

TO: NATIONAL WORKING COMMITTEE  
OFFICE AND SECRETARY GENERAL

FROM: ANC CONSTITUTIONAL COMMITTEE

DATE: 13 JULY 1992

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TRANSITION TO DEMOCRACY ACT

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Notes to memorandum

- (i) The memorandum is set out in the following form:
- a) A memorandum briefly setting out the form and the purpose 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 quotation 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.

**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 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 a 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 a defined level of support<sup>1</sup> 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 defined majority.<sup>2</sup>

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

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<sup>1</sup> An explanatory note in the text deals with the question as to whether the majorities required in the referendum and the 3rd assembly should be less than 2/3. The Constitutional Committee was divided upon this issue.

<sup>2</sup> See Footnote (1).

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.

whereas it is necessary to guarantee the rights and freedoms required during the period of trans. to

TRANSITION TO DEMOCRACY ACT

create credits for free pol. activity

ACT

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

1. Preamble

in conditions of freedom activity

Delete the Preamble and substitute with the following:

"Whereas it is necessary to establish mechanisms whereby a new non-racial, non-sexist constitution can be brought into being through the participation of all South Africans".

[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

insert the pol. as Art IA.

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".

[Explanatory 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 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. He/she will set in motion new elections. No provision is made for permanent Deputy or Vice Presidents. The possible benefit of having such <sup>in office</sup> Vice Presidents as a means of extending the representivity of the President's office <sup>may be</sup> was considered but no decision was taken.]

8. 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.]

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PART IV - OWN AFFAIRS and GENERAL AFFAIRS

9. Articles 14 to 18 are hereby deleted.

[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.]

10. "Part V" shall become "Part IV"

11. 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; 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/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 and will take decisions by a 2/3 majority. It should be noted that "consultation" here, by accepted convention means "with the agreement of". The areas of decision-making in which the President exercises his/her powers alone include certain formal functions, appointment of Ministers, assent to bills. But see also Paragraph 21 below.]



12. Article 20 - Cabinet

Delete subclause 20(d)

13. 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 ~~maximum~~ size of the cabinet to 20 persons. The provision generally ensures the appointment of a multi-party cabinet.]

*to manageable proportions during the transition period.*

14. 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.)15. 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 agreement of other parties in respect of their nominees to the Cabinet]

16. Article 26 - delete (population group or) in Article 26(1)(b) and delete Article 26(2).
17. Article 27 - Deputy Ministers  
Delete (subject to subsection 2) in Article 27(10(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, and to allow for a period of ~~'tutelage'~~ in regard to persons not adequately prepared for executive government.]

18. Article 28 - Delete (population group) in 28(2)b.
19. PART IV - LEGISLATURE  
Substitute Part V Parliament for (Part VI Legislature) and delete (Parliament) after heading article 36.
20. 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 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

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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.

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 in terms of Article 32(1) above has not adopted a new constitution within a period of six months 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).

Explanatory Note:

1. In the letter of 9 July 1992 by the President of the ANC to Mr F W de Klerk it is said that "our position (in regard to the negotiations) is founded on the basic features of any democratic structure charged with the task of constitution making" ... "In the South African context there is the additional requirement that such a constitution making body constitute a unifying and legitimising process which must however not thwart the will of the overwhelming majority.

*Separate note:*

There is an equally strong  
views

Therefore the constitution making body shall arrive at decisions by a two-thirds majority". There are members of the constitutional committee who feel that the provisions of Articles 32(5) and 32(6) are inconsistent with this position and should be changed. They argue that apart from what is said in the letter to Mr de Klerk, the ANC has taken up the position that a two-thirds majority is an "internationally accepted standard" for constitution making and that it should not depart therefrom. Also, if there is substantial opposition to particular provisions in the constitution, the adoption of a constitution over such opposition would be divisive and undermine the goal of a "unifying constitution". It is argued that a constitution which is opposed by more than 40 or 45% of the population is itself a potential cause of instability. They hold the view that Articles 32(5) and 32(6) of the draft should be amended to bring them into line with the public position of the ANC, or at the very least, to require majorities of 60%.

2. A second position on the committee believes that by dropping the required percentage to 50% + 1 after 18 months, the ANC will be accused of adding an incentive to or rewarding its own representatives, who deadlock or frustrate negotiations at the earlier stages.
3. The position as stated in the text believes these "punitive" provisions will penalise those minorities who frustrate the process of reaching agreement thus facilitating a more expeditious agreement at the first or second stage.

**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.

*This format. Leave open the possibility of well x regional lists*

[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. ~~A~~ **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.

[Important Explanatory Note:

In terms of the system of proportional representation, lists would be published by the parties, and the electorate would vote only for their parties. However at CODESA and indeed in previous ANC proposals provision was made for two lists per party - a national list and a regional list. The latter being comprised of persons in the regions and elected in proportion to support in such regions. In this proposal we have made no reference whatsoever to regions, partly because the ANC policy conference was not able to formulate policy on regions, and partly because of the reluctance to agree to a vexed and potentially protracted process of demarcation of regions. However it may be possible to separate the question of regional demarcation for representation in the National Assembly from the question of regional demarcation for the purposes of regional government. Attention, in this regard, should be drawn to the letter of (our) President to F W de Klerk dated 23 June in which the principle of regional list is referred to as a concession by the ANC. This amendment assumes the "concession" has been withdrawn.]

*an independent election system shall be established to ensure that elections are free and fair.*

*Separate note.*

Article 36. ~~A~~ **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.

[Explanatory Note:

In terms of the list system, a member who ceases to belong to the party which nominated him or her, also ceases to be a member of the Assembly. In view of the possibility of Patriotic Front lists this principle may need to be revisited.]

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 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, subject to the provisions of sections 41(7) and 41(8), 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, ~~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.

[Explanatory Note:

Articles 38 and 41 limit the role of the Supreme Court to adjudication on questions of procedural regularity, and observance of fundamental rights. A constitutional panel is charged with determining issues related to conformity with agreed CCDESA principles. This is so in order to

prevent post facto attempts to strike down or suspend any new constitution, or to frustrate the interim government except on real issues of human rights protection where the courts will continue to have jurisdiction.

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. The whole question of language will have to be decided at the Constituent Assembly. See Note to Article 89.]

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). (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 Panel referred to in section 41(5) of this Act for its determination.

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

[Explanatory Note:

The large number of the panel is in due consideration of the need to establish a panel having wide ~~group gender and party~~ representation.]

(5) 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.

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

(7) 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.

(Explanatory Note:

This amendment does not propose any special regional majorities in respect of certain decisions as indicated in the letter of the ANC President to F. W. de Klerk. It may thus be interpreted as reiterating a pre-CODESA position.]

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 majority of two thirds of the votes of members present.

Article 42      (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 (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.

(3) Should any political party represented in the National Assembly contend that proposed

legislation which has been put to Parliament 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.

[Explanatory Note:

In general new legislation would require more than a simple majority, as the constitution is of an interim nature and hence more consensual. However, the exceptionally high majorities required to amend the constitution arise out of the pact terms of which the CODESA agreements are to be finalised - i.e. it is a rigid agreement. 80% would allow a minimum of flexibility. It is ironic that the NP would (in contrast to the IFP) prefer a more flexible interim constitution. In their view this constitution should provide a platform for piecemeal reform. Our proposal, ironically, makes it more difficult to amend this constitution, and related aspects of the CODESA pact, precisely because we insist that this constitution should not be capable of reform except by way of its wholesale replacement by a new constitution.]

**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(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. Save as aforesaid, and save as set out in section 42(a) 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

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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 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 panel, amendments to this Act. Some of the provisions simply re-insert the necessary formal provisions relating to procedure.]

21. Articles 56 - 69 The following article numbers are amended as follows:

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articles (56 - 61) are amended to numbers (47 - 52) (63) to (53), (65) to 54 and (68) to 55 and (69) to 56.

22. Article 56 (new Article 47) Penalties  
Substitute the National Assembly for (a House) and (the House in question) respectively.
23. Article 57 (new Article 48) Oath  
Substitute the National Assembly for (a House) and (House of Assembly/Representatives/ Delegates) respectively.
24. 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)
25. 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.
26. 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 principle Act will continue to contain "Chairman", "his" etc.]

27. Article 61 (new Article 52) Quorum  
Substitute the whole of article 61 with the following:  
"Quorum To constitute a meeting the National Assembly

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either as the Constituent Assembly or the legislative shall require the presence of at least 100 members for the determination of a question"

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

29. 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.]

30. PART IX FINANCE amend to read PART VIII FINANCE

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

31. 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]

32. 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

33. 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

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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].

34. Article 92 - Offenses in respect of National Flag  
Delete whole of article 92.

[Explanatory Note:

Original provision is inappropriate in a transitional phase]

35. 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.]

36. 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).

37. Article 98 Administration of existing Laws  
Delete whole of article 98

[Explanatory Note:

This article refers to tri-cameral or provincial structures.]

38. Article 99 Amendment of Act (Constitution)  
Delete whole of Article 99

[Explanatory Note:

This has been dealt with in Part V above.]

39. 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]

40. 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.]

41. Schedule 1 is replaced

[Explanatory Note:

This schedule identifies which matters are "own" or "general" affairs]



*Separate note*

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2. The administrator and provincial council shall have the powers and functions -
    - (a) as conferred upon them by any law;
    - (b) the power to amend or repeal or substitute any provincial ordinance save that any such legislative action shall not be repugnant to any statute or the rights and freedoms set out in the Protection of Fundamental Rights Act;
    - (c) discharge the duties and functions of any state department on behalf of such department as is delegated to them;
    - (d) perform the functions and duties as set out in the schedule annexed hereto in respect of the whole province, and
    - (e) perform such duties and functions in respect of only a part of the province as is conferred upon them by this Act.
  3. There shall be a regional administrator appointed by the provincial administrator in each province in respect of those areas which are or were 'self-governing' in terms of the National States Constitution Act of 1971 and in respect of the Transkei.
  4. The regional administrator referred to in sub-article (3) shall have such powers as are assigned to it by the provincial administration and upon such terms and conditions as he/she sets out.

[Explanatory Note:

Option 1 - The existing system allows the State President (in consultation with his or her cabinet) to appoint administrators and executive council, generally resident members, who are then responsible for the functions which are currently delegated to provincial authorities as set out in Section 14 of Act 69 of 1986. (The Provincial Government Act of 1986). He may (1) amend or repeal existing provincial ordinances by proclamation and (2) perform and function delegated by law, and (3) as delegated by the State President; (4) perform function on behalf of a department of the State.

He/she is in this sense, similar to a governor appointed by a higher authority. In this model sub regional government could be responsible to him/her but such an arrangement would require an amendment to the National States Constitution of 1971, and the appropriate Presidential Proclamation to be issued in terms of the Provincial Government Act of 1986.

The civil services in any province and homeland could remain as they are but the chain of political accountability would be dramatically altered. The homeland assemblies and cabinets would disappear in this scenario. It may be that in the appropriate amendment to the National States Constitution Act, provision will be made for a regional administrator who would then be a member of the provincial executive committee responsible for the executive in that homeland.

Implications of Option 1

- (1) In this option no elected assemblies would exist at the provincial or homeland levels. There would be, thus, no new structures created which would pull against the transitional process. However this option may lack any appeal for existing homeland legislative authorities, especially in Natal, and thus also for the National Party.
- (2) This option does not require substantial amendments to the existing constitution, but only to the two existing statutes which set out the framework for regional/provincial governance. Thus this amending Act only refers to the principle.
- (3) Currently the self-governing states have considerably greater authority, in terms of the nature and range of functions they perform, than the provincial authorities. This discrepancy could be harmonised by the proclamation process delegating greater authorities and functions to the provincial administrator, either in respect of the whole province or the sub-regions, and by amendments to the National States Constitution Act.

Option 2

In this option, the provisions relating to provincial councils as contained in the 1961 Constitution would be revived during the interim phase. In particular provincial councils would be elected, on the same day that national elections were held. The boundaries of such provinces would be as set out in 1910 - the four provinces. The provincial councils would exercise legislative powers (powers to pass ordinances) in respect of defined matters, would be responsible for the execution of the both provincial, and, where delegated or authorised, national functions. The homelands would be a sub-region with its civil service being merely a part of the larger

provincial bureaucracy. The residents of the sub-region would be voters in the provincial elections and would thus be represented there. Under the 1961 Constitution the administrator was not elected, but appointed by the central executive authority. We propose that for the purposes of a smooth transition that this mode of appointment remain.

Implications

- (i) This amending Act would have to revive the old provincial structure, as well as effecting the repeal and amendment of the provisions of the National States Constitution Act of 1971. Such an amendment would have to establish what powers and functions these councils would have, with a view inter alia of bringing the sub-regional governments powers under the control of provincial government.

C. TECHNICAL COMMITTEE: FUNDAMENTAL RIGHTS DURING THE TRANSITION

- |     |                    |          |   |
|-----|--------------------|----------|---|
| 1.  | ANC                | 12/05/93 | List of fundamental rights which should be protected and guaranteed in a transitional constitution, The Transition to Democracy Act |
| 2.  | DP                 | 12/05/93 | Securing fundamental human rights during transition   |
| 3.  | Lourens du Plessis |          | First interim report  |
| 4.  | Govt               | 12/05/93 | Proposals on charter of fundamental rights  |
| 5.  | MA McLoughlin      | 26/03/93 | Constitution and Bill of Rights (A3)  |
| 6.  | Democratic Party   | 12/05/93 | Submission re fundamental rights during the transition  |
| 7.  | Rural women        |          | Statement re fundamental rights   |
| 8.  | Ciskei             | 12/05/93 | Head notes - Fundamental rights   |
| 9.  | IFP<br>KwaZulu     | 13/05/93 | Heads of arguments and positions  |
| 10. | Transkei           | 13/05/93 | Supports Codesa agreements  |

## **Submission by the African National Congress**

### **To the Technical Committee on the question of Fundamental Rights During the Transition**

**Date : 12 May, 1993**

**The African National Congress submits that the fundamental rights listed here should be protected and guaranteed in a transitional constitution, the Transition to Democracy Act:<sup>1</sup>**

- (a) Freedom from racial discrimination and the right of both men and women to 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, the 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, employer's organisations and to engage in collective bargaining.
- (h) The right to form and join associations and political parties.
- (i) 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.

Any existing or future legislation during the transition which is contrary to these rights shall be null and void.

It is the ANC's belief that the final Bill of Rights shall be adopted by the Constitutional Assembly as part of a future constitution for South Africa.

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<sup>1</sup>See the ANC's proposed Transition to Democracy Act annexed hereto and marked "A".