



INKATHA

Inkatha Freedom Party

Iqembu leNkatha yeNkululeko

CODESA WORKING GROUP III

TRANSITIONAL ARRANGEMENTS / INTERIM GOVERNMENT /
TRANSITIONAL AUTHORITY

WORKING DOCUMENT FOR SUBMISSION TO A CODESA MEETING ON
6TH FEBRUARY 1992



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1. INTRODUCTION

- 1.1 The IFP's approach in this Working Group is and will be dictated by the need for it to keep a broad overview of developments and progress in other working groups, because the negotiating process now set in train in this working group is part of a larger whole. Directions taken in one working group could have profound impact on the policy position and goals of the IFP in terms of its overall objectives. Such objectives are by consensus negotiations to pursue a two phase approach, the first aimed at determining the destination and the second at determining the course for reaching it, of the new South Africa. The IFP wishes to make it clear at the outset that both these aspects must encompass the principles of regionalisation.
- 1.2 Members of other delegations should also appreciate that the IFP operates upon democratic lines, requiring regular consultation with its Central Committee and through the Central Committee to the Party's grassroots support base.
- 1.3 The IFP delegation in this, as in other working groups, does not have an unlimited mandate and is therefore not prepared to conduct negotiations in a hurried manner or to run ahead of its mandate or the progress achieved in other working groups.

- 1.4 It will not hesitate therefore to call for adjournments in the interests of ensuring such proper consultation if this is deemed necessary.
- 1.5 Nor is the IFP delegation in this working group as in other working groups prepared to be dictated to by parties with openly declared anticipated time frames for the completion of certain steps in the negotiating process.
- 1.6 Attempts by any party to force the pace of the working group's work in an unreasonable manner, as though its work can be divorced from that taking place in other working groups, will meet with firm resistance.
- 1.7 The IFP has no intention of bargaining away the future of South Africa's people through participating in a negotiating process which seeks quick expedient results at the expense of enduring principles. The foundations for the future multi-party democratic order need to be carefully laid and sufficient time should be allowed for reconciliation. The new South Africa must be responsibly and well governed into existence and the IFP will strenuously resist any suggestion that there should be constitutional leaps in the dark in trying to get there.

2. TERMS OF REFERENCE

- 2.1 The IFP has investigated the following possibilities for the governance of the country until the introduction of the "new constitution" prepared by a constitutional forum or constitutional making body, under which a general election of voters elects the first government of the new state -

- 2.1.1 the present government remains in power under the present unamended constitution responsible to Parliament under the existing constitution;
- 2.1.2 a Transitional Government of Reconciliation (broader based than CODESA is now), constituted under the State President and responsible to Parliament under the existing constitution, amended as to certain unentrenched clauses to make this legally possible. This government would encompass generally recognised political parties and organisations, the portfolios of cabinet responsibility to be allocated in an equitable manner and in accordance with recommendations and selection structures agreed upon by such parties and organisations.
- 2.2 A further possibility investigated has a similar starting point to 2.1.2, except that the 1983 constitution would be "suspended", and that the Government of Transition would be of short-term duration, its principal function being to organise the holding of an election for a constituent assembly to draw up and adopt a new constitution, and to hold elections under it for a new government.
- 2.3 Yet a further possibility examined would involve the re-shaping of the executive and the legislature as well. This could introduce at least four distinct possibilities: first that the current Constitution Act of 1983 would effectively (and perhaps incrementally) be replaced by a new "interim Constitution Act"; second, that the interim period will be much longer than the generally anticipated two or three years; third, that CODESA becomes the constitution making body for an "interim" constitution; and fourth, that the interim government itself becomes the constitution making body for the "ultimate" constitution.

2.4 The IFP rejects 2.1.1 as an acceptable scenario because it believes that the Government cannot be player and referee at the same time. Despite separate representation at CODESA, it is an undeniable constitutional fact that the Government and the National Party are inseparable when it comes to the actual governing of the country. The State President, for example, remains the leader of the National Party, and his Cabinet, some of whom sit in the National Party delegations to CODESA and its working groups, is made up of representatives of that party. At the same time, this Cabinet is in control of a highly centralised and very powerful constitutional and administrative system, every move of which can benefit the National Party to the detriment of others in the negotiation process. The self governing territories are particularly vulnerable in view of the Government's budgetary and other controls over them. At the international level the (National Party) Government concludes agreements according to its (party political) preferences.

2.5 The IFP also rejects the scenario of 2.2 because -

2.5.1 this brings about a constitutional vacuum in which the Transitional Government operates without being grounded in a constitutional framework and without being responsible for its actions to any parliamentary body (however representationally inadequate it may be) in the run up to the election for the constituent assembly;

2.5.2 the country has yet to achieve anything like an acceptable culture of democracy in which there would be no significant degree of intimidation of the electorate. The memory of shocking incidents of "the necklace" of those who were allegedly "collaborators" of "the system", the destruction of their property and

the forced participation in "stay-aways" in attempts to render the country "ungovernable", by persons giving allegiance to the so-called "progressive forces", are still too recent. Such an election for a constituent assembly, if held prematurely would most likely be a travesty of what it should be: free, fair and without intimidation. The IFP, since the signing of the Peace Accord, has lost no less than 20 of its leaders through assassination.

- 2.5.3 depending upon the electoral system and the rules of procedure, this could entrust to a party with a simple majority, the awesome task of constitution making at the expense of other players, whose minority position would guarantee their impotence to make any difference to the result;
- 2.5.4 it cannot subscribe to a piecemeal approach to the bringing about of a new South Africa but instead insists upon overall agreement being first reached upon all major ingredients of the new South Africa.
- 2.5.5 The IFP's respect for constitutionality makes it insist upon the need for all changes to take place in a constitutional and legal way. Support for this stance is to be seen in item 1.1.4 (j) of the Terms of Reference of Working Group 5 where reference is made to "the context of constitutional continuity". The current Parliament is the only legal authority capable of changing the current constitutional dispensation. Any other approach would in effect be revolutionary.
- 2.6 The IFP is also opposed to any interim arrangements as envisaged in paragraph 2.3 in terms of which the present constitution would be replaced by an "interim" constitution on the way to the "ultimate" constitution, whereby there

would be a change in the composition of Parliament in addition to a change in the position of the Executive. Effective participation in power sharing at the more important Executive level by those presently unrepresented in Parliament would suffice, in the IFP's view, until the first elections are held under a new constitution. The IFP would insist that the question of the future form and regions of the new state would have to be placed on the agenda as well.

3. CONSTITUTIONAL BACKGROUND

3.1 Introduction

3.1.1 It is necessary at the outset to take a hard look at the current Republic of South Africa Constitution Act of 1983 to see whether it is flexible enough to accommodate three main and ostensibly conflicting considerations: first, the State President's repeated undertaking to put any fundamental deviation from the current system to those who were ultimately responsible for voting him into power, namely the white electorate; second, the need to avoid anything that would look like co-option and endorsement by those outside the current system of something which they regard as 'illegitimate'; finally, how to avoid producing a new constitution under the guise of amending the old one.

3.1.2 Proceeding from these, a number of possibilities for adapting the current Constitution in the light of these considerations without replacing it, exist. In order to appreciate these, a brief gloss over the Constitution itself will facilitate understanding.

3.2 Brief Background : the Constitution Act

- 3.2.1 In sequence, the parts of the Constitution Act relevant to this discussion concern the State President, the system of own and general affairs, the executive government and the legislature.
- 3.2.2 The State President is elected by an electoral college consisting of members of the three houses of parliament, with the (white) house of Assembly in the majority. Their candidate is bound to be the State President. In terms of section 7(5) the State President must qualify to be elected to one of the houses of Parliament, which means that as the Act stands at the moment, he cannot be a black South African.
- 3.2.3 Own and general affairs were supposed to form the backbone of the Constitution Act. In terms of section 14 own affairs are all those matters which affect a 'population group' (white, coloured and Indian for the purposes of the Constitution) specifically. Section 15 provides that all other affairs are general affairs. It is no secret that the distinction has not worked well in practice; in fact, under Mr F W de Klerk, there has been a marked move in the direction of fusion.
- 3.2.4 The executive consists of the State President, the cabinet and ministers councils, the latter for own affairs. The State President has a free hand in the appointment of ministers. Two major qualifications are that if a minister is not a member of parliament, he must become one within twelve months (section

24(3)(a); and that in the case of ministers councils, the ministers should enjoy the support of the majority in the particular house.

The State President may also appoint deputy ministers.

3.2.5 The legislative authority vests in the State President and parliament, consisting of three houses. The legislature is the sovereign law-giver in and over the Republic (section 31). There is a proviso that legislation on own affairs has to be passed in accordance with a specified procedure (in essence: such legislation may only be adopted by the house representing a particular population group). An Act passed by parliament and signed by the State President, is a law of parliament, and cannot be questioned in a court of law, except for the procedure followed in passing the law.

If there is a dispute among the houses on so-called general affairs legislation, the State President may refer the bill to the President's Council for a decision. Joint sittings may be held, but voting on resolutions, or, as it is put in parliamentary parlance, "putting the question" has to be done separately by each house. (Incidentally, joint sittings have become the order of the day in parliament).

3.2.6 As regards the amendment of the Constitution, section 99 provides that the Act can be amended in three ways. First, the majority of the provisions may be amended by ordinary Act of Parliament, i.e. by a bare majority, and if there is a dispute, the President's Council may be called upon to resolve the matter.

Secondly: two sections of the Act can only be amended by a two thirds majority of all the members of all three houses voting separately; these two are the language clause (section 89) and the amendment clause itself. Thirdly, some forty sections and the first schedule need an ordinary majority of all the members of all three houses voting separately. This is important, for some of the suggestions which follow, will require this procedure, which will be referred to as the procedure for amending 'entrenched' sections.

4. THE IFP'S POSITION AND PROPOSAL

4.1 Statement

The IFP's position and proposal in short is that it is willing in principle to agree to the establishment of a Government of Transition as envisaged in paragraph 2.1.2 above, mainly for 2 reasons : first, that it is important that the transitional authority should be established without delay to create an all inclusive constitutional forum or negotiating body with a much wider representation than is present at CODESA and second because the IFP strongly believes that no major changes should be made to the present Constitution without at the same time dealing comprehensively with the question of a future regional structure.

4.2 The Constitutional Mechanics for Realising the Proposal

4.2.1 The basic option would be to repeal the unentrenched section 24(3)(a), which provides that a minister who is not a member of a house at the time of his or her appointment, must become a member within twelve months. The original version of the Constitution Bill

did not contain this clause. It was inserted afterwards, probably as a result of the doctrine of ministerial responsibility, in terms of which a minister is supposed to be responsible or accountable to the representatives of the electorate, on the one hand, and the parliamentary system of government, which implies that the executive is drawn from and accountable to parliament. In South Africa, however, real ministerial responsibility to parliament has become extremely weak anyway, and need not be a major obstacle to removing section 24(3)(a).

The benefit of repealing this subsection would be that the State President could, in terms of section 24(1), appoint any person to be a minister. At the political level, it would leave room for negotiation among all interested political organisations to compose an agreed upon all inclusive 'multi party' cabinet.

4.2.2 A number of further options can be considered to supplement or reinforce the first one:

- a. Part IV on own and general affairs can be repealed. Some sections in this part, notably sections 14, 15 and 16(1), are entrenched. There should not be much objection to removing them. As was pointed out above, the distinction between own and general affairs has become a burden, if not an embarrassment.
- b. Consequential to the removal of own affairs, ministers councils (section 21 and other provisions in which reference is made to these councils) should be abolished. If needs be, the ministers serving on these councils could either be accommodated in the cabinet, or be appointed deputy ministers.

- c. As a further result, section 31, which provides for own affairs legislation, should be deleted, together with the proviso to section 30, and some other sections referring to own affairs legislation. The first schedule, purporting to set out own affairs, should also be repealed.

- d. Finally, as a very bold step, section 67 can be amended to provide that the three houses of parliament sit and vote together. This may also require an amendment of section 99, governing the procedure for the amendment of the constitution. With its strong majority in the House of Assembly, its substantial membership in the House of Representatives and the likely support of other parties on issues that matter, the possibility that the National Party will be outvoted in parliament is remote. It should even be able to muster the two-thirds majority of all three houses for the amendment of section 99.

4.3 The Advantages of the IFP's Proposals

- 4.3.1 The IFP's proposal would not lead to a complicated system of transitional government, would not draw attention too far away from the ultimate objective of a new constitution and would not involve too much time and energy-consuming tampering with the existing constitution; and it would allow for an effective government involving all participants in CODESA.

- 4.3.2 The IFP submits that its proposals, not only meet these criteria but would bear the following advantages:
 - 4.3.2.1 initially the transitional stage would be confined to the life of the present Parliament (i.e. the end of 1994);

- 4.3.2.2 they leave sufficient flexibility in the system to be adjusted in other directions (i.e. to overcome the time limit of the end of 1994);
- 4.3.2.3 they provide a real platform for a transitional government of all inclusive national unity, with full responsibility and participation by all concerned;
- 4.3.2.4 they leave room for close liaison between the Government and CODESA for as long as CODESA remains relevant to the constitutional process without creating additional and cumbersome structures.

4.4 The Effect of the Proposed Changes

- 4.4.1 A potentially non-racial, multi-party executive, including representatives of the self governing territories, nominally accountable to a sympathetic, non-dominant parliament, and with all the constitutional and statutory powers of the existing cabinet could be established. Since, in terms of constitutional convention, and outwardly at least, the cabinet acts unanimously, there will be a strong tendency to seek agreement among all represented in the cabinet. On the other hand, in view of its transitional nature, the temptation for the cabinet to take decisions of great political or constitutional significance without consulting the people, would be weak.
- 4.4.2 Since there will be no own affairs/general affairs distinction, the way is paved for constitutional equality in administering the country, in producing budgets, and in rendering services such as health, education and welfare.

4.4.3 Parliament remains intact in terms of its composition, it does not pass own affairs legislation, and the three houses sit and vote together.

4.4.4 Own affairs will be discarded, and it will be possible to commence administrative rationalisation within the terms of broadly agreed policies adopted by the three houses sitting together, by the dissolution of the existing own affairs departments or their integration into other departments.

4.4.5 In order for the system to function properly, some preconditions will have to be met, and some understandings adhered to :

- a. It will have to be accepted by those currently outside the system that parliament will have to keep functioning in its present form.
- b. It will have to be accepted by those in parliament at present that in most respects parliament will have to assume the role of formal legislative endorsement of agreements reached by the executive. That this is achievable is illustrated by the announcement that parliament, during its forthcoming session, will not sit on certain days in order to allow participants in CODESA time to fulfil their commitments.
- c. Parliament will have to accept that in due course it will have to terminate its own existence, and open the door to the new constitution.

4.4.6 The significant concessions would be the following :

- a. On the part of the National Party, it would give up its ultimate control over the government. (Obviously, through its control of parliament it could in principle at any time frustrate the exercise, but that would be seen as such a display of bad faith that it is hardly foreseeable).
- b. The parties presently outside the system would be required to live with an unrepresentative parliament during the transition, but in view of the rubberstamp nature of that parliament, it should not be too high a price to pay. In this respect the Namibian experience offers some encouragement. For the sake of progress, the world, including the United Nations and SWAPO, accepted the de facto governance of Namibia by the (illegal) representative of the South African government, even to the point of conducting a constituent assembly in terms of a proclamation issued by that representative.

4.5 Conclusion

- 4.5.1 This proposal is based on the assumption that an interim government or transitional arrangements cannot be created distinct from or outside the context of the current constitution.
- 4.5.2 Hence the suggestion of the IFP that instead of setting up additional transitional or interim structures, a more satisfactory and rational procedure would be to transform the current Constitution Act, even to the point of renaming it the Transitional Government Act.

5. THE MANDATE OF THE TRANSITIONAL GOVERNMENT OF RECONCILIATION

5.1 It is of fundamental importance to the IFP that there should be firm agreement reached at CODESA and/or in other negotiating processes as to certain key principles to be pursued in the period of transition to a new constitutional dispensation by the Transitional Government of Reconciliation, prior to its establishment. Agreement as to the construction and composition of such government is not enough, it is what it will do and not do in certain key areas of policy which is primary. No party participating in such Government of Transition should have the ability to frustrate its task by claiming that it did not have due notice of the key policies to be followed. That Government must have the political will and direction to effectively govern in the transitional period.

5.2 Agreement will therefore have to be reached, inter alia, on the following key principles to operate during the period of transition :

5.2.1 identification of the regions for major devolution of powers and the creation or augmentation of appropriate strong structures for them so that when the new Constitution is written, it can draw upon the actual experience gained in the regional governmental context. Specifically, the principles of the Natal KwaZulu Indaba agreement in respect of that region's development must be built upon and implemented;

5.2.2 the equitable funding thereof and of socio-economic development within such regions during the transition on a non-discriminatory basis, having got rid of the doctrine of own affairs;

- 5.2.3 a charter of fundamental socio-economic policies which the Government of Transition shall establish by prior agreement of the parties in CODESA or other negotiating process, to be implemented through the normal parliamentary process, in pursuit of economic recovery and development, including privatisation of state owned or para-statal entities;

6. CONDITIONS

The IFP's willingness in principle to agree to and enter into a Government of Transition as a participant is however posited upon the following expectations -

- 6.1 Agreement on the seating of His Majesty The King of the Zulu nation and his delegation at CODESA.
- 6.2 Agreement on the IFP's reasonable amendments to the Declaration of Intent, designed to ensure appropriate neutrality of wording in place of wording which has been reasonably construed by it as committing CODESA to a unitary state and of elevating decisions of CODESA beyond their competence.
- 6.3 Proper consideration in CODESA to the claims of a people regarding itself as a separate nation to exercise the right of self-determination, so encouraging participation by presently excluded political parties and organisations and so enhancing the inclusivity of CODESA.
- 6.4 That as far as the constitutional position of the self governing territories are concerned, the relevant provisions of the Self Governing Territories Constitution Act of 1971 should be scrupulously observed by CODESA/the

Government, and that the principle of sufficient consensus cannot be used to override a self governing territory's objection to a change in its constitutional status - in other words, no self governing territory should be deprived of its current status without its consent.

- 6.5 Agreement as to the composition of the Transitional Government of Reconciliation to ensure its all inclusivity.
- 6.6 Agreement in respect of the disbanding and outlawing of all private and liberation armies and the surrender of arms caches.
- 6.7 Agreement with regard to the principles and framework of the constitution of the new state.

7. SUMMARY

- 7.1 The IFP's strong adherence to constitutionality has encouraged it to search for a constitutionally acceptable method of creating a Transitional Government of Reconciliation which would be broadly based and all inclusive, representative of all significant political parties both inside and outside CODESA.
- 7.2 This Transitional Government of Reconciliation would be in place until the Constitution of the new state was approved by national referendum and thereafter elections held to elect its first government.
- 7.3 Such Transitional Government would responsibly and effectively govern the new state into existence under the present State President in accordance with policies which had been agreed in the prior negotiation process so that all would be committed to achieving growth and economic re-construction in the interregnum.

- 7.4 Such policies would include a firm commitment to create, develop and augment strong regional structures of government and a socio-economic charter.
- 7.5 Because of constitutional restraints relating to the life of the existing Parliament, the period of transition envisaged would be approximately two years.
- 7.6 Amendments to the existing Constitution, requiring only the simple majority of each of the three houses of Parliament in the tricameral system, would enable ministers to be appointed to the Cabinet on a non-racial basis, while the principle of "own affairs" would be legislated out of existence so that the three houses would sit and vote as one.
- 7.7 The IFP firmly rejects an election for a Constituent Assembly to draw up the new constitution principally because first, the country does not remotely have the democratic culture which would render such election free from violence and intimidation, second it would effectively exclude minority parties from any meaningful say in the constitution making process, and third it would place such process in a constitutional vacuum outside of the present constitution.
- 7.8 The IFP likewise rejects proposals for a Government of Transition which would envisage the holding of elections/ referenda under an "interim" constitution on the way to the "ultimate" constitution.
- 7.9 The IFP's willingness to agree to and participate in the Transitional Government of Reconciliation is posited on certain conditions, namely -

- 7.9.1 agreement on the seating of his Majesty the King of the Zulu Nation and his delegation at CODESA;
- 7.9.2 agreement on the IFP's reasonable amendments to the Declaration of Intent;
- 7.9.3 a proper consideration in CODESA to the issue of self determination;
- 7.9.4 scrupulous observance by CODESA/the Government of the constitutional position of the self governing territories which should not be deprived of their current status without their consent.
- 7.9.5 agreement as to the composition of the Transitional Government of Reconciliation to ensure its all inclusivity.
- 7.9.6 agreement in respect of the disbanding and outlawing of all private and liberation armies and the surrender of arms caches.
- 7.9.7 agreement with regard to the principles and framework of the constitution of the new state.