

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 opponents.
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.