

Working Group 2 - ANC Proposals - 31/03/1992
Second Assignment

Body and Procedures for drafting a new constitution

The ANC proposes that:

1. The Constitution be drafted and adopted by a body to be elected according to the principle of universal franchise.
2. This body (which in this document will be called the Constituent Assembly) shall be as inclusive as possible.
3. All persons over the age of eighteen (18) living within the 1910 borders and regarded in international law as South Africans, shall be entitled to vote.
4. The system of proportional representation shall be used.
5. The Constituent Assembly shall consist of four hundred (400) delegates and have a steering committee which will lay down its procedures.
6. The Constituent Assembly shall elect from its own ranks a representative drafting commission consisting of 40 persons to work under its direction.
7. Decisions at the Constituent Assembly shall be by a two thirds majority.
8. The Constituent Assembly shall be obliged to enshrine the principles agreed upon by CODESA in the new constitution and shall not contradict such principles.
9. The Constituent Assembly shall appoint an independent constitutional panel consisting of nine respected, representative and competent persons to hear any disputes concerning the application of clauses submitted to it by members of the Constituent Assembly.
10. Functioning within the above framework, the Constituent Assembly shall be legally entrusted with sovereign powers to draft and put into operation a new and binding constitution for South Africa.

Towards a Democratic and All-inclusive Constitution-making body

1. THE NAME OF THE CMB.

We prefer the term Constituent Assembly. This is the one most widely used internationally. It indicates that what we are doing is constituting a new South Africa out of the old, and that we function not as self-appointed individuals but as representatives sitting in solemn assembly with a proper mandate and appropriate procedures.

The name in itself is not crucial. We could call it the Congress, after the body which drafted the first great modern Constitution - that of the USA. What matters is how it is chosen and how it functions, not who first came up with its name.

2. THE BODY MUST BE CREATED AND MUST FUNCTION IN A DEMOCRATIC WAY.

Since the objective is to install democracy in South Africa, the body must itself exemplify democracy. At the heart of democracy lies the question of choice and elections. Without elections there can be no democracy.

CODESA has a vital but limited function, namely, to create the conditions for the adoption of a new constitution, not to draft a new constitution itself. The fact that it is self-appointed is appropriate to its function, which is essentially that of negotiating the process of transition from apartheid to democracy. The broad support that it is receiving despite its non-democratic character derives from acceptance of its limited role. When it has established the foundation for the process of drafting a new constitution, its historic task will have been completed. Should it attempt to perpetuate itself and usurp the role of the body it was set up to create, CODESA will lose its prestige. *in our view,*

No one who genuinely supports democracy can fear elections. Once the racial and colonial myths are destroyed, there can be no justification for denying the principles and practice of democracy. Are we to say that elections are only good for whites in South Africa and blacks in other countries? Are we to back democracy in Zambia and in Eastern Europe and deny it in our own land?

The dream of the oppressed majority in this country ever since 1910 has been full participation as ordinary South Africans in elections and the choice of government. The National Convention that preceded the 1910 Constitution was based on whites-only elections for a whites-only convention. That ugly beginning to our constitutional life can only be expunged by non-racial elections for a non-racial convention.

Elections thus have an historical healing role to play in our country. They are the part of the process of achieving independence from which the majority were excluded in 1910; they are a signal that true citizenship has at last arrived for all.

Elections will be proof that we really are in a new South Africa. They will signal a compelling acknowledgement of our common South African-ness. They will open the way to the development of a genuine and generous national vision, and encourage a sense of shared responsibility for the country's future.

When we say that it is elections that give the constitution-making proceedings legitimacy, we accordingly refer not just to formal international and internal legitimacy, but to subjective and moral legitimacy in the hearts of our people.

It might be difficult for those who take elections for themselves for granted to understand what it will mean to those who have been permanently excluded from the electoral process to at last have a chance to stand up and drop their ballot slip into the ballot box.

What the voters will be asked deciding is who they wish to represent them in the body which drafts the constitution. By voting they identify actively with the whole process and hence take responsibility for its outcome.

There will be a direct nexus through the elected representatives between each voter and the final product.

In this way, elections will take away the sense of distance and incomprehension which unfortunately at present separates the general South African public from CODESA.

Elections will be the first step in an open and public process. The people of our country should be entitled to know at each step exactly what is being done at the CMB in their name. Compromises openly struck, honestly agreed to for purposes of mutual advantage and frankly explained, have a much greater chance of being accepted than those negotiated in terms of secret agreements behind closed doors. The electoral process encourages openness and accountability. It places the issues before the people who take an interest in them because they know that their opinions can make a difference.

Ratification by referendum.

An after-the-event ratification can never be considered as a serious alternative to involving the public in elections for the CMB. Far from legitimising the process, it will ensure that the Constitution is born in an atmosphere of cynicism and indifference.

A referendum is a useful means of testing public opinion in relation to issues where a simple "Yes" or "No" would be appropriate. It is a grotesque device for ensuring that a long and complicated document corresponds to what the populace thinks is correct.

The public is placed in the invidious position of giving a simple "Yes/No" to a lengthy document, much of which will inevitably be in technical language, without the option of influencing its individual parts.

There is the added problem of persons being compelled to vote in favour of a constitution with which they might not agree, simply because to continue with the present racist constitution would be a greater evil.

All the practical problems and inconvenience said to relate to elections for a Constituent Assembly would apply to the holding of a referendum.

The arguments against the CMB being elected

The case for elections in the modern world is so strong that only someone very cut off from contemporary thinking would argue against it. As we understand it, none of the participants in Working Group 2 are actually against elections in principle.

Certain participants have, however, raised queries about the feasibility of elections in current conditions or about the desirability of granting what they call a 'blank cheque' to an elected constituent assembly. It would be ungracious to suggest that they are opposed to elections because they fear that they themselves will not fear well if they lose their base in apartheid structures and are left to the mercies of the electorate. We accordingly treat the arguments on their merits.

(i) Violence

The first point made is that there is too much violence in the country for free elections to be held, and that elections would only encourage further violence [one assumes that this is meant to express a fear and not to convey a threat].

The danger of this argument is that if the existence of violence is accepted as a reason for not holding elections, then those who are fearful of losing an election will have a stake in maintaining the level of violence.

We are in fact convinced that far from contributing to violence, the holding of elections will provide an orderly and publicly supervised manner in which the contest for political leadership can be conducted. It will serve not as a source of violence but as an alternative to it.

The turning point in Namibia from a state of severe internal conflict to a state of peace was the holding of elections for the Constituent Assembly. The way in which the CA there conducted its business, based on extensive give-and-take, promoted national unity and has until now virtually eliminated political violence. We have no doubt that the same process would have the same beneficial results in South Africa.

What we should be concerned about is not the fact of holding elections, but how to ensure that voters are free in the exercise their choice and that they are well-informed when doing so.

Elections are held precisely so that different ideas can compete. The stronger the competition, the greater the need for elections.

(ii) "Simple Majoritarianism"

The second argument against having the constitution drafted by an elected Constituent Assembly is that this would amount to giving a blank cheque to an electoral majority without respecting the rights and interest of minorities. The term "majoritarianism" is used in this connection as though somehow it is inherently evil. Add the adjective "simple" and it becomes even worse.

This approach comes badly from people who hold office on the basis either of no elections at all or of elections based on principles of simple majoritarianism.

If the present government were to resign because it had been chosen by means of simple majoritarianism [times three], then its moral position as an opponent of majority rule would indeed be powerful. The same would apply if it were to impugn the validity of the recent referendum on the basis of its simple majoritarian nature, or to deny the validity of all legislation passed since Union in 1910; with one exception, such laws were always based on the approval of a simple majority of Members of Parliament who in turn had been elected on the basis of a simple majority [or less] of voters.

The Presidents of France and the USA as well as the Prime Ministers of the United Kingdom and India have all been elected on the basis of "simple majoritarianism".

One cannot escape the conclusion that the arguments against majority rule are being advanced not so much because of the principle involved but because of dissatisfaction with whom the majority will be. Put simply, "simple majoritarianism" was good enough for the whites for 82 years, but will not be good enough for the blacks today, unless, that is, they promise to vote for the party presently in office, in which case the virtues of majority rule might re-assert themselves.

The irony of the situation is that while we in the ANC firmly believe that the principle of free elections and majority rule lies at the heart of democracy, we do not support what has been called simple majoritarianism for South Africa. We, who have never benefitted from the Westminster system of government in the past, in fact have a much stronger claim to opt for a different system than those who for decades have been advantaged by it.

There are at least three major respects in terms of which our proposals differ from what is called simple majoritarianism.

More than 15 months ago, the ANC declared its support for the system of proportional representation. We did so for two basic reasons (in addition to the usual arguments in favour of PR). **One**, it enables the diverse range of currents in South African society to be accommodated without reference to groups and, two, it avoided the problems of delimiting constituencies in a country divided by group areas.

The system of PR lends itself to alliances and joint election lists. In this way, relatively small parties or parties with support limited to a particular region are able to secure representation by linking up with other parties in a similar situation. Furthermore, there are very few countries that use PR, that have governments based on one party only. PR thus tends to encourage coalition governments. Applied to the election of the CA, this would suggest a majority that was complex rather than one that was simple.

Secondly, we propose a qualified rather than a simple majority in relation to decision-making at the CBM. Our proposal is that bearing in mind the special nature of the Constitution, the majority be two-thirds. This is the figure that was used in Namibia, where the procedure turned out to be so satisfactory that the final constitution was adopted unanimously.

It is a realistic figure for South Africa. Commentators suggest that no single party is likely to achieve two thirds of the representatives in a Constituent Assembly. The figure means that in the case of a dispute, the party with the most seats would be compelled to seek support from groups with whom it had competed in the elections. At the same time, the figure would not be so high as to place the CA under ransom to small groups lacking significant popular support. The higher the required majority, the more bargaining power is given to groups with a tiny base. A near veto power for very small groups would encourage fanaticism on the one hand, and pork-barrelling or even worse, outright corruption and buying of votes on the other.

The pressure should be on at the CA to get consensus based on principled points of common ground and a reasonable measure of give-and-take, and not to obtain support by means of threats, bribes or promises.

Thirdly, there will be certain general principles which will be binding on the Constituent Assembly and which will have to be enshrined in the final Constitution, whatever a majority of any size might say. These are the general principles that Working Group 2 is currently debating.

Whatever formulation CODESA finally agrees upon, it is clear that these principles will be such as to establish the basic democratic character of the Constitution, its supremacy as the fundamental law of the country, and the inclusion within it of a Bill of Rights guaranteeing universally recognised rights and freedoms.

Our proposal in this respect is that a special panel of respected and competent persons be chosen to ensure that in the case of any dispute in this connection, the Constituent Assembly does not deviate from the agreed principles. This point will be developed more fully below.

3. THE CMB MUST BE ALL-INCLUSIVE

We feel that a constitution is a very special document that is intended to bind the whole nation and be accepted by all South Africans. Accordingly every attempt should be made to achieve consensus in its elaboration.

In our view, the CA should be as inclusive as possible. Since it will be the constitution for the whole of South Africa, it is important that all South Africans feel that they are represented there, independently of which part of the country they live in and without regard to their race, sex, language, religion, origin or political affiliation. In order to achieve this all-bracing character, we propose the following:

That the delegates to the CA be chosen by proportional representation. This issue has already been dealt with.

That the threshold or minimum percentage required in terms of PR be relatively low.

That the whole territory within the 1910 borders of South Africa be covered by the elections.

That the CA be large rather than small.

Relatively low threshold

On the one hand, it is important that the electoral system encourages parties to have a national rather than a purely local vision; we should discourage an electoral system which promotes extreme parochialism and narrow self-interest. On the other hand, it is important that the views and concerns of

all South Africans in all the regions of the country, and reflecting both majority and minority opinions, be represented.

The experience in Israel, where very small parties have been able to extort disproportionate advantages, is instructive.

Estimates of the number of potential voters range from 18 to 23 million. For purposes of rough calculation we will suggest that the electorate will be 22 million and that 20 million people will vote.

This would mean that a 2% threshold would be 400 000 while a 3% cut-off point would require 600 000 votes. Five percent would need a million votes.

There are a number of well-established political organizations in South Africa which might not be able to reach 5%. New parties might well be born. Keeping them out might reduce the all-inclusive character that the CA should have, though to some extent this problem could be mitigated by the creation of electoral pacts or alliances whereby joint lists are created.

In agreeing on an appropriate threshold, we need to ensure that the inclusive character of the CA is maintained, while avoiding an undue proliferation of tiny parties

The elections cover all the territory between the 1910 borders

x x It is inconceivable that grand apartheid should operate in relation to the new constitution. The very purpose of CODESA is to bury apartheid grand as well as small and establish the way in which non-racial democracy is to be installed in South Africa. We cannot build the mansion of democracy on the pillars of apartheid.

No serious person can doubt that the territorial integrity of South Africa will soon be restored. The only possible dispute can be over the process whereby reincorporation of the TBVC states is to be achieved.

The new constitution will be for all of South Africa. Whatever one's view about the status of the TBVC states, there can be no contesting the fact that the persons living in these areas will be directly affected by the constitution. This will in reality be their future constitution, irrespective of how reincorporation is achieved. They have a right and a responsibility to participate in its elaboration.

As far as we in the ANC are concerned, they are and always have been South African citizens. This is also the position of the majority of South Africans and of the international community. It was the system of grand

apartheid that sought to deprive them of their rights as South Africans.

Problems related to the modalities and timing of the reincorporation of the TBVC states ~~in reality~~ should not in any way impede the participation of persons living in those states in elections for a Constituent Assembly. Once the principle is agreed to that all the persons born withⁱⁿ or living within the 1910 boundaries for sufficient time are entitled to South African nationality and citizenship, all of them would have the right to vote in elections for a Constituent Assembly. The modalities and timing of reincorporation can be dealt with separately.

To exclude the millions of people living in those four zones from participation in the process of constitution-making would be an injustice to them and a disservice to the rest of South Africa.

The appropriate legal mechanisms to achieve a franchise that can truly be called universal, can be worked out at CODESA by Working Groups 4 and 5. Our Group should insist that no one be deprived of the right to participate in the electoral process.

The CA should be large rather than small

On the basis that there should be one representative for every 50 000 voters, an Assembly of 400 persons would be required for a voting population of 20 million. If the potential number of voters is 22 million, then there would have to be 440 seats. This figure is larger than we are used to for the white House of Assembly or even for the Tricameral as a whole, but then the Tricameral represents only a quarter of the total population. The House of Commons in the United Kingdom has about 650 members for a population roughly one and a half times that of South Africa.

Whereas ~~an~~ assembly of 400 or over might be unduly large for a future legislature, it is our view that the CA should err ~~of~~ the side of largeness rather than on the side of smallness. This would facilitate the creation of large rather than small party lists composed not just of top party leaders but of a wide range of personalities representing an extensive spectrum of interest groups. It would facilitate regional participation.

In other words, a relatively large body would more easily accommodate the diversity of the South African nation than would a small one.

We are of the view that it would be of great advantage for individuals and communities to feel that they are directly represented at the CA through persons they know and who will be able to report back and explain the proceedings to them.

It would not, of course, be necessary for the CA to work all the time in plenary. Our proposals for a drafting commission are set out below. This commission would be relatively small in size and would be responsible for the day-to-day technical carrying out of the wishes of the CA in relation to establishing draft terms for the new constitution.

A CRITICAL INTERPOLATION ON THE PROPOSAL FOR A BICAMERAL CMB

One of the participants has made the proposal, apparently seriously, that the CMB be a bicameral body. We are unaware of any precedent anywhere in the world for such a procedure. Indeed, it seems to represent the kind of elementary confusion between the functions of a CMB and those of a legislature, that would fail a first year law or political science student. These are clear, democratic and manifestly fair ways of ensuring that the Constitution will emerge from an all-inclusive CA seeking consensus, and that the end result will be basically acceptable to all South Africans. Why create a complex and constitutionally monstrous Second House when manifestly legitimate and internationally acceptable means of achieving the same result are available?

We feel that constructing two Houses on the basis of assuming inevitable conflict between the majority and minorities, and then setting them against each other on a collision course, is designed to maximise rather than reduce differences.

It will encourage reciprocal intransigence rather than mutual attempts to find solutions. Sensitivity to the wishes of the minority cannot be achieved by insensitivity to the feelings of the majority. The Upper House will come generally to be seen as the House of Losers, and bad Losers at that. What are elections for if losers take nearly all?

Already we hear the mocking phrase: "simple minoritarianism". One may also speak of the system of DR (Disproportionate Representation). How inclusive and nation-building can a process be that nullifies the wishes of seventy or eighty per cent of the population? How inclusive is the process if the third of the population living in the TBVC states is excluded from it? What we need are not two Houses at each other's throats, fearful of and antagonistic towards each other, but a single, multi-faceted body representing the nation in all its variety and seeking to establish fair ground-rules for the realisation of the principle that South Africa belongs to all who live in it.

This ad hoc and specially constructed bicameralism will be seen by the majority of South Africans and by the world at large as a reminder that the cadaver of apartheid still rules from the grave into which it was said to have been cast. The racial group rights idea at least had the virtue of honesty, declaring in effect that some people were inherently different from and more worthy than others. We now end up with the confusion that inevitably results from trying to democratise

apartheid. Elections are held to choose losers. Minority parties undermine their moral position by being associated, whether they like it or not, with institutional chicanery.

Deadlock is built in as a mathematical inevitability. The defensible principle of regional representation, and, possibly of over representation in favour of poor regions, is undermined by the principle of minority groups in the region ending up with more representation than the regional majority. Everything is brought into disrepute: elections, consensus, minority rights, even true bicameralism itself.

4. SOME PROCEDURAL ELEMENTS

THE DRAFTING COMMISSION

*Try to find consensus
- steps to encourage -*

X The drafting of the Namibian Constitution was considerably facilitated by the establishment by the CA of a drafting commission from its own ranks, supported by three independent legal advisors from outside. We propose that the CA for South Africa elect a drafting commission of approximately 40 persons from its own ranks. These need not be lawyers or political scientists, but should be persons with competence in drafting and in handling constitutional concepts. The commission should be chosen on the basis of proportional representation, subject to the right of every party represented in the CA having at least one member.

Provision could be made for legal and other advisors to participate in support of the respective parties as they have done at CODESA.

The Commission would have the task of giving appropriate shape to the wishes of the CA, under whose direction it will function.

FUNCTIONING OF THE CMB

The CMB, which should function in Parliament in Cape Town, should be given four months to complete its work. Should it fail to do so, it should be compelled to dissolve itself so that new elections could be held. The threat of imminent elections would concentrate the minds of the delegates.

X The CMB would at its first session elect a steering committee on the basis of proportional representation. This committee would be responsible for questions of management. ~~It would be responsible for questions of management.~~ It would propose rules of procedure and suggest the persons, drawn from the ranks of the CA, who would chair sessions. It would attempt to achieve consensus wherever possible, but if an issue were to go to a vote, a simple majority should suffice.

The Drafting Committee, on the other hand, should take its decisions by a two thirds majority. It may submit majority and minority reports to plenary sessions.

If a dispute arises in this Committee or at the CA as to whether an agreed general principle has been ignored or contradicted, the problem should be referred to the steering committee, and if the steering committee in turn is unable to find a solution satisfactory to all, the issue shall be sent to the Constitutional Panel.

THE CONSTITUTIONAL PANEL

The Constitutional Panel would consist of nine persons selected on the basis of their integrity, representativity and competence by the CA. We propose that they be chosen *en bloc*, with a vote of at least 80% in favour of the panel as a whole. This would conform with procedures in European countries where the Constitutional Court is nominated by Parliament.

The members of the Panel would not be members of the CA and would be independent in their functioning. They would entertain petitions by the Steering Committee, or by at least 15% members of the CA, in relation to whether draft proposals for the Constitution contradicted or fail to enshrine general principles agreed to at CODESA. They would also be called upon to verify that the Constitution, as finally adopted by the CA, enshrined and did not contradict these principles.

The decision of the Panel shall be final and not subject to review by the CA or by the ordinary courts. While there are undoubtedly persons of great merit in the present judiciary, the court system as such is seen by the majority of South Africans as a creation of the apartheid government which appointed the judges and as lacking in legitimacy. Many outstanding lawyers have in fact refused to serve as judges for this very reason. Only 1 out of approximately 150 judges is not white, and only 2 are not male; if issues of non-racialism and non-sexism arose, it would be manifestly inappropriate for them to be decided by all-white and all-male bodies.

In any event, the procedures and time frames of the ordinary courts would be such as totally to impede the proper functioning of the CA. Decisions at the CA will have to be taken swiftly so as to enable the constitution-drafting process to proceed.

The Panel will in fact function very much along the lines of the French Conseil Constitutionnel which decides on questions of the constitutionality of proposed laws submitted to it from Parliament, and which enjoys considerable prestige. Members of the present judiciary would not, of course, be debarred from being selected for the Panel, but they would serve as respected and competent persons, not as members of the judiciary.

5. CONCLUSION

This document, is confined to the second assignment of Working Group 2. It will have to be read with global proposals the ANC has made in relation to transitional arrangements. At this stage, the function of our Working Group is to establish the concept, character, mode of creation and method of work of the CMB. When these basic ideas have been formulated, we can meet with other Groups concerned with transitional arrangement to create a total procedural package.