



LAWYERS' COMMITTEE
FOR CIVIL RIGHTS UNDER LAW

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Comments on
Draft Constituent Assembly
Proclamation

This draft proclamation must be read with the draft election proclamation. Most of the provisions in both drafts are copied, almost unchanged, from the 1978 Election Proclamation (# AG 63 of 1978).

Subsec. 2 (2). This subsection consists of an inexact version of the 1982 agreement on fundamental principles to be incorporated in the Namibian constitution, as reported by the Contact Group in UN document S/15287.

The wording of the 1982 agreement should be retained verbatim (subject to any changes made necessary by syntax).

If the intention is to amend the agreement (as, e.g., by omitting the right to due process), there is no authority to do so. If the intention is to paraphrase the agreement, these changes are inaccurate and infelicitous and can only serve to complicate, rather than aid, future interpretation of the principles.

Subsecs. 2 (3), (4). Subsec. (3) appears to derive from subsec. 2 (2) of the 1978 Election Proclamation. That subsection, however, related to matters of interim administration by the AG pending the adoption of the constitution and independence.

Subsec. 2 (3) of the 1989 draft proclamation is not limited to matters of interim administration, however. In its present form, when read with subsec. 2 (4), it appears to empower the AG to disregard or veto any constitution drafted by the Constituent Assembly.

If this interpretation is correct, the effect of these two subsections is that Namibia can never gain independence unless the Constituent Assembly drafts a constitution that is acceptable to the AG. Such a provision is totally contrary to Security

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Council Resolution 435, as well as to international law, which holds South Africa an unlawful occupier in Namibia.

These subsections must be deleted.

Subsecs. 4 (1) and (2). These two subsections, read together, enable some persons to become members of the Assembly who should be disqualified while preventing others, who should be qualified, from becoming members.

Sec. 4 (1) goes beyond the wording of Security Council Resolution 435 (para. 6 of the Western Proposals (S/12636)), which provides that "every adult Namibian" shall be eligible to stand for election to the Assembly. (In fact, under the system of proportional representation set out in sec. 36 of the draft election proclamation Namibians will vote for parties, not persons, since the parties' lists of candidates will not appear on the ballot.)

While the term "Namibian" has no legal meaning in the absence of Namibian citizenship, it should, by any reasonable construction, exclude: (a) citizens of other countries, even if they are eligible to vote through residence in Namibia; and (b) persons who, although born in Namibia, have (i) taken up permanent residence elsewhere or (ii) have transferred their allegiance by taking foreign citizenship, by serving in the armed forces of another state, or by voting in foreign elections.

Sec. 4 (1) should be reworded to include these limitations on eligibility of candidates.

In addition, as a matter of sound policy, those classes of persons who would in most democratic countries be barred from serving in national legislatures should be barred from serving in the Assembly, viz., members of the civil service, the judiciary, the armed forces, and the police.

Subsec. 4 (2), by contrast, bars persons from serving who should be eligible to be members of the Assembly. Indeed, para. 4 (2) (a) as written would disqualify many of SWAPO's most prominent members, including, for example, Tuiwo ya Tuiwo.

The paragraph disqualifies all persons who have been convicted of any crime listed in Schedule I to the Criminal Procedure Act, No. 51 of 1977. Schedule I specifically includes the political crimes of treason (to South Africa) and sedition, but also "any offence" punishable by a term of imprisonment of more than six months without the option of a fine. This includes all political offenses. A substantial number of SWAPO's most active supporters in Namibia have been convicted of political crimes, and many refugees fled to avoid continuing harassment after serving a term for such an offense.

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Although most of the provisions of the draft Constituent Assembly proclamation derive from the 1978 Election Proclamation, it is significant that para. 4 (2) (a) is new: its provisions were not needed in 1978 when SWAPO (and most other parties) boycotted the territorial election run by South Africa in defiance of the UN.

While para. 4 (3) (a) provides that a convicted person who has received a "free pardon" shall not be disqualified, the amnesty granted to returnees under Proclamation # AG 13 of 1989 apparently does not constitute a pardon. In any case, the amnesty applies only to returning refugees; it does not cover Namibians who remained in the Territory.

Paras. 4 (2) (a) and (b) should be removed. If they are removed, para. 4 (3) (a) would be unnecessary.

Subsec. 6 (1). The Assembly, not the AG, should approve any extension of time for the filling of a vacancy.

Subsec. 6 (2). Substitute President of the Assembly for the chief electoral officer. This subsec. is very awkward and should be redrafted.

Subsec. 6 (3). Substitute President of the Assembly for the chief electoral officer.

Subsec. 7 (1), (2). The AG should not hold the power of the purse over the Assembly. The Assembly should determine its own reimbursement, charging it to a special fund. (See comment to sec. 15.) The remuneration of the members should be a matter of public record, so that their "constituents" may hold the members of the Assembly accountable.

Subsec. 9 (1). The annex to 9/12636 provides that the Assembly shall meet one week after certification of the election. Subsec. 9 (1) should be amended to conform to the provision of the annex.

Sec. 10. The election of the President of the Assembly should be under the supervision and control of UNTAG. The SR should be substituted for the AG in subsecs. (1), (3), (5), (6), (8), (9), (10), and (13).

Subsec. 10 (2). This subsec. should be reworded to provide positively that the Assembly may elect or designate its own officers, as needed, in accordance with its own rules.

Para. 11 (1) (a). This quorum provision is unrealistic and likely to hamstring the Assembly. There should be a much smaller

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quorum for opening sessions (perhaps 24?) and a larger quorum (perhaps 48?) for the adoption of any decision.

Para. 11 (3) (b). This provision is outrageous and totally unworkable. It would prevent the Assembly from ever reaching any decision on any subject unless one party controlled considerably more than 2/3 of the seats.

This paragraph, in practical application, goes far beyond requiring a 2/3 majority for any decision: It requires 48 votes, which is 2/3 of the full membership, but a greater percentage of a normal Assembly meeting, which will have less than total attendance. Thus, the required 48 votes would constitute 4/5 of an Assembly if only 60 members attend and 100% of the Assembly if a bare quorum was present.

This provision violates the spirit and intent of the 1982 agreement on fundamental principles (S/15287). That agreement requires only that the constitution as a whole be adopted by a 2/3 majority-- not by a specific number of votes. By necessary implication it permits specific provisions to be adopted and decisions to be taken by a simple majority. (Note that, according to sec. 10 of this draft proclamation, the President of the Assembly may be elected by a simple majority of all votes cast, not of the entire membership of the Assembly.)

This subsection should be scrapped and the agreed provision of S/15287 substituted for it.

Sec. 12. This section should be redrafted to include the full range of privileges and immunities normally extended to legislators, viz., immunity, during membership in or a session of the Assembly, from criminal proceedings, from arrest or imprisonment, and from civil suit. Such a section should also save members from liability to legal proceedings for their speech, votes, or acts in the Assembly or any of its subordinate bodies.

Subsec. 14 (1). This subsection should provide that the Assembly may appoint a Secretary to the Assembly. It should direct the AG to make available to the Assembly, upon request, the services of a specified person in the government service to serve as its Secretary.

Subsec. 14 (1), sec. 15. (See comments to subsecs. 7 (1) and (2).) A special fund should be set aside for the expenses of the Assembly so that it need not be beholden to the AG.

Sec. 16. This broad category of offenses seems largely unnecessary and tends to unduly glorify the members of the Assembly and isolate them from their "constituents" and the normal hurly-burly of politics.

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Para. 16 (a). Threats and obstruction are surely already covered by existing criminal law, and members of the Assembly do not need protection of the criminal law against "insults."

Paras. 16 (a), (b). While disturbances that actually interrupt, obstruct, or disturb Assembly proceedings may be punishable, disturbances that are only "likely" to should not. The limited offenses under (b) should be treated as ordinary crimes, not contempt.

Para. 16 (d). This para. should be removed. Processions and demonstrations should be considered a form of "free" speech and permitted within sight of the Assembly meeting place so that members may be kept aware of, not isolated from, Namibian concerns. (See para. 16(a).)