



## Sentrum vir Konstitusie-Analise • Centre for Constitution Analysis

### NATIONAL CONVENTION: THE NEXT HURDLE

No. 5, November 1990

#### Pre-negotiations

The unbanning of the ANC and other organizations on 2 February 1990, combined with other steps to normalize the political environment, heralded the beginning of the real negotiations that eluded South Africans for many years. Informal discussions, appropriately labelled "pre-negotiations", marked the first earnest attempt of opposing political actors to get together and prepare the way for formal negotiations.

The pre-negotiation phase, focusing on the removal of certain stumbling blocks in the way of formal negotiations, is nearing completion. Issues such as the release of political prisoners, the return of people in exile, suspension of violence and the scrapping of remaining discriminatory legislation have been the focus of the pre-negotiation phase.

The two main parties involved thus far in this process have been the government and the ANC. This has caused frustration among certain political actors for fear that they may be left out of an agreement. Both the government and the ANC have however recently emphasized that the next phase of negotiations focusing on constitutional issues should be open to all parties — including the far right and far left.

One of the main hurdles facing the parties before the next phase can be entered is agreement on the composition and competences of the constitutional conference. Various names have been suggested for the conference such as a National Convention, Great Indaba, or Constituent Assembly.

#### Constitutional conference

Most political groupings agree that a constitutional conference of some nature should be called in order to allow leaders to negotiate the framework and detail of a new constitution for South Africa. That is however where the consensus ends. Parties such as Inkatha, the National Party, the Labour Party and Democratic Party support the notion that all political groupings with "reasonable" support should participate in negotiations — thereby rejecting the calling of a general election for a constituent assembly. Parties such as the ANC and PAC support a constituent assembly based on a general election by which representatives for negotiations are elected.

## Alternative options

This newsletter focuses on a few different options that may be considered by referring to the experience of other countries in this regard. Owing to a lack of space a full discussion of the merits of each option is not possible.

### 1. Existing institutional structures

Representatives serving on existing governmental institutions can be delegated to a constitutional conference to participate in its activities. Such members act with the authority of their respective institutions and a proposal by the conference must be ratified by the various institutions before it is binding. This option presupposes that existing institutional structures have the necessary legitimacy to undertake constitutional negotiations.

The constitutional convention of the *United States of America* of 1787 consisted of 55 delegates, representing the different state governments. Twelve states participated in the activities with the delegation of Rhode Island abstaining. The draft constitution was adopted unanimously by the states on 17 September 1787 with three delegates refusing to sign the proposal. The constitution however only came into force after its ratification by the various states.

*Canada* adopted the same approach in 1987 when the so-called Meech Lake Accord was accepted by the 10 provincial prime ministers and the national prime minister. The accord which contained a number of proposals affecting Canadian federalism was however later rejected by two of the ten provincial legislatures and lapsed on 23 June 1990.

### 2. Elected constituent assembly

The constitution can be drawn up by a directly elected constituent assembly. This entails that a general election is held on a one-man-one-vote basis during which representatives of a constituent assembly are elected. The constituent assembly then has the task of drawing up the new constitution. After completion of the constitution elections can be held or the constituent assembly can be transformed into the first legislature.

In *Namibia* an election for a constituent assembly took place in November 1989. The constituent assembly, which later became the first parliament, consisted of 72 members elected on a one-man-one-vote basis by means of proportional representation. SWAPO gained a clear majority of 57 % (41 seats) but was still short of the required two-thirds necessary to adopt the new constitution. The constitution was unanimously adopted by the constituent assembly on 9 February 1990 and Namibia gained its independence on 21 March 1990.

### 3. Elite agreement between political actors

Major political parties and actors can form a coalition based on a constitutional framework agreed to by them during preceding negotiations. Such a framework can be put to the electorate in a referendum or it can form the basis of an election pact between the parties. No formal provision is thus made for a constituent assembly to be elected with the sole purpose of drawing up a new constitution.

During the past two decades *Belgium* has moved from a unitary to a federal form of state. During that process which started in 1970, drastic changes had been brought about to the Belgium Constitution such as the granting of autonomy to regions and communities, the introduction of a constitutional court and the entrenchment of the constitution. All these



reforms were initiated by political coalitions without any reference to a constituent assembly. Political parties thus entered into coalitions and in such a manner phased in a new constitution with the important reforms of 1970, 1980 and 1988/89.

#### 4. *Elite agreement and constituent assembly*

Political actors may negotiate an agreement on the basic framework of a constitution, whereafter an election is held for a constituent assembly to finalize the details of the constitution. In such a manner provision is made that the most important parties agree beforehand on certain principles which have to be adhered to when the constitution is drawn up.

Namibia experienced such a combination of options owing to the acceptance of the basic constitutional proposals in 1982 and the subsequent elections for a constituent assembly in 1989. In 1982 the five Western countries that initiated Resolution 435 accepted certain basic principles on which the future constitution had to be based. These principles which included reference to the elections for a constituent assembly, as well as key issues regarding the constitution, formed the foundation of discussions and negotiations seven years later when the constitution was drafted. The 1982 principles described the future Namibia as a "unitary, sovereign and democratic state", with the constitution being the "supreme law of the state", setting out the organization and powers of the different levels of government, and laying down basic provisions to be incorporated in a bill of rights. The constituent assembly was thus obliged to draw up a constitution consistent with these principles.

In Nigeria a Constitution Drafting Committee consisting of 49 "wise men" was appointed in 1979 to draft the framework of a new constitution. Each of the 12 states had two representatives and eighteen were appointed from universities, with the rest being civil servants, lawyers and businessmen. An indirectly elected constituent assembly, whose members were elected by local governments, thereafter legitimized the draft constitution.

#### 5. *Transition over time*

A transition over a predetermined period of time entails that a government of national unity consisting of the most important parties commit themselves publically to a transitional period during which democracy is restored in various phases. This would mean that certain sectors of society are governed by democratically composed institutions while other sectors remain under the competency of the government of national unity.

In Nigeria the military government announced in 1987 that it intended phasing in civilian rule over a period of five years, culminating in 1992. The most important characteristic of this transition was, according to General Babangida, that it was "less abrupt" than previous efforts. These announcements can be ascribed to the recommendations of the Political Bureau. The process of democratization which was suggested by the Constitution Review Committee entails the following: 1987 — Establishment of a Constitution Review Committee; 1988 — Establishment of a Constituent Assembly; 1989 — Local government elections; 1990 — State government elections; 1991 — census; 1992 — Federal elections and a return to fully fledged civil government.

### **Conclusion**

The manner in which a constitutional conference is constituted, the way in which negotiations are conducted and the interaction between negotiators and the general population are of the

utmost importance to the legitimacy of the future South African Constitution. Several caveats lurk on the way. A short term "quick fix" approach by elites without sufficient popular support could run out of steam once the present leaders are replaced by new ones. On the other hand a drawn out process could cause the present spirit of optimism and compromise to evaporate.

### Workshops

The Centre for Constitution Analysis will present four one-day workshops on "Regional government in the new South Africa" from 11 — 15 February 1991. The well known international scholar Prof. Daniel Elazar will deliver the keynote address at each workshop whereafter other papers will be read. Ample time for questions and debate will be allowed. The workshops will be held in Pretoria, Durban, Cape Town and Bloemfontein. Only 30 participants are allowed at a workshop and the entrance fee is R200. Enquiries can be addressed to Mrs R. du Toit (012) 202-2162 .

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We endorse wholeheartedly the efforts of the HSRC to improve the quality of life of all South Africans.

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*There is no fear in love. But perfect love drives out fear because fear has to do with punishment. The one who fears is not made perfect in love.*

1 John: 4





## Sentrum vir Konstitusie-Analise • Centre for Constitution Analysis

### SENTRUM VIR KONSTITUSIE-ANALISE

Die Raad vir Geesteswetenskaplike Navorsing (RGN) het onlangs 'n Sentrum vir Konstitusie-Analise gestig. Die Sentrum se doelwit is om navorsing oor grondwetlike aangeleenthede te doen, die resultate te publiseer en belanghebbendes daaroor te adviseer.

Enkele van die projekte waarmee die Sentrum tans besig is, is die volgende:

- 'n Analise van alle moderne grondwette van die wêreld word met behulp van 'n deurtastende vraelys gedoen om sodoende data te rekenariseer. Daar is tans meer as 40 binne- en buitelandse medewerkers betrokke by die projek. Na voltooiing daarvan sal navorsers en praktisyns in staat wees om met die hulp van 'n rekenaar tergelykertyd verskillende bepalings van moderne grondwette te ondersoek ten einde vergelykings te kan tref. Die resultate van dié projek is nie alleen vir Suid-Afrika nie, maar ook vir ander state van die wêreld, waarvan sommige reeds hul belangstelling toon, uiters handig en noodsaaklik.
- Die Sentrum onderneem navorsing oor aktuele aangeleenthede in die staatkunde om sodoende 'n praktiese bydrae tot die huidige grondwetlike debat in Suid-Afrika te lewer. Die onderwerpe vir navorsing word op eie inisiatief en ook op versoek van kliënte bepaal. Die navorsingsresultate word gereeld gepubliseer ten einde by te dra tot die ontwikkeling van die staatkundige kennis van die breë gemeenskap. 'n Nuusbrief word ook gereeld aan plaaslike meningsvormers gestuur ten einde hulle goed ingelig te hou oor die nuutste internasionale en plaaslike grondwetlike ontwikkelinge.
- Die Sentrum verskaf advies oor grondwetlike aangeleenthede aan persone en instansies wat dit verlang. Indien nodig, word addisionele kundiges betrek ten einde perspektiewe te verbreed. In dié proses word

kommentaar gelewer op wetsontwerpe, voorstelle gemaak ten opsigte van grondwetlike modelle en hulp verleen in die verdere afronding en verbetering van regeringsinstellings.

- Die Sentrum poog om deur middel van die aanbieding van dinkskrum, simposia en kongresse staatkundiges byeen te bring om aktuele grondwetlike vraagstukke te kan aanspreek. In die proses word daar ook van buitelandse kundiges gebruik gemaak om hulle kennis en ervaring tot beskikking van die plaaslike debat te stel.

Die Sentrum vir Konstitusie-Analise is daarvan oortuig dat die staatkundige ontwikkelingsproses in Suid-Afrika 'n objektiewe ontleding van grondwetlike modelle noodsaak ten einde die daarstelling van 'n eiesoortige demokratiese grondwetlike bedeling vir Suid-Afrika moontlik te maak en in stand te hou. Die dienste van die Sentrum is gevolglik tot beskikking van alle sektore van die publiek wat inligting en advies verlang.

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- The Centre attempts to bring a variety of interested parties together by means of workshops, simposia and conferences to discuss contemporary constitutional issues. Foreign experts participate in these discussions in order to make their expertise and experience available to the local debate.

The Centre for Constitution Analysis is convinced that the constitutional development process in South Africa necessitates an objective analysis of constitutional models in order to develop and maintain a unique democratic constitution for the country. The services rendered by the Centre are available to all sections of the public who are in need of advice or information of a constitutional nature.

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## **CENTRE FOR CONSTITUTION ANALYSIS**

The Human Sciences Research Council (HSRC) recently established a Centre for Constitution Analysis. The aim of the Centre is to undertake research regarding constitutional matters, to publish the findings and to furnish advice to interested parties.

A few of the projects with which the Centre is engaged are the following:

- An analysis of all modern constitutions of the world is being conducted by means of an extensive questionnaire in order to computerize the data. More than 40 local and foreign researchers are at present involved in the project. When completed it will enable researchers and practitioners to study and analyse different provisions of modern constitutions simultaneously by means of computers. The results of the project are not only useful and essential to South Africa but also to other countries of which a number have already shown their interest.
- The Centre undertakes research regarding topical issues in constitutional law in order to contribute to the present debate in South Africa. The topics for research are determined on own initiative and also at the request of clients. The results of research projects are published regularly in order to contribute to the development of the constitutional knowledge of the general public. A newsletter is distributed regularly to local opinion makers in order to keep them well informed on local and international constitutional issues.
- The Centre renders advice to interested individuals and institutions regarding constitutional affairs. When necessary, additional academics are involved in order to broaden perspectives. In this process comment is offered on bills considered by parliament, proposals are made with regard to constitutional models and assistance is given in the further improvement of governmental institutions.