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Submission by the African National Congress **A1**

To the Technical Committee on Constitutional Matters

Date : 12 May, 1993

The African National Congress hereby places before the above Committee the following submissions: (Further submissions in this regard will be made on or before Wednesday the 19th May, 1993)

1. FORM OF STATE AND CONSTITUTIONAL PRINCIPLES

Introduction

It is the view of the African National Congress that the question of the form of state is composed of different elements, all of which are intimately related to the constitutional issues listed in the terms of reference of the Technical Committee. One of the areas for dealing with the critical question of the form of state in the South African context is the constitutional principles in general. A particular aspect of this relates to the constitutional principles which define the parameters of the relationship between the central and regional levels of government. Accordingly, the submissions of the African National Congress on this question focus sharply on the question of national, regional and local levels of government. A resolution of this question would be an important contribution to the debate on the form of state.

The African National Congress therefore submits that:

South Africa shall be a united, non-racial, non-sexist and democratic state. South Africa shall be a sovereign state and must be seen, as recognised by the international community, as a single, non-fragmented entity including Transkei, Bophuthatswana, Venda and Ciskei.

Government in such a united sovereign state shall be structured at national, regional and local levels, in respect of which:

i) At each level there shall be democratic representation;

ii) At each level of government there shall be appropriate and adequate legislative and executive powers and functions that will enable each level to function effectively within the context of a united, democratic state. Such powers and functions at central and regional levels shall be entrenched in the constitution.

iii) In addition to powers and functions entrenched in the constitution, each level of government may delegate powers and functions to lower levels of government.

iv) Powers and functions may be either exclusive or concurrent.

v) The national government shall have overriding powers in those matters that are not allocated exclusively in the constitution to the regional level of government.

vi) The general principles of the constitution, including the terms of the Bill of Rights, shall apply at all levels of government.

The African National Congress proposes that the constitution-making body (the Constituent Assembly) shall draft and adopt a new constitution for South Africa on the basis of and within the framework of the following constitutional principles which shall be binding on it:

i) South Africa shall be a united, sovereign state in which all persons shall enjoy a common South African citizenship.

ii) South Africa shall be a democratic, non-racial and non-sexist state.

iii) The constitution adopted by the Constituent Assembly shall be the supreme law of the land.

iv) There shall be separation of powers between the legislature, the executive and the judiciary with appropriate checks and balances. This, however, shall not exclude the executive being made accountable to the legislature.

v) The judiciary shall be independent, non-racial, non-sexist and impartial.

vi) Provision shall also be made for a Constitutional Court which enjoys the respect of all South Africans and draws on the experience and talents of the entire population.

vii) All individuals shall enjoy universally accepted human rights, freedoms and civil liberties which shall be guaranteed by an enforceable/justiciable Bill of Rights.

viii) There shall be representative and accountable government at all levels embracing multi-party democracy, regular elections, universal adult suffrage, a common voters' roll and, in general, proportional representation.

ix) There shall be freedom of association, including the right to form, join and maintain organs of civil society, including trade unions, religious, residents, students, social and cultural societies.

x) The diversity of languages, cultures and religions shall be acknowledged.

xi) Special provision may be made for the appropriate recognition of traditional institutions at regional and local level.

xii) The constitution shall develop and maintain a foundation for the emergence of national unity while respecting the linguistic, cultural and religious diversity of the nation.

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xiii) The constitution shall outlaw all forms of racism and discrimination based on race and gender in public and private life, within the principles of the equality clause referred to hereunder.

xiv) There shall be an equality clause which shall provide that:

i) Every individual shall be equal before and under the law and shall have the right to equal protection and equal benefit of the law without discrimination, and in particular without discrimination based on the grounds of "race", colour, language, gender, creed or sexual orientation.

ii) Sub-section (i) above shall not preclude any law, programme or activity that has as its object the amelioration of the conditions of the disadvantaged, be they individuals or groups, including those disadvantaged on the grounds of race, colour, or gender.

iii) All rights and freedoms contained in the constitution shall be guaranteed equally to all male and female persons.

2. CONSTITUTION-MAKING BODY/CONSTITUENT ASSEMBLY

In view of the historical disfranchisement of all the black people of South Africa and the fact that in South African history thus far, only white people had the opportunity of participating in the process of constitution-making, the African National Congress is firmly of the view that, for the constitution-making process to be legitimate and credible in the eyes of the majority of the people of South Africa, the constitution-making process must involve the people of South Africa as a whole and that the constitution-making body should be an elected one.

Accordingly, the African National Congress proposes that the new constitution for South Africa should be the product of a democratic process. This means that there shall be an elected Constituent Assembly to draw up and adopt a new constitution for South Africa. Such Constituent Assembly shall be sovereign and not be limited in any way except that it shall work within the framework of agreed general constitutional principles.

The Constituent Assembly shall be required to adopt the new constitution within a fixed time-frame. There shall also be appropriate deadlock breaking mechanisms.

It is the view of the African National Congress that the new constitution of South Africa should be adopted as quickly as is reasonably possible so as to ensure that South Africa enters a new historical phase - that of democracy - as quickly as possible. A political solution which involves the democratization of the country will play a major role in restoring peace and stability to the country which are essential for social and economic development and transformation.

The proposal for the setting up of a Constituent Assembly as envisaged by the African National Congress is contained in a document entitled Transition to Democracy Act, which is annexed hereto and marked Annexure "A". The TDA has been prepared by the ANC to facilitate a speedy transition process.

The proposal of the ANC provides for the following:

(i) There shall be a National Assembly consisting of 400 members who will be elected on a single ballot of whom

* 200 shall be elected from the national lists of the participating parties according to proportional representation.

* The 200 regional seats will be allocated between the regions in proportion to the number of votes cast in each region.

(ii) Steps will have to be taken to ensure maximum democratic representation in the National Assembly, but at the same time also to ensure that there will not be an undue proliferation of political parties entering the election.

(iii) When the National Assembly sits as a Constitution-Making Body, it shall be known as a Constituent Assembly. It will be required to adopt a new constitution for South Africa on the basis of a two-thirds majority of the votes of members present; provided that the constitution to be adopted shall in all respects conform with, and shall not in any respect contradict, the agreed general constitutional principles.

(iv) The Constituent Assembly shall have the right to set up, and make use of, such specialised committees as it may deem fit to facilitate the process of agreement and adoption of a new constitution.

(v) The time-frame for the adoption of a new constitution as well as appropriate deadlock-breaking mechanisms are matters which are negotiable. In the Transition to Democracy Act, the ANC proposes that the constitution must be adopted by the Constituent Assembly within a period of nine months, failing which there shall be fresh elections to create a new Constituent Assembly. This provision is an inducement upon members of all parties to agree to a constitution as expeditiously as possible. The second Constituent Assembly will have six months within which to agree to a new constitution which will also have to be adopted by a two-thirds majority. Should this also fail, then a constitution enjoying the support of a simple majority of the Constituent Assembly shall be put to the people of South Africa for approval by way of a referendum at which the constitution must enjoy a majority of 55% to be adopted.

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If this constitution also fails to obtain the necessary support, then finally fresh elections should be held for a third Constituent Assembly. Such Constituent Assembly shall have the power to adopt a new Constitution by a simple majority.

The provision for breaking deadlocks is absolutely crucial in the process of constitution-making and this is the objective of the ANC's proposals. However, such a process could be unduly extensive and drawn out. The ANC is therefore prepared to consider any other proposal which will ensure that out of the constitution-making process there shall arise a new constitution within the shortest possible time.

3. TRANSITIONAL CONSTITUTION

In the view of the African National Congress, the issue of the role of the transitional constitution is an important matter and is to be explained in terms of its vision of the transitional process and the crucial importance which the ANC attaches to the need for the process to be legitimate in the eyes of the South African people.

The objective of all transitional arrangements is the following:

i) The holding of elections based on one person one vote throughout South Africa (including the TBVC territories), such elections to be based on the universal franchise of all persons without regard to "race", colour or creed. The elections would be for a Constituent Assembly, whose task would be to draw up and adopt a new constitution for the country.

ii) Accordingly, all transitional arrangements must be directed with this objective in mind and also to ensure that mechanisms are in place to guarantee free and fair elections, free political activity and a level political playing field.

iii) Subject to this objective, mechanisms must also be in place to provide for the governance of the country as from the date of the elections and until a new constitution has been adopted.

In the light of the above, it is necessary for legislative measures to be passed to legalise the entire process up to and including the adoption of the new constitution. The African National Congress proposes that appropriate measures be agreed upon, including a Transition to Democracy Act. The Transition to Democracy Act will be the basic law or transitional constitution which will provide the legal basis for and give legal effect to all the agreements arrived at the multi-party forum, to cover the complete transitional process leading to the adoption of the new constitution by the Constituent Assembly and the installation of the first government in terms of such constitution.

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4. TRANSITIONAL, REGIONAL/LOCAL GOVERNMENT

(i) During the period of transition, the most convenient, effective and least expensive road to follow is to adopt the four provinces, namely Natal, Transvaal, the Cape Province and the Orange Free State with the boundaries as created at the time that the Union of South Africa was formed to be the four regions of South Africa for the purpose of regional administration during the period of transition.

(ii) Insofar as powers and functions are concerned, the ANC proposes that regional administrations shall exercise concurrent powers with national government in respect of all matters allocated by the national government to the regional level. This shall be subject, however, to the national government retaining overriding powers in all matters.

(iii) Regional administrations shall be required to implement laws and policies of national government. Alternatively, they shall participate jointly with national government in such implementation.

(iv) The advantage of the provincial boundaries as proposed is the ready existence of the requisite infrastructure and facilities. The maintenance of stability, law and order will be facilitated by the adoption of the course proposed by the ANC.

(v) The phasing in of the existing homeland structures into the new constitutional dispensation will be facilitated by this approach. It will mean that an orderly phasing-in process of existing administrations in the TBVC territories as well as self-governing homelands can proceed effectively within the framework of the said provincial boundaries. This will make the process of phasing in any future regions as may be agreed upon all the easier.

(vi) One of the major objectives of the current process of transition is to rid South Africa of all vestiges of apartheid and racism. The adoption of the course proposed by the ANC will help to facilitate this process.

(vii) The issue of the division of powers and functions between central government and the transitional regions can easily be resolved. The formula adopted at the time of union with respect to such division of powers and functions was extremely effective and can provide a useful guideline.

(viii) **Structures for Regional Administration during the Transition Period**

The ANC takes into account that the transition period will be of relatively short duration. The objective of administration during the period of transition will therefore be adequately catered for by providing for an appropriate provincial executive committee as well as an administrator for each region.

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5. TRANSKEI, BOPHUTHATSWANA, VENDA AND CISKEI

The African National Congress points out that not a single one of these entities enjoys international recognition. No state in the world, other than apartheid South Africa, has recognised these territories as independent states. In fact, the international community has consistently condemned the SA Government's homeland policy in terms of which self governing states have been created, including the four so-called independent states.

The African National Congress is firmly of the view that the four so-called independent states should be re-incorporated into a united, non-racial, non-sexist and democratic South Africa.

The African National Congress is also of the view that South African citizenship should immediately be restored to the people of the TBVC territories.

All the inhabitants of the TBVC territories are entitled to participate in all transitional arrangements as well as elections in every way and on the same basis as all other South African citizens. The ANC therefore believes that effect must be given to this position.

FURTHER PROPOSAL

The African National Congress is of the view that the above proposal is in the best interests of South Africa and indeed the various parties presently participating in the negotiation process. At the same time it is mindful of the concerns of the various parties on the issue of regions. Accordingly, the ANC has also considered the feasibility of setting up an Independent Commission on Regions which would have amongst its functions the following tasks:

(1) that of making recommendations to the Multi-party Negotiating Council on regional boundaries for the purposes of the election of the Constituent Assembly/Constitution-making Body;

(2) that of making recommendations to the Multi-party Negotiating council on the boundaries, powers, functions and structures for the purposes of regional administration during the period of transition; and

(3) that of enquiring into, and making recommendations to the Constituent Assembly/Constitution-making Body, on boundaries, constitutional structures, powers and functions of regional government structures to enable the Constituent Assembly to finalise the issue of regionalism.

Though the African National Congress firmly believes that the entire issue of regions should appropriately be addressed and finalised by the elected Constitution-making Body, it is, nonetheless, anxious that the modalities pertaining thereto be resolved in

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agreement with all parties concerned. The ANC is therefore prepared to place its proposals on the issues of electoral regions and regional administration during the transition period, as well as its position on the issue of regions in a new constitutional order, before such a Commission. The details of how such Commission should be set up, its composition, powers and time-frames would have to be agreed upon.

LOCAL GOVERNMENT

Insofar as local government is concerned, it is pointed out that there already exists a national negotiating forum on local government at which all interested parties are represented. The issue of local government is crucial and no decisions can, in the view of the ANC, be taken without the participation of all the stake holders. The ANC is of the view, therefore, that the decisions of the said negotiation forum should be taken into account. The guiding principles shall, however, be the need to ensure that there is democratic participation of all the people on the basis of complete equality at local government level as well.

SELF-DETERMINATION IN SOUTH AFRICA

1. Introduction

1.1 The African National Congress welcomes the opportunity to present a submission on the vital issue of self-determination in the context of South Africa. The concept of self-determination has provided the inspiration for the struggle of the people of Africa and Asia from alien occupation and foreign rule and has been inextricably bound up with the development of human rights, the right to dignity and political and economic power of previously subjugated peoples. It has been the most important element in the democratization of international society.

1.2 Self-determination has moral, political and legal elements. In effect, it identifies two elements of particular relevance to South Africa. Internally, governance must be based on the will of the people, freely expressed. A regime which does not obtain the consent of the governed is illegitimate and has no entitlement to speak on behalf of the people. Secondly, governance must be free of an official policy of discrimination based on race, colour or ethnicity or in breach of basic rules of international law such as a policy of genocide, slavery or aggression against other states.

1.3 In its external application, self-determination recognises the right of a people, providing certain conditions are met, to be recognised as an entity, and if necessary, as a sovereign state. As the World Court has said in the *Western Sahara Opinion*, it is for the people to decide the destiny of a territory, and not for the territory to decide the destiny of the people. Such a decision may include closer association with an existing body to form a unitary or a federal state or independence.

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1.4 The right to self-determination is clearly a legal right today. It is based on, but not created by, the Charter of the United Nations, which recognised the relationship between peaceful relations among people and stability between states and the freedom of peoples by invoking the principle of equal rights and self-determination of peoples (Articles 1(2) and 55 of the Charter). Subsequent international and regional texts, declarations and treaties re-emphasised the need for respect for the self-determination of peoples, so that it is now possible to speak categorically of a right to self-determination as part of customary law and, hence, as part of international public policy.

1.5 This right was invoked systematically to ensure the movement towards the independence of colonies in Africa and Asia in the great sweep of freedom in the 1960s. The continual point of reference in the General Assembly's decolonization practice was the seminal resolution 1514 of 1960 which built on the Charter and which was subsequently expanded by other declaratory resolutions of the United Nations. This Declaration effectively outlawed colonialism. It also guarded against the strategies that attempted to partition various colonial territories or the manoeuvres at encouraging recession by the colonial powers by laying down in Article 6 that:

> Any attempt aimed at the partial or total disruption of the national unity and the territorial integrity of a country is incompatible with the purposes and the principles of the Charter of the United Nations.

1.6 In the area of decolonization, it was relatively easy to identify the "people" who formed the "self" for purposes of deciding on their future. The colonial boundaries were accepted as the unit of self-determination. The United Nations established special structures which assisted in this process and there were only limited areas of controversy, such as Gibraltar and the Malvinas (Falklands), largely because the original inhabitants had been displaced or restrictions had been imposed on the movement of people from contiguous territories which had historic claims.

1.7 Since the effective application of the right to self-determination also depends on the recognition by other states, it is necessary to look at later developments. In 1971, the state of Bangladesh was recognised as an independent State when, following a war of liberation, it seceded from Pakistan. East Pakistan had a separate cultural and linguistic tradition from the rest of Pakistan and, over a period of time, had suffered from national oppression and economic exploitation from the dominant part of West Pakistan. As with the collapse of the Soviet Union and the voluntary separation of the former Czechoslovakia in 1992, there were clearly identifiable "peoples" who occupied distinct territory who could invoke the right to self-determination which was recognised by the international community.

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2. The International Community and South Africa

2.1 Since various proponents of secession or partition or an independent Afrikaner State base their arguments on international law and practice, it is necessary to look at the international response over the past two decades to the issue of apartheid, especially in its "grand design" manifestations.

2.2 The perverted logic of apartheid represented the partition policy of the bantustans as an expression of self-determination. A racially-elected government first identified, through the Population Registration Act, ten African "nations" and then, without the clearly-expressed will of the people and without consultation, imposed independence on four of the "territories" and gave a measure of internal self-government to the remainder. The same regime then systematically denaturalized millions of South African citizens and treated them as aliens.

2.3 The response of the international community was rapid and historic. When "independence" was conferred on the Transkei, the General Assembly, by a vote of 134 states in favour with no dissent, condemned the establishment of bantustans as "designed to consolidate the inhuman policies of apartheid, to destroy the territorial integrity of the country, to perpetuate white minority domination and to dispossess the African people of South Africa of their inalienable rights". For the first time in the history of the United Nations, the organised international community rejected a form of "independence" conferred by a member state and declared it to be "invalid". No state, other than apartheid South Africa, has recognised the "independence" of the Transkei or the other three "states".

2.4 The reasons for such a historic decision concerning non-recognition of the products of apartheid must be emphasised. They are two-fold:

2.5 First, the international community, as part of international public policy, began to intervene in various ways in the affairs of a state where there was a gross and systematic violation of human rights. This was particularly in relation to a state which based its policy on an official policy of racial discrimination, such as apartheid. These developments were so rapid that apartheid was soon designated as a crime against humanity, a special convention was adopted which assimilated apartheid policies to and genocide, the crime of crimes. The result, as evidenced in the judgement of the World Court in 1970, is that the adoption of an official policy of racial discrimination is in breach of fundamental rules of international law and other states are not only obliged not to recognise such a state but are permitted to assist in the removal of such an entity. No state can be set up, therefore, on an ethno-chauvinistic basis with control over migration on racial grounds, with political power based on race or where "norms and standards" and "central values" are code- words for racial separation or superiority.

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2.6 The second reason for the non-recognition of the TBVC states was that the racist policies of the apartheid state were assimilated to the denial of the right to self-determination of the entire people of South Africa. Over the past twenty-five years, both the General Assembly and the Security Council of the United Nations have identified the nub of the South African problem, namely the denial of the vote and, therefore, the consent of the majority, as vitiating the independent status of South Africa. Although South Africa has been a state since 1910 and a member of the United Nations since 1945, its internal governance violated a fundamental rule of international law: non-discrimination on grounds of race, colour or ethnicity. The legitimacy of the government was therefore challenged.

2.7 The most striking insight into the international community's response to apartheid policies and its view about the future is provided by the Security Council, where South Africa's partners, with the power of the veto, sit. Whereas the Third World could be dismissed as providing an automatic majority in the General Assembly, the Security Council's actions could be stopped by the three western powers. Yet, they did not. In 1977, the Security Council passed resolution 417 without dissent. This resolution *affirmed the right to the exercise of self-determination by all the people of South Africa as a whole, irrespective of race, colour or creed.* The unit for self-determination is therefore South Africa within its 1910 frontiers and the "people" are the undifferentiated people of South Africa.

2.8 Resolution 417 of 1977 was therefore, in legal terms, a vindication of the Freedom Charter of 1955 with its declaration to South Africa and the world that "South Africa belongs to all who live in it, black and white, and that no government can justly claim authority unless it is based on the will of the people".

2.9 Further, for the first time in history, an international body which has the authority to apply rules to situations, invalidated elections and declared the proposed Tri-cameral Elections of 1984 to be "null and void". Through Resolution 554 of 1984, the Security Council decided, with no dissentients, that only the"total eradication of apartheid in a united and unfragmented South Africa" could lead to a "just and lasting solution".

2.10 The persistent approach of applying the concept of self-determination to South Africa must also be seen in the context of peaceful relations between states. Any entity based on racial or ethnic exclusivism would be a source of tension in the region. This is vividly echoed in Resolution 556 of 1984 by the Security Council - passed at a critical period in the rising struggle against apartheid - where the "legitimacy of the struggle of the oppressed people of South Africa for the *full exercise of the right to self-determination and the establishment of a non-racial democratic society in an unfragmented South Africa*" was reiterated and the demand was made for the "immediate

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eradication of apartheid, the dismantling of the bantustans" and the taking of the necessary steps towards the *full exercise of the right to self-determination in an unfragmented South Africa*.

2.11 The views of the international community towards partition or secession, as expressed in these resolutions are very clear. There are compelling legal grounds for the assertion that no state would recognise a state which forcibly came into being on the basis of a racial or ethnic basis or which would be identified with exclusivism of the nature proposed recently or in evidence before the Law Commission during 1990 and 1991. Secession by force of arms to set up a "Volkstaat" would, at worst, result in the *cul de sac* of non-recognition. However, is there an obligation in law to negotiate a settlement which would recognise the right of a self-identified "people" in South Africa to self-determination on the ground that they have a right to form an independent state?

3. Negotiated Self-Determination

3.1 The evidence given to the Law Commission by various parties and individuals asserts such a right. Expressly in some cases, but implicitly in others, the case for such an assertion rests on the need to protect Afrikaner "identity", "personality", "nation-hood" or the values of the "volk". Such protection, it is further asserted, can only be pursued through statehood based on the international right to self-determination. The response of the African National Congress to these demands is as follows:

3.2 The right to self-determination does not automatically mean the right to sovereign, independent status, although a claim may, under appropriate conditions, result in the acquisition of independent sovereign status in international law. On the assumption that the claim to self-determination includes a claim to sovereign independence, there are further conditions that must be met. There must be territory which is occupied by the discrete "people"; there must be a "population". No so-called ethnic group occupies an appreciable area of South Africa; all are dispersed throughout our land. Third, there is the requirement of meeting a state's international obligations. This means that it must be "peace-loving" under the Charter. Such an exclusive State would be inherently unstable and could be created to commit regional aggression, especially against a democratic South Africa, in order to "protect" kith and kin who do not wish to join the "Volkstaat". Finally, there must be a "government". To the extent that such a state would be based on the principles of factual apartheid, this state would be a creature whose existence would not only be the negation of obligations under the Charter of the United Nations, but would effectively be a creature criminalised under the Convention for the Suppression and Punishment of the Crime of Apartheid. Such a creature would comprise, if not radically erode, the international juridical framework within which South Africa's transition is occurring.

3.3 Such a claim confuses the rights of a minority to have their human rights respected and have their cultural rights, such as language, religion and culture, protected as is consistent with international obligations. Those who claim rights under the separate state theory are claiming rights to which they cannot aspire, since they are not a "people" in the national liberation and international sense. They are part of a larger group tied to a common history, language and cultural, political and historical baggage. Basic to the right of people to claim independence is that the right claimed must be one enjoyed consistently with the obligations under the UN Charter. There is no right to self-determination to create a state of racial or ethnic supremacy.

3.4 The claim is not a claim to self-determination but a claim to secession from an independent and pre-existing state. Those who are making the claim do not represent a people as defined in various international instruments and practice which is mostly to do with matters of alien rule or undemocratic regimes or tyranny. This claim is made by a party or parties whose programmes and platforms are a denial and denigration of international law and the central values of the international order which values co-operation and peaceful relations. This is therefore a secessionist claim transparently presented as self-determination.

3.5 Claims to secession, inconsistent with any other internationally-sanctioned right, destabilise society and, if permitted, would reduce the right to self-determination to a meaningless juridical formula since every state on our planet has some kind of minority sub-group. Self-definition, as proposed by some of the claimants, is not an adequate basis for such a claim. In the absence of national oppression, racial or religious persecution or total economic deprivation, sub-groups have no right to secede, as the Law Commission in South Africa has clearly identified in its document on human rights. On the contrary it is the majority in South Africa who have been oppressed and who now seek through the invocation of the right to self-determination, the protection of a new Constitution based on democracy and free participation.

3.6 This claim to secession is resisted in the African public order and in the larger world community on the practical basis that it destabilises the nation-state, threatens international peace and security and affirms no valid principles of international law.

3.7 The claim confuses the rights a group or sub-group has to the protection validly and legitimately accorded under the regime for the protection of individuals and minorities under international law with self-determination and independence. It is an invalid conflation.

3.8 The African National Congress believes that the proper and most satisfactory method of dealing with the claims, aspirations and anxieties of minorities is in the manner identified in the resolution adopted by the Conference on Security

and Co-operation in Europe (CSCE) on 1990. It reflects the internationally accepted principles for the protection of discrete minorities. The opening paragraph of this important resolution stipulates:

> The participating States recognise that the questions relating to national minorities can only be satisfactorily resolved in a democratic political framework based on the rule of law, with a functioning independent judiciary. This framework guarantees full respect for human rights and fundamental freedoms, equal rights and status for all citizens, the free expression of all their legitimate interests and aspirations, the restraints on the abuse of governmental power, political pluralism and social tolerance.
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> They further reaffirm that respect for the rights of persons belonging to national minorities as part of universally recognised human rights is an essential factor for peace, justice, stability and democracy in the participating States.

The ANC strongly believes in the principle of self-determination as internationally understood. Indeed, our organisation was set up precisely to overcome the national oppression of the African people manifested by the South Africa Act of 1910. For generations we have been ruled as though we were a conquered people. The Native Administration Act of 1927 set up elaborate administrative structures to govern us. We were almost totally excluded from the vote, denied the right to acquire land in nine-tenths of the country, required to carry passes and governed by a dictatorial network of officials accountable only to Pretoria. To this day our President, Nelson Mandela, does not have the vote.

We know what it is like to be dominated and marginalised in the land of our birth , to be discriminated against, to have our languages and beliefs treated with disrespect and to be denied basic human rights because of our national origin. No-one is more sensitive to the importance of true respect for the rights of all groups than we are.

The question is not whether to have self-determination, but how self-determination is to be expressed in a country like ours. All South Africans share a common destiny. We live together in the same cities and on the same farms. We are involved in a single economy. The problem is not how we can separate ourselves out, but how we can live together without domination or subordination.

South Africa is a country peopled by men and women of the most diverse origins. We speak many different languages, have different religions and different customs. At the same time we share the same land have the same problems of health, education, access to economic opportunities and the pursuit of happiness. We all want peace, development, respect and a sense of security and worth.

The ANC has long believed that South Africa belongs to all who live in it. Our country is spacious enough and sufficiently endowed with resources to grant a decent life to everybody. Everyone shall have the right to enjoy fundamental rights and freedoms and to feel comfortable in all parts of the land.

Division has never solved any of our problems. On the contrary it has always brought with it domination, inequality and conflict. we have learn to live together as equals in the same country. If we cannot live together peacefully in the same country, there is no reason to expect we can live together peacefully side by side.

True self-determination in South African conditions can only be achieved by means of acknowledging the reality of our inter-dependence and not by forcing an artificial and unsustainable independence. We have learnt from prolonged and painful experience that self-determination comes from enjoyment of the right to inclusion in, and not from exclusion from, the life of the country. It means the right to full participation in every area of life without having to give up our beliefs, languages and cultures.

The self-determination of one cannot be separated from the self-determination of all. Self-determination is certainly not consistent with baasskap in any shape or form, indeed it is its complete opposite.

Concretely, self-determination in the context of the historical, social and cultural reality of South Africa means the achievement of a voluntarily negotiated constitutional settlement that contains the following basic principles:

1. The right to equal participation in all areas of life, equal protection and the enjoyment of equal benefits under the law;

2. Mechanisms to ensure non-discrimination, either against individuals or against groups;

3. The right to use and develop one's language and culture and respect for the diversity of religious faiths;

4. Principles of good government which ensure that the institutions of state represent the wisdom, skills and life experience of all groups and communities;

5. Guarantees for an active role for organisations of civil society including cultural, religious and linguistic organisations.

All additions to further constitutional devices will help to ensure acknowledgement of the diversity of the country.

The first is an electoral system based on proportional representation, which facilitates the formation of political groupings to represent the most varied interests.

The second is the acceptance of the importance of strong regional and local government, acting within the framework of general constitutional principles and broad national legislative policy. Regional diversity can reflect itself in a non-racial and democratic way without violating the basic unity of the country.

In conclusion, we feel it is no accident that no clarity exists in terms of the territory in which it is claimed that one particular national group, namely the Afrikaners or "Boerevolk", should exercise exclusive sovereignty. If we accept that baasskap is no longer permissible, then no such region exists in the country.

We cannot believe that the majority of Afrikaners would prefer to give up full and guaranteed citizenship and cultural rights in a democratic South Africa, for the illusory dream of undefined rights in a state without boundaries, without a name, without governmental infra-structure and without international recognition.

We cannot believe that the majority of Afrikaners would wish to de-nationalise themselves in South Africa so that they would need residence permits to continue living in Bellville or Algoa Park, that they would wish to register at Stellenbosch University as foreign students or have to show passports in order to attend a rugby game at Ellis Park.

We cannot believe that the majority of Afrikaners would wish to deny themselves any right to be members of the South African Defence Force, the South African Police, or the South African civil service; nor that they would wish to disqualify themselves from working for the South African Broadcasting Corporation or to play in the South Africa rugby, cricket or football teams.

To sum up, the components of self-determination for all groups in South Africa are, firstly, the right not to be oppressed, secondly the right to maintain identify, thirdly the right to cultural development and fourthly the right to political freedom. All these rights can be guaranteed by appropriate constitutional arrangements based on principles of non-racism, democracy and respect for human rights, including cultural rights. None of these will be furthered by dismemberment or balkanisation of our country.

Self-determination for the people of South Africa as a whole, in all our diversity and respecting the multiplicity of our languages, faiths and historical experiences, can only be achieved by means of a constitution and institutions of government and law that guarantee full equal rights for all. As a basic human right, the right to self-determination cannot be seen in isolation from the rest of human rights. Neither can it be exercised and enjoyed by any population group to the exclusion, and at the expense, of any person or persons not belonging to such a group.

fh12.7

TRANSITION TO DEMOCRACY ACT, 1992

Explanatory Note

INTRODUCTION

The Transition to Democracy Act (Transitional Law) is designed to provide the legal and constitutional framework to lead South Africa from the present dispensation (The Republic of South Africa Act, No. 110 of 1983, the National States Act of 1971, the Status of Transkei Act, the Status of Bophuthatswana Act, the Status of Venda Act, the Status of Ciskei Act, as well as the constitutions of the TBVC states) to a new united non-racial non- sexist democratic state.

ABOLITION OF PRESENT GOVERNMENT SYSTEM

The Transition to Democracy Act abolishes the whole tricameral Parliament, the distinction between Own Affairs and General Affairs, the all-powerful Presidency the Executive Authority, the Presidents Council, and other features of the tricameral system. The transitional law achieves this result by deleting major provisions contained in the Republic of South Africa Act, No. 110 of 1983.

TBVC STATES

It is envisaged that Transkei, Bophuthatswana, Venda and Ciskei will simultaneously make appropriate provisions so as to ensure the implementation of a uniform agreed plan for the reincorporation of those territories into the new democratic South Africa. Provision is made for the participation of the people of the TBVC states in all transitional arrangements under this Act as well as in all constitution-making processes including elections provided for in the Transitional Law.

PARLIAMENT

The Transitional Law makes provision for a Parliament which consists of a single House made up of 400 women and men elected on the basis of one person one vote of equal value by all persons of the age of 18 years and over, who are citizens of South Africa or who would have been citizens but for the various bantustan laws. An electoral law will, inter alia, make provision for an electoral system based on proportional representation system so as to ensure that parties are represented in Parliament in direct proportion to the number of votes won by them.

Parliament will perform two functions:

1. It will act as the country's constitution-making body;

2. It will act as the law-making body during the period of transition from the time elections have taken place until the installation of the first government under the new constitution.

The two functions are defined in such a way as to ensure that there is no confusion between these two separate functions. The function of drawing up and adopting a new constitution must not become enmeshed with governing the country in the transitional period. When Parliament sits as the Constitution-making body it will be known as the Constituent Assembly. When it sits as the law-making body it will be known as the Legislature. The Law makes provision for an Executive Authority based on the principle of a government of National Unity. The Executive during this phase of transition will be made up of representatives of parties which have won 5% or more of seats in Parliament in proportion to their number of seats in Parliament.

DECISION-MAKING, DEADLOCK-BREAKING AND TIME-FRAMES

The Transitional Law seeks to provide for a transition period which is not indefinite. In other words the task of constitution-making must be completed within a defined period of time. This requires that the decision-making formula must be clear and must include time frames and a deadlock-breaking formula.

The Transitional Law, therefore, provides that when Parliament sits as Constituent Assembly it will adopt each Article of the Constitution and the Constitution as a whole by a two-thirds majority. It must do so within a period of nine months from the date of commencement of its first meeting. If a two-thirds majority cannot be obtained, a procedure is created which will ensure that a Constitution is finally adopted within a defined period. Firstly, fresh elections will be held to create a new Constituent Assembly. This provision is an inducement upon members to agree to a duly proposed constitution. This second Constituent Assembly will have only 6 months within which to agree on a new constitution which also would have to be adopted by a two/thirds (2/3) majority. Should this second Constituent Assembly fail to adopt a new constitution then a constitution enjoying the support of a simple majority of the Constituent Assembly shall be put to the people of South Africa for approval by way of a referendum at which the constitution must enjoy a majority of 55% to be adopted. If this constitution also fails to obtain the necessary support then finally, a fresh election will be held for a third Constituent Assembly. This Constituent Assembly shall have the power to adopt a new constitution by a simple majority.

During the period that it takes to draw up and adopt the Constitution, Parliament will also act as interim legislature. In this capacity decision-making will be by a simple majority.

ADDITIONAL MEASURES

In addition to the Transition to Democracy Law a number of other measures will be necessary to take South Africa through the transitional period to a new and democratic order. These measures will have to give legal effect to all agreements designed to level the playing field and to guarantee that elections are fair and free. They will make provision for various structures to be set up during the pre-election (or preparatory) period eg. a Multi-Party Commission to take control over security forces, an independent Media Commission to ensure fair access and fair reporting, an independent Electoral Commission to take responsibility for the conduct of elections and all aspects relating to elections.

The measures will also have to make provision to facilitate the process of re-unifying South Africa and the reincorporation of all the homelands.

REGIONS

The important issue of provincial or regional and local government during the transitional period must also be provided for. The ANC is of the view that the whole issue of demarcation of new regions, the distribution of powers functions as well as regional structures is the prerogative of the Constituent Assembly. Nothing should be done in the transitional period to undermine the work of the Constituent Assembly or its sovereignty in this regard. Therefore and pending the demarcation of regions by the Constituent Assembly the present provincial system with appropriated adjustments to include the homelands should be retained during the transitional period. Interim structures, consistent with the ultimate objective of a united democratic South Africa will have to be set up and given legal effect through appropriate measures.

CONCLUSION

The amendments proposed to the existing Act 110 of 1983 in the Transitional Law concentrate largely on aspects required to create a legitimate constitution-making body. It is that body, namely the Constituent Assembly, which will have the right and duty to address the various questions of constitution-making such as the Anthem, language, religion, culture and other incidental matters. To get to an elected Constituent Assembly as quickly as possible these issues need not be addressed at this stage. If, however, it is decided to address these issues at the present stage, then provision will have to be made for them. This proposed transitional law, however, adopts the approach that those matters must await the Constituent Assembly.

TRANSITION TO DEMOCRACY ACT

ACT

To amend the Republic of South Africa Constitution Act (No.110 of 1983)

The Republic of South Africa Constitution Act No. 110 of 1983 is hereby amended as follows:

Preamble

Whereas it is necessary:

To create a legal framework for the orderly and peaceful transition to democracy;

To establish democratic mechanisms and procedures through which a non-racial, non-sexist constitution based on democratic principles can be brought into being;

To ensure that elections for the above proposes are free and fair and that participants take part on a basis of equality;

To guarantee that fundamental rights and freedoms are respected during the transition and enshrined in the new constitution, and to secure the engagement of all sectors of society in a common endeavour to bring about national reconstruction, economic growth, social justice and peace.

We hereby adopt this Transition to Democracy Act.

Nkosi Sikelela i'Afrika/

Morena boloke sechaba se yeso.

Ons vir jou Suid Afrika.

God bless our country.

[Explanatory Note:
The substitution is clear. In view of the interim and transitional nature of the constitution it is not necessary to retain the existing preamble except in as much as it is desired to establish the purpose of the amendment - to provide for a legitimate constitution-making process. Further, the existing preamble is in many senses inappropriate in that it uses apartheid categories and excludes non-Christians from its embrace.]

2. Article 1
Article 1 is hereby deleted and substituted by the following:

"The Republic of South Africa shall consist of the territories as defined in the Union of South Africa Act of 1909 (excluding Walvis Bay)".
[Explanatory Note:
The current definition of the Republic of South Africa excludes the TBVC states. The amendment restores the integrity of the country by including those territories as part of South Africa.]

3. Insert the following new article 1(a):

Article 1 (a) - Guaranteed Rights and Freedoms for Free Political Activity

(1) Notwithstanding anything to the contrary contained in any other law, all persons shall have the following rights, which shall be exercised subject to the provisions of subsection (2) hereof.

(a) Freedom from racial discrimination and the right of both men and women to enjoy equal rights in all areas of public and private life.

(b) Freedom of speech and expression which shall include the freedom of the press and other media.

(c) Freedom of thought, conscience and belief.

(d) The right to personal freedom including the right not to be detained without trial.

(e) The right to personal privacy, including freedom from arbitrary search and seizure, integrity of the home and the inviolability of personal communications.

(f) The right to assemble and demonstrate peaceably without arms, including the right to hold public meetings, gatherings and processions and to participate in peaceful political activity intended to influence the composition and policies of governments.

(g) The right to form trade unions, employers' organisations and to engage in collective bargaining.

(h) The right to form and join associations and political parties.

(i) The right to freedom of movement, including the right to leave and return to South Africa.

(j) Respect for human dignity.

(k) The right of a person to use the language and to participate in the cultural life of his/her choice.

(2) Nothing in subsection 1 hereof shall affect the operation of any existing law insofar as such law imposes reasonable restrictions on the exercise of the rights and freedoms conferred by the said subsection and which are necessary in a democratic society, in the interest of the security of the state, public order, decency or morality, or in relation to contempt of court, defamation or incitement to an offence. Save as aforesaid, any provision of any law that is inconsistent with this Act shall be deemed to have been repealed.

(3) Subject to subsection 2 hereof the Executive and agencies of the government, including institutions of local and regional government shall not exercise any powers that they have or otherwise act in or refrain from acting in any way which takes away or abridges the rights and freedoms specified in subsection 1 hereof.

4. Article 3 - National Flag

Substitute the words "There shall be an Interim National Flag, the design of which is set out in the schedule hereto" (for Section 4).

[Explanatory Note:
The present Flag is unacceptable to the majority of the people. An Interim National Flag should be designed.

5. Article 4 is deleted in whole.

6. Article 5 - National Anthem - amend by substituting the words "anthems" for (anthem) and by inserting the words "Nkosi sikelel iAfrica and" before "The call of South Africa".
[Explanatory Note:
See comment in 4 above]

7. Article 6 - State President
Article 6 is hereby amended by substituting in subclause 6(3)(a) the words "the

National Assembly" for the words (any House, or the Houses at a joint sitting).

8. Article 7 - Election of State President
Article 7(1) is hereby amended by the substitution of the words "of all members of the National Assembly" for subclauses 7(1)(b)(i), (ii) and (iii) and the deletion of the remainder of subclause (b) and the deletion of subclause (c).
[Explanatory Note:
The State President will be elected by simple majority by the National Assembly. Provision already exist for an acting State President who serves when the State President is unable to act, or dies. No provision is made for permanent Deputy or Vice President. The possible benefit of having such an office may be considered.

9. Article 9 - Tenure of office of State President Article 9 is amended by the substitution of the words "the National Assembly" for the words (each of these Houses) in 9(3)(a), (any Houses) in 9(3)(c), (a House) and (each House) in 9(3)(d) and (House in question) in 9(3)(e).
[Explanatory Note:
The amendments above simply replace references to tri-cameral chambers by reference to the National Assembly. The tenure of the State President is the same as that of the National Assembly as provided for below.]

10. Articles 14 to 18 are hereby deleted including the heading (PART IV - OWN AFFAIRS and GENERAL AFFAIRS)

[Explanatory Note:
The deletion is self-explanatory. The amending Act does away with the distinction between the own (ethnic) affairs categories which were the responsibility of the different "Houses" in the tri-cameral Parliament. Such abolition obviously does away with the tri-cameral Houses.]

11. The heading ("Part V") shall become "Part IV"

12. Article 19 (Executive Authority) is hereby amended by deleting the whole of the section and replacing it with the following:

"19 Executive Authority
(1) The executive authority of the Republic shall vest in the State President acting in consultation with the Ministers who are members of the Cabinet.
(2) Except in sections 20(c), 24, 25, 26, 33 and 37 or where otherwise expressly stated or necessarily implied, any reference in this Act to the State President is a reference to the State President acting as provided in subsection (1)."
[Explanatory Note:
The original clause allowed the State President to take certain decisions on his/her

own and some only with the support of cabinet. The amendment simply brings these provisions into line with the other changes. Articles 19, 20 and 21 make it clear that the executive will operate in the transition on the basis of a 'government of national unity'. It will be composed in proportion to party support in the National Assembly.

13. Article 20 - Cabinet
Delete subclause 20(d)

14. Article 21 Substitute the following for the whole of clause 21:
"21(1) The cabinet shall be composed of nominees of political parties whose representation in the National Assembly exceeds 5% of the total membership of the Assembly.
(2) Cabinet appointments shall be in proportion to the representation of the parties concerned in the National Assembly; provided that a political party may decline to participate in the Cabinet, in which event, its membership in the National Assembly shall be excluded for the purposes of calculating the proportional representation of the parties in the Cabinet.
(3) All Cabinet appointments shall be made by the State President in consultation with the leader of the political party from which the Cabinet member will be appointed."
[Explanatory Note:
See note to Paragraph 16 (Article 19) above. The agreement of 5% is intended to limit the size of the cabinet to managable proportion. The provision generally ensures the appointment of a multi-party cabinet during the transition period.]

15. Article 23 - delete from 23(2) the words (on the advice of a minister's council) and ('a member of the ministers council in question or, as the case may be.)

16. Article 24 - Appointment of Ministers
Delete the words (for general affairs) in article 24(1) and substitute article 24(2) with the following:
"24(2) Persons appointed under subsection (1) shall be a minister of the Republic of South Africa and any such persons shall only be removed from office by the State President acting in consultation with the leader of the political party which nominated such member.

[Explanatory Note:
In line with the principle of a 'government of national unity' the State President's powers to 'hire and fire' ministers will be subject to the agreement of other parties in respect of their nominees to the Cabinet]

17. Article 26 - delete (population group or) in Article 26(1)(b) and delete

Article 26(2).

18. Article 27 - Deputy Ministers
Delete (subject to subsection 2) in Article 27(1)(a) and whole of Article 27(2).
[Explanatory Note:
Deputy Ministers need not be members of National Assembly and are not members of the cabinet. The proportionality principle does not apply to Deputy Ministers. The effect of the above will be to allow wider choice from excluded groups, even from civil society.

19. Article 28 - Delete (population group) in 28(2)b.

20. Substitute "Part V Parliament" for (Part VI Legislature) and delete (Parliament) after heading article 36.

21. Article 30 - 69
Delete articles 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 62, 64, 66, 67, and insert the following new articles.

Article 30 **Reconstitution of Parliament.** - (1) Parliament shall be reconstituted as one House, the National Assembly, which shall have sovereign legislative authority in and over the Republic
(2) Parliament, reconstituted in terms of subsection (1) hereof, shall function both as a Constituent Assembly, with power to draft and adopt a new constitution, and as legislature, with the power to make laws for the peace, order and good government of the Republic.

"Article 31 **Sitting of Parliament.** - (1) Parliament shall commence its first session seven days after the last polling day for the election.
(2) Parliament may adjourn its sittings from time to time, but shall remain in session until it has completed its primary task of adopting a new constitution, or until it is dissolved by effluxion of time in accordance with the provisions of this Act.
(3) After completing its task of drafting a new constitution, Parliament will continue to function of a Legislature for a period (not exceeding five (5) years from the date it was first elected) unless it agrees by a two thirds majority to an earlier dissolution.

Article 32 **Duration and dissolution of Parliament.** - (1) Parliament shall continue until a new constitution has been adopted as contemplated in section 41 (1) of this Act, provided that if a new constitution has not been adopted within a period of 9 months from the date on which the first sitting of Parliament commenced, it shall be dissolved, and an election shall be held for a

new Parliament in accordance with the provisions of this Act.
(2) If the National Assembly newly elected in terms of Article 32(1) above has not adopted a new constitution within a period of six months as contemplated in Section 41(1) from the date of the first sitting of such an Assembly, it may by resolution passed by a single majority within a further seven days, put a constitution which has the approval of such majority to a general referendum.
(3) The general referendum referred to in 32(2) shall be held on a date to be fixed by the State President by notice in the gazette, which shall not be later than one month after the passing of such resolution.
(4) The referendum shall be conducted in accordance with the provisions set out in the Schedule to this Act.
(5) If at least 55% of the votes cast in the general referendum are in favour of the adoption of the proposed constitution, it shall be deemed to have been adopted in accordance with the provisions of this Act.
(6) If the proposed constitution is not adopted in terms of section 32(5), or if a resolution is not adopted in terms of article 32(2), fresh elections for a new National Assembly shall be held within one month of the publication of the result or within one month of the date by which the National Assembly was to have adopted a constitution in terms of article 32(2), and a constitution adopted by a simple majority of this National Assembly shall be deemed to have been properly adopted in accordance with the terms of this Act.
(7) The National Assembly referred to in article 32(6) shall remain in session until a new constitution is adopted in terms of article 32(6) save that if a new constitution is not adopted within two years fresh elections will take place for a new National Assembly which will function as if elected in terms of article 32(5).

Article 33. **Effect of dissolution.** - Notwithstanding the dissolution of Parliament by effluxion of time or otherwise, the State President shall have the power by proclamation in the gazette to summon Parliament for the dispatch of urgent business during the period following such dissolution up to and including the day immediately preceding the day on which polling for the election held in pursuance of such dissolution commences.

Article 34. **Constitution of the National Assembly.** - The National Assembly shall consist of four hundred members to be elected by qualified voters by secret ballot. All persons who are South African citizens, or who are deemed to be South African citizens in accordance with the provisions of the schedule to this Act, shall be qualified and entitled to vote in the election for members of the National Assembly.

[Explanatory Note:
The schedule will specify that all citizens of the TBCV States will be regarded as South African citizens. The schedule will also make provision for exiles and those

persons who have been resident in South Africa for many years such as migrants.]

Article 35. **Elections for the National Assembly.-** The members of the House of Assembly shall be elected by proportional representation in accordance with the following principles:

(1) There will be a National Assembly consisting of 400 members elected on a single ballot, of whom:
200 will be elected from national party list according to proportional representation;
200 members will be elected from regional party list according to proportional representation;

(2) The 200 regional seats will be alocated between the regions in proportion to the number of votes cast in each region.

Article 36. **Disqualifications for membership of the National Assembly -**(1) No person shall be capable of being elected to or of sitting as a member of the National Assembly unless such person is qualified in accordance with the provisions set out in the schedule to this Act to hold such office.
[Explanatory Note:
The schedule would expressly cater for persons who currently could not stand for elections because they have criminal convictions arising out of political activities.]

(2) Any member of the National Assembly who, after having been elected to the House, ceases to be qualified for membership, shall vacate the seat.

Article 37. **Assent to bills. -** (1) A bill which has been passed by the National Assembly shall be presented to the State President for her/his assent.
(2) The State President shall assent to a Bill which has been passed in accordance with the provisions of this Act, and shall withhold her/his assent if the provisions of this Act have not been compiled with.

Article 38. **Validity of Acts of Parliament. -** (1) A bill referred to in section 37 to which the State President has assented shall be an Act of Parliament.
(2) (a) The Constitutional Tribunal referred to in Section 41 (4), shall, subject to the provisions of sections 41(6) and 41(7), be competent to inquire into and pronounce upon the question as to whether the provisions of this Act relating to the procedure for the passing and enactment of legislation were complied with in connection with any law which is expressed to be enacted by the State President and Parliament.
(3) Save as provided in this Act no court of law shall be competent to inquire into or pronounce upon the validity of an Act of Parliament.

Articles 39. **Signature and enrolment of Act.-**

(1) As soon as may be after any law has been assented to by the State President, the Secretary to Parliament shall cause two fair copies of such law, one being in English and the other in Afrikaans language (one of which copies shall have been signed by the State President), to be enrolled of record in the office of the Registrar of the Appellate Division of the Supreme court of South Africa, and such copies shall be conclusive evidence as to the provisions of every such law, and in case of conflict between the two copies so enroled that signed by the State President shall prevail.

(2) Parliament may decide on additional languages for the purposes of enrolment and signature as referred to above.

[Explanatory Note:

Subsection 1 is the unamended article 35 of the existing Act. The whole question of language will have to be decided at the Constituent Assembly. See Note to Article 89.]
Subsection 2 would allow for legislation to be published in African languages.

Article 40. **Seat of Legislature** - Cape Town shall be the seat of the National Assembly.

[Explanatory Note:

The seats of the Executive and Legislature have been left at Pretoria and Cape Town respectively.]

PARLIAMENT SITTING AS A CONSTITUENT ASSEMBLY

Article 41. (1) Save as set out in the Act when Parliament sits as a Constituent Assembly for the purposes of adopting a new constitution, all questions shall be determined by a majority of two thirds of the votes of members present provided that the Constitution to be adopted shall in all respects conform with, and shall not in any respect contradict the constitutional principles set out in the Schedule to this Act.
(2) The general constitutional principles set out in the Schedule to this Act shall limit the power of Parliament sitting as a Constituent Assembly, and no repeal or amendment of such principles shall be permissible under this Constitution.
(3) Should any political party represented in the National Assembly contend that

a proposed provision of the new Constitution which has been put to the National Assembly for adoption does not comply with the requirements of section 41(2) of this Act, the political party concerned shall inform the Speaker of its contention, and in that event debate upon such proposal shall be suspended, and the contention of the political party shall be referred by the Speaker to the Constitutional Tribunal referred to in section 41(5) of this Act for its determination.

(4) A Constitutional Tribunal consisting of a minimum of seven and a maximum of eleven suitably qualified persons shall be appointed en bloc by the National Assembly to determine all disputes arising out of the provision of section 41(3) hereof. The Constitutional Tribunal shall function and take decisions in accordance with the procedures set out in the Schedule hereto.

(5) A determination by the Constitutional Tribunal shall be final and binding and shall not be subject to appeal or review by a court of law.

(6) No court of law shall have jurisdiction to pronounce upon the validity of any constitution adopted by parliament sitting as a Constituent Assembly on the grounds that such constitution does not comply with the requirements of Section 41 (3) of this Act.

(7) Nothing in section 41 (6) of this Act shall be construed as depriving a court of law of its duty to uphold determinations made by the Constitutional Tribunal.

PARLIAMENT SITTING AS A LEGISLATURE

Article 42 **Voting in the National Assembly -** (1) Save as set out in this section all questions in the National Assembly shall be determined by a simple majority of the votes of members present.

(2) When Parliament sits as a legislature the special majorities hereinafter set out shall be required for the following matters -

(a) in order to repeal specific provisions of or otherwise amend this Act, 80 per cent of the votes of members present other than the Chairman or the Presiding member.

(b) in order to repeal or amend any special legislation specially agreed upon, 80 per cent of the votes of members present other than the Chairman or the Presiding member.

Article 43. **Repeal of this Act.-** When Parliament sitting as a Constituent Assembly adopts a new constitution in accordance with the provisions of section 41(1) hereof, or when a new constitution is deemed to have been adopted in accordance with the provisions of section 32 hereof,this Act shall be deemed to be repealed thereby. Save as aforesaid, and save as set out in section 42(2) hereof, the National Assembly shall have no power to repeal this Act or any of its provisions.

Article 44. **Committees of the National Assembly -** The National Assembly may appoint committees consisting of its members in order to perform functions assigned to them by the assembly provided that no party represented in the Assembly shall be excluded from any such committee, and provided further that the committees shall as far as possible be composed in a way which gives parties representation in proportion to their representation in the Assembly.

Article 45. **Rules of Procedure.-** (1) The National assembly may make rules and orders in connection with the order and conduct of its business and proceedings as a Constituent Assembly and as a Legislature.
(2) the rules and orders may provide for the manner in which committees appointed by it in terms of section 44 shall conduct their affairs and take their decisions, and may authorise any such committee to meet and exercise or perform its powers duties and functions at a place beyond the seat of Parliament.

Article 46. **Public Access to Sittings.-** All sittings of the National Assembly shall be held in public and members of the public and the media shall have access to such sittings; provided that reasonable safeguards may be instituted to search or refuse entry to persons in order to protect the safety of members or other persons present in the National Assembly.
[Explanatory Notes:
The original deletions in paragraph 21 abolishes the tri-cameral Parliament, and the new provisions provide for a National Assembly acting as legislature and as a Constituent Assembly, and provide for the deadlock breaking mechanisms, time frames, the binding general constitutional principles, the role of the courts and the constitutional tribunal, amendments to this Act. Some of the provisions simply re-insert the necessary formal provisions relating to procedure.]

22. Articles 56 - 69 The following article numbers are amended as follows: articles (56 - 61) are amended to numbers "47 - 52" (63) to "53", (65) to "54" and (68) to "55" and (69) to "56".

23. Article 56 (new Article 47) Penalties
Substitute "the National Assembly" for (a House) and (the House in question) respectively.

24. Article 57 (new Article 48) Oath
Substitute the "National Assembly" for (a House) and (House of Assembly/Representatives/ Delegates) respectively.

25. Article 58 (new Article 49) Speaker of Parliament
Substitute a "National Assembly" for (a House) throughout and for (House of which he was a member at the time of his election as a speaker) and substitute

"the chairperson of the National Assembly" for (every chairman of a House)

26. Article 59 (new Article 50) Function of Speaker
Delete article 59 and replace with new article 50.
(1) The Speaker of Parliament shall preside at meeting of the National Assembly.
(2) The Speaker shall when presiding at a meeting be vested with all the process duties and functions of the Chairperson of the House.

27. Article 60 (new Article 51) Chairman
Substitute "the National Assembly" for the words (the House) (Every House) (House in questions) (that House).
[Explanatory Note:
The original Act is incurably sexist in its terminology. But, like other features this aspect might best be tackled in the Constituent Assembly. In this proposal we use non-sexist terminology but the principal Act will continue to contain "Chairman", "his" etc.]

28. Article 61 (new Article 52) Quorum
Substitute the whole of article 61 with the following:
"Quorum To constitute a meeting the National Assembly either as the Constituent Assembly or the legislature shall require the presence of at leat 100 members for the determination of a question"

29. Article 65 - Substitute the National Assembly for (any House) and delete 65(2), (3) and all the words after word 'vote' in 65(1).

30. PART VIII PRESIDENT'S COUNCIL
Delete the whole of Part VIII, from articles 70 to 78 inclusive.
[Explanatory Note:
This amendment abolishes the President's Council. That Council was a special mechanism designed to facilitate the operation of the tri-cameral legislature.]

31. PART IX FINANCE amend to read PART VIII FINANCE
Amend the numbering of articles 79 to 86 to read Articles 57 to 64.

32. Article 82 (new article 60) Accounts of State Revenue Fund
Delete 82(1)(b) and 82(2)
[Explanatory Note:
The provisions deleted refer to the financing of 'own affairs' matters]

33. PART X - GENERAL amend to read Part VIII General.
Renumber Articles 87 - 91 to read Articles 65 - 69.
Renumber Articles 94 - 97 to read Articles 70 - 73

33

Renumber Articles 100 - 103 to read Articles 74 - 77

34. Article 89 (new article 67) Equality of Official Languages
Substitute whole of Article 89(3) with the following:
"(3) Notwithstanding the provisions of subsection (1) an Act of Parliament or a proclamation of the State President, issued under an Act of Parliament may provide for the recognition of one or more languages as an additional official language or as additional official languages for use in a designated region for official purposes prescribed by or under that Act or by any such proclamation.
[Explanatory Note:
The provision allows for the official use of several languages in designated areas, rather than English and Afrikaans only].

35. Article 92 - Offences in respect of National Flag
Delete whole of article 92.
[Explanatory Note:
Original provision is inappropriate in a transitional phase]

36. Article 93 - Administration of Black Affairs
Delete whole Article 93.
[Explanatory Note:
This provision which inter alia grants the President the many powers derived from colonial and apartheid legislation is inappropriate.]

37. Article 97 (new article 73) Construction of certain references
Substitute the National Assembly for (House of Assembly) and ('Parliament or the House or a member of the House, as the case may be or the circumstances may require') in 97(c), and delete all the words after 'Cabinet' in 97(d) and delete 97(e).

38. Article 98 Administration of existing Laws
Delete whole of article 98
[Explanatory Note:
This article refers to tri-cameral or provincial structures.]

39. Article 99 Amendment of Act (Constitution)
Delete whole of Article 99
[Explanatory Note:
This has been dealt with in Part V above.]

40. Article 100 Definitions
Delete the following definitions in whole
"coloured persons"
"general affairs"

"general law"
"House"
"Indian"
"Own affairs"
"population group"
"the Coloured Persons" "Indians" or "the white persons"
"white persons"
Delete the words after "other act of" in line 6 and replace with the National Assembly.
[Explanatory Note:
These amendments do away with certain apartheid categories]

41. Article 102 (new article 76) Transitional Provisions

REGIONAL ADMINISTRATION IN THE TRANSITIONAL PERIOD

1. The Cape of Good Hope, Natal, Orange Free State and Transvaal with the boundaries as created at the time that the Union of South Africa was formed in 1910 shall serve as a basis of regional government until the new constitution has been adopted and new regional authorities have been established.

2. An Independent Commission on Regions shall be established with the function of delimiting boundaries for the purposes of regional list in respect of elections to the Constituent Assembly.

3. Such Regional Commission shall further make recommendations to the Constituent Assembly in respect of boundaries, powers and functions for regions in the new constitution.

4. After receiving the report of the commission on regions the Constituent Assembly may either accept the report or may refer the matter back for reconsideration by the Commission on Regions which shall then make further recommendations.

5. The Constituent Assembly shall thereupon decide on the boundaries, powers and functions of regions for the new constitution.

SCHEDULE 1

CONSTITUTIONAL PRINCIPLES BINDING PARLIAMENT IN THE

CONSTITUTION-MAKING PROCESS

The Constituent Assembly shall draft and adopt a new Constitution for South Africa on the basis of and within the framework of the following Constitutional Principles:

(a) South Africa shall be a united, sovereign state in which all shall enjoy a common South African citizenship.

(b) South Africa shall be a democratic, non-racial and non-sexist state.

(c) The Constitution shall be the supreme law of the land.

(d) There shall be separation of powers between the legislature, the executive and the judiciary with appropriate checks and balances.

(e) The judiciary shall be independent, non-racial and impartial.

(f) Provision shall also be made for a Constitutional Court which enjoys the respect of all South Africans and draws on the experience and talents of the entire population.

(g) All shall enjoy universally accepted human rights, freedoms and civil liberties, which shall be guaranteed by an enforceable and justiciable Bill of Rights.

(h) The general principles of the constitution including the terms of the Bill of Rights shall apply to each level of government.

(i) There shall be representative and accountable government at all levels embracing multi-party democracy, regular elections, universal adult suffrage, a common voters role and, in general, proportional representation.

(j) There shall be freedom of association, including the right to form, join and maintain organs of civil society, including trade unions, religious, residents', students', social and cultural societies.

(k) The diversity of languages, cultures and religions shall be acknowledged.

(l) Special provision may be made for the appropriate recognition of traditional institutions at regional and local level.

(m)The Constitution shall maintain a foundation for the emergence of national unity while respecting the linguistic, cultural and religious diversity of the nation.

(n) The rights provided for in the Constitution may be made subject to reasonable limitations.

(o) The Constitution shall outlaw all forms of racism and discrimination based on race and gender in public and private life, within the principles of the Equality clause referred to hereunder.

(p) There shall be an equality clause which shall provide that:

(1) Every individual shall be equal before and under the law and shall have the right to equal protection and equal benefit of the law without discrimination, and in particular without discrimination based on the grounds of "race", colour, language, gender, creed or sexual orientation.

(2) Subsection 1 shall not preclude any law, programme or activity that has as its object the amelioration of disadvantaged individuals or groups, including those that are disadvantaged on grounds of race, colour or gender.

(3) All rights and freedoms contained in the constitution shall be guaranteed equally to all male and female persons.

(q) No property shall be compulsory acquired by the state save in accordance with statute. Any law providing for the compulsory acquisition of property by the state shall provide for equitable compensation which shall take into account the public interest, available public resources, the circumstances of the prior acquisition and use of the property as well as the interests of the party or parties affected by the acquisition.

Any statute providing for such acquisition shall establish mechanisms and tribunals to determine the manner and amount of compensation but shall not exclude the right of the courts to hear an appeal against any amount so awarded.

These provisions shall not in any way impair the rights of the state to enforce such laws as it deems necessary for the regulation or control in the public interes to the use of property.

(r) Government shall be structured at national, regional and local levels.

(i) At each level there shall be democratic representation.

(ii) At each level of government there shall be appropriate and adequate legislative and executive powers and functions that will enable each level to

function effectively; within the context of a united, democratic state. Such powers and functions at central and regional levels shall be entrenched in the constitution.

(iii) In addition to powers and functions entrenched in the constitution, each level of government may delegate powers and functions to lower levels of government.

(iv) Powers and functions may either be exclusive or concurrent.

(v) The national government shall have overriding power in those matters that are not allocated exclusively in the Constitution to the regional level of government.

(vi) Special procedures involving the consent of regional representatives will be required for changes to the powers or boundaries of the regions.