

**PROPOSAL PREPARED BY WORKING GROUP 2
FOR SUBMISSION TO PRINCIPALS
5.5.92**

1. Codesa shall agree to ^{and draft} legislation that would make provision for a constitution making body operating within the framework of an interim constitution. The legislation shall be submitted to and legislated by parliament. [Note: this presupposes 2 documents, a law + an IC]
2. Codesa shall consult governments of the self-governing states and other interested parties in the drafting of the legislation and interim constitution.
3. Codesa shall agree on a set of general constitutional principles.
4. The interim constitution shall make provision for:
 - 4.1 An elected ^{national assembly} ~~parliament~~, the structure of which to be decided on with the power to:
 - 4.1.1 In terms of agreed procedures, draft a new constitution which shall enshrine and not be in conflict with the general constitutional principles
 - 4.1.2 Act as an interim legislature in terms of such special majorities and general constitutional principles agreed upon. [Note: are these a different set of constitutional principles?]
 - 4.2 The composition, functions and procedures of a multiparty interim executive in accordance with the principle of an interim government of national unity.
 - 4.3 Justiciable civil and political rights during the transition.
 - 4.4 The balance between the executive, legislature and judiciary according to the principles underlying a constitutional state.
 - 4.5 Regional boundaries for the purposes of the implementation of the interim constitution.
 - 4.6 Elections for a national assembly on the basis of proportional representation and universal adult suffrage, half the seats being allocated through national lists and half being allocated through regional lists.
 - 4.7 Decision making on all matters relating to the constitution to be taken in general by a special majority. [Do we want to leave these details open? Who decides? When?]
 - 4.8 Decisions on matters relating to regional structures and the distribution of power between central, regional and local levels of government to require a special majority of the regional representatives in the NA in addition to a special majority of all the delegates in the NA.
 - 4.9 Regional government and/or the phasing in of such government and ^{the} entrenched powers, duties and functions for these regional governments in the interim/transitional phase.
 - 4.10 Transitional provisions to ensure that there is no legal, administrative or constitutional hiatus during the interim/transitional phase.

4.11 The establishment of an independent mechanism which will be the only body to determine that the general constitutional principles (as referred to in paragraph 3 above) have been enshrined and not contradicted in the final constitution which determination may only be initiated by a party to the NA.

5. The interim constitution shall not be amended unless the amendment has first been approved by the parties/organisations in Codesa in accordance with the standing rules of Codesa and after consulting the parties referred to in Clause 2 above;

should such parties still be in existence.

6. Codesa shall agree upon special mechanisms to ensure that the NA completes the work of drafting and adopting the new constitution within a specified period of time.

What?

*participants in CODESA
such ~~parties/organisations~~ as may
still be in existence*

*Van Dyk
Laurie
Mamphele
Meer
Dabone
Mabasa
Fisf*

Arguments

- ① We are for voluntary sharing of responsibility, but against artificial formulas that lead ~~to~~ in effect to minority vetoes over legislation and paralysis of government.
- ② How can there be Cabinet responsibility if the Cabinet is divided but forced to stay together?
- ③ How can there be a vote of no confidence in an all-party government?
- ④ Dr. Viljoen supports only majority-minorities, and not minority-minorities!

What is Meant by

WORKING GROUP TWO

GENERAL PRINCIPLES

1 The first assignment of this Working Group is to decide on general principles which must be enshrined in the new Constitution and which may not be contradicted by it.

2 Different opinions exist as to what is meant by the term general principles. This note sets out to establish how the term should be read.

3 The idea is not one with a long history - the idea has been taken over from Namibian experience

4 General principles govern the basic character of the constitution without prescribing in advance the institutional or structural means whereby they are to be implemented. Basically, we are following the format that functioned successfully in Namibia, where the Contact Group worked out a document in 1982 which provided an agreed set of principles which would be binding on the parties at a Constituent Assembly.

5 it gave sufficient scope for all concerned for the actual process of drafting a const. to be left to the CA and it worked

6 The essence of the matter is to achieve sufficient confidence over the basic notions which will underlie the constitution to encourage all parties to entrust its elaboration to a body whose legitimacy cannot be impugned.

7 For reasons of legitimacy, public confidence and practicality it is important not to attempt to load too much on to the phrase: general principles - requires that we do

8 The question of legitimacy is central to the whole Codesa enterprise. Codesa is a self-appointed body. It has no legitimacy to draft a constitution. It was not elected. We have no way of knowing how representative the different groups are. The public has not been consulted nor given an opportunity to express its views with regard to what the constitutional options are.

9 The decision-making mechanism, namely a determination of sufficient consensus for the process to proceed, was specially created for the purposes of negotiations. It would be far too imprecise a means for breaking deadlock over the terms of a constitution. The function of Codesa is to create enough common ground for the process of elaborating a constitution to proceed, not to draft a constitution itself.

10 There is intense public suspicion that all sorts of deals are being worked out at Codesa. The only way to allay this concern is to throw the matter back to the public and make it the ultimate arbiter. The idea is to build up public confidence, not to undermine it. The way to do this is to

11 The worst thing we could do is attempt to sneak in elements of a const. by stealth. The drafting of a const. belongs to a body that enjoys full legit. and, in modern states, means, one created by voters in a free election.

Our task is to

guarantee that the constitution will conform to internationally accepted principles of democracy and respect for human rights, and then to have an open and democratic process to create an open and democratic constitution ~~that~~ *will* enshrining these principles. *the public feels involved.*

The general principles, then, are such as to satisfy the people of our country and the world that whatever the constitution-making body agrees upon will not go outside of universally held notions of freedom, equality and democracy.

free & democratic govt. they are not a min - const.
There is a third reason for not attempting to pre-empt, ~~neither openly nor by stealth,~~ the work of the constitution-making body, ~~and that is practicality.~~ The institutions and mechanisms of a constitution hang together. There is an intricate relationship *procedural* between the electoral system, regions, the structure of the legislature and the way ~~the~~ *the way* government is selected and made accountable. ~~sample~~ *the way*

Checks and balances are finely inter-related. Within the broad parameters of basic principles, the constitution-making body will need the greatest flexibility. To tie its hands in advance with regard to mechanisms or institutions could impose a rigidity which would block the way to sensible solutions.

To give two examples. The nature of the presidency cannot be determined in isolation. *There* is a strong connection between the way *he or she* is elected, his or her powers, his or her relationship to the legislature, and his or her period of office. The stronger the powers of the presidency, the greater the greater the need for accountability. Should it directly to the people or else to Parliament? That depends....

Similarly, if there is to be an Upper House, there are multiple ways in which it can be elected, depending on how it fits into the total constitutional scheme. It could, as in Germany, be a body that is based on the regions with a special role in ensuring regional development. If so, it would be composed and would function in a particular way. Conversely, the existence of such a body would influence the conception of the regions themselves.

Any move to decide questions like these in advance would be dangerous and limit the options of the constitution-making body.

To sum up.

The general constitutional principles enshrined in the new constitution must be clear and unequivocal in their basic intent, but not seek to tie the hands of the constitution-making body in advance as how best to achieve their realisation. They should impell the negotiating process forward by giving all participants the guarantee that they are not signing a blank constitutional cheque which could lead to the installation of dictatorship or authoritarian rule, or which could permit oppression of or discrimination against themselves or any other section of the community or of individuals in the future. The concept of general principles should not be tailored in any way so as to give electoral advantage or disadvantage to any participant.

They should be formulated in sufficiently broad terms so as to allay public anxiety that Codesa is working out binding constitutional deals by stealth. Once the basic democratic nature of the constitution has been established, the people at large must be given every chance, indeed encouraged, to participate actively in determining precisely how they wish to be governed. Their participation will not only provide legitimacy, it will promote the achievement of sensible and acceptable solutions, and encourage popular identification with the document finally adopted.

Finally, the drafters of the constitution should be able to work with the freedom and confidence that comes from knowing that they have been chosen in a way that enjoys internal and international legitimacy, that they are oriented by clear, fundamental principles favouring democracy and freedom as understood in the modern world, and that they have full freedom in determining how best to achieve a constitution which conforms with these general ideas.

This they will do through mandated reps. at the const making body.