

27/2/1/5/1

CONSTITUTIONAL ASSEMBLY

THEME COMMITTEE TWO STRUCTURE OF GOVERNMENT

Submissions as at 26 January 1995

VOLUME TWO

(i)

African National Congress

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OFFICE OF THE SECRETARY GENERAL

MR H. Ebrahim
The Executive Director
Constitutional Assembly
Cape Town

25.01.95

Dear Mr Ebrahim

ANC SUBMISSIONS TO THEME COMMITTEES

We forward herewith preliminary submissions of the ANC to the Theme Committees, in respect of Block One of the adopted CA work programme. We wish to advise that, as these are preliminary submissions, the ANC will be forwarding further submissions in due course.

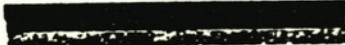
We trust you find same in order.

Yours Sincerely

A handwritten signature in cursive script, which appears to read 'C. Carolus', is written over a horizontal line.

C. Carolus

DEPUTY SECRETARY GENERAL


The People Shall Govern!

ANC. SUBMISSION: THEME COMMITTEE 2

A There should be a separation of powers in the South African National Government; viz; Legislative, Executive and Judiciary. This principle should be designed to restrict the power of each branch, whilst at the same time ensuring and fostering co-operation amongst them.

B. Separation of powers is meant to enhance accountability, independence and checks and balances.

C Specific form of separation of powers in South Africa will have to be functional and suitable for our South African Situation.

D. The system of checks and balances restrains the separate branches from seeking to centralize power to dominate the others.

1. LEGISLATURE/S

- legislature/s shall be the embodiment of the will and the aspirations of the people.
- Parliament shall subject to the Constitution be the supreme law maker and the expression of the will of the people.
- The political parties will have to discuss the question of bicameralism.
- The composition, powers and functions of such a bicameralis of agreed upon will be defined in the Constitution.
- The executive will be accountable to the legislature.

2. EXECUTIVE:

- The head of the State shall be the President
- The President will appoint and supervise the functioning of the Cabinet.
- The President will consult with the cabinet when taking important decisions.
- There shall be a deputy president who will be accountable to the president and Parliament.
- The executive will govern the Country.
- The executive will be accountable to Parliament
- The separation of powers between different levels of government shall be provided for in a manner that ensures the accountability of the executive to Parliament and shall not undermine the principle of majority rule.

3. Judiciary.

- There shall be an independent judiciary, impartial subject to the Constitution and law.
- The independent Constitutional Court shall have the power to nullify an Act of Parliament if it finds that the law is in conflict with the Constitution.
- The South Africans shall have recourse to independent Courts of law and other tribunals.- The judiciary must be protected from Political interference.

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NATIONAL ASSEMBLY
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Ref No.

T 02
General

12 03 JAN 1995

Mr Hassen Ebrahim
Executive Director
Constitutional Assembly
ROOM 104

18 January 1995

Dear Mr Ebrahim

Democratic Party: Initial Submission on the New Constitution - January 1995

1. In response to the Constitutional Assembly's invitation to the public to make initial submissions on the new Constitution, the Democratic Party has pleasure in submitting the following:-
2. The Democratic Party believes that a Constitution that is liberal, democratic and federal is best suited to meet the needs of our people and reflect the realities of our country.
3. Many of the features associated with this form of Constitution are itemised in the Constitution Principles which are binding on the Constitutional Assembly. Others, to a greater or lesser extent, are given effect to in the present interim Constitution.
4. The Democratic Party submits that
 - (i) the Constitution Principles and
 - (ii) the present interim Constitution, shorn of its transitional and interim features,provide a useful starting point for the Constitutional Assembly when it considers and drafts the new Constitutional Text.
5. Against this background the Democratic Party believes that the following priorities should be born in mind when drafting the new Constitutional Text.
 - 5.1 The new Constitution must bring government closer to the people - and the people closer to government. Wherever possible people must be empowered to make decisions on matters directly affecting their lives and their communities.

This can be done by strengthening the Provincial System - allocating more original powers to the Provincial Governments and ensuring their financial and fiscal viability. In addition there must be effective people-driven Local Governments in both the urban and rural areas through which communities can exercise a considerable degree of local autonomy.

- 5.2 The new Constitution must maximise openness and accountability at all levels of government.

This can be done by introducing strong checks on the executive government and on the decisions of bureaucrats, and by introducing direct constituency accountability for elected public representatives. The public must have the right of access to information relating to executive and administrative decisions.

- 5.3 The Bill of Rights in the new Constitution must guarantee to all the people of our country fundamental human rights, civil liberties and equality before the law.

The Bill of Rights must be written in a language that can be understood by and be meaningful to the individual citizens of our country.

- 5.4 If the new Constitution with its Bill of Rights is to provide the legal framework within which our society will function and governance can take place, it is essential that there should be a strong and independent judiciary.

The courts as well as the legal system should be readily accessible to the ordinary citizens of our country.

- 5.5 The new Constitution should reject totally all forms of racial discrimination. It must also provide for the cultural, religious and language diversity that is part of our country's rich heritage.

Each South African, whether acting as in an individual or acting together with others with whom he or she shares a common heritage, must feel comfortable and secure under the new Constitution.

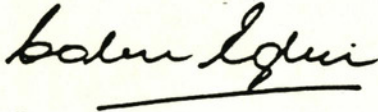
The new Constitution must encourage our people to say "In spite of our diversity, we are all South Africans. Because the Constitution respects our rights, we respect the Constitution."

- 5.6 Representativity and accountability makes it necessary for South Africa to have a range of legislative, executive and judicial structures. However, a developing country like ours must take the cost factor into account.

Accordingly, the government structures under the new Constitution should be as small and as cost effective as possible.

6. The Democratic Party will make further detailed submissions on specific aspects of the new Constitutional text as the work schedule for the various Theme Committee "Blocks" unfolds.

Yours sincerely

A handwritten signature in cursive script, appearing to read "Colin Eglin", with a horizontal line underneath.

for Colin Eglin MP
Democratic Party

26 JAN 1995

Demokratiese Party, 5de Verdieping, Marks-gebou, Parlementstraat, Kaapstad 8001
Democratic Party, 5th Floor, Marks Building, Parliament Street, Cape Town 8001

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Demokratiese Party
Democratic Party

532

To: Mr Hassen Ebrahim
Executive Director
Constitutional Assembly
11th Floor
Regis House

25 January 1995

**DEMOCRATIC PARTY: SUBMISSION TO THEME COMMITTEE 2
ON "SEPARATION OF POWERS"
(Ref T.C. 2 no 1)**

1. In respect of the heading "Separation of Powers" the Constitutional Assembly is required to give effect to the following Constitutional Principle.

**Schedule 4
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."

2. To achieve the above in respect of the separation of powers, the Constitution must contain specific provisions in which the separate powers are allocated. The DP proposes the following provisions:

2.1 Legislative authority of Republic

"The legislative authority of the Republic shall, subject to this Constitution, vest in Parliament, which shall have the power to make laws for the Republic in accordance with this Constitution." (See Interim Constitution Section 37)

2.2 Executive Authority of the Republic

"The executive authority of the Republic with regard to all matters falling within the legislative competence of Parliament shall vest in the President, who shall exercise and perform his or her powers and functions subject to and in accordance with this Constitution." (See I.C. Sect 75)

"On being elected, the President shall vacate his or her seat in the National Assembly." (See I.C. Sect 77 (4))

2.3 Judicial Authority

- "(1) The judicial authority of the Republic shall vest in the courts established by this constitution and any other law.
- (2) The judiciary shall be independent, impartial and subject only to this Constitution and the law.
- (3) No person and no organ of state shall interfere with judicial officers in the performance of their functions." (See I.C. Sect 96)

3. There are a number of mechanisms/structures that should be included in the Constitution to ensure "accountability, responsibility and openness."

e.g. certain provisions in a Bill of Rights, a Human Rights Commission, an Auditor General, a Public Protector, regular elections, accountability at Provincial and Local level etc.

However, the most important "checks and balances" are to be found in the relationship between the President and his Cabinet on the one hand and Parliament on the other.

4. There should be no ambiguity about the Executives accountability to Parliament. Accordingly, the Democratic Party proposes, inter alia, the following provisions:

4.1 Accountability of Ministers and Cabinet

"A Minister shall be accountable individually both to the President and to Parliament for the administration of the portfolio entrusted to him or her, and all members of the Cabinet shall correspondingly be accountable collectively for the performance of the functions of the national government and for its policies." (See I.C. Sect 92 (1))

4.2 Votes of no confidence

- "(1) If Parliament passes a vote of no confidence in the Cabinet, including the President, the President shall, unless he or she resigns, dissolve Parliament and call an election in accordance with section 39.
- (2) If Parliament passes a vote of no confidence in the President, but not in the other members of the Cabinet, the President shall resign.
- (3) If Parliament passes a vote of no confidence in the Cabinet, excluding the President, the President may -
 - (a) resign;
 - (b) reconstitute the Cabinet in accordance with section 88(4); or
 - (c) dissolve Parliament and call an election in accordance with section 39.

- (4) The President shall where required, or where he or she elects, to do so in terms of this section, dissolve Parliament by proclamation in the Gazette within 14 days of the relevant vote of no confidence."

(See I.C. Sect 93)

4.3 National Revenue Fund

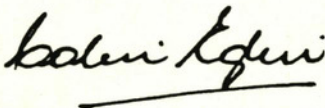
- "(1) There is hereby established a National Revenue Fund, into which shall be paid all revenues, as may be defined by an Act of Parliament, raised or received by the national government, and from which appropriations shall be made by Parliament in accordance with this Constitution of any applicable Act of Parliament, and subject to the charges imposed thereby.
- (2) No money shall be withdrawn from the National Revenue Fund, except under appropriation made by an Act of Parliament in accordance with this Constitution: Provided that revenue to which a province is entitled in terms of section 155(2)(a), (b), (c) and (d) shall from a direct charge against the National Revenue Fund to be credited to the respective Provincial Revenue Funds." (See I.C.Sect 185)

4.4 Annual budget

"The Minister responsible for national financial affairs shall in respect of every financial year cause to be laid before the National Assembly an annual budget reflecting the estimates of revenue and expenditure, which shall, *inter alia*, reflect capital and current expenditure of the government for that year."

(See I.C. Sect 186)

5. This submission is made without knowing which structure of government the Constitutional Assembly will decide on. The provisions may have to be adjusted dependant upon the nature and details of such structure of Government.



Colin Eglin MP
Democratic Party



INKATHA

Inkatha Freedom Party

Iqembu leNkatha Yenkululeko

THEME COMMITTEE No. 2 STRUCTURES OF GOVERNMENT

1ST REPORT ON SEPARATION OF POWERS¹

SEPARATION OF POWERS (Form of Government):

1. There shall be a pure parliamentary form of government.
2. Head of State and Head of Government shall be separate. Parliament shall sit for a five year term.
3. The President shall be elected by parliament in joint session for a seven year non renewable term and shall have the task to ensure the proper functioning of the constitutional and institutional machine.
4. The President shall appoint the head of government who shall form the cabinet in his/her discretion.
5. Cabinet shall be in a fiduciary relationship with Parliament which shall freely exercise its no-confidence vote without being dissolved.

HEAD OF STATE AND HEAD OF GOVERNMENT

1. In order to secure greater democracy and improve checks and balances, the office of the Head of State and that of the Head of Government should be separate.
2. The Head of State should ensure the preservation of the constitutional order and the proper functioning of the constitutional machinery while the Head of Government shall be in charge of the daily operation of Government.
3. Important functions related to the composition of other constitutional organs, such as the Constitutional Court and the defense forces² could be ascribed to the Head of State

¹. The IFP makes this submission under protest, for the Constitutional Committee should withhold consideration of the matters covered in this report and further development of the work program so as to allow international mediation to take place.

². The IFP has proposed that the Defense Force be under the control of a collegial civilian body headed by the Head of State, who is also the Commander-in-Chief of the Defense

rather than to the Head of Government.

4. The Head of State shall own exercise functions with respect to the representation of the state in international relations, ceremonial functions, the political resolution of conflicts within the institutional machine, and clemency and granting of honours.

EXECUTIVE AND PARLIAMENTARY FORM OF GOVERNMENT

1. South Africa should have a pure parliamentary system in which cabinet is collegially responsible to parliament, with which cabinet is to entertain a fiduciary relation.
2. Parliament's vote of no-confidence should not be impaired.
3. After consultation with the leaders of the political parties the Head of Government (Prime Minister) shall be appointed by the Head of State (President).
4. The Head of Government shall form the Cabinet and submit it for ratification by means of a vote of confidence of both Houses of in joint session.

MONO-CAMERALISM OR BI-CAMERALISM

1. There shall be a bicameral system and the Senate shall represent the Provinces.
2. The Senate shall have as much legislative power as the National Assembly.

RECONCILIATION OF DIFFERENT TEXTS ADOPTED BY THE TWO HOUSES

1. Differences between the texts adopted by the two Houses should be reconciled by a Joint Standing Committee of the two Houses in which the Senate and the National Assembly have an equal number of representatives.
2. The text so reconciled shall be approved by both Houses separately.
3. If one of the Houses does not approve it, the legislation is not enacted.

THE SENATE

1. The Senate should not have less legislative authority than the one given to the National Assembly.
2. The Senate should represent the provinces and its members should derive directly from the provinces either through appointment or through indirect elections.
3. Each province shall be equally represented in the Senate.
4. Legislation affecting the powers, functions and boundaries of Provinces may only be introduced in the Senate. Legislation affecting one of more specific Provinces must be approved by the senators of the Province(s) concerned.

COMPOSITION AND APPOINTMENT/ELECTION OF THE SENATE

1. Senators should be elected for a five year term by the Provincial Legislatures in consultation with the provincial Cabinet.
2. The Premiers of the Provinces shall have the privilege of the floor for themselves and/or for their ministers or designees.

Forces.

ROLE OF SENATE WITH RESPECT TO SOME EXECUTIVE FUNCTIONS

1. The Senate should have a special role in monitoring the function of the Executive branch of government with respect to some activities which are outside the competence of the Provinces such as defense and armed forces³.

COMPOSITION OF CABINET

1. Members of Cabinet shall be appointed by the Head of Government and shall serve at his or her pleasure, subject to the power of Parliament to vote its no confidence with respect to Cabinet in its entirety.

POWER SHARING OR ROLE OF MINORITIES IN CABINET

1. The IFP does not believe in constitutionally mandated power-sharing arrangements.
2. The IFP believes that the protection of minorities should be provided for by means of a federal system and by means of very effective protection of minorities in Parliament⁴.

RELATION BETWEEN HEAD OF GOVERNMENT AND MINISTERS - COLLECTIVE OR PERSONAL RESPONSIBILITY OF CABINET

1. The Ministers shall be chosen by the Head of Government and shall serve at his/her pleasure, provided that any substitution shall be ratified by a resolution of at least one House of Parliament.
2. Cabinet shall be collegially responsible to Parliament.
3. Each Minister shall be responsible to Cabinet for his/her Department, provided that Parliament may ask any Minister to provide information or to tender his/her resignation to Parliament.

CONSTITUTIONAL COURT

1. A portion of the justices of the Constitutional Court shall be appointed by the Provinces from their own judicial systems and legal fraternities.

TRADITIONAL LEADERS AND THEIR STRUCTURES

The separation of powers of government should be cross-referenced with the recognition of the role of traditional leaders and the preservation of traditional communities.

In fact, traditional communities are autonomous societies, organised by traditional and

³. For instance, the Senate could be charged with the special task to authorize the execution by the Executive of international treaties or the employment of armed forces outside the country or even within the country for civil protection reasons.

⁴. As a part of the second Report of this Theme Committee, the IFP will address the issue of protection of political minorities in Parliament.

customary law and administered by traditional leaders. Within a traditional community, legislative and executive and judicial functions are exercised in terms of indigenous and customary law, which also determines the degree and the modalities of the separation of these powers. Among the most significant aspects which regard the exercise of these powers is the institution of communal property.

Given its speciality, this matter will be treated in the third Report of this Theme Committee as per the approved schedule.



National Party
Nasionale Party

Federal Council
Federale Raad

26 January 1995

Mr Hassen Ebrahim
The Executive Director
Constitutional Assembly
Regis House
Adderley Street
CAPE TOWN

Dear Mr Ebrahim

Enclosed please find the National Party proposals regarding subject matters pertaining to Theme Committee 2, and included in the Work Schedule, Block 1.

Kind regards

Jac Rabie

THEME COMMITTEE 2

NATIONAL PARTY PROPOSALS REGARDING THE SEPARATION OF POWERS

The proposals contained in this document deal with the separation of powers as envisaged in Constitutional Principle VI viz. horizontal separation between the legislature, executive and judiciary. The proposals, furthermore, deal with principles (and not detail) and accordingly entail broad outlines which will be filled in as the work of the theme committee progresses.

1. As a general point of departure, the new Constitution must improve the current checks and balances provided by the division of powers between the legislature, the executive and the judiciary.
2. The legislature at the national, provincial and local levels shall comprise of elected representatives who directly represent the voters. Such representatives shall act independently from the respective executive authorities.
3. In order to enhance the objectives set in the previous paragraph, an electoral system based on proportional representation and which may include elements of geographical representation, shall be devised. The viability of corporate self-determination, as a method for

furthering collective rights of self-determination, should be explored.

4. The concept of representative government, apart from what has been stated above, also entails that the role of opposition parties in the legislatures must be clearly defined e.g. regarding meaningful consultation and participation in decision making.
5. At the national level, the legislature shall comprise of the National Assembly and the Senate.
6. The Senate shall represent the provinces at the national level and its members shall be directly elected and empowered to act authoritatively on behalf of the provinces, jointly and separately.
7. Decreasing the number of members of the National Assembly, should be considered.
8. The method of appointment, the functions and the functioning of the Head of State, the Head of Government and the Cabinet (including its composition) should best serve the nation's interests.
9. All executive(s) should be completely responsible to the relevant legislature(s)

In this regard the advisability to define the rights of the legislature viz-a-viz the executive in the Constitution should be explored. The same applies to Parliament's control over the administration of laws by the executive.

10. Provision must be made for Cabinet members to also be appointed from outside the ranks of Parliament, and on the grounds of expertise.
11. Government at all levels must be transparent, accountable and responsive.
12. The complete independence of the judiciary as the interpreting authority and protector of the Constitution shall be ensured. In particular, the judiciary shall protect and enforce the Constitution and all fundamental rights.
13. The mechanisms and procedures for the appointment of judges must be credible and transparent.
14. The exercise of all state powers shall be controllable and within set limits.