

Notes by
A.S. - May 1987,
from memory,
before looking
at minutes of
meetings

MC411-31-1-9

Drafts for the NEC —
many members appear to have felt
that the Constitutional Principles
were too weak. I suggested 3
prototype const: (i) People's Power

(ii) Liberal - Democracy

(iii) Anti-Fascist
(post-dictatorship)

The NEC opted
— for the last
Pablo Jordan was
on a sub-committee
of the NEC on these
propositions, together with J.S.
and P.I. [Simon?]

He would know more from the inside.

These are important docs. — the ^{nearest} ~~nearest~~
anyone produced on the general conceptual
side!

Before Jan 1987, I visited Nicaragua,
I think in late 1986 or earlier, to
study their constitutional process, and,
incidentally, discovered autonomy
for ethnic minorities, and the idea
of constitutional principles.

Some Responses
of ANC Gov. Gov. to
NWC critique.

ANTI - FASCIST CONSTITUTIONS.

Anti - fascist constitutions is a term we use to group together constitutions that cannot be easily classified either with liberal democratic or with people's power type constitutions. They are relatively modern phenomenon, being associated with the overthrow of fascism in the Second World War and the destruction of fascist - type dictatorship since. Thus they would include the Constitutions of Italy and Japan and the constitutional documents of Eastern Europe, immediately after the war, the Constitution of Portugal more recently and the Constitutional proposals presently being debated in Nicaragua.

Anti - fascist constitutions vary considerably in form and content one from the other, depending on the concrete historical conditions in which they were initially adopted. But they all tend to have certain things in common.

They are drawn up by the victor after the overthrow of fascism, representing such common ground as exists in the broad anti - fascist alliance at the time. They are like liberal democratic constitutions in that they presuppose political pluralism (as opposed to fascist hegemony) and a mixed economy. They are unlike 'pure' liberal democratic constitutions in that, firstly, they expressly contain measures to prevent any revival of fascism or propagation of fascist values, secondly they expressly contain social programmes that presuppose economic and cultural renewal and thirdly, they ensure that the implementation of the Constitution is not left to the representative of the overthrown dictatorship. They fall short of being people's power type constitutions, however, in that they do not give a leading role in explicit constitutional terms to an social class or alliance of classes, nor do they attribute to any party or alliance of parties a defined vanguard position. From a constitutional point of view the nature of the state is left open.

These points are made clearer by an analysis of the Constitution adopted in Portugal after the overthrow of the dictatorship on 25 April 1974 and of the constitutional process at present under way in Nicaragua. (see annexure)

Applying these principles to the South African situation, we can draw the following conclusions:

Firstly, anti fascist constitutions are made after and not before the overthrow of fascism. We are not aware of any fascist regime that has negotiated an anti - fascist constitution. The broad anti - fascist front may, however, agree on certain constitutional principles ~~before~~ before the overthrow, which are published with a view to consolidating the anti - fascist alliance and guaranteeing to the people the right to pronounce on the kind of society they want after the overthrow of fascism. In our case, the Freedom Charter already exists, as a basic programmatic statement. Consideration could be given to converting its essential ~~essential~~ elements into simple constitutional phrases that make immediate impact and summarise our basic positions, (e.g. Unitary state; Democracy; Non - Racism; Anti -

Apartheid ; Equal Rights ; Political Pluralism ; Mixed Economy ; Redistribution of Wealth ; Transformation of the Civil Service , Police and Army ; Non - Alignment). Alternatively, or in addition we could , acting together with all patriotic forces, produce a series of statements outlining our positions in relation to certain fundamental constitutional themes. These could follow the form of a series of Charters, for example :

- Charter of Political Rights.
- Charter of Economic Rights .
- Workers Charter.
- Education Charter.
- Charter on Religious Freedom.

Such Charters would all have a democratic , anti - apartheid character, and could , taken together be incorporated as the core of a Bill of Rights in a future constitution.

Secondly, when the anti - fascist Constitution finally comes to be drawn , it must , in addition to establishing the unitary , non - racial and democratic nature of the new state be clear on three points :

- 1) No freedom to organise for the continuation or restoration of apartheid in any shape or form ;
- 2) Total reconstruction of the civil service, army and police force on democratic lines ;
- 3) Re - Distribution of Wealth (including the Land) as a Constitutional principle.

The Constitution will not be 'neutral' or open on these questions.

WE should mention that the Constitutional Outline which we drafted in fact does pay attention to these themes but in a rather subdued way.

In the light of the comments subsequently, it is clear that they should have been spelt out more forcefully.

Finally, while it appears to be premature at this stage to be taking decisions on questions like voting systems and forms of government, it is equally clear that we need to do much basic research so as to be well prepared in these areas. We need to understand the technical issues and also the political questions that lurk behind them, so as not one day to lose political advantage through seemingly technical questions.

These are themes that occupy an important place in anti - Fascist constitutions and we should seek to be in a position where we can take initiatives rather than merely respond to the initiatives of others.

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Anti-Fascist Constitutions.

(1). 1+2

Anti-fascist constitutions is a term we use to ~~define~~ ^{group together} constitutions that cannot be easily classified either with liberal democratic or with people's power type constitutions. They are a relatively modern phenomenon, being associated with the overthrow of fascism in the Second World War and the destruction of fascist-type dictatorships since. Thus they would include the ^{or constitutional documents} Constitutions of Italy and Japan and ^{the constitutional documents of} Eastern ~~Europe~~ ^{Europe} immediately after the war, ~~and~~ the Constitution of Portugal more recently and ^{presently being debated in} the Constitutional proposals ~~for~~ Nicaragua.

~~Each such constitution is a product of a particular historical process. It bears the particular marks of the particular historical process that brought it to birth.~~

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Thirdly, the Constitutional Outline which we drafted in fact ^{does} pay attention to these themes but in a rather subdued way. ~~At that~~ exploratory phase, we interpreted our

(7)

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In the light of the comments subsequently made, it is clear that they should have been spelt out more forcefully.

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technical issues and also the political questions that lurk behind ~~them~~ ^{them, so as not later} ~~to be caught by surprise~~. ~~These~~ ^{one day (to buy political advantages through seemingly} ~~one day~~ ^{technical questions. These} are themes that occupy an important place

(8).

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PEOPLE'S POWER CONSTITUTIONS

The basic difference between liberal democratic and people's power constitutions is that the former purports to be neutral on the question of who exercise powers in the state, whereas the latter take a declared constitutional position - based on class analysis - on the question. Put another way, liberal democratic constitutions presupposes that power vests in the institution of government themselves and that the essential function of the constitution is to establish the 'rules of the game' as to who holds the reins, people's power constitutions, on the other hand, confirm that power in any state belongs to classes or class alliances, which use the institutions of government as means of exercising such power.

A number of consequences flow from this distinction :

First, liberal democratic constitutions are silent on the nature of power in the state, while people's power constitution expressly legitimate a defined form of class hegemony or domination.

Secondly, liberal democratic constitutions do not ~~have~~ accord any overt recognition of political parties, while people's power constitutions expressly recognise a leading or vanguard role in relation to society as a whole and to the State apparatus in particular of an identified party or alliance of parties.

(It should be noted that the issue is not simply whether the State is One Party or Multi-Party, nor whether the Constitution institutionalise a party or not. One-Party states may be fascist, liberal capitalist or socialist. Multi-Party states as well as many conservative African States institutionalise a single party).

Thirdly, liberal democratic constitutions tend to regard the State as a necessary evil that has to be controlled through separation of powers and a Bill of Rights, while people's power constitutions regard the State as the major instrument whereby the people achieve their rights to progress and development. Thus, people's power constitutions emphasise the harmony of objectives of the three basic institutions of the constitution, namely, the legislature, the executive and the judiciary, while outlining the separate functions. Similarly, people's power constitutions, while affirming individual rights of citizens, refer also to citizens' duties or responsibilities, and indicate that these rights and duties are exercised in a context which does not permit a restoration of the overthrown power.

Fourthly, liberal democratic constitutions leave open the question of social and economic programmes, or only deal with them indirectly, for example, by consecrating the rights of private property in a Bill of Rights, while people's power constitutions expressly impose on the State a duty to fulfil a defined socio-economic-cultural programme. One consequence of this is that new Constitutions emerge in a liberal democratic state as a result of the failure of institutions, (France at the time of De Gaulle) while in a people's power state they result from their success.- the realisation of one constitutional programme requires the formulation of another.

Fifthly, liberal democratic constitutions imply that the army and other instruments of power are neutral, responding to the command only of the elected government, while people's power constitutions recognise the existence of a politicised armed forces to defend the gains of the people's struggle.

Finally, Constitutions are normally complemented by separate electoral laws, which differ considerably depending on whether the state is liberal democratic or people's power in character. While the principle of universal suffrage and secret ballot is common to both types, there are major distinctions in relation to the way candidates are selected. In addition people's power constitutions sometimes deprive persons directly implicated in crimes or policies of the overthrown regime of the right to elect or to be elected.

These are the main differences. There are a number of other constitutional variants that cannot be correlated with the existence of liberal democracy or people's power. Thus, either system might be unitary or federal (the USA and the USSR both call themselves Union but in fact from a constitutional point of view both are federations). Equally, either type may be presidential or prime ministerial. (Maurice Bishop was the first Prime Minister of Grenada, the first former British colony to follow the road of people's power).

What could the implications of a people's power constitution be for South Africa ?

It would declare that South Africa is a state of national democracy in which the formerly oppressed masses, uniting around themselves all patriotic forces, exercise power. It would institutionalise the revolutionary alliance headed by the ANC as the vanguard force in society and government.

It would impose on the state a duty to carry out a programme of social, economic and cultural transformation.

It would institutionalise changes in the judiciary, armed forces, security apparatus and civil service, putting them at the service of people's power.

It would outlaw activities designed to defeat the programme of transformation or to restore or perpetuate apartheid.

The electoral law would give the alliance headed by the ANC, working together with democratic mass organisations, a leading role in the selection of candidates.

In short, people's power establishes itself first, then proceeds to institutionalise itself. The process of institutionalisation, including the adoption of a Constitution, cannot be predicted in advance. What can be done in advance is to publish a general political programme which defined the basic goals of the post-liberation society. A people's power constitution published in the absence of people's power is virtually a contradiction in terms.

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These are the main differences. There are a number of other constitutional variants that cannot be correlated with the existence of either liberal democracy or people's power. Thus, either system might be unitary or federal (the USA and the USSR both call themselves Unions, but in fact from a constitutional point of view both are federations). Equally, either type may be presidential or prime ministerial. (Maurice Bishop was the first Prime Minister of Grenada, the first former British colony to follow the road of people's power).

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It would impose on the state a duty to carry out a programme of social, economic and cultural transformation.

It would institutionalise changes in the judiciary, armed forces, security apparatus and civil service, putting them at the service of people's power.

It would outlaw activities designed to defeat the programme of transformation or to restore or perpetuate apartheid.

The electoral law would give the alliance headed by the ANC, working together with democratic mass organisations, a leading role in the selection of candidates.

In short, people's power establishes itself first, then proceeds to institutionalise itself. the process of institutionalisation, including the adoption of a Constitution, cannot be predicted in advance. What can be done in advance is to publish a general political programme which defines the basic goals of the post-liberation society. A people's power constitution published in the absence of people's power is virtually a contradiction in terms.

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ANTI - FASCIST CONSTITUTIONAL DEVELOPMENT IN NICARAGUA.

Before spearheading the overthrow of the Somoza regime in 1979, the Sandinistas did not publish a Constitution. Infact, to this day , Nicaragua does not have a post - liberation Constitution, though discusion of a new Constitution has reached an advance stage.

The basic steps in constitutional development were as follows :

Some months after the triumph of the National Liberation struggle, the Junta of the Government of National Reconstruction published a document entitled 'Fundamental Statute and Statute on Rights and Guarantees of Nicaraguans'. The Fundamental Statute gave legal form to two major instruments of government established at this time, namely, a five - person Junta with powers to promulgate laws, a 33 person Council of State with certain veto powers. The documensnt determined the precise composition of the Council of State, in which incidentally the Sandinistas only had 6 members as opposed to 7 for the difference units of the Council of Private Enterprise. The members were to be elcted by their various organisations, but thereafter have a free vote. A new judicial system was established , Somoza National Guard and associated security organisations were dissolved and a new patriotic national army created on the basis of the Sandinistas combatants, honests and patriotic members of the National Guard , others who had fought for liberation and wished to join the army, and those who were to do national service.

The next step was the elaboration of an Electoral Law, a task which fell to the Council of State, acting in consultation with the countrries political parties and stimulating a national debate. The Council ^{sent} ~~and~~ a mixed team to visit different countries in Western Europe and Latin America in order to 'incorporate into Nicaraguan law, elements of universal tradition applicable to the reality of the country'. The Law was adopted in 1983 and electio for a President , Vice - President and 90 member National Assembly were held in November, 1984.

Finally , the National Assembly has the fñction of producing a Draft Constitution, which is expected to be adopted in January 1987, two years after the present government took offic. The above summary indicates the step by step nature of Constitutional development in the post - liberation society. What the documents themselves reveal is that the Sandinistas have managed to fulfil their guarantee of political pluralism, mixed economy and non - alignment, while at the same time maintaining their leading role in government, engaging in extensive reforms and beating off counter - revo.ution. The documents available are mainly in Spanish and contain many interesting sections, ranging from freedom of speech to land reform to the rights of national minorities - it would be advisable to attempt to find translations, summaries or commentaries in English. Although the Nicaraguan experience is not directly relevant to the South African experience , it shares a similar context , Fidel Castro pointed out :

"The front of struggle for social change has to be a broad one, including Christians, Trotskyites , workers , the middle class and also the military, don't forget them , or do

we want to hand them over to the CIA ? The front cannot be extremist. We have to find formulas like the Nicaraguan one or others. The Nicaraguan approach is well adjusted to current international circumstances. It is realistic. With regard to the way it took power, the Nicaraguan revolution is very similar to the Cuban one. But if the Nicaraguan revolution has radicalised itself and proclaimed socialism, I don't think this would have helped the revolutionary movement of Central America or South America.

"The Nicaraguans have made an important contribution to the struggle of other peoples, since, if it had become radicalised, it would have isolated itself, frightened people, given arguments to imperialism and facilitated the work of Reagan". *Cadernos do Terceiro Mundo*, August 1985.

It should be noted that in the concrete circumstances of the ongoing process of exercising State Power, negotiations by the Sandinistas with other political parties (at least six, ranging from ultra - left to conservative) is part of the pluralism they guaranteed. But it never involved negotiations with Somoza, nor does it involve negotiations with the contras today. The two guarantees against pluralism leading to counter - revolution are popular mobilisation and the fact that the Sandinistas control the armed forces; the external guarantee is the support of progressive international forces.

ANTI - FASCIST CONSTITUTIONAL DEVELOPMENT IN NICARAGUA.

Before spearheading the overthrow of the Somoza regime in 1979, the Sandinistas did not publish a Constitution. Infact, to this day , Nicaragua does not have a post - liberation Constitution, though discusion of a new Constitution has reached an advance stage.

The basic steps in constitutional development were as follows :

Some months after the triumph of the National Liberation struggle, the Junta of the Government of National Reconstruction published a document entitled 'Fundamental Statute and Stattute on Rights and Guarantees of Nicaraguans'. The Fundamental Statute gave legal form to two major instruments of government established at this time, namely, a five - person Junta with powers to promulgate laws, a 33 person Council of State with certain veto powers. The documesnt determined the precise composition of the Council of State, in which incidentally the Sandinistas only had 6 membersas opposed to 7 for the difference units of the Council of Pivate Enterprise. The members were to be elcted by their various organisations, but thereafter have a free vote. A new judicial system was established , Somoza National Guard and associated security organisations were dissolved and a new patriotic national army created on the basis of the Sandinistas combatants, honests and patriotic members of the National Guard , others who had fought for liberation and wished to join the army, and those who were to do national service.

The next step was the elaboration of an Electoral Law, a task which fell to the Council of State, acting in consultation with the countrries political parties and stimulating a national debate. The Council ^{sent} ~~was~~ a mixed team to visit different countries in Western Europe and Latin America in order to 'incorporate into Nicaraguan law, elements of universal tradition applicable to the reality of the country'. The Law was adopted in 1983 and election for a President , Vice - President and 90 member National Assembly were held in November, 1984.

Finally , the National Assembly has the fñction of producing a Draft Constitution, which is expected to be adopted in January 1987, two years after the present government took office. The above summary indicates the step by step nature of Constitutional development in the post - liberation society. What the documents themselves reveal is that the Sandinistas have managed to fulfil their guarantee of political pluralism, mixed economy and non - alignment, while at the same time maintaining their leading role in government, engaging in extensive reforms and beating off counter - revo.ution. The documents available are mainly in Spanish and contain many interesting sections, ranging from freedom of speech to land reform to the rights of national minorities - it would be advisable to attempt to find translations, summaries or commentaries in English. Although the Nicaraguan experience is not directly relevant to the South African experience , it shares a similar context , Fidel Castro pointed out :

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It should be noted that in the concrete circumstances of the ongoing process of exercising State Power, negotiations by the Sandinistas with other political parties (at least six, ranging from ultra - left to conservative) is part of the pluralism they guaranteed. But it never involved negotiations with Somoza, nor does it involve negotiations with the contras today. The two guarantees against pluralism leading to counter - revolution are popular mobilisation and the fact that the Sandinistas control the armed forces; the external guarantee is the support of progressive international forces.

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~~Anti-Fascist~~

①. 1+2

Anti-Fascist Constitutional Development in Nicaragua.

The anti-Somoza popular insurrection led by the Sandinistas finally succeeded in destroying Somozaist power in 1979.

Before spearheading the overthrow of the Somoza regime in 1979, the Sandinistas did not publish a Constitution. In fact, to this day, Nicaragua does not have a post-~~revolutionary~~^{liberation} Constitution, though discussion of a new Constitution has reached an advanced stage.

The basic steps in constitutional development were as follows:

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Immediately after the triumph of the National Liberation struggle, ~~revolution~~, the Junta of the Government of National Reconstruction published a document entitled 'Fundamental Statute and

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~~Council of State~~ ^{precise} composition of the Council
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the National Guard, ~~the~~ other who had ^③ fought for liberation and wished to join the army, and those who were to do national service.

The next step was the elaboration of an ~~the~~ Electoral Law, a task which fell to the Council of State, acting in consultation with the country's political parties and ^{stimulating} ~~promoting~~ a national debate. The Council sent a mixed team to visit different countries in Western Europe and Latin America in order to 'incorporate into Nicaraguan law, elements of universal tradition applicable to the ~~reality~~ reality of the country.' The Law was adopted in 1983 and elections for a President, Vice-President and 90 member National Assembly were held in ^{November} 1984.

Finally, the National Assembly has the function of producing a Draft Constitution, which is expected to be adopted in January 1987, two years after the present government took office.

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The above summary indicates the step by step nature of ~~the~~ Constitutional development in the post-liberation society. What the documents themselves reveal is that the Sandinistas have managed to fulfil their guarantees of political pluralism, mixed economy and non-alignment, while at the same time maintaining their leading role in government, engaging in ~~revolutionary~~ extensive reforms and beating off ^{available} counter-revolution. The documents ^{are} mainly ^{interesting} in Spanish and contain many ^{(sections ranging from} freedom of speech to land reform to the rights of national minorities - ^{at} it would be advisable to attempt to find translations, summaries or commentaries in English. ~~Finally, the~~ Although the Nicaraguan experience is not directly relevant to the South African experience, it shares a similar context, as Fidel Castro pointed out:

"The front of struggle for social change has to be a broad one, including Christians, Trotskyites, workers, the middle class and also the military, don't forget them, or do

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The front cannot be extremist. We have to find formulas like the Nicaraguan one, or others. The Nicaraguan approach is well adjusted to current international circumstances. It is realistic. With regards to the way it took power, the Nicaraguan revolution is very similar to the Cuban one. But if the Nicaraguan revolution had radicalised itself and proclaimed socialism, I don't think this would have helped the revolutionary movement of Central America or South America.

"The Nicaraguans have made an important contribution to the struggle of other peoples, since, if it had ^{become} radicalised ~~itself~~, it would have isolated itself, ^{frightened people,} ~~induced fear,~~ ^{and} given arguments to imperialism and facilitated the work of Reagan." Cademor do Terceiro Mundo, August 1985. ^{(exercising State power,}

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