

MCAM-A-4-2,

WORKING GROUP TWO
PRINCIPLES AND PROCEDURES FOR ADOPTING CONSTITUTION

PROPOSALS BY THE ANC TO WORKING GROUP TWO

The ANC proposes that:

1. The constitution be drafted and adopted by a body to be elected according to the principles of universal franchise and a common voters roll.
2. The voting covers the whole of South Africa, including the areas designated as the TBVC states.
3. The system of proportional representation be used.
4. The body be called the Constituent Assembly.
5. In order to guarantee that the elections will be free and fair, they be supervised by a broadly-based Interim Government of National Unity, with appropriate international monitoring.
6. The Constituent Assembly will be bound to respect the general constitutional principles set out in the schedule annexed hereto, and will enshrine them in the constitution.
7. Decisions at the Constituent Assembly will be by a two thirds majority.
8. Functioning within the above framework, the Constituent Assembly will have sovereign powers to draft a new and binding Constitution for South Africa.

COMMENTS

1. On the principle of an elected body:

Even the government has come round to accepting the principle that only an elected body representing the whole South African nation will have the legitimacy to draft a new constitution. Earlier on, they were insisting that it be Codesa or some other self-appointed body that drafted the constitution. Now they say that it should be a Parliament elected according to the principles of universal suffrage. They attempt to lock this body into complicated, compulsory and unacceptable power-sharing arrangements. Nevertheless,

one can extract from their latest proposals commitment to the principle of an elected body.

We should insist on this principle being adopted.

A common voters roll:

This states the principle of non-differentiation in voting. It is the negation of the separate voters rolls introduced first for African then for coloured voters in the Union of South Africa days. It means that not only would all South Africans have the vote, but their votes will be treated equally on a non-racial basis. It does not necessarily mean that all voters will have to be registered and placed on a roll before elections can be held. It is a principle, not a physical requirement. Nevertheless, we must explore the question of whether or not there should be registration before voting.

Inclusion of the TBVC states:

This item belongs essentially to Working Group 4. At the same time, it bears directly on the nature and character of the constitution-making body. If, as the Declaration of Intent declares, South Africa is to be undivided, if the participants at Codesa have committed themselves to a united state [whether unitary or federal], then it is only logical that all the inhabitants of this state take part on an equal basis in the creation of its constitution. The principles of legitimacy, representativity, integrity and non-discrimination require no less.

Proportional representation:

This is the system that was successfully used in Zimbabwe and then in Namibia. Apart from the fact that it is by far the most widely used system in the world, it has two special advantages for South Africa. Firstly, it ensures that smaller groups can get representation without the protection of group or racial quotas. Secondly, it avoids the necessity of delimiting constituencies and thus fighting over boundaries, which could be disastrous in our divided country.

Two problems will need attention. The first is the threshold or cut-off point, that is, the minimum percentage that is required to permit a party to be represented. This will be of special importance to some of the smaller parties at Codesa, especially those that have only a regional

following. It might also be of interest to groups that have remained outside of Codesa. A low threshold, of say 1% of the votes cast, could encourage a proliferation of tiny regional, ethnic or religious parties, while a high threshold of say 5% could possibly exclude the Conservative Party, the Communist Party if it had a separate list, the PAC and the Democratic Party. Alternatively, a high threshold could encourage alliances to form single lists, or even giant lists [Patriotic Front or Christian Democrats].

The second, and related issue is whether there should only be a single national list for each party, or whether the regional factor should be taken into account. In Namibia, the regions were relevant only in relation to counting, a fact which was vital to SWAPO since it had majority support in less than half the regions but overwhelming support in the north. In Zimbabwe, the PR system was applied to lists drawn up on a Provincial basis, with a fairly high threshold, thus prejudicing Muzorewa, who was unable to benefit from accumulating scattered votes throughout the country.

The ANC Constitutional Committee has in general favoured the idea of a single vote that would count towards both national and regional lists of a party. Thus, if the CA were to have 400 members, 200 would be elected according to national lists and 200 would come from the regional lists. If we have ten regions, the number of seats per region would depend on the number of voters in the region, each vote having the same value.

The advantage of this system is that it gives people in the regions a more direct say in the choice of persons to go on the party lists, as well as in relation to their ranking on the lists, while encouraging MPs on the regional lists to be accountable to persons in their region.

It reduces the power of what has been called the party machine and strengthens the position of the branches and regions. It also diminishes the competitive scramble by persons in the regions for places on the national lists, with head counts of how many persons from their region or speaking their language are high up on the list.

The name of the body that drafts the constitution:

We have fought for the term Constituent Assembly because it emphasises both powers of the body to create a wholly new constitution [constituent] and its democratic character [assembly]. The name in itself would not, however, appear to

be vital, provided that both the foundational and the democratic elements were maintained. The Democratic Party have proposed the term Constitutional Conference. The term "conference" is weak. An alternative might be to call it a Democratic National Convention.

Supervision of elections and the role of Interim Government

Once again, this theme belongs essentially to another working group, and once again there is inevitable overlap. The legitimacy of the Constituent Assembly arises from the fact that it truly represents in all its diversity the national will. The government proposes elections first for a new Parliament which will then in its turn choose an interim government. In other words, it wants to keep the referee's whistle until after the game is over.

Quite independently of other reasons for having an Interim Government as soon as possible, we must insist in our Working Group on the principle of having an evenly-balanced, credible and impartial body to guarantee free and fair elections for the Constituent Assembly.

Enshrining the general principles

If any doubts exist, we must remove them: we are paying so much attention to the general principles because we understand that they will be binding on the drafters at the Constituent Assembly. That is why we feel it important to focus only on general principles, and not become involved in laying down in advance institutions or elements or mechanisms that will tie the hands of the Constituent Assembly.

What the general principles have in common is that they all guarantee that the basic elements of a modern, democratic state will be there. Participants at Codesa and the public at large can rest assured that, whatever the outcome of the elections, the Constituent Assembly will not be able to impose a totalitarian constitution on the people of South Africa, nor a racist one.

The two thirds majority

A constitution is such an important document that normally special majorities are required for its adoption as well as for its subsequent amendment. In the case of Namibia, a two thirds majority was required. Since SWAPO received only 56% of the vote, it could never have its way on its own. SWAPO leaders today claim that this turned out to be fortunate. In

the first place, although their draft was tabled as the basis for discussion, the final product, they say, benefitted extensively from the debates and arguments. More important, the final version was signed by every party at the Constituent Assembly, becoming a truly national constitution. No-one could say thereafter that they were not bound by the constitution since it was only a SWAPO document.

We could leave the question of a special majority open, and wait for others to raise it, even demanding something in exchange for moving from a simple majority to a qualified one. This would appear to be inadvisable. The whole Constituent Assembly idea comes as a package. We should make that package as coherent and clearly defined as possible, and make it plain from the start that we are not envisaging the Constituent Assembly as a means of legalising an ANC one-party take-over of the country, but rather, as the means for the first time allowing our people to have a chance in deciding their fate. The National Convention which drafted the constitution for the Union of South Africa was an all-white [and all-male] affair. The referendum to convert the country into a republic was also restricted to whites only.

Ideally, consensus should be reached on every issue. The party that is in government today could be in opposition tomorrow. Yet there must be mechanisms to enable finality to be reached where consensus cannot be achieved, and a two thirds majority seems to be appropriate.

In practical terms, this will mean that the ANC at least will have to agree to any measure before it is adopted; that is, unless we collapse completely and the voters desert us on a massive scale, we will be assured at least of a blocking veto. If the polls are correct, and our vote and that of our close allies is roughly the same as SWAPO received, then we will be the ones who will make all the running, but will have to pass the ball from time to time to get support from other groups.

Sovereign powers

Within the framework of agreed democratic principles of a general nature and subject to a two thirds majority, the Constituent Assembly will be sovereign. This means two things. It is not limited or constrained in any way as to what it drafts, and, secondly, its draft is not subject to approval or amendment by any other body. Legitimacy comes from elections which have the objective of conferring plenary constitution-making powers on the Constituent

Assembly. It is not necessary to re-legitimise what already is legitimate.

It is thus up to Codesa to produce a package of sequential steps that will ensure that there is no doubt or uncertainty about the legality of the Constituent Assembly and the binding nature of its proceedings and decisions.

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