

MEMORANDUM**FOR: NIC/TIC/CODESA WORKING GROUP 2****FROM : FIROZ CACHALIA & FINK HAYSOM****NEGOTIATING STRATEGY AND OBJECTIVES****Introduction**

The point needs to be made at the outset that the NIC/TIC delegations and representatives to the Working Groups need to develop a negotiating strategy, and to do so informed by the ANC's negotiating positions and those of its allies. In this regard greater co-ordination and consultation is required between the ANC's negotiating forum and the NIC/TIC delegation. It is also suggested that at least some time be spent in sharing our perspectives with such parties as the Transkei and Inyanga delegations.

It is also imperative that individual NIC/TIC working group delegations are informed as to the developments in the other working groups because of the vital linkages which exist between the subject matter of the different working groups. This is more fully elaborated upon below. This memorandum is concerned principally to address the issues arising in Working Group 2 but may be of relevance to the other working groups. The general position is that informed by discussions in the ANC and, more especially, the Legal and Constitutional Committee conferences, seminars, workshops and discussions convened by them.

Objectives

The broad objectives of the progressive forces at CODESA are to achieve the following:

1. Agreement on the establishment of a Constituent Assembly as the constitution-making body.

2. An interim government to oversee the process of transition, to remove the elements of unilateralism which currently characterise this process, and to secure the irreversibility of the process.
3. To obtain in broad outline only the necessary constitutional principles which would bind the constituent assembly and would, as in Namibia, secure the participation in and support for the constituent assembly modality.
4. To secure the appropriate climate for free political activity (which is to be distinguished from the elements described in the Harare Declaration setting out the preconditions for negotiations). In this regard the progressive forces seek to level the political playing field by inter alia instituting mechanisms which guarantee equal access to the media information, guarantee impartial policing, secure ground rules for the exercise of freedom of assembly, association and expression.
5. Finally, the progressive forces seek to obtain in regard to all the above demands an enforceable commitment to implement the demands in the form and manner agreed upon at CODESA.

Linkages

The progressive forces do not seek to obtain one or other of the above demands in isolation. The demands are not a shopping list. They are an integrated package. In other words, for example, should the ANC procure an agreement in regard to interim government but fail to secure the agreement on the constitution-making body, it will be placed in a most invidious position. It will in effect be left with a mechanism of interim government in which it will have to participate, which will be of indefinite duration, thereby securing the international legitimacy of the interim administration but which is unable to effect the proper transformation to a democratic society. Similarly, should the progressive forces secure commitment to electoral processes in regard to the constitution-making body but fail to secure the adequate concessions in group 1

and group 3 regarding the climate and supervision of that process it may end up contesting for political power in the most disadvantageous conditions. One such condition would be, for example, the exclusion of the TBVC states from such electoral processes. It is clear therefore that even group 4 subject matter should be seen as properly integrated into the objectives of the other working groups.

In this regard what the progressive forces seek to achieve at CODESA is one integrated agreement and not five separate ones. It may well be that concessions will be made by all the parties in the course of the negotiations and it is thus vital to monitor and to relate the agreements and negotiations in different working groups to the work of the other working groups.

In regard to Working Group 2 the subject matter lies at the heart of the CODESA project. In brief, it is the agreement on the principles of a new constitution which will facilitate, and perhaps even secure an agreement in regard to the constitution-making body. Agreement upon the latter will then facilitate agreement in regard to the installation of the necessary transitional authority. However, should the principles agreed upon in group 2 be too numerous or elaborate the progressive forces will stand accused of having negotiated the real constitution at CODESA and of having left the constituent assembly the task only of dotting the i's and crossing the t's.

Objectives in Group 2

The task of Group 2 is to secure agreement on the basic principles which should underlie a new constitution. And linked to that, to secure agreement on the constitution-making forum. In regard to the latter it is clear that the ANC seeks to establish an electoral basis to the constitution-making forum for the obvious reasons that this will enable its membership to participate in the process, and secure a proper proportionality between a party's influence in the process and that party's influence amongst the people of South Africa.

The important and initial area to which we must direct our attention, then, is the

question of the principles. As is argued above the objective of this working group will be to limit the agreement on the principles to the necessary bare bones of a new constitutional dispensation. In this regard it had initially been hoped that the commitment by the parties to the statement of intent may have served as a basis for short-circuiting the work of this working group. It is clear, however, that both the National Party and Inkatha (and many of the other parties as well) would seek and wish to table a myriad of constitutional details for discussion and agreement in this working group. The progressive forces task, then, is a particularly difficult one in that it will be constrained to limit agreement rather than to obtain agreement. It will be a tempting to void discussion rather than promote it. This strategy may provoke disquiet amongst groups which are on the fringes of the Patriotic Front. One approach to this issue is to secure initial agreement on the meaning of the word 'principle' and to argue that this working group must not deliberate on 'elements' or the 'structures' of a new constitutional dispensation. Drawing a distinction between a principle and a structure the progressive forces could argue, for example, that non-racialism is a principle but the composition and method of appointment of the judiciary is a structural matter. This distinction would need to be conceptually developed. There are many issues which would be hard to classify as either structural or as a principle. For example, is an executive president a structure or a principle? Is a bi-cameral parliament a principle or a structure? If one agrees on an independent judiciary can one resist an argument to define the meaning of 'independence'? In our view the best approach to this whole problem would be to secure agreement at the outset on the ambit and detail of this working group's proposals.

The working group must also deal with the issues of substance which will be properly tabled as matters of principle. The contentious matters will include the following:

1. Regionalism/federalism/evolution of local government powers.
2. Whether the Bill of Rights or some other mechanism should protect or entrench property rights and Whether the constitution should protect the right to make a profit or commit the country to one or other economic system.

3. The meaning of the word 'power-sharing' and whether this would include the imposition of compulsory coalitions/proportionally representative executive.
4. Mechanisms for the protection of political, linguistic, ethnic or even racial minorities. Such a debate may include the question of the 'self-determination' for such groups. Some thoughts on some of these issues are set out in the memorandum attached hereto.

INTRODUCTION

Since February 2 1991 there have been significant developments in the constitutional debate which have improved the prospects for a successful transition from an authoritarian regime to democratic government in our country. The National Party's position on the question of minorities is no longer as rigid, and in certain respects has converged with ours. It continues, however, to manipulate the concept of minority rights (in quotation) in order to maintain cohesion in its own constituency and to win support outside its traditional constituency. The ANC, on the other hand, has in its public documents, articulated a constitutional vision not originally present in the movement's discourse, which has great potential to persuade political incumbents, economic minorities, ethnic communities and intransigent political minorities to accept majority rule. The movement has, however, not done enough to promote its position in public as one which accommodates minority concerns.

Until recently two basic assumptions informed the thinking of the National Party on the question of the relevance of ethnicity to constitution-making, and minority rights both of which are inconsistent with the positions it is now adopting. These are firstly, that ethnicity is the most salient line of political and social division in South Africa and, secondly, that the institutionalization of ethnicity is a necessary condition of political stability. The ANC, on the other hand, has always, correctly in our view, recognised that the allocation of rights on the basis of group membership threatens the emergence of an inclusive political community of equal citizens.

The shift towards a constitutionalist framework, evident in the positions of both the National Party and the African National Congress, has important implications for the way in which ethnicity, minority rights, democracy and constitution-making are conceptualized.

CONSTITUTIONALISM AND ETHNICITY

No party to CODESA has advanced constitutional proposals which would require the accommodation of groups as corporate entities in a future system of representation. The published proposals of the parties to CODESA converge in recommending that the constitution should enshrine the basic rights of the individual citizen, that political society should be structured on the basis of an equal and "open" citizenship, that civil society should be structured on the basis of freedom of association and that a future electoral system should be based on proportional representation - a system which allows individuals to select the constituencies to which they wish to belong. These proposals amount to a recommendation of colour blind, ethnically-neutral constitutionalism, recognise the importance of depoliticizing ethnicity in the process of constitution-making and would require a future democratic South African state to adopt a neutral position in relation to ethnic identities. On the other hand, the constitutional state would protect the expression of ethnic identities by guaranteeing space to associate on a voluntary basis in civil society. Constitutionally guaranteed freedom to associate allows communities to emerge and organise without coercing individuals and without limiting democracy.

This model has great potential to reconcile group conflicts and to reconcile individual freedoms with group self-determination. It therefore undermines the basis for group-based power sharing formulae and could form the basis for possible future discussions with the Afrikaner nationalists. The concept of state neutrality and the idea of the self-determination of communities in civil society are important in this regard. We think, that we should make detailed proposals aimed at expanding the autonomy of communities in civil society to defuse their claims for partition and group political

power.

CONSTITUTIONALISM AND GROUP RIGHTS

Constitutionalism represents a shift away from majoritarianism without undermining the basic democratic principles of equal citizenship and majority rule. Constitutionalism protects (1) political minorities by guaranteeing basic civil liberties, (2) ethnic communities by guaranteeing language rights, religious freedom, the right to associate etc. It does so by: (a) substituting the courts for Parliament as the final decision maker in constitutional questions; (b) withdrawing constitutional questions from the jurisdiction of the temporary electoral majorities, c) empowering minorities in both senses to prevent future changes of the constitution. Constitutionalism also limits the powers of national majorities through a system of checks and balances on the powers of the executive, the legislature and the judiciary, by creating multiple points of access to the political process through a bi-cameral parliament and through a strong system of regional and local government. *A constitutional democracy, therefore, is a democracy which incorporates a strong system of minority rights.* We should also not allow ourselves to be outflanked on the regionalism issue. Regionalism is not inconsistent with the concept of a unitary state. We should be careful not to allow ourselves to be projected by our opponents as opponents of any form of regionalism because this could undermine our support amongst our allies in the homelands who may be nervous about their positions in the future.

There is a tension in the National Party's positions. *Agreement that minorities should be protected through a system of basic rights and judicial review undermines the rationale for power-sharing.* The two concepts work with different logics. Constitutionalism is concerned with the content of constitutions, with the structuring of governmental institutions, and with the distribution of decision-making powers. Power sharing is concerned with *dictating the composition of government.* If minorities are adequately protected by the constitution there is clearly no further need to entrench power sharing between political parties. Power sharing is a method of

guaranteeing losing political parties power but it is not a mechanism for protecting groups.

CONSTITUTIONALISM AND POWER SHARING

Power Sharing and Interim Government.

The National Party has, inter alia, proposed that the Constituent Assembly should be the Interim Government (and vice-versa). In the abstract there can be little objection to the Constituent Assembly exercising governmental powers. Indeed it may be preferable to a CODESA Council exercising this function. However it is the linkage of this proposal to a complex, consensual, interim constitution that holds out the danger that the National Party will attempt to draft a constitution at CODESA by projecting it as an interim measure.

We can do no better here than to quote from a recent paper by Lynn Berat and Yossi Shain:

'The great danger is that although there is an explicit commitment to hold free elections, the old elite may try to use to interim government to introduce reforms that fall short of complete democratization. They may also try to manipulate the power sharing formula to ensure that the old regime retains its privileged position in a constitutional fashion . . . In the power sharing model, manipulations by the incumbent component within the interim government are likely to arouse strong opposition on the part of those who reject intermediate solutions and exert pressure to move towards the creation of conditions for free elections . . . Power sharing involves opportunities and dangers for the incumbents and opposition elites alike. Critical is the time factor, namely the length of time the power sharing regime is in control before democratic legitimation is completed. Delay of the transition to fully legitimate institutions may also delay the ability to move toward daring policies on domestic and international fronts or enable the old guard to manipulate the situation and win some undeserved privileges'.

The National Party's recent final proposals for an elected interim government hold out

all these dangers. An elected interim government will defuse pressures to complete the process of democratic transformation, will be expensive, complicated and cause destabilizing delays, increase tensions in our support base, isolate us from potential allies on the left, undermine our capacity to win support from minorities and could create international alliances opposed to thoroughgoing democratic transformation.

POWER SHARING AND DEMOCRATIC GOVERNMENT

We have already indicated that constitutionalism undermines the rationale for power sharing. We think constitution-making is primarily about the content of the constitution and not the composition of government. The latter, should in our view, be negotiated through informal pacts, rather than be frozen in constitutional stone.

The new rationale for power sharing now, is not that it is a mechanism for protecting groups, but that it is necessary to ensure stability. This assumption is highly questionable. Entrenched power sharing arrangements do not produce open and accountable government, a prerequisite for stable democracy. It creates elite cartels, excludes newcomers and in the South African context would solidify historical lines of political division. We think that open public contestation is essential to democratic legitimacy and that it will allow a stable party system to emerge in our country. The form of power sharing which follows elections, is not open to the same objections as it will then be based on the real balance of power and will reflect a popular mandate.

CONSTITUTIONALISM AND TRANSITION

The process of constitution-making should be related to our constitutional vision and our political objectives. A relatively short and 'flat' transition is more likely to secure a democratic constitution and entrench the capacity of the movement to effect political transformation: conversely, a relatively long and 'complex' transition is more likely to produce a compromised constitution and an emasculated ANC.

Thus, in our view, we should resist attempts by the National Party to negotiate a new constitution piecemeal - the "constitutional moment" has arrived for us to negotiate a principled, relatively permanent constitution; the National Party on the other hand appears determined to negotiate the emergence of a new order incrementally and on the basis of short-term compromises.

The principles of constitutionalism can be invoked in support of our case. Constitutions are not the simple product of political compromise; on the contrary, they embody fundamental principles binding on future governments. They are therefore more likely to produce durable institutions and governments capable of commanding assent. Since constitutionalism 'stands for the rare moments in a nation's history where principled discussion transcends the log-rolling and horse-trading of everyday politics . . .' (John Ely) a new South African constitution must be adopted by an *elected* body. Furthermore, since constitutions bind future generations by an amendment procedure which requires more than a simple majority for constitutional change, the *founding constitution-making body* should adopt a new constitution with

a weighted majority. The present generation cannot bind future generations simply with fifty-one percent. This meets objections, that the constituent assembly mechanism will enable the majority to impose its constitutional vision on minorities. Furthermore, a constitution adopted by this method is more likely to produce stable outcomes.

Our argument, is an in-principle argument. But, it is not an abstract argument derived from principles. On the contrary, these in-principle arguments support our political project.

para 6.