

## XIMOKO PROGRESSIVE PARTY

## WORKING GROUP 2

23 MARCH 1992

## POSITION PAPER ON THE CONSTITUTION-MAKING PROCESS

1. COMPONENTS OF THE PROCESS

Essentially two components of the process of constitution-making may be identified, namely, the drawing-up of the Constitution and the adoption of the Constitution by way of some enactment which will give it the force of law. The distinction is useful since different considerations apply in respect of the two components.

2. PRINCIPLES AND PROPOSALS REGARDING THE PROCESS OF CONSTITUTION MAKING

It has been suggested that, in short, the objects of a Constitution are to limit the arbitrary action of the government, to guarantee the rights of the governed, and to define the operations of the sovereign power. In a constitutional state the Constitution enjoys special status as a social contract providing for the manner in which a nation is governed. To the extent at least that the Constitution serves to define and to guarantee the rights of the governed, both individually and collectively, it is necessary to take account of both the individual and collective dimensions in the process of constitution-making.

The special character of Constitutions is universally acknowledged inter alia by requiring special majorities for their amendment, etc.

It is for the very reason that the Constitution has a generally recognised special character that the Ximoko Progressive Party argues that the process of constitution-making should be as inclusive as possible. In the final analysis it is suggested that the test of a "good" constitution for South Africa is not to be found in the numerical measure of support for that Constitution alone, but in the degree to which it achieves its objects in respect of each and every individual and interest group in that Society.



Following this line of thought it would seem that ideally constitution-making mechanisms should accommodate the full variety and spread of viewpoints and interests present in the society. To the extent that the process of electing constituent bodies as part of the constitution-making mechanism results in a narrowing of the spread of interests represented by marginalising smaller interest groups and merely increasing the proportional representation of larger groups, the process is not ideally suited for the purpose of constitution-making.

## 2.1 Drawing Up the Constitution

The process of drawing-up the Constitution in its turn involves two identifiable steps namely:

- Establishing the guidelines within which drafting is to take place and:
- Drafting the Constitution itself.

### 2.1.1 Establishing the Guidelines

CODESA has accepted that it has the task interalia of generating constitutional principles and has handed down this brief to Working Group 2. All parties to CODESA have already conceded that so fundamental a task as the generation of constitutional principles should be entrusted to CODESA, despite the fact that it is not an elected body. In fact some participating parties go so far as to seek to make the relevant principles produced by CODESA binding upon the further constitution-making process.

The Ximoko Progressive Party has no difficulty with this approach since it considers CODESA to be broadly inclusive of a wide range of interests and most of the major players. The situation can only improve if ongoing efforts to draw others who are as yet not part of the process into CODESA meet with success.



Ximoko places a much higher premium for present purposes upon such a broadly-based process and the consensus resulting from it than it does upon a process involving a smaller number of elected participants representing a narrower range of interests and producing decisions on the basis of some albeit qualified majority.

For this reason it would seem imperative to explore dynamically and to the full, the potential for consensus at CODESA in order to generate as comprehensive a set of guidelines as possible which will serve to define in unambiguous terms the major structural features of the Constitution. This would involve considerably more negotiation and debate of major issues than has hitherto taken place in Working Group 2 at CODESA. A disturbing feature of the points of consensus produced so far has been their relative superficiality and the impression which is created that the really important and fundamental matters upon which there is no ready consensus are merely conveniently shelved in the interests of good order.

The Ximoko Progressive Party is firmly convinced that full exploitation of the potential of CODESA is important if we are to achieve some success in producing a Constitution for South Africa whose acceptance is universal.

#### 2.1.2

#### Drafting the Constitution

Whilst the Ximoko Progressive Party notes the call for an elected body to draft the Constitution, it does not subscribe to the conventional wisdom and is not yet persuaded of the necessity for such a step. The fact that this requirement has become an emotive issue in some quarters should not influence the better judgement of the Working Group. The fact is that if CODESA makes the necessary effort and proceeds far enough in establishing meaningful and substantial principles and guidelines defining the salient features of the new Constitution,



the drafting of the Constitution itself would be a largely technical task and Ximoko is not persuaded of the need for a specially elected body merely to accomplish this task. If CODESA were not to proceed far enough and issues as yet remained to be resolved by a drafting body which was not broadly based and on any basis other than consensus, the Ximoko Progressive Party would have some severe misgivings.

It is therefore suggested that an alternative worthy of consideration would be for CODESA to assume responsibility for the drafting of the Constitution in accordance with the guidelines produced by Working Group 2. This would give the advantage of continuity in the process of drawing up the draft Constitution. It would, also accommodate a wider spectrum of minority interests than would be practical in all but the largest elected body and would not conflict with the legislative culture in South Africa where draft legislation for consideration by the legislature is generally not produced by elected bodies but by legally qualified drafters advised by specialists.

The Ximoko Progressive Party is convinced that with the co-operation of all parties CODESA can acquire the status in the eyes of the people of South Africa satisfactorily to discharge the task of drafting a Constitution for South Africa.

Were the Constitution to be drafted by some body other than CODESA it is considered even more desirable that the guidelines and principles produced by CODESA should be binding and sufficiently comprehensive to unambiguously define all the salient features of the Constitution.

## 2.2

### Adopting the Constitution

The Ximoko Progressive Party supports the view that the process of transition toward a new South Africa must proceed constitutionally with each step in the process of constitutional development being enabled by the necessary amendments to the existing Constitution along the way.

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This should apply also to the new Constitution by requiring it to be given legal effect by a body competent to do so in terms of the existing Constitution as amended.

In its proposals regarding interim and transitional governmental arrangements the Ximoko Progressive Party has envisaged two phases, an interim phase and a transitional phase.

Envisaged in the transitional phase is transitional legislature in the form of an elected Transitional Assembly. It is considered practical and desirable that this Transitional Assembly, elected in terms of rules and procedures laid down by CODESA, and an integral part of the machinery of Transitional Government, should adopt the new Constitution and give it the force of law. This would avoid the necessity of additional elections for the specific purpose of adopting the new Constitution.