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CONSTITUTIONAL ASSEMBLY

SUBCOMMITTEE 2

**THURSDAY
26 SEPTEMBER 1996**

G26

DOCUMENTATION

CONSTITUTIONAL ASSEMBLY

SUBCOMMITTEE 2

NOTICE OF MEETING

Please note that a meeting of Subcommittee 2 will take place as indicated below:

Date : Thursday, 26 September 1996

Time : 10:00

Venue : G26

Please note that there has been a change of venue

Documentation

1. Minutes (pages 1-3)
2. Constitutional Principles (pages 4-7)
3. Work programme (page 8)
4. Overview of issues requiring attention for certification (pages 9-10)

**Hassen Ebrahim
Executive Director**

CONSTITUTIONAL ASSEMBLY
MINUTES OF THE FIRST MEETING OF SUBCOMMITTEE 2
WEDNESDAY, 25 SEPTEMBER 1996

PRESENT

Gordhan, PJ (Chairperson)

Ackermann C	Alant TG
Bhabha M	De Lange J
Du Toit DC	Groenewald PJ
Hogan B	Groenewald PH
Marais P	Meshoe K
Rabie JA	Selfe J
Watson W	

Apologies: Fourie A, King T, Malatsi D, Maree J, Moosa V, van Breda A

Advisors: Grove G, Haysom N, Murray C and Yacoob Z

Minutes: McKenzie K

1 OPENING

The meeting began at 11:55 and Mr Gordhan was elected as Chairperson.

It was agreed that the work programme contained in the documentation for the meeting would be adhered to. The NP stated that they would co-operate in completing the subcommittee's work by 7 October but said that this date should not be set in stone.

It was agreed that the committee would adopt a flexible approach to its work dividing into further committees if necessary, taking into account the constraints of smaller parties.

2 OVERVIEW OF THE JUDGMENT OF THE CONSTITUTIONAL COURT

Prof Haysom outlined aspects of the Constitutional Court's judgment and spoke to the draft changes prepared by the technical advisors and contained in the documentation for the meeting:

2.1 Constitutional Amendments (section 74)

Prof Haysom explained that in approaching these formulations the technical advisors had taken their lead from the judgment which noted that there was no provision for special procedures in effecting constitutional amendments.

A provision prohibiting constitutional amendments during a state of emergency was suggested to ensure that during times of crises there would be no temptation to make constitutional amendments which might suspend the democratic process, particularly as provision for states of emergency was made in the bill of rights.

It was noted that there were different perspectives on the role of the joint committee to review the constitution, contained in section 45 of the new text. The procedural role of this committee in commenting on constitutional amendments required further discussion.

2.2 Override clause (section 146)

Prof Haysom stressed that amending section 146, which deals with conflicts between national and provincial legislation, was one of the ways in which the Court's judgment regarding provincial powers could be addressed. The Court had indicated that the new text would comply with the Constitutional Principles if this section was amended.

The NP stated that they believed there were a number of instances in which provincial powers had been diminished and that most, if not all of these, should be addressed by the Assembly in order to ensure compliance with the Constitutional Principles.

2.3 Local government (chapter 7)

The Court's objection to this chapter centred around what had been omitted from the new text. In interpreting the judgment four areas required further attention namely:

- i. The structure of local government, variously referred to by the Court as the typology, category and framework for local government.
- ii. Procedures for passing by-laws.
- iii. How decisions are taken by municipal councils.
- iv. Financial and fiscal powers.

It was noted that there was some confusion surrounding the terminology used. It was suggested that the technical advisors develop a document on terminology in order to ensure that terms had the same meanings in different contexts.

2.4 Excise taxes (section 229)

It was noted that the word "selective", used in the proposed draft text contained in the documentation, was not clear and that a definition was required.

It was agreed that Dr Alant and Ms Hogan would look at section 229 and draw up proposals in consultation with other parties.

3 CLOSURE

The meeting closed at 12:45.

It was agreed that the members would reconvene on Thursday 26 September 1996 at 10:00 and that the time set aside for the meeting of Friday 27 September would be assessed.

CONSTITUTION OF THE REPUBLIC OF SOUTH AFRICA, 1993

SCHEDULE 4

Constitutional Principles

I

The Constitution of South Africa shall provide for the establishment of one sovereign state, a common South African citizenship and a democratic system of government committed to achieving equality between men and women and people of all races.

II

Everyone shall enjoy all universally accepted fundamental rights, freedoms and civil liberties, which shall be provided for and protected by entrenched and justiciable provisions in the Constitution, which shall be drafted after having given due consideration to *inter alia* the fundamental rights contained in Chapter 3 of this Constitution.

III

The Constitution shall prohibit racial, gender and all other forms of discrimination and shall promote racial and gender equality and national unity.

IV

The Constitution shall be the supreme law of the land. It shall be binding on all organs of state at all levels of government.

V

The legal system shall ensure the equality of all before the law and an equitable legal process. Equality before the law includes laws, programmes or activities that have as their object the amelioration of the conditions of the disadvantaged, including those disadvantaged on the grounds of race, colour or gender.

VI

There shall be a separation of powers between the legislature, executive and judiciary, with appropriate checks and balances to ensure accountability, responsiveness and openness.

VII

The judiciary shall be appropriately qualified, independent and impartial and shall have the power and jurisdiction to safeguard and enforce the Constitution and all fundamental rights.

VIII

There shall be representative government embracing multi-party democracy, regular elections, universal adult suffrage, a common voters' roll, and, in general, proportional representation.

IX

Provision shall be made for freedom of information so that there can be open and accountable administration at all levels of government.

X

Formal legislative procedures shall be adhered to by legislative organs at all levels of government.

XI

The diversity of language and culture shall be acknowledged and protected, and conditions for their promotion shall be encouraged.

XII

Collective rights of self-determination in forming, joining and maintaining organs of civil society, including linguistic, cultural and religious associations, shall, on the basis of non-discrimination and free association, be recognised and protected.

XIII

1. The institution, status and role of traditional leadership, according to indigenous law, shall be recognised and protected in the Constitution. Indigenous law, like common law, shall be recognised and applied by the courts, subject to the fundamental rights contained in the Constitution and to legislation dealing specifically therewith.

2. Provisions in a provincial constitution relating to the institution, role, authority and status of a traditional monarch shall be recognised and protected in the Constitution.

[Constitutional Principle XIII substituted by sec 2 of Act 3 of 1994.]

CONSTITUTION OF THE REPUBLIC OF SOUTH AFRICA, 1993

XIV

Provision shall be made for participation of minority political parties in the legislative process in a manner consistent with democracy.

XV

Amendments to the Constitution shall require special procedures involving special majorities.

XVI

Government shall be structured at national, provincial and local levels.

XVII

At each level of government there shall be democratic representation. This principle shall not derogate from the provisions of Principle XIII.

XVIII

1. The powers and functions of the national government and provincial governments and the boundaries of the provinces shall be defined in the Constitution.

2. The powers and functions of the provinces defined in the Constitution, including the competence of a provincial legislature to adopt a constitution for its province, shall not be substantially less than or substantially inferior to those provided for in this Constitution.

3. The boundaries of the provinces shall be the same as those established in terms of this Constitution.

4. Amendments to the Constitution which alter the powers, boundaries, functions or institutions of provinces shall in addition to any other procedures specified in the Constitution for constitutional amendments, require the approval of a special majority of the legislatures of the provinces, alternatively, if there is such a chamber, a two-thirds majority of a chamber of Parliament composed of provincial representatives, and if the amendment concerns specific provinces only, the approval of the legislatures of such provinces will also be needed.

5. Provision shall be made for obtaining the views of a provincial legislature concerning all constitutional amendments regarding its powers, boundaries and functions.

[Principle XVIII substituted by sec 13(a) of Act 2 of 1994.]

XIX

The powers and functions at the national and provincial levels of government shall include exclusive and concurrent powers as well as the power to perform functions for other levels of government on an agency or delegation basis.

XX

Each level of government shall have appropriate and adequate legislative and executive powers and functions that will enable each level to function effectively. The allocation of powers between different levels of government shall be made on a basis which is conducive to financial viability at each level of government and to effective public administration, and which recognises the need for and promotes national unity and legitimate provincial autonomy and acknowledges cultural diversity.

XXI

The following criteria shall be applied in the allocation of powers to the national government and the provincial governments:

1. The level at which decisions can be taken most effectively in respect of the quality and rendering of services, shall be the level responsible and accountable for the quality and the rendering of the services, and such level shall accordingly be empowered by the Constitution to do so.

2. Where it is necessary for the maintenance of essential national standards, for the establishment of minimum standards required for the rendering of services, the maintenance of economic unity, the maintenance of national security or the prevention of unreasonable action taken by one province which is prejudicial to the interests of another province or the country as a whole, the Constitution shall empower the national government to intervene through legislation or such other steps as may be defined in the Constitution.

3. Where there is necessity for South Africa to speak with one voice, or to act as a single entity — in particular in relation to other states — powers should be allocated to the national government.

CONSTITUTION OF THE REPUBLIC OF SOUTH AFRICA, 1993

4. Where uniformity across the nation is required for a particular function, the legislative power over that function should be allocated predominantly, if not wholly, to the national government.

5. The determination of national economic policies, and the power to promote interprovincial commerce and to protect the common market in respect of the mobility of goods, services, capital and labour, should be allocated to the national government.

6. Provincial governments shall have powers, either exclusively or concurrently with the national government, *inter alia* —

(a) for the purposes of provincial planning and development and the rendering of services; and

(b) in respect of aspects of government dealing with specific socio-economic and cultural needs and the general well-being of the inhabitants of the province.

7. Where mutual co-operation is essential or desirable or where it is required to guarantee equality of opportunity or access to a government service, the powers should be allocated concurrently to the national government and the provincial governments.

8. The Constitution shall specify how powers which are not specifically allocated in the Constitution to the national government or to a provincial government, shall be dealt with as necessary ancillary powers pertaining to the powers and functions allocated either to the national government or provincial governments.

XXII

The national government shall not exercise its powers (exclusive or concurrent) so as to encroach upon the geographical, functional or institutional integrity of the provinces.

XXIII

In the event of a dispute concerning the legislative powers allocated by the Constitution concurrently to the national government and provincial governments which cannot be resolved by a court on a construction of the Constitution, precedence shall be given to the legislative powers of the national government.

XXIV

A framework for local government powers, functions and structures shall be set out in the Constitution. The comprehensive powers, functions and other features of local government shall be set out in parliamentary statutes or in provincial legislation or in both.

XXV

The national government and provincial governments shall have fiscal powers and functions which will be defined in the Constitution. The framework for local government referred to in Principle XXIV shall make provision for appropriate fiscal powers and functions for different categories of local government.

XXVI

Each level of government shall have a constitutional right to an equitable share of revenue collected nationally so as to ensure that provinces and local governments are able to provide basic services and execute the functions allocated to them.

XXVII

A Financial and Fiscal Commission, in which each province shall be represented, shall recommend equitable fiscal and financial allocations to the provincial and local governments from revenue collected nationally, after taking into account the national interest, economic disparities between the provinces as well as the population and developmental needs, administrative responsibilities and other legitimate interests of each of the provinces.

XXVIII

Notwithstanding the provisions of Principle XII, the right of employers and employees to join and form employer organisations and trade unions and to engage in collective bargaining shall be recognised and protected. Provision shall be made that every person shall have the right to fair labour practices.

XXIX

The independence and impartiality of a Public Service Commission, a Reserve Bank, an Auditor-General and a Public Protector shall be provided for and safeguarded by the Constitution in the interests of the maintenance of effective public finance and administration and a high standard of professional ethics in the public service.

CONSTITUTION OF THE REPUBLIC OF SOUTH AFRICA, 1993

XXX

1. There shall be an efficient, non-partisan, career-orientated public service broadly representative of the South African community, functioning on a basis of fairness and which shall serve all members of the public in an unbiased and impartial manner, and shall, in the exercise of its powers and in compliance with its duties, loyally execute the lawful policies of the government of the day in the performance of its administrative functions. The structures and functioning of the public service, as well as the terms and conditions of service of its members, shall be regulated by law.

2. Every member of the public service shall be entitled to a fair pension.

XXXI

Every member of the security forces (police, military and intelligence), and the security forces as a whole, shall be required to perform their functions and exercise their powers in the national interest and shall be prohibited from furthering or prejudicing party political interest.

XXXII

The Constitution shall provide that until 30 April 1999 the national executive shall be composed and shall function substantially in the manner provided for in Chapter 6 of this Constitution.

XXXIII

The Constitution shall provide that, unless Parliament is dissolved on account of its passing a vote of no-confidence in the Cabinet, no national election shall be held before 30 April 1999.

XXXIV

1. This Schedule and the recognition therein of the right of the South African people as a whole to self-determination, shall not be construed as precluding, within the framework of the said right, constitutional provision for a notion of the right to self-determination by any community sharing a common cultural and language heritage, whether in a territorial entity within the Republic or in any other recognised way.

2. The Constitution may give expression to any particular form of self-determination provided there is substantial proven support within the community concerned for such a form of self-determination.

3. If a territorial entity referred to in paragraph 1 is established in terms of this Constitution before the new constitutional text is adopted, the new Constitution shall entrench the continuation of such territorial entity, including its structures, powers and functions.

[Principle XXXIV inserted by sec 13(b) of Act 2 of 1994.]

CONSTITUTIONAL ASSEMBLY PROGRAMME - 1996 SEPTEMBER

MON	TUES	WED	THURS	FRI	SAT	SUN
23	24	25 <i>10:00</i> Meet in <i>OAC</i> <i>10:30 - 16:00</i> Break up into Sub Committees <i>V16 & G26</i>	26 <i>10:00 - 16:00</i> SC 1 - <i>V16</i> SC 2 - <i>G26</i>	27 <i>10:00 - 16:00</i> SC 1 - <i>V16</i> SC 2 - <i>G26</i>	28	29
30 <i>10:00 - 16:00</i> SC 1 - <i>V16</i> SC 2 - <i>G26</i>						

OCTOBER

8

MON	TUES	WED	THURS	FRI	SAT	SUN
	1 <i>10:00 - 18:00</i> SC 1 - <i>V16</i> SC 2 - <i>G26</i>	2 <i>10:00 - 18:00</i> SC 1 - <i>V16</i> SC 2 - <i>G26</i>	3 <i>8:00 - 10:00</i> MC <i>V16</i> <i>10 - 13:00</i> Caucus <i>14:30 - 18:00</i> SC 1 - <i>V16</i> SC 2 - <i>Venue to confirm</i>	4 <i>Technical Refinement</i>	5	6
7 <i>8 - 10:00</i> Caucus <i>10:00 - 16:00</i> OAC Constitutional Committee	8 <i>10:00 - 16:00</i> SC 1 - <i>V16</i> SC 2 - <i>venue to confirm</i>	9 <i>10:00 - 16:00</i> SC 1 - <i>V16</i> SC 2 - <i>G26</i>	10 <i>8:00 - 10:00</i> MC <i>V16</i> <i>10 - 13:00</i> Caucus <i>14:30 - 18:00</i> SC 1 - <i>V16</i> SC 2 - <i>G26</i>	11 <i>10:00 - 16:00</i> Constitutional Assembly	12	13

- Overview of Issues Requiring attention for Certification -

(To be read with accompanying opinion)

Sub Committee 1

No	Sec	Issues	CP's	Judgement	Proposal
1	23(3)	Collective Bargaining	28	[69] Individual employers rights to collective bargaining to be secured.	Draft option 3 recommended. Political approval is required.
2	37(5)	State of Emergency	2	[95] It is desirable that a distinction be drawn between derogable and non-derogable rights in a more thoughtful and rational way. With particular reference to making section 35(5) non-derogable.	This is a matter which requires technical reformulation and political approval.
3	249 & Sch 6 22	Immunisation of LRA & TRC		[149/ 150] The constitution should not shield provisions in legislation from constitutional review.	The deletion of section 241 and section 22(1)(b) of schedule 6 is recommended.
4	196		20	<u>Public Service Commission</u> [170 - 177, 275 - 278, 298, 390] The Court has no complaint with a single Public Service Commission or a single civil service. However, its powers and functions which have not been sufficiently spelt out, must be so spelt out in a way that does not compromise provincial autonomy in the appointment and staffing of its administration - even if subject to national norms and standard. In addition, in elaborating on its powers and functions, the text must also more clearly provide for the protection of its independence and impartiality.	Parties to consider their views on the powers and functions of the PSC and the provincial role in appointing and staffing their administration.
5	194	Public Protector & Auditor General	19	[163 - 165] The Court argues that measures more stringent than an ordinary majority of the National Assembly should be required to remove the two office-bearers for them to be truly independent.	Parties to consider their views on the measures required for removal. In the meantime, a mandate is required to prepare draft formulations for political consideration.

Sub Committee 2

No	Sec	Issues	CP's	Judgement	Proposal
1	74	Amendment of Constitution	15	[153 - 156] Amendments of the constitution should require special procedures in addition to the special majority that they presently require. These could be done by way of: (1) involving both houses in the amendment procedure; (2) giving proper notice periods; (3) allowing extra time for a reflection on the proposed amendment.	Parties to consider their views on (1) what the special procedures should entail; (2) the entrenchment of the Bill of Rights. In the meantime, a man-

No	Sec	Issues	CP's	Judgement	Proposal
			2	[158] The Bill of Rights must be entrenched. Amendments to it should either require greater majorities than ordinary amendments, or the involvement of both houses, or some additional mechanism <u>not</u> otherwise required for ordinary constitutional amendments.	date is required to prepare draft formulations for political consideration.
2	146 206	Provincial powers Provincial powers (continued)	18(2) 17	<p><u>Overrides</u> [477 - 481] The ability of the National Assembly to override provincial legislation comes at the expense of Provincial powers. Together with weaker provincial powers viz. Police; (2) local government and (3) Traditional leaders, equals a substantial diminution of provincial powers. In other words, a diminution compounded by increased override powers [146 (4) & (2)(b)] which was not substantial. If the override provisions are not amended, other diminutions identified could be examined or re-examined anyway even if not strictly necessary.</p> <p><u>Police</u> [394 - 400] Provincial power relating to police were diminished - (1) in their ability to issue directions to Provincial Commissioners; (2) approve or veto Provincial Commissioners' appointments; and (3) instituting legal proceedings against provincial commissioners.</p> <p>Provinces powers to determine the remuneration of traditional leaders have been made subject to a national framework and their concurrent powers over training colleges have been removed.</p>	Parties to consider their views on the issues raised by the Court. In the meantime, a mandate is required to prepare draft formulations for political consideration.
3	Ch 7 155	Local Government	24, 25 & 10	<p>[301/302/364] CP 24 requires a framework for local government must be set out in the text. This framework must set out a framework of different categories of Local Government that can be established by Provinces and make provision for appropriate fiscal powers and functions for the different categories of local government. The framework must convey an overall structural design within which local government structures are to function and provinces are entitled to exercise their establishment powers. Included in such a framework, it must at the very least be an indication as to (a) how local government executives should be appointed; (b) how it should take its decisions; and (c) what its formal legislative procedures should be (as required by CP 10).</p> <p>[303] Remove power or impose excise taxes in section 229.</p>	Parties to consider their views on: (1) the framework for LG; (2) the different categories of LG that can be established by provinces; (3) the structural design of these LG structures; (4) their fiscal powers and functions; (5) how decisions should be made; (6) its formal legislative procedures; and, (7) the appointment of LG executives. In the meantime, a mandate is required to prepare draft formulations for political consideration.

CONSTITUTIONAL ASSEMBLY

SUBCOMMITTEE 2

NOTICE OF MEETING

Please note that a meeting of Subcommittee 2 will take place as indicated below:

Date : Friday, 27 September 1996

Time : 10:00

Venue : G26

Agenda

- 1 **Opening and welcome**
- 2 **Minutes** (pages 1-3)
- 3 **Constitutional amendments** (page 4-5)
 - 3.1 Overall procedure
 - 3.2 Entrenching the bill of rights
- 4 **Provincial powers** (page 6-7)
 - 4.1 Overrides : 146(2)(b)
 - 4.2 Presumptions : 146(4)
 - 4.3 Other
- 5 **Any other business**
- 6 **Closure**

Hassen Ebrahim
Executive Director

