

7 October 1994

**PACs INITIAL SUBMISSIONS ON THE CONSTITUTION MAKING-PROCESS
AND PUBLIC PARTICIPATION IN THAT PROCESS**

INTRODUCTION

The Constitution drafting task with which the Constitutional Assembly is seized, is a very complex and involved one. This is due partly to the fact that this process has few, if any parallels, in the world. In addition, it has very rigid and complex guidelines (Constitutional principles) which must be adhered to. This does suggest therefore that, although the process may involve some trial and error, the participants must ensure that the outcome is perfect in order to get the required certification. Equally, this process is likely to be time-consuming and costly.

1. CONSTITUTION-MAKING PROCESS

- 1.1** s73 requires that the Constitutional Assembly should pass the New Constitutional Text within two years. The PAC accepts this time-frame as a target which the process must earnestly endeavour to meet. However, as the Constitutional Drafters themselves did recognise, this time-frame is not cast in stone or sacrosanct and should the Constitutional Assembly feel that it is reasonably necessary to extend it, the PAC will be amenable to such a proposal.
- 1.2 There are a number of factors which will have an impact on the time-frame. These, inter alia, are:
 - 1.2.1 A structured and inclusive process of public participation in the Constitution-making process.
 - 1.2.2 The setting up of structures and processes through which the Constitutional Assembly will seek to carry out its mandate.

By and large, this has been achieved by inter alia, the setting up of the Constitutional Committee, Theme Committees, Administrative Support staff and so on. The PAC is satisfied that these structures and processes do seem adequately equipped for the challenges that lie ahead. They should be given the opportunity to perform their tasks.

- 1.2.3 A clear, focused and integrated, programme. The topics allocated to the Theme Committees would in our opinion, meet this requirement. It is important therefore, that the process must clarify the functions, objectives and powers of

Theme Committees. Progress of the Theme Committees in processing work to the Constitutional Committee, will in due course indicate whether the Constitutional Assembly will meet the target date of May 1996 (S73 (1)).

In this regard, the PAC also feels that there are additional factors which, if addressed quite early in the process, will facilitate progress on the substantive aspects of the process. These are:

- (a) A Common understanding of the full implications of the Constitutional Principles. These principles cannot be amended and are binding on the Constitutional Assembly (S74). It is important therefore, that the practical meaning of the Constitutional principles and their implications for a Final Constitutional Model/Framework, are known as soon as possible.

The PAC suggests that either these principles should be among the first issues to be discussed by the Theme Committees, or that a Technical Committee or the panel of Constitutional Experts be requested to give possible interpretations of them. Some people have argued for instance, that the Constitutional Principles are drafted in a broad and flexible manner and could accommodate more than one Constitutional Model/framework.

In addition, one would like to know for instance, what principle II implies, in requiring that due regard should be paid to chapter III of the Interim Constitution before a new chapter on Fundamental Rights is drafted, and the practical implications of S161 and so on.

- (b) There are a number of concepts and Conceptual issues that are raised by the Constitutional principles and the Constitution-making process which need some discussion, clarification or common understanding. These include, a Democratic State, Representative Government, Self-determination and so on. This suggests therefore, that Theme Committee I on the Character of the State, should be given some priority. Most of these concepts are part of the terms of reference of that Theme Committee. We believe that a common understanding of their implications will help to facilitate the smooth functioning of the process.

1.2.4 We are drafting a Final Constitution while on the other hand, we are busy implementing the New Interim Constitution. It has been suggested that already some of the Constitutional principles form the basis of the interim Constitution. Equally, in some instances, these principles require that the Constitutional Assembly should pay due regard to the Interim Constitution (Principle II). Further, certain chapters of the Final Constitution (eg. on Provincial Government) are prioritised and would also require an input from the Commission on Provincial Government (see S161). This implies that although the Constitutional Assembly has the task of drafting a Final Constitution, it cannot however, ignore the development of the Interim Constitution and its jurisprudence. This of course, has implications for the time-frame and the entire work of the Constitution-making process.

1.2.5 The Constitutional Assembly takes its decisions by a 2/3 majority

(S73) and a 1/5 of its members have the right at any stage, to refer parts of the final Constitution to the Constitutional Court to check whether they are in accordance with the Constitutional principles (S71(4)). These suggest a need for negotiations and bargaining before decisions are taken and such a process is bound to take its toll on the allocated time for the passing of the Final Constitution by the Constitutional Assembly.

1.3 Recommendations

1.3.1 We will not at this stage attempt to breakdown the time-frame of two years given by the Constitution. We endorse the programme of work suggested by the Administrative Staff of the Constitutional Assembly which goes up to the end of the 1994 session.

1.3.2 The PAC recommends that at the end of the 1994 session, we need to assess the progress achieved. This will allow participants to prepare well in advance for the crucial 1995 sessions. In addition, the Administrative staff can then prepare a programme for 1995 bearing in mind the progress and experiences of 1994 and the factors mentioned in 1.1 and 1.2 above.

1.3.3 We recommend that what has been approved by the Constitutional Committee and the Constitutional Assembly in terms of process and substantive programme for 1994, must be implemented without further delays. Flexibility should,

where it is reasonably necessary, be allowed.

1.3.4 Issues must be fully discussed and where possible finalised. No matters should be deliberately shelved so that they can be steamrolled later when the deadline is approaching or is very near.

2. PUBLIC PARTICIPATION IN THE CONSTITUTION-MAKING PROCESS. This must be encouraged. It should involve all sectors of Society from all corners of the country. Genuine public participation will enable our people to be involve in the decision-making process rather than to react to already made decisions. The interaction between the people and their elected representatives will enable the latter to remain in touch with the needs of the people and also creates a sense of accountability. These will assist in legitimising the New Constitution as the population will feel that it is their constitution as they were directly involved in its making.

On the other hand, public participation is time consuming and can be a costly affair. However, these should not prevent attempts to encourage public participation. Public participation should therefore, be planned, structured and managed so that it does not end up hampering progress.

In this context, the PAC views public participation in two ways which are not mutually exclusive. They are:

2.1 Direct Public Participation

This suggests the full involvement of our people from all sectors of our Society in the constitution making process. The creation of this National Dialogue should go beyond our interacting only with those who have the resources and live in accessible areas. The process must endeavour to reach even the poor people who reside in the most remote areas of our country.

The Constitutional Assembly must come out with a multi-dimensional approach to this issue. It should for instance, invite oral and written submissions, sponsor or co-sponsor seminars and workshops on various aspects of the Final Constitution.

Further, in order to encourage grassroots participation, public fora to hear views of the people should be convened in selected areas of the country by Committees, sub-committees and commissions of the Constitutional Assembly.

Chiefs, Local Authorities, Provincial Governments and other relevant structures should be mobilised to assist in this process.

2.2 Indirect Public Participation.

Here we envisage a process where (a) the media plays an effective role in explaining the process to the people. A media strategy therefore, is imperative. (b) The Constitution-making process takes note of comments made, either, in the media or in Academic Journals by experts and other interested persons and, (c) The Constitution-making process should whenever it is necessary, go out to the people to explain developments in the process. This will empower people, counter disinformation and also ensures that control of the process does not slip away from the Constitutional Assembly into the hands of experts and other influential groups in our society.

On (c) above, it is important that the process should recognise that the electronic media reaches a limited number of people. The print media and Radio, are the most effective means. There is a need therefore, for representative official spokespersons of the process who will go on radio talk-shows to explain the process in very simple terms. Equally, statements can be issued which will appear in the Newspapers, or be read on Television or radio. This will inform people and popularise the process and will also help to focus the National debate.

In this regard, language becomes an issue. The Constitutional Assembly, must also utilise the vernacular media when issuing advertisements or making important statements. This of course, will have resource implications and may also depend on the subject matter. Nevertheless, attempts should be made to go beyond the traditional Newspapers.

Equally it is necessary to reiterate that official spokesperson should be representative of the population and should include persons who can speak the other 9 official languages. This will enable them to communicate in debates with the public in languages that people can understand. Of course, statements whenever it is necessary, should be translated.

2.3 The PAC is encouraged by this spirit of openness, free-flow of information, accountability of public officials and the involvement of the people in the decision - making process. This will definitely enhance the quality of our decisions, increase their acceptability and will go a long way in ensuring good and stable government.