

AN AMENDED CONSTITUTION PROVIDING FOR AN INTERIM PARLIAMENT

1. The South African constitution is contained in the Republic of South Africa Constitution Act No 110 of 1983. It consists of a preamble and ten parts. Part I deals with territory; Part II with the national flag and anthem; Part III with the State President; Part IV with own and general affairs; Part V with the executive authority; Part VI with the legislature; Part VII with the administration of justice; Part VIII with the President's Council; Part IX with finance and Part X with general provisions.
2. It is possible to amend the constitution so as to make provision for a one chamber sovereign parliament to function both as a Constituent Assembly and as an interim legislature. Although the language of a number of the provisions of the present constitution is contrary to established ANC positions, it is not strictly necessary to amend such provisions in order to achieve a constitutional framework for an acceptable constitution making body/interim legislature. It is after all only an interim arrangement. Attempts to introduce extensive amendments could lead to prolonged debates and support for the argument that the correct procedure would be to draft an interim constitution. For that reason we have attempted to avoid unnecessary changes and to keep the amendments to a minimum. There are, however, a number of principled issues that will have to be addressed and we draw attention to some of them in this memorandum
3. All reference in the constitution to "own affairs" "general affairs" Minister's Councils and population groups have to be deleted and replaced with language suitable for a one chamber non-racial parliament. The present constitution uses only the male gender in its references to people. To make the constitution gender free or gender neutral would call for extensive amendments. We have not made those amendments in our annotations to the present constitution, though it would be possible to do so. The simplest way of doing this would be to rewrite the constitution using appropriate language, but that would immediately raise other language issues as well as the spectre of an interim constitution. A decision needs to be taken as a matter of principle in regard to this issue. Can unacceptable language be retained on the basis that we are amending an unacceptable constitution as an interim measure, and not writing a new constitution.
4. In order to show the nature of the changes that are necessary, we have annotated the existing constitution, marking the deletions that will have to be made and writing in new provisions. We have not changed the numbers of the sections more than is necessary to avoid duplication. The

amendments that we have suggested are a first formulation. In the time available we have not been able to refine the language, to undertake careful proofreading or to prepare the supporting schedules. That can be done later if the proposals are seen to be acceptable. An annotated constitution is attached to this memorandum.

5. We draw attention in particular to

5.1. The language of the preamble, read with section 2.

5.2 The flag and the national anthem dealt with in Part II and section 92.

5.3 The oath of office prescribed in section 11.

5.4 The period fixed for the duration of the National Assembly as provided for in the new section 32 which should be read with the new section 42.

5.5 The language provisions of sections 89, 90 and 91.

5.6 The power-sharing arrangements in respect of the executive authority in sections 19, 20 and 24. We have not restricted the power of the State President to allocate portfolios. We have, however, provided that cabinet ministers from minority parties will be appointed jointly by the State President and the leaders of their parties, and not by the State President alone, and that they will be subject to removal in the same way. We have excluded deputy ministers from these arrangements because they are not members of the Cabinet. The power of the State President to appoint all deputy ministers will serve a useful purpose. It will enable the majority party to have its own nominees in positions of authority in departments allocated to minority parties, and at the same time it will enable such nominees to gain experience in the functioning of those departments.

5.7 The provisions made for weighted majorities and a constitutional panel in section 41.

5.8 The limited testing right given to the courts by section 34 which should be read with sections 41(7) and (8).

5.9 The need for appropriate transitional mechanisms to be introduced once the final form of the amendments has been determined.

- 5.10 We have not made provision for the position of vice-president. There may be some advantage to creating such an office, though we would in any event want to retain the post of acting President to hold office during the absence of the President, or in a period following the death of a President.
- 5.11 The schedule which will include provisions dealing with elections and the qualification of voters will be of considerable importance. It will depend to some extent upon agreements reached in Codesa in regard to the Electoral Law, the details of the Independent Election Commission and other matters such as how voting will take place in the TBVC states. Similarly legislation will have to be drafted for the protection of fundamental civil and political rights during the interim period.
6. The amendments have been drafted on the assumption that new regions will not be created at this stage, that a bill of rights will not be incorporated into the constitution, though legislation will be enacted guaranteeing certain fundamental rights in the interim, that the TBVC states will remain intact until the new constitution is adopted, and that the provinces will remain as administrative areas. The "non-independent homelands" are not dealt with in the constitution and no reference has been made to them in the proposed amendments. Their position in the interim structures will, however, have to be dealt with by Codesa.
7. It should be possible to identify areas of particular concern and in negotiations to devise suitable protections for such concerns. For instance property, nationalisation etc. What may be problematic is how to deal with disputes concerning the budget. Particular legislation and executive action may be capable of being postponed but the budget has to be passed. What will happen if there is a deadlock and the necessary majority or consensus cannot be obtained? These and other matters will depend on negotiations. The proposed amendments do not offer a way out of all the problems that are likely to arise. They do, however, offer a framework within which changes can be made and provide an indication of some of the important issues that need to be addressed.

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