

XIMOKO PROGRESSIVE PARTY

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SUBMISSION TO THE TECHNICAL COMMITTEE ON CONSTITUTIONAL MATTERS OF THE NEGOTIATING COUNCIL

16 MAY 1993

The Ximoko Progressive Party would wish to avail itself of the opportunity of submitting to the Technical Committee on Constitutional Matters of the Negotiating Council its views on matters relating to future constitutional development. These, and other views, will be amplified and canvassed as appropriate in the debate of the Council on the content of reports of the Technical Committee.

1. The Issue of Self-determination and the Rights of Minorities
 - 1.1 The position of the Ximoko Progressive Party on the Rights of National, Regional and Linguistic Minorities and on the self-determination of peoples is contained in the Attachments 1 and 2, originally prepared for Working Group 2 of CODESA.
 - 1.2 The Ximoko Progressive Party is of the view that the issue of self-determination has a multiplicity of facets and cannot be considered in isolation. Rather, the many facets of self-determination need to be addressed as a natural part of the debate on such issues as the nature and form of the State, subsidiarity as applied to second- third- and lower-tier Governments, the delimitation of areas of jurisdiction of lower-tier Governments and the functions of such Governments, etc.
2. The Constitution-making Process
 - 2.1 A broad perspective on the Ximoko position is provided by Attachment 3 which encapsulates basic principles formulated in respect of the CODESA debate.
 - 2.2 In essence the position of the Ximoko Progressive Party in regard to the matter of constitution-making is as follows:
 - 2.2.1 Adoption

The process of transition to a new South Africa must proceed constitutionally, with any new Constitution, be it interim or final, being adopted in terms of the Constitution of the day by the Legislature of the day. The particular constitutional arrangements of the day will determine how the relevant legislature is structured, but the point is that the necessary

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enactments will need to be made along the way by the relevant Legislature to give constitutional effect to each step along the way of constitutional development.

2.2.2 Drawing up the Constitution

The process of drawing up of the Constitution (either interim or "final") in its turn involves two distinct actions namely:

- setting the parameters (guidelines or principles) in terms of which the Constitution has to be drafted; and
- drafting the Constitution itself.

2.2.2.1 Establishing Constitutional Principles

This aspect is seen to be the major constitution-making function of the Multi-Party Negotiating Process. It is the view of the Ximoko Progressive Party that no benefit can be derived from truncating this process on the pretext that it is not the work of the Multi-Party structures to become involved in matters of detail. The fact of the matter is that the greater the range of issues upon which multi-party consensus can be achieved, the greater will be the universality of the Constitution finally emanating from the Constitution-making process in terms of its acceptance by the broadest spectrum of political persuasion in the country. Ximoko therefore advocates, as it did at CODESA, the establishment at the multi-party level of as complete a set of unambiguous and comprehensive constitutional principles germane to the content of the new Constitution as possible.

The Ximoko Progressive Party is strongly of the view that the process of determining the content of the Constitution should be as inclusive as possible and therefore is the work of multi-party structures. Certainly it should not be a matter to be determined by simple majoritarianism since an important role of a Constitution is to regulate the behaviour of the majority toward the individual the determination of the rules of this game therefore cannot, in principle, be left to the unqualified will of the majority. The more parties and interest groups who are directly involved in the process, preferably and ideally right up to the point of production of the final product for consideration by the Legislature, the more universal will be its acceptance.

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2.2.2.2 Drafting the Constitution

This will be an essentially technical task provided that sufficient progress has been made at the multi-party level with the establishment of comprehensive and unambiguous principles. The Ximoko Progressive Party would foresee a two-stage process including first an Interim/Transitional Constitution whose drafting will be superintended by the Multi-Party process and a "final" constitution drawn up and enacted during the period of transition, in terms of the Interim/Transitional Constitution and according to the Constitutional Principles emanating from the Multi-Party Negotiating Process. In accordance with its concern that the shape and form of the Constitution should at all times encapsulate not so much the views of the majority but rather of the broadest spectrum of interests in the community, Ximoko believes that even in the transitional phase the process of determination of the shape of the "final" Constitution for enactment by the Transitional Legislature should also be as inclusive of political and other interest groups in the South African society as possible.

3. Constitutional Principles

3.1 The Ximoko Progressive Party stands for a multi-party, non-racial, non-sexists constitutional democracy in South Africa based upon universal adult suffrage and displaying the following essential features:

- There will be a separation of powers between the Legislature, the Executive and the Judiciary with the necessary constitutional safeguards;
- there will be representative government at the First-, Second-, and Third Tier levels with clearly defined and separate powers and functions;
- **jurisdiction** of Second- and Third-Tier government, both geographic and functional, must be such as to promote economic growth and development;
- in order to bring Government closer to the people there will be maximum devolution of powers to lower tiers of government consistent with the capacity of lower tiers to exercise these powers in the interests of their constituencies;
- there will be the necessary constitutional safeguards to preclude the progressive centralisation of powers;
- the entrenched Constitution will be the Supreme Law and will be protected and impartially applied by the independent Judiciary;

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- Fundamental Rights will be entrenched and both constitutionally protected and promoted in a justiciable Bill of Rights;
- the principle of proportional sharing of power rather than the winner-takes-all approach will be fundamental;
- there shall be free association and the autonomy of all structures of Civil Society will be Constitutionally entrenched.

3.2 Attachment 4, produced for the CODESA debate, provides some amplification of the Ximoko Progressive Party's position on the balance between Central, Regional and Local Government.

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XIMOKO PROGRESSIVE PARTY

WORKING GROUP 2

24 FEBRUARY 1992

POSITION PAPER ON THE RIGHTS OF NATIONAL, RELIGIOUS AND LINGUISTIC MINORITIES

The Ximoko Progressive Party subscribes fully to the principles enunciated in the Chapter on Minority Rights contained in the Final document of the Copenhagen Meeting: Conference of the Human Dimension of the Economic and Social Council of Europe (1990) as follows:

1. Questions relating to national minorities can only be resolved in a democratic political framework based on the Rule of Law functioning with an independent Judiciary;
2. The existence of national minorities and cultural diversity should be recognised not as an impediment to the realisation of nationhood within the context of a nation state, but rather as an enriching influence on the quality of that Society whose diversity is worthy of protection;
3. Persons belonging to national minorities have a right to exercise fully and effectively their human rights and fundamental freedoms without any discrimination and in full equality before the Law;
4. The principle of Free Association will apply, that is to say, to belong to a national minority is a matter of a person's own individual choice and no disadvantages may arise from the free exercise of that choice. Persons have the right freely to express, preserve and develop their cultural, linguistic or religious identity free of any attempts at assimilation against their will. In particular they will have the right:
 - 4.1 To use freely their mother tongue in private and in public;
 - 4.2 To establish and maintain their own educational, cultural and religious institutions, organisations and associations and to seek voluntary financial and other contributions as well as public assistance in conformity with national legislation provided only that such organisations do not propagate racial exclusivity;
 - 4.3 To profess and practice their religion and to conduct religious education in their mother tongue; and
 - 4.4 To establish and maintain unimpeded contact with similar groups across national frontiers.
5. Persons belonging to national minorities, notwithstanding the need to learn the official language or languages of the State, will be ensured adequate opportunity for instruction in and of their mother tongue as well as, wherever possible and necessary, for its use before public authorities.

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6. The promotion of the interests of national minorities could possibly be achieved by granting appropriate degrees of autonomy to such minorities in a Constitution in addition to the protection of the rights of persons belonging to such minorities in a constitutionally enshrined Bill of Rights.
7. None of the above commitments may be interpreted as implying any right to engage in any activity in contravention of the provisions of the Constitution or of international human rights conventions.

The Ximoko Progressive Party generally supports an approach in relation to national minorities which will encompass:

- effective measures, including legislation where necessary, to provide protection against acts that constitute incitement to violence directed at persons or groups and based on national, racial, ethnic or religious discrimination, hostilities or hatred and including acts calculated to demean or prejudice such minorities;
- commitment to appropriate and proportional measures to protect persons or groups who are subject to threats or acts of discrimination, hostility or violence as a result of racial, ethnic, cultural, linguistic or religious identity and to protect their property;
- promotion of tolerance and understanding between all groups and persuasions in the Society; and
- endeavours to ensure that the objectives of education include special attention to the problem of racial prejudice and the development of respect for different civilisations and cultures.

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XIMOKO PROGRESSIVE PARTY

WORKING GROUP 2

24 FEBRUARY 1992

POSITION PAPER ON THE SELF DETERMINATION OF PEOPLES.

The views of the Ximoko Progressive Party on the question of the self determination of peoples are a natural extension of its views regarding the rights of minorities already tabled. Its views on the self determination of peoples are as follows;

1. Self determination within a nation state according to international juridical convention is not an unqualified right (Refer Vol 1 of the S.A. Law Commission Report on Constitutional Models) Rather, self determination must generally be viewed as a negotiable option for the exercise of rights and, in the view of the XPP, should not reflect the unilateral preference of the minority or people concerned, but the democratic will of the nation in its entirety;
2. Restricted autonomy could be granted only in accordance with the will of the nation to a voluntary minority group or people conforming to the requirements of international law;
3. Such autonomy should not be on a racial basis;
4. It should not negatively impact the rights and interests of non-members of the minority or people concerned;
5. Autonomy shall be feasible on points such as the size of the minority or the numbers of the people concerned, geographic concentration, and so on;
6. It shall be financially and economically affordable and viable and should not be such as to compromise the integrity of the State nor the principles and tenets reflected in its Constitution;

The Ximoko Progressive Party recognises the relevance and significance of these principles both to the debate on the future of the TBVC states and the matter, for example, of an Afrikaner state. In the specific case where a form of territorially-based self determination is contemplated the XPP would favour the inclusion of the following additional principles:

- The relevant area shall preferably have historical or symbolic significance for the minority or people concerned and shall be an area in which they form a majority;
- It will not be reserved for occupation on a racial or other preferential basis;
- Ownership of land will change hands through the operation of mechanisms which will not advance racial exclusivity or prejudice the constitutional

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rights of any individual;

- All residents will enjoy full political and other rights in accordance with the national Constitution and no discrimination on the basis of race, colour or creed will be countenanced.

The Ximoko Progressive Party is not opposed in principle to a degree of self determination for national minorities or peoples, provided such self determination accords with the above principles, and persuasive arguments can be advanced in support of this expedient as the most desired option for the advancement of the cause of human rights in South Africa.

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Presented to Working Group 2.

Attachment 3

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.

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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 inter alia 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.

* For CODESA read ^{"the} multiparty Negotiating Process"

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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,

* For CODESA read "the Multiparty Negotiating Process"

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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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* For CODESA read "the Multiparty Negotiating Process"
 ** In the present context there would be guidelines agreed to in advance

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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 a 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.

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Attachment 4

17 February 1992

XIMOKO PROGRESSIVE PARTY

Working Group 2

Subject: The Balance Between Central, Regional and Local Government

1. POINTS OF DEPARTURE

The stated position of the Ximoko Progressive Party is that:

- there will be representative government at the First-, Second- and Third-tier levels with clearly-defined and separate powers and functions;
- jurisdictions of Second- and Third-tier governments, both geographic and functional, must be such as to promote economic growth and development; and
- there will be maximum devolution of power to lower tiers of government in order to bring government closer to the people with the necessary checks and balances to preclude the centralisation of power, these checks and balances to be clearly circumscribed in the Constitution.

2. DISCUSSION

2.1 Expanding the basis of effective democracy.

2.1.1 The Ximoko Progressive Party is mindful of the observation attributed to Thomas Jefferson over a century and a half ago ".....it is not by the consolidation or concentration of powers, but by their distribution that good government is effected." It is the conviction of the XPP that the more sites of power that exist, the greater the potential checks and balances and the greater the potential for having as many citizens as possible living under the laws and regulations of their own choice. This would require a great deal more than merely the decentralisation of administrations which would at regional level merely execute the will of a centralised authority. Rather, it would require the establishment of truly representative and democratic government at the Second- and Third-tiers with defined and entrenched functions and corresponding autonomy, protected either through a federal constitution or entrenched within the constitution of a unitary state.

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2.1.2. It is the firm belief of the XPP that by bringing government close to the people through the devolution of power, a mechanism will in effect

be put into place which will ensure a departure from the inertia which has for so long characterised the government of this country. Smaller local and regional governments are generally more flexible or responsive to change than are central governments which are detached and whose preoccupations tend to be more on the plane of grand ideology.

2.1.3. It is the conviction of the XPP that strong and autonomous local and regional governments provide the most compelling instrument for achieving a free society in South Africa.

2.2 Some Objections to Regional and Local Autonomy Frequently Encountered.

2.2.1. The distribution of wealth and income between "rich" and "poor" regions

The argument is frequently encountered that the greater the level of autonomy enjoyed by regions or states within a nation state, the greater the probability of locking poverty into poor states and wealth into rich states. This argument is generally advanced by those who propagate the redistribution of wealth as the primary instrument for social change. It can and has been persuasively argued that natural resources and wealth are not necessarily linked, as evident from case studies throughout the world. Far more important determinants of wealth are skills and knowledge, and most particularly benign economic and institutional arrangements which encourage and foster the best use of those skills. The concept of "rich" and "poor" regions therefore needs to be revisited and carefully considered. However, it would be naive not to accept that in the short- and medium- term transfers of resources from "rich" to "poor" regions would be necessary in pursuit of national objectives. We are convinced that mechanisms could be designed for such reallocation. Empirical research in the Third World would seem to indicate that normative considerations generally tend to be more important constraints.

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success of decentralisation or regionalisation than are material considerations.

2.2.2. Normative considerations

The perception that strong regionalism implies disunity and a return to some form of tribalism is erroneous and frequently the most important normative constraint on effective regionalism. The perception that nation-building can only be achieved through the centralisation of power has in many African countries in fact led to a gross

misuse of that power by central authorities and the development of a yawning gap between governmental- and popular perceptions of what the real needs and priorities of the society are. The ideological argument against strong regional government is more often that not an argument in favour of a centrally-planned economy which has been to the detriment of effective democracy and the economic development of millions in Africa.

3. THE BALANCE OF POWER BETWEEN CENTRAL, REGIONAL AND LOCAL GOVERNMENT

3.1 A Federal or a Unitary State

Central to the debate on the balance of power between the First- and Second-tier levels of government is the question of federalism versus unitarism. The XPP is well aware of the inherent complexity of federal governmental forms but recognises the great advantages which they offer in protecting the autonomy of regions. However, it is also recognised that such systems are inherently rigid and that some flexibility may be desirable in order to allow the country to develop over time toward an optimal dispensation of functions between the various levels of government. The XPP recognises that the option of unitary regionalism, provided there is sufficient entrenched protection in the Constitution, can provide many of the advantages of federalism but without its disadvantages.

3.2 The Devolution of Powers to Regional and Local Governments

3.2.1 The XPP will provide more detailed proposals

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when the debate has advanced to that stage. However, it is proposed that the principle of the devolution of power to the lowest tier of government capable of exercising that power efficiently and effectively within the overall requirement of cost-effectiveness of democratic government be accepted.

- 3.2.2 The XFP is in favour of the adoption of the general principle of limitation of the autonomy and functions of higher authority and of the devolution^{of} all residual powers to lower tiers.

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