

Report of the N.W.C. Sub Committee on the Report of the Legal and Constitutional Commission.

1. The Sub-committee was set up by the President on 14th January 1986 after he received the report of the Legal and Constitutional Commission on their deliberations. It was composed of Z. Pallo Jordan (convenor), Simon Makana (Nkokeli), and Joe Slovo.

2. The sub-committee was charged with the responsibility of reading and studying the report produced by the Legal and Constitutional Commission in order to guide the NWC during its discussions. The sub-committee met on two occasions (18/01/86 and 25/01/86) during which a consensus emerged around a number of crucial questions. A number of differences also arose among the members of the sub-committee, some of which remain unresolved and hinge upon the interpretation of the mandate the Legal and Constitutional Commission received from the NEC.

3. The sub-committee's report commences with the areas on which there was a consensus before discussing the differences that arose. In our report we continuously make reference to the document "The Freedom Charter and the Commission's Report of the Legal and Constitutional Commission" in preference to the actual document. In each paragraph that we cite.

These 3 docs are commented on elsewhere,

The Areas of Consensus.

4. Firstly, the sub-committee agreed that the approach of the Legal and Constitutional Commission to a future constitution should be based on the principles of a democratic framework with some slight modifications. The document envisaged a framework of bourgeois-democracy and not a framework arising from or created by a revolutionary struggle. While we recognise that it is difficult to predict the shape of future institutions there are however already some indications in the embryonic forms of popular power that are being thrown up in the course of the struggle; that new and more far-reaching forms will emerge and that our constitutional thinking must necessarily accommodate these.

5. We agreed that it would be unwise to instruct our Legal and Constitutional Commission to draw up a constitution at this point in time. We felt that what we need is rather a constitutional document containing general principles, which document can, when the need arises, be quickly transformed into a constitution. This will take account of the fluidity of the situation so that as new forms emerge they too can be incorporated.

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3. The sub-committee's report commences with the areas on which there was a consensus before discussing the differences that arose. In our report we continuously make reference to the document "The Freedom Charter and the Constitution", which is the report of the Legal and Constitutional Commission. Comrades will be expected to make reference to the actual document to get at a particular quotation or paragraph that we cite.

The Areas of Consensus.

4. Firstly, the sub-committee made a general critique of the report of the Legal and Constitutional Commission to the effect that its approach to a future constitution was too wedded to liberal-democratic notions with some slight modifications. Thus, the type of constitutional framework the document envisages is one very similar to conventional bourgeois-democracy and not a framework arising from or created by a revolutionary struggle. While we recognise that it is difficult to predict the shape of future institutions there are however already some indications in the embryonic forms of popular power that are being thrown up in the course of the struggle; that new and more far-reaching forms will emerge and that our constitutional thinking must necessarily accommodate these.
5. We agreed that it would be unwise to instruct our Legal and Constitutional Commission to draw up a constitution at this point in time. We felt that what we need is rather a constitutional document containing general principles, which document can, when the need arises, be quickly transformed into a constitution. This will take account of the fluidity of the situation so that as new forms emerge they too can be incorporated.

ed within our purview.

6. The sub-committee agreed that paragraph 1. on page iii sets out in very sound terms the objectives of such a constitutional document. The last paragraph of the same page sets out a second objective, which while not contradictory or antagonist to the first, presents another dimension of the constitutional document.

It was on the basis of the above that the sub-committee felt that paragraph on page iv was rather unfortunate. The addressing of "the legitimate ~~for~~ fears of minorities", we felt, was a form of pandering to the racial bigotry of the whites. It was the considered view of the sub-committee that the future position of the Whites will be determined by the role Whites play in the course of the struggle. While we consider that last point in this paragraph as well-taken we still feel that encouraging division in the enemy ranks cannot be absolutised to a point that it jeopardises the aspirations of the majority.

#### 7. The Areas of Differences:

The first controversy arose about the interpretation that should be placed on paragraph 2 on page 1. One view was that while we cannot entrench the rights of property in our constitution we should maintain a diplomatic silence on the constitutional rights of church and private schools - not commit ourselves, lest we alienate forces in the church whom we presently wish to draw into the broad front of anti-apartheid forces.

The opposite view was that we cannot entrench the rights of property but that this should apply equally to secular as well as church property. Therefore we cannot even contemplate constitutional guarantees for church or private schools because such protection would invariably be a device for securing crucial areas of white privilege. (As has happened in Zimbabwe.)

8. Electoral scheme: - one view was that this was an irrelevancy. The opposing view was that it would be crucial for ensuring the political ascendancy of the liberation forces and as such needs to be closely studied with particular attention to the present demographic distribution largely determined by racist laws.

9. Basic Principles:- On page 2, in paragraphs 2 and 3, overflowing on to page 3, the principles set out here are what any constitutional document has to address with respects to the rights and aspirations

of the oppressed majority. However, in its discussion of the 'problem especially on page 4, in the last paragraph, we pinpoint what we feel is the fundamental flaw in the Legal and Constitutional Commission's approach. Over the past three years, especially since Nkomati, the ANC has been at pains to explain to the world that we are not fighting for the democratisation of the 1910 constitutional framework. Quite the contrary! This flawed approach re-appears on page 5, in dealing with the US constitution. Our commission seemed to draw no distinction between a "formal non-racialism" and a "practical non-racialism". For it is obvious that while the US constitution from its inception made no reference to race, its application in practice allowed numerous pockets for the institutionalisation of racism. Our constitution should outlaw racism in theory and in practice.

10. Reconciling civil liberties and popular power:- The report of the commission does not point us in any direction with respect to the solution of this dilemma, it merely poses the problem. The sub-committee felt that in every respect priority must be given to the defence of popular power and the securing of the aspirations of the majority. In this regard the sub-committee supports the principle of affirmative action - what is usually referred to as positive discrimination in favour of the blacks - even if this undermines the principle of equity.

Equally, freedom of speech, of assembly, of the press, of peaceful petitioning, etc will be subject to provisions outlawing the advocacy of racism, tribalism, fascism, nazism or militarism,

11. The Legal and Constitutional Commission correctly warns against the inadvertent duplication of bantustans and pockets of permanent under-development in the context of devolution of central powers down to organs of local and regional government. We think the point made in paragraph 2 on page 16 is very apt.

12. The transition from apartheid to democracy is conceived as retaining a number of 'racially neutral' laws - Roman-Dutch Law, company law, etc. The sub-committee feels that no aspect of South African law can be judged as politically neutral. The Commission will have to give serious consideration to the implications of this assertion. In the same light we cannot conceive of a democratic state retaining the services of the present judiciary. We would advocate the dismissal of all of them, if there are indeed 'noble exceptions', these can be rehired into a body of democratic jurists established by the new state.

13. Proposals:- The Legal and Constitutional Commission should be charged with the task of preparing a brief that will:

- (a) Outline the various options from which we can choose e.g. the relative benefits of the Presidential over the Prime Ministerial system; proportional representation over the Westminster system; the centralised state over the decentralised state; etc.
- (b) Examine how we can incorporate mass organisations in the constitutional model and give them direct role in the legislative framework;
- (c) Examine how other constitutions have dealt with the problem of the rights and duties of property, i.e. how one can constitutionally endow the democratic state with the powers to define and limit the rights of property.

14. The NEC should discuss and more clearly define what we mean by the following:

- (i) Political power and the forms it will take - are we speaking in terms of liberal-democracy or are we speaking of a system of majority rule; are we speaking of a system that grants all 100% equity or are speaking of a system that is weighted in favour of certain class forces; do we envisage the enfranchisement of all or do we foresee disenfranchisement of certain classes, categories of persons, etc.
- (ii) The Rights of Property - do we want to write in the limitation of these into the constitution or not?
- (iii) Civil Liberties - are these to be limited or unlimited? Do we envisage weighting the actual application in favour of certain classes or leave them as 'legally' neutral?

Such a discussion must involve the members of the legal-constitutional commission and assist to guide them in drafting a constitutional document.

End of Sub-Committee Report.

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Discussion in N.W.C.

a. The main question which has to be addressed is whether we are preparing a transitional or a final document; whether we see this as a constitution for the initial period of transition from apartheid to democracy, or a post transitional document.

The constitutional document, if it makes space for amendment, will by that fact accomodate future change and can be seen as transitional. Clarity on this point is however necessary because the institutional framework that the constitution creates must be flexible in order to take account of the fluidity of the situation during transition.

b. Expert guidance from our Legal and Constitutional Commission must be based on clear guidelines. Four questions need to be addressed:

(i) How do we view this constitutional document? Is it primarily a mobilising tool in the context of struggle or is a tactical instrument in the event of negotiations? The answer in large measure determines the character of the document.

(ii) How do we frame a document which is a tactical tool in the event of negotiations that helps us maintain the unity of our mass constituency?

(iii) The constitutional document must create a framework through which popular power is translated into reality, ie a government which is in reality subject to the people.

(iv) The constitutional document must address itself to the balance of forces during the transition and must accomodate the likelihood that this will be a shifting balance.

c. The ANC must champion the rights of the majority whether we come to power by force of arms or through a negotiated settlement. A constitutional document that does this is what we need.

d. It could be important for our Legal and Constitutional Commission to study the experience of the People's Democracies in Europe in this regard.

e. What is needed is a fully-fledged NEC meeting to draw up the guidelines for the Legal and Constitutional Commission. A sub-committee was appointed to draw up the draft guidelines for the NEC. Convenor:- Z. Pallo Jordan; members: Simon Makana; Joe Slovo.

Members of the NEC were free to make their individual submissions to

the sub-committee.

f. Action to be taken:

The Secretariat shall write a letter to the Legal and Constitutional Commission to:

- (i) Commend the members of the commission on the work;
- (ii) place before them the critique of the sub-committee and the NWC discussion;
- (iii) advise them that the commission shall be invited to a discussion of the guidelines from which point their work can commence.

The NWC needs to consider also at which point we will call in our friends from the Socialist Countries and solidarity movements in the west.

End of NWC Discussion.

Pursuant of the NWC meeting of 18th February, the Sub-committee was convened on 20th February to draft the guidelines. Present were all the members of the sub-committee.

We agreed on the following:

1. Basic principles:

(a) Sovereignty in the democratic state will be vested in one central legislature, administration and executive within the context of a unitary state;

(b) The thrust of all state policy shall be towards the cultivation of a single national identity and loyalty binding on all South Africans irrespective of racial or ethnic origins;

(c) consistent with the above considerations the state must recognise and encourage the linguistic and cultural diversity of the South African people;

(d) consistent with the (a) and (b) there will be provision made for the regional and local delegation of the powers of the central authority to smaller administrative units for purposes of more efficient and effective administration.

2. Political Power and its Exercise:

(a) There can be no entrenchment of minority group veto rights;

(b) A Bill of Rights guaranteeing the rights of individuals is acceptable but not group rights, mechanisms for their enforcement;

(c) The principle of one person, one vote will be fundamental;

(d) Complete outlawing of the advocacy or practice of racism, fascism, nazism, tribalism, chauvinism or regionalism;

(e) Political pluralism permitting the existence of a multiplicity of political parties subject to the provisions of (d);

(f) Entrenchment of the power of the electorate to exercise control over and its right of recall of all its elected representatives;

(g) Special provision shall be made for the representation and participation of organs of popular power which are emerging during the course of the struggle;

(h) provision must be made for the participation of mass organisations, such as trade unions, in the governing and administration of the country.



3. Economics:

(a) The state shall have power to define and limit the rights and obligations relating to the ownership of land and all other forms of productive property;

(b) Entrenchment of the rights and protection of persons and non-exploitative property;

(c) Entrenchment of the workers' participation in the economic management and planning of all enterprises in which they are employed ;

4. Choice between Presidential over Prime Ministerial system; proportional or direct representation; etc shall be adjourned until fuller study.

5. A legal system and judiciary consistent with these objectives and dedicated to their pursuance must be created.

End of Sub-Committee's Report.

Z. Pallo Jordan.

Convenor. 23rd February  
1986.