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**A Triumph for Democracy**

The central question in negotiations is whether parties, organisations and administrations are prepared to allow a democratically elected body to draft the new constitution or not. The question is whether they are prepared to subject themselves through the test of an election and the will of the majority, or not?

The ANC and its allies in the Patriotic Front have long committed themselves to an elected body drafting a constitution. After a long and bitter struggle even the South African Government and National Party were forced to agree to this approach.

Democracy means the freedom to choose. The IFP and its allies in COSAG say not. It is their argument that a final constitution must be drawn up by the Multi-Party Negotiating Forum and not a democratically elected body.

This is the reason why they walked out of negotiations on 15 June - only to return to the next meeting (*See: Bulletin 29*). The argument then was that the Technical Committee on Constitutional Matters did not consider the federalist option. The truth was that the Report did not exclude this possibility.

Nevertheless the Technical Committee was instructed to draft a further recommendation based on the submissions of COSAG and report thereon in the next few days.

The Technical Committee has now done so in its Seventh Report. This Report was discussed by the Negotiating Council on 29 and 30 June.

**The Seventh Report**

The Technical Committee having considered all the submissions, reported as follows:-

The submissions made by the parties in COSAG differ from one another. There is no agreement amongst them as to how the boundaries of regions should be drawn up. In fact, the IFP proposal on how regional constitutions should be drafted differ from that of the KwaZulu administration.

COSAG has argued for a so-called 'one-phase' approach - that the negotiators draft the constitution as opposed to the ANC's so-called 'two phase' approach of drafting the constitution only after an election.

In terms of the argument by COSAG, the Constitutions of both the regions and federal governments should be drafted and approved by the negotiators. The election would then take place for both regional and national legislatures in terms of the new constitution.

However, the Technical Committee points to the fallacy of the so-called 'one-phase' approach. In fact, this process really amounts to nine phases *not* one.

Should the COSAG proposals be agreed to, the following would be the different phases:-

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- b) Provision could be made in the transitional constitution for the representation of regions in the constitution making body. This could be done in various ways. It could be by additional party regional lists on a regional basis, direct election into a second chamber or the designation of members of the regional legislatures to a second chamber.
- c) The transitional constitution could provide for the establishment of a commission to interact with the constitution making body in a prescribed manner regarding the finalisation of boundaries, authority, powers and functions of regions, including either uniform or asymmetrical regional constitutions.
- d) Should this approach be accepted, the implementation of constitutional arrangement for a specific region during the transitional period may become practicable. It is conceivable that the elected legislatures of some or all of the regions would be capable of developing regional constitutional arrangements before the constitution making body would be able to produce a new national constitution. These constitutional arrangements should be consistent with the constitutional principles and the transitional constitution and be in conformity with the new Constitution as it evolves in and is authorised by the constitution making body.

In conclusion, the Report states the following:-

A process of regional constitution making along these lines could establish an equilibrium between the different approaches to constitution making. Regional constitutional dispensations are not left entirely in the hands of the national constitution making body. Further, regional dispensations and their implementation may not necessarily be postponed until a final national constitution has been adopted and implemented. The adoption of such a procedure for finding an equilibrium between the two approaches, would require a somewhat detailed regulation in the transitional constitution to be followed by the constitution making body for the establishment, approval, ratification and implementation for the regional dispensations.

## The ANC's Position

The ANC has developed proposals which attempts on the one hand to ensure the most democratic outcome, while on the other hand, also considers the fears and aspirations of parties based on political or regional minorities.

The ANC has therefore proposed the following:-

1. The final constitution will only be democratic if it is drafted by people who have been democratically elected to do so. An election is therefore necessary.
2. Because of the present levels of violence and political intolerance, a truly non-racial election can only take place if the playing fields are levelled and all parties can equally contest an election.
3. To level the playing field, the NP regime cannot be both player and referee at the same time. Therefore both the election and the control over state owned media should be placed in the hands of Independent Commissions.
4. To ensure that the NP regime does not pass any laws detrimental to the process of a free and fair election, a Transitional Executive Council should be established. This would also ensure that the security forces are placed under multi-party political supervision.
5. A Commission on Regions should make proposals for electoral boundaries.
6. To allay the fears of regionally based governments and parties, the agreed constitutional principles which would be binding on the Constituent Assembly should be agreed to at the MPNP. Furthermore, election to the constitution making body will be both on national and regional lists.
7. Once elected, the Constituent Assembly should then draft the new constitution.

The above debate was resolved on 30 June Democracy has once again triumphed. A Resolution proposed by the Planning Committee was accepted by the large majority of participants.

1. The Multi-Party Negotiating Process (MPNP) should resolve that there shall be a federal state;
2. MPNP decides upon constitutional principles for the federal state;
3. MPNP decides upon regional boundaries after considering the report of the Commission on Delimitation/Demarcation of Boundaries;
4. The establishment of institutions for the levelling of the playing fields;
5. Each region elects a constituent assembly to formulate proposals for its constitution and a national constitution;
6. Referenda are conducted at regional level to secure approval of the proposals for the regional constitutions;
7. MPNP co-ordinates proposals for regional constitutions and the national constitution, and finalises the national and regional constitutions with the assistance of a committee/commission;
8. The national constitution is submitted to a national referendum for approval;
9. Elections are held for national and regional legislatures in accordance with the provisions of the approved constitutions, which mark the termination of the present constitutional dispensation.

However, as pointed out by the Technical Committee, the following questions still would have to be answered:-

1. How will the regional constituent assemblies be elected and how will they take their decisions?
2. What majority will be required for approval of the constitutions at the regional and at the national level?
3. What will the position be if the specified majorities are not obtained at the regional level?
4. How will the playing field be levelled in each of the regions?
5. Should the MPNP remain as it is presently constituted?
6. Will the MPNP be bound by the decisions taken by the regions or will the MPNP have the final say?

Having considered the two opposing views on how to arrive at a final constitution, the Technical Committee made the following recommendation:-

1. The constitutional principles regarding regional autonomy should be finalised. These principles indicate the essential features of both the nature and form of state which clearly emerges as a decentralised one with regional autonomy. In fact, there is nothing in these principles which stand in the way of federalist aspirations.
2. There is no universally accepted definition of federalism and it would serve not useful purpose to use as a point of departure preconceived concepts such as unitary or federal states. A more expeditious way of dealing with the matter of the form of state would be to consider all those aspects which have a bearing on the form of state.
3. For the concerns of various parties, especially those having regional interests, to be catered for, the constitutional principles agreed to at the MPNP would have to have the legal force of being binding on a constitution making body and actually implemented.
4. In addition, the constitutional principles are stated as principles for a future democratic South Africa. As principles, they are not prescriptive in their actual implementation. They bind the constitution making body, but leave it free with the limitations they impose to develop the precise terms and mechanism of the constitution.
5. In view of the demand by the COSAG group for constitutional arrangements for regional government and administration immediately after the election of a constitution making body, a possible middle ground would be to include in the text of a transitional constitution, provisions for the following:-
  - a) At the time of the election of the constitution making body, legislatures can be elected simultaneously within each demarcated region. These legislatures could elect regional executives for the period of the transition.

## The Consensus Resolution

1. The Negotiating Council agrees on the following steps to be taken for the purposes of establishing a new constitutional order:
  - a) The MPNP shall adopt the constitutional principles including principles of Regional Government providing for both strong Regional Government and strong National Government;
  - b) The Constitutional Principles shall be binding on the Constitution-Making Body and shall be justiciable by a constitutional court/ tribunal;
  - c) The Commission on Delimitation/ Demarcation appointed by the MPNP will make recommendations to the MPNP on regional boundaries for the purposes of elections and Regional Government for the transitional phase;
  - d) The MPNP shall agree on legislation to make provision for the following structures for the purpose of levelling the playing field and promoting conditions conducive to the holding of free and fair elections:
    - (i) A Transitional Executive Council;
    - (ii) An Independent Electoral Commission;
    - (iii) An Independent Media Commission and an Independent Broadcasting Authority;
  - e) The MPNP shall agree on details of discriminatory legislation to be repealed;
  - f) The MPNP shall agree on a constitution for the transitional period;
2. The Negotiating Council accordingly requests the Technical Committee on Constitutional Issues to draft a Constitution for the transition which shall make provision for:
  - a) The election according to a system of proportional representation of a Constitution-Making Body, legislature and national government for the transitional phase which will include a National and Regional component. With regard to constitution making, this constitution shall provide for

deadlock breaking and special majorities by which decisions will be taken;

- b) The election of regional legislatures and the establishment of regional governments in the transition;
  - c) The powers, functions and structures of regions for the transitional period;
  - d) fundamental human rights on a justiciable basis during the transitional period;
  - e) A Constitutional Court/Tribunal to ensure the justiciability of the constitutional principles, of the fundamental rights and of the constitution itself;
3. Participants are given until the 12th of July 1993, to make further inputs to the Technical Committee with regard to the above draft constitution for the transition.
  4. This is agreed against the background of paragraph 6 of the Explanatory Memorandum adopted by the Negotiating Council on 30 April 1993.

## The Way Forward

The most important achievement of this weeks negotiations is that it has finally been agreed that it would be an elected body that would finally draft the new Constitution for South Africa.

The Negotiating Forum that was scheduled for Friday 25 June and postponed to 4 July can now report significant progress. The path is clear for the drafting of a transitional constitution (Transition to Democracy Act) and the installation of a Transitional Executive Council.

Based on the progress recorded thus far, there is little reason for the date of the elections not to be agreed to.

### Notice

This Bulletin is intended merely to inform and stimulate discussion. The views contained herein do not necessarily reflect the official views of the NEC of the ANC.