

CONSTITUTIONAL ASSEMBLY

THEME COMMITTEE 2

STRUCTURE OF GOVERNMENT

SELF-DETERMINATION / VOLKSTAAT

Fourth Progress Report of the Ad hoc Committee on Self-determination

29 August 1995

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1. Overview

1.1 The Constitutional Assembly's mandate is set out in Principles XI, XII and XXXIV (Schedule 4) and Section 184B of the 1993 Constitution, as amended.

1.2 The specifics of this mandate are:

- Should the final Constitution provide for self-determination?
- If so, should this take the form of a territory, Volkstaat, for example - or are there other recognised ways of expressing such a desire?
- What types of community (eg. language and culture) could be said to share such a heritage so as to justify a form of self-determination?
- What level of support should be shown within a community as a prerequisite for self-determination?

1.3 The Volkstaat Council (established in terms of the 1993 Constitution, Section 184B) recently published its First Interim Report in May 1995. It was officially referred to this Ad hoc Committee on Self-determination, for further consideration. This was made available at the time of the In-House Workshop on Self-determination.

1.4 An In-House Workshop on Self-determination took place on Monday 26 June 1995.

1.5 Some 68 individuals, organisations (including the Volkstaat Council and the Commission on Provincial Government) and political parties, have made submissions, the latest being the Freedom Front.

2. Issues

Comment: The right of self-determination constitutes a major issue. International law recognises that all peoples have the right of self-determination. But the question is whether minorities and/or cultural communities within the boundaries of existing states can be acknowledged as "peoples". These and other issues, such as the right to secession, were dealt with comprehensively during the In-House workshop. Speakers did not reach consensus on these issues. In its report, the Commission on Provincial Government, also deals with these problems, but concludes that concepts such as these remained vague

The problem in South Africa is that the Constitution of 1993 initially dealt only with the more inclusive concept, i.e with collective self-determination for all South Africans, which the Constitution states, had to be recognised and protected (Principle XII). The rest of the body of the Constitution is in line with this general principle. But for the sake of securing the widest possible acceptance of the Constitution, certain pre-election agreements were made, including the addition of Principle XXXIV, which also refers another form of

self-determination, namely that "communities sharing a common cultural and language heritage, whether in a territorial entity within the Republic or in any recognised way", shall also be entitled to self-determination. The problem is, however, that the body of the rest of the Constitution of 1993 was, except for the inclusion of the sections on the Volkstaat Council, not brought in line with this principle. The substance of this, became the subject of negotiations, as well as much of the submissions to TC2. But this process is far from settled. It therefore seems advisable that constitutional provisions would not preclude the pursuit and/or realisation, through negotiations, of this principle in some form.

Current constitutional issues and the 1993 Constitution which govern them, are:

2.1 "Self-determination" is not listed as a fundamental right in Chapter 3.

Comments : In its response to the First Interim Report of the Volkstaat Council, the Commission on Provincial Government reports (on 15 August 1995) that it finds the Volkstaat Council's recommendations problematical, also in the context of Principle XXXIV, which it regards as "vague". It elaborates by stating "the fact that internal self-determination as a concept is still evolving and may assume various forms, not necessarily territorial based and falling short of full self-government for the group as such, as distinct from the general rights of political participation enjoyed by all citizens" (par 3.7 of CPG Report).

The CPG also interprets paragraph 3 of Principle XXXIV as follows: "if a territorial entity referred to in paragraph 1 is established before the new constitutional text is adopted, the continuation of such entity, including structures, powers and functions, shall be entrenched in the new constitution. The provisions will therefore lapse if such entity is not created before the new Constitution is adopted". Its proposal in this respect, is incorporated in par 6(f) hereunder.

2.2 Citizenship : Section 5, 20 and 33(1) of the Constitution are relevant.

Section 5: There shall be a South African citizenship, the right to which (including the loss of citizenship), shall be regulated by an Act of Parliament, subject to sections 20 and 33(1).

Section 20 : Every citizen shall have the right to enter, remain in and leave the Republic, and no citizen shall, without justification, be deprived of his or her citizenship.

Section 33(1) : The rights entrenched in the Constitution may be limited by law, but only in prescribed ways.

2.3 Language, culture and community : Principle XI and Sections 3, 31 and 32 are relevant.

Principle XI: The diversity of language and culture shall be acknowledged and protected, and conditions for their promotion shall be encouraged.

Section 3: Afrikaans is one of the 11 official languages at the national level and conditions must be created for the promotion of their equal use and enjoyment. Rights relating to language must not be diminished and an Act of Parliament must make provision for rights relating to language and the status of languages existing only at regional level to be extended nationally.

An Act of Parliament will establish an independent Pan South African Language Board to promote these goals.

Section 31: Every person shall have the right to use the language and to participate in the cultural life of his or her choice.

This section should be read in conjunction with the right to freedom of association (section 17), the limitations clause (section 33(1)) and the existence of no less than 11 official languages (section 3).

Section 32: Every person shall have the right to basic education, equal access to education, instruction in the language of choice (where it is reasonably practical), but there shall also be a right to educational institutions based on a common culture, provided that there shall be no discrimination on the grounds of race.

These rights should be read in conjunction with the provisions on equal treatment (s8(2)), affirmative action (s8(3)(a)), and the right to establish private schools, provided these are inclusive and non-discriminatory (s 32(c)).

2.4 Self-determination and the Volkstaat as an integral (provincial) part of South Africa: Sections 48, 50, 61 and 62 are relevant.

See, comments under 2.1 above.

Section 48(1): The Senate shall be composed of an equal number of senators from each province, nominated by the parties represented in a provincial legislature.

Section 50: No person shall be qualified to become or remain a senator unless he or she is qualified to become a member of the National Assembly.

Section 61 : Bills affecting the boundaries or the exercise or the performance of the powers and functions of the provinces shall be deemed not to be passed by Parliament unless passed separately by both Houses, and in the case of a Bill, other than a Bill referred to in section 62, affecting the boundaries or the exercise or performance of the powers and functions of a particular province or provinces only, unless also approved by a majority of senators of the provinces in question.

Section 62: Any Bill amending the Constitution shall, for its passing by Parliament be required to be adopted at a joint sitting of the National Assembly and the Senate by a majority of at least two-thirds of the total number of members of both Houses. For the amendment of sections 126 (on the legislative competencies of provinces) and 144 (on the executive authority of

provinces), separate passage by both Houses by a two-thirds majority of each House is required for amending the constitution: provided that the boundaries and legislative competencies of a province shall not be amended without the consent of a relevant provincial legislature.

- 2.5 Provincial boundaries: Section 62, Chapter 9, and Schedules 1, 4 and 6 are applicable.**

Section 61 prescribes the procedures for a Bill affecting either boundaries or power of provinces: these must pass separately, and in the case of boundaries, also by a majority of senators of the provinces concerned.

Section 62 prescribes the procedures for the amendment of the constitution (see 2.4 above).

Chapter 9 contains extensive provisions on provinces, provincial legislative authority, provincial executive authority, finance and fiscal affairs, provincial constitutions and a Commission on Provincial Government.

Schedule 1 defines the boundaries of each of the nine provinces.

Schedule 4 sets out 34 principles which are to serve as norms for the finalisation of the new constitution to be written by the Constitutional Assembly. This is to be read in conjunction with sections 71-74 of the Constitution.

Schedule 6 lists the competencies of provinces, which, read in conjunction with other provisions in the Constitution (s 126), imply concurrent rather than exclusive powers.

- 2.6 Provincial constitutions: Sections 160-162 are relevant, and refer to the adoption of provincial constitutions, the development of provincial dispensations and the election of new provincial governments. However, no mention is made of a Volkstaat (i.e a different kind of province), but there is nothing that prohibits the creation of another province, subject to provisions set out in the Constitution (e.g another province in the Eastern Cape).**

- 2.7 Popular support: what level of support should be shown within a community as a prerequisite for self-determination?**

Principle XXXIV(2) is relevant where it stipulates that the Constitution may give expression to any particular form of self-determination provided there is substantial proven support within the community concerned for such a form of self-determination.

Comment : According to the Accord signed between the Freedom Front, the ANC and the National Party on 23 April 1994, the parties agreed:

- * that "substantial proven support" for the idea of self-determination and the concept of a Volkstaat, will be a requirement for the process (S 3.1.1); and
- * that "electoral support", which parties with a specific mandate to pursue a Volkstaat, have gained in the 1994 election, will indicate such support. The Freedom Front gained 640 000 votes within the provincial legislative

elections. The FF regards this as "majority" Afrikaner support (par 4.1 of FF submission), although independent analysts calculated this to be about 14% of white support and 37% of AFRikaner support (the FF calculated the stayaway factor, as advocated by the Conservative Party, as part of the Volkstaat mandate).

- 2.8 Incrementality:** is enough scope provided for in the case of an incremental approach to self-determination, e.g minority autonomy and/or cultural or community councils and/or corporate self-determination and/or ethnic self-determination and/or Cultural Councils and/or local and regional councils and/or tenth province and/or relations with other institutions and/or autonomous Volkstaat, its territory and boundaries?

Sections 1(1), Chapters 3 and 9, and Principle XXXIV are relevant.

Section 1(1), read in conjunction with Principle XXXIV, does not provide for secession, be that ethnic or otherwise. Self-determination is therefore, in terms of the 1993 Constitution, to be exercised only within the existing boundaries of an single, sovereign South African state.

Chapter 9 and Principle XXXIV apply to processes of federalisation/provincialisation (i.e sub-national autonomy), but without providing for "escape clauses" e.g secessionism.

Chapter 3 on fundamental rights, likewise, stops short of legitimising ethnic self-determination (it does however provide for freedom of association and political rights). Minority rights in the form of religion, language and culture, are expressly recognised in the sections on basic human rights in the 1993 Constitution.

- 2.9 Contextual Comment:** The central issue in this report as well as in the submissions received so far (see 3 hereunder), related to the question of "self-determination" in South Africa.

In the light of hereof, many proponents of self-determination / Volkstaat in their submissions to the Constitutional Assembly pointed out that Principle XXXIV was included in the 1993 Constitution at a late stage, without amending the rest of the Constitution in any significant way, except for the inclusion of sections 184A and B, providing for the establishment and functions of the Volkstaat Council.

The Freedom Front also argues that agreements made before the April 1994 elections, notably the tripartite Accord (referred to under 2.7 above: see Appendix A of the FF's submission to Theme Committee 2, dated 8 August 1995), should be evaluated from a South African perspective and the Constitutional Assembly "should be guided" by them (par 2 of the FF's submission).

The interpretation of the list of issues (2.1 to 2.8 above) should therefore be

seen in this light. Much of this is unfinished business. Hence our proposal in paragraph 6, where an "open-ended" approach is suggested. The Commission on Provincial Government makes a similar type of proposal. The implication of this is that other Theme Committees should also be notified about this problem, otherwise coherence may be lost.

3. Submissions

In response to Constitutional Assembly invitations for submissions on self-determination / Volkstaat, the following have been received (as at 08 August):

3.1 Individuals

A total of 68 individuals have responded as follows:

- * approximately one-third said "No" to self-determination / Volkstaat;
- * approximately two-thirds gave a qualified "Yes":
 - over half of those proposed an Afrikaner Volkstaat;
 - approximately one-third of those proposed self-determination, (i.e stopping short of a Volkstaat); and
 - a few made diverse, non-related, proposals e.g two said apartheid should be re-introduced; one requested a Zulu Volkstaat; one a Griqua Volkstaat; and one said something about vehicle registration numbers.

3.2 Organisations

Four organisations have responded so far: the Afrikanerbond; the Afrikaner Freedom Foundation; the Volkstaat Council and the Commission on Provincial Government.

3.3 Political Parties

Four political parties in Parliament have responded so far: the ANC, the National Party, the PAC and the Freedom Front. The Conservative Party (not represented in parliament) also responded.

4. Agreements

4.1 There are very few non-contentious issues, between individuals, organisations and parties.

4.2 Those who agree that there should be no territorial self-determination / Volkstaat in whatever form, are approximately one-third of the individuals and the PAC.

4.3 Those who agree that the process of seeking solutions to self-determination /

Volkstaat should or could continue, include 38 of the 68 individuals, the Afrikanerbond, the Afrikaner Freedom Foundation, the Volkstaat Council, the Commission on Provincial Government, the Freedom Front, the ANC, the NP and the Conservative Party. However, they all differ on details.

4.3.1 Agreements on an Afrikaner Volkstaat:

A total of approximately one-third of the 68 individuals, the Afrikaner Freedom Foundation, the Volkstaat Council (not the Afrikanerbond), and the Conservative Party and the Freedom Front, proposed a Volkstaat. On substance, however, there is very little agreement, except that all tend to say that a Volkstaat (as an expression of self-determination) is a fundamental right, also linked to the rights to language, culture and community and the freedom of association. For the Conservative Party, this implies a separate citizenship.

Otherwise there are very few, or no agreements on boundaries, the details of a Volkstaat constitution, required degrees of popular or proven community support (see the Freedom Front's arguments about the 1994 election outcome), and whether the Volkstaat could be introduced incrementally. The Volkstaat Council and the Freedom Front are the only bodies that provide for incrementalism. It is also implicit in the proposals of the Afrikaner Freedom Foundation.

4.3.2 Agreement of self-determination : Cultural Councils

A total of approximately one-sixth of the 68 individuals, the Afrikanerbond and the National Party, agreed that self-determination (without a Volkstaat) should be investigated further.

The Afrikanerbond and the National Party propose the establishment of Cultural Councils, as an expression of self-determination in respect of language, culture and community. Their proposals have no implications for citizenship, boundaries, provincial constitutions, popular support or incrementality. They emphasise the voluntary aspect, but do provide for statutory recognition.

The proposals of the Afrikanerbond are the most comprehensive, and include not only the question of Cultural Councils, but other aspects of the new Constitution as well. It does however not provide for the listing of self-determination as a fundamental right in the chapter on Fundamental Rights.

While the NP also proposes Cultural Councils, the details are different from those of the Afrikanerbond.

The Freedom Front also proposes elected Afrikaner Community Councils at the local level and provincial representation (in the absence of a Volkstaat). For the FF however, the provincial level will fall away once a Volkstaat is established. As such, this is the clearest expression of incrementalism so far.

4.3.3 Agreements that negotiations should continue

The ANC, the Freedom Front and the Commission on Provincial Government (as some of the others) propose that negotiations on forms of self-determination for communities concerned should continue. The outcome should be the result of negotiations.

5. Disagreements

5.1 The biggest disagreements relate to the position on (a) no self-determination in the ethnic and/or cultural sense at all; (b) proposals on cultural self-determination, and (c) proposals on territorial self-determination, including secession.

5.2 The ANC tends to say "let the process develop" (see, 4.3.3 above), while neither opposing self-determination / Volkstaat, nor endorsing any specific form of it.

5.3 On the form of self-determination, the major disagreements are between the proponents of cultural self-determination (e.g Afrikanerbond and NP) and the proponents of territorial self-determination (e.g Afrikaner Freedom Foundation, Volkstaat Council, the Conservative Party and the Freedom Front).

5.3.1 Cultural Councils: The Afrikanerbond provides for voluntary Cultural Councils, linked mainly to language communities. Councils are appointed, not elected, and their functions are mainly advisory. There may be provincial and local councils. Councils ought to be recognised by statute.

The NP's proposals are slightly different. Under NP proposals, Councils shall generally be elected, not appointed, and in addition to advisory functions, also have decision-making powers on a specified list of culture-related competencies.

The Freedom Front also provides for elected councils, for the local level, called Community Councils. It also includes a specific list of culture-related competencies. But the FF goes further: Community Councils should supplement local authorities and should therefore, presumably, be statutory, because they are to be entitled to a reasonable share of national and local revenues. Another difference, is the proposal that the Afrikaner community should have one elected member per province in the Senate.

5.3.2 Volkstaat: Two models are proposed: a Volkstaat as part of South Africa, i.e in a federal-type set-up (e.g the Volkstaat Council and the Freedom Front); and a Volkstaat outside South Africa, i.e proposals in favour of a sovereign, secessionist state (e.g Afrikaner Freedom Foundation and the Conservative Party). However, the CP proposes a confederal framework for the relations between the Boer Republic (see

hereunder) and South Africa.

The Volkstaat Council rejects the idea of a tenth province. It proposes, instead, the establishment of a constituent Afrikaner state within the existing South African boundaries. It emphasises strongly that this is not corporate self-determination either. Eventually an independent Volkstaat must be pursued - whether inside or outside South Africa is not quite clear. The proposals also provide for boundaries.

In the light hereof, the Volkstaat Council's proposals may be seen as incremental, together with those of the Freedom Front.

The other model, that of immediate partition, is proposed by the Afrikaner Freedom Foundation and the Conservative Party.

The Afrikaner Freedom Foundation addresses the issues of an own Volkstaat citizenship, relations with the RSA, a Bill of Rights, the position of Afrikaners not residing within the borders of the Volkstaat, and finally, takes the Northern Cape as the region in which the Volkstaat should be considered.

The Conservative Party proposes a sovereign Boer Republic (within a South African Confederation), with its own citizenship, legislative authority, executive authority, President, public service, judiciary, military and local government. The proposals make no mention of specific Volkstaat boundaries, nor of how much popular support will be necessary for the establishment, or whether incrementality is acceptable.

6. Possible approaches relating to conflicting positions

In the light of the issues identified in paragraph 2.1 to 2.8, especially 2.9, as well as the nature of the submissions received (see paragraphs 3, 4 and 5), the Ad hoc Committee on Self-determination / Volkstaat is not in a position to formulate consensus positions.

The Committee therefore proposes:

- a. that the political process continues; the Constitutional Assembly should issue guidelines in this respect;
- b. that the Constitutional Assembly should express itself on the status of the agreements made before the April 1994 elections; especially on the issue of "proven support", as argued by the Freedom Front;
- c. that the constitution-makers adopt an open-ended approach to the issue of self-determination, while further deliberations take place, including the formulation of positions on self-determination that may assist in expediting the draft constitution;

- d. that except for only one party and some individuals who totally reject any form of self-determination/Volkstaat, there appears to be an emerging consensus on at least two issues: negotiations should continue; and some form of cultural self-determination may be provided for at the local level: constitution-makers must take cognisance of that;
- e. since the deadline for the publication of the draft final constitution is approaching fast, other Theme Committees ought to take note of the thinking and implications emanating out of our deliberations so far;
- f. if the deadline is reached without further clarity on the issues concerned, the Constitutional Assembly should perhaps consider, as an interim measure (i.e before the final constitution is adopted in 1996), that Principle XXXIV be retained, in some form, depending on the outcome of a, b, c and d above. And, if so, reference(s) should be included, somewhere in the text, substantiating this principle. It also seems desirable that provision be made in the draft of the final constitution for the continuation of negotiations which may lead to some form of self-determination after the adoption of the final constitution for such groups;
- g. members of the ad-hoc committee, after consultation with Theme Committee 2, propose the following: "The most appropriate form of constitutional provision is one that would not preclude the pursuit and/or realisation through negotiations, of the right of self-determination in some form, the outcome of which will be binding on any future government"; and
- h. The NP and FF insist that the principle of cultural self-determination at least be accepted and provided for in the final constitution, the details of which may be the subject of further negotiations.

9. SUMMARY

ISSUES	CONST. PRIN.	AGREEMENTS	DISAGREEMENTS	OUTSTANDING	COMMENTS
1. Self-determination	XII & XXXIV	None	On the extent of the right of self-determination		The body of the 1993 Constitution does not reflect sufficiently the references to all those forms of self-determination as envisaged in CP XXXIV
2. Citizenship	I	That present arrangements be retained	CP & AFF propose separate citizenship		Changes only if secession is pursued
3. Language, Culture and Community	II, XI	Wide consensus on continuation of said rights	None	Manner of expressing these rights at local & national levels	
4. Within South Africa	I, XVI	Most parties oppose secession	CP & AFF propose secession	The issue of an Afrikaner state and/or Cultural Councils within South Africa	
5. Boundaries	I, XVIII(1)+(3)	None on details	Existing proposals don't coincide		Tenth territ entity and/or sovereign volkstaat: parties must investigate further
6. Constitutions	None				Only if territorial expression arises

ISSUES	CONST. PRIN.	AGREEMENTS	DISAGREEMENTS	OUTSTANDING	COMMENTS
7. Support	XXXIV(2)	None	FF points to outcome of 1994 elections		Parties must consider FF proposal
8. Incrementality	XXXIV	Negotiations must be pursued	None		In order to preserve maximum flexibility, a provision, which ought to be general and broad, may be included in the final Constitution (see par 6(g)) to facilitate the principle of self-determination to those communities who have negotiated this right

Note : The drawing up of this summary was made very difficult by the complexity of the subject matter, such that not all points could be included above. The body of this report, rather than this summary, should be consulted in cases of doubt.

PROF W J BREYTENBACH

Convenor Ad hoc Committee (after consultation with Professors Corder and Raath)

