

M E M O R A N D U M

TO : CODESA MANAGEMENT COMMITTEE
FROM : MILEY RICHARDS AND MARK PHILLIPS
DATE : 22 JUNE 1992
RE : STATUS OF DISCUSSIONS IN WORKING GROUP 2 PRIOR TO CODESA II

1. ASSIGNMENT ONE

- 1.1 The working group drew up a list of principles embodying provisional areas of commonality that existed on 11.2.92. It was agreed that these were interim proposals which could be amended and added to in the course of the working group's work. These provisional areas of commonality are reflected on page 1 of the Steering Committee document dated 27.4.92, which is attached, marked "A".
- 1.2 The working group agreed on a principle regarding the balance between central, regional and local Government. At the meeting of 23 and 24.3.92, however, the IFP informed the working group that it wished to re-open discussions on this principle. The principle is reflected on page 2 of Annexure "A". There was no further discussion of the principle before Codesa II.
- 1.3 The working group agreed on a principle regarding the participation of political minorities which is also reflected on page 2 of Annexure "A".
- 1.4 The working group drew up a list of eight further issues for discussion. These issues are reflected on page 2 and 3 of Annexure "A". They were not discussed in the working group before Codesa II.
- 1.5 On 23.3.92 the Steering Committee prepared draft principles on four of the above issues requiring discussion. These draft principles were tabled at the working group but were not discussed before Codesa II. They are reflected on page 3 of Annexure "A".
- 1.6 On 12.5.92 the Steering Committee prepared a document which integrated the provisional areas of commonality agreed to on 11.2.92 and the principles on the balance between central, regional and local government and the participation of political minorities. A copy of this document is attached, marked "B". It was tabled at the working group but not discussed before Codesa II.

2. **ASSIGNMENT TWO**

- 2.1 Working Group 2 discussed various proposals and amended proposals regarding a constitution making body. The final proposal upon which the working group deadlocked was a Steering Committee proposal dated 13.5.92 and annotated "as amended 16h30 13.5.92", which is attached, marked "C". The only issue on which no agreement is reflected in this document is the issue of the percentages in terms of which the final constitution should be adopted in 3.2.2 and 3.2.3. However, the eventual deadlock in Working Group 2 occurred on the following four issues :
- 2.1.1 The interpretation of the time period in clause 1.1.
- 2.1.2 The percentages which should apply regarding the adoption of different clauses of the constitution.
- 2.1.3 Whether there should be a role for the Senate in the adoption of a final constitution and future amendments to it.
- 2.1.4 Special deadlock breaking mechanisms.
- 2.2 The following formal proposals were before the working group, but the working group could achieve consensus on none of them.

PROPOSAL 1 :

- 2.2.1 The interim constitution should be drawn up within two months following agreement at CODESA II and immediately submitted to Parliament. The final constitution should be adopted by the National Assembly by a majority of 70%. The Bill of Rights should be adopted by the National Assembly by a majority of 75%. Clauses relating to the distribution of power between central, regional and local levels of Government should, in addition to requiring a 70% majority of the National Assembly as a whole, require a 70% majority of the regional representatives in the National Assembly. In the event of a deadlock within a specified period of time, the following deadlock breaking mechanism was proposed :
- 2.2.1.1 A constitution agreed to by a majority of delegates in the National Assembly should be submitted to the population at large by means of a referendum.

PROPOSAL 2 :

- 2.2.2. There should be no deadline for the drawing up of an interim constitution. However, once the interim constitution has been agreed upon, it should be submitted to Parliament within two months thereafter. The final constitution should be adopted by a majority of 66-2/3% (subsequently amended to 70% in response to proposal 1), with the Bill of Rights and those clauses relating to the balance of power between the centre, regions and localities being adopted by a majority of 75% of the National Assembly. In addition Working Group 2 should agree on a general constitutional principle that the final constitution will confer upon the Senate co-equal powers with the National Assembly to amend the final constitution in future.

PROPOSAL 3 :

- 2.2.3. The final constitution should be adopted by a majority of 70% of the National Assembly with the Bill of Rights being adopted by a majority of 75% of the National Assembly.

3. PUBLIC SUBMISSIONS TO WORKING GROUP 2

By 21.4.92, Working Group 2 had received 162 submissions from members of the public. These submissions were listed in an index which was circulated to members of the working group. A summary of these submissions was prepared and was also distributed to all members of the working group. Since 21.4.92 a number of additional submissions have been made by members of the public to Working Group 2. The secretary and the administration have copies of these submissions, but they were not made available to members of the working group.

4. Working Group 2 did not discuss whether any members of the public or non-Codesa organisations should be accorded the right to make oral representations to the working group, nor did it discuss the summary of public submissions or the public submissions themselves before Codesa II.
5. The index of submissions and the summary of submissions are too lengthy to attach to this report, but they are available in the administration's files.

4. FINAL REPORT

Consensus could not be reached on the submission of a report to Codesa II. Accordingly no report was submitted.

C

**WORKING GROUP 2 STEERING COMMITTEE PROPOSAL
ON A CMB 13.5.92**

As amended 16h30 13.5.92

1. Basic approach: Constitution making within the framework of a Transitional/Interim Constitution.

1.1 CODESA shall agree to and draft a transitional/interim constitution. This constitution shall be submitted to parliament for legislation within two months of this agreement and all parties within Codesa in parliament commit themselves to supporting such legislation.

1.2 The transitional/interim constitution shall make provision for the constitution making process through which, and the constitution making body by whom, a final constitution shall be drafted and adopted. There will therefore be three phases:

1.2.1 Phase 1: The present Codesa phase;

1.2.2 Phase 2: The transitional/interim constitution drafted by CODESA and legislated by the present Parliament;

1.2.3 Phase 3: A final constitution drafted and adopted in terms of the provisions of the transitional/interim constitution.

1.3 The transitional/interim constitution and the final constitution will each contain the necessary transitional provisions to ensure that there is no legal, administrative or constitutional hiatus between the three phases.

2. The process of drafting a Transitional/Interim constitution: The role of CODESA

2.1 CODESA may agree to set up for the purpose of drafting an interim/transitional constitution such committees or commissions as it may deem fit.

2.2 CODESA shall consult governments of the self governing states and may also consult other interested parties.

3. The content of the Transitional/Interim Constitution

The transitional/interim constitution shall make provision, inter alia, for the following:

3.1 A Legislature

The legislative authority shall vest in a democratically elected interim/transitional parliament consisting of a National Assembly and a Senate functioning in terms of the special majorities and general constitutional principles agreed upon.

3.1.1 The structure and role of the Senate must still be agreed upon.

3.1.2 The National Assembly shall be elected on the basis of proportional representation and universal adult suffrage, half the seats being allocated through national lists and half through regional lists in order to ensure proper representation of regions.

3.2 Provisions regarding the drafting and adoption of a final Constitution

3.2.1 The final constitution for South Africa shall be drafted and adopted by the National Assembly in terms of the procedures set out in the following paragraphs.

3.2.2 Subject to the provisions of paragraph 3.2.3. every clause in the final constitution shall be adopted by a majority of (66,7%, 70% or 75%) in the National Assembly, *save that the Charter/ Bill of Rights will require a 75% majority of the Nat Assembly.*

3.2.3 Provisions in the final constitution affecting regional government as set out in paragraph 3.6 and the distribution of power between central, regional and local levels of government shall, in addition to the general special majorities referred to in paragraph 3.2.2 also require a special majority of the regional representatives in the National Assembly. ~~such special majority to be agreed upon by CODESA.~~

70% of

in the NA

3.3 An Executive

3.3.1 Executive authority shall vest in a multiparty executive in accordance with the principle of an interim/transitional government of national unity.

3.4 The separation of powers

There shall be a separation of powers between the executive, legislature and judiciary according to the principles underlying a constitutional state.

3.5 Fundamental Rights

CODESA shall agree on justiciable fundamental rights which shall form part of and shall be entrenched in the transitional/interim constitution.

3.6 Regional Government

3.6.1 CODESA shall agree on the boundaries, powers, duties and functions of regional governments.

3.6.2 Provision shall be made for regional government and/or the phasing in of such government with the boundaries, powers, duties and functions as referred to in paragraph 3.6.1.

3.6.3 The transitional/interim constitution shall entrench regional government and its boundaries, powers, duties and functions in the transitional phase and the transitional/interim constitution shall in this regard not be amended without the agreement of all the parties in the National Assembly until the adoption of a new constitution in terms of the procedures set out in 3.2.

3.7 Provisions regarding amendments to the transitional/interim constitution.

Amendments shall only be of force and effect if:

3.7.1 They do not contradict the set of constitutional principles referred to in paragraph 3.8.1.

3.7.2 They have been adopted according to the procedures set out in paragraph 3.2.

3.8 Provisions regarding a set of constitutional principles

3.8.1 CODESA shall agree on a set of general constitutional principles to be enshrined in the final constitution and which shall not be contradicted by any provision of the final constitution.

3.8.2 The transitional/interim constitution shall contain an entrenched provision prescribing that the final constitution shall give effect to paragraph 3.8.1 and shall establish an independent mechanism which will be the only body to determine that the general constitutional principles have been enshrined and not contradicted in the final constitution; which determination may only be initiated by a party in the NA.

4. Special Mechanisms

Codesa shall agree on special mechanisms to ensure that the national assembly completes the work of drafting and adopting the final constitution within a specified period of time. The transitional/interim constitution shall remain in force until replaced by the final constitution.

"A"



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STEERING COMMITTEE WORKING GROUP 2 DOCUMENT 21 APRIL

AREAS OF AGREEMENT AND AREAS ON WHICH NO AGREEMENT YET EXISTS ON ASSIGNMENT 1 OF WORKING GROUP 2 PREPARED BY THE STEERING COMMITTEE 27.4.92

1. Areas of Agreement

1.1 Provisional Areas of Commonality that Already Exist

- 1.1.1 South Africa will be a united, democratic, non-racial, non-sexist, sovereign state.
- 1.1.2 The constitution shall be the supreme law.
- 1.1.3 The diversity of languages, cultures and religions will be acknowledged.
- 1.1.4 All will enjoy universally accepted human rights, freedoms and civil liberties including freedom of religion, speech and assembly.
- 1.1.5 There will be separation of powers between the legislature, the executive and the judiciary with appropriate checks and balances.
- 1.1.6 The legislative branch of government will embrace multi-party democracy, regular elections, universal adult suffrage, a common voters roll and in general proportional representation.
- 1.1.7 The judicial branch of government will include:
 - 1.1.7.1 A judiciary that will be independent, non-racial and impartial.
 - 1.1.7.2 An entrenched and justiciable Bill/Charter of Fundamental Rights.
 - 1.1.7.3 A legal system that guarantees the equality of all before the law.
- 1.1.8 All will be entitled to enjoy common South African citizenship.

(The Working Group agreed that the above areas of commonality, as well as the key issues to be addressed which were identified, were interim proposals which would be subject to amendment and additions in the course of the Working Group's work (Minutes 11.2.92). The Working Group also agreed that parties could make written proposals to the Steering Committee regarding additions to the areas of commonality and key issues to be addressed and that the Steering Committee would consider amending the documents accordingly (Minutes 17.2.92))

CONVENTION FOR A DEMOCRATIC SOUTH AFRICA

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1.2 The Balance Between Central, Regional and Local Government

- 1.2.1 Government shall be structured at national, regional and local levels.
- 1.2.2 At each level there shall be democratic representation.
- 1.2.3 Each level of government shall have appropriate and adequate legislative and executive powers, duties and functions that would enable each level to function effectively; such powers, duties and functions to be entrenched in the constitution.
- 1.2.4 In addition to the powers, duties and functions entrenched in the constitution, each level of government may delegate powers, duties and functions to the lower level of government.
- 1.2.5 The general principles of the constitution, including the terms of the Bill/Charter of Fundamental Rights shall apply to each level of government.

(Minutes 2.3.92)

(The Working Group agreed unanimously that the principles imply that all levels of government will have fiscal powers defined in the constitution and that this agreement should be considered when the Working Group's report is drawn up for Codesa 2 (Minutes 2.3.92). At the meeting of 23 and 24.3.92, the IFP informed the Working Group that it wished to re-open discussion on this principle.)

1.3 The Participation of Political Minorities

- 1.3.1 A new constitution shall provide for effective participation of minority political parties consistent with democracy.

(Minutes 9.3.92)

(The Working Group also agreed that this principle does not imply or reject:

- * Constitutional prescription for the participation of minority political parties in any executive structure of government;
- * Simple majoritarianism;
- * Veto powers by minority political parties on any issue.)

2. Issues on Which No Agreement Yet Exists

- 2.1 Economic freedom, government intervention and economic systems.
- 2.2 Accommodation of the diversity of languages, cultures and religions.
- 2.3 Role of Traditional Leaders.
- 2.4 The Bill/Charter of Fundamental Rights including:
 - 2.4.1 Its nature and scope
 - 2.4.2 Affirmative action

2.4.3 Second generation rights

2.5 Self-determination

2.6 New items proposed, namely:

2.6.1 The role of standing committees in the formulation of legislation.

2.6.2 Government will be open, accessible and accountable.

2.6.3 Power sharing.

3. Draft Principles on 2.1 to 2.4 Above Prepared by the Steering Committee on 23.3.92

3.1 Draft principle on economic freedom, governmental intervention and economic systems:

"The constitution should provide for the promotion of the improvement in the quality of life of all South Africans by enabling economic growth, human development, social justice and equal opportunities for all "

3.2 Draft principle on the Bill/Charter of Fundamental Rights:

"There shall be a justiciable bill/charter of fundamental rights which shall ensure inter alia :

- universally accepted human rights and freedoms;
- civil liberties including freedom of religion, speech and assembly;
- the equality of all before the law;
- property rights, provided that legislation may in the public interest authorise expropriation against payment of reasonable compensation which shall in the event of a dispute be determined by a court of law.

The constitution shall enable the implementation of measures to help address the racial and gender inequities caused by past discrimination."

3.3 Draft principle on the accommodation of the diversity of languages, cultures and religions:

"The constitution at all levels of government shall accommodate and protect the right of citizens to practice their religion, enjoy their culture and use their own language both as individuals and in association with others. This shall include the right of citizens where practicable to have their children educated in their mother tongue and the right of citizens to establish educational institutions reflecting their language, culture and religion, provided that racial discrimination may not be practised."

3.4 Draft principle on the role of traditional leaders:

"The constitution should define a suitable role for traditional leaders consistent with the objective of a united, non-racial, non-sexist, democratic South Africa."

**GENERAL CONSTITUTIONAL PRINCIPLES
AREAS OF COMMONALITY - PREPARED BY WORKING GROUP 2
STEERING COMMITTEE 12.5.92**

1. South Africa will be a united, sovereign state in which all will enjoy a common South African citizenship.
2. South Africa will be democratic, non-racial and non-sexist.
3. The constitution shall be the supreme law.
4. There will separation of powers between the legislature, the executive and the judiciary with appropriate checks and balances.
5. The judiciary will be independent, non-racial and impartial.
6. There will be a legal system that guarantees the equality of all before the law.
7. There will be representative and accountable government embracing multi-party democracy, regular elections, universal adult suffrage, a common voters role and, in general, proportional representation.
8. The diversity of languages, cultures and religions will be acknowledged.
9. All will enjoy universally accepted human rights, freedoms and civil liberties including freedom of religion, speech and assembly which will be guaranteed by an entrenched and justiciable Bill/Charter of Fundamental Rights.
10. Government shall be structured at national, regional and local levels.
 - 10.1 At each level there shall be democratic representation.
 - 10.2 Each level of government shall have appropriate and adequate legislative and executive powers, duties and functions that will enable each level to function effectively; such powers, duties and functions to be entrenched in the constitution.

- 10.3 In addition to the powers, duties and functions entrenched in the constitution, each level of government may delegate powers, duties and functions to other levels of government.
 - 10.4 The general principles of the constitution including the terms of the Bill/Charter of Fundamental Rights shall apply to each level of government.
11. The new constitution shall provide for effective participation of minority political parties consistent with democracy.