

**NOTE**

**Two unidentified submissions**

## THE FUTURE OF THE SELF GOVERNING TERRITORIES

This topic can, for convenience's sake be divided into two sub-headings viz:

### (a) DURING THE REFORM PROCESS

Common sense dictates that, until a new government is in place, it would be unwise to completely dismantle all the existing government structures in the self governing territories. It is true that, regardless of their questionable image, these governments did and still continue to provide vital services in their respective areas of jurisdiction.

To avoid creating a vacuum and a situation of anarchy and ungovernability by abruptly dismantling them at this stage of our reform process, we submit that they not be tempered with until a new government/ authority is in place. They are not likely to cause further harm to society.

(b) As soon as the Interim government is in place, it would, be ideal to transfer all powers vested in the self governing territories to the Interim government. This would therefore call for the dismantling of the self governing territories. The adoption of this root will depend on a number of provisions, such as (amongst others):

- (1) The integrity of the Interim government.
- (2) The form, powers, checks and balances built in the constitution of the Interim government.
- (3) Its term of government/office.
- (4) Alternatively, depending on the provisions in 1,2 and 3 above, the governments in those territories could continue to exist in one or more of the following forms:

- (a) The present form and function under the directorship of the interim government or
- (b) Administrators could be appointed to administer those territories or.
- (c) The political heads in these territories could stand down and commissioners appointed or
- (d) They could be run as federal states responsible for their internal affairs only.

Whatever happens it is a fact that the administrative structures in the self governing territories will remain.

(C) IN THE NEW SOUTH AFRICA

It would seem that these structures are bound to disappear in the new South Africa as soon as the new constitution has been drawn and the new South African government is in place.

THE INTERIM GOVERNMENT

The general principle is that all South Africans must be represented in the interim government. To ensure this, it is mandatory that all political parties with proven support must participate as equals in the formation of the Interim government. This will enable all South Africans to have a say in its establishment, more especially because the National Party and its cohorts are inclined towards forming an Interim "structure" that will include a wider range of representatives from the disenfranchised as opposed to an Interim government in the true sense of the word.

Ideally, it could be a good thing to have an interim government based on the West Minster model and formed through the process of democracy. This could, unfortunately, involve the whole process of the general elections. This could be a lengthy and expensive exercise. Because of the time constraints, it is not practical to follow this route. We do not recommend it.

This leaves us with one or more of the following options. We would like to point out, at the outset that the following options are not without problems:

Option: (a) would be to target the civil service and amputate it to the extent that it ceases to carry out the will of the present rulers.

Inevitable the next question would be how? As a suggestion, it could be done by identifying key and strategic positions and dilute the power and control of the present officials by appointing a panel of, say, three people to fill that post. The panel should include the present official.

Under this system it would not matter who the Ministers are because interest groups would also be represented at the executionary level. In fact this option would provide us with both what we want and what AZAPO highlights as the problem about the concept of an Interim government, viz. that it will inherit the sins of the racist regime and may be accused of having enforced racist laws.

b. Alternatively form panels of say 4 to 5 people to act as Ministers in respect of each and every Ministerial post. Each panel to include the Minister presently heading that department.

But we would advise that unless the civil service is also diluted the danger for manipulation continues to exist.

c. Alternatively, adopt one of the following models:

(i) ZIMBAMBWE

To have U.N. appointed officials monitor the transition. (Lancaster House Agreement)

(ii) NAMIBIA

U.N. appointed officials.

3. SOUTH AFRICA

To have U.N. appointed officials assisted by local leaders of credible repute and representing political parties with a proven or generally assumed support.

A. WORKING GROUP No. 1

1. CREATION OF A CLIMATE FOR FREE POLITICAL PARTICIPATION

- (a) Identify stumbling blocks/impediments to free political participation, being such as, inter alia, the following:
- (i) Political intolerance.
  - (ii) Ignorance amongst large sectors of the populace regarding the basic fundamental principles and working of the democracy and regarding economic and other constraints upon modern government.
  - (iii) Unrealistic economic, financial and developmental expectations of a large sector of the population.
  - (iv) Widespread political and associated violence and intimidation which, in turn conduces to an unbridled increase in common criminality.
  - (v) Lack of trust in and support and respect for the law enforcement authorities and agencies.
  - (vi) Prohibitive and restrictive enactments, regulations and measures within some of the SATBVC-states.
  - (vii) Due to a regional economy in recession and weakened by international sanctions and further by workers' strikes and mass action, a widespread retrogression in the economic and financial position of the individual (e.g due to closures, liquidations, lay-offs, curtailment of economic activities by entrepreneurs) which conduces towards the creation of a discontent, jobless work/labour force.
  - (viii) A sense of futility and unwillingness to participate which prevails amongst certain of the political groupings, in that they regard some of the major participants to Codesa as not being willing to consider/accommodate any views, values, models or interests other than their own as being outright hostile to anything contrary or having a fixed agenda.
  - (ix) Certain Codesa participants' direct or indirect engagement or participation in or support of subversive or hostile acts/actions against the authorities of the TBVC states.

At this juncture it suffices to state that the factors enumerated under sub-paragraphs (i) to (ix) above, do not by any means purport to constitute an exhaustive list. It should further be noted that many of those factors are interwoven or interdependent to one another.

The above-mentioned impediments should be addressed and resolved as a matter of first priority in order to facilitate and secure the broadest possible support for and participation in the negotiations. Of particular importance will be for the participants to undertake, whether individually or collectively, an intensive and continuous educative and informative campaign in regard to the matters specified in paragraphs (i), (ii) and (iii), and to actively support and co-operate in the restoration of law and order and the eradication of violence, intimidation and criminality in the region; to accept as a given fact the existence of Transkei, Bophuthatswana, Ciskei and Venda as sovereign separate entities and to refrain from the activities as contemplated in paragraph (ix); to exact a commitment from all participants to Codesa to nurture the economy so as to stimulate economic activity and job-creation on a nation-wide scale which, by itself, will conduce to the elimination of many of the impediments mentioned above.

## 2. THE ROLE OF THE INTERNATIONAL COMMUNITY

- (i) For the purposes of this paragraph the international community includes the United Nations or any of its organizations, the European Economic Community, the Common Wealth of Nations, any international or multi-national institution, association, organization or company of whatever description.
- (ii) The participants are ad idem that the role of the International Community is not one of interference in the negotiation process or alignment with the views of any particular participant therein. Instead participants view the involvement of the International community as restricted to support and assistance in the resolution of the impediments referred to in paragraph 1.
- (iii) To that end Codesa shall through its authorized or Buro keep the

International Community informed of all developments and progress made any appeal for assistance in connection with the resolution of any matter; shall be made through such spokesman or buro.

B. WORKING GROUP No.2

1. GENERAL CONSTITUTIONAL PRINCIPLES

- (i) In formulating the general constitutional principles for a new Southern Africa participants must bear in mind that South Africa, and for that matter Transkei, Bophuthatswana, Venda and Ciskei, are not new territories in respect of which no constitutional dispensation exists, irrespective of the legitimacy or recognition accorded there-to. In fact it is undisputable that the subjects of each are guaranteed certain rights and entitlements thereunder. Accordingly it will be unacceptable in so-far as any new constitution provides for a lesser dispensation.
- (ii) In the light of the above the following principles should be regarded as a sine qua non for any future constitution:-
  - (a) The recognition of the "trias politica"-doctrine, that is, the separation of the judicial, legislative and executive functions and powers of the state from one another and entrusting each to its own distinct function, so as to avoid or rectify the exercise of arbitrary political power.
  - (b) The introduction and perpetuation of a democratic society, that is, involving a system of government and way of life, in which representatives chosen by the people act on behalf of and in the interest of society as a whole and are periodically required to seek the approval and mandate of the electorate.
  - (c) Guaranteed freedom of political association, expression and opposition and other fundamental human rights, for example, equality before the law and public institutions, the recognition and protection of private proprietary and economic rights vested or accrued.



- (d) The nullity of any law, measure or act passed, imposed, performed or omitted contrary to the provisions of the constitution and the conferment of testing and other residuary powers on the judiciary whenever any infringement or breach of the constitution, or any right there-under is claimed.
  - (e) Official language(s)/predominant official language.
  - (f) Guaranteed regular elections.
  - (g) The electoral system, for example, the constituent electoral system" (best suited to homogenous societies), "proportional representation" (usually employed in countries with divergent political and or ideological groupings or demographics).
  - (h) System of government, that is, the "Parliamentary system" of responsible government where the executive or cabinet is responsible to Parliament for its handling of national affairs or the "Presidential system" of government, where the executive is largely independent of the legislature for its conduct of the administration of national affairs.
  - (i) The manner and procedures to be observed in order to effect amendments to the constitution and safe-guards in this regard to protect minority interests.
  - (j) The preservation of the Roman Dutch oriented Southern African common law and judicial system.
- (iii) As no indication is given as to constitutional format of the state in relationship to which the essential constitutional principles are to be identified the contents of sub-paragraph (a) to (j) were a unitary state. However, should some Federal or Confederal format be envisaged, the above principles, whilst being equally valid to a constituent state in a Federation, will have to be appropriately supplemented by a Federal Constitution, that is, one regulating the relationship between the constituent states inter se as well as the relationship between each constituent state and the central Federal authority. Constitution

should make provision for inter alia the following:-

- (a) The limitation of the matters in respect whereof the legislative body of each constituent state is competent to legislate or the enumeration of matters in respect whereof it may not legislate.
- (b) The financial responsibility of each constituent state to contribute to true treasury of the Federal authority and the power of the latter to impose Federal taxes.
- (c) The creation of a Federal Supreme Court clothed with jurisdiction to hear and determine all matters relating to the Federal Constitution and alleged infringements of the Federal Constitution of any constituent state. In this regard any subject of a constituent state should be entitled to approach the court to rule on where he is of the opinion that any Federal or other enactment is ultra vires.
- (d) Certain Federal constitutions, for instance that of U.S. of America contains its own Bill of Rights which binds all constituent states of the Federation, however nothing precludes any constituent state from adopting guaranteeing additional fundamental rights in its own Constitution.

## 2. CONSTITUTION MAKING BODY OR PROCESS

In as much as the SATBVC territories are in law regarded as sovereign independent territories each within its own legislator and government any constitutional proposals emanating from Codesa can only be made applicable to and implemented within the region to the extent that each legislature accedes to those proposals and adopts the necessary legislation within its own territory to that end in coordination and conjunction with one another.

C. WORKING GROUP No. 3

TRANSITIONAL ARRANGEMENTS/INTERIM GOVERNMENT/TRANSITIONAL AUTHORITY

In view of the remarks in paragraph B 2 supra proposals emanating from Codesa in relation to transitional arrangements/interim government/transitional authority, will only become a reality and lawful upon each legislature referred to in that paragraph acceding to those proposals and adopting the necessary legislation within its own territory for that purpose.

D. WORKING GROUP 4

THE FUTURE OF THE TBVC STATES

1. It is beyond dispute that in terms of South African law, the territories comprising Transkei, Bophuthatswana, Venda and Ciskei were excised from the territorial sovereignty and jurisdiction of the Republic of South Africa - see the Status of the Transkei Act, No. 100 of 1976; the Status of Bophuthatswana Act, No. 113 of 1977; the Status of Venda Act, No. 107 of 1979; and the Status of Ciskei Act, No. 110 of 1981 whereby they are declared to be sovereign independent states which thereupon cease to be part of South Africa and in respect of which South Africa ceases to exercise its (sovereign) authority. Each of the Status Acts hereinbefore mentioned contained the necessary transitional provisions relevant to the continuation of orderly government and further empowered the Legislative Assembly then in existence for the relevant territory to adopt a constitution (and other laws) for that territory upon its "excision"/independence from South Africa. Pursuant to the Authority conferred by various Status Acts which remain applicable in those territories, constitutions were duly adopted for the TBVC States (by their respective legislative authorities) whereupon a new constitutional order arose within each of those territories.

2. In view of Paragraph 1 it becomes apparent

- (a) that matters affecting TBVC territories, e.g. their inclusion or incorporation into a "new" Southern Africa and the manner/nature of incorporation, interim arrangements, etc. affecting them, cannot reasonably constitute the subject matter of discussion and negotiation by participants to Codesa except in as much as such participants include groupings which are representative of participants in the domestic political systems and processes provided for by the respective constitutions;
- (b) that any constitutional proposals emanating from Codesa and affecting any TBVC state will as shown above under B.2 and C, supra, have to be considered by that State and will become capable of implementation only in so far as the governmental and legislative authority has assented/acceded thereto, taken the necessary legislative steps and made all the necessary arrangements with the view to eventual implementation in creating a new constitutional system/dispensation in an orderly fashion.

3. In accommodating the TBVC States in a new Southern African Constitutional Dispensation, the determination of the nature of the constitutional model (format of the State), e.g. unitary, "decentralised unitary" (e.g. such as the devolution of power to provincial councils and provincial administrations), federation or confederation will have to enjoy a very high priority, in view of the following:

- (a) the heterogenous nature (diversity) of the Southern African population as a whole;
- (b) the mainly homogenous nature of the population within each of the TBVC States;
- (c) the existence of extensive, sophisticated public infrastructure (e.g. houses of Parliament, governmental office

complexes and centres, high court/supreme court complexes, prisons, military bases and camps, etc;

- (d) the existence of separate and extensive public sectors, i.e. public services, military and police forces, prisons' services and the like, statutory corporations (e.g. development corporations, utility corporations and parastatal parts, recreation and educational organisations) with their own specialised tasks, goals and personnel, each of whom has rights and which interests have vested and will have to be guaranteed;
  - (e) the particular rights requirements and way of life of the inhabitants of the TBVC territories have since their excision from South Africa become expressed, provided for or guaranteed by their own constitutions, laws and legal systems catering for the unique and specific requirements and of ideals of individual, the worker, businessman, industrialist, farmer, ~~entrepreneur~~ entrepreneur and professional person;
  - (f) the likelihood of the population of any of the TBVC States constituting a minority under a new dispensation/being overwhelmed by majority groups and made to suffer repression, discrimination and/or neglect at the hands of the majority;
  - (g) whether the proposed new dispensation offers the subjects of any of the TBVC State in question more than that which is enjoyed at present. If not at least on par with the present dispensation, the proposed dispensation is likely to be unacceptable.
4. It will be noted that the matters referred to in sub-paragraphs (a) - (g) of paragraph 3 supra. are likely to constitute dangerous negative factors and are most likely/if not inevitably to be found

in a unitary state (albeit a "decentralised"/"provincial" unitary State), i.e. the central authority has absolute power and may withdraw/encroach upon any power delegated by it to a regional/provincial body. Accordingly a <sup>centralised</sup> Federal model, which dispenses with most (if not all) of those negative factors, <sup>some most appropriate</sup> It should further be borne in mind that the considerations/factors militating against a form of unitary state may equally be relevant as regards many/some of the self-governing territories within South Africa (e.g. Kwa-Zulu).

E. WORKING GROUP 5

1. Time Frames

- (i) In view of the gravity of many of the issues at stake care should be taken not to give the impression that the "negotiating process" albeit important, can be completed in haste and without reasonable time being achieved for the widest possible deliberation, as such an approach will discourage those who may be participating reluctantly, or those who refuse to participate, from ever entering the negotiations.
- (ii) It is foreseeable that participants require time for the following actions following the tabling of any proposal:-
  - (a) Research and consultation aimed at preparing a response to a proposal;
  - (b) a "familiarisation session" at which the proposal is presented by the proposer and discussed or where an opportunity to provide answers to questions arising will be provided;
  - (c) a "cooling off" period during which participants can revert to their principles <sup>and</sup> for instructions and deliberation;
  - (d) presentation of amended proposals, if any, discussion thereon with a view to achieving <sup>consensus</sup> ~~consensus~~ in respect of a final draft proposal;

- (e) report back by delegates to their principals regarding final draft proposals, in order to finalise such proposals for presentation to the general meeting of Codesa.

## 2. IMPLEMENTATION OF DECISIONS OF CODESA

- (a) Decisions will presumably be formally communicated to participants. To this end Codesa will require a secretariat responsible for carrying out the administrative steps required.
- (b) The sui generis position of the SATBVC states will again have to be borne in mind as decisions of Codesa will have no binding force on them until such time as such decision shall have been adopted and legislatively promulgated. Obviously allowance will have to be made for each government to comply with the mandatory constitutional processes to obtain approval from their subject and/or legislative institutions applicable within its own territory. It should also be considered that after approval or adoption, the relevant proposal may involve the alteration or repeal of existing legislation and/or the introduction of new legislation.
- (c) The possibility that a decision may be rejected should also be considered.
- (d) From the point of view of convenience of the aforementioned governments it may be preferable not to submit decisions for implementation on an ad hoc basis, but rather to seek approval and implementation of all decisions at once.
- (e) Consideration should also be given to the fact that the various governments steps in order to seek implementation will have to be coordinated.