our trade union federation to ANC as a ruling government.
 - (c) Multi-party system.
 - (d) Is there to be a Bill of Rights entrenched and if so how will they be enforced/protected.
- The group then looked into the question of procedure.
- The group to discuss generally the basic principles involved and acquaint itself with certain political/constitutional concepts.
- Whether the basic approach is to proceed from continuity or discontinuity.
- It was felt that there must be a break with the past.
- In the preliminary stage the group will make general observation examining closely bourgeois constitutions e.g. USA, Portugal, Canada, Australia, FRG, etc. on the other hand those of revolutionary democratic states.
- Comrade from Ireland will collect various precedents and other material for the group's resources.
- It was stressed that the group's work should not betray our struggling masses because S.A. is their patrimony.
- We should avoid a constitution that generates or supports ethnicity, chauvinism or other discriminatory practices. Necessity not to perpetuate communalism was stressed.

- Even if we can have a multi-party system - tribally based parties would be prohibited.
- No parties based on ethnicity.
- The constitution must exclude certain negative feature which we have been fighting against.
- The group should draw a schedule of problems we have to grapple with.
- The concept 'majority rule' was discussed. If it is 'one man one vote' voting procedure then the majority will reflect a preponderance of workers and peasants to other classes.
- It was further stated that we must have in mind the inclusion of the majority of Africans in the participation and involvement in whatever arrangement is considered.
- 'Federalism' a further discussion revealed that this system in practice will entrench white minority and preserve their former class property position and economic power base.

It will encourage a situation where the white minority will be resident in the greater part of South Africa.

- Group expressed its reservation on the question of protection of minority rights as this might in practice mean protection of privileges.
- On the question of sovereignty it was agreed that it must rest in the national assembly/parliament. Everything must flow from the laws passed by the national assembly.
- The group does not necessarily have to arrive at a consensus. Its task is to clarify concepts, put options to the NEC and lay down certain constitutional precepts e.g. questions of transition, constitutional models:

discuss and elaborate on certain fundamental themes like:- Revolutionary Power, National Democratic State, Unitary-Federal State.

- Group will have to address itself to the question of allaying the fears of our enemy and minorities, though not necessarily pandering to their sensibilities.
- Some of the slogans we use may be exploited as propaganda against us.
- It was within the group's mandate to consider the 1910 Constitution and decide whether there might be clauses that may be retained to our advantage.
- At all relevant times the group must have mind the audience/constituencies it is addressing.
- Is the group proceeding from continuity or discontinuity? Taking into consideration that the present constitution cannot be reformed. The

The old constitution was bad because 70% of the people of S.A. were left out.

The NEC should know the range of possibilities from which it can formulate its opinion.

- It is important that ANC come with new structures expressing peoples powers.
- The work of the group will further be governed in future by the way power is taken in S.A.
- The ANC has expressed itself against federalism but the group has a free hand to investigate the possibilities of a federation.
- Another argument was that the purpose of a federation is to weaken central government.

But our country is as big as Nigeria and for the purpose of administration we can end up being divided into more

- provinces or federal states than we had before.
- We cannot foresee as to how power is to be transferred but we have to equip ourselves, spell out options with the main task to draft a constitution in future. These will be referred to the NEC.
 - The group is in a unique situation because we are not receiving a constitution from anybody.
 - We are obligated to nobody, but responding to the interests, problems and struggles of our people.

10th January, 1986

Present: Cdes Jack, Maduna, Zola, Jobs, Teddy introduced,
Albie Sacks

Agenda is discussed and items thereon marshalled as follows:

- (a) Freedom Charter
 - (b) Political Structures
 - (c) Organs of Power
 - (d) Bill of Rights
 - (e) Forms of Representation
- Discussion of Freedom Charter lead by Cde Sacks.
 - Discussion summary
 - Membership may ask "We have Freedom Charter - do we need a Constitution".
 - Constitution defines institutions that exercise power.
 - Constitution embody relationship between State and individual.
 - Freedom Charter does not include political structures.
 - Does Freedom Charter advocate for a Unitary State.
 - In the Freedom Charter there is nothing which indicates.
 - (a) Nature of legislature
 - (b) Electoral System

- (c) Whether S.A. is to be a Republic or Monarchy
- (d) Unitary or Federal State
- (e) Official language
- (f) Capital city of the future S.A.
- (g) Symbols, Flags and National Anthem.

- On the other hand the Freedom Charter is more than a simple political programme.

The Freedom Charter is legally binding and could constitute the foundation of a constitution. We have to translate the Freedom Charter as a basis of a constitution.

- Freedom Charter is more than just a Bill of Rights, it is an affirmation of claims.
- It contains ideas and specific proposals which have to be incorporated into the constitution.

N.B. FOR FURTHER DETAILS A SHORT PAPER ON WHY A FREEDOM CHARTER IS NOT A CONSTITUTION WAS PREPARED BY CDE A. SACKS AND HAS SINCE BEEN CIRCULATED AMONG MEMBERS OF THE GROUP. A COPY WILL BE SENT TO CDE KADER WHO LEFT ON FRIDAY 10/1/86.

- Before the Freedom Charter was discussed clause by a clause as suggested by Cde Maduna a lengthy discussion on how the content of the Freedom Charter could be incorporated into a constitution ensued.
- As a result Cde Albie was asked to revise his paper on the Freedom Charter.
- To complete the minutes on this aspect we quote the relevant paragraphs:

Page 2

"One would be to distill its (Freedom Charter's) principle and introduce them in this way into the relevant parts of the constitution.

Another would be to incorporate the full text of the ten provisions as they stand, in a section of the constitution entitled 'general principles' (to be followed by structures of government and 'Individual Rights').

- A third would be to disperse the actual text of the Charter throughout the constitution, locating them where they belong, but not necessarily using the whole text.
- It was argued that the group cannot revise the Freedom Charter because it came from the people of South Africa themselves.

FREEDOM CHARTER DISCUSSED

Clause 1

para 1: It was felt the age qualification be included.

para 2: "All people" with the exclusion of (a) all those who participated in the criminal activities of apartheid; (b) Mentally disabled persons and other legal impediments.

para 3: Accepted

para 4: All bodies: was this to be construed as referring to lawmaking bodies - paragraph needs some clarification, as it could mean elective bodies.

Clause 2

para 1: "Equal status" this term might be misinterpreted to mean proportionate representation in the bodies of state. It might be exploited by various groups to encourage ethnicity.

para 2: Accepted

" 3: "

" 4: "

" 5: "

Clause 3 & 4

The group deferred discussion of these clauses pending report of the Economic Commission doing similar work.

Clause 5

Accepted except that it was agreed that in practice restrictive clauses in the legislation of former oppressor state are retained in order to suppress counter-revolution and reaction.

- N.B. It was the opinion of the group that the NEC should specify as to how courts shall be constituted.
- Courts should include community representation even at top level.

Clause 6

para 1 - It was the opinion of the group that ANC Education council should look into this clause and give a critical analysis of its implications.

- The question of private schools was raised as these might be used to promote racialism and class differentiation".
- Right to speak, publish, preach, worship, etc. shall not be inconsistent with the provisions of the Charter, or Constitution.

para 2 - Privacy of the house - this may be regulated and modified by legislation.

- Travel restrictions - this may be regulated by legislation.
- Pass laws: these may also be regulated by legislation.

Clause 7

This constitutes the programmatic aspect of the Constitution and does not have to be interfered with.

Clause 8

For the ANC Education Council.

Clause 9

In principle it was agreed that this clause be left as it is, however, the following questions were raised and some few observations made:-

- (a) Do we protect peoples rights to houses.
- (b) What do we do with "all white suburbs".
- (c) The Constitution should not be designed so as to prevent government from embarking on programmes of reconstruction.
- (d) The state is obliged to take action by legislation to ensure that the consequences of apartheid do not manifest after independence.

Clause

Retain all these paragraphs except paragraph 4, which has been overtaken by history.

10th January and 11th January 1980 Session

These sessions were devoted to discussing the structures of government.

Cde Albie was appointed rapporteur and was requested to produce a memo which has since been circulated amongst the members of the group.

14th January 1986

Cde Albie's memo discussed:

1. Group prefers a presidential system of government with an executive president.
 - President to be the Head of State and Government.
 - This system favours the ANC.
2. Group accept the principle of a multi-party system, but no parties must be based on ethnicity.
3. Voting system preferred that of a single member constituency.

It was strongly recommended that NEC should institute a Demographic and Delimitation study surveys which inter alia, will include a map showing areas where ANC is weak or strong.

- Further this will assist when the question of registration of voters arises.
- Greater importance was attached to the incorporation of the Commissions, e.g. Constitutional Commission with a Judiciary Section, Affirmative Action Commission and Public Service Commission with their own departments.
- These commissions will, in turn, allay the fears of the minorities.
- The Skeleton of the Constitution was discussed and worked out as follows:-

1) PREAMBLE: This could include part of the preamble of the Freedom Charter, i.e.

(a) Sentence 1 and 4 of Preamble to the Freedom Charter;

(b) Points 1 to 0 on pages 3 of Cde Albie's memo. These may be added and wording modified.

The NEC should be made aware of the nature of authority that will have to adopt the constitution, e.g.

- i) National Convention or
- ii) Transitional Government or
- iii) Specially constituted Assembly or
- iv) First Session of the new National Assembly or
- v) Provisional Government or
- vi) Peace Treaty?

It might be added in the Preamble that: "S.A. is constituted as an independent, non-racial democratic State".

2. NAME OF THE COUNTRY

- This has to be brought to the attention of the NEC.
- All suggestions of the group point to the retaining of the name of AFRICA - importance being given to the content.
- DEMOCRATIC REPUBLIC OF SOUTH AFRICA, LUNDI, MALUTI considered but no recommendations made.

3. SYMBOLS

- i) Flag: Pending the decision of the first parliament colours Black, Green and Gold accepted.
- ii) Anthem: Nkosi Sikelele - Morena Boloka.
 - It was felt there was a strong sentimental attachment to our national anthem - Tampering with the anthem is worse than tampering with the Freedom Charter.

4. OFFICIAL LANGUAGES

*Reference was made to the Freedom Charter which provides that "all languages shall have equal status".

5. COAT OF ARMS: for NEC.6. CAPITAL: Leave the topic for the time being.7. ORGANS OF GOVERNMENT (Structural Government)

- (a) Presidency and Vice Presidency.
- (b) National Assembly (composition, elections, Functions, etc.)
- (c) Council of Ministers (composition, Appointments, Functions).

8. REGIONAL & LOCAL GOVERNMENTS9. COMMISSIONS

Constitutional Commission
Affirmative Active Commission
Public Service Commission

- Under each: Appointments, Functions, etc.)

10. FUNDAMENTAL RIGHTS & DUTIES OF CITIZENS

- Consideration of UNO and OAU Charters on Human Rights.

11. DECLARATION OF INTERNATIONAL ASPECTS

12. TRANSITIONAL LEGAL ARRANGEMENTS (End of Skeleton).

- Group discussed allocation of responsibilities for research on Constitutions.
- A dossier on Basic Documents & Text on Constitutions and other documents prepared to be made available.
- ANC President to approach President Machel (for the purposes of allowing Cde Albie to attend groups sessions in future.
- Cde Pallo to represent the NEC and liaise with the other commissions.

The following documents are annexed:

- (1) The Freedom Charter and the Constitution
- (2) Our Objective in Drafting a Constitution
- (3) The Preliminary Nature of the Constitutional Document.