

CONSTITUTIONAL ASSEMBLY

THEME COMMITTEE 3

**RELATIONSHIP BETWEEN
LEVELS OF GOVERNMENT**

**COMMISSION ON PROVINCIAL
GOVERNMENT**

**INPUT BY
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COMMISSION ON LOCAL GOVERNMENT

This draft copy as far as possible reflects Mr Botha's words.

I wish to thank the members of this Theme Committee for allowing me this short intervention on the work of the Commission. We have been looking forward to this opportunity because we feel that there are a number of overlaps between the work we do and the work that the Theme Committees, especially this Theme Committee, is doing.

We have been interacting with the Management Committee. We have had some meetings with the Chairperson and Deputy Chairperson of the Constitutional Assembly to discuss the structure of our work and how we are going to interact with the CA.

First of all I think that is import to briefly explain what the Commission is all about and what is does. The work of the Commission is in two parts.

One deals with the transitional arrangements assisting to set up the Administrations of the nine Provinces. It deals with the setting up of structures, division of assets, rationalisation of legislation and personnel, and where the needs arises it deals with the division of resources both human and financial between National and Provincial.

Perhaps the one level of the work of the Commission on the Constitutional side it is responsible for the drafting of a Constitutional text on the Provincial dispensations. It is expected that it would submit that text to the CA after it has been commented upon by the Provincial Governments. It is important to note that the Provincial Governments are not defined narrowly only to mean the executives of the Provinces. It is defined in its broad sense to include the legislatures.

We have had a number of discussions with the Provinces and with the Speakers. We attended a meeting of the Speakers late last year in Bishu where all the Speakers of the Provincial Legislatures were discussing how they are going to be involved themselves in the discussion of the Constitution among other things. It became clear there is no structured way in which the Provinces are going to deal with the Constitution. Some Provinces have established the Committees within their Legislatures dealing with the Constitution. But not all Provinces have got those committees.

The question that we are faced with is that if we are to make our submissions for comment to those committees that do not represent the Government in terms of the way in which the Constitution is structured. So we have to ask the Provinces to explain to us how they are going to giver comments which would carry the mandate of the Constitution, namely that these would be regarded as comments coming from the Governments of the Provinces.

It became clear that there were no structures and the Provinces themselves were not clear. A suggestion that we put forward, although we have not put it forward formally to all the Provinces, but to some of the Speakers, was that they should follow the methods that are followed by the CA. That is transform themselves as

a Legislature into a Constitution discussion body when they are dealing with Constitutional matters. After all many of the Legislatures are not big bodies. They can form themselves into Committees if they want to divide themselves. But when they want to discuss broadly they can discuss this in the larger body of 80 or less than that in some of the Legislatures. That seems to be generally accepted at least from those Speakers I have spoken to. But that is not yet formalised. We were hoping that from the side of the CA the same sort of message would be communicated to the Provinces so that there is one structure that we would all use. When we receive inputs we would know that those inputs would be coming from that body and when we make our submissions we would refer those submissions to that body.

Presently we are busy developing a document that we are going to send out. At the beginning we were uncertain about how to set the process in motion. Whether we should start by inviting submissions from the Provinces or whether we should draft a document to guide the discussion so that the submissions are following the format of the document that we have drafted. We realise that if we just ask for general submissions we will end up with a lot of submissions and it will be very difficult to know where we begin or act. We therefore followed the latter route namely that we would draw up a framework document which is going to stick fairly closely to the Constitutional Principles.

What we have then done is look at the issues. We started by defining issues as contentious and non-contentious. We later decided to remove contentious and non-contentious and just put issues. But we have told ourselves in our minds that are certain issues which are contentious. That guided us in selecting the issues. We have listed a number of issues in this document and in listing those issues we state what the Constitutional Principal says around those, just in summary form and then pose a number of questions which would lead us to develop, or those who are discussing that document to come up with possible options.

For example, in the Senate there are all sorts of issues that are arising about the structure of the Senate, how it relates to the Provinces, how it is elected, who does it represent and so forth. It posed questions such as 'Should a Senate represent the Executive of the Province or the Provincial Legislature or should it represent the constituencies?' And then people would discuss that along those line so that they would then give some indication of what they opting for or what they favour.

Same thing with the Executives. We posed questions such as 'There are different types of Executives - which type of Executive in the Provinces are we going to be going for?'

I am just giving these as illustrations of the way in which we are going about the first draft of the document. Then we are hoping that we would get inputs from the Provinces. That document is also going to be released beyond the Provinces. Anybody who wants to comment on it and submit will submit including the Theme Committees.

What we had done before that, we had invited through the Government Gazettes of all the Provinces, comments and submissions. We have received some

submissions but the response was not overwhelming. Some of the responses has nothing to do with the Constitution - they were dealing with the transitional issues. We have been going through the submissions and selecting what is Constitutional and what is administrative.

Once we have received those submissions we are going to start drafting what we refer to as a 'lay persons draft' - again not in the form of a strictly Constitutional text. We will try to draft a document which will be fairly close to what we will end up with, again in an unfinished manner, and then release that and especially discuss that with the Provinces. We will have in between a number of Think-tanks and workshops. I think we have given a document to the Secretariat to circulate to the members of the Committee so as to look at our timeframes and how we are going to go about doing our job.

We have a Core Group which you can think of as our Technical Committee which involves political scientists, economists, lawyers and so forth. The group consists of 12-15 people, not more than that. This group is brainstorming some of these inputs and processing the documents as they come in. But I must emphasise the point that we are not simply receiving the document and just grouping items - we have to submit a text to the CA as the Constitution requires.

The way we have gone about it is that we don't want to be prescriptive. We will develop a minimum of three options on each topic. We would obviously argue for one of those options and state reasons why we favour such an option. As we receive submissions from the different Provinces and other players we are hoping to exchange that information with this TC and other TC's that overlap. So that what happens here is also informing what we are doing in our Commission and vice versa. Our intention is that we should exchange information. As we draft we would have rough sketchers of the areas - if its a Senate we would submit to you the rough draft of the document that we are busy working on so that you could look at it and you may want to incorporate it into your own submission.

We would like to get some of those documents that your are receiving in terms of information, or submissions so that we can take on board some of the options that are emerging.

That is the approach that we would like to follow. The only problem that we are faced with at the moment is that your time-frames are much tighter than ours. Or should I say the time-frames of the CA do not give us sufficient time to actually go through the discussion process with the Provinces. Therefor if we have to make submission to the TC by June we would not have had the time to go through thorough discussions which would enable us to have a Constitutional text for submission to the CA.

We then prepared ourselves to make our first rough draft submission which is close to what we would submit by August. So we go beyond the time you have, because we have to draft not just collate information and process the data. That presents us with a problem in that in August if the CA wants to release a draft it may have to append to that draft our draft submission as well. We have not yet discussed whether at that time we would have had enough time to incorporate it

into the main text, whether our submission would go as an appendix.

That in a nutshell is the way we are going about our work

QUESTIONS

Mr Smith You mentioned that the CPG would provide three possible options and then you would make a possible recommendation on the one allowing the other two, as options, to be perused. Does that refer simply to the draft report or to the text itself? In other words, will there be three versions of the Constitutional text with your recommendation or just three versions in layman's language plus one text?

Mr Botha In fact the last point you are making is the intention. We would not do a detailed text on all three options. The other two would be written in a lay-persons language. We would write only the one that we opt for in the legal sense.

Dr Rabinowitz I would like to know what basis the 15 members of the Core Group were selected?

Mr Botha What we did was to look around and ask some organisations to give us names of people - we did it randomly, let me put it that way. There was no systematic way of doing it. We drew in people whom we know and of course in so doing although you will know the sensitivity of the work we are supposed to be not above what is above being discussed by parties, but yet be much more objective and not be influenced by the trends of the political parties. In selecting people we also tried to get experts, academics, and what have you who are also belonging broadly speaking to a variety of schools of thought. I don't want to say they are aligned to political parties but we have taken that on board in drawing people.

Mr Smith The issue of preparing a text for submission to the CA after it has been commented on by the Provinces - when you say after comment by the Provinces, does this amount to *in consultation with* or *after consultation with*, or are you entirely autonomous in terms of whether you choose to accept what the Provinces suggest as proposals? Is there any obligation to take on board what the Provinces put forward if they do so for example collectively?

Mr Botha The Constitution doesn't use the word 'after' or 'in' consultation with in respect to this. I am not sure of the exact formulation. However it amounts to that whatever submission that we make must take on board the submissions of the Provinces. But obviously as you know how complex this issue is, it is very difficult if at the end of the day we have got to

submit an independent, technically objective submission to the CA, we will have to take those on board at the end of the day we have got to present something that we can defend. So what will do in taking on board these we will accommodate some of these into these options and we will argue why we think a particular option is not workable. So that at the end of the day we are going to present a viewpoint that comes from the Commission which will have taken on board. Obviously if there are 5,6 or 7 different options we won't take all them.

Dr Rabinowitz

Coming back to what Mr Gordan said before Mr Botha started to speak I mentioned that we should use a framework which would be based on the one that we have already used for our submissions in reports. I am suggesting that we should have some consistency between our framework and your framework and the framework the Secretariat uses to stipulate the submissions that come from the public. As Mr Botha says it is going to be a very complex and confusing procedure if we want to integrate all our inputs. As I say I don't know if this is the final one but I am suggesting we use the same framework. I am interest to know what framework would they need for the drafting of their submissions of the issues.

Mr Botha

The framework that our administrative staff and the Secretariat (CA) have been looking at are very close to each other. There is no major disparity. The topics and the sequence are fairly close - there may be slight differences in terms of the order of things. Our list may not be exhaustive. We have said that if there are new issues which come up these will be added and we can reorder the document as we draft it later on.

Ms de Lille

I think we need to look at Mr Gordon's proposal as how are we going to organise ourselves now that we have had the overview from Mr Botha. I am not sure whether we are going to do that in this TC because what we have to keep in mind also is the recommendation by the MC that the first block as recommended by them must be followed. Thereafter we can start changing our programme but this and next week we have to complete what is recommended. How do we deal with Mr Gordons proposal? Are we going to refer that to the CG to come up with a proposal and bring it back to the TC or are we going to discuss it now?

Mr Smith

I am not sure as your question refers to two things - organising our work and secondly organising our work in terms of the CPG. It seems that if their text will only be submitted in August at the earliest, the only way I can think that we could liaise in the interim in a constructive fashion would be if we were aware of for example of the initial draft that is going out to the Provinces concerning the issues. Perhaps if we were a

little more aware of the process from now until August it would help us to see to what extent there is an overlap that could allow us to structure things to fit it. It seems that if we have one report and then the Provinces are getting together and having a series of meetings month after month until we end up with these options I don't know how we get involved in that process or how we structure ourselves to fit it. Maybe there isn't a necessity to do so. We might have to accept at the end of the day that there is two parallel processes and we simply feed each other information out apposed to structuring work together.

Ms de Lille

We will receive and collate submissions. The actual debate will take place in the CC and they are expected to deliver a Constitutional text by August. As the TC we are the group that must link up and work closer with the Commission because we are not going to present the final draft.

Mbasa

The TC and the CPG are both receiving submissions - is there a way that we could have access to the CPG's submissions?

Mr Botha

The intention of the co-operation with the TC is precisely to exchange information. There may be reports or submissions that we will receive that you may not receive, or papers as referred to by Mr Gordan as other documents. It may be that we interact with other bodies, international experts and so forth. We are also commissioning people to write papers on specific themes to give us an international perspective on certain issues. We will exchange those documents with yourselves and we would expect the same from your side. But also if you go and hear evidence from the other Provinces, especially if we are dealing with the Government, we may be able to co-ordinate that. Especially with regard to the first block which appears to follow very closely ours.

Secondly although we are saying we would have a fairly complete text by August, in the interim we will start drafting section by section which follow those blocks. Therefore we would want to interact with yourselves so that what you collate might also take on board some of the preliminary ideas that are emerging from the documents that we are getting. We will have section by section in a lay persons draft, not the final text. We will revisit whatever we have to to agree here to do that. We will be refining the draft beyond June.

Dr Rabinowitz

I suggest that if we think the CPG has an important role to play, and they are at the very heart of the issue we are grappling with, and to ask them to do work that cannot relate to relate to ourselves because we have a time issue and a process issue and more important a substantive issue - it is

defeatist and counter-productive. Therefore I would to say at the outset that we organise parallel time schedule and if necessary move our date from June to August and move forward constructively.

Mr Gordhan

I think that we must be careful conflate the TC with the CA as a whole. The principle relationship with the CPG is with the CA not with the TC. The discussions that we are having are not limited to the TC itself. Very soon some of these issues as the first reports appear from the TC's in respect of the blocks, the debates will take place in the CC and then in the CA as well. By next week we will have received the document that Mr Botha speaks about that sets out their timeframes. I think we would be more interested in understanding the substantive issues that the CPG is looking at rather than the process issues that we have talked about. The sooner we have access to for example one of the topics on which they have commissioned papers. Are any available now? We could then work out what our relationship would be as a TC.