

To: Dullah Omar

for bilateral negotiators

16/2/93

regs.

NOTES FROM THE RUMP

The rump of the Constitutional Committee met in Belville to consider, amongst other things, a report on bilateral discussions on future regions.

The following is a summary of some of the different points made.

1. It is important now to start thinking about the composition of the Demarcation Commission. It is easier to think of the kind of people who could serve on it, than to come up with a tight definition. In other words, we compose a list of people of integrity and standing who have broad acceptance across the spectrum, see what they have in

common, and then set out the criteria. Our feeling was that the DC should consist of individuals, not representatives of parties, who should be members of high calibre, capable of dealing with the many issues that will arise. They should have a good character, and be of different genders. We should also have a high level of activity in

We prepared quite a long list, starting with names like Mamphela Rhampela, Francis Wilson, Enos Mabuza, Bertus de Villiers and Fiks Bam.

2. We were not happy at all with the criteria for regional demarcation as set out by the Law Commission and taken over in the bilateral. The reference to demographic features rather than to population size and density has an unpleasantly South African ring to it. Similarly, mention of cultural and linguistic realities hints at homelands. We suggested criteria similar to those in our Regions document.

In particular, demarcation should take into account:

for bilateral
negotiations

16/2/93

regs.

NOTES FROM THE RUMP

The rump of the Constitutional Committee met in Belville to consider, amongst other things, a report on bilateral discussions on future regions.

The following is a summary of some of the different points made.

1. It is important now to start thinking about the composition of the Demarcation Commission. It is easier to think of the kind of people who could serve on it, than to come up with a tight definition. In other words, we compose a list of people of integrity and standing who have broad acceptance across the spectrum, see what they have in common, and then set out the criteria!

Our feeling was that the DC should consist of individuals, not representatives of parties; that they could be members of political organisations, but should not be too high profile as such; that although some could be [white] technocrats, it should not basically be a [white] technocratic body, but rather be made up of persons capable of listening to and analysing arguments, looking at issues in the round, and showing sensitivity towards the many currents and strands of opinion in the country. The body should have a broad South African appearance and character, that is, draw on the experience of persons from both genders and all the major currents of opinion and schools of thought, and represent a sense of balance and objectivity in relation to region and background.

We prepared quite a long list, starting with names like Mamphela Rhampela, Francis Wilson, Enos Mabuza, Bertus de Villiers and Fiks Bam.

2. We were not happy at all with the criteria for regional demarcation as set out by the Law Commission and taken over in the bilateral. The reference to demographic features rather than to population size and density has an unpleasantly South African ring to it. Similarly, mention of cultural and linguistic realities hints at homelands. We suggested criteria similar to those in our Regions document.

In particular, demarcation should take into account:

the objective of promoting human development [not just material resource development], equality and a sense of shared citizenship [that is, overcoming the divisions and hatreds of the past]. These factors are left out of the Law Commission formula.

3. Money matters. Reference to adequate fiscal authority is potentially disastrous. It goes back to the notion of fiscal autonomy or fiscal federalism, which we resisted in Working Group 2, and for good reason, even if we did not always understand the reason ourselves.

Even the most conservative economists are rejecting the idea of separate fiscal regimes for the different regions. They accept that property taxes can be local and that certain other taxes that relate to local functions can be collected and retained locally. But the financial structure of the country has to be seen as a whole. Macro-economic balance, about which we hear so much, is impossible if each region can go its own way, some running up huge budget deficits while others show restraint and so on.

We also need free movement of capital, goods and labour, and dear comrades, we cannot afford a set-up where some regions offer sweet-shop wages and union-bashing as an inducement to investors, like the decentralisation policies of old.

Watch out, too, for influx control under new names. It is already being more than hinted at in the Western Cape ["mense wat is nie van onse streek nie, kan nie vir ons se hoe om to regeer nie"]. All this will be based on property ownership or house occupation and payment of taxes in certain regions.

What the regions need so as not to be financially dependent on the centre is guaranteed access to funds for the carrying out of their proper functions. This is achieved not through fiscal autonomy or adequate fiscal authority but by means of guaranteed fiscal capacity. In federations like Australia, the states get the bulk of their money not from taxes which they raise themselves, but from allocations made by a central Grants Commission. In Germany, the Laender each get a fixed percentage of tax revenue [income tax and VAT], according to a formula which builds in an equalisation factor in favour of the poorer regions.

The whole debate about the regions has been dominated by the theme of securing the right to isolation. What the majority of the people want, particularly those living in conditions of gross underdevelopment in what are commonly referred to

as 'the regions,' is precisely the opposite, namely, the right to participate in national life, to be part of the mainstream and to share fully in the wealth of the country. It is not fiscal separatism that will guarantee a better life for the poor farmer in northern Natal, but guaranteed funds for development.

4. We are definitely opposed to separate constitutions for the regions. In genuine federations, such as the USA and Australia, which came about through existing states coming together, pooling some of their sovereignty and retaining some, it made sense to keep residual state constitutions. The basic objectives of regionalism in South Africa are to bring government closer to the people and to ensure a dispersion of power. In other words, to promote democracy.

Germany is a rare exception in this regard. Yet no attempt was made to revive ancient principalities, kingdoms and free cities; moreover, the population of Germany is relatively homogeneous, so there was little danger of separate states becoming constitutionalised into separate ethnic enclaves.

The objectives of promoting democracy, regional development and respect for cultural rights can easily be achieved by ensuring that the principles and structures of regional government are the same for the whole country.

Do we want to live in a country where we have to sing God Save the King in Durban and Nkosi Sikelele i'Xhosaland in East London and Ons Vir Jou, Goeie Hoop in Cape Town? Where part of our land really becomes a Banana Republic, or, rather, a Banana Kingdom, replete with feudal type structures, wasteful and pompous bureaucracies, and autocratic palace guards? Should regions be able to set up and abolish second, third or fourth chambers at will, have as many presidents, prime ministers and chief justices as they want, irrespective of need or affordability? Do we need to hear something on the news about the people of Tswana Herzegovinia?

Our whole struggle over generations has been to separate the question of cultural diversity from the issue of political rights. In fact, language and cultural rights in South African conditions become more secure when they are not associated with political power. The real reason for asking for separate constitutions is to accommodate what is called a Zulu character into Natal and what is called an Afrikaner character into the Western Cape and the Western Transvaal.

In reality, we can and must accommodate language rights throughout the country. Regions should be able to develop distinctive language policies within the broad framework of constitutionally protected language rights. A separate constitution is not needed for this. Similarly, there has to be a national policy with regard to securing a dignified and meaningful position for traditional leaders throughout the whole country. We must avoid unedifying contests over precedence between traditional leaders in one region as opposed to their counterparts in another.

The real problems in Natal do not stem from conflict between Natalians and non-Natalians, but from conflict between Natalians and Natalians. This latter conflict will not be diminished by hiving Natal off from the rest of the country. On the contrary, the more interchange there is, the more national standards of peace and good government are applied on a universal basis throughout the country, the more likely is it that the people of Natal will at last find peace.

We have to encourage and develop a sense of South African-ness. Our allegiance must be to South Africa, not to the head of state in this region or that. If we cannot live together in freedom as South Africans in one country, we will not be able to live together peacefully side by side.

In any event, is this not exactly the kind of question which the Demarcation Commission will have to deal with as part of the total relationship between the regions and the centre? We should not pre-empt options at this stage. Nor should we tie ourselves down to precise formulae before we have heard what the people of Natal, the Cape and the Western Transvaal really want. Elections enable us to gauge what a bottom up approach would in reality lead to.

5. Perhaps the most important part of our discussions related to the question of how to phase in regional government.

Basically, we came down in favour of three phases.

Phase one - from now until elections.

The TEC would promote re-integration of existing administrations with emphasis on creating conditions for free and fair elections.

The Demarcation Commission would recommend provisional boundaries for the purposes of elections. The TEC would

ensure multi-party\multi-administration responsibility within these regions for guaranteeing free and fair elections.

Phase two - after elections to the CA and before new elections for regional assemblies:

The MP's on the provisional regional lists will choose by proportional representation an agreed number of persons to function as a regional administration for their respective regions. They will also choose a regional administrator. The Administrator and the Regional Administration will function as an Interim Regional Government, pending the establishment of regional governments in terms of a new constitution.

Phase three - after a new constitution has been adopted:

The Government of National Unity and Reconstruction will supervise the holding of elections in terms of the new constitution for the creation of regional assemblies and regional government. The new regional authorities would then function normally according to the constitution of the new South Africa.

6. We notice that none of the proposals touch on the crucial question of how the civil service is to be organised. Smuts saw to it at the time of Union that the centre would make national policy while the regions would be responsible for implementation. This is what the German constitution in essence does as well. In other words, you do not have a central civil service operating side by side with a regional civil service. They interact with each other at their different levels of responsibility. This fits in with the idea of concurrent powers [the modern trend, and ours].

7. A note on over-riding powers for the centre. This was not discussed at our meeting, but the point is raised in the interesting document on Constitutional Options. The idea is not so much that the centre can intervene against the region to over-ride what the region has done or proposes to do. Rather, it is to insist that regional powers be exercised within the framework of national legislation.

This was the position in the Union of South Africa through a non-repugnancy clause. It is the position in the USA today, where an Act of Congress will always override state legislation [except, possibly, we were told, in relation to

such purely local matters as appointments to the local civil service].

What this means is that the overriding power of the central government should not be seen as an intervention after the fact by the central government to compel the regional government to alter course. Rather, it would be the fact that national legislation, rather than central government executive action, will always override regional legislation.

The regions will have a direct and an indirect say in the shaping of national legislation. They will largely control the implementation of national legislation within their areas. They will be able to pass their own legislation in respect of matters within their constitutional competence, provided that it does not conflict with national legislation. There might be some matters in respect of which they have exclusive jurisdiction. Yet they cannot go their own way, with laws and policies at variance with national laws and policies.

We want a country called South Africa, please, not a collection of funny states within the borders of South Africa.

Before the R.A. govt on a bash -
after elects. Complete reconstr.
2 phases.

The function of the TEC will be to ensure that the second major step towards democracy can be taken. Its basic task is to ensure that free and fair elections can be held for a democratic parliament.

Once free and fair elections have been held, the second step can be taken. This will involve a complete reconstruction of government. The racist Tricameral Parliament will disappear. It will have been replaced by a democratically elected Parliament representing all the people of South Africa.

The democratic Parliament will then take three further steps.

Its most important function will be to draft and adopt a new constitution for South Africa.

It will at the same time elect a new President to form a government of national unity. This government of national unity will hold office while the constitution is being drafted.

Thirdly, it will make laws for the good government of the country while the new constitution is being drafted.

Fourthly, it will carry on as the founder of a GNUR for an agreed period while the new const is being phased in.

PROVISIONAL ARRANGEMENTS MADE BY THE TDA

The TDA makes provisional arrangements for a number of important questions during the period, of transition, namely:

basic freedoms of speech, association and religion;

the flag;

the national anthem;

the capital cities and seats of government.

THE CENTRAL POSITION OF DEMOCRATIC ELECTIONS FOR A CONSTITUTION-MAKING BODY

The central idea of the TDA is that a new democratic constitution for South Africa must be drawn up by a democratically elected Constituent Assembly. The TDA establishes the way in which the CA will be created and the general principles which will govern its operation.

It also makes provision for how the country is to be governed firstly, in the period before the CA has been elected and secondly, during the period when the CA is drawing up a new constitution. *on the whole -*

THE GOVERNMENT OF SOUTH AFRICA IN THE PERIOD BEFORE ELECTIONS FOR A CONSTITUENT ASSEMBLY:

THE TRANSITIONAL EXECUTIVE COUNCIL

This section sets out to give legal force to the agreements reached in Working Group Three at CODESA. It deals with the period before elections are held. In fact, its basic purpose is to create conditions so that free and fair elections can be held.

At the moment the government is player, referee and rule-maker at the same time. It controls the electronic media, the police force and the army. It runs the civil service. It is in charge of the department which issues identity documents. It controls the country's budget. It has a vast army of secret agents under its wing. It will also be a major contender - through the National Party - in the elections.

In any country, the party in office has many advantages. In South Africa, however, the National Party got into office by means of a racist constitution. It is not the normal incumbent government. *in office* It completely lacks legitimacy. The elections are being held precisely to pave the way for the adoption of a completely new constitution.

Even if its record were spotless, the present government could not be expected to be impartial in supervising its own conduct during elections. As it is, large sections of the government have a shocking record of recent dirty tricks, disinformation, misuse of public funds, corruption and abuse of office. These abuses and misuses of power have been particularly prominent in the fields of security, documentation and information.

It is in the interests of the National Party as well as of everyone else that it not be left in charge of the election process. If it does well at the polls, no-one should be able to say that it achieved its vote through fraud or other irregular means. *←*

What the draft law does is to establish a transitional executive council to ensure joint responsibility for

government in certain key areas. These are the areas that directly or indirectly impinge on the electoral process and the context in which elections take place.

The TEC would function with the assistance of sub-councils in the following areas:

regional and local government:

law and order, stability and security;

defence;

finance;

foreign affairs.

The TEC shall consist of one person from each body represented at CODESA. This means CODESA as reconstituted, whatever its name might be. Thus, the PAC would be entitled to a member if it participated in the new CODESA. The same would apply to the Conservative Party. The only conditions are:

they agree to facilitate the transition to a democratic order in South Africa;

endeavour to create a climate favourable to free and equal political participation;

promote conditions conducive to the holding of free and fair elections;

and agree to carry out decisions of the TEC.

THE CHAPTER DEALING WITH A MEDIA COMMISSION

[This section is still being worked on. In essence, it will establish an Independent Media Commission. The function of this Commission will be to ensure that during the election campaign the SABC ceases to be the information arm of the National Party. Internationally accepted norms of open broadcasting and fair access to the media will have to be guaranteed.]

THE CHAPTER DEALING WITH THE INDEPENDENT ELECTION COMMISSION

[This section is still being elaborated. It deals basically with the establishment of an Independent Elections Commission to supervise the process of identifying voters