

CONSTITUTIONAL ASSEMBLY

**CONSTITUTIONAL
COMMITTEE**

**MONDAY 3 APRIL 1995
14H00
OLD ASSEMBLY**

DOCUMENTATION

PART 1

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CONSTITUTIONAL ASSEMBLY

MEETING OF THE CONSTITUTIONAL COMMITTEE

Please note that a meeting of the above committee will take place as indicated below :

Date : Monday 3 April 1995
Time : 14h00 - 18h00
Venue : Old Assembly Chamber

DRAFT AGENDA

1. Opening
 2. Minutes : *Page 2 - 15 of Part 1*
 3. Matters Arising
 - 3.1 Correction to Minutes of 6 March 1995 : *Page 16 - 17 of Part 1*
 4. Theme Committee 5 Report on Blocks 1 - 4 : *Page 1 - 94 of Part 2*
 5. Theme Committee 6.4 : Draft Provisions for Report of 27/2/95 : *Page 95 - 108 of Part 2*
 6. Agenda for Constitutional Assembly of 24 April 1995 : *No documentation*
 7. AOB
 8. Closure
-

HASSEN EBRAHIM
EXECUTIVE DIRECTOR

For information contact Ms MM Sparg, Tel 245 031 ext 2212; Ms M Keegan Tel 245 031 ext 2214

CONSTITUTIONAL ASSEMBLY

MINUTES OF 15TH MEETING OF THE CONSTITUTIONAL COMMITTEE

MONDAY 13 MARCH 1995

Present

Ramaphosa MC (Chairperson)

Asmal K	Mdladlana MMS (alt)
Bhabha M	Meshoe KR
Camerer S (alt)	Mtshali LPHM
Chabane OC	Mulder CP
De Beer SJ	Myakayaka-Manzini YL
De Lange JH	Ngcuka BT
Du Toit DC	Pahad EG
Eglin C	Pandor GNM
Fourie A	Rabie JA
Gogotya NJ	Rabinowitz R
Gordhan PJ	Radue R (alt)
Green LM (alt)	Ripinga SS
Hofmeyr WA (alt)	Schutte DPA
Holomisa SP	Seaton SA (alt)
Kgoali JLB	Sifora TVT
Kota ZA	Sizani RK
Ligege MG	Smith PF
Lockey D	Van Breda A
Mahlangu NJ	Van Deventer FJ (alt)
Mahlangu	Van Heerden FJ (alt)
Malatsi DM (alt)	Viljoen CL
Marais PG	Wessels L (Deputy Chairperson)
Mchunu ES	

Alternates for this meeting : the IFP gave notice that P Powell would replace S Mzimela ; the NP gave notice that SJ De Beer would replace C Ackerman and that G Koornhof would replace T J King; the ANC gave notice that L Sisulu would replace L Ngwane.

Apologies : Mv Moosa, B Nzimande, BS Mabandla, J Schreiner (for TC6.4), C Ackerman, TJ King, S Mzimela, B Kgositsile, L Ngwane.

Absent : Fraser-Moleketi GJ, Ginwala FN, Makhanya DW, Moosa M (Sen).

1. OPENING

Mr Ramaphosa opened the meeting at 14h05. Apologies and replacements were announced as above. The Agenda was adopted with the following additions to item 6.

6. AOB

- 6.1 Report from sub-committee on technical experts
- 6.2 Proposal on amending work programme
- 6.3 Report from TC5 on correctional services, Human Rights Commission and Public Protector

2. MINUTES

- 2.1 The minutes of the 14th meeting of the Constitutional Committee were adopted with the following corrections :

i) Item 4.3.2 on page 5 : would be amended such that the ff. sentence would be added :

It was further noted that Theme Committees would need to work more closely with technical experts to ensure that parties did not place issues under contentious matters because of differing interpretations of constitutional principles.

ii) Item 4.4.3 on page 6 : would be amended to add the following :

Regarding, Item 5.3 iv on page 5 of the Documentation of 6 March 1995 which reads :

" Each province must be equipped to provide for the special needs and capacities of its inhabitants " :

the meeting agreed to accept point 10 on the understanding that it did not imply assymetrical powers for the provinces;

It was noted that in the meeting of 13 March 1995, the IFP had stated that it disagreed and that in its interpretation, this did imply assyemetical powers for the provinces.

iii) Item 7.2.1 on page 11 : would be amended to add the following :

It was also agreed that where parties wished to ask members from particular

Theme Committees to attend and participate in Constitutional Committee members to replace full members of this committee, procedure needed to be followed and the Chairperson formally notified.

iv) Item 6.5.1 on page 9 would be amended to read :

"The following points were raised in discussion on the issue of whether provinces should have the right to declare a State of Emergency involving a suspension of human rights :"

← iv) It was noted that Mr Asmal had forwarded apologies for the meeting of 6 March 1995.

2.2 It was agreed that minutes should not contain the names of persons who made statements. Reference should only be made to the party whose views they were representing.

3. MATTERS ARISING

Regarding item 6. 4 in the minutes of the previous meeting, which reads :

"The constitution should provide for presidential power to declare a state of emergency, and to regulate a suspension of human rights in that context, and right of parliament to review/overturn such decisions."

and which had been referred to Theme Committee 4 , it was explained that the Theme Committee would not conclude the matter. It would report back to the Constitutional Committee, to see how to take the matter forward. This was in response to a question as to whether Theme Committee 6.4 should not continue to deal with the procedural aspects, while Theme Committee 4 dealt with the limitation of human rights.

4. CONT. OF DISCUSSION OF THEME COMMITTEE 6.4 REPORT

The meeting continued its discussion of the report from Theme Committee 6.4 on the first block of the work programme, which it had not completed by the close of the previous meeting.

4.1 Regarding Point 5 on page 37 of the Documentation of the Constitutional Committee of Monday 6 March 1995 on which no contention is reported and which reads :

" Declaration of a state of national defence/war."

The following was noted :

- i) This matter had been referred to the CA for further debate;
- ii) The document prepared by the IFP on the matter would be circulated and the IFP could make further input at the CA.

4.2 On the two issues requiring clarity on page 37 which read :

*"1. Time period allowed for the review of such a decision by Parliament.
2. Deployment of the Defence Force within South Africa and relationship between Police and Defence Force within this deployment." "*

It was noted :

- i) It would be useful if the TC could do some work on the ff issues : as to whether there is a review of this executive power; and whether there can be a time period allowed for review of the decision;
- ii) Two separate issues were in fact being dealt with :
 - a) Confirmation of decision by parliament and no character in terms of time frames when that confirmation should be done
 - b) Review of decision already confirmed by parliament.
- iii) Was there another mechanism if parliament could not be convened ?

It was agreed these issues would acquire greater clarity as the Theme Committee continued with its work.

4.3 Regarding point 6 on page 38 on which there are 2 points of contention and which reads :

" Definition of action in the national interest and national security." :

It was agreed that because there was not enough detail on what exactly is in contention, the Constitutional Committee would wait for further detail in the next report. It was suggested the Theme Committee could shape this view within the broad parameters of the values that could underlie the work of the security apparatus.

4.4 Regarding point 7 on page 39 on which no contention is reported and which reads :

"Parliamentary oversight" :

It was agreed there was agreement on the broad principle and the Constitutional Committee would look at the Theme Committee's report on

the next block for further detail on the application of this principle.

- 4.5 Regarding point 8 on page 40 on which contention is reported and which reads :

"Executive control." :

It was noted that the point under contention "*national and provincial competencies*" would be fleshed out as the work of Theme Committee 3 progresses. It was agreed that Theme Committee 6.4 should synchronise its work in this regard with the work of Theme Committee 3 when it deals with the competencies of provinces in their totality. It was also noted that further clarity would emerge from Theme Committee 6.4 when the specific agencies were dealt with.

- 4.5.1 Regarding the 2nd point of agreement on point 2 on page 40 which reads :

"The Constitution should provide that each arm of the security apparatus is accountable to a member of the Executive at the appropriate level of competence" :

It was noted that with regard to the words "*appropriate level of competence*" no suggestion had yet been made of individual ministers for intelligence, for example, for each province but there is strong contention that there should be provincial MEC's for safety and security; and further that more detail would emerge when the Theme Committee moved onto the specific agencies in the next blocks of the work programme.

- 4.6 Regarding point 9 on page 41 on which there is no contention and which reads :

"Civilian control of the Ministry" :

It was agreed the Theme Committee should in future provide some indication to the Constitutional Committee of how it intends that issues requiring further clarity should be dealt with. It was further agreed that where general agreement was reported in a Theme Committee report, some preliminary discussion could take place on issues requiring further clarity but that the matter should be referred immediately for drafting. If the drafters have an answer, they would deal with it and if not, the issue would be debated once the draft text is brought back to the Constitutional Committee.

The following points were noted :

- i) An ex-soldier should be regarded as a civilian;
- ii) The issue of the chain of command and its relationship to civilian control is important as it affects accountability and should be contained in the constitution; the danger of civil control and military and police executive is that of something falling between the 2 seats and needs to be very clear, the chain of command from national to provincial levels is also important and needs to be very clear.

It was agreed these issues would be further dealt with once draft text was available.

- 4.7 Regarding point 10 on page 41 on which there is no contention and which reads :

" Judicial and legal control " :

It was confirmed that the Constitution should state that the security apparatus should act within the law, Bill of Rights, Constitution and relevant international law and conventions on armed conflict.

- 4.8 Regarding point 11 on page 41 on which contention is reported and which reads :

" Ombud structures " :

It was agreed that this matter should be referred for drafting with various options being presented.

The following was noted in discussion :

- i) Disagreement was more apparent than real in that there is broad agreement on the principle but that appropriate structures need to be agreed upon;
- ii) The Ombudsperson referred to here was a very specialised function and should not be confused or conflated with that of the Public Protector;
- iii) The need for an Ombudsperson within the security apparatus was not meant to undermine the role of the national Ombudsperson but was required to cater for the unique situation within each arm of the security apparatus;
- iv) Whilst a Defence Ombudsperson may be required, this was not necessarily so in the case of the police services;
- v) Should avoid a tendency of creating too many structures in the constitution in view of the cost implications;

- vi) The creation of Ombudspersons, particularly in the police services, could assist in enabling one to deal more effectively with police corruption.

4.9 Regarding point 12 on page 42 on which there is contention and which reads :

"Rights of members of the security apparatus in relation to the state." :

It was agreed drafting should proceed to allow the Constitutional Committee to take the matter forward in considering the various options.

The following was noted in discussion :

- i) Two views were expressed on the amount of detail required : The first was that a lot of the detail on this point should be contained in the Code of Conduct or legislation and not in the Constitution; the second view was that because of the history of South Africa there was a need for more detail in the Constitution itself.
- ii) The wording of S226(7) of the Interim Constitution should be taken into account;
- iii) The word "curtail" should be replaced by the word "prohibit" in the first point under agreement which reads "The constitution should curtail the rights of members of the security apparatus to strike."

4.10 Regarding point 13 on page 43 on which there is no contention and which reads :

"Political neutrality of security apparatus." :

It was agreed that :

1. The Constitution should provide that members of the security apparatus should be educated to be conversant with the law, Constitution, international law and Conventions on armed conflict and human rights.
2. The security apparatus constitute non-partisan professional bodies; the security apparatus themselves cannot participate in partisan political activity and cannot allow partisan political activity within themselves.

4.11 Regarding Part 3 of the report on page 44 - 45 it was agreed these would be

dealt with once reports were received on further blocks of the work programme from the Theme Committee.

4.12 It was agreed to request the Theme Committee to look for another word to replace the word " apparatus" in the phrase " security apparatus" because of the possible negative contentions thereto.

4.12 It was agreed the report would be referred for drafting on both contentious and non-contentious points. On contentious points the drafters would be requested to provide options for further consideration in the Constitutional Committee.

4.13 The Constitutional Committee thanked Theme Committee 6.4 for the report and urged it to proceed to the next block of the work programme.

5. DISCUSSION OF THEME COMMITTEE 1 REPORT

5.1 The report on page 46 - 91 was presented by Mr PG Marais who spoke briefly to the document contained in the documentation of the Constitutional Committee of 6 March 1995.

5.1.1 Mr Marais pointed out two corrections to the document entitled " Supplementary Report to Amended Report from Theme Committee 1 " :

i) The word " *varying*" to replace the word " *verifying*" in the 5th sentence of the 5th paragraph on page 53 such that the sentence will read " *The PAC propogates the most limited powers for provincial and local government (adminstrative and advisory) while the FF, the DP, the NP and the ACDP argued to varying degrees for systems where central government is limited but effective with strong provincial and local government.* "; and

ii) On page 55 , paragraph H, the sentence is amended to read in part: "*There is no disagreement between the parties, with the exception of the ACDP and IFP, on the fact that the constitution should provide for ...*"

5.1.2 It was agreed to use the Analytical Survey contained in Additional Documentation for 13 March 1995 for purposes of discussion in the meeting. (*Note : all references to page numbers from hereon refer to the Survey, in Additional Documentation*) It was noted that this survey had not come before the Theme Committee but had been provided by the Law Advisors on the instructions of the Management Committee to facilitate

discussion in the Constitutional Committee.

5.2 Regarding point 1 on page 1 which reads :

"Supremacy of Constitution" :

It was agreed this matter should be referred for drafting and further debate would take place at that point .

5.3 Regarding point 2 on page 1 which reads :

" Political system " :

5.3.1 It was agreed this was a restatement of CP VIII and that the agreement on non-contentious aspects would be fleshed out by TC 1, 2 and 4 in Block 6.

5.3.2 Regarding the matters raised by the IFP in the meeting, viz :

1. The principle of political representation of government and regular elections should be constitutionally entrenched with respect to national, provincial and "primary" local governments (excluding local government substructures, including traditional communities);
2. The implementation of this principle with respect to provincial and local government shall be within the exclusive competence of the Provinces;
3. The electoral system is a fundamental element characterising the form of government and the type of democracy. Therefore the constitution should set out the general principles of the national electoral system, leaving to the the law the task of implementing such principles so as to leave sufficient flexibility for future developments. The provincial electoral systems should be within the exclusive competence of provincial constitutions :

It was agreed these would be clarified in later blocks as outlined above. The Chairperson pointed out however that Constitutional Principles could not be qualified.

5.4 Regarding point 3 on page 2 on which there is agreement and which reads :

"Electoral system" :

It was agreed this was a restatement of CP VIII. The agreement lacked specifics and further clarity was needed. TC 2 would provide further clarity

on national and provincial electoral systems in Block Six.

- 5.5 Regarding point 4 on page 2 on which there is agreement and which reads :

"Fundamental rights" :

It was agreed this was a restatement of CPII. Detail is required on manner of entrenchment (special majorities etc) and court system. It was noted that TC 4 and 5 will provide further clarity.

- 5.6 Regarding point 5 on page 2 on which there is agreement and which reads :

"Normative values underlying Constitution" and which listed the ff. values : Accountability, Democracy, Equality, Freedom and Transparency :

- 5.6.1 It was agreed these, and other (non-contentious) principles will underlie the whole Constitution and that all provisions of the Constitution should give effect to them. No specific drafting instructions were required. However, drafters of the new text should see how this permeates the Constitution as a whole. It was also noted that TC 4 would provide further clarity.

- 5.6.2 Mr Eglin suggested that specific drafting instructions may have to be given; in that there may be values so important that they should be mentioned as fundamental principles even in the new constitution binding all organs of government, either by way of the preamble or by way of general principle. This was noted with a request that the DP and other political parties make a specific submission in this regard.

- 5.7 Regarding point 6 on page 3 on which there is agreement and which reads :

"Accountability" :

It was agreed the executive would be accountable to parliament but that the manner in which the executive will be accountable will be developed further by TC 2 in Block 2.

- 5.8 Regarding point 7 on page 3 on which there is agreement and which reads :

" South African citizenship" :

It was agreed there would be common South African citizenship but this was a restatement of CP i. Clarity is needed on the particular aspects of citizenship that need to be entrenched in the Constitution. TC 1 will deal with citizenship in greater detail in Block Six and drafting instructions can stand over.

5.9 Regarding point 8 on page 3 which reads :

"Establishment of one, sovereign state" :

It was agreed with regard to the non-contentious aspects which reads :

"South Africa to be sovereign, independent, undivided State" :

to use the wording of CP I : *" The Constitution of South Africa shall provide for the establishment of one sovereign state ... "*

It was further agreed that the concept of " one sovereign state " is an agenda item for TC 1 in Block 2 and that drafting instructions can stand over to Block Two.

5.10 Regarding point 9 on page 3 on which there is agreement which reads :

" Horizontal separation of powers " :

It was agreed this is a restatement of CP VI.

5.11 Regarding point 10 on page 4 on which there is agreement and which reads :

" Levels of government " :

It was agreed levels of government need to be further developed and that this falls within TC 2's mandate.

5.12 Regarding point 11 on page 4 on which there is contention and which reads :

"Vertical separation of powers" :

It was agreed this issue falls within TC 3's mandate and that the powers and functions of the judiciary would be dealt with by TC 5.

5.13 Regarding point 12 on page 4 on which there is contention and which reads :

"Parliament's supremacy as law-maker" :

It was agreed that the matters in contention fell within TC 3's mandate and the matter would be further considered once a draft was provided. It was further noted that TC 1 will also deal with provincial autonomy in Block 2.

5.14 Regarding point 13 on page 4 on which there is contention and which reads :

"parliamentary structure" :

It was agreed that the question of a second chamber is to be dealt with by TC 2 in Block 2.

5.15 Regarding point 14 on page 5 on which there is contention and which reads :

"Collective rights of self-determination" :

It was agreed that TC 1 will develop the question of self-determination within the context of "one sovereign state" in Block Two and that TC 2 is also dealing with this issue. The non-contentious aspect agreed to i.e. *recognition and protection of collective rights of organs of civil society, including linguistic and cultural associations*, need fleshing out before drafting instructions should be given. It was noted that TC 4 would also be dealing with this aspect.

5.16 Regarding point 15 on page 5 on which there is contention and which reads :

"Minority party participation in government" :

It was agreed that the question of minority parties' participation in executive structures will be dealt with by TC2.

5.17 Regarding point 16 on page 5 on which there is contention and which reads :

"Participatory democracy" :

It was agreed this would be dealt with TC 1 in Block Two.

5.18 Regarding point 17 on page 6 on which there is contention and which reads :

" *Secular state* " :

It was agreed this issue impacts on TC 4's mandate. Decision should therefore stand over until TC 4 submits its report on freedom of religion. This issue also affects the Preamble which will be dealt with by TC 1 in Block Ten. It was noted that the first point under non-contentious aspects would become contentious in the light of Mr Marais' earlier corrections to the report.

5.19 The committee concluded discussion on the report and thanked Theme Committee 1 for the report.

6. ANY OTHER BUSINESS

6.1 REPORT FROM SUB-COMMITTEE ON NOMINATIONS FOR TECHNICAL EXPERTS

6.1.1 The report from the subcommittee to recommend the appointment of technical experts to technical committees dated 13 March 1995 was accepted.

6.1.2 The following appointments were made :

- i) Prof Dlamini would replace Prof Thomashausen in TC 1;
- ii) Prof B Mqoke would replace Prof Dlamini on the ad hoc technical committee on traditional leaders;
- iii) Prof Raath, Prof W Breytenback and Prof H Corder were appointed to the ad hoc committee on self-determination;
- iv) Mr Louis Van Zyl and Ms Christine Qunta were appointed to TC 6.2 to deal with the itme of the Public Protector;
- v) Mr Andrew Boraine, Mr Blake Mosley and Mr Andre Cornellisson were appointed to the ad hoc committee on local government.

6.2 PROPOSAL ON WORK PROGRAMME

6.2.1 Mr Wessels reported that the Cabinet had requested that the CA and CC should not meet on Mondays too allow Ministers to spend Monday and Tuesday with their departments and also participate in the CC and CA. A suggestion was made to the meeting that Theme Committees meet on

Monday mornings and evenings and that Parliament convenes on Monday afternoon. Further, that the CC and/or CA would meet on Friday mornings.

6.2.2 The suggestion was not agreed to with various concerns being raised in the meeting. These concerns centred on the limited no. of airtickets available to MP's as opposed to Ministers, the fragmentation of CA work and the need to cater for parents in the light of evening meeting times.

6.2.3 It was agreed the Chairpersons would convey the feelings of the meeting to the Leader of the House and the matter would be finalised after further discussion.

6.3 DOCUMENT ON CPM'S FROM MRS RABINOWITZ

6.3.1 The Chairperson announced that a document addressed to the Constitutional Committee by Mrs Rabinowitz on the Constitutional Public Meetings (CPM's) of 11 March 1995 had been handed to the Administration by a member of the press and that certain allegations against him were made in the document.

6.3.2 It was agreed the matter of CPM's would be addressed in the Management Committee on Thursday 16 March 1995.

6.3.3 On the procedure followed by Mrs Rabinowitz, it was noted that the Constitutional Committee felt it had been shabbily treated and that documents addressed to a meeting should not be handed to the press prior to the meeting itself receiving such documents. It would not help matters to raise issues in this manner and members of the Constitutional Committee should be treated with more respect.

6.3.4 The Chairperson said he took exception to a political party wishing to sensationalise matters in this manner. He said he would now be bound to respond to the press on the same matter. However, after an appeal from the NP who stated that they also had problems with the CPM's but they had agreed to deal with these at the Management Committee, he agreed to review this decision. It was pointed out that the Management Committee would only meet on Thursday. It was finally agreed the Chairperson and Administration would consider the matter and decide how to best deal with it.

7. CLOSURE

There being no other business, the meeting rose at 17h30.

MEMORANDUM

To : Chairperson
Date : 15 March 1995
From : Marion Sparg

Re : Minutes of CC Meeting of 6 March 1995

The Constitutional Committee of 13 March 1995 requested transcriptions of two sections of the minutes of 6 March 1995, to deal with two corrections to the minutes raised by Mrs Rabinowitz.

1. The first correction related to item 4.3 of the minutes. Mrs Rabinowitz states that she made a reference to a difference of interpretation of the Constitutional Principles which is not reflected in the minutes.

The following has been added to the minutes :

It was further noted that Theme Committees would need to make more use of technical experts to ensure that matters covered by Constitutional Principles were not placed under contentious issues because of differing interpretations of these Principles.

The transcription reads as follows :

Chair : ... that is a clear proposal then from Mr Gordhan. Dr Rabinowitz has seconded it. Is that broadly acceptable ? I would also from the chair tend to support you that these matters should be sent back to the Theme Committee for further development and one of the reasons, or the main reason I would support it is that as one looks at the contentious issues identified by the Theme Committee one finds that they have also put under contentious issues matters that are already covered by the Constitutional Principles, matters that should not be under contention - and I think Theme Committees, and this applies to all Theme Committees, will be helping the process a great deal if they were to apply their minds more closely to the Constitutional Principles so that when they report back they should not under contentious issues be putting forward issues that are already covered by Constitutional Principles. As one looks at their report they put forward a number of issues which the Constitutional Principles cover and I think it is not desirable that we should be repeating ground that we have already traversed.... Dr Rabinowitz.

Rabinowitz: Mr Chairperson, I would like to suggest that this would not have happened unless we have different interpretations of those Constitutional Principles. Therefore in order that or before that should be done we are going to have to bring in the technical experts or we do need to work more closely in conjunction with the experts.

Chair : *I think that is agreed and it is agreed in a more general way to apply to all Theme Committees, it would be helpful.*

2. The second raised by Mrs Rabinowitz is that a comment she made in the discussion on the right of provinces to declare a state of emergency is not covered. The first point made by Mrs Rabinowitz is covered in item 6.5.1 i) of the minutes of 6 March 1995.

The second point raised by Mrs Rabinowitz is also covered in the same item of the minutes in the last sentence : *She further stated that the right of Provinces to review or overturn a national decision on State of Emergency could prevent violence in the country.*

The transcription of the discussion at this point reads :

Rabinowitz : *Mr Chairman, I would like to start by saying that I second Mr Eglin's proposal and by saying that I think it would be problematic if we cut an issue from the debate before we actually looked at it with .. being fleshed out in the terms suggested by Mr Eglin and I also would like to say with regard to the statement made by the gentleman behind me (Mr Green) appropos number two that the right of provinces to review or overturn the declaration of a State of Emergency in that province might save a certain amount of violence because there is ... he had suggested it could create problems in the country. I am suggesting that that the right of the State to issue a State of Emergency in the provinces as everybody has seen has in itself a great potential for creating problems in the country. Therefore that is surely an issue that should be addressed and fleshed out so ... I am suggesting that it should be debated, fleshed out as Mr Eglin suggested, rather than cut the way Mr De Lange suggests, before it has been fully debated.*

Chair : *Mr Eglin wants to follow up.*

Egling : *In case it is said that I put forward a proposal, what I said was that I am opposed to this, but the protagonists of that particular provision if they want it to be pursued must flesh it out themselves and come back to us. I am not arguing that we as a CC must flesh it out. I am saying that if in fact there are protagonists of this particular clause, it would be easier to come to a final decision on the basis of a draft clause than on the basis of these which I think are vague and ambiguous.*

CONSTITUTIONAL ASSEMBLY

MINUTES OF 14TH MEETING OF THE CONSTITUTIONAL COMMITTEE

MONDAY 6 MARCH 1995

Present

Ramaphosa MC (Chairperson)

Bhabha M	Meshoe KR
Camerer S	Meyer RP
Chabane OC	Moosa MV
De Beer SJ	Mtshali LPHM
De Lange JH	Mulder CP
De Lille P	Myakayaka-Manzini YL
Du Toit DC	Ngcuka BT
Eglin C	Pahad EG
Gogotya NJ	Pandor GNM
Gordhan PJ	Rabie JA
Green LM	Rabinowitz R
Hofmeyr WA	Radue R
Holomisa SP	Ripinga SS
Kgositsile B	Selfe J
King TJ	Sifora TVT
Kota ZA	Sizani RK
Ligege MG	Smith PF
Lockey D	Van Breda A
Mabandla BS	Van Heerden FJ
Mahlangu MJ	Viljoen CL
Marais PG	Wessels L (Deputy Chairperson)
Mchunu ES	

Apologies : Mzimela S, Mahlangu NJ, Mdladlana MMS, Ackerman C, Fourie A, Makhanya DW, Schutte DPA.

Absent : Asmal K, Fraser-Moleketi GJ, Ginwala FN, Kgoali JLB, Moosa M (Sen), Ngwane LB, Nzimande BE.

1. OPENING

Mr Ramaphosa opened the meeting at 14h10. The agenda was adopted with the following amendments :

1.1 It was agreed that various issues raised by Mr Ramaphosa as additional Matters Arising from the Minutes of the 13th Meeting of the Constitutional Committee of 27 February 1995 would be discussed as item 4.4 on the agenda. These issues are :

- i) Point 5.6 iv) on page 7 of the documentation for discussion in the next meeting of the Constitutional Committee;
- ii) Point 5.6. v) on page 7 of the documentation for discussion in the next meeting of the Constitutional Committee;
- iii) Point 5.6.vii) on page 8 of the documentation for discussion in the next meeting of the Constitutional Committee.

1.2 On behalf of the IFP Mr Smith pointed out that various issues requiring clarity or input from the IFP were also listed. It was agreed these would also be dealt with as item 4.4 as above.

1.3 It was further agreed that a letter from the IFP regarding the minutes of the 12th meeting of the Constitutional Committee of 13 February 1995 would be dealt with as item 10.1 under AOB. It was noted that this letter had been received too late for consideration in the meeting of 27 February 1995.

2. MINUTES

The minutes of the 13th Meeting of the Constitutional Committee on Monday 27 February 1995 were adopted.

3. MATTERS ARISING

These were set out in agenda items for the meeting.

4. THEME COMMITTEE THREE REPORT

4.1 DRAFTING INSTRUCTIONS

4.1.1 Mr Ramaphosa reported that the Management Committee had agreed to recommend to the Constitutional Committee that the

non-contentious issues confirmed in this report at the meeting of 27 February 1995 should be referred for drafting by the Constitutional Committee. The Constitutional Assembly would be requested to ratify this decision at its next meeting.

4.1.2 In discussion the following concerns were noted :

- i) The non-contentious issues referred to were very broad principles or norms and did not constitute adequate material for drafting purposes;
- ii) In preparing these drafts, the technical experts should not anticipate work that Theme Committees would commence in following blocks;
- iii) Sample texts of constitutions from other countries should be obtained and studied to assist the Constitutional Committee in deciding what style should be adopted before issuing drafting instructions; and
- iv) The Constitutional Committee should move from process matters to matters of substance.

4.1.3 Mr Ramaphosa explained that drafting procedures had been agreed upon by the Management Committee. However, in view of the concerns raised, it was agreed that all parties would look at the Drafting Proposals circulated in previous meetings again, and communicate their views if any to their representatives on the Management Committee which would finalise the procedures at its next meeting.

4.2 CONTENTIOUS ISSUES ARISING FROM 27 FEBRUARY 1995

It was agreed that points 5 and 8 listed on page 44 of the Constitutional Committee documentation of 27 February 1995 would be discussed with other matters arising under point 4.4. of the agenda.

4.3 DISCUSSION OF REMAINDER OF REPORT

4.3.1 Mr Gordhan explained that the remainder of Section I of the report dealt with general points which overlapped with future blocks of the Theme Committee's work programme. It was agreed these issues would therefore be revisited as a matter of

course as the Theme Committee progressed with its work and that discussion was not needed now.

4.3.2 The meeting noted a concern also that Theme Committees should apply their minds more closely to the Constitutional Principles. Many of the points identified as contentious in the Theme Committee report were already covered by the Principles and should therefore not be in contention.

4.3.3 A suggestion was also made, drawing the meeting's attention to an earlier agreement, that Theme Committees should use the Interim Constitution as a point of reference and should not "reinvent the wheel". It was stated specifically that Section 126 and Schedule 6 were useful points of reference for issues such as the definition of powers and functions, overrides and national standards which all were within the terms of reference of Theme Committee Three.

4.3.4 The non-contentious issues listed in Section II of the Report on pages 48 and 49 were endorsed as general statements that impact on the broad overview of local government.

4.3.5 However with regard to the first non-contentious issue listed on page 50 which reads :

" Local government should have guaranteed, transparent, predictable and equitable sources of revenue " :

It was agreed this required further elaboration as the Theme Committee continued with its work, in light of the various interpretations it could give rise to.

4.4 MATTERS ARISING FROM 27 FEBRUARY 1995

4.4.1 Regarding Point 5.6 iv) on page 7 which reads :

" The exercise of state power shall be controllable within set limits ":

Mr Meyer explained on behalf of the NP that this should be seen in the context of the concept of a constitutional state or "*rechtstaat*". It was agreed that this issue would be left with the Theme Committee as a contentious issue to be further considered as it continued its work.

4.4.2 Regarding Point 5.6.v) on page 7 which reads :

"Uniformity is a vital national objective to pursue in the context of massive disparities and inequalities that prevail in South Africa " :

It was agreed that the Theme Committee and later drafters would treat this as a general political goal to strive towards which would be developed further as the work of the Theme Committee continued.

4.4.3 Regarding Point 5.3 iv) on page 5 and all other issues in the report not fully dealt with on 27 February 1995 because of the IFP absence on 27 February 1995 :

It was agreed these would also be left with the Theme Committee as contentious issues to be further considered as it continued its work.

4.5 In conclusion, the Constitutional Committee accepted the report from Theme Committee 3 on Block 1 of the work programme on the understanding that the various contentious issues listed above would be developed further as the work of the Theme Committee continued.

5. THEME COMMITTEE FOUR REPORT

5.1 Mr Ramaphosa referred the meeting to the report from Theme Committee 4 on Block 1 of the Work Programme on pages 88 - 91 of the documentation of the meeting of 27 February 1995.

5.2 Regarding Point 1 on page 88 which reads :

"Everyone shall enjoy ..." (Whether the term "everyone" includes juristic persons, structured and unstructured groups, and organs of civil society, etc.):

It was agreed that this was an outstanding issue on which expert opinion had been obtained by the Theme Committee and would be the subject of a further report to the Constitutional Committee.

5.3 Regarding Point 1.2 on page 89 which reads :

"Vertical and horizontal application of rights ":

It was agreed that this was also an issue which the Theme Committee continued to debate and on which expert opinion had been obtained and would emerge in the next report to the Constitutional Committee.

5.4 Regarding Point 2 on page 89 which reads :

"all universally accepted fundamental rights, freedoms and civil liberties" (which rights etc., qualify as universally accepted fundamental rights) :

It was noted that expert opinion had been received which had proved useful and that further submissions from parties had been received. A supplementary report was being prepared.

5.5 Regarding Point 3 on page 90 which reads :

"entrenched and justiciable provisions" :

It was accepted these were all non-contentious issues. However the Constitutional Committee requested the Theme Committee to apply its mind to the extent of entrenchment referred to in 3.1.1

5.7 Regarding Point 4 on page 90 which reads :

"after having given due consideration to inter alia the fundamental rights contained in Chapter 3"; and

5.8 Regarding Point 5 on page 90 which reads :

"General discussion of Related Constitutional Principles such as I, III, V, IX, XI, XII, XIII(1), XXXIV " ; and

5.9 Regarding Point 6 on page 91 which reads :

"Suggested approaches as to the identification of rights not covered by Constitutional Principle II " :

It was accepted this had been covered by discussions on the previous point.

5.10 Regarding Point 7 on page 92 regarding outstanding issues :

It was agreed outstanding issues would be covered in further reports.

- 5.11 In response to a query on outstanding issues from Mr De Lange on whether the Theme Committee had considered the principle of the interdependency of fundamental rights, Ms Pandor explained this had not been dealt with in Block 1 but the Theme Committee had already begun to delve into this matter in Block 2 of the work programme.
- 5.12 In conclusion, the meeting accepted the report from Theme Committee Four on Bloc 1 of the work programme, noting that the Theme Committee had gone some way to clarifying issues at a conceptual level and would table a more substantial report to the Constitutional Committee.

6. THEME COMMITTEE 6.4 REPORT

- 6.1 Ms J Schreiner introduced the report from SubTheme Committee Four of Theme Committee Six on pages 9 - 45 of the documentation.
- 6.2 On the point under 2 on page 12 which reads :

"Further clarity:

That correctional services is not part of security apparatus and should be dealt with under Theme 5 in relation to the judiciary and the legal system" :

It was noted that Theme Committee 5 had already met with SubTheme Committee 4 of Theme Committee 6 on this issue and would report to the next meeting of the Constitutional Committee.

- 6.3 On point 3.4 on page 13 which reads :

"The constitution should state that the Executive cannot use the Security Apparatus to violate the constitution" :

- 6.3.1 The following points were raised in discussion :

- i) The statement was an attempt to ensure that the security apparatus could not be used by the executive outside constitutional provisions;
- ii) The concern should be reflected in a positive manner by stating that one of the main functions of the security apparatus is the protection of the constitution;
- iii) The statement needed to be understood against the background

of the misuse of the security apparatus in South Africa and that this point needed to be clearly stated in the constitution because of the history of South Africa; and that

- iv) There was value in phrasing the concern in both a positive and negative manner.

6.3.2 It was agreed that the statement reflected a broad agreement; that the Constitutional Committee would apply its minds to the later draft provision of the new constitutional text and that the points raised in discussion were noted and would be taken on board for drafting purposes.

6.4 Regarding point 1 of the areas of agreement on page 37 which reads:

" The constitution should provide for presidential power to declare a state of emergency, and to regulate suspension of human rights in that context, and right of parliament to review/overturn such decisions. " :

It was agreed that the suspension of rights could only be properly dealt with by Theme Committee 4 and that this aspect should be referred to them to tease out the implications for the Bill of Rights.

6.5 Regarding points 4.1 and 4.2 of the areas of contention on page 37 which read :

*"1. The powers of Provinces to deploy police in a provincial state of emergency
2. The right of Provinces to review or overturn the declaration of a state of emergency in that Province. " :*

6.5.1 The following points were raised in discussion on the issue of *whether provinces should have the right to declare a State of Emergency* :

- i) Mrs Rabinowitz stated on behalf of the IFP that the issue would only be decided once there was an agreement on the degree of provincial autonomy and that a decision on international mediation was awaited. She further stated that the right of Provinces to review or overturn a national decision on State of Emergency could prevent violence in the country.

- ii) Mr De Lange stated that the ANC was opposed to provinces having such powers referred to; and further, that if there was a possibility either implicit or explicit in these two points that human rights could be suspended in one part of the country with only those in that part of the country being party to that decision this would also be opposed by the ANC since one could not allow the limitation of rights to become a power game to two different structures in the country.
- iii) Mrs Camerer asked whether this was a departure from the Constitution which regulated a State of Emergency through an Act of Parliament and that this would now be regulated more directly in the constitution itself or by means of a Presidential decree ? Ms Schreiner responded that the committee had not yet applied its mind to this question.
- iv) Mr Green stated on behalf of the ACDP that the declaration of a State of Emergency was a national issue and there were dangers in giving such powers to provinces;
- v) Gen Viljoen stated that Premiers should have the right to declare a State of Emergency and to review their own but in no way should Province have right to review or overturn a State of Emergency declared by national government;
- vi) Mr Eglin stated that he was opposed to provinces having such powers and that if protagonists of this point of view were to produce draft clauses it would facilitate discussion in the Constitutional Committee;
- vii) Mr Meyer stated that point 1 was anomalous in that a State of Emergency related to deployment of the Defence Force and that Premiers at present had no powers over the Defence Force; and further that utilisation of police in a particular part of the country should perhaps fall under provisions of the Police Act.
- viii) Mrs Kgositsile stated that it was important to flesh out the understanding of what constituted a State of Emergency and the different situations at provincial level;

- ix) Prof Du Toit requested the IFP to provide a comparative study of other federations where provinces had the power to declare a State of Emergency;
- x) Mr Meyer supported Prof Du Toit citing the example of the United States where interesting case studies existed on this point;
- xi) Mr Chabane said that the declaration of a State of Emergency may be in contravention with Constitutional Principle 31 which required that the security forces " exercise their powers in the national interest..."; and further suggested a legal opinion be sought on this matter;
- xii) Mr Van Heerden referred the meeting to Section 34(3) of the Constitution and said that in the event of a dispute on the declaration of a State of Emergency, one could have recourse to the courts for a decision in this regard.

6.5.2 In summary Mr Ramaphosa said it appeared the IFP strongly supported the view that provinces have the powers to declare a State of Emergency and that the Freedom Front had also indicated a degree of support for this view. It was agreed this matter should be debated further in the Constitutional Assembly. In the meantime parties could discuss the matter to attempt to reach agreement.

6.5.3 It was agreed that those issues listed as requiring further clarity on page 37 of the documentation should continue to be dealt with by the Theme Committee in the manner suggested.

6.5.4 The report was not completed and discussion would be continued in the next meeting on the remainder of the report.

7. AOB

7.1 IFP LETTER

It was agreed to correct the minutes of the 12th meeting of the Constitutional Committee on 13 February 1995 to better reflect the position the IFP adopted at the meeting. Item 4.1 of the minutes would read :

" The IFP rejected the substantive Theme Committee reports and requested that they be returned to the Theme Committees for redrafting to comply with the CA's resolution of 31 October 1994."

7.2 PROCESS

Various issues of process arose during the meeting :

7.2.1 ATTENDANCE OF THEME COMMITTEE MEMBERS

It was agreed that Theme Committee members could attend meetings of the Constitutional Committee to present reports and clarify issues when requested to do so but not to participate in debate.

7.2.2 DISCUSSION OF THEME COMMITTEE REPORTS

The Chairperson stated that the Constitutional Committee should avoid referring matters back to Theme Committees and should remain seized with issues once reports were received by the Constitutional Committee.

7.3 NEXT MEETING

It was agreed the Constitutional Committee would meet on Monday 13 March 1995 from 14h00 - 18h00.

8. CLOSURE

The meeting rose at 17h00.

