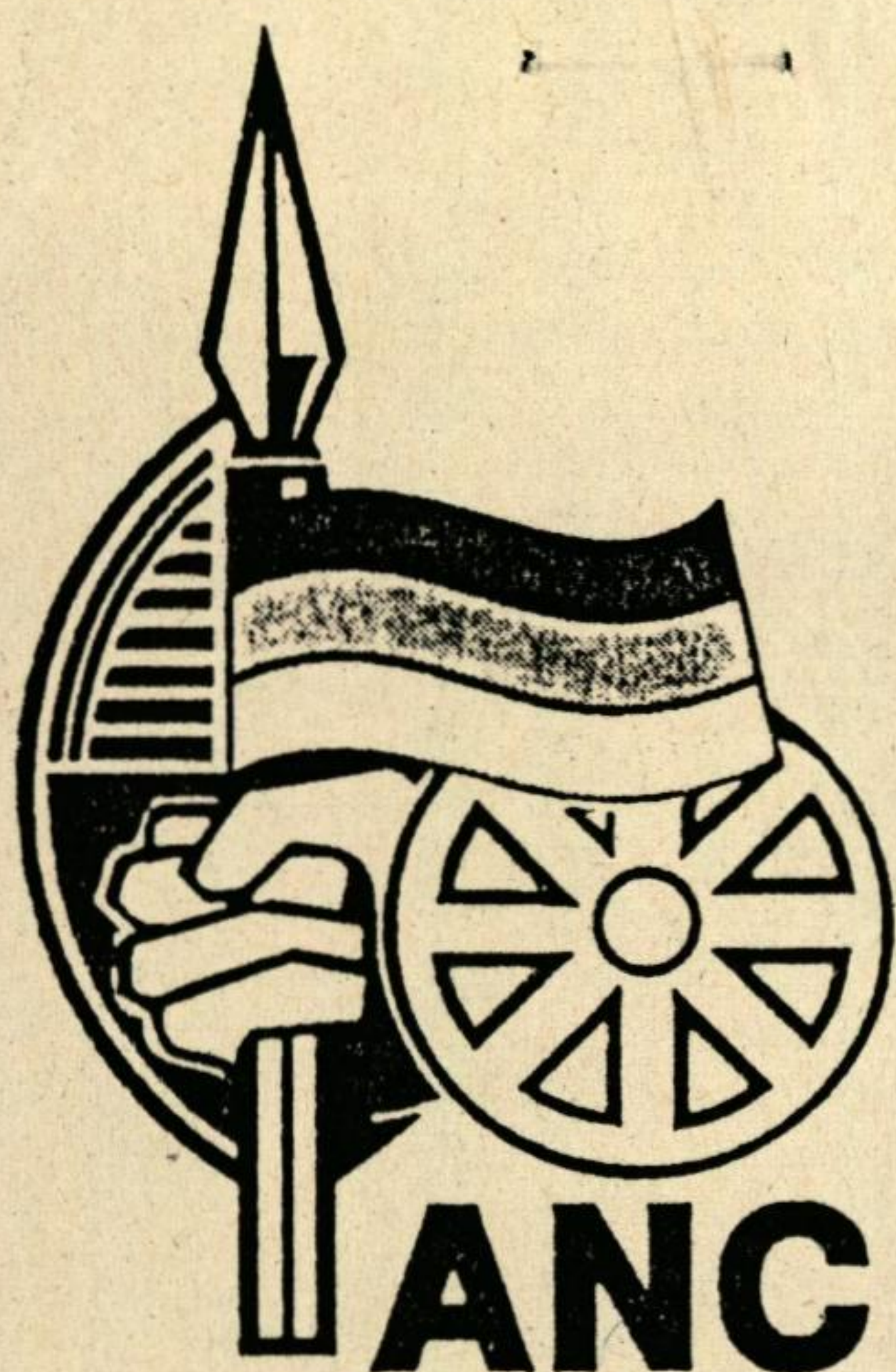


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ANC

Negotiations Bulletin

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INTRODUCTION

A lot of progress has been made at the negotiating table. Amongst the most important is the Government's acceptance of the ANC's demand for an interim Government and the principle that a new South Africa would be non-racial, democratic and non-sexist.

1 WORKING GROUP 1

1.1. CREATING A CLIMATE FOR FREE POLITICAL ACTIVITY

MEDIA

The Government has accepted the principle that the electronic media and all broadcasting services be placed under Independent supervision. However, the government is still clinging to its unilateral restructuring of the media. The ANC will therefore continue to challenge this.

SECURITY

Discussions at a bilateral level with the Government with regard to the release of political prisoners, the return of exiles and security legislation are continuing. The outcome of these discussions would produce agreements which are to be tabled at Codesa.

1.2 CONTROL OF SECURITY FORCES

✓ Notwithstanding the statements made by NP Ministers Roelf Meyer and Kriel, our position remains that the future of MK shall be determined at the Interim Government Council. MK shall not be disbanded before then.

✓ The ANC is presently carrying out detailed research on the control of the security forces and proposals in this regard will shortly be tabled at Codesa.

2 WORKING GROUP 2

2.1 Agreements on General Constitutional Principles. Working Group 2 has agreed to the framework of a constituent assembly. It is as follows:

- 2.1.1 "South Africa will be a democratic, non-racial, non-sexist sovereign state.
- 2.1.2 The constitution shall be the supreme law.
- 2.1.3 The diversity of languages, cultures and religions will be acknowledged.
- 2.1.4 All will enjoy universally accepted human rights, civil liberties, including the freedom of religion, speech and assembly.

- 2.1.5 There will be a separation of powers between the legislature, the executive and the judiciary with appropriate checks and balances.
- 2.1.6 The legislative branch of government will embrace multi-party democracy, regular elections, universal adult suffrage, a common voters roll and in general proportional representation.
- 2.1.7 The judicial branch of government will include:
- ◆ A judiciary that will be independent, non-racial and impartial.
 - ◆ An entrenched and justiciable bill of rights.
 - ◆ A legal system that guarantees the equality of all before the law.
- 2.1.8 Government shall be structured at national, regional and local levels.
- ◆ At each level there shall be democratic representation.
 - ◆ Each level of government shall have appropriate and adequate legislative and executive powers, duties and functions that will enable each level to function effectively; such powers duties and functions to be entrenched in the constitution.
 - ◆ In addition to the powers, duties and functions entrenched in the constitution, each level of government may delegate powers, duties and functions to the lower level of government.
 - ◆ The general principles of the constitution, including the terms of the Bill/ Charter of Fundamental Rights shall apply to each level of government.
- 2.1.9 A new constitution should provide for effective participation of minority political parties consistent with democracy. "

(It has been agreed in the Working Group that this principle does not imply or reject:

- ◆ constitutional prescription for the participation of minority political parties in any executive structure of government;
- ◆ simply majoritarianism;
- ◆ veto powers by minority political parties on any issue.]

2.2 CONSTITUENT ASSEMBLY

Discussions on the nature and character of the Constituent Assembly are due to begin on the 23rd March, 1992.

3 WORKING GROUP 3

INTERIM GOVERNMENT

- 3.1. The following has been agreed:
- 3.1.1 That there is need for interim/ transitional arrangements in order to facilitate the transition towards a new democratic constitution to which Codesa is committed.
- 3.1.2 An important aspect of such arrangements will be the creation of a transitional executive structure.
- 3.1.3 The transitional executive structure shall initially be by appointment in accordance with procedures agreed upon by Codesa.
- 3.1.4 Agreements reached at Codesa in this regard will have to be given effect to by Parliament through amendments to the existing constitution and relevant legislation, in order to give them constitutional and legal form.
- 3.1.5 Other aspects of the interim/ transitional arrangements still need to be discussed.

- 3.2 In this regard, it is important to note that the Working Group denied reports that the agreement implied the formation of a "super cabinet" or co-option of other formations to the present government. The position of the ANC remains that as reported in the March, '92 edition of Mayibuye.

4 WORKING GROUP 4

REINCORPORATION OF THE TVBC STATES

With the exception of Bophutatswana, which has proven to be intransigent on a number of matters, there is general agreement that the TVBC states be immediately reincorporated. The ANC position, in this regard, is guided by the principle that there must be an immediate restoration of citizenship of all of South Africa's people and that an Interim Government must exist over all of South Africa including each of the TVBC states.

5 WORKING GROUP 5

This working group is presently considering the agreements reached in other working groups and will draft legislation accordingly. Also being considered is the drafting of an electoral law. These agreements are also being considered with a view to making recommendations with regard to appropriate time frames and target dates for its implementation.

6 ✓ PARTICIPATION OF TRADITIONAL LEADERS IN CODESA

A special sub-committee of Codesa has been set up to discuss this matter. The matter has to date not been resolved.

The position of the ANC is that all traditional leaders should be accorded observer status.

7 DATE OF CODESA II

It has already been agreed that Codesa II should be held towards the end of April, 1992. There is now a common understanding that Codesa II must deliver substantial and meaningful progress. The ANC is determined to ensure that Codesa II takes place only after it's immediate demands for an Interim Government and Constituent Assembly have been fully discussed and agreements reached.

8 PATRIOTIC FRONT MEMBERS WITHIN CODESA

✓ Patriotic Front forces participating at Codesa have continued to meet on a regular basis to strategise and discuss progress being made at Codesa. This relationship has ensured that many matters are speedily resolved.

✓ At a meeting which took place on the 21st February, 1992, it was agreed at this meeting that the reconvening of the next Patriotic Front meeting be the responsibility of all. It was further agreed that Intando Ye Sizwe, the Labour party, Inyandza, Cosatu, the UPF and the ANC establish an interim committee to convene the next meeting after which permanent structures would be set up.

9 ISSUES FOR DISCUSSION

Contributions on any of the matters pertaining to the process of negotiations would be appreciated. In particular, discussion documents by branches and regions on the following matters would be most welcome:

9.1 ✓ ELECTORAL LAW

There is widespread feeling against the present identity documents. It is important for have a common understanding on voter identity and a new electoral law. In

this regard, we would appreciate views on how to approach the matter of voter identification. Here, issues which are to be taken into consideration are; ensuring that only South Africans vote and that no person may vote more than once. Some of the proposals made thus far are the use of identity books and indelible ink. Your ideas on this matter are important.

9.2 REINCORPORATION OF THE TVBC STATES

The process of reincorporation of the TVBC states is another matter of immediate importance. Some parties may find it convenient to exploit the fears and uncertainties of those in the civil service of these states. It is for us important to ensure that such reincorporation does not cause any of the people resident and working in such areas any hardship or adversely affect the basic civil service and the provision of amenities.

9.3 INDEPENDENT ELECTORAL COMMISSION

An electoral commission should be made up of South Africans of integrity to organise and supervise elections. It will have sole and exclusive control of the electoral process with powers to validate or invalidate election results. An independent electoral commission is critical if we are to ensure free and fair elections.

What are your views with regard to an independent electoral commission. Can you suggest what kind of people should be appointed to such a commission. Should you have names of such people, kindly let us have them together with the necessary motivation for your choice.

NB: PLEASE LET US HAVE YOUR CONTRIBUTIONS ON THE ABOVE BY NO LATER THAN THE 25TH MARCH, 1992.

PROPOSALS FOR TRANSITIONAL ARRANGEMENTS

1. Since 1910 South Africa has had consecutive constitutions that gave only certain sections of her population representation in national structures of government. That era of our constitutional history came to an end with the steps announced by the State President on 2 February 1990, and sanctioned in the referendum of 17 March 1992. With the mandate of those who elected it, the Government can now proceed with vigour on the road of reform to a new negotiated democratic constitution securing equal representation for every South African citizen and eliminating domination.
2. In continuation of the process the Government proposes that negotiations should begin as soon as possible with a view to the formulation of a transitional constitution amending the *Republic of South Africa Constitution Act* 110 of 1983. In order to make the necessary preparations for the implementation of such a transitional constitution, it is proposed that structures with broadly representative membership be created by statute without delay. This will ensure that all interested parties can be assured of an opportunity of participating in the preparation, planning and implementation of a transitional constitution.
- 3.1 With a view to meaningful discussion, consideration and negotiation thereof in CODESA, the Government will make its proposals for a transitional constitution available in the form of draft legislation towards the end of April.
- 3.2 It is accepted that the parties participating in the negotiations concerning a transitional constitution, do so under the following conditions:
 - Decisions in this regard are taken by consensus.
 - The question of political violence in general and the bilateral understandings in inter alia paragraph 3 of the Pretoria Minute and the DF Malan Accord, are solved decisively.

- Everything that can harm South Africa and all its people is effectively opposed by participants.
- The transitional constitution is implemented only when a general and satisfactory situation of order and stability has been established in the South African community.

3.3 The draft transitional constitution that will be presented to CODESA, will be formulated within the following framework:

Parliament

Parliament is composed of two Houses, namely a National Assembly and a Senate.

The National Assembly is elected according to a system of proportional representation. Every South African citizen above the age of 18 can vote and be elected.

If sufficient progress is made with the negotiation process concerning a system of regional government, the Senate is composed of regional representatives. Should sufficient progress not be made in this regard, the Senate can initially be composed of members of existing legislative bodies.

The Head of State

A Presidency is formed by the leaders of the three to five strongest political parties jointly representing a majority in the proposed National Assembly as determined by a general election. The Presidency is the executive head of the Republic and it takes its decisions by consensus. The chairmanship of the Presidency rotates on a six monthly basis.

The Cabinet

The members of the Cabinet are appointed by consensus by the Presidency and need not be members of Parliament. The Cabinet functions under the direct guidance of the Presidency.

Charter of Fundamental Rights

The Constitution, including an enforceable Charter of Fundamental Rights, is the supreme law of the Republic. The Constitution and Charter are justiciable by the Supreme Court of South Africa.

Further Transitional Measures

In order to maintain good government and to provide for the responsible management of the transition process, the Constitution contains extensive transitional provisions.

4. The following arrangements for the preparatory phase are now proposed for negotiation. As soon as the discussion and negotiations have proceeded to the point where the details can be discussed, a draft bill thereon will also be presented:

Transitional Councils

- 4.1 Transitional Councils are established for facilitating the planning and implementation of a next constitutional dispensation. Each Council is composed of six members designated by the Management Committee of CODESA and appointed by the State President together with one additional member appointed by the State President on the grounds of his expertise after consultation with the Management Committee of CODESA.
- 4.2 A person may be appointed as a member of more than one Transitional Council and the number of persons who are members of Transitional Councils may at no time exceed thirty.
- 4.3 A person who is a Minister or Deputy Minister in the present constitutional dispensation or who is a member of the Executive Committee of a Province, may also be appointed as a member of a Transitional Council.

- 4.4 Members of Transitional Councils receive the remuneration and benefits determined by the State President after consultation with the Management Committee of CODESA.
- 4.5 No one who is a member of more than one Transitional Council, or who is a member of a Transitional Council and holds an office mentioned in 4.3, is entitled to receive remuneration and benefits in respect of more than one of the capacities in which he serves.
- 4.6 The State President may, on the recommendation of the Management Committee of CODESA or the relevant Transitional Council, terminate the appointment of any member of a Transitional Council and appoint another person in his place. The State President may in the same manner appoint a member of another Transitional Council to act for a member of a Transitional Council who is temporarily indisposed or who is for any other reason incapable of attending meetings of that Transitional Council. The State President may dismiss any member of a Transitional Council on grounds of proven misconduct.
- 4.7 Transitional Councils take decisions by way of the consensus of all their members and they themselves decide on matters such as chairmanship and procedure.
- 4.8 Two or more Transitional Councils may meet together to discuss matters of mutual interest or of interest to any specific Transitional Council, or in general concerning the transitional process towards a new democratic constitution.
- 4.9 All the Transitional Councils meeting together constitute the Joint Transitional Council, which does not have any of the specific duties and functions of any of its constituent Transitional Councils, but may by way of consensus reach agreements on resolutions.
- 4.10 Detailed definitions of the duties, functions and activities of Transitional Councils can be described in the proposed legislation after negotiation. This may include the studying of existing legislation and making of

recommendations thereon and on new legislation in the area for which a Transitional Council is responsible.

4.11 The following Transitional Councils are proposed:

(a) The Transitional Council for Elections.

that is charged with the preparations and planning for the holding of elections under the transitional constitution and to ensure that they will be free and fair. The Transitional Council may adopt resolutions by consensus about any matter concerning its activities and shall initiate and co-ordinate those negotiations that it may consider necessary for the purposes of its activities.

(b) The Transitional Council for Regional Government

shall, having regard to existing provincial boundaries as well as political, geographic, demographic and economic determinants and after consultation with existing government authorities as well as knowledgeable persons and institutions, formulate proposals regarding the delimitation of the territory of the Republic into a number of provinces or federal component states which is politically and economically justifiable. The Transitional Council may adopt resolutions by consensus regarding any matter concerning its activities and shall initiate and co-ordinate those negotiations that it may consider necessary for the purposes of its activities.

(c) The Transitional Council for Local Government

shall, having regard to provincial and federal component state boundaries that may be proposed by the Council for Regional Government and the boundaries of existing local government areas as well as geographic, demographic and economic determinants and after consultations with existing government authorities as well as knowledgeable persons and institutions, formulate proposals regarding the delimitation of local

government areas in such a way that no local government area will be in more than one province or component state. The Transitional Council may adopt resolutions by consensus regarding any matter concerning its activities and shall initiate and co-ordinate those negotiations that it may consider necessary for the purposes of its activities.

(d) The Transitional Council for Government Finance

shall do planning and preparations relating to the handling of government finances in a next constitutional dispensation. The Transitional Council may adopt resolutions by consensus regarding any matter concerning its activities and shall initiate and co-ordinate those negotiations that it may consider necessary for the purposes of its activities, and more specifically regarding intergovernmental financing. This Transitional Council may be given the opportunity of making inputs regarding budgeting.

4.12 The possibility of instituting Transitional Councils for Law and Order (or Police) and for Defence can also be considered. In negotiations in this regard the progress made in Working Group 1 and in various bilateral negotiations will have to be taken into account. The institution of such Transitional Councils can not be properly discussed in Working Group 3 in isolation from those developments.

4.13 The possibility of instituting further Transitional Councils functioning in areas such as education, housing, health and international relations, can also be investigated.

5. The Government is convinced that these proposals are fair, constructive and justifiable. It is trusted that the proposals will contribute to the early reaching of agreement on the next step in the transition towards a fully representative democratic constitution.

NOTES ON NP PROPOSALS

PHASE I

1. All transitional councils sitting together constitute the Joint Transitional Council (JTC). The JTC and the other transitional councils have advisory powers only. The tricameral parliament and the NP Cabinet will have power of veto over transitional council recommendations.
2. Also propose other transitional councils for education, housing, etc. The brief of all transitional councils is to investigate future policies, not to level the political playing field.

The establishment of these structures is subject to preconditions:

- ending of violence;
- disbanding of MK, etc.

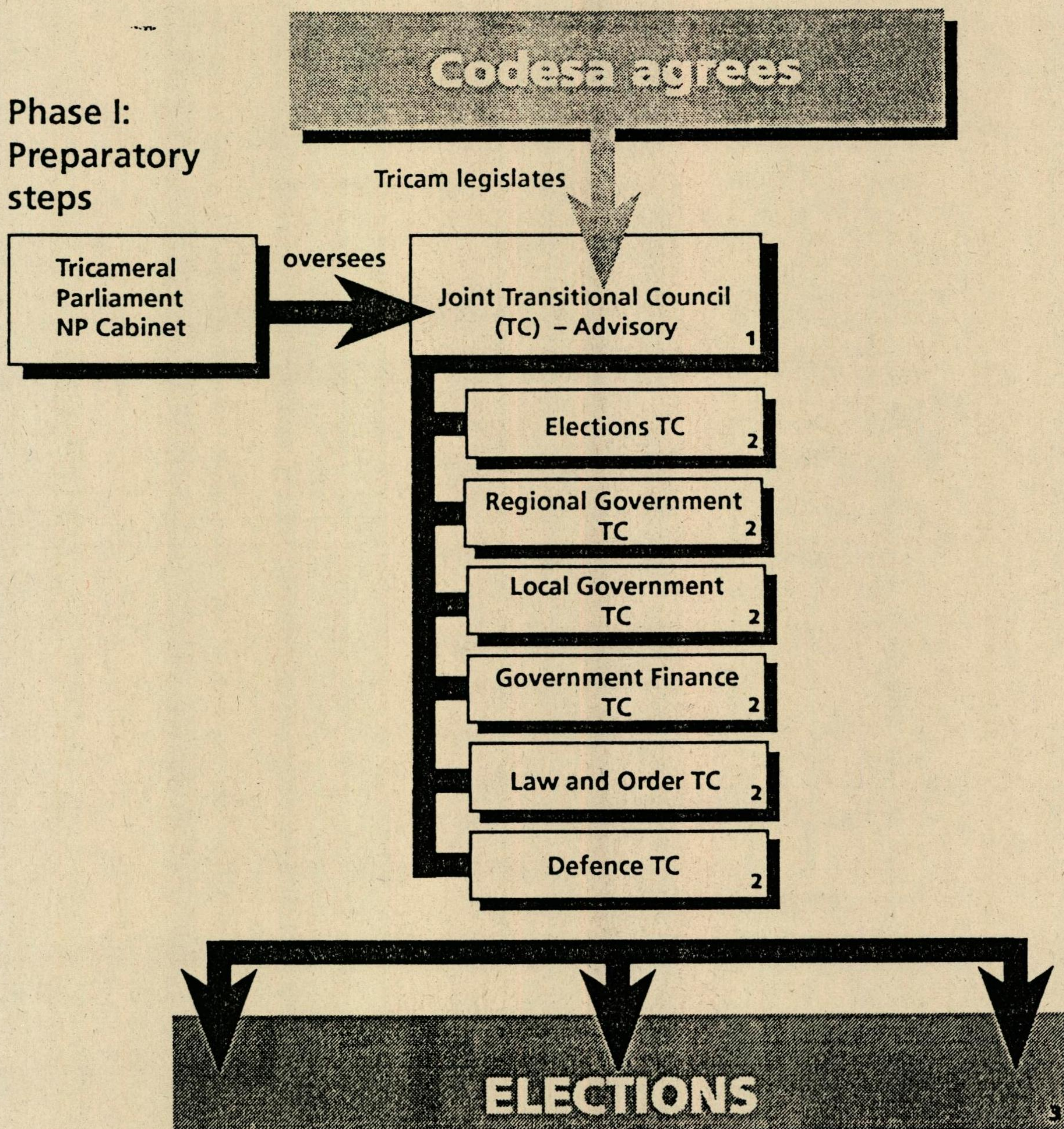
A time frame of up to 18 months is envisaged for Phase I.

PHASE II

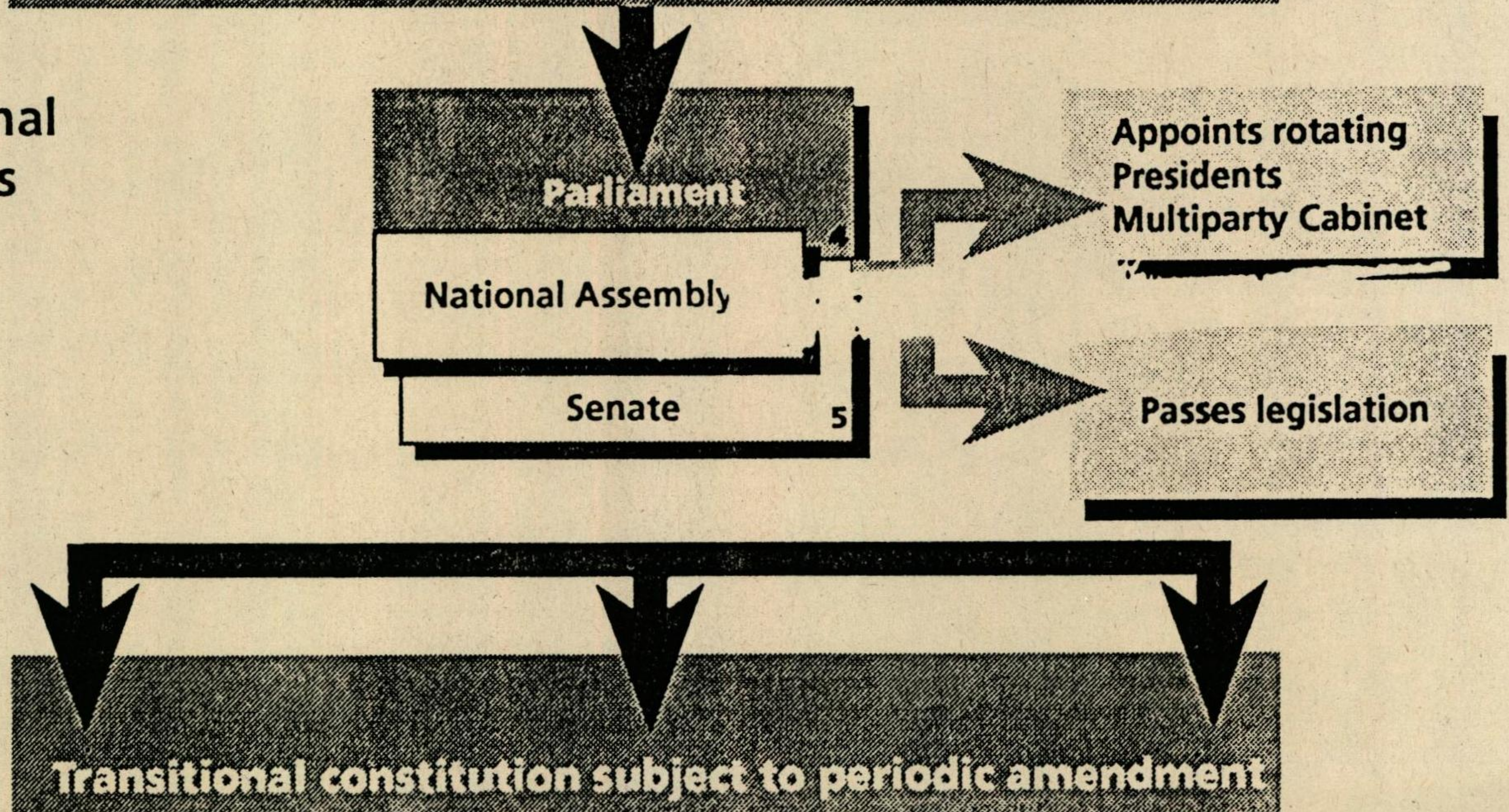
3. Proportional representation, but on regional basis.
4. Based on transitional constitution.
5. Made up of tricameral parliament and homeland legislatures with veto powers. Later to be composed of regional representatives.

NP PROPOSALS

Phase I: Preparatory steps



Phase II: Transitional structures



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.

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 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

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 African 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 with 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 on 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

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.

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.

VIEWS ON A CONSTITUTION-MAKING BODY

Tabled by the S A Government at Codesa Working Group 2

1. Judging from the inputs thus far made to this Working Group there seem to be three different approaches to the way in which a Constitution-making Body should be composed.

There is first the idea of a Constituent Assembly elected on a one-man-one-vote majoritarian basis. The impression has been created as though this is the generally accepted concept. The S A Government has, however, for long been on record as being against this approach which reduces the importance of a negotiating process, with multiparty involvement, in working out a constitution representative of the people on a truly broad basis. It is noted that most parties favouring this approach have recently introduced qualifications as to the majority required for decision making, but their system still remains basically majoritarian.

The second approach which we initially preferred, is to have a multi party conference as the constitution making body deciding by consensus, e.g. this conference Codesa itself or some multi-party body set up by Codesa and representative of all parties having a meaningful support base.

A third possibility, to which the S A Government would now give preference, is to charge the envisaged elected and bicameral transitional Parliament contained in its transitional proposals, also with the task of constitution-making. Both houses of this Parliament will have to approve the constitution. The composition of the Senate or Second House will ensure special representation and decision-making ensuring protection of minorities on a regional and political party basis. Copies of the S A Government's proposals for transitional arrangements tabled yesterday at Working Group 3, are made available for Working Group-members.

2. The government proposes that the constitutional negotiating forum may best be composed of the representatives of all the political parties and organizations qualifying for participation and arriving at their decision by consensus.

3. In contrast, a one-man-one-vote election would put the cart before the horses by starting off with a *simple majoritarian system* which is actually the goal or desired outcome that some parties seek to achieve by the negotiations. On the basis of a majority-takes-all result such an election would leapfrog the whole negotiating process - it would predetermine its outcome. The elected majority will swamp the constitution-making process and that is where negotiation will end.
4. The government has *no mandate* to enter into a constitution-making process which has the effect of negating the negotiating process by imposing simple majoritarian decision-making. The majority is not the only interested party in constitution-making. A constitution is a structuring of the political process for all communities, and therefore requires a broader agreement than just a majority, so as to ensure its acceptance by all major political groupings and communities. There must be broad multiparty involvement in its acceptance.
5. The future South Africa needs to be built on a basis constructed by *negotiation, in a spirit of give and take*, reflecting the very real concerns of Black and White, and where the best minds seek reconciliation and compromise, leaving not winners against losers but a result in which all parties will share because South Africa will be the winner. Such a negotiating process is necessary also because in itself it will materially contribute to building a spirit of mutual understanding, trust and confidence among the parties involved in negotiation. This would muster a substantial majority of all sections of the population behind the negotiated result. This process would be essential for the birth of a properly functioning new constitution.
6. An elected constitution-making body constituted and functioning in such a manner that consensus among all significant political parties is not required, is rejected because:
 - (a) it reduces *negotiation* to a level of *insignificance*,
 - (b) it amounts to a simple *"transfer of power to the masses"*,

- (c) it eliminates a *broad multi-party involvement* in shaping a new constitution which belongs not only to the majority but to all communities,
- (d) and it creates excessive *tension and confrontation* at a time when we need the building of trust and reconciliation.

7. *Constitutional change* must take place by a *process of negotiation*. Negotiating requires a context of order and stability. Involvement in violence, intimidation and destabilisation disqualifies a party from credible negotiation. Negotiation also requires normalisation of the political process and adherence to the basic rules of the democratic game. This includes in particular tolerance towards the political articulation and mobilisation of one's apponents.
8. CODESA does not have the required political legitimacy to institute a government super-imposed on the present constitutional government. It does, however, have sufficient legitimacy to institute structures charged with the responsibility to prepare the way for an elected transitional government and to draft a transitional constitution by consensus. For details of this view, cognizance should be taken of the Government's *Proposals for Transitional Arrangements* submitted to Working Group 3 on 23 March 1992.
9. [NOTE: It can of course be questioned whether an election is to be considered the only manner in which *legitimacy* of a constitution-making body can be established. Especially if the basis of a body such as CODESA could be broadened further, agreements arrived at by consensus would be quite legitimate. (How else can agreements on constitutional principles arrived at in this Working Group be legitimate?)]
10. The Government's views amount to the following:
 - (a) Codesa should agree on transitional government (as envisaged in the terms of reference of Working Group 3);
 - (b) Such transitional government should be instituted in terms of a transitional constitution agreed to in Codesa and legislated for by the existing Parliament;

- (c) the transitional constitution should make provision inter alia for an elected legislature (consisting of one House based on proportional representation and a second House based on regional and minority political party representation);
- (d) the constitution should be drafted by this legislature created by the transitional constitution.

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ANC Submission:**Working Groups I and III****MEDIA STRUCTURES IN THE INTERIM****I. INTRODUCTION:**

1. The media - especially state-owned institutions - have a central role to play in levelling the political playing field. In order to ensure free flow of information and opinion, it is necessary to address the laws, ethics and structures which impact on media work.
2. Particular attention needs to be paid to the period leading up to the election of a Constituent Assembly. While most of the basic principles and structures might endure into Phase II, it might be necessary to broaden the tasks when elected bodies are in place.
3. A distinction should be made between state and privately-owned media. The former are public property and should therefore serve the people as a whole on a non-partisan basis and without bias. The latter reserve the right to uphold their own editorial views, though they should subscribe to a code of practice agreed upon.

II. GENERAL PRINCIPLES:

4. All citizens must enjoy the right of unrestricted access to information and opinion, and to freely publish, broadcast and otherwise disseminate information and opinion.
5. Public media should serve society as a whole, and should be independent of political parties. They should be supervised by structures broadly representative of society.
6. Media workers should be afforded the environment conducive for their work and they should be protected from intimidation and harassment by the state and/or sections of the public.
7. All media should subscribe to a standard of practice agreed upon among the various media role players.
8. The right to privacy and other such freedoms in broader legislation should not be violated on account of free flow of information.

III. STRUCTURES AND THEIR TASKS:**9. Media Commission:**

- 9.1. The Media Commission will be appointed by Codesa and will be made up of South Africans of high standing representative of the widest possible spectrum of forces.
- 9.2. The Commission will have the following tasks:
 - 9.2.1. appoint an interim Independent Communications Authority for broadcast media;
 - 9.2.2. appoint boards of the public broadcasters;
 - 9.2.3. monitor and oversee government departments and institutions dealing with media, with powers to take relevant action; and
 - 9.2.4. in co-ordination with the Electoral Commission and independent monitoring initiatives pronounce on media matters during the election campaign.

10. Broadcasting:

10.1. Independent Communications Authority:

10.1.1. Appointed by the Media Commission and made up of South Africans of high standing and widely representative of society as a whole.

10.1.2. The primary tasks of the ICA will be to ensure impartial control of all broadcasting and to effect limited re-regulation in the interim period. All the relevant powers vested in state organs including TBVC administrations, contained in the broadcasting, radio, post office and other acts should be transferred to this body.

10.1.3. The ICA will have the following tasks:

- ☆ take overall responsibility for the entire frequency spectrum;
- ☆ ensure impartiality of public broadcasting services (PBS) and that all adhere to defined standards and norms;
- ☆ normalise licensing arrangements and technical accountability of TBVC broadcasters;
- ☆ re-regulate broadcasting in a limited way in favour of communities and formerly deprived sectors; and
- ☆ operate an ombuds office to receive and act on complaints around all broadcasting.

10.2. Public Broadcasting Boards:

10.2.1. Made up of South Africans of high standing and widely representative. These will cover the SABC and each of the TBVC broadcasting institutions.

10.2.2. Their tasks will include:

- ☆ ensuring that all news and current affairs broadcasting are fair, impartial and professional;
- ☆ ensure rational usage of fictional, documentary and educational material with the necessary emphasis on independent local productions;
- ☆ reevaluate management structures of all public broadcasters and ensure that they fulfil their obligations;
- ☆ afford fair and reasonable access for all political parties in terms of Electoral Commission guidelines, including such aspects as prime time access, the right to reply and public withdrawals by offending parties; and
- ☆ apply the necessary penalties where the need arises.

11. Printed Media:

The Media Council should be restructured taking into account integrity of members and representativity regarding society as a whole. The Council's tasks should include an ombuds office. This process, including the ethics which will apply to printed media, should be based on the negotiations currently under way between the Media Council and journalists' unions.

12. Monitoring:

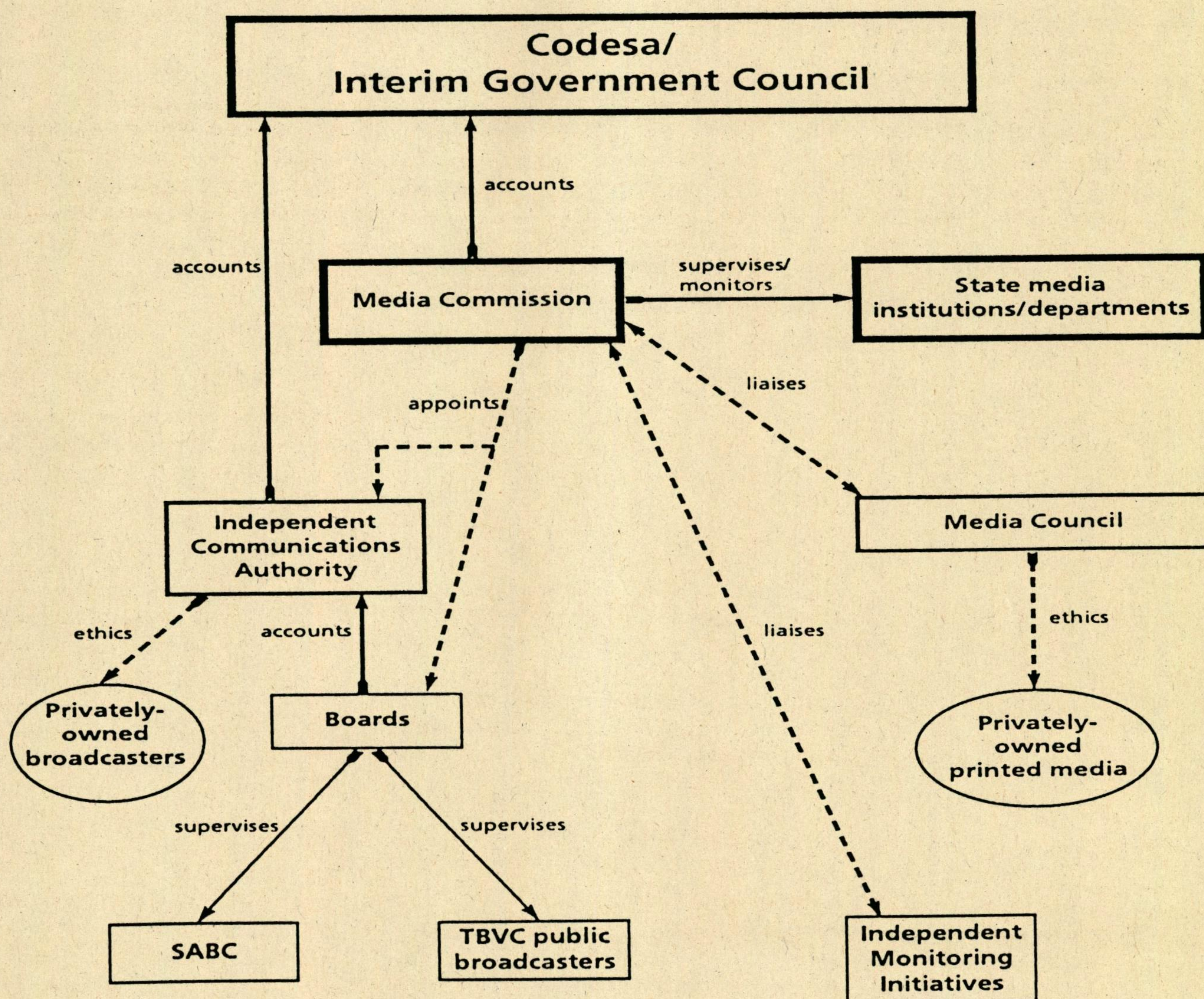
Monitoring of reporting and comments in both printed and broadcast media should be independent of political parties and the governing authority. Interpretations of bias do not lend themselves to consensus-mechanisms among contending parties. Monitoring should therefore be left to independent initiatives such as the one proposed by Campaign for Open Media (COM). Parties themselves can set up their own monitoring structures and present their complaints to the relevant ombuds offices. Simple and effective procedures for attending to complaints should be worked out to ensure speedy redress.

IV. PROCESS:

13. Parties in Codesa should appoint the Media Commission as soon as agreement has been reached in the relevant Working Groups on principles, structures and their powers.
14. The Media Commission will then, acting independently of Codesa parties, appoint the ICA and Boards for all public broadcasters. The Boards should restructure the broadcasters taking into account the current political and social imbalances.

15. Negotiations around the Media Council and relevant ethics should be speeded up.
16. In principle, the levelling of the media playing field should not wait for Codesa II. Mechanisms to ensure impartiality by the various public broadcasters should be ended as soon as possible.
17. In order to ensure non-partisanship in the composition of the various media bodies, the following criteria, inter alia, should apply in the appointments:
 - 17.1. No appointee should be an office bearer of any political organisation or have a vested interest in the film and broadcasting industries, or any other conflicting interest.
 - 17.2. Appointees should divest themselves of any economic interest in the media and/or political office.
 - 17.3. Regional, language, cultural and gender considerations need to be taken into account during the nomination process.
 - 17.4. In addition to eminent and widely respected persons, account should also be taken of expertise in the following fields: news and current affairs, broadcasting, education, technological, developmental issues, trade union, business, legal, film, advertising, entertainment and culture.

V. STRUCTURAL RELATIONSHIP:



18. The general principle is to ensure as much distance as possible between regulatory structures and the parties/governing authority. While these independent regulatory structures will rigorously oversee the public media, they will relate to privately owned media only on the basis of ethics agreed upon.
19. The Media Commission will have a monitoring and supervisory role in relation to relevant government departments and institutions: SA Communications Services, Human Sciences Research Council, Communication Branch of the State Security Council Secretariat and so on. It will have powers of veto regarding matters which affect free political activity and impartiality.
20. Under normal conditions, the ICA would account to the parliament of the day. In Phase I it will account to Codesa or structures created by it. In Phase II, the Constituent Assembly, acting as the interim legislature, will be the most suitable forum to which the ICA accounts. Structures such as the Media Commission may become redundant under a comprehensive interim government.

VI. LEGISLATION:

21. The implementation of these proposals will require legislation at various levels:
 - 21.1. An omnibus law on human rights should include media-related freedoms.
 - 21.2. Legislation specifically on media freedoms will also be required.
 - 21.3. Legislation removing powers from current structures and investing them in the Media Commission, ICA and so on will need to be passed.
22. Among others, the following laws or sections thereof will need to be repealed or amended:

Police Act Sections 27A and 27B; Prisons Act s44(1); Defence Act s101, 118, 119, 121; Criminal Procedures Act s205; Publications Act; Electoral and Referendums Acts; Mental Health Act s66A; National Key Points Act s10(2); National Supplies Procurement Act; Petroleum Act; Nuclear Energy Act; Armaments Development and Production Act; Public Safety Act; Internal Security Act; Protection of Information Act.