

TO: ZOLA SKWEYIYA
TO: ANC CONSTITUTIONAL COMMITTEE
FROM: FINK HAYSOM
DATE: 7 JULY 1992

TRANSITION TO DEMOCRACY ACT

Notes to memorandum

- (i) The memorandum is set out in the following form:
- a) A memorandum briefly setting out the form and the purposes of the Transition to Democracy Act.
 - b) The Transition to Democracy Act in the form of a statute amending a principal Act, together with brief explanatory notes.
- (ii) Words or phrases in the Act which are to be replaced are bracketed.
- (iii) Words or phrases to be inserted are underlined. Where clauses are to be substituted in whole they are set out separately in question marks.
- (iv) Where no explanatory notes accompany an amendment this is because the amendment self-evidently replaces tri-cameral terminology.
- (v) For the sake of completeness, the articles have been amended to reflect the new numbers and sequence of the article.
- (vi) It is not clear whether all the amendments proposed at the NEC meeting have been incorporated. Amendments proposed by the Constitutional Committee at its last meeting have been incorporated to the best of my own and Dullah's memories.

TRANSITION TO DEMOCRACY ACT, 1992Explanatory Note**INTRODUCTION**

We propose a
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 society.

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 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 Constitutional 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. When 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 duly proposed constitution. This second assembly will have only 6 months within which to agree on a new constitution which would also 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 assembly will be put to the people for approval by way of a referendum at which the constitution must enjoy more than 55% support to be adopted. If this constitution also fails to obtain the necessary support then finally, a fresh election will be held for a third assembly. This 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 two-thirds majority. This will also apply to the Executive in the form of the cabinet.

CONCLUSION

The amendments proposed to the existing Act 110 of 1983 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 Flag, 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

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ACT

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

(1) Preamble

Delete the Preamble.

[Explanatory Note: The substitution is clear. South Africa is a multi-faith society. The Constitution should be so framed that adherents of faiths other than the Christian faith do not feel excluded. In view of the interim and transitional nature of the constitution it is not necessary to retain the preamble except in as much as it is desired to establish the purpose of the amendment - to provide for a legitimate constitution making process.]

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".

[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. Article 3 - National Flag

Substitute the words "the design of which is set out in the schedule hereto" for Section 4

[Question: Should the design of the national flag be altered in the interim period or should the resolution of this matter await the consideration of the Constituent Assembly?]

4. Article 4 is deleted in whole.

5. 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".

[Note see comment in 3 above]

6. Article 6 - State President

Article 6 is hereby amended by substituting in subclause 6(2)(a) (the words the National Assembly for the words (any House, or the Houses at a joint sitting).

7. 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 all subclause (c).

[Explanatory Note: The State President will be elected by the National Assembly. Provision already exist for an acting State President who serves when the State President is unable to act, or dies. He/she will set in motion new elections. No provision is made for Deputy of Vice Presidents.]

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 8(3)(a), (any Houses) in 8(3)(c). (A House) and each House) in 8(3)(d) and (House in question) in 8(3)(e).

[Explanatory Note: The amendments above simply replace references to tri-cameral chamber of reference to the National Assembly. The tenure of the State President is co-terminous with that of the National Assembly as provided for below.]

14. Articles 14 to PART IV - OWN AFFAIRS and GENERAL AFFAIRS 18 are hereby deleted.

[Explanatory Note: The deletion is self-explanatory. The amending Act does away with this distinction.]

15. "Part V" shall become "Part IV"

16. 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 Republics shall vest in the State President acting in consultation with the Ministers who are members of the Cabinet; provided that such consultation shall be deemed to be sufficient in respect of any decision that is supported by at least two thirds of the 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 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 and will take decisions by a 2/3 majority]

Explain

18. Article 20 - Cabinet
delete subclause 20(d)
19. Article 21 Substitute the following for the whole of clause "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 members will be appointed."

[Explanatory Note: See note to Article 19 above. The agreement of 5% is intended to limit the size of the cabinet to 20 persons.]

20. 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.)

21. Article 24 - Appointment of Ministers

Delete the words (for general affairs) in article 24(1) and substitute of 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 duty to consult other parties in respect of their nominees to the Cabinet]

22. Article 26 - delete (population group or) in Article 26(1)(b) and delete Article 26(2).

23. Article 27 - Deputy Ministers

Delete (subject to subsection 2) in Article 27(10(a) and whole of Article 27(2).

Art 28(2)(b) - delete 'population group or'

24. PART IV - LEGISLATURE

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

25. Article 30 - 69

delete articles 30, 31, 32, 33, 34, 35, 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 following 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} ~~sittings~~ 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.

Article 32 **Duration and dissolution of Parliament.** - (1) Parliament shall continue until a new constitution has been adopted as contemplated in section 31 (2) 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 ^{to 32(1)} after the ~~dissolution of the National Assembly sitting as a Constituent Assembly~~ has not adopted a new constitution within a period of six months from the date of the first sitting of such Assembly, ~~dissolved in terms of section 32(1)~~, a constitution which has the approval of a simple majority ~~of the Assembly~~ shall be put 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 ^{NA} proposed constitution is not adopted in terms of section 32(5), fresh elections for a new National Assembly shall be held within one month of the publication of the result, 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.

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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.]

Article 35. **Elections for the National Assembly.**- The members of the House of Assembly shall be elected by proportional representation in accordance with the principles and procedures set out in the schedule to this Act.

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.

(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 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 his assent if the provisions of this Act have not been complied 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) Any division of the Supreme Court of South Africa, shall, ~~be~~ subject to the provisions of sections 41(7) and 41(8), ~~to~~ be competent to inquire into and pronounce upon the question as to whether the provisions of this Act 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, or the Protection of Fundamental Rights 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.**- 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 enrolled that signed by the State President shall prevail.

[Explanatory Note: This article is the unamended article 35 of the existing Act.

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

(2) 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.

(3) 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

or legislation

Legislature
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principles shall be permissible under this Constitution.

(4) Should any political party represented in the National Assembly contend that a proposed provision or 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 Panel referred to in section 41(5) of this Act for its determination.

Shall apply - Panel

(5) A Constitutional Panel consisting of seven 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 Panel shall function and take decisions in accordance with the procedures set out in the Schedule hereto.

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

(7) 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 requirement of section 41(3) of this Act.

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

PARLIAMENT SITTING AS A LEGISLATURE

Article 42. 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 ~~constitution~~^{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 (special legislation agreed to by Codesa, including the 'Protection of Fundamental Rights Act'), 80 per cent of the votes of members present other than the Chairman or the Presiding member.

Article 43. (1) **Repeal of this Act.**- When Parliament sitting as a Constituent Assembly adopts a new constitution in accordance with the provisions of section 41(2) 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 (2) Save as aforesaid, and save as set out in section 42(a) hereof, the ~~House of~~^{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 43 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 25 abolishes the tricameral 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 panel.]

26. 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.

27. Article 56 (new Article 47) Penalties
Substitute the National Assembly for (a House) and (the House in question) respectively.
28. Article 57 (new Article 48) Oath
Substitute the National Assembly for (a House) and (House of Assembly/Representatives/ Delegates) respectively.
29. 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 chairman of the National Assembly for (every chairman of a House)
30. 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 Chairman of the House.
31. 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.]

32. 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 legislative shall require the presence of at least 100 members for the determination of a question"

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

34. PART VIII PRESIDENT'S COUNCIL

Delete the whole of Part VIII, from articles 70 to 78 inclusive.

[Explanatory Notes: This amendment abolishes the President's Council.]

35. PART IX FINANCE amend to read PART VIII FINANCE

Amend the numbering of articles 79 to 86 to read Articles 57 to 64.

36. 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]

37. 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

Renumber Articles 100 - 103 to read Articles 74 - 77

38. 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].

39. Article 92 - Offenses in respect of National Flag

Delete whole of article 92.

[Explanatory Note: Original provision is inappropriate in a transitional phase]

40. 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 apartheid legislations is inappropriate]

41. 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).

42. Article 98 Administration of existing Laws

Delete who of article 98

[Explanatory Note: This article refers to tricameral or provincial structures.]

43. Article 99 Amendment of Act (Constitution)

Delete whole of Article 99

[Explanatory Note: This has been dealt with in Part V above.]

44. 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]

45. Article 102 (new article 76) Transitional Provisions

Delete article 102

[Explanatory Note: the whole of article 102 will be replaced by the appropriate transitional provisions which may be necessary, and which should be addressed once the terms of any political agreements have been finalised.]

46. Schedule 1 is replaced

[Explanatory Note: This schedule identifies which matters are "own" or "general" affairs]

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