



PAN AFRICANIST CONGRESS (P.A.C.) OF AZANIA

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TO: Head of Administration
Technical Committee on the Transitional Constitution

FROM: Pan Africanist Congress of AZANIA

COMMENTS ON THE TRANSITIONAL CONSTITUTIONAL ISSUES

INTRODUCTION

- South Africa for a long time has been governed under illegitimate constitutions. The PAN AFRICANIST CONGRESS is very reluctant to add another one of this list. We therefore, in principle, do not support the concept of a Transitional Constitution, especially one drafted by the Multi-Party Negotiations Process - an undemocratically constituted body.
- We may however, be persuaded to allow some Transitional Rules for a Transitional government at the National Level while the Constituent Assembly is drafting the legitimate South African Constitution. Some commission could assist the National Government with the co-ordination, rationalisation and Transitional Governance of the existing Regional and Local Government Structures after or in consultation with the latter structures.
- The suggested Transitional Constitution is a source of great concern to us. It is creating elaborate structure without consulting the people. In a society ravaged by violence and divisions, this illegitimate constitution may be an additional source of conflict. Can South Africa afford this? Enforced Power sharing in the Executive, changing the form of the African state undemocratically, imposing Regional Boundaries without genuine consultation with the people, elaborate dead-lock breaking mechanism and certification of the constitution by a constitutional court, do suggest to us that this transitional constitution may not only be a possible source of conflict, but has a permanent character about it. It must be categorically stated that an imposed constitution, no matter how good it may be, is unlikely to be a uniting force or even to last.

1. **COMMENTS ON THE SUBSTANTIVE PROVISIONS (without prejudice to position stated above)**

2. **ELECTION OF A HEAD OF STATE**

We would suggest an Executive President who is indirectly elected by members of the National Legislative.

3. **APPOINTMENTS TO AND THE FUNCTIONS OF THE CABINET**

We support 3.1 on the conventional way of appointment of the cabinet by Executive President.

REASONS

- This is simple, effective, saves time and therefore good for the Transitional period.
- It is a system we are all used to and does not introduce new things during a shaky transition.
- It is conducive to strong and effective government with a clear mandate and a unified policy position which can be implemented without lengthy deadlocks and in fighting.
- We are opposed to a Multi-Party Cabinet as long as it is necessitated by the political process and not required and imposed by a constitution. We are opposed to enforced constitutional representation in the executive.
- We reject a Bi-Racial Coalition of elites (ANC and NP)
- This may also be based on the racist notion that blacks cannot govern on their own they need guidance, supervision and assistance.
- Such a provision, is also based on the assumption that only those favouring this BI-RACIAL power sharing will win the elections.

What if a party like PAC which is opposed to enforced power sharing wins. Should it be enforced to take partners it does not want. There must be a provision allowing a party to campaign against Power Sharing. Making a provision enforcing power sharing is actually fettering the democratic process and making the entire election process meaningless.

- Proportional Representation in the Executive is complicated, will lead to endless deadlocks, to weak government and an unclear and adulterated policy.

4 & 5 SHOULD PRESIDENT AND CABINET BE MEMBERS OF PARLIAMENT?

- YES - They should. We do not see the need for a strict separation of power as in a federal state. The form of state has not been settled. Transitional Constitution should not do so by the back door.
 - We support the fact that Proportional Representation should take place at the level of the legislature. We have in that regard supported proportional representation as an electoral system.
 - The Executive should therefore govern through Parliament. This is where they should get their policy checked and scrutinised by the representatives of the people.
 - This is much more democratic and inclusive than the policies hammered by a Coalition of an Executive few and rubber-stamped by Parliament. Parliament must be more effective in checking the Executive.
 - We stand for a Responsible Government.
 - Further, there is a more simple, effective and known system in South Africa. It would be useful for the Transition.
6. We therefore see no need for a Prime Minister. Dividing the Executive power always leads to conflict and a weak government.
7. We support a Deputy President appointed in the conventional way by the President.
- We do not support any system that is likely to bring conflicts and deadlocks that may prolong the transition period. We want it to be as short and as smooth as possible.

ELECTION OF PRESIDENT

S2(4) - We are opposed to a President being outside Parliament. We find it objectionable that the Party from whom the President comes will have an additional member. This is an unfair and undemocratic advantage.

- We understand that this is based on the dubious assumption that the President will be above societal conflict and be neutral and objective. There is no such a person capable of such noble qualities. The President will be a leader of a particular political party and the Presidency will not change that or his/her political leanings.

7. POWER OF PRESIDENT

This provision makes the Executive President powerless and a ceremonial figure head. We would prefer the President to have all the normal functions and power of an Executive President. (See the Zimbabwean and Namibian constitutions)

CONSTITUTION OF THE REPUBLIC OF SOUTH AFRICA 1993:

- * This title is misleading. This is a Transitional Constitution. This is important to allay the genuine fears that what the MPNP is drafting is a final constitution.

PREAMBLE

- This preamble is too characterless and colourless.
- It does not give an idea where we are coming from, why we are here and where we are going. It is drafted in an ahistorical and procedural or bureaucratic fashion.
- * - There should be in our preamble something condemning the apartheid legacy and about our determination and equalities in our society in clear and unambiguous terms.
- There must also be an idea or a promise of a type of society we envisage for ourselves and our children and their children's. Apart from promising liberty and equality, we should promise socio-economic prosperity.
- These are important in a preamble even one for a Transition or we should not have a preamble.

CITIZENSHIP

On S5(3) of the constitution and S20 of the Chapter on Rights, we don't believe that there is a conflict here. Sec 5(3) of the Constitution has a reasonable limitation stated in it while sec 20 of the Bill of Rights is limited by Sec.34 of the Chapter on limitation. We feel S5(3) should remain with the provision that those political activists who fled the country because of political persecution, and therefore did not take up citizenship on a voluntary basis of another country during a period of exile, retains their birthday and therefore their citizenship.

THE LEGISLATURE:

LEGISLATIVE AUTHORITY:

On S38, since we are opposed to Regions for the Transitional period on the ground that:

- 1) We are imposing boundaries without any genuine consultation with people.
- 2) Without settling the issue of land claims; and
- 3) The impracticality of setting up these Regions for the Transitional period,

We are therefore reserving our position on the senate.

COMPOSITION OF THE NATIONAL ASSEMBLY

S40(1) - We do not see the need of Regional list in the National Assembly if there is a Senate to cater for Regional interests. We would only be willing to consider a Regional list in the National Assembly only if the Senate is not there.

We reserve our position on the Regional List.

QUALIFICATION OF MEMBERS OF THE NATIONAL ASSEMBLY

S24(1) (A) - We reject this provision as it is giving the South African government the right to imprison our people so as to exclude their participation. There are still political prisoners in South Africa.

CHAPTER 5

THE ADOPTION OF THE NEW CONSTITUTION

Sec. 66 (3) - We reject certification by the constitutional court. If people want to challenge the constitution they have the right to do so under S 66 (2). If the constitution is adopted by the Constituent Assembly that should, be the end of the constitution making process.

This certification is unnecessarily delaying the birth of a New Democratic Constitutional order.

CHAPTER 9

We reject the establishment of Regions for the Transitional period. This should be decided by the Constituent Assembly which would have a proper mandate from the people. Other reasons are given above (see legislature)

We reserve our position on the chapter.

SCHEDULE 5

We reject schedule 5 in its entirety.

This should be part of the technical Committee dealing with the Electoral Commission and Electoral Act. The figures used here, such as 50 000, are too arbitrary to be practical and will cause a lot of problems if the population is more than that.

Sec. 13 on the Declaration - is totally unacceptable. It violates one person one vote and the secret ballot. If the process cannot deliver one person one vote then the entire exercise is meaningless. We cannot accept the fettering of the Electoral process, the individuals choice and its secrecy.

CONSTITUTIONAL COURT

We support the establishment of a separate Constitutional Court (see examples 2 and 4).

We are in support of some aspects of example 2 giving the Constitutional Court exclusive jurisdiction on Constitutional Issues.

It should be a Court of first and final instance on Constitutional issues. We do not support the parts giving the Appellate division power to hear appeals from the Constitutional Court and how the court is to be composed.

The Court should be composed as suggested in example 4 and should have the exclusive jurisdiction on Constitutional issues.

COMPOSITION OF THE CONSTITUTIONAL COURT

We feel that this composition should not only be by people with Legal Training. Also Historians, Economists, Political Scientists etc, may be helpful.

JURISDICTION OF CONSTITUTIONAL COURT

We are in agreement with the observations and suggestions of the Technical Committee. However, in respect section 5 (3) we submit that there should be a rethink about the provision that gives the court the power to make orders (at their discretion) that are prospective. Our fear is that outstanding historical disadvantages and blatant discrimination will not be addressed timeously.

ORDINARY COURTS

We accept that during the Transition, the structure of the ordinary courts should remain largely the same. However, changes should be made to its personnel. The composition of the courts should ultimately be representative of society and this should be attempted even during the transition.

No doubt the law is already changing and this will of necessity require persons with a different orientation than the existing Judiciary. This, we realise is not an overnight task but a start should be made as soon as possible.