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INPUT BY THE PAN AFRICANIST CONGRESS OF AZANIA ON:

THE SECOND DRAFT OF THE INDEPENDENT ELECTORAL COMMISSION ACT

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GENERAL INTRODUCTION

It is very difficult to evaluate the working of the proposed Independent Electoral Commission Act without any information about the proposed re-enacted Electoral Act.

It is our contention that these two Acts must be read in conjunction with one another because of the simple fact that the first democratic elections will be conducted according to the provisions of both these proposed Acts. In fact, the function of an Electoral Act is to deal with the whole administration of elections and in this regard there is an inexplicable overlap with some of the provisions of the proposed Independent Electoral Commission Act that also deal with the administration of elections.

By definition, any Electoral Act (as does the present Electoral Act, 45 of 1979) will have to deal with issues such as notices and periods pertaining to elections (including election day); the registration of voters (presently dealt with by Act 103 of 1984); the registration

of political parties; the nomination of candidates; the appointment of electoral officers; the arrangement of polling stations; voting hours; the form of the ballot paper; voting procedures; the secrecy of the vote; voting by disabled persons; special and postal votes; the counting of votes; election misdemeanors such as intimidation of voters, bribery, fraud, impersonation and treating; the prohibition of opinion polls before elections; and election applications to Court.

These provisions of an Electoral Act are clearly aimed at the orderly administration of the elections with a view to ensure that the circumstances surrounding the elections will be such as to afford the voter an opportunity to bring out his or her vote free from any interference or intimidation whatsoever. In other words, the Electoral Act aims at the conduct of free and fair elections whereby every voter can freely express his or her true vote without undue influence. In this regard the secrecy of the vote is of the utmost importance and every voter should have the complete assurance that the provisions of the Electoral Act will ensure a secret ballot. On the other hand, adequate precautions should be taken against the possibility of anybody voting more than once. In this regard certain tegnology is available and the Electoral Act should clearly cater for both of these concerns.

Furthermore, we also have a very real concern with regard to a possible new electoral system (this will probably have to be provided for in the proposed interim Constitution). In our view, the present system must change to make way for a completely new electoral system based upon the principle of proportional representation. The present electoral system that leads to disproportionate election results simply

cannot be implemented when the first democratic Parliament or Constituent Assembly is elected. It is clear that the introduction of such a new electoral system will of necessity influence the working and contents of the proposed new Electoral Act. Accordingly, proper discussion on the merits of the proposed Independent Electoral Commision Act can only be meaningful once the technical committee has completed its promised draft of the new Electoral Act, also taking into account the effect that the introduction of a completely new proportional electoral system will have on the provisions of the proposed Electoral Act.

COMMENTARY ON THE PROVISIONS OF THE PROPOSED INDEPENDENT ELECTORAL COMMISSION ACT

Bearing in mind our reservations discussed by way of introduction, we have certain specific criticisms relating to the proposed Independent Electoral Commission Act.

The definition of **Elections** in Clause 1: We are very firmly of the view that the proposed Act should only deal with the first elections and that it should be left to the future democratically elected Parliament to make provision for future elections. It is namely unwise to bind future Parliaments to the present proposed Act that will be legislated by an illegitimate Parliament. Furthermore, we are of the view that any reference to "Referenda" should be left out altogether because this issue can more logically be dealt with in a separate Act (as replacement of the present Act 108 of 1983). It is clear that such a Referendum Act will have to define this concept (is it a mere plebiscitum or opinion poll or is it a referendum that will be binding in law?) and deal with all other issues that are incidental to a direct popular vote in constitutional law.

It is clear from the aforegoing discussion that Clause 30 that deals with the issue of the application of the proposed Act to so-called Referenda should (for the reasons given above) be scrapped altogether. In fact, all references to Referenda (compare, for instance, Clause 12) must be scrapped. Likewise, it is clear that **Clause 2** will have to be amended in that the provisions of the proposed Act must not be applied to future elections or Referenda but only to the first elections on the national and SPR levels. In the same vein, it is clear that the whole of **Chapter 3** that deals with the reconstitution of the Commission must (for reasons given above) be scrapped altogether.

The definition of **The Electoral Code of Conduct** in Clause 1: It is extremely important to know beforehand exactly what the contents of the Electoral Code of Conduct (supposed to be contained in the First Schedule of the proposed Act) will be. In order to decide whether such a Code of Conduct should be made binding upon all and sundry one namely has to have a complete picture as to what the political parties and the like will be bound to do. The same criticism accordingly applies to **Clause 29** that puports to deal with the Electoral Code of Conduct and not only stipulates that it must be made binding upon all political parties, candidates and others partaking in the elections but puts it as a precondition to the right to register for participation in the elections that a written undertaking to abide by the Code must be given. Moreover, Clause 29 declares that the Commission shall be entitled to impose such penalties and/or sanctions as may be prescribed in the First Schedule. This is a very worrying provision because it is not clear what these penalties or sanctions will be and in what manner these proposed penalties and sanctions will interfere with the principle of free political participation in the elections.

The definition of **International Members** in Clause 1: We are of the view that the so-called International members should fully participate in the important work of the Commission and therefore should have full voting power.

The definition of **Political Office** in Clause 1: We are of the view that "any bona fide employee who is neither directly nor indirectly engaged in political activity" is too wide because it excludes almost all persons employed by a political party. It may namely well be argued that (being employed by a political party) these persons are indirectly involved in political activity.

The definition of **Public Office** in Clause 1: We are of the view that "any position in the service of the State" is too wide. We raise this concern particularly with regard to the position of judges who will not be eligible to serve and future judges who will likewise not be able to be appointed as such for a full period of 18 months after the Commission has completed its work. We believe that it must be made possible to appoint judges (present and future) to the Commission. Furhermore, the phrase "institution ... owned and/or controlled, directly or indirectly by the State" is also too wide in that it is unclear if university and other academic personel are excluded. We believe that it must be made possible for academic personel to serve on the Commission.

We support the fact that **Clause 3** provides specifically that the proposed Act should bind the State and the State President. In our view this provision is necessary in order to make it clear beyond any doubt that the proposed Act will override the powers of the present executive organs of

State. Although it is the accepted constitutional law meaning of acting "on the advice of" that the State organ that is thus required to act upon the advice of another State organ must follow the said advice, it is in our view necessary to make it absolutely clear that the State President is obliged to act in accordance with the advice that he receives (Clause 3.2).

As far as Clause 5 is concerned, we support the principle that the Commission should have plenary executive powers. If this was not so, it is difficult to see how the Commission could be in a position of ultimate control as far as its executive functions are concerned. We do, however, have a problem with the fact that the Commission will be the ultimate power as far as the "conduct, supervision, monitoring and adjudication" of elections are concerned. In our view the function of conducting (or administering) elections is a separate function that is usually dealt with by the provisions of an Electoral Act. This function, namely the creation of conditions conducive to (free and fair) elections; the registration of voters, candidates and political parties and all other matters involving the electoral process (as enunciated in Clause 5), must in our view be separated from the functions of monitoring (supervising) and adjudicating the elections.

As far as Clause 6 is concerned we support the idea that the Commission must operate independently of all other organs of State. We, however, reiterate our position that as far as the organisation or conduct of elections is concerned it should not be left to the Commission that has to carry out the important tasks of monitoring and adjudicating elections. It is namely a sound principle of administrative

law that you should not be a judge in your own case and if the Commission organises the elections and then also monitors its own actions in doing so as well as finally adjudicates on the way in which these elections have been conducted, this principle is clearly not adhered to. As it will also appear more clearly in the discussion below, the idea is to rather leave the organisation of the elections to the proposed Directorate of Administation (and this must be dealt with in the proposed Electoral Act). Having stated this principle, we want to make it absolutely clear that we do not propose that the present State organs deal with the organisation or conduct of the first elections but we very firmly believe that the proposed Directorate of Administration should also be an independent and representative body that is answerable to the Transitional Authority and is also constituted by the negotiation process' structures.

We do not have serious problems with the proposed composition of the Commission (Clause 7). We do, however, feel that the bodies from which the five international representatives are drawn must be identified. After giving the issue much thought, we are of the view that the members from the international community (who, in any event, make up the minority of the Commission) should have the vote. In our view, this will increase the efficiency of the Commission and make its decisions even more acceptable because of the fact that the members from the international community are perceived to be truly independent in that they are removed even further from the political processes and political parties than the indigenous members are bound to be. Furthermore, we reiterate our position set out above to the effect that we believe that the elimination of possible candidates for the position of Commissioners on the basis of holding "Political Office" and "Public Office" (Clauses

7.2.2; 7.2.3 and 7.4.1) is not entirely acceptable - especially as far as the possible elimination of judges and academics are concerned.

It is acceptable that the term of the Commission (Clause 8) expires on the completion of its work (with the proviso that it comes to an end after the very first elections). However, it is imperative that there must be clear provisions as to what happens if the elections are declared to be void (not free and fair). This problem is returned to below where the provisions of Clause 20.4 are discussed.

We have problems concerning the provisions dealing with the termination of appointment of a Commissioner (the proposed Clause 9). We namely believe that it is unwise to award a constitutional/political role to Supreme Court, especially in the light of the unrepresentative composition of this body at present. We are of the opinion that the same institution that apppoints must also be the institution that terminates. In the event, the whole of Clause 9 must be re-written in order to comply with the aforementioned principles.

According to Clause 18, the Commission is charged with the sole responsibility for the organisation, conduct and supervision of elections and in this regard functional sub-structures, that is, **An Election Administration Directorate, An Election Monitoring Directorate** and **An Election Adjudication Directorate** is envisaged. It is also stipulated (Clause 18.4) that each such Directorate shall operate independently of the others but that they shall be accountable and subject to the overriding management and control of the Commission. In other words, the Commission is

in ultimate control of all these functions. Clause 17 then deals with the **Election Administration Directorate** and makes it clear that this body shall have functions pertaining to: the education of voters; determining the eligibility and identification of voters; deciding on the issue of voters' lists; the registration of political parties and candidates; the registration of names, logos, etcetera of political parties; measures for preventing intimidation of voters, candidates and political parties; facilitating the conduct of free and fair elections; measures relating to the disclosure of funds received; regulations pertaining to political advertising; the selection, appointment and registration of election officers; the identification of voting stations and times and places for voting; voting by disabled persons; special and postal votes; the form and content of ballot papers; the manner of recording the vote; arrangements to secure the secrecy and security of the ballot; the rejection of ballot papers; and the regulation of election expenses and election funds. As it has already been pointed out in the Introduction above, all these matters are matters that are usually dealt with by an Electoral Act. Because of the fact that a new Electoral Act is envisaged, it is not understandable why the Independent Electoral Commission Act now also deals with these issues. In our view, this will lead to duplication, uncertainty and contradictory statutory provisions. We are therefore of the view that the whole issue of the organisation, administration and conduct of elections should be dealt with by the provisions of the proposed Electoral Act and be left out of the Independent Electroral Commisssion Act. It is also noted with concern that Clause 17 provides for the suspension of the provisions of the Electoral Act (Clause 17.10) with regard to most of the issues pertaining to the conduct and administration of elections. It is unclear why such a provision is inserted. We wish to reiterate our standpoint that the organisation, administration and conduct

of elections should be left to one (properly constituted) body. This body can competently be called the Election Administration Directorate and should be constituted in a proper manner on the advice of the Transitional Authority in order to be both representative and independent. The composition and functioning of such an Election Administration Directorate and all other matters pertaining to the administration, conduct and organisation of elections should then be dealt with in the proposed Electoral Act. In our view, this will ensure that the function of administrating, conducting or organising elections will be kept independently from the functions of monitoring and (eventually) adjudicating upon the elections. Accordingly, Clause 17.8 that purports to give the function of imposing penalties and sanctions to the Election Administration Directorate is, in our view, incorrect: the function of the enforcement of the Electoral Code and the imposition of sanctions should be left to another body (such as the proposed Special Election Tribunals - Clause 19.3) and logically falls under the heading of the adjudication on elections that is dealt with by the Independent Electoral Commission Act (that establishes an Election Adjudication Directorate in terms of Clause 18).

In the event, it is our submission that only Clauses 18 and 19 dealing with the Election Monitoring Directorate and the Election Adjudication Directorate should be contained in the proposed Independent Electoral Commission Act. We reiterate our position that the body that administers, conducts or organises the elections cannot be the same body that also (in the final analysis) supervises these elections and eventually also adjudicates on the elections (as well as on the conduct of the parties partaking in the elections).

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responsibilities of the Election Monitoring Directorate (Clauses 18.1 to 18.6). We support the principle that the Election Monitoring Directorate will have the power to investigate and institute proceedings before the Election Adjudication Directorate or the Special Electoral Tribunals. As far as the **Election Adjudication Directorate** is concerned (Clause 19) we support the idea that it should be the final arbiter of claims (subject to a final internal appeal to the Commission) and we also support the proposal that the Commission will be the body of final determination in a dispute involving any of the Directorates. This may even include an appeal against actions of the Election Administration Directorate (in which event both the Electoral Act and the Independent Electoral Commission Act must, of course, contain such a provision). However, we are of the view that a legal lacuna exists in that the functions and composition of the Special Electoral Tribunals (Clause 19.3) as well as the legal relationship between these bodies and the Election Adjudication Directorate is not properly and explicitly provided for. We submit that these bodies must be easily accessible as tribunals of first instance; that they must to a large extent operate independently; and that they must be properly representative. Lastly, and with reference to Clause 19.2, we reiterate our criticism to the effect that the possible penalties and sanctions as well as the exact contents of the Electoral Code must be clearly stipulated before meaningful debate on the merits of these concepts will be possible.

We express grave concern with regard to the provisions contained in the proposed **Clause 20.4**. We namely believe that it is of the utmost importance for the Independent Electoral Commission Act to clearly and unambiguously state what the legal position will be in the event of a

declaration by the Commission that the elections (or a part thereof) are not certified as being substantially free and fair. In our view, the legal effect of such a certification must be clearly circumscribed as well as the procedures that will have to be followed in order to remedy any such defect in the elections. In short, it is our view that new elections will be called for and provision must therefore be made both for the interim governing of the country as well as for a process speedily resolving the crisis and moving on to new elections.

As far as Clause 21 is concerned, we reiterate our point of view that the present Supreme Court is not the appropriate institution to resolve a highly politicised conflict of this nature. Hopefully, the interim Constitution will provide for a fully representative Constitutional Court to also deal with other issues such as the enforcement of an interim Bill of Rights and the jurisdiction problem that will arise between the proposed SPR's and the central government.

We support the principle of prohibiting the publication of opinion polls in the six week period before the first elections (Clause 28). We namely believe that undue influence will be exerted on the voter if these are published in this crucial period before the elections, particularly when taking into account the dangers inherent in the publication of faulty or unscientific opinion polls. However, this provision (dealing as it is with the conduct of elections) must more properly be contained in the proposed Electoral Act.

We accept that the Commission (having plenary executive powers) might find it necessary to make regulations (Clause

28). However, we reiterate our position that we reject the concept whereby the Commission can thereby change the provisions of the new proposed Electoral Act. Furthermore, in the light of our standpoint that the Independent Electoral Commission Act should not regulate matters pertaining to the administration, conduct or organisation of elections and that this should be left to the proposed Electoral Act, the Commission can not be empowered to make regulations for matters that are dealt with by the Electoral Act.