

2/4/1/2/30

A25

**CONSTITUTIONAL
ASSEMBLY**

**THEME COMMITTEE 1
CHARACTER OF
DEMOCRATIC STATE**

29 MAY 1995

**ROOM M515
09H00**

**EXTRA
DOCUMENTATION**

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FIRST DRAFT REPORT FROM THEME COMMITTEE ONE

BLOCK 4: ACCOUNTABLE GOVERNMENT

29 MAY 1995

PART ONE

- A) Summary Overview of submissions received and processed by Theme Committee One from sources outside the Constitutional Assembly (Vols 18 and 19) - see attachment.
- B) The Technical Committee conducted an Orientation Workshop on 19 April before parties made their submissions on the subject matter of this Block, for which the attached Briefing Document was compiled.
- 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 4.
- 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 civil liberties, which shall be provided for and protected by entrenched and justiciable provisions in the Constitution, which shall be drafted after having given due consideration to inter alia the fundamental rights contained in Chapter 3 of this Constitution.

VI

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

IX

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

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.

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.

XXX

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

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

PART TWO

AGENDA ITEM 5: ACCOUNTABLE GOVERNMENT

A. GENERAL DISCUSSION OF THE MATERIAL

All the parties confined their submissions to issues of broad principle, and there was a substantial degree of concurrence between them. As is the case in other Blocks, much of the detailed consideration of these issues falls within the scope of the work of other Theme Committees, so that the focus on broad principle is appropriate.

B. NON-CONTENTIOUS ISSUES

1) All parties support the goal of accountable government, and that structures and mechanisms to achieve this object be included in the final constitutional text. The following particular aspects of accountability enjoyed general support as important contributors to

the achievement of accountability:

- i) the concept of the separation of powers between legislature, executive and judiciary, and the concomitant checks and balances between these branches of government;
- ii) the executive's accountability to the legislature, and the legislature's accountability to the electorate, through fair and regular elections;
- iii) the establishment (or continuation), independence and impartiality of institutions, such as the Public Protector, various Commissions, the Auditor-General and the Reserve Bank, as mechanisms to foster accountability and expose maladministration;
- iv) the pursuit of the principles of "transparency" or "accessibility to information"; and
- v) the creation of an effective regime for the protection and furtherance of fundamental rights, based on the principles of equality and freedom.

ii) Beyond the above central aspects of accountability, the following additional aspects were stressed by the parties concerned:

ACDP: Emphasized that all power is derived from God, and that accountability starts with individual self-control. Proposed a two-chamber system of government to further mutual checking of power, and a code of conduct for members of government at all levels, which recognised the aspects of morality, servanthood and honesty, among others.

ANC: Mentioned the parliamentary committee system as a means "to ensure executive accountability to an informed parliament". Stressed the independence of the judiciary and the need for the members of the Bench to be drawn from the fullness of South African society.

DP: Concentrated on the fundamental rights of every citizen to hold the government accountable, as well as the indispensability of access to government information.

FF: Divided its submission into sections on legal and political accountability, the former (the government's subjection to the law) being the "first curb on government powers". Emphasized the political accountability (embodied in the Constitutional Principles) of the government towards minority political parties (XIV) and other

particular communities (XXXIV, read with XI and XII), in addition to the aspects mentioned above.

NP: Added the following mechanisms to those mentioned: the "full range of parliamentary control mechanisms", and the "distribution of powers among different levels of government".

PAC: Concentrated on the accountability of the bureaucracy.

C. **CONTENTIOUS ISSUES**

None.

PART THREE

The Theme Committee will be dealing with the issue of "the economy" in the next Block. An orientation workshop based on a briefing document drawn up by the Technical Committee was held with the Theme Committee on Monday 15 May. Reaction from the public on this issue has already been sought by means of media advertisements.

**ANALYTICAL SURVEY OF REPORT BY THEME COMMITTEE ONE
ON BLOCK 4 - ACCOUNTABLE GOVERNMENT**

NO.	CONSTITUTIONAL PRINCIPLES	ISSUE	CONTENTIOUS ASPECTS	NON-CONTENTIOUS ASPECTS	REMARKS
1.	II, VI, IX, XXVII, XXIX, XXX	Accountable Government	None	Accountable Government pursued through: 1) checks and balances through separation of powers 2) the legislature's accountability to the electorate through elections; 3) institutional mechanisms to check maladministration and corruption and to further equality; 4) transparency and freedom of information; 5) the protection of fundamental rights	concept to be included as a goal in the Preamble/postamble ----- Within the jurisdiction of TC 2 ----- Within the jurisdiction of TC 6 ----- Within the jurisdiction of TC 4

FIRST DRAFT - 23 MAY 1995

Status:- Draft provided by Technical Advisors to TC 1
and CA Law Advisors

THEME COMMITTEE ONE
SUPREMACY OF THE CONSTITUTION

DRAFT CLAUSE

"Supremacy of the Constitution

- (1) This Constitution shall be the supreme law of the Republic.
- (2) Any law, act or conduct inconsistent with this Constitution shall be invalid to the extent of the inconsistency.
- (3) This Constitution shall bind all legislative, executive and judicial organs of state at all levels of government."

ALTERNATIVE ELECTORAL SYSTEMS

i) Single non-transferable vote

1 seat 10 000 voters A 6000 B 4000
3 seats 10 000 " A(3x2000) B(1x4000)
 2 seats : 1 seat

ii) Limited vote (same result)

3 seats, each voter 2 votes.

A 27000 voters = 54 000 votes : 2 seats

B 20 000 voters = 40 000 votes : 1 seat.

iii) Single transferable vote

3 seats 10 000 voters

$$\text{DROOP QUOTA} = \left(\frac{10\,000}{3+1} \right) + 1 = 2501 \text{ votes}$$

Candidates Votes 2nd preferences

elected	{	A	4000	(1499 extra: 899 to C, 600 to D)
elected		B	2000 + 1200 E	(699 extra: 601 to D, 98 to C)
		C	1500 + 899 A + 98 B	= 2497 out
elected		D	1200 + 600 A + 100 E + 601 B	= 2501
		E	1300	(1200 to B, 100 to D) out

iv) List system

100 seats : Party A 37% = 37 seats

Parties E, F, + G Party B 35% = 35 seats

Party C 18% = 18 seats

Party D 6% = 6 seats

divided up amongst others : how ?

Prisoners' voting rights

Thanks to: B J Kroeker, Jacovs Iacovides, João Marcello, Marie-André Bertrand, Victor Kogan-Jasny, Michael Mollineau, Edmond R B Nkalubo, L O Maganga, Elói Alfredo Pietá, Ashley Mudford, Jana Valkova, Giuseppe Mosconi, Alain Agboton, Roland Thacker, Klára Kerezi, A N Mnkandla, Jorge Cauti de la Cruz, Rattan Amol Singh Sidhu, Peter Butler, D Van Zyl Smit, Monika Plateř, Bart Hofstra, George-Mircea Botescu, Alec Spencer, Erik Van Der Maal, Cristian Riego, Amir Salem, Akram Ali Krishan, Ansar Burney, Jean Stewart, John McNeill, Mladen Knezevic, Jephthah K Gathaka, Norman Bishop, M S Rahi, Johannes Feest, Yuichi Kaido, Hans Henrik Brydensholt, Peter Sirr, Nils Christie, Jens Borg Nielsen, Les Cave, Jens Tolstrup, Alvin J Bronstein, Yoshio Tsujimoto, Laure Baste-Morand, Duncan McLaughlan, Brendan Reynolds, Institute of Criminology and Social Prevention (Czech Republic), Jerzy Kielbowicz, Marina Ajdukovic

	Do unconvicted prisoners have the right to vote in your country?	Do convicted prisoners have the right to vote?	Is there a law which says that prisoners cannot vote?	If you answered 'yes' to either 1 or 2 above, are prisoners allowed to vote in: a) local elections b) national elections c) other (please give details)	Is the voting age for prisoners the same as for the general population? Please give brief details	Do prisons provide the necessary facilities for prisoners to vote (eg by providing information about candidates, voting papers, etc). Please give brief details
Australia (Commonwealth)	Yes	Yes		(a) Yes for up to 12 months of the prison sentence (b) Yes, for up to 5 years of the prison sentence (c) -	Yes 18 years and over	Yes. The Electoral Commission provides a mobile polling booth; postal voting; enrolment.
Australia - State of Queensland	Yes	Some, i.e. those under sentence for an offence punishable by a prison sentence of less than 5 years	Yes	see note i (a) Yes (b) yes (c) -	Yes 18 years and over	Yes. Prisoners receive information on request and the means to vote by post. However many prisoners are ineligible because they are not on the electoral register.
Brazil	Yes	No	Yes Article 15 (iii) of the Brazilian Constitution	(a) Yes see note ii (b) Yes see note ii (c) -	Yes between 16 and 18 years of age, voting is optional, after 18 voting is mandatory	No
Canada	Yes	Yes	Yes. The Elections Act	(a) No (b) No (c) Prisoners may vote in the following provincial elections: Quebec, Ontario, Newfoundland, Manitoba. They may not vote in provincial elections in British Columbia, New Brunswick, Nova Scotia, Prince Edward Island. In Alberta, prisoners serving community sentences may vote. In Saskatchewan, only remand prisoners may vote.	Yes	Yes. Voting areas are set up in the institution and segregated inmates have the ballots brought to their cells; Elections Canada personnel and a designated institutional coordinator prepare the voting lists.
Chile	Neither convicted nor unconvicted prisoners have the right to vote in Chile					
Croatia	Yes	Yes	No	(a) Yes (b) Yes (c) -	Yes 18 years and over	Yes
Cyprus	Yes	Yes	No	(a) No (b) No (c) -	Yes see note iii	
Czech Republic	Yes	No	Yes	(a) No, because there is as yet no Municipality Election Act (b) Yes (c) -	Yes 18 years and over	Yes. Elections take place in prisons. Voting papers and electoral lists are provided by prison staff. Candidates are allowed to enter prisons.
Denmark	Yes	Yes	No	(a) Yes (b) Yes (c) National referenda and European elections	Yes	Yes. Inmates' representatives often arrange presentations by electoral candidates.

	Do unconvicted prisoners have the right to vote in your country?	Do convicted prisoners have the right to vote?	Is there a law which says that prisoners cannot vote?	If you answered 'yes' to either 1 or 2 above, are prisoners allowed to vote in: a) local elections b) national elections c) other (please give details)	Is the voting age for prisoners the same as for the general population? Please give brief details	Do prisons provide the necessary facilities for prisoners to vote (eg by providing information about candidates, voting papers, etc). Please give brief details
Egypt	Neither convicted nor unconvicted prisoners have the right to vote in Egypt.					
France	Yes	see note iv	No	(a) Yes (b) Yes (c) European (see note v)	Yes	Yes. Prison governors are obliged to inform inmates of their right to vote by proxy.
Great Britain	Yes	No	Yes. The Representation of the People Act	(a) Yes (b) Yes (c) referenda and European elections	Yes 18 years and over	Prisoners have to apply for a voting slip. Information about candidates is scarce.
Germany	Yes	Yes	No, but the court may, in a few rare cases, take away the right to vote as part of the sentence	(a) Yes (b) Yes (c) -	Yes	Yes. Prisoners can vote in the prison or by post. The prison is required by law to assist prisoners in exercising their voting rights.
Hungary	Yes	No	Yes, Section 4 of the Hungarian Criminal Code	(a) Yes (b) Yes (c) Referenda and other democratic processes	Yes 18 years and over	Yes
India	Yes	Yes see note (vi)	Yes, certain provisions of the Representation of the People Act disqualify some prisoners from voting	(a) Yes (b) Yes (c) -	Yes 18 years and over	Yes, but this is not always the case in practice.
Italy	Yes	No	-	(a) Yes (b) Yes (c) European Elections	Yes	This depends on the policy of the individual prison.
Japan	Yes	No	Yes	(a) Yes (b) Yes (c) Election of governors and election of mayors	Yes 20 years and over	Yes. Information is printed in newspapers, but these are not easily accessible to all prisoners. Unconvicted prisoners vote by obtaining absentee ballots.
Jordan	Neither convicted nor unconvicted prisoners have the right to vote in Jordan					

Notes

- i Unconvicted prisoners are allowed to vote in local, national and state elections. Those under sentence for an offence punishable by imprisonment for less than 5 years may vote in federal (national) elections.
- ii Unconvicted prisoners can vote provided they are imprisoned within their own political domicile. Voting for unconvicted prisoners is at the judge's discretion.
- iii The voting age for local elections is 18, and 21 for national elections. This also applies to prisoners. The apparently

contradictory answers are explained by the existing restriction on free movement outside prison which prevents prisoners from visiting the polling station, to exercise their voting rights. The problem is expected to be solved by a new bill soon to become law, 'The Prisons Law 1994'.

iv Before the implementation of the new penal code in 1994, all convicted prisoners were automatically deprived of their civil rights and therefore of the right to vote. Since the implementation of the new penal code, deprivation of civil

rights is now one among many of the additional punishments which may be imposed by the court. Therefore convicted prisoners are no longer automatically deprived of their civil rights. Most prisoners were sentenced before the new penal code was implemented and it is not yet clear what the result of the reform will be.

v Foreign prisoners belonging to the European Union can vote in European elections.

vi A prisoner's right to vote depends on his/her conviction.

There was an excellent response to this information collection sheet. However, as space is limited the table has been split into two parts. The responses for the following countries will appear in Newsletter 19: Kenya, Lesotho, The Netherlands, New Zealand, Northern Ireland, Norway, Pakistan, Peru, Poland, Romania, Russia, Senegal, South Africa, Sweden, Trinidad & Tobago, Uganda, USA and Zimbabwe.

Prisoners' voting rights

(continued)

Thanks to: B J Kroeker, Iacovos Iacovides, João Marcello, Marie-André Bertrand, Victor Kogan-Jasny, Michael Mollineau, Edmond R B Nkalubo, L O Maganga, Elói Alfredo Pietá, Ashley Mudford, Jana Valkova, Giuseppe Moacomí, Alain Agboton, Roland Thacker, Klára Kerecsi, A N Mnkandla, Jorge Cauti de la Cruz, Rattan Amol Singh Sidhu, Peter Butler, D Van Zyl Smit, Monika Platek, Bart Hofstra, George-Mircea Botescu, Alec Spencer, Erik Van Der Maal, Cristian Riego, Amir Salem, Akram All Krelshan, Anwar Burney, Jean Stewart, John McNeill, Mladen Knezevic, Jephthah K Gathaka, Norman Bishop, M S Rahi, Johannes Feest, Yuichi Kaido, Hans Henrik Brydensholt, Peter Sirr, Nils Christie, Jens Borg Nielsen, Les Cave, Jens Tolstrup, Alvin J Bronstein, Yoshio Tsujimoto, Laure Baste-Morand, Duncan McLaughlan, Brendan Reynolds, Institute of Criminology and Social Prevention (Czech Republic), Jerzy Kielbowicz, Marina Ajdukovic

	Do unconvicted prisoners have the right to vote in your country?	Do convicted prisoners have the right to vote?	Is there a law which says that prisoners cannot vote?	If you answered 'yes' to either 1 or 2 above, are prisoners allowed to vote in: a) local elections b) national elections c) other (please give details)	Is the voting age for prisoners the same as for the general population? Please give brief details	Do prisons provide the necessary facilities for prisoners to vote (eg by providing information about candidates, voting papers, etc). Please give brief details
Kenya	Yes	No	No	(a) Yes (b) Yes (c) -	Yes 18 years and over	Yes. A polling station is set up within the prison.
Lesotho	Neither convicted nor unconvicted prisoners have the right to vote in Lesotho.					
The Netherlands	Yes under Article 6 of the Dutch Voting Act (see note vii)	Yes (see note viii)	No (see note vi)	(a) Yes. Foreign prisoners also have this right (b) Yes, but this applies only to Dutch nationals (c) European	Yes 18 years and over	Yes. City Councils are obliged to provide all inhabitants, including prisoners, with an electoral list. Further information may be provided by the prison itself and sometimes the City Council. Most political parties produce articles for local papers which are available to prisoners.
New Zealand	Yes	Yes, if they are serving a sentence of less than 3 years	Yes	(a) Yes (b) Yes (c) -	Yes	Yes
Northern Ireland	Yes	No	Yes	(a) Yes (b) Yes (c) European elections	Yes 18 years and over	Yes. Application forms are issued for postal votes; full instructions are given on voting procedures in prison; prisoners are allowed to receive election literature.
Norway	Yes	Yes	No	(a) Yes (b) Yes (c) -	Yes	Yes
Pakistan	Neither convicted nor unconvicted prisoners have the right to vote in Pakistan					
Peru	Yes	Yes, see note (b)	Yes, in the Peruvian Penal Code	(a) Yes (b) Yes (c) -	18 years and over	No
Poland	Yes	Yes		(a) No (b) Yes (c) -	Yes 18 years and over	Yes through T.V., radio and newspapers.

	Do unconvicted prisoners have the right to vote in your country?	Do convicted prisoners have the right to vote?	Is there a law which says that prisoners cannot vote?	If you answered 'yes' to either 1 or 2 above, are prisoners allowed to vote in: a) local elections b) national elections c) other (please give details)	Is the voting age for prisoners the same as for the general population? Please give brief details	Do prisons provide the necessary facilities for prisoners to vote (eg by providing information about candidates, voting papers, etc). Please give brief details
Romania	Yes	Yes	-	(a) Yes (b) Yes (c) -	Yes 18 years	Yes
Russia	Yes	No	-	(a) Yes (b) Yes (c) -	Yes	No
Senegal	Neither convicted nor unconvicted prisoners have the right to vote in Senegal					
South Africa	Yes	Yes see note (b)	Yes see note (x)	(a) yes (b) Yes (c) referenda or plebiscites	Yes 18 years and over	Yes
Sweden	Yes	Yes (see note (d))	No	(a) Yes (b) Yes (c) -	Yes 18 years and over	Yes. A few open prisons arrange for prisoners to vote in person but most prisoners vote by postal ballot. In addition to prisons providing information about candidates, it is possible for candidates to visit most prisons.
Trinidad & Tobago	Yes	Yes	No (see note (d))	(a) Yes (b) Yes (c) -	Yes 18 years and over	No, unless the prisoner has registered as a 'special voter'.
Uganda	Neither convicted nor unconvicted prisoners are allowed to vote in Uganda.					
USA	Yes	No	Yes various state laws	(a) Yes (b) Yes (c) -	Yes	No pre-trial prisoners must obtain all the information and absentee ballots on their own initiative. As a result, most do not vote.
Zimbabwe	Yes	Yes	No	(a) Yes (b) Yes (c) -	Yes	No

Notes

vi As an additional punishment, offenders sentenced to at least one year imprisonment can be excluded from voting in elections. However this is hardly ever enforced.

vii Prisoners vote by proxy. They cannot leave the prison.

ix In theory, convicted prisoners can vote but this is not always the case in reality. These convicted of terrorist offences cannot vote.

x Not all convicted prisoners have this right and in the run up to the first democratic elections in South Africa this

right became a major public issue. After much debate, the law which applied to South Africa's first democratic elections was that no person was entitled to vote if that person was detained in a prison after being convicted and sentenced without the option of a fine in respect of murder, robbery with aggravating circumstances and rape, or of an attempt to commit any of these offences. This new law was enforced without too much difficulty and the majority of prisoners were able to vote. However it is as yet unclear whether prisoners will retain these rights in future elections.

xi Some foreign prisoners are entitled to vote in elections in their own countries if practical arrangements can be made e.g. Finnish prisoners presenting no serious risk to society have been given leave to travel to Finland to vote.

xii A prisoner's right to vote is not automatic. He or she must apply to vote as a 'special voter' so that appropriate procedures can be put in place.

