

African National Congress



WORKING GROUP TWO

11 FEBRUARY, 1992

WHAT IS MEANT BY THE TERM GENERAL PRINCIPLES

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.

This note sets out to establish what is meant by the term general principles.

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, the idea has been taken over from 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.

The essence of the matter was to achieve sufficient confidence over the basic notions which would underlie the constitution to encourage all parties to entrust its elaboration to a body whose legitimacy could not be impugned.

The People Shall Govern!

Today, Codesa, which has no legitimacy itself to draft a new constitution, must create the conditions for the coming into being of a body which does enjoy such legitimacy. This explains the two projects of Working Group Two, and their inter-connection.

The general principles must be of such a nature as to encourage confidence in the constitution-making body. They should be sufficiently precise so as to guarantee that the constitution-making body does not stray from certain fundamental notions, but not so detailed as to pre-empt the work of that body.

In the case of Namibia, the 1982 principles were informally referred to by the drafters at the Constituent Assembly as the " holy cow ". Our Working group will, using the format we regard as appropriate, establish a similar document for the constitution-making body in South Africa. The constitution-making body must be a real body with real functions, not just a rubber stamp to legitimise the work of Codesa, or merely dot the i's or cross the t's or fill in the numbers.

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.

Similarly, codesa's decision-making mechanism, namely determination of sufficient consensus for the process to proceed, was especially created for

the purposes of negotiations. It is functional rather than democratic in its nature, appropriate to this stage but quite wrong and too imprecise for breaking deadlock over the terms of a constitution. Indeed, one of the tasks of our group is precisely to determine how decisions should be taken by the constitution-making body, not to take those decisions ourselves.

The function of Codesa, then, is to create enough common ground for the process of elaborating a constitution to proceed, not to draft a constitution by stealth.

In addition to the question of legitimacy there are also reasons of good relations with the public and of practicality for not trying to load the term general principles with more detail than it could bear.

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 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. The public feels involved and secure at the same time.

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 what a modern democratic state should be.

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, for example, between the electoral system, regions, the structure of the legislature and the way government is selected and made accountable.

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 finding sensible solutions.

To give two examples. The nature of the presidency cannot be determined in isolation. There is a strong connection between the way the President 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 presidency, the greater the need for accountability . Should it be accountable 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.

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 to how best to achieve their realisation.

They should impel 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 a dictatorship or authoritarian rule, or which could permit oppression or discrimination against themselves or any other section of the community or of individuals in the future.

The concept of general principles should certainly not be tailored in any way so as to give electoral advantage or disadvantage to any participant.

Once the basic democratic nature of the constitution has been established by

means of agreed general principles, the people at large must be given every chance, indeed encouraged, to participate actively in determining how they wish to be governed. This they will do through mandated representatives whom they will elect to the constitution-making body.

Their participation will not only provide legitimacy, it will promote the achievement of sensible and acceptable solutions and encourage popular identification with and support for 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, and that they are oriented by clear fundamental principles favouring democracy and freedom as understood in the modern world. They shall also have full freedom in determining how best to achieve a constitution which conforms with these general ideas.

Agreement in advance on general constitutional principles is only one of various means of building up confidence in the idea of a democratically elected body to draft a constitution. The use of an electoral system involving proportional representation and agreement on a two thirds majority for decisions should be binding. These three elements will ensure that no party would be in a position, even if it wished, to push through a constitution on its own terms.