

AN EVALUATION OF THE WORKING GROUP AGREEMENTS

- 1 The agreements in the Working Groups contemplate a transition to a democratic order which is substantially in line with the ANC's negotiating position.

- 2 The first stage of the transition makes provision for the installation of a Transitional Executive Council which will exercise joint control with the government over certain functions and will have a say in relation to other functions. A key component of this structure will be the Independent Electoral Commission. It is contemplated that it will be vested with wide powers to control the elections and take action necessary for free political participation and the levelling of the playing fields. If it functions impartially, and is vested with effective powers, it will have the capacity to prevent obvious abuses of power and malpractices. It will also be able to ensure that regulations for the holding of the elections and procedures connected therewith are fair. It will not, however, be well-placed to deal covert actions.

- 3 The government has also committed itself to the principle that the constitution should be drawn up by an elected constitution making body; that there should be one South Africa, and that voting for the National Assembly should be on the basis of a common voters roll with proportional representation.

- 4 To this extent the Working Group agreements constitute gains for the ANC. The problems lie not so much in the form of the transition as in the substance of certain of the positions taken by the government negotiators.
- 5 The problems arise out of attempts by the government to gain acceptance of the principle that there should be a comprehensive interim constitution with a Bill of Rights, a bi-cameral parliament and provisions for regional government. Through this process, the government clearly hopes to establish on the ground during the period of interim government, regions with their own legislative and fiscal powers, and to institutionalise a senate of the type described in its constitutional proposals which were published last year.
- 6 There are two dangers in agreeing to this type of interim parliament. First, it is a parliament for long term government rather than interim government. There will be little incentive for parties satisfied with such structures to agree to a different constitution. Moreover, there is little purpose in establishing new regions at this stage unless these regions are to form part of the future constitutional order. By attempting to impose regionalism at this stage of the process, the government is clearly hoping to establish structures which will be difficult to alter in subsequent

negotiations. The same holds true for its positions in regard to the Bill of Rights and bi-cameralism. Secondly, by making provision for an interim constitution which is appropriate to its long term vision of government in South Africa, and at the same time insisting upon high majorities for the adoption of the final constitution the government is clearly hoping to achieve a position in which the ANC will be trapped in an interim constitution, and will not be able to get out of it unless it agrees to terms imposed by the government indirectly through the use of its minority veto. The attempt to secure agreement on constitutional principles which will make the final constitution difficult to amend, is consistent with this strategy, and the entrenchment of a constitution consistent with its vision of the future.

- 7 There is no reason in principle why sovereignty should not be vested in a constituent assembly. Many advantages would flow from such a consolidation of power. It is important, however, that the structures of the 'interim parliament' should be confined to what is needed for interim government, and should not involve a major restructuring of the political institutions of the country in line with the long term goals of the government and its allies. It is also crucial that there should be an effective means of escaping from the interim

constitution. The interim constitution should be a brief stage on the road to democracy, and not a trap which will frustrate the achievement of democracy.

- 8 There are also problems which will arise if any of the TBVC states elect not to participate in either or both the stages of interim government. If there is no participation in the first stage of interim government, there will be difficulty in achieving a levelling of the playing fields or the promotion of a climate for free elections, in those of the TBVC states whose administrations do not participate. To a lesser extent, the same holds true of places like KwaZulu, which could elect to remain outside the transitional structure. In such cases, however, laws could be enacted by the South African parliament to ensure that the Electoral Commission has jurisdiction within the geographical areas of such administrations, and that the laws designed to ensure fair and free elections are applicable throughout South Africa.

- 9 As far as regionalism is concerned, there may be some advantage to the dismantling of the homelands during the second stage of interim government, and to the introduction of regions. If this is seen to be appropriate, then there is a need to develop a more detailed and acceptable regional policy than exists at

present. Boundaries and powers established for the purposes of the second stage of interim government, are almost certain to have an impact upon the definition of regions subsequently. It is important, therefore, to establish a firm position in regard to the number and boundaries of regions, and the functions which regional administration should perform in the future. If the second stage of interim government is to include regional structures, then we should argue for regional administration to be carried out during this stage by administrators appointed by the interim government, in the same way as provincial administrations function at present. The appropriate legislation already exists, and there is no need to devise complicated new laws to deal with this situation.

- 10 In the same vein we should argue that there is no need for a detailed Bill of Rights before the second stage of interim government. What is needed is the guarantee of civil and political rights necessary for the holding of free and fair elections. This can be provided for through the electoral law, and need not be entrenched in the constitution.
- 11 It seems possible that the negotiations may break down, particularly if the government is not willing to depart from its present position. It is important that there

should be no confusion in regard to the responsibility for such a breakdown should it occur. For that reason, we should endeavour to avoid departing from the positions presently taken by the ANC in the Working Groups. By dealing with regionalism and the Bill of Rights along the lines suggested in this memorandum, it should be possible to maintain the positions already adopted. The positions can be justified on the basis that the interim constitution is needed for a short term only, and should not be seen to anticipate decisions to be taken by the Constituent Assembly. Bi-cameralism may prove to be more troublesome, but as long as it is kept out of the constitution making process, and the second house is a democratically elected one, it should present no insuperable problem.

- 12 At this stage it is important that we should have a clear understanding of what our position will be in the Constituent Assembly in regard to the various legislative structures and their powers, and that nothing should be included in the 'interim constitution' that would be inconsistent with, or hamper the achievement of, such positions

A.C.

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