

MLC 091-10-1-4



\*\*\*\*\* JOURNAL \*\*\*\*\* DATE 07-APR-1992 \*\*\*\*\*

DATE/TIME = 07-APR 11:45

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**FAX COVER SHEET**

**DATE** : 7 APRIL 1992

**TO** : MAYIBUYE  
FAX NO : (011) 3338870

**ATTENTION** : BRIAN HOGA (SCRATCH)

**FROM** : ALBIE SACHS  
FAX NO: 021 222626

**TOTAL NUMBER OF PAGES (INCLUDING THIS PAGE):** 5

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~~SECRET~~

Dear Comrade Scratch

I suggest you do the article as follows.

1. Print the text verbatim of what Working Group 2 called "Areas of commonality and areas that needed further discussion." The areas of commonality have been fully agreed on. The areas needing further discussion are still being debated. I suggest you get the texts from Frene who is one of the advisors to Working Group 2 and who is also head of the Research Department.

2. Below the text, I suggest you put in the following commentary by myself:

NOTES FROM CODESA

NO BLOOD ON THE FLOOR, BUT HEAVY DISAGREEMENTS

by Albie Sachs

The impression put forward by the press that the ANC and the Government have come to some kind of agreement on two critical areas, namely, power sharing and regional government, is misleading. The function of Working Group 2 is twofold: first, to work out general constitutional principles which will be enshrined in the new constitution and second, to define the body which will draft that constitution. We are having heavy battles on both.

In the beginning, great progress was made in relation to General Principles. We were able to use the Declaration of Intent signed at CODESA 1 as the foundation of a document entitled "Commonalities". These commonalities include such important principles as that South Africa shall be a united, non-racial, non-sexist democratic state; that the constitution will be the supreme law; that there will be a multi-party democracy; that there will be an entrenched and justiciable Bill of Rights containing universally recognised rights and freedoms, including freedom of religion and expression; and that the language, religious and cultural diversity of the country will be recognised.

These principles will lie at the heart of the new democratic constitution for South Africa. They embody the spirit and the letter of the Freedom Charter, and represent a great achievement for all those who support democracy in our country.

A number of other more controversial areas, however, have been set aside for detailed argument and discussion. The first related to what is popularly known as the unitary state/federalist debate. To the surprise of many of the participants, who imagined that the ANC was only interested in a highly centralised, bureaucratic and commandist state, where all power in the country would be concentrated in the hands of a few people, the ANC came out with principled positions supporting democracy at the levels of national, regional and local government. We favoured regions constituted on a non-ethnic basis with governments elected by and accountable to the people in the region. This has long been ANC policy, and in fact conforms to ANC internal practice. Yet by stating it we were said suddenly to have become reasonable and moderate.

We agreed to the functions and the powers of the regions being stipulated in the constitution, so that the regions could not be broken up by the centre, nor could regional governments be dismissed. At the same time, we made it clear that at the CA we would argue that the last word in legislation should always be with the central government.

The Government and a number of other groups, on the other hand, favoured exclusive powers and fiscal autonomy for the regions. We agreed to disagree.

In the first place, we argued that our task at Codesa was only to draft the broad principles that would underlie the Constitution and that all questions of detailed structure belonged to the Constituent Assembly. Secondly, we said that in any case we would argue at the CA against the idea of separate, autonomous states.

There was no reconciling the positions of the ANC and the Government, so the result was rather open language with a number of explanatory notes attached.

The second major area of hard debate was in relation to power-sharing. Our position is that coalitions only work if the requisite political will, coupled with perceived mutual interest, exists. The tragic experiences of Cyprus, the Lebanon and, now, Northern Ireland, show that if the will to cooperate does not exist it cannot be imposed by constitutional devices. The many successful coalition governments to be found in various parts of the world function precisely because the parties to the coalition realise that they stand more to gain by working together for a certain period than by opposing each other.

has a bi-cameral system been used for drafting what will in effect be a totally new constitution for the country.

We agree that the objective of the Constituent Assembly (the term we prefer for the CMB) should be to function in as inclusive a manner as possible so as to produce a document acceptable to and binding on the whole South African nation. Having what in effect would amount to a House of Winners and a House of Losers, however, each trying to face the other down, would be the worst way of achieving <sup>the desired</sup> consensual result.

Accordingly we have been arguing for a single chamber that would take decisions by a two thirds majority; it would be elected by proportional representation with a relatively low threshold, and provision would be made for an independent Constitutional Panel to ensure that the principles agreed on by CODESA were enshrined. At the time of writing, the debate continues. It is not true as one newspaper put it, that there is blood on the floor, but there have been strong differences of opinion.

*which met with broad approval,*

The Government's immediate reaction to the ANC proposals was not to deal with their merits, but to criticise their tone. In particular, the Government objected to a phrase in the ANC document stating that the concept of bi-cameralism for the CMB confused the role of a constitution-making body with that of a legislature ~~so~~ *clumsily* as to be unworthy of a first-year law student. We are happy to retract, and to place on record that in fact we feel that the proposal would be worthy of a first year law student.

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## Fax Cover Sheet

TO: \_\_\_\_\_

ATTENTION: ALBIE SACHS

FAX NO: 222-626

DATE: 30/03/92

SENT BY: Brian Hoga (Scratch)

TEL: 011-330-7156

NO OF PAGES INCLUDING THIS ONE: 1

MESSAGE: FOLLOW-UP TO OUR DISCUSSION IN CAPE TOWN. GENERALY IMPRESSION GIVEN BY MEDIA IS THAT THERE'S LOT OF AGREEMENT AROUND CONSTITUTIONAL PRINCIPLES. YET THOSE AGREEMENTS SEEM TO HAVE DIFFERENT MEANINGS TO THE ANC ON ONE HAND AND THE GOVERNMENT ON THE OTHER. CAN YOU WRITE HOW MUCH GROUND HAS BEEN COVERED IN WORKING GROUP 2, AREAS OF CONVERGENCE AND DIVERGENCE, ETC. LENGTH: 1200 words. DEADLINE: APRIL 7. REGARDS.

It is quite clear that in South Africa the concept of Transitional Government presupposes a phase of power-sharing according to agreed proportions. There would be nothing to stop parties with widely different philosophies from later entering into arrangements to cooperate for defined periods in the interests of the country. This is vastly different from stating in the final constitution that for all time to come the executive should be based on participation by all parties. For one thing, this would do away with the concept of opposition, which is vital to democracy, since everyone would be in the government. For another, it would establish rigid and artificial quotas in government which would inevitably lead to friction, paralysis and ungovernability.

The final formulation left the matter open and vague. What we felt had to be guaranteed were the rights of the opposition rather than what were called the rights of minority parties. The rights of the opposition would include the right to campaign for change, to enjoy freedom of expression and of information, and the right to contest regular elections so as to become the majority party. We also acknowledged that the majority party in central government could well be the minority party in a region. Finally, we accepted that minority parties in the parliamentary set-up should have the right to block amendments to the constitution (that is, a high majority would be needed for such amendments) and that they should have the right to representation on parliamentary committees. In all these respects, minority parties would have a meaningful role in any new constitutional set-up.

We made it very clear however, that these rights did not include ~~the~~ <sup>an absolute</sup> right to participate in government against the wishes of the majority, <sup>and to veto all government actions.</sup> The result here, too, was an open formulation with an explanatory note added by us.

It should be said that the debates were rich and interesting, but the gulf between us and the Government remained large.

The third issue where we are still far apart is in relation to the constitution making body (CMB). The government says it would prefer CODESA to convert itself into the CMB, but reluctantly agrees to an elected body performing that function. It insists, however, that there be a second house with equal powers, made up either of a collapsed Tricameral Parliament or else of a Senate consisting of representatives from regions and from minority parties. We point out, however, that nowhere in the world