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A23

**CONSTITUTIONAL
ASSEMBLY**

**THEME COMMITTEE 1
CHARACTER OF
DEMOCRATIC STATE**

15 MAY 1995

ROOM M515

DOCUMENTATION

CONSTITUTIONAL ASSEMBLY

THEME COMMITTEE 1 CHARACTER OF DEMOCRATIC STATE

Please note that a meeting of the above Committee will be held as indicated below:

Date: Monday, 15 May 1995
Time: 09h00 - 13h00
Venue: Room M515 (Marks Building)

AGENDA

1. Opening
2. Apologies
3. Adoption of previous minutes: Pages 2 - 5
4. Matters Arising
5. Discussion of draft report for Block 3: Pages 6 - 33
6. Oreintation workshop for Block 5 (The Economy): Pages 34 - 40
7. Public Participation
8. General
9. Closure

H EBRAHIM
EXECUTIVE DIRECTOR
CONSTITUTIONAL ASSEMBLY

Enquiries: L Rammable and S Rabinowitz (Tel: 24 5031 Ext 2266)

**CONSTITUTIONAL ASSEMBLY
THEME COMMITTEE 1
CHARACTER OF THE DEMOCRATIC STATE**

**MINUTES OF THE MEETING OF THEME COMMITTEE 1
MONDAY 8 MAY 1995 14H00 ROOM M515**

**Present
Mahlangu NJ (Chairperson)**

**Booi MS
Chiba L
Chikane LLL
Fani LM
Gumede DM
Hangana NE
Janse Van Rensburg P
Kekana NN
Lekgoro MK
Mabuza MC
Majola-Pikoli NT
Marais A
Marais PG
Meshoe KR**

**Momberg JH
Moorcroft EK
Mulder PWA
Ncube BS
Nobunga BJ
Ripinga SS
Schoeman EA
Shope G
Shope NR
Sisulu AN
Streicher DM
Van Deventer FJ
Vilakazi BH
Williams AJ**

APOLOGIES:

**Goosen AD
Mukhuba TT
Niehaus CG
Nzimande BE
Routledge NC**

Technical Experts present:

**Corder H
Heunis JC
Husain Z**

Leola Rammble and Susan Rabinowitz were in attendance.

1. OPENING

1.1 The meeting was opened by the Chairperson at 14h05.

2. ADOPTION OF PREVIOUS MINUTES

- 2.1 The Minutes of the Theme Committee meeting of 20 April 1995 contained in Document A22 (Pages 3-6) were adopted.

3. MATTERS ARISING

- 3.1 None

4. CORE GROUP REPORT

- 4.1 The Chairperson tabled the Minutes of the Core Group Meeting held on 3 May 1995 contained in Document A22 (Pages 7-9). He reported that the Core Group had approved the format for the advertisements on language, seats of government and name. He further reported that although several parties had expressed reservations about the advertisement on the issue of the flag, it had been agreed that to avoid delaying the process further, the first advertisement presented at this Core Group meeting was acceptable in terms of the Theme Committee decision. He reported that the advertisements would appear on Wednesday 10 May 1995 in the media.

5. TABLING AND DISCUSSION OF PARTY SUBMISSIONS ON BLOCK 3: SUPREMACY OF THE CONSTITUTION

5.1 ACDP

The ACDP tabled and talked to its submission contained in Document A21 (Pages 8-11).

Questions of clarification were asked on the issue of the conflict between constitutional principles and Biblical principles, on what was meant by the "majority", the party's position on the death penalty, what was meant by a "non-elected" body and the role of the Constitutional Court.

The ACDP expressed the view that the majority of South African do not know what the Constitutional Principles are and that these should be revisited to gain agreement as to whether or not all parties accept them. They further explained that the Constitutional Principles should be acceptable to the majority of South Africans and, if that was the position, then they would have no problem with the Constitutional Court interpreting such principles.

The Technical Experts pointed out to the Theme Committee that as a matter of law the Constitutional Principles could not be revisited.

5.2 ANC

The ANC tabled its submission contained in Document A22 (Pages 10-13) and talked to its submission.

Questions of clarification were asked on the issue of "moderated constitutionalism" and a qualified constitution, on the role of Parliament, the relationship between democracy and constitutionalism, and what majority would be required to amend the constitution.

The ANC reported that it had not yet discussed the issue of what majority would be required but would do so at a later stage. Its position was that the Constitution should not bind Parliament to such a degree that Parliament would be unable address the legacies of the past.

On a point of clarification from the Technical Experts, the ANC agreed that the word "unacceptable" in Point 8.3 on Page 13 of its submission should be replaced with the word "acceptable".

5.3 DP

The DP tabled its submission contained in Document A21 (Pages 12-13). The DP talked to its submission and requested clarification from the Technical Experts on the separation of powers.

The Technical Experts clarified that the principle of separation of powers meant that no body should enjoy more than one type of power, but that the corollary of this is that checking and balancing mechanisms have arisen between powers so that there is an interaction and a necessary inter-dependency between the powers but that they have degrees of independence from each other.

The use of the word "doctrine" was queried and the DP agreed that this should be substituted by the word "philosophy".

5.4 FF

The FF tabled and talked to its submission contained in Document A21 (Page 14).

Clarification was asked for on the use of the expression "tyranny of the majority" and on what majority the FF envisioned with regard to amendments to the Constitution.

The FF expressed the view that the decisions taken at Kempton Park negotiations should be examined as a guideline to solving the issue of what majority was required.

5.5 NP

The NP tabled and talked to its submission contained in Document A21 (Pages 15-17).

Clarification was sought on the amendments to the Constitution and the issue of special majorities.

The NP expressed the view that it should not be possible to amend the Constitution with an ordinary majority and referred to Constitutional Principle XV where reference is made to special majorities although the party had not yet discussed what the special majority should be.

5.6 PAC

The PAC submission on Block 3 contained in Document A21 (Pages 18-19) was tabled and the Chairperson reported that their submission had been talked to together with their submission on Block 2.

There were no points of clarification or comments.

- 5.7 It was agreed that the Drafting Sub-Committee would meet this week together with the Technical Experts to begin drafting the report on Block 3. The Secretariat would make the arrangements for the meeting.

6. PUBLIC PARTICIPATION PROGRAMME

- 6.1 It was agreed that the names of the Theme Committee members who would be attending the Constitutional Public Meeting in Standerton (13 May) and the Public Hearings on Children Rights (13 May) and Traditional Authorities (12/13 May) would be submitted to the Secretariat by Tuesday 9 May 1995 at 09h00.

7. GENERAL

- 7.1 The Chairperson tabled a memorandum from the Executive Director regarding a meeting with Constitutional Expert, Daniel Elazar. It was agreed that the Theme Committee would meet with him and that the Secretariat would make the necessary arrangements.

8. CLOSURE

- 8.1 The meeting rose at 16h05.

CHAIRPERSON

FIRST DRAFT REPORT FROM THEME COMMITTEE ONE

BLOCK 3: SUPREMACY OF THE CONSTITUTION

15 MAY 1995

PART ONE

A) Summary Overview of submissions received and processed by Theme Committee from sources outside the Constitutional Assembly (Vols 15, 16 and 17) - see attachment.

B) The Technical Committee conducted an Orientation Workshop on 27 March before parties made their submissions on the subject matter of this Block, for which a Briefing Document was compiled - see attachment.

C) Public Participation Programme:

None of the submissions received from the public during the CPMs was relevant to the agenda items being dealt with by the Theme Committee in Block 3.

D) No Public Hearings were held on this agenda item.

E) The following Constitutional Principles refer:

II) *Everyone shall enjoy all universally accepted fundamental rights, freedoms and 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.*

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.*

- XV) *Amendments to the Constitution shall require special procedures involving special majorities.*

PART TWO

AGENDA ITEM 4: SUPREMACY OF THE CONSTITUTION

A. GENERAL DISCUSSION OF THE MATERIAL

As will be seen, a substantial degree of consensus exists between the parties on this issue. While there were some superficial differences in approach to the manner in which the idea of constitutional supremacy was expressed, the notion that the Constitution should be the supreme instrument of government in the final constitutional text was supported by all parties.

B. NON-CONTENTIOUS ISSUES

- I) All parties endorse the essence of the Constitutional Principles set forth above. Of particular relevance for the issue of Constitutional Supremacy are the following issues:
- i) the Constitution shall be the supreme law;
 - ii) any law or act inconsistent with the Constitution shall be invalid to the extent of such inconsistency;
 - iii) the Constitution shall bind all legislative, executive and judicial organs of state at all levels of government;
 - iv) the Constitution shall be justiciable by an independent and impartial judiciary, based on the doctrine of the separation of powers;
 - v) fundamental rights and freedoms shall be provided for in the Constitution;
 - vi) the provisions of the Constitution should not unduly shackle legislative action to redress past wrongs (see Report for Block 2, Part 2, Agenda item 2 Equality, Point B1 - Non-contentious Issues); and
 - vii) the Constitution shall be entrenched, in that special procedures involving special majorities shall be necessary for its amendment.
- II) Differences of emphasis or refinements of the above non-contentious issues are to be seen in the following aspects of party submissions:

ACDP: Argued for the Supremacy of God and a non-secular republic, run on biblical principles. Expressed concern at the fact that any final Constitution will have to be approved, in terms of the Constitutional Principles, by the Constitutional Court, on the basis that the Principles "were drawn up by a non-elected, non-representative body" and that the Constitutional Court is not subject to the "fixed and certain principles expounded in the Bible".

ANC: Appears to argue (in para 1.4 of its submission) for Parliament not to be limited in its capacity to address issues such as land restoration, racism and affirmative action. After some discussion it became clear that the point being stressed was not that Parliament should be able to act unconstitutionally in these areas, but that the actual provisions of the Constitution should not unduly shackle legislative action in redressing past wrongs such that Parliament could not act effectively in these matters. The submission describes this potential conflict as a tension between "democratism" and "constitutionalism". It further counselled against a "legislative role" for the judiciary, consistent with the separation of powers.

DP, FF and NP: Endorsed the above explication of constitutional supremacy without qualification.

PAC: Endorsed the idea of the sovereignty of the Constitution as the supreme law, and that "all political decisions and actions must therein find their legitimacy and justification".

C. CONTENTIOUS ISSUES

None.

PART THREE

The Theme Committee will be dealing with the issue of "Accountable Government" in the next Block. An orientation workshop based on a briefing document drawn up by the Technical Committee, was conducted with members of the Theme Committee on Wednesday 19 April.

The public should be encouraged in its submissions on this issue to focus on issues like: public representation and participation; impartiality and fairness of the Public Service; constitutional entrenchment of fundamental rights to information and administrative justice; the role of the Public Protector, Public Service Commission and Financial and Fiscal Commission, etc.

**ANALYTICAL SURVEY OF REPORT BY THEME COMMITTEE ONE IN BLOCK 3
15 MAY 1995**

NO.	CONSTITUTIONAL PRINCIPLES	ISSUE	CONTENTIOUS ASPECTS	NON-CONTENTIOUS ASPECTS	REMARKS
1	II, IV, V, VI, VII AND XV	SUPREMACY OF THE CONSTITUTION	NONE	1) CONSTITUTION SHALL BE THE SUPREME LAW. 2) LAWS OR ACTS INCONSISTENT WITH THE CONSTITUTION SHALL BE INVALID. 3) CONSTITUTION SHALL BIND ALL ORGANS OF STATE AT ALL LEVELS OF GOVERNMENT. ----- 4) CONSTITUTION SHALL BE JUSTICIABLE BY AN INDEPENDENT AND IMPARTIAL JUDICIARY. ----- 5) CONSTITUTION SHALL PROVIDE FOR FUNDAMENTAL RIGHTS AND FREEDOMS. ----- 6) CONSTITUTION SHALL BE ENTRENCHED	THESE MATTERS FALL WITHIN JURISDICTION OF TC1 ALONE. A CLAUSE ALONG THE LINES OF SECTION 4 OF THE 1993 CONSTITUTION WILL HAVE TO BE DRAFTED. ----- WITHIN THE JURISDICTION OF TC5 ----- WITHIN THE JURISDICTION OF TC4 ----- WITHIN THE JURISDICTION OF TC2

***BRIEFING DOCUMENT
FOR BLOCK 3***

SUPREMACY OF THE CONSTITUTION

THEME COMMITTEE ONE
BLOCK 3: BRIEFING DOCUMENT

AGENDA ITEM 4: SUPREMACY OF THE CONSTITUTION

1. INTRODUCTION

In its Final Report on Block 1, Theme Committee One agreed that the following points were not contentious:

"A) The Constitution shall be the supreme law of the land. It shall be binding on all organs of State at all levels of government."

(In fact this is the text of Constitutional Principle IV in Schedule 4 of the transitional Constitution).

"C) Fundamental rights of the person shall be protected in an entrenched Bill of Rights, justiciable by an independent judiciary."

"I) There shall be separation of legislative, executive and judicial powers in the State."

The Theme Committee has, therefore, already agreed on the principle of constitutional supremacy. What is needed now is a detailing of what this principle means in terms of the actual provisions in the final Constitution. What follows are some background facts on this issue, for consideration by the parties in drafting their submissions on this point.

It is important to stress that this does not attempt to prescribe to parties - it merely sets out boundary guidelines, in order to attempt to focus the debate.

2. TRANSITIONAL PROVISIONS

Any discussion of the issue of constitutional supremacy must occur within the limits set by the applicable Constitutional Principles. While some of the Constitutional Principles are more flexible than others, it is important to remember that the final constitutional text must accord with these unchangeable Principles, in the view of the Constitutional Court.

2.1 The Constitutional Principles which have relevance for "constitutional supremacy" are the following (per Revised Work Programme p13, Block 3):

- II) *Everyone shall enjoy all universally accepted fundamental rights, freedoms and 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.*
- 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.*

2.2 Certain matters are raised prominently by these Principles:

- 2.2.1 the inter-relationship of the protection of fundamental rights and freedoms and the idea of constitutional supremacy;
- 2.2.2 the central role played by equality (including the idea of non-discrimination in this context) as a core value underlying rights-protection;
- 2.2.3 the crucial link between constitutional supremacy and the doctrine of the horizontal separation of powers (into legislative, executive and judicial functions);
- 2.2.4 the necessity for an impartial and independent judiciary to interpret and enforce the constitution; and
- 2.2.5 the extent to which legal relations should be bound by the Constitution - it certainly should apply to relations between all organs of the State at all levels of government (see Principle IV) and to the state - subject relationship (what is commonly called "vertical" applicability), but should the Constitution also apply to legal relationships between private individuals or private individuals and other legal persons, such as close corporations or voluntary associations (what is commonly called "horizontal" applicability)?

- 2.3 The transitional Constitution of 1993 provides for these matters as follows:

Preamble - Extract

WHEREAS there is a need to create a new order in which all South Africans will be entitled to a common South African citizenship in a sovereign and democratic constitutional state in which there is equality between men and women and people of all races so that all citizens shall be able to enjoy and exercise their fundamental rights and freedoms;

AND WHEREAS in order to secure the achievement of this goal, elected representatives of all the people of South Africa should be mandated to adopt a new Constitution in accordance with a solemn pact recorded as Constitutional Principles.

SECTION 4

- (1) *This Constitution shall be the supreme law of the Republic and any law or act inconsistent with its provisions shall, unless otherwise provided expressly or by necessary implication in this Constitution, be of no force and effect to the extent of the inconsistency.*
- (2) *The Constitution shall bind all legislative, executive and judicial organs of state at all levels of government.*

SECTION 7 (1)

- (1) *This Chapter shall bind all legislative and executive organs of state at all levels of government.*

SECTION 33 (2) AND (4)

- (2) *Save as provided for in subsection (1) or any other provision of this Constitution, no law, whether a rule of the common law, customary law or legislation, shall limit any right entrenched in this Chapter.*
- (4) *This Chapter shall not preclude measures designed to prohibit unfair discrimination by bodies and persons other than those bound in terms of section 7 (1).*

SECTION 96

- (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.*

In addition, section 34 stipulates the conditions under which Chapter 3 (the "transitional Bill of Rights") may be suspended partially, as the result of the declaration of a State of Emergency, and sections 110 to 120 provide for the establishment of three important additional mechanisms (besides the courts) for the realisation of human rights and the accountability of government viz. the Public Protector, the Human Rights Commission and the Commission on Gender Equality.

3. THE TASK OF THEME COMMITTEE ONE

- 3.1 Because of a degree of overlapping between the work of Theme Committees, it does not seem that detailed suggestions for provisions of the final Constitution are expected from Theme Committee One in respect of the following matters:
- 3.1.1 the scope of application of the Bill of Rights (Section 7(1) - Theme Committee Four);
 - 3.1.2 the effect of the Bill of Rights on private legal relations, in particular as regards non-discrimination in the private sphere (sections 33 (2) and 33 (4) - Theme Committee Four);
 - 3.1.3 the "suspendibility" of the Bill of Rights (section 34 - Theme Committee Four);
 - 3.1.4 the authority and constitutional jurisdiction of the different courts (section 96 - Theme Committee Five);
 - 3.1.5 the Public Protector, Human Rights Commission and Commission on Gender Equality (sections 110 - 120 - Theme Committee Six);
 - 3.1.6 the horizontal separation of powers (Constitutional Principle VI - Theme Committee Two).
- 3.2 On the other hand, both the Preamble and the vital statement that the Constitution is supreme (see section 4(1)) fall squarely and exclusively within the jurisdiction of Theme Committee One.

4. THE SIGNIFICANCE OF THE NOTION OF CONSTITUTIONAL SUPREMACY

- 4.1 The statement that the Constitution shall be supreme is probably the most important single statement in the transitional Constitution. The terms of Constitutional Principle IV mean that this concept must underlie the final

Constitution. In a sense, everything else in the transitional Constitution flows from section 4, emphasised by that part of the Preamble which states that the Constitution shall be supreme.

- 4.2 The adoption into South African law of the notion of constitutional supremacy amounts to a legal revolution, which brings this country into line with most democratic systems throughout the world. In our case (as happened in Canada in 1982), it marks a shift from the (British) Westminster system, whereby the sovereignty of the law-maker (Parliament) is the basis on which all constitutional law is founded to a constitutional model where the written word of the Constitution (as interpreted by the courts, primarily the Constitutional Court) rules supreme.
- 4.3 Several crucial consequences follow from this change:
 - 4.3.1 the judiciary assumes a higher public profile, being involved in laying down the limits of political power in accordance with the courts interpretation of the Constitution;
 - 4.3.2 all branches of government and organs of state function within the boundaries laid down in the Constitution, which is a sort of higher contract agreed upon in advance, according to which government must proceed; and
 - 4.3.3 the Constitution (of course, depending on what it actually stipulates) will generally limit the powers of government absolutely, and relatively (as between government bodies).
- 4.4 A further concomitant of the acceptance of the supremacy of the Constitution, is the incorporation of the idea of "constitutionalism" into our law. This is in many ways, simply put, the equivalent of the "rule of law" in the Westminster system.

Its role has been described as follows:

"Constitutionalism proclaims that there are characteristics fundamental to the democratic enterprise which cannot be amended or destroyed even by a majority government. Each citizen must be allowed to participate within the political process and thereby be empowered to make a difference to the character of political decisions. This process of participation cannot be qualified limited by assumptions of talent, ability, or economic resources. Individuals can only count as members of the political community when the principle of equal concern and respect is safeguarded."

(see Davis, Chaskalson and De Waal at p2 of Van Wyk (et al Eds) Rights and Constitutionalism (1994))

In other words, the idea of constitutional supremacy is not a mere statement of purpose: it brings with it constitutional "baggage" without which it cannot function effectively. The precise form which this "baggage" assumes is not pre-ordained, and will develop in the legal system of each country in which it is applied in accordance with the constitution, social values and judicial interpretation of that country.

Whatever the circumstances, however, it seems that the following values are indispensable to the notion of constitutionalism: limits to powers, participation, equality, justiciability and accountability. Each of these values is to be found in the Constitutional Principles in Schedule 4 to the transitional Constitution.

5. CONCLUSION

The above is an attempt to set the scene for Block 3. It will be expanded upon orally during the Orientation Workshop of Monday 27th March. Although this is the work of Prof. H. Corder, it has been circulated for general approval to the other Technical Advisors to Theme Committee One.

PARTY SUBMISSIONS

**AFRICAN CHRISTIAN DEMOCRATIC PARTY
SUBMISSION TO THE CONSTITUTIONAL ASSEMBLY
THEME COMMITTEE ONE**

SUPREMACY OF THE CONSTITUTION

The Origin of Constitutionalism

In his excellently reasoned treatise on the condition and direction of Western Civilisation, philosopher Francis Schaeffer traces back the history of constitutionalism to the Reformation principle of a people's political control of its sovereign in the Samuel Rutherford work *Lex Rex : Law is King*, published in 1644. (How Should We Then Live? Revell, 1976.)

Previously, early medieval parliaments adhered to changing winds of political events and inconsistent counciliar pronouncements, causing chaos in the certainty of law. Here, at last, was established a government of law, rather than of the arbitrary decisions of men - because the Bible as the final authority served as its foundation.

Biblical Perspectives

Romans 13:1 presents the basic premise of Christian politics : There is no power but from God. The powers that be are ordained by God. "Powers" in this sense mean the civil authorities with their God-given right and power to rule in the jurisdiction of civil issues assigned to it by God Himself in the Bible.

The accent is clearly on the Supremacy of God, and only thereafter on the supremacy of the State and Constitution. It is not a question of the Constitution being supreme and beyond criticism because civil institutions are established by God, but rather that because the civil authorities have been ordained by God, God is supreme over even the Constitution and He is beyond criticism - He is the ultimate authority.

Current political thinking on Constitutionalism, inalienable rights, government by consent and separation of powers among others, was shaped to a large extent by the ideas of John Locke. Ironically enough, there is an inherent contradiction in the work of Locke, because the empiricism that permeates his thinking - the idea that everything rests on experience - does not allow any notion of "natural rights". It is only when Locke's theories are seen as having been drawn from the work of Rutherford and secularised, that the ideas begin to have a foundation - namely a biblical base.

Through secularising the foundations of his political thinking, however, Locke found himself in the same warped thinking that amongst others, Americans are now experiencing the results of, in that their Supreme Court had taken a Constitution with clearly defined biblical roots and through a process of positive law application, tried to emulate the *fruits* that only a truly non-secular Republic - the very model the framers of the American Constitution envisioned for their country - could bear while denying its *roots* - an impossible exercise.

The ACDP has learned from these mistakes and as such, we stand for the new South Africa, to be a non-secular Republic - recognising that only a republic, run on biblical principles, under the authority of God, rather than under a democracy will lead to true freedom for all citizens.

The two concepts - 'democracy', a nation governed by the majority - and a 'republic', a nation governed by law - are definitely not synonymous. A non-secular Republic, the model that we in the ACDP proposes, will prove to be the only workable solution in this country, with its deeply ingrained history of oppression and hurt. This means that the new South Africa will be a nation governed by a constitution rooted in Biblical law, administered by representatives of the constitution democratically elected by the citizens.

In a democracy, the whims and fancies of the majority, manipulated by the media or elitist power-brokers, become the law of the land. In such a situation, neither our lives, nor our private possessions are safe.

In a democracy, if the majority of people believe abortion-on-demand is permissible, the lives of all unborn citizens are jeopardised.

If the majority believe that everyone over seventy-five years of age should be required to commit suicide so as to not be a drain on society's resources, no elderly person is safe.

But in a Republic, governed by constitutional law, rooted in biblical law, all life and property is safe. A constitution based on the Bible, would protect the sanctity of human life and the legitimacy of the private ownership of property. If the majority wants lax divorce laws and the legalisation of pornography, such immorality is not allowed because of the Constitutional protection of the family. If the majority want the education of children to be controlled by the State, rather than the family, such an assault on parental authority will not occur, because of the protection of the sphere of authority of the core of society, the family.

A more immediate cause for concern, is the requirement in Section 71(2) of Act 200 of 1993, that any new constitutional text passed by the Constitutional Assembly shall be of no force or effect unless the Constitutional Court has certified that all the provisions of this text comply with the Constitutional Principles.

These principles were drawn up by a non-elected, non-representative body and, as such, offends any notion of democracy that the rest of the constitutional process might aspire to. Where these principles are in contravention of Biblical legal principles, they will have to be carefully revisited - this equally goes for the interpretation of these by the Constitutional Court.

The ACDP holds the view that the biblical principles of the Triune Creator God are the standard against which all else will be measured - including the Constitution.

As such, we cannot willy-nilly accept that an elite group of people - the judges of the Constitutional Court - be elevated to the position where they can override elected representatives on the basis that what the elected representatives decided does not correspond with "Principles" that were drawn up by a non-elected body and forced upon them and the citizens of this land.

Only when an absolute standard, originating outside of, and above mankind, is adhered to, even by the members of the Constitutional Court, namely, the fixed and certain principles expounded in the Bible, will South Africans be able to rest assured that their rights and interests will be safeguarded from arbitrary infringement. With the system operating as it is now, the Constitutional Court will be guided by legal positivism in the constitutional legal systems of Canada, Germany, India and the United States of America, where it has been clearly shown that their constitutional judiciary has overridden so-called universal human rights of one individual or group in favour of another on the basis that "society so dictates".

The ACDP calls for the people to decide, by way of referendum, on issues such as abortion, euthanasia and capital punishment, where it is shown that the Constitutional Court overrides the voice of the people on issues with moral content. This would be so, because God has revealed his law to all of His human creation - it is that ingrained notion of right and wrong that is guiding scores of Americans to protest abortion practices and that is causing Britons to call for the re-institution of the death penalty.

18th April 1995

[SUPREME.WPS]

ANC SUBMISSION

Supremacy of the Constitution

Constitutional Assembly Submission to Theme Committee 1 Block 3

Guiding principles

1. The ANC submits that the following guiding principles are relevant for the question of the supremacy of the constitution and should be reflected in the context in which the supremacy of the constitution is formulated:
 - 1.1 The character of the state shall be a multi-party democratic state based upon democratic majority rule.
 - 1.2 There shall be a bill of rights guaranteeing all accepted human rights including socio-economic right and which shall, where appropriate, be applicable against all sources of power.
 - 1.3 Parliament shall, subject to the Constitution, be the supreme law maker, and the expression of the will of the people. The executive will be accountable to it.
 - 1.4 Parliament shall not be limited in its capacity to legislate so as to address the legacy of the past including such issues as land restoration, re-distribution, and affirmative action.
 - 1.5 Separation of Powers between the organs of state shall be provided for in a manner consistent with the accountability of the executive to Parliament.
 - 1.6 All provisions of the final constitution shall be capable of amendment subject only to the constitutional prescribed majorities and procedures.

The democratic constitutional state

2. The South African state should have the character of being a democratic constitutional state expressing the balance between democratism and constitutionalism.
3. The concept of the democratic constitutional state¹ should be a normative guide and not a mere political programme, and should in an harmonious way encompass the following:

¹. To be included at least in the Preamble of the Constitution

3.1 *The principle of democracy:* The right of the people of South Africa to exercise state power through the vote as well as state organs and institutions.

3.2 *The principle of constitutionalism:* The national lawgiver (Parliament) should be bound by the Constitution except and in so far as the Constitution may be amended in the prescribed way, whilst the executive and judiciary should be bound by written and unwritten law.²

4. It follows from 3 that the principle of constitutionalism should be formulated in the context of, and will be influenced by:

4.1 The doctrine of the separation of powers, and

4.2 a fair balance between rigidity and elasticity regarding amendment of different parts of the constitution.

The harmonisation of democratism and constitutionalism

5. The central problem which the Constitution should solve is the apparent antinomous relation between freedom and equality. Whilst the idea of freedom eventually leads to constitutionalism in the sense of ³ "limited government", the idea of equality is the point of departure of democratism.

6. Extreme constitutionalism may give rise to the fear that the exercise of legitimate democratic powers of the people may be subjected to unacceptable and inappropriate limits.⁴

7. In the same way democracy unconstrained by rules guaranteeing equality of citizenship and a fair contest between parties may lead to the arbitrary exercise of state power and anarchic conditions.

² It follows that all organs of state at all levels of government are to be bound by the constitution, including Parliament, but only Parliament may amend the Constitution in the prescribed way.

³ As in the constitutional history of the USA.

⁴ Sometimes more strongly expressed in the terms that extreme constitutionalism, or "limited government", may be an elitist orientation discourse technique to transcribe an anti-democratic attempt. Giving too much weight to, or over-stating, the supremacy of the constitution may be used to make highly relevant democratic/political questions appear as legal/constitutional questions and thus as unpolitical questions. These political questions are thus restylised and relegated to the legal-scientific sphere, where non-elected experts decide.

8. The solution for a moderated constitutionalism and democratism should be sought along the following lines:
 - 8.1 Democracy should be seen as the supremacy of the people through the supremacy of law/the constitution: the idea of democratic constitutionalism. There should be no democracy without constitutionalism, and no constitutionalism without democracy.
 - 8.2 Constitutionalism should be legitimate, and it is legitimate when it is seen against the background of democratic law-making and the democratic system of responsible and accountable government.
 - 8.3 The distinction between judicial and political questions which is required for an unacceptable statement of the supremacy of the constitution should be made within the context of the basically undivided unity of law-making and politics in a system of democratic governance.
 - 8.4 The supremacy of the Constitution could accordingly and against this back-ground be seen as meaning that democratic decisions should, with regard to material content and procedure, only be legally possible within the limits set by the Constitution, and thus in accordance with the Constitution.
 - 8.5 The supremacy of the constitution should not be a system against the state, but it should be a system for the democratic state, to guard against the state degenerating into anarchy, arbitrariness and illegality, without a framework of rules. Such a state would undermine democracy and democratic practices.

The role of the judiciary

9. It follows from the above that the underlying assumption in Constitutional Principle XXIII should be accounted for in the final constitution, i.e. that the judiciary should not assume a legislative role in the sense of having to decide on the desirability or necessity of legislative.
10. The judicial determination of the constitutionality of legislation should be restricted to establish the formal and material legal compatibility of national or provincial legislation with the Constitution, or the compatibility of provincial legislation with other national legislation, and not the political desirability of the same.

THEME COMMITTEE ONE

BLOCK THREE "SUPREMACY OF THE CONSTITUTION"

"Constitutionalism" is the concept that government shall exist and function under law, as laid down by the Constitution and embodied in valid statutes. It means essentially that power derives from law and that power is to be held accountable and that power is to be limited and circumscribed by checks and balances. Further, constitutionalism is authoritatively held to be a doctrine of limited government, meaning that its structure provides for the rights and liberties of individuals and corporate bodies that are invulnerable to abrogation or infringement by any legislative or administrative organ. Substantially, the interim Constitution complies with these criteria, and in particular Sec 4 (1) and (2), providing for the supremacy of the constitution marks a clean break from the former principle of the supremacy of parliament. Our recommendation is that this clause should be retained as it stands.

The usage of the concept of 'separation of powers' is fashionable. While it is certainly the case that 'executives', 'legislatures' 'judiciaries' can be analytically separated, in democratic practise they relate to one another in different ways - US system c/v British system. According to Blackwell's Encyclopedia of Political Theory (entry on Separation of Powers by Geoffrey Marshall) the criterion derived from the purest form (ie in US) is:

The branches of government are regarded as co-ordinate and autonomous, none of them being subordinate or accountable

to any of the others. (For example, the legislature cannot remove the executive, nor can the executive dissolve the legislature).

To describe the interim Constitution as based on 'separation of powers' seem to be incorrect. Where executives are responsible to legislatures and ministerial heads and Prime Ministers/Presidents and Deputy Presidents are members of the legislature, it is more correct to speak of 'fusion powers'. Perhaps political scientists' usage differs from that of constitutional lawyers.



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THEME COMMITTEE 1

(b) SUPREMACY OF THE CONSTITUTION

The concept of a constitutional state means that no organ of state (not even Parliament itself) is above the constitution: sovereign power in such a state vests in the constitution. However, as Parliament has the power to alter the Constitution (in accordance with its provisions) it is imperative that appropriate checks and balances be introduced in the Constitution. In this regard Constitutional Principle XV reads: 'Amendments to the Constitution shall require special procedures involving special majorities'. The very purpose of this requirement is to preclude the possibility of the 'tyranny of the majority' in Parliament. In some states this possibility is reduced by the requirement that constitutional change requires approval of certain majorities of voters in referenda.

Supremacy of the constitution in the present context refers not only to the constitutional state mentioned above, but also to the following: that the Constitution is the highest law in the land, and all other law (statutory and common law) is subject to it, i.e. the latter would be void or invalid to the extent of any conflict between the two; and that international law, in so far as it may be part of South African law, is likewise subject to the same limitation.

The Freedom Front wishes to point out that this submission is a general statement of principle, and that the appropriate checks and balances referred to above should be spelled out in subsequent reports of relevant Theme Committees (e.g. Theme Committee 1 and/or 2 and/or 3).

NATIONAL PARTY SUBMISSION

THEME COMMITTEE 1

BLOCK 3: SUPREMACY OF THE CONSTITUTION

As pointed out in the briefing document made available by our Technical Committee, the principle that the constitution shall be the supreme law of the land is a non-contentious issue. We strongly support the principle that the state and all its organs shall be subject to a constitution in which their structures and powers, as well as the relationship between the state and its citizens, are defined.

We agree that the supremacy of the constitution will be the most important feature of the final constitution. The consequences of this for the position of parliament as the highest legislature, the executive as the authority that execute those laws, and the judiciary as the authority responsible for the application of the constitution to the actions of those other branches are indeed as far-reaching as expounded in the briefing document.

In particular, we wish to react as follows to the issues raised in paragraph 2.2 of the briefing document:

2.2.1 Inter-relationship between bill of rights and constitutional supremacy

We believe that the notion of an entrenched, justiciable constitution is actually very closely related to a justiciable bill of rights. A bill of rights enforced by the courts, but not part of the supreme law of a land, cannot be an effective instrument of law, as it can be amended or abolished too easily. In order to be such an instrument, it needs to be a part of an entrenched supreme constitution. As a matter of fact, a bill of rights will and should form an integral and prominent part of the constitution.

2.2.2 Equality

This matter has been addressed in a previous submission of the National Party.

2.2.3 Relationship between constitutional supremacy and separation of powers.

In a very direct sense, supremacy of the constitution will not be effective if the courts are not afforded the authority to review the actions of other branches of government. This presupposes at least a measure of separation between the different branches of government which will enable the judiciary effectively to exercise its review function. In a broader, more indirect sense, the idea of the separation of powers, its underlying premise of preventing an over-concentration of power and effecting meaningful checks and balances is, of course, an essential feature of a constitutional state. Again, the separation of powers can be provided for effectively only in a written, entrenched constitution that has higher status than the government bodies, the powers of which it seeks to control.

2.2.4 Impartial and independent judiciary

We can only reiterate that a supreme constitution, which includes a bill of rights, cannot be an effective instrument of law if there is no effective way of enforcing it. We believe that an impartial and independent judiciary is the most suitable instrument for this purpose. As a matter of fact, in our view, an independent judiciary goes hand in hand with the idea of a supreme constitution.

2.2.5 Horizontal application of the constitution

In our understanding this matter will be dealt with extensively and exhaustively by Theme Committee 4. Suffice to say that the transitional constitution provides for

limited horizontal application of the bill of rights in particular, and that it should be retained in the final constitution.

2.2.6 Entrenchment of the constitution

We believe that the principle of the entrenchment of the constitution should also be considered by this Theme Committee. A supreme constitution that is not entrenched, and that can be amended easily, cannot be an effective instrument to control state action. In actual fact, entrenchment is one of the ways in which a constitution is afforded higher status or, put another way, in which the supremacy of a constitution is given real and practical meaning. To explain: if the constitution provides that it is supreme, but that particular section can be amended by an ordinary majority, that is a majority of a quorum, that supremacy can be abolished almost by the stroke of a pen and cannot mean very much.

Conclusion

By way of summary, one can conclude that the following concepts are inextricably bound to one another and should all be provided for in the final constitution:

- (i) constitutional supremacy;
- (ii) justiciability of the constitution;
- (iii) entrenchment of the constitution;
- (iv) the separation of powers; and
- (v) effective protection of fundamental rights and freedoms.



22 February 1994

PAC SUBMISSION TO THEME COMMITTEE 1 ON BLOCK 2 AND 3

- 2.1 The South African constitution like that of the United States of America should in its preamble enshrine the reality and truism of the equality of all human beings in general but should entrench that equality in the body of the constitution in respect of the nationals of the South African State.
 - 2.2 The constitution should not couch the equality of South African Nationals in impalpable terms that allow the possibility of various jurisprudential interpretations. Neither should the constitution give way to intellectual contests on the nation of the equality of all South African nationals. The constitution must succinctly define and spell out what is meant by the equality of all South African nationals.
 - 2.3 PAC believes and prays that the constitution should be designed to facilitate the fast but not forced transition from political emancipation to economic emancipation where social justice shall be founded in the ruins of a social stratification based on institutionalised economic advantage and disadvantage. PAC firmly believes that it is only when individual members of the nation enjoy equal access to all national resources that South Africa will be truly free and foundation for peace and security is attained.
-
- 3.1 South Africa should be a single sovereign state with provincial and local governments that derive their power from a central government.
 - 3.2 PAC feels a dire need for galvanising all the presently, culturally heterogeneous people of South Africa into a single whole, not by means of force of whatever nature but through allowing the now freed people to freely and equally interact in the united economy that South Africa happens to have. Taking ethnicity,

race or territorial ethnicity into account in the practice of politics and economics in South Africa, is anathema to PAC and cannot be contended because that is bending backwards in favour of divisive and retrogressive tendencies of those who still represent in our society the vestiges of racialism and racism. PAC strongly believes that the logic of South African history which is even attested to by the national aspirations and ideals of the south African liberation movement, is leading towards the realisation of a homogeneous nation via the evolutionary path. PAC is, thus, loath to any constitutional attempts aimed at obstructing the existing evolutionary movement towards a de-ethnicised and de-racialised nation.

- 3.3 The mainly ethnically demarcated provincial governments such as we have today in South Africa are worrying to PAC as they perpetuate ethnic identity and affinity. The emergence of scourges such as the policies of ethnic cleansing find fertile ground for germination in such political arrangements.
- 3.4 From its inception, PAC is politically committed to the propagation and promotion of a politically joined commonwealth through the establishment of a federation of Southern Africa. South Africa needs to join that federation as a unitary state inhabiting a united people.
- 4.1 PAC believes that a constitution written by democratically elected persons with the interested members of the nation freely contributing in the formulation of the same, has to be the supreme law and all political decisions and actions must therein find their legitimacy and justification.
- 4.2 All law, statutory or otherwise and all ordinances, political policies and commands must of necessity conform to the provisions of the constitution to be of legal force
- 4.3 In the constitution must vest the sovereignty of the nation.

M Dyani - MP

***BRIEFING DOCUMENT
BLOCK 5***

THEME COMMITTEE ONE

BLOCK 5: BRIEFING DOCUMENT

AGENDA ITEM 6: THE ECONOMY

1) INTRODUCTION

Most constitutions do not prescribe directly what form of economy should exist in the state concerned. Economic arrangements are to be implied from sundry statements in the Constitution about the form of state, the institutions which are provided for, and the rights which are entrenched, for example.

So, the Basic Law of the Federal Republic of Germany reads as follows (in Article 20(1)):

"The Federal Republic of Germany shall be a democratic and social federal state." From this the courts have deduced the constitutional sanctioning of a fair degree of social welfare measures as part of the politico-economic system.

Again, the American Constitution has been interpreted as envisioning a free enterprise capitalist economy, especially when seen in its historical context. Changing political circumstances, however, particularly during the 1930's, forced the U.S. Supreme Court to acknowledge a fair level of government intervention in economic affairs, in the form of President Franklin Roosevelt's "New Deal" legislation. [Appearances are not always what they seem. Canada, an acknowledged "free market" economy, does not protect property rights in its Charter of Fundamental Rights.]

The "Suggested Framework for Agenda Item 6" proposes that Theme Committee One considers "constitutional regulation of economic matters" and "constitutional mechanisms to achieve substantive equality, economic empowerment and socio-economic development" in this Block. What follows is an attempt to amplify these issues, as an aid to parties in drawing up their submissions in this regard.

2. TRANSITIONAL PROVISIONS

Various provisions which affect economic matters are to be found in the Transitional Constitution of 1993.

2.1 The relevant Constitutional Principles are the following:

- II) *Everyone shall enjoy all universally accepted fundamental rights, freedoms and liberties, which shall*

be provided for and protected by entrenched and justiciable provisions in the Constitution, which shall be drafted after having been give 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.*
- 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.*
- 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 government 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 rights 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.

2.2 These Principles emphasise the following aspects of constitutional regulation of the economy:

2.2.1 the entrenchment of the notion of substantive equality and the removal of discriminatory practices;

2.2.2 a requirement of defined fiscal powers in national and provincial government jurisdiction, including the constitutional right of each level of government to an "equitable share of revenue collected nationally";

2.2.3 the regulatory role (in regard to 2.2.2) of the Financial and Fiscal Commission, and of the Reserve Bank generally; and

2.2.4 the recognition and protection of employers' and employees' rights in their mutual relationships.

2.3 Each of the above stipulations contemplates a degree (and sometimes a particular form) of legislative, executive and even judicial involvement in and regulation of economic life. The power to impose taxation is one of the most obvious such forms.

2.4 The transitional Constitution further provides the following measures which influence economic life:

Servitude and forced labour

12. No person shall be subject to servitude or forced labour.

Economic activity

26. (1) Every person shall have the right freely to engage in economic activity and to pursue a livelihood anywhere in the national territory.

(2) Subsection (1) shall not preclude measures designed to promote the protection or the improvement of the quality of life, economic growth, human development, social justice, basic

conditions of employment, fair labour practices or equal opportunity for all, provided such measures are justifiable in an open and democratic society based on freedom and equality.

Labour relations

27. (1) Every person shall have the right to fair labour practices.
- (2) Workers shall have the right to form and join trade unions, and employers shall have the right to form and join employers' organisations.
- (3) Workers and employers shall have the right to organise and bargain collectively.
- (4) Workers shall have the right to strike for the purpose of collective bargaining.
- (5) Employers' recourse to the lock-out for the purpose of collective bargaining shall not be impaired, subject to section 33(1).

Property

28. (1) Every person shall have the right to acquire and hold rights in property and, to the extent that the nature of the rights permits, to dispose of such rights.
- (2) No deprivation of any rights in property shall be permitted otherwise than in accordance with a law.
- (3) Where any rights in property are expropriated pursuant to a law referred to in subsection (2), such expropriation shall be permissible for public purposes only and shall be subject to the payment of agreed compensation or, failing agreement, to the payment of such compensation and within such period as may be determined by a court of law as just and equitable, taking into account all relevant factors, including, in the case of the determination of compensation, the use to which the property is being put, the history of its acquisition, its market value, the value of the investments in it by those affected and the interests of those affected.

Environment

29. Every person shall have the right to an environment which is not detrimental to his or her health or well-being.

Children

30. (1) Every child shall have the right
- (e) not to be subject to exploitative labour practices nor to be required or permitted to perform work which is hazardous or harmful to his or her education, health or well-being.

- 2.5 In addition, sections 155 to 159 and 178, and the whole of Chapter 12 of the 1993 Constitution govern provincial and local financial and fiscal affairs, as well as the establishment, powers and functions of the financial institutions of central government, particularly the Reserve Bank, the Financial and Fiscal Commission and the Auditor-General.

3. THE TASK OF THEME COMMITTEE ONE

- 3.1 Once more, much of the detail in relation to the above matters appears to have been allocated to the jurisdictions of other Theme Committees:

3.1.1 matters pertaining to rights protection are being dealt with by TC4;

3.1.2 public finances and associated institutions by TC6; and

3.1.3 the division of fiscal powers between central and provincial governments seems to be a necessary factor for TCs 2 and 3 to consider.

- 3.2 It seems, therefore, that Theme Committee One might consider the general principles of the form and extent of constitutional regulation of the economy, and constitutional mechanisms to achieve socio-economic development. Questions which may arise are:

3.2.1 should South Africa be described as a particular type of economic state (e.g. capitalist, socialist, social-democratic, free market, etc) in the Constitution?

- 3.2.2 should the power to acquire, hold and dispose of legal rights in property become constitutional rights?
- 3.2.3 should the sphere of labour relations be constitutionally regulated?
- 3.2.4 should environmental regulation be dealt with in the Constitution? and
- 3.2.5 are there mechanisms (other than those mentioned above) of economic regulation which ought to be contained in the Constitution?

4. CONCLUSION

It is clear that economic life will inevitably be affected by measures taken in the Constitution. Some of those measures have already been prescribed in the Constitutional Principles. If parties consider it advisable that direct reference be made to one or another economic form of state, they might like to suggest how this could be expressed in the Constitution e.g. in the Preamble or the Postamble, or as a substantive provision.

It is hoped that this briefing document has provided some assistance to members. It will be expanded on orally at the Orientation Workshop on 15 May 1995.

