

2/02/1/1/21

TC2/22

CONSTITUTIONAL ASSEMBLY

THEME COMMITTEE 2

STRUCTURE OF GOVERNMENT

THEME COMMITTEE MEETING

**Monday
12 May 1995
14h00-17h00
M46**

DOCUMENTATION



CONSTITUTIONAL ASSEMBLY

MEMORANDUM

TO: Theme Committee 2
FROM: Secretariat, Theme Committee 2
DATE: 7 June 1995
MEMO REF: TC2/7 June 1995/1
SUBJECT: TC2 MEETING: MONDAY 12 JUNE 1995

CONSTITUTIONAL ASSEMBLY

THEME COMMITTEE 2 STRUCTURE OF GOVERNMENT.

THEME COMMITTEE MEETING

Please note that the above meeting has been scheduled as follows:

Date : Monday 12 June 1995
Time : 14h00 - 17h00
Venue : M46

Please note that the Theme Committee meeting is scheduled to take place in the afternoon, as a Core Group meeting is scheduled to take place in the morning. The Order Paper, which indicates that the Theme Committee meeting is scheduled to take place in the morning, should be ignored.

P. O. Box 15, Cape Town, 8000
Republic Of South Africa

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THE NEW CONSTITUTION

AGENDA

1. **OPENING AND WELCOME**
2. **SENATE**
Matters to address:
 - (i) Discussion and approval of reworked aspects of the Report
 - (ii) Decision that drafting takes place
3. **WORK PROGRAMME**
Matters to address:
 - (i) Revision of Work Programme to utilise remaining Theme Committee meetings
 - (ii) Theme Committee meeting scheduled on 15 June (week beginning 19 June not available for Theme Committee work)
4. **ANY OTHER BUSINESS**
5. **CLOSURE**

**HASSEN EBRAHIM
EXECUTIVE DIRECTOR
CONSTITUTIONAL ASSEMBLY**

Enquiries: James Nene	Pager: 468 - 5050 Code 9127
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**THEME COMMITTEE 2
PROPOSED WORK PROGRAMME (05 MAY - 28 JUNE 1995)**

DATE	TOPIC	DEADLINE: POL. PARTIES' SUBMISSIONS	FINAL REPORT TO CC
MAY 05	<p>STRUCTURE OF GOVERNMENT: NATIONAL LEVEL (Block 2/3)</p> <p>-Technical Advisors'draft report on the Senate to be discussed</p> <p>-CPG presentation on the Second Chamber</p> <p>*To focus on questions / issues that should be addressed by the TC</p>		<p>NB:Report on Block One still outstanding</p>
08	<p>-ELECTORAL SYSTEM (Block 6): WORKSHOP</p> <p>*Questions to be developed in a manner that will determine the parameters of debate and final report of this Block</p>	<p>Extended Deadline for submissions on Block 2/3 (Provincial Level)</p> <p>*Deadline was 10 March 1995</p>	
15	<p>-STRUCTURE OF GOVERNMENT: PROVINCIAL LEVEL (Block 2/3)</p> <p>*Theme Committee 2 & 3 Technical Advisors to develop a joint approach to this issue</p>		

17		Deadline for submissions on Block 4 (Traditional Authorities)	Deadline: Report on Block 2/3
22	<p>TRADITIONAL AUTHORITIES (Block 4)</p> <p>-Discussions on the Technical Advisors' draft report on this Block to commence</p> <p>*Report to take cognisance of the Public/Pol parties submissions</p>		
29	<p>VOLKSTAAT/COMMUNITY SELF DETERMINATION (Block 5)</p> <p>Workshop to take place</p> <p>*Technical Advisors to set a clear approach with regard to the parameters of the debate & the report</p>		
JUNE 01		Deadline: Submissions on Block 5 (Volkstaat/Community Self-Determination)	
05	<p>BLOCK 4</p> <p>-Discussion of Technical Advisors' draft report on Traditional Authorities continues</p>		Deadline: Report on Block 4 (Traditional Authorities)

12	BLOCK 5 -Discussion of Technical Advisors draft report on Volkstaat/Self Determination commences		
15		Deadline: Submissions on Block 6 (Electoral System)	
19	BLOCK 5 -Discussion of Technical Advisors draft report on Volkstaat/Self Determination continues		
20	BLOCK 5 -Discussion of Technical Advisors draft report on Volkstaat/Self Determination continues	Deadline: Submissions on Block 7 (Constitutional Amendments)	
21	BLOCK 6 -Discussion of Technical Advisors draft report on Electoral System commences		
22	BLOCK 6 -Discussion of Technical Advisors draft report on Electoral System continues		
23			Deadline: Report on Block 5 (Volkstaat)

26	BLOCK 7 -Discussion of Technical Advisors draft report on Constitutional Amendments commences		
27	BLOCK 7 -Discussion of Technical Advisors draft report on Constitutional Amendments continues		
28			Deadline: Report on Block 6 (Electoral System)

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*d*escribe the shape of **things** to *come*. In your *own* words.

There's still time to have your say about the Constitution making process. We'd like to hear from you concerning these vital issues.

Volkstaat/Community Self-Determination

- Should the Constitution provide for self-determination?
- If you think the Constitution should provide for self-determination, should this take the form of a territory - Volkstaat, for example - or are there other recognised ways of expressing such a heritage?
- What types of Community could be said to share such a heritage so as to justify a form of self-determination?
- What level of support should be shown within a community as a prerequisite for a self-determination?

DEADLINE 4 JUNE 1995

Electoral System

- How should members of Parliament be elected?
- Should our electoral system be based on a system of pure proportional representation - i.e. party list only, as in the 1994 elections - or should it be combined with constituencies?

DEADLINE 19 JUNE 1995

Constitutional Amendments

- Once the final Constitution has been adopted, how should it be amended?

DEADLINE 20 JUNE 1995

Voice your opinions on paper and give your ideas or proposals to The Executive Director, Constitutional Assembly, P.O. Box 15, Cape Town, 8000, or fax us on (021) 24 1160/1. And help formulate the future for us all.

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You've made your *mark*. Now have *your* say.

THE NEW CONSTITUTION

CONSTITUTIONAL ASSEMBLY

SCHEDULE OF MEETINGS Latest update - 07 June 1995

Monday 12 June	Theme Committee 1 Theme Committee 2 Theme Committee 3 Theme Committee 4 Theme Committee 5 Theme Committee 6*	08h30 - 12h00 08h30 - 12h00 08h30 - 12h00 14h00 - 17h30 14h00 - 17h30 14h00 - 17h30	M515 M46 E249 M46 V227 E249
Wednesday 14 June	Constitutional Committee	08h30 - 18h00	
Thursday 15 June	Management Committee Party Caucuses Theme Committees/Core Groups to convene in afternoon. Details will follow.	08h00 - 10h00 14h00 - 18h30	V16
Monday 19 June	<i>Parliament</i>		
Tuesday 20 June	Parliament		
Wednesday 21 June	<i>Parliament</i>		
Thursday 22 June	Management Committee Party Caucuses	08h00 - 10h00	V16
Friday 23 June	<i>Parliament</i>		
Monday 26 June	Theme Committee 1 Theme Committee 2 Theme Committee 3 Theme Committee 4 Theme Committee 5 Theme Committee 6*	08h30 - 12h00 08h30 - 12h00 08h30 - 12h00 14h00 - 17h30 14h00 - 17h30 14h00 - 17h30	M515 M46 E249 M46 V227 E249
Tuesday 27 June	Core Group - TC 4 Core Group - TC 5 Core Group - TC 6 Core Group - TC 1 Core Group - TC 2 Core Group - TC 3	08h30 - 13h00 08h30 - 13h00 08h30 - 13h00 14h00 - 18h00 14h00 - 18h00 14h00 - 18h00	E337* M201* E340* M515* E216* G26*
Wednesday 28 June	Theme Committee 4 Theme Committee 5 Theme Committee 6* Theme Committee 1 Theme Committee 2 Theme Committee 3	08h30 - 13h00 08h30 - 13h00 08h30 - 13h00 14h00 - 18h30 14h00 - 18h30 14h00 - 18h30	M46 V227 E249 M515 M46 E249
Thursday 29 June	Management Committee Party Caucuses	08h00 - 10h00	V16

Saturday 1 July	Winter Recess		
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AFTER RECESS

Monday 31 July	Core Group Theme Committee 1	08h30 - 12h00	M515*
	Core Group Theme Committee 2	08h30 - 12h00	E216*
	Core Group Theme Committee 3	08h30 - 12h00	G26*
	Core Group Theme Committee 4	08h30 - 12h00	E337*
	Core Group Theme Committee 5	08h30 - 12h00	M201*
	Core Group Theme Committee 6	08h30 - 12h00	E340*
	Theme Committee 1	14h00 - 17h30	M515
	Theme Committee 2	14h00 - 17h30	M46
	Theme Committee 3	14h00 - 17h30	E249
	Theme Committee 4	14h00 - 17h30	
Theme Committee 5	14h00 - 17h30	V227	
Theme Committee 6*	14h00 - 17h30		
Tuesday 1 August	Theme Committee 4	08h30 - 12h00	M46
	Theme Committee 5	08h30 - 12h00	V227
	Theme Committee 6*	08h30 - 12h00	E249
	Theme Committee 1	14h00 - 18h00	M515
	Theme Committee 2	14h00 - 18h00	M46
	Theme Committee 3	14h00 - 18h00	E249
Wed 2 August	Theme Committee 1	08h30 - 12h00	M515
	Theme Committee 2	08h30 - 12h00	M46
	Theme Committee 3	08h30 - 12h00	E249
	Theme Committee 4	14h00 - 18h00	M46
	Theme Committee 5	14h00 - 18h00	V227
	Theme Committee 6	14h00 - 18h00	E249
Thursday 3 August	Theme Committee 4	08h30 - 12h00	M46
	Theme Committee 5	08h30 - 12h00	V227
	Theme Committee 6	08h30 - 12h00	E249
	Theme Committee 1	14h00 - 18h00	M515
	Theme Committee 2	14h00 - 18h00	M46
	Theme Committee 3	14h00 - 18h00	E249
Friday 4 August	<i>Constitutional Assembly</i>	09h00 - 18h00	NAC

- * All Core Group Venues subject to confirmation
- * Theme Committee 6 - These incorporate Sub-Theme meetings
- * MC meetings - can be rescheduled to 11h00 - 13h00 as and when required.
- * CC and CA - Flexibility exists in relation to which meetings are required.

VOLKSTAAT COUNCIL
SUBMISSION TO THEME COMMITTEE 2

STRUCTURES OF GOVERNMENT

(This document is also available in Afrikaans)

A. HEAD OF GOVERNMENT

Election

1. There shall be a distinction between the head of state and the head of government.
2. The head of state shall operate on a basis of rotation to accord recognition to the federated nature and cooperative ideal of the Republic of South Africa.
3. On a rotational basis each constituent state shall elect a head of state who will serve for a period of six months.
4. The out-going head of state serves as acting head of state for the six month period following the six month period during which he served as head of state.
5. To qualify for election as head of state, an individual must qualify for election as a members of the national parliament.
6. The head of state shall vacate his office should he no longer meet the stated requirements.

Functions

7. The head of state shall be competent to exercise and perform the following functions:
 - (a) to assent to, sign and promulgate Bills duly passed by parliament;
 - (b) in the event of a procedural shortcoming in the legislative process, to refer a Bill passed by parliament back for further consideration by parliament;

- (c) to refer disputes of a constitutional nature between parties represented in parliament, or between organs of state at any level of government, to the Constitutional Court or other appropriate institution, commission or body for resolution;
 - (d) to confer honours;
 - (e) to appoint, accredit, receive and recognise ambassadors, plenipotentiaries, diplomatic representatives and other diplomatic officers, consuls and consular officers;
 - (f) to appoint commissions of enquiry;
 - (g) to make such appointments as may be necessary under powers conferred upon him or her by this Constitution or any other Law;
 - (h) to negotiate and sign international agreements;
 - (i) to proclaim referenda or plebiscites in terms of this Constitution or an Act of parliament;
 - (j) to pardon or relieve offenders, either unconditionally or subject to such conditions as he or she may deem fit, and to remit any fines, penalties or forfeitures.
8. The head of state is obliged to sign all laws duly adopted, but may, where the validity of a law is in question, refer such law to the Constitutional Court for a decision on its validity before signature.
 9. The head of state opens and prorogues parliament and adjourns and dissolves parliament.
 10. The head of state may also call an election if a motion of no confidence in the government is introduced in and accepted by parliament, or if he is of the opinion that the government has lost the support of the majority in parliament, or if he is requested to do so by the head of government.
 11. The head of state exercises his executive functions on the advice of the government provided that such advice is constitutional and subject to the proviso that he may have the legitimacy of such advice in the light of the Constitution, determined by the Constitutional Court.

Head of Government

12. The head of government is elected by majority vote of parliament.
13. The head of government is removed from office by majority vote of parliament or if the head of state dissolves parliament and calls an election.
14. The head of government appoints the cabinet.
15. The head of government and the cabinet are responsible to parliament for the performance of their duties.

16. The head of government and the cabinet advise the head of state on the performance of his duties.
17. Under normal circumstances, the cabinet advises the head of state on the convening, prorogation and dissolution of parliament.

B. THE LEGISLATIVE AUTHORITY

Composition

1. Parliament shall consist of two chambers and shall be the highest national legislative authority.
2. Parliament shall consist of two chambers, namely the Legislative Assembly and the Senate.
3. The Legislative Assembly shall consist of 400 members and the Senate of 100 members.
4. The Legislative Assembly is elected as currently provided in the Interim Constitution but with due regard to the fact that the representation of the volkstaat as a participating member state shall be calculated in terms of the appropriate formula based on the volkstaat electorate entitled to vote.
5. The Senate shall comprise 10 representatives from each of the constituent states and from the volkstaat.

Functions

6. Parliament shall have legislative powers in respect of all matters entrusted to it in terms of this Constitution.
7. All laws adopted by parliament, must be approved by majority vote in both the Legislative Assembly and the Senate, except where expressly otherwise provided.
8. The Senate, or a Senate sub-committee on which the constituent states are represented in a ratio proportionate to their representation in the Senate, shall confirm the appointment of all judges to the National Supreme Court, National Appeal Court or the Constitutional Court; of all ambassadors of the Republic of South Africa to posts outside of the Republic; of the Public Protector; of the Human Rights Commission; of the Commission for the Restitution of Land Rights; and of the Commission on Gender Equality.
9. Bills affecting the boundaries or the powers of a constituent state, may only be adopted if the majority of the Senators representing that constituent state, consent to the Bill.

10. (1) Parliament is accorded exclusive legislative competence over the following matters:

- (i) Foreign affairs and the conclusion of treaties which fall within the legislative powers of parliament.
- (ii) The external protection and safety of the Republic, the declaration of war and ancillary measures including provisions governing an air force and a navy.
- (iii) National citizenship.
- (iv) Visas and passports.
- (v) Immigration and emigration.
- (vi) Extradition.
- (vii) Monetary matters including the legal tender (monetary unit) and the determination of weights and measures.
- (viii) Issues relating to customs and excise, toll unions and commercial treaties with foreign states, in so far as the Republic is affected directly by such issues.
- (ix) National railways, national air, sea and road traffic and national harbours and airports.
- (x) National elections.
- (xi) National post and telecommunication services.
- (xii) The national Public Service and national courts, including the Constitutional Court, and persons competent to appear in such courts.
- (xiii) The national police force.
- (xiv) Joint national electricity and water networks.
- (xv) The national recognition of patents, trade marks, copyright and similar rights to immaterial property.
- (xvi) National statistical services.
- (xvii) The levying of uniform national taxes.
- (xviii) Borrowing powers.
- (xix) The Republic's claims to the sea and related maritime matters.
- (xx) Arrangements governing national legislative and executive seats.
- (xxi) National research, national tertiary education and national health matters, but without detracting from the rights enjoyed by constituent states over health, research and tertiary education services.
- (xxii) The establishment of a national television and radio service.
- (xxiii) Criminal and civil procedural powers necessary for the exercise of all powers conferred.
- (xxiv) The creation and unification of constituent states.

(2) The legislative, executive and judicial powers over all other matters vest in the various constituent states.

- (3) Where a constituent state so requests by special decision of its legislature, parliament may grant such constituent state the capacity to exercise legislative, executive and judicial powers in respect of any of the matters listed in par 10(1) above.
11. (1) The constituent states have full and original legislative, executive and judicial powers except in respect of those matters over which they have transferred powers to the national parliament as listed in par 10(1).
- (2) Without derogating from the general provision in par 11(1), legislative, executive and judicial powers in particular in respect of the following matters are expressly and exclusively reserved for the volkstaat:
- (i) Own education and training on pre-primary, primary, secondary and tertiary levels and own research institutions.
 - (ii) Health services, hospitals, clinics, old-age homes and special care institutions, together with social services and housing.
 - (iii) Agriculture and land issues, animal control and agricultural marketing.
 - (iv) Local governments.
 - (v) Own police force, citizens' defence units and domestic defence units.
 - (vi) Own public media, including television, radio and films.
 - (vii) Public transport within the constituent state but with the exclusion of national road, sea, rail and air transportation.
 - (viii) Own road and transportation infrastructure.
 - (ix) Tourism.
 - (x) The capacity, after consultation with the national government, to conclude treaties with other constituent states and with foreign states dealing with matters falling within the legislative capacity of the constituent state.
 - (xi) The levying and collection of taxes to enable it to perform its legislative, executive and judicial functions.
 - (xii) Courts for the constituent state concerned and the qualifications of persons who may appear before such courts.
 - (xiii) The definition and institution of volkstaat citizenship.
- (3) A constituent state may by legislation authorise parliament to perform on its behalf, any legislative, executive or judicial function relating to any matter over which the constituent state enjoys such capacity.

- (4) Constituent states exercise their legislative functions in respect of local government, subject to and in accordance with the proposals submitted in respect of local government.
- (5) In the event of the suppression or negation of the Afrikaner's right to self-determination, which shall include his right to culture and his own language, the volkstaat shall, after a majority of its citizens have made their will known through a referendum, have the power to declare itself independent from the Republic of South Africa.
12. (1) Parliament and the legislatures of the constituent states shall enjoy concurrent jurisdiction in respect of the following matters:
- (i) The adoption of emergency financial measures in the event of extraordinary inflation or monetary instability.
 - (ii) The legal system governing civil and criminal matters and the execution of sentences.
 - (iii) Registration of births, marriages, deaths and domicile.
 - (iv) Bill of fundamental rights.
 - (v) Residence rights and the settlement of non-citizens.
 - (vi) Pensions.
 - (vii) Economic matters and trade including industries, mining, factories, stock exchanges, professions, occupations, banking, insurance and nuclear energy.
 - (viii) Labour law including social security.
 - (ix) Bursaries and awards for study.
 - (x) Expropriation in so far as it may prove necessary for the performance of specific legislative powers.
 - (xi) Fisheries matters and the exploitation of the sea.
 - (xii) Waste management.
 - (xiii) Autonomous units.
- (2) In the event of the exercise of concurrent legislative powers, the legislation of a constituent state and that of parliament shall be reconciled. Only where the two cannot be reconciled, and then to the extent of such irreconcilability only, shall the parliamentary legislation enjoy precedence, and then only if the law in question is essential for the uniform application of the specific legislative power over the entire Republic.

VOLKSTAAT COUNCIL**SUBMISSION TO THEME COMMITTEE 2****THE PRINCIPLES UNDERLYING A VOLKSTAAT**

(Hierdie dokument is ook in Afrikaans beskikbaar)

1. The current Interim Constitution entrenches the principle of a volkstaat for the Afrikaner constitutionally.
2. (1) In terms of section 184B (1) the Volkstaat Council serves as a constitutional mechanism to enable proponents of the concept of a volkstaat to pursue its establishment by constitutional means. To understand what is being sought, clarity must be obtained on the meaning of the term "volkstaat". A volkstaat can only mean a state for a certain people. The normal juridical requirements for the existence of a state are territory, a government, a population and the capacity to establish relations with other governments. The requirement of monetary sovereignty may be added to these requirements.

(2) The characteristics of a state are a national population, state territory and state authority. For present purposes, the distinction between a "state" and other government bodies and entities is particularly important. A municipality also has an area of jurisdiction, government authority and a population - as does a province. Yet it is clear that neither a municipality nor a province qualifies as a state. The Constitution establishes the Volkstaat Council with the express aim of its striving for the establishment of a volkstaat. In terms of the normal rules of statutory interpretation, this does not mean pursuance of the establishment of a municipality or a province. Had the Constitution sought to empower the Volkstaat Council to strive for the establishment of a municipality or a province for the Afrikaner, the obvious course would have been to use these terms. This was not done and one can only conclude that a "volkstaat" is something other than a municipality or a province.

(3) A state may be distinguished from a province or a municipality first, in that it is the bearer of international legal personality. In other words, as a subject of public international law, a state may participate in international intercourse. This capacity generally goes hand-in-hand with independence; it is the capacity to conduct relations with other

states referred to in 2.1 above. This is the "normal" meaning of the term "state". It is also the most generally accepted meaning. It is only logical that the term "volkstaat" as appearing in the Constitution, should bear this meaning.

(4) However, not all states are independent. One also encounters dependent states; that is states which do not have the capacity to conduct their own external or internal affairs. There are also constituent states which form part of a federation - as in the case of the United States of America and the former Federal Republic of Germany. Although these constituent states have been subsumed within a greater state, they are still regarded as states. This may be ascribed to the fact that an entity retains its statehood even once it has been included within another state provided that it retains certain characteristics. The entity should still enjoy its own, original - albeit limited - government authority. Furthermore, some measure of equality must exist with the federation. In other words, the constitution must provide for a division of powers without a relationship of subordination, and rules of public international law must, by analogy, be capable of application to the relationship between the state and the federation. Further, the entity must retain a measure of its "high state powers" such as the capacity to conclude treaties, the power to levy taxes, a police force of its own, an education system of its own and its own judicial processes. Such an entity should also have the capacity - albeit limited - to determine its own legal system, for example, the capacity to adopt and amend its own constitution. These characteristics should not, however, be regarded as absolute. It may be accepted that the "volkstaat" to which the Constitution refers, could include such a constituent or dependent state. This is clear not only from Constitutional Principle XXXIV discussed above, but also from the provisions of section 184B (1)(a). This section indicates clearly that the volkstaat is something other than a province. It is also clear that what the provision envisages, is a territorial entity.

(5) From what has been said above, it is clear that the "volkstaat" which the Volkstaat Council is seeking to establish, is not some abstraction akin to corporative self-determination. There is no way in which corporative self-determination may be equated with a volkstaat. The term "volkstaat" does not, either in legal or in political idiom, bear the limited meaning ascribed to a concept such as corporative self-determination. To equate the search for corporative self-determination with the institution of a volkstaat is simply to interpret the Constitution in a purely political idiom. It amounts to a negation of the precise meaning of the words used to define the functions of the Volkstaat Council, and furthermore, violates the history of the provision instituting the Volkstaat Council. Before the insertion of the provisions governing the Volkstaat Council, the Constitution already

provided for corporative self-determination, provinces and subordinate territorial authority structures. If we now accept that the provisions governing the Volkstaat Council added nothing, the institution of the Council and the provisions governing the volkstaat are rendered meaningless. The juridical presumption that the legislature does not intend to enact futile or nugatory provisions comes into play.

- (6) Paragraph 1 of Schedule 4 embodies the constitutional principle that the South African Constitution shall provide for the establishment of a single sovereign state:

First, it must be accepted that were this principle to clash with Constitutional Principle XXXIV, the latter would take precedence as a principle added by a subsequent (more recent) amendment to the Constitution.

Second, this provision does not necessarily conflict with the view that the Interim Constitution allows for the institution of an independent volkstaat. The principle relates to that for which the Constitution of South Africa must provide. Were an independent volkstaat to be established, it would no longer form part of South Africa and would, in any event, not fall under the South African Constitution. The Constitution, therefore, would still be able to provide for a single sovereign state. In practical terms, all that would happen is that there would be a change to the definition of the territorial boundaries of South Africa. South Africa would continue to exist but in a smaller form and differently defined. Constitutional Principle XVIII of Schedule 4, establishes special procedures for the alteration of the boundaries of national government and the provinces and is therefore based on the assumption that boundaries may be altered - even the boundaries of the national government. How can the boundaries of the national government be altered but by the exclusion of a territory from South Africa? This principle relates to procedures to be prescribed in a future Constitution. There is no principle entrenching the definition of the current South Africa, that is South Africa as defined in the Interim Constitution.

- (7) Section 5 and Part 1 of Schedule 1 define the Republic as a single sovereign state. This section may be replaced but such an amendment will in all likelihood be subject to the majority-requirements as provided in section 73(2) or (11) of the Interim Constitution as such an alteration to the boundaries of the Republic would necessarily also alter the boundaries of a province.

3. The Volkstaat Council's pursuance of an independent volkstaat is compatible with the Interim Constitution.

4. (1) As a constituent state within a federated South Africa, the volkstaat is likewise reconcilable with the Interim Constitution provided that the constituent state satisfies the requirements for statehood.
- (2) The Constitution may not infringe upon such statehood. The Constitution should indeed provide that such a state may exercise its full right to independence in accordance with the principle of the right of peoples to self-determination.
5. (1) A precondition for statehood is the identification of a territory. The Volkstaat Council proposes the territory as defined in Annexure A hereto as the territory of the volkstaat. This territory represents an area over which the Afrikaner has historical claims to the right to self-determination and in which the Afrikaner constitutes a majority of the population. Because the Afrikaner is in the majority in this territory, it is axiomatic that he enjoys the right to realise his right to self-determination within such territory.
- (2) The distribution of the Afrikaner makes it impossible for all Afrikaners to be accommodated within the proposed volkstaat. Provision is consequently made for autonomous units within other parts of the Republic of South Africa within which the Afrikaner may live as "concentrated minorities". In this latter case, the internationally accepted principle of minority autonomy is engaged. Of course, any minority within the proposed volkstaat will also be subject to this principle. Where minorities are, or will be, too small to exercise their autonomy territorially, provision is made for minority self-realisation on local government level through citizens' councils which exercise their capacities in the cultural sphere.
6. (1) Statehood also demands as a precondition that the state have a population. It flows logically from the Interim Constitution that if a volkstaat is to be established for the Afrikaner, such a state must also have a citizenship defining the inhabitants of the volkstaat and providing who shall enjoy rights and duties within the state. If the volkstaat takes the form of a constituent state within a federated South Africa, it stands to reason the volkstaat citizenship will have to be established alongside South African citizenship.
7. A state must also have a government to exercise state authority. To establish such a government for the volkstaat, the volkstaat is granted powers as a constituent state within the Republic of South Africa, but retains the right to realise its full self-determination should this be the wish of the inhabitants of the volkstaat. Provision is also allowed for the volkstaat, as well as any other constituent state or current province, to draft their own constitutions in accordance with their right to self-determination, and to organise their system of government in accordance with their natures. The process by which a volkstaat may be established in an orderly and

constitutional manner is through federating the Republic of South Africa in constituent states.

8. It is accepted that the peaceful creation of a volkstaat must take place through constitutional means in accordance with both the Interim and the New Constitutions of South Africa.

VOLKSTAAT COUNCIL**SUBMISSION TO THEME COMMITTEE 3****THE NATURE OF THE FEDERATED PROVINCIAL SYSTEM OF GOVERNMENT**

(Hierdie dokument is ook in Afrikaans beskikbaar)

A. PRINCIPLES

The Constitutional Principles in Annexure 4 of the Interim Constitution refer, under Principles XVIII-XXVI, to aspects relating to the nature of the provincial system of government and of local government. In evaluating the principles below, regard must also be had to the provisions of section 184B(3) of the Interim Constitution.

1. The Provinces form constituent states within the Republic of South Africa.
2. As constituent states, the Provinces constitute the cornerstones on which the Republic of South Africa rests.
3. The boundaries of constituent states must be drawn so as to reflect the historical development of specific communities and to unite peoples sharing nature and culture within a constitutional context.
4. As the cornerstone of the South African state, constituent states enjoy original powers which are derived from the society they represent and which confer state authority on the government.
5. The constituent states enjoy all powers save for those powers which have been transferred to the national government.
6. Constituent states have the right to draft constitutions of their own to give expression to their individual characters.
7. The boundaries of constituent states should be adaptable to allow persons sharing culture and language the opportunity of forming a society of their own and realising their right of self-determination.
8. The boundaries of a constituent state may be altered should the citizens of such a state so request by means of a referendum.

B. PROPOSALS FOR CONSTITUTIONAL WORDING

(This proposal relates to the nature of constituent states and does not deal with the powers and duties of constituent states. This is addressed later. The establishment of boundaries is dealt with in a subsequent submission dealing specifically with section 184A(3) of the Interim Constitution.)

1. (1) The Republic of South Africa comprises the following constituent states:
 - (a) Those constituent states which existed as Provinces as defined in the Interim Constitution Act 200 of 1993 immediately before the coming into operation of this Constitution, with their boundaries as adapted by this Constitution;
 - (b) An Afrikaner Volkstaat with boundaries as defined in this Constitution;
 - (c) Any other state which may join.
 - (2) An Afrikaner Volkstaat is a constituent state established for the Afrikaner people in terms of the Afrikaner's historic right to self-determination and his right to a state of his own as embodied, among others, in the Zuid-Afrikaansche Republiek (Transvaal) and Orange Free State, and in those areas where the Afrikaner constitutes a majority of the population.
 - (3) In addition to the specific powers provided in this Constitution, the Volkstaat shall enjoy all other powers vested in the other constituent states.
2. (1) All constituent states enjoy full and original legislative, executive and judicial powers and capacities save for those instances in which such powers and capacities have been transferred to the national legislative, executive and judicial authorities.
 - (2) Any legislative, executive or judicial power or capacity which has not been transferred to the national legislative, executive or judicial authority, shall vest in the constituent state.
 - (3) The national parliament may by legislation transfer specific powers vesting in the national legislative or executive authority to specific constituent states which have requested such a transfer by special resolution of the legislature of the constituent state.
 - (4) In the exercise of their full and original legislative powers, the constituent states are empowered to draft constitutions of their own in so far as such constitutions do not conflict with the provisions of this Constitution.

- (5) The constitutions of the constituent states may not conflict with the universal, fundamental rights embodied in this Constitution.
 - (6) The constitutions of the constituent states must provide for the election of their legislative and executive authorities and the establishment of a judicial authority. They shall further provide for the responsibility of such organs vis a vis the electorate of the constituent state and the form of representation enjoyed by the electorate in such state organs.
- 3.
- (1) The constitutions of constituent states must be accepted by a majority of at least two-thirds of all the members of the existing legislative body in the constituent state concerned.
 - (2) In the case of a newly established constituent state, a constituent state which does not yet have a legislature of its own, or of the Afrikaner Volkstaat, the constitution for such a state shall be drafted by a specially elected constitutional assembly elected by the citizens of that constituent state entitled to vote.
 - (3) Before the constitution of a constituent state shall come into operation, the Constitutional Court shall certify that such constitution does not conflict with this Constitution.
 - (4) Once the Constitutional Court has certified a constituent state's constitution as being in accordance with this Constitution, such certification shall be final and binding and neither a national court nor the Constitutional Court shall have the power again to test such compatibility.
4. Should a constituent state not wish to draft its own constitution, or not wish to exercise its legislative powers, it may request the national government to draft such a constitution or to exercise the legislative powers vesting in the constituent state.
- 5.
- (1) Autonomous regions with boundaries as defined in this Constitution, are established within the territory of those constituent states within which they fall.
 - (2) Autonomous regions are self-governing regions established for a minority group within a constituent state with the aim of developing into territories within which such a minority may exercise its right of self-determination.
 - (3) Autonomous regions may also be established by a constituent state's legislative authority after consideration of a petition from individuals of a specific group and after the constituent state has satisfied itself

that the majority of the inhabitants of the autonomous region support the institution of such a region.

- (4) Autonomous regions enjoy the executive and legislative powers and capacities provided in this Constitution.
 - (5) The legislative and executive powers enjoyed by autonomous regions may be extended by the legislature of the constituent state or by the national parliament but may not be restricted.
 - (6) The national parliament may authorise the incorporation of an autonomous region into the territory of some other constituent state. Such authorisation is granted after the legislative organs of the constituent state within which the autonomous region is situated and the constituent states whose territory will be affected have, by special majority, taken a decision to that effect.
 - (7) Such authorisation of incorporation is granted only after it has been established that the majority of the inhabitants of the autonomous region are in favour of the incorporation.
6. The national legislature may by legislation create new constituent states or authorise the unification of existing constituent states provided that the legislature or legislatures of existing affected constituent states consent thereto by means of a decision adopted by special majority.

VOLKSTAAT COUNCIL**SUBMISSION TO THEME COMMITTEE 3****AUTONOMOUS AREAS**

(Hierdie dokument is ook in Afrikaans beskikbaar)

Reference is here made to the submission of the Volkstaat Council on the nature of the federated provincial system and in particular to par B 5 dealing with the proposals with regard to autonomous areas. The proposals below serve as a further elaboration of the concept of autonomous areas.

1. The following areas are demarcated as autonomous units:
 - 1.1 A Bushveld area.
 - 1.2 A Drakensberg North area.
 - 1.3 A Drakensberg South area.
 - 1.4 A Southern Free State area.
 - 1.5 A South East Cape area.

2.
 - (1) Legislative powers in respect of autonomous units vest in a "Heemraad" comprising 20 persons elected for a period of five years by the citizens of the autonomous unit who are entitled to vote.
 - (2) Executive powers in respect of those matters over which the Heemraad enjoys legislative power, vest in a Presidium of five members elected by majority vote of the Heemraad from within its own ranks.
 - (3) From the five members of the Presidium, the Heemraad elects a chairman, termed the Primarius, who acts as the chief executive officer of the unit.
 - (4) The Presidium acts as the executive organ of the Heemraad for as long as it enjoys the confidence of the Heemraad.
 - (5) A new Presidium is constituted should the existing Presidium cease to enjoy the confidence of the Heemraad.
 - (6) The Primarius convenes the Heemraad as often as may be necessary but at least once every year and determines the sittings, adjournments and agenda of the Heemraad.

- (7) The premier or chief executive officer of the constituent state is responsible for the dissolution of the Heemraad and shall call an election every five years to constitute a new Heemraad.
3. (1) A Heemraad exercises its legislative powers by means of resolutions which are embodied in edicts.
- (2) Such edicts acquire legislative force once they have been signed by the Primarius and by the premier of the constituent state concerned.
- (3) An edict is valid only in so far as it does not conflict with the National Constitution and the constitution of the constituent state concerned.
- (4) The Heemraad may issue edicts dealing with the following matters:
- (a) Agriculture and fisheries;
 - (b) Language and culture;
 - (c) Education;
 - (d) Health services including hospitals and clinics;
 - (e) Housing;
 - (f) Public transport;
 - (g) Regional planning and development;
 - (h) Roads;
 - (i) Social services including the care of the aged and of children;
 - (j) Regional industries and local trade matters;
 - (k) Radio and television for such units.
- (5) In the event of irreconcilable conflict with the legislation of superior legislative bodies, edicts will enjoy precedence within the above limited power sphere and territorial limits.
- (6) A Heemraad of an autonomous area and the legislature of a constituent state have the power to expand the territory of the autonomous area by means of agreement which has been accepted as law by both legislative bodies.
4. (1) The premier or chief executive officer of the constituent state must sign a duly adopted edict save where he is of the opinion that the edict conflicts with the National Constitution or the constitution of the constituent state concerned.
- (2) Where the edict is not signed in terms of par 4(1) above, the premier of the constituent state shall refer it to the Constitutional Court for determination of its validity.
- (3) An edict adjudged valid by the Constitutional Court, shall be deemed to have been signed by the premier concerned.

5. (1) An autonomous unit may levy taxes on its inhabitants to meet expenses in respect of its legislative and executive powers.
- (2) A constituent state and the national government respectively provides by means of agreements with the autonomous unit, the percentage of tax relief which the inhabitants of the autonomous unit shall receive in respect of their tax obligations towards the constituent state or national government.
- (3) Tax relief in terms of par (ii) above is calculated in terms of a formula based on the saving which the autonomous unit generates for the constituent state or national government respectively, through the autonomous unit itself managing matters which would otherwise have fallen to be financed by the constituent state or the national government.
- (4) The Fiscal Commission may make recommendations to the parties concerned on how the formula in par (iii) above, should be applied.

COMMISSION ON PROVINCIAL GOVERNMENT

Established in terms of section 163 of Act 200, 1993

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Ref 6/1/1

1995-05-29

The Executive Director
Constitutional Assembly
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8000

Dear Mr Ebrahim

PRELIMINARY SUBMISSIONS ON PROVINCIAL GOVERNMENT SYSTEMS

In compliance with the agreement between the managements of the CPG and CA, I enclose the undermentioned preliminary recommendations of the Commission for consideration by the relevant committees. I must emphasise that these recommendations contain only the interim views of the Commission as all the information required for the final recommendations has not yet been collected. The comments of the provinces have also not been obtained yet. Kindly inform the committees accordingly.

1. Preliminary recommendations on traditional leaders
2. ~~Preliminary recommendations on local government~~

Further preliminary recommendations will be forwarded as soon as possible as per the Commission's programme which has been submitted to you.

Yours faithfully


CHAIRPERSON

18 May 1995

COMMISSION ON PROVINCIAL GOVERNMENT

**PRELIMINARY RECOMMENDATIONS ON
TRADITIONAL AUTHORITIES
(RECOMMENDATIONS DOCUMENT 8)**

1. INTRODUCTION

- 1.1 See introductory notes under recommendations on provincial legislative powers (Recommendation 2).
- 1.2 Indigenous law and custom have for centuries ordered the lives and activities of indigenous communities in South Africa. Today, it is still the system of law which is closest, best known and most accessible to millions of citizens especially in the rural areas. It is part of a culture which, while influenced to a certain extent by other cultures, continues to draw overwhelmingly on indigenous experience and serves as a strong communal bond. Even among many people who have since become urbanised, the link to their cultural heritage is still strong. The recognition and constructive use of this fact could assist any government not only in the maintenance of social stability but also in the execution of its obligation to deliver public goods and services to such communities.
- 1.3 Experience in South Africa as also in other African countries is that systems of indigenous law and custom are often abused for party-political purposes. There are numerous examples of such abuses. Unfortunately this has the effect of discrediting such systems. A system may become so contaminated by its abuse that it may ultimately be rejected by its adherents. If the system is to remain viable, it therefore needs to be protected from abuse for purposes which are not conducive to its retention and development.
- 1.4 It is also apparent that traditional leadership is inseparably interlinked with indigenous law and custom. If leaders are imposed on such a system in any other manner, it would amount to a contamination of the system. It is significant, therefore, that Constitutional Principle XIII entrenches the institution, status and role of traditional leadership according to indigenous law.
- 1.5 In order to ensure legal certainty, the body of indigenous law regarding the institution, status and role of traditional leadership in South Africa requires comprehensive codification.

- 1.6 It is recognised that indigenous law and custom have been adapting and will continue to adapt in accordance with changing circumstances. Voluntary or organic evolutionary changes are preferable. However, the interim Constitution contains guarantees in regard to certain basic human rights, which must also be incorporated in to the new Constitution, and which will take precedence over traditional law.
- 1.7 The constitutional protection of traditional leadership (CP XIII) must also be compatible with those other Constitutional Principles which prescribe that the system of government shall be democratic (CP VIII, XVII).
- 1.8 The Commission conducted a special workshop on traditional leadership in which relevant topics were discussed by local and foreign experts and representatives of a large number of organisations and bodies including the Constitutional Assembly and provincial governments and/or legislatures and Houses of Traditional Leaders (Invitations were extended to all Houses through the provincial Speakers.). Available literature on the subject was also studied. A Think Tank consisting of persons with expertise in various academic and other fields assisted the Commission in the discussion and formulation of recommendations in regard to the issue. The Commission's provisional recommendations contained in this document will be forwarded for comment to provincial governments, with a request to obtain also the comments of the Houses of Traditional Leaders and of traditional communities in so far as it may be practicable.

2. CONSTITUTIONAL PRINCIPLES AND PROVISIONS

- 2.1 The following Constitutional Principles relate to or have an effect on the application of indigenous laws and customs and traditional leaders:

II, III, IV, V, XI, XII, XIII, XVI, XVII.

The role of traditional leaders or traditional authorities in national, provincial and local government systems is not specifically addressed in the Principles.

- 2.2 Constitutional Principle XIII deals with the issue more specifically and provides that the institution, status and role of traditional leadership, according to indigenous law, shall be recognised and protected in the Constitution. Indigenous law, like common law, shall be recognised and applied by the courts, subject to the fundamental rights contained in the Constitution and to legislation dealing specifically therewith.
- 2.3 The interim Constitution contains a number of provisions relating to traditional authorities, inter alia the following -

Section 126 read with Schedule 6 and section 144 (2) allocates indigenous law and customary law as well as traditional authorities as provincial legislative and executive competences, subject to parliamentary competence to make laws in regard to such matters under specific conditions (section 126 (2A) and (3)).

Section 181 provides for the continued recognition of previously recognised indigenous authorities and indigenous law, subject to amendment or repeal by a competent authority and regulation by law.

Section 182 provides for ex officio membership of local government for traditional leaders under certain circumstances.

Section 183 obliges a provincial legislature inter alia to establish a House of Traditional Leaders, where applicable, to advise and make proposals and to comment on Bills relating to traditional authorities and indigenous laws and customs.

Section 184 establishes a Council of Traditional Leaders with powers and functions inter alia to advise and make recommendations to the national government and the President and to comment on Bills relating to matters enumerated in the section.

3. DISCUSSION

3.1 There appears to be broad consensus in the documentation consulted by the Commission and the views expressed by participants in its workshop and think tank, that it would be politically and administratively prudent to involve traditional authorities in the system of government. However, the nature and extent of their involvement are at issue. In the Commission's view, the following questions need to be addressed:

- (a) Should the Constitution provide a basis for determining who are to be recognised as traditional leaders?
- (b) What should be the role of traditional authorities; how should this role be reconciled with other elements in the constitutional system; and how should the Constitution deal with these matters?
- (c) What should be the powers and functions of traditional leaders at each level of government? What provisions should be made for their accountability in regard to the exercising of such powers and functions? Should this be provided for in the Constitution?
- (d) What should be the relationship between traditional authorities and elected structures at various levels?

- (e) Should provinces have exclusive powers with regard to traditional matters? If not, which matters should be subject to national regulation?
- (f) Should the Constitution provide a basis for determining the number and remuneration of traditional leaders, and the size of Houses of Traditional Leaders? What might that basis be?

3.2 The Commission takes, as its point of departure, the need to read Constitutional Principles XIII in conjunction with the principles and provisions concerning fundamental rights as set out in Constitutional Principles II and III and Chapter 3 of the interim Constitution, together with the provisions for democratic governance established by Constitutional Principles VIII and XVII. This is the basis for the Commission's recommendations regarding the provisions to be made in the new Constitution on the institution, status and role of traditional leaders. The CPG recognises that the accommodation of traditional leaders within the system of governance involves complex and delicate issues which will have to be resolved by processes and provisions other than those which need to be written into the new Constitution.

3.3 Recognition of traditional leaders

3.3.1 In terms of CP XIII the institution of traditional leadership according to indigenous law shall be recognised and protected in the new Constitution. The new Constitution therefore need not provide for recognition of leadership which is not in accordance with indigenous law. This is in itself a basis for determining who are and who are not to be recognized as traditional leaders. Leaders appointed by governments otherwise than in accordance with indigenous law need therefore not be recognized in terms of the Constitution. It also follows that the method or procedures for the vesting of traditional leadership will have to be in accordance with the laws of an indigenous community. It is apparent, however, that there could be a considerable degree of uncertainty about the content of such laws, where these have not been codified. The Commission recommends that provisions similar to CP XIII be incorporated into the new Constitution; and that the need to codify the body of indigenous law regarding the institution, status and role of traditional leadership in South Africa be addressed as a matter of urgency.

3.3.2 There is a possibility that the number of persons claiming to be traditional leaders could proliferate if left unregulated. This would not be of any official significance if their recognition does not incur state responsibility for providing for ex officio representation on official bodies or the payment of remuneration. However, limits should be placed on the number of leaders who will be recognized for official purposes. The detailed provisions for this should be dealt

with in provincial laws. Some co-ordination or regulation is required to ensure that significant disparities (in e.g. remuneration) do not arise between provinces, otherwise this may lead to dissatisfaction amongst traditional leaders of the various provinces. The Commission consequently recommends that such co-ordination or regulation be provided for in an Act of Parliament in terms of provisions similar to that contained in section 126 (3)(b) of the interim Constitution.

3.3.3 Particular care needs to be exercised to ensure that the recognition and remuneration of traditional leaders cannot be exploited for their own political ends by political parties which are in power at any time, either at national or provincial level. This is an additional reason why officially recognised traditional leaders should manifestly be seen and treated as authorities without connection to political parties. If this distinction cannot be implemented successfully, the continued official recognition of traditional leaders will need to be re-examined to determine whether this is justified in the interest of the communities they purport to serve.

3.3.4 If a traditional leader is elected to any legislature, his/her recognition for official purposes should be terminated as it would be contrary to law to allow him/her to occupy two positions in government for which he/she is remunerated by the state.

3.4 Role of traditional leaders

3.4.1 It is apparent from CP XIII that the role of traditional leaders should be recognised according to indigenous law. The role assigned to traditional leaders by traditional law has, as far as the Commission is aware, not been fully documented. It is clear, however, that traditional leaders are not entitled as of right to perform any official roles other than those assigned by indigenous law. However, this does not preclude governments from assigning additional roles to them.

3.4.2 Additional roles have indeed been conferred upon traditional authorities in the interim Constitution, e.g. ex officio membership of a local government as provided for in section 182 and advisory and recommendatory roles in the Houses and Council of Traditional Leaders. Despite this, the Commission is of the opinion that the new Constitution should not confer any official roles or powers upon traditional leaders over and above those determined according to indigenous law. Such additional roles, powers or functions not vested in them according to indigenous law may be allocated more appropriately in parliamentary, provincial and local laws, particularly in regard to the provision of services to local communities, so as to adapt more easily to the changing nature of society and social needs.

3.5 Powers and functions

3.5.1 This question has to some extent been dealt with under paragraph 3.3 above. In view of the recommendations in that paragraph, only limited powers and functions should be provided in the new Constitution while more extensive provisions in regard to specific functions and the powers related to them, should be dealt with in national, provincial and local laws.

3.5.2 As far as the Constitution is concerned, the Commission recommends that only the following provisions in regard to traditional authorities be incorporated:

- (a) provisions for the protection of the institution, recognition and role of traditional leadership, as envisaged in CP XII;
- (b) provision for the establishment/continuation of Houses of Traditional Leaders in the relevant provinces to be dealt with in provincial laws; and
- (c) provision for the establishment/continuation of a Council of Traditional Leaders to be dealt with in a law of Parliament.

3.5.3 The principle of accountability is as much a feature of indigenous law as it is of modern governance. In as much as the Constitutional Principles require accountability in respect of all functions of government this should also pertain to traditional leaders. Such accountability should not only be in relation to their communities in terms of indigenous law, but also to those levels of government from which they receive public monies, e.g. in the form of remuneration or for the rendering of services. The Commission recommends that provision for such accounting should be made in ordinary laws dealing with traditional authorities.

3.6 Relationship with elected structures

3.6.1 It seems clear to the Commission that the primary role of traditional leaders is in regard to the maintenance and application of indigenous law. Specifically, traditional leaders also have traditional powers in respect of the use and allocation of traditional land. The relationship between those leaders and elected structures in regard to these matters is of such complexity and has such serious implications that it will require special investigations and negotiations in order to come to a generally acceptable solution. The Commission does not find itself in a position to make recommendation at this stage as to how such relationships should be dealt with.

3.6.2 In certain matters that do not fall within the category of indigenous law and land issues, traditional leaders will obviously be acting as agents for elected national, provincial and local governments in respect of functions or services entrusted to them for execution. The normal relationship as between principal and agent will therefore apply.

3.6.3 The question has been raised whether traditional leaders could be accommodated as ex officio members of elected structures of government, such as local government (including its legislative aspect), provincial legislatures, the Senate or even of the National Assembly. CP's XVII and XIII indeed seem to suggest that traditional leaders may represent traditional communities at each level of government, notwithstanding the fact that this may not be considered to be democratic representation in constitutional terms. At local government level, such representation has indeed been provided for in section 182 of the interim Constitution. Such representation in other elected structures at provincial and national levels would provide for a more meaningful role in national and provincial government for traditional leaders than that provided for in the interim Constitution. It could also make redundant the structures designed specially to accommodate them, namely the Houses of Traditional Leaders and the Council of Traditional Leaders.

3.6.4 Perhaps a case can be made for the ex officio representation of communities by traditional leaders at local government level, provided that the geographical areas in question can be excluded from areas in which elections on the basis prescribed by CP VIII must be conducted. This proviso is necessary in order to avoid double representation of the areas in question, which would itself be undemocratic. Such ex officio representation would not be undemocratic if the institution of traditional leadership is demonstrably based on popular support in the communities concerned. The matter will be dealt with more specifically in recommendations regarding that level of government. However, the Commission would be hesitant to recommend ex officio representation at national and provincial levels of government for the following reasons -

- (a) it could be contrary to the principle of proportional representation (CP VIII);
- (b) because of the large number of traditional leaders, it would be difficult to determine rationally how many representatives should be provided for and how they should be nominated or elected;

- (c) the balance of power established by elections could be significantly changed by the introduction of persons who were not elected through the normal electoral process;
- (d) if the communities who are represented by such leaders are permitted to vote in normal elections, it would amount to double representation which would be contrary to the democratic concept of "one person, one vote";
- (e) because of their participation in political bodies (legislatures) the traditional leaders would themselves become politicised and this could give rise to the abuses which have tended to discredit the system in the past (par. 1.3 and 3.2.3 above).

3.6.5 The Commission draws attention to a view which has been expressed, that where traditional leaders are accommodated as ex officio members of any elected structure of government, this arrangement should be subject to periodic review.

3.6.6 The Commission recognises the need to accommodate traditional leaders in government and is of the opinion that the creation of provincial Houses and a Council of Traditional Leaders provides for this need. It is up to the respective governments and traditional leaders to ensure that these structures function effectively and that traditional leaders will consequently have a meaningful role in government.

3.7 Provincial powers

3.7.1 The interim Constitution empowers provinces to legislate and perform their executive powers in respect of indigenous law and customary law as well as in respect of traditional authorities. However, Parliament also has the power to legislate in respect of these functional areas, subject to conditions enumerated in section 126 (3). The powers of provinces in this respect can be enhanced in the new Constitution if the Constitutional Assembly so decides, but may not be substantially less or inferior to those provided for in interim Constitution.

3.7.2 A major portion of governmental powers and functions in regard to traditional authorities could be vested in the respective provincial governments. However, the Commission is of the opinion that the issues concerned are of such national importance, that not all relevant powers and functions should be assigned to the provinces. The national government needs the powers to intervene where

necessary in the national interest. The Commission therefore recommends that the national government retain its powers to legislate in regard to traditional authorities and indigenous law to the extent contained in section 126 (2A) and (3) of the interim Constitution.

3.8 Numbers

3.8.1 The last question to be addressed concerns the issue of establishing a basis for determining the number and remuneration of traditional leaders. The Commission has already recommended that a basis for the determination of the remuneration of traditional leaders should be provided for in an Act of Parliament, i.e. not in the Constitution. The Commission on Remuneration of Representatives provided for in Section 207 of the interim Constitution could perhaps also play a role in the determination of such remuneration. The Commission therefore recommends that no such basis be provided in the new Constitution.

3.8.2 The Commission has also recommended that the Constitution should contain only provisions providing that Houses of Traditional Leaders be established/continued in terms of provincial legislation. The interim Constitution does not limit the size of such Houses, nor should the new Constitution. If any problems are experienced with the size of the Houses in future, the national Parliament could provide for norms on standards in terms of section 126 (3)(b). The Commission so recommends.

md585

COMMISSION ON PROVINCIAL GOVERNMENT

Established in terms of section 163 of Act 200, 1993

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1995-05-29

Reference: 6/1/4

The Executive Director
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Dear Mr Ebrahim

COMMENTS BY PROVINCES OF CPG RECOMMENDATIONS

I enclose the comments of the Northern Cape Province on the interim recommendations of the Commission in respect of the documents mentioned hereunder, for consideration by the Constitutional Assembly in terms of section 161 of the interim Constitution.

Document 1 - Provincial constitutions

Document 2 - Provincial legislative competence

Document 3 - Provincial legislatures

Replies to questions headings 1 to 6 of key constitutional issues and questions

Yours sincerely


CHAIRPERSON

md857

COMMISSION FOR PROVINCIAL GOVERNMENT

INTERIM RECOMMENDATIONS WITH REGARD TO PROVINCIAL AND LOCAL GOVERNMENT SYSTEMS

25 April 1995

Comment by the Provincial Constitutional Committee,
Northern Cape Provincial Legislature

DOCUMENT 1

COMMENTS:

3.5.1(a) (Pg5) : Agreed

3.5.1(b) (Pg5) : Agreed

3.5.1(c) (Pg6) : Composition should be left to the Province as far as the size is concerned, but there should be uniformity with regard to . . . proportional and/or constituency representation.

3.5.1(d) (Pg6) : The dissolution must be determined by the rules in the Provincial Legislature of that specific province, but the duration of the Provincial Legislature should run until the next election.

3.5.1(e) (Pg6) : Provincial and National elections should be held simultaneously.

3.5.1(g) (Pg6) : The appointment of the Speaker and Deputy Speaker must be determined by each province. This also holds for the Premier and the Provincial Executive Council.

- 3.5.1(h) (Pg6) : Qualification for membership of Provincial Legislature must be set at a national level.
- 3.5.1(k) (Pg6) : These must be provincial, however - benefits must be consistent with a national standard.
- 3.5.1(m) (Pg6) : Rules and orders must be determined within the province.
- 3.5.1(n) (Pg6) : Quorum must be determined within the province.
- 3.5.1(o) (Pg6) : Ordinary votes and special votes must have a form of standardization, nationally as well as provincially.
- 3.5.1(p) (Pg6) : Assent to bills must go through the rules and is therefore provincial.
- 3.5.2 (Pg6) : Provincial Executive Authority - Agreed.
- 3.5.3 (Pg7) : Provincial Finance and Fiscal Affairs - the fiscal powers and functions should only be in broad terms in the Constitution; specifics should be in legislation.
- 3.7.1 (Pg8) : These are important issues and we are in complete agreement.
- 3.7.2 (Pg9) : Complete Agreement
- 3.7.3 (Pg9) : Complete Agreement
4. (Pg9) : Conclusion - endorsed fully

DOCUMENT 2

COMMENTS:

- 1.1 (d) (Pg1) : Care must be taken to ensure that the present position with regard to infrastructure and nodal points of service is not permitted to become a limiting factor. There must be provision for capacity - building for provinces currently less well endowed, particularly where there is obvious potential for such development.
- 1.3 (Pg2) : "Nine members from the provinces, appointed by the President, with the concurrence of the Premiers.": please advise what policy is being followed with regard to the reporting back by the provincial representatives to the provinces.

SPECIFICALLY:

- * to whom do the Provincial representatives report at present;
- * how frequently do they do so;
- * are the reports in writing;
- * is there any provision for meeting periodically with:
 - the Premier
 - the Speaker
 - any of the Standing Committees
- * how do they ensure that they have the mandate of their provinces on issues.
- * it is recognized that the CPG itself, and all its individuals members, is non-partisan; however was there any multi-party consultation with regard to the CPG composition, and if so on how wide a basis?
- * When meeting with the committee etc. who is going to carry the expense of these visits.
- * it is strongly recommended that the Provincial representative remains in very close contact with all the branches of the provincial legislature and of the Premier.

1.4 (Pg2) : Please confirm that the submission from the Northern Cape (Key Constitutional issues Question 1-6) have been received and have been taken into account.

1.6 (Pg3) : This is a sound differentiation

1.7 (Pg4) : What is the CPG doing to recognize these recommendations?

1.8 (Pg4) : There is only a terminology problem with this ".....the establishment of sub-regions,".

This should read the establishment of provinces, as we don't have regions.

1.9 (Pg4) : This is true, but dependence on the national government should always be perceived as a temporary measure, particularly on the part of the National government themselves.

1.10 (Pg5) : Agree in principle, but the constitution should provide for this in broad principles only, with specifics left to legislation. Costs should always be considered, and care must be taken not to create additional authoritative structures. There must be no interference with the autonomy of any of the spheres of government concerned.

1.11 (Pg5) : Absolutely - agree with this.

1.13 (Pg6) : The Province of the Northern Cape has already made submissions in this regard. (We have again included the list we Submitted for Question 1.6 of the Key constitutional Issues.)

"..... The proposed appropriate provincial legislature powers should be:

- Agriculture
- Abattoirs
- Airports other than international (national airports to be considered separately)
- Animal control and diseases
- Casinos, racing, gambling and wagering
- Consumer Protection
- Cultural Affairs
- Economic Affairs
- Education at all levels, excluding university and technician education (teachers colleges and technical colleges need to be considered separately)
- Environment and conservation
- Health services - requires definitions i.e which levels
- Housing
- Indigenous law and customary law
- Language policy and the regulation of the use of official languages within a province, subject to section 3.
- Local Government, subject to the provisions of chapter 10.
- Markets and Pounds
- Nature conservation (national parks, national botanical gardens and marine resources should be considered separately.)
- Police subject to all provisions of Chapter 14
- Provincial Sport and Recreation
- Provisional Fiscal and Financial Control

S

- * Provincial public media
- * Provincial Public Protector
- * Provincial Public Works
- * Public Transport
- * Reconstruction and Development Programme at Provincial level
- * Regional Planning and Development
- * Road traffic regulation
- * Roads
- * Soil Conservation
- * Tourism
- * Trade and Industrial Promotion
- * Traditional Authorities
- * Urban and Rural Development
- * Welfare Services
- * Question of Standardization should be addressed.

However all those items not specifically listed above should be regarded as potential exclusive provincial powers or as concurrent powers depending on negotiations between provincial and national authorities, which should be facilitated by an independent and impartial body such as the Constitutional Court.

+ Residual powers

6

(Please note that we would like to add Finance, Mineral Affairs and Water to the list. A memorandum has been sent to the CPG on this matter).

2.6 (Pg8) : Agreed.

3.3 (Pg9) : As stated in the comment on 1.13 (Pg6) the Province of the Northern Cape has already made Submissions in this regard.

4.4 (Pg12) : The question of a Second House will be dealt with according to the time schedule which the CPG has provided.

4.5 (Pg12) : This is a great concern to the committee, as it seems that the submissions handed in have been disregarded. A memorandum has been written in this regard. Agreed that Finance should be added to this list (schedule 5).

4.6 (i) (Pg12) : Agreed.

4.6 (ii) (Pg13) : Agreed.

4.6 (iii) (Pg14) : This should not only be unidirectional from national to provincial, but bilateral in that it can be from national to provincial or vice versa, furthermore, the consultation should be possible between national government and only one province i.e it should no be required that all provinces become part of the process.

4.7 (Pg16) : Agreed.

4.8 (Pg16) : Agreed.

5. (Pg17) : Conclusion - Agreed with the conclusion, however would strongly like to state that we feel the CPG has disregarded what we have said about schedule 6.

MR MOKGORO (ANC)
FACILITATING CHAIRPERSON

MRS PAPERFUS (DP)

PROF HENNING (FF) pp. Committee Secretary

MR VAN WYK (NP) pp. Committee Secretary

COMMISSION FOR PROVINCIAL GOVERNMENT

INTERIM RECOMMENDATIONS WITH REGARD TO PROVINCIAL AND LOCAL GOVERNMENT SYSTEMS

11 May 1995

Comment by the Provincial Constitutional Committee,
Northern Cape Provincial Legislature.

DOCUMENT 3

COMMENTS:

3.4.2 (Pg2) : Agreed

3.5.2 (Pg3) : Provinces need greater say on this. Present minimum numbers are too low. It must be remembered that, regardless of the number of citizens in a Province the number of Ministerial Portfolios is the same for all, and therefore of Legislation, Committee Work etc.

On the recommendation of weighting for representation, the provinces must be consulted with fully as to how this should be done.

3.5.3 (Pg4) : This standard is inconsistent with the point made in page 5 of Discussion Document 1 - 3.5.1(c). However, we have already said in answering question 3b in the Key Constitutional Issues that a system of partial constituency and proportional representation in the Northern Cape Province will be preferable. It can be attended to as a provincial constitutional matter.

3.6.1 (Pg4) : Agreed

3.6.3 (Pg4) : It is recommended that this procedure be followed. The difficulties in view of the powers already assigned to the Premiers of the provinces by the interim constitution can be dealt with.

3.7.1 (Pg4) : This should only apply in special circumstances, notably a vote of no confidence.

3.9. (Pg5) : The Speaker's role in a Provincial Legislature is very different from that of the Speaker at National Level. The number of legislators at each level alone is indicative of this. This needs to be fully and thoroughly researched.

3.10. (Pg5) : The question of a deliberate vote for the speaker, as well as a casting vote (as for chairpersons for committees) needs to be addressed. The limited number of provincial seats needs to be taken into account in considering this.

This is not a proposal, it is only recommended that this be researched.

3.10.3 (Pg5) : This needs further consideration.

3.10.4 (Pg5) : There is a concern as to when the provinces were asked about this.

3.11.2 (Pg7) : This very important issue needs to be fully discussed. It is felt that the CPG should not consider itself empowered to address this vital issue itself.

3.11.3 (Pg7) : This is a problem which should perhaps be workshopped.

3.14 (Pg8) : Most of these issues should be covered in Rules and not in the Constitution, the broad guidelines could be of assistance.


G. COUTTS
COMMITTEE SECRETARY

OFFICE OF THE COMMITTEE SECRETARY

NORTHERN CAPE LEGISLATURE

FACSIMILE

TO: FAX NUMBER 012-341-8452
ORGANISATION COMMISSION ON PROVINCIAL GOVERNMENT
REFERENCE KEY CONSTITUTIONAL ISSUES
ATTENTION THE SECRETARY
TELEPHONE NUMBER 012-44 2297

FROM: FAX NUMBER: (0531) 814776

SECTION: The Office of the Committee Secretary

REFERENCE FAXE124

PERSON: Mr LA Jones **TEL. NUMBER:** (0531) 814760 Ext 2347

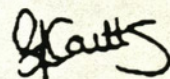
DATE 28 MARCH 1995 **NO. OF PAGES:** 13

KEY CONSTITUTIONAL ISSUES

Herewith Questions 1 - 5 of the Key Constitutional Issues for Provincial and Local Government.

As an extension of time has been asked for, please accept these proposals for Thursday's deadline, 30 March 1995.

Thank you.



(Miss) GH Coutts
Secretary: Provincial Constitutional Committee
Northern Cape Legislature

IF YOU HAVE NOT RECEIVED ALL THE PAGES, CONTACT THIS OFFICE IMMEDIATELY

KEY CONSTITUTIONAL ISSUES

PROVINCIAL AND LOCAL GOVERNMENT

1. PROVINCIAL LEGISLATIVE COMPETENCE

- 1.a Provinces have a choice between having entrenched exclusive legislative powers, thus sacrificing a say in national legislative powers, or having a say in national powers with concurrency. Which is preferable?

Neither of these options is preferable. A combination of exclusive and concurrent legislative powers should be considered (as has already been guaranteed by constitutional principles XVIII to XXI). Certain powers need to be exclusively allocated to the national level, other powers exclusively to the provincial level (with certain standardization provisos). All those powers not specifically listed must be regarded as potential exclusive provincial legislative powers or possible concurrent powers depending on negotiation between provincial and national authorities and must be facilitated by an independent and impartial body, such as the constitutional court. The exclusive national competencies should be: Foreign Affairs, Defence, Finance and Copyright Law.

- 1.b What would be the appropriate legislative powers to allocate to provinces in the light of the preference expressed in (a)

The proposed appropriate provincial legislative powers should be:

- Agriculture
- Abattoirs

- * Airports other than international (national airports to be considered separately)
- * Animal control and diseases
- * Casinos, racing, gambling and wagering
- * Consumer Protection
- * Cultural Affairs
- * Economic Affairs
- * Education at all levels, excluding university and technikon education (teachers colleges and technical colleges need to be considered separately)
- * Environment and conservation
- * Health services - requires definitions i.e which levels
- * Housing
- * Indigenous law and customary law
- * Language policy and the regulation of the use of official languages within a province, subject to section 3.
- * Local Government, subject to the provisions of chapter 10.
- * Markets and Pounds
- * Nature conservation (national parks, national botanical gardens and marine resources should be considered separately.)
- * Police subject to all provisions of Chapter 14
- * Provincial Sport and Recreation
- * Provisional Fiscal and Financial Control

- * Provincial public media
- * Provincial Public Protector
- * Provincial Public Works
- * Public Transport
- * Reconstruction and Development Programme at Provincial level
- * Regional Planning and Development
- * Road traffic regulation
- * Roads
- * Soil Conservation
- * Tourism
- * Trade and Industrial Promotion
- * Traditional Authorities
- * Urban and Rural Development
- * Welfare Services

- * Question of Standardization should be addressed.

However all those items not specifically listed above should be regarded as potential exclusive provincial powers or as concurrent powers depending on negotiations between provincial and national authorities, which should be facilitated by an independent and impartial body such as the Constitutional Court.

1.c How are the powers and functions going to be established?

1.c.i Should the allocation be on the basis of specific allocation to one level of government with residual powers to the other?

No as already stated in 1.a

1.c.ii In the case of concurrent powers, should the Constitution spell out the detail of powers allocated to each of the legislatures or are the provisions in section 126 in conjunction with schedule 6 of the interim constitution adequate?

No, the constitution should not spell out the detail of the powers allocated to each of the legislatures. However it is imperative that the Constitution make provision for section 126 not to be used in such a way as to minimize powers and functions.

1.c.iii How should powers which are not specifically allocated in the new constitution be dealt with (CP XXI)?

This must be facilitated by an independent and impartial body such as the Constitutional Court.

1.c.iv Should all provinces exercise identical powers? Should provinces be able to decide which powers they wish to exercise?

No, provinces need to be self-determining according to their unique needs. Yes, provinces must be able to decide which powers they wish to exercise.

1.c.v How should future disputes about legislative powers be settled?

By negotiation, facilitated by an independent and impartial body such as the Constitutional Court.

1.d How explicitly should the Constitution address these issues?

These issues should not be too explicitly addressed. The constitution should address broad principles in line with the 34 Constitutional Principles.

2. PROVINCIAL CONSTITUTIONS

2.a To what extent should the national Constitution specify the form and content of provincial constitutions?

In answer to this question, (we have chosen option b.) that is provinces should be entirely free to shape their own constitutions, provided only that they are not in conflict with the National Constitution.

3. PROVINCIAL LEGISLATURES

3.a Do checks and balances between the provincial legislature and provincial executive need to be improved?

Yes, they do need to be improved.

3.a.i Do you consider that one branch of government is dominant at present in your province?

Yes, the Provincial Cabinet is dominant at present.

3.a.ii Should there be a greater role for the legislature in introducing legislation?

Yes. In addition, provision should be made to ensure that proposals for legislation proceed through the system.

3.a.iii Should the legislature have greater leeway in turning down bills emanating from the executive? (If so, this would probably indicate an independently elected executive).

The standing committee system is working well and has already established a procedure for processing bills.

3.a.iv How can provincial legislatures be made more accessible to the public?

The public should be encouraged: to make written and oral submissions to and ask questions of the standing committees, to submit petitions; to attend sittings of the legislature and to attend committee meetings.

3.a.v Should the legislature fulfill a greater watchdog role over the administrative departments at provincial level? What limits should there be on this role? What are the implications for the separation of powers?

The legislature does need to have a strong watchdog role over administration departments at provincial level. This role should not take the form of an individual MPL making direct personal contact with any official in any department; it should take the form of a standing committee asking a Minister to respond on behalf of his department, or asking for a response from officials within that department. In that case the Minister should be informed of the committee's intention, as a courtesy gesture, although the Minister would not have the right to refuse. Other means of exercising the watchdog role are by means of questions and interpellations in the house. This can be undertaken by any member, but should only be directed to the Minister responsible. The separation of powers would not be negatively effected, it would in fact enhance the accountability of the executive to the legislature and the transparency of government.

3.a.vi Should the legislature have a guaranteed period of existence, or should the executive have the right to dissolve the legislature.?

Yes, the legislature should have a guaranteed period of existence, only in the case of a vote of no - confidence in the Premier would there be a premature dissolution of the Legislature.

3.a.vii Should MECs be members of party caucuses?

Yes, MEC's should be members of party caucuses. Generally speaking, these members should act on a mandate from their caucuses.

3.a.viii Should the executive convene sittings of the legislature, or should it be decided by the constitution?

The speaker should convene sittings of the Legislature in conjunction with the Premier.

3.b At present, no member of a provincial legislature represents a geographic constituency, because of the form of PR being used. There are other options, such as:

- A multimember constituency system, or
- Electing a proportion of the legislature on the basis of constituencies, while the rest are elected on party lists.

Should a constituency system be introduced alongside, or in conjunction with, the PR system?

Without being prescriptive this committee decided to choose the second option that is electing a proportion of the legislature on the basis of constituencies, while the rest are elected on party list.

3.c In terms of Section 133(1)(b) of the Interim Constitution, a member of a provincial legislature will vacate his/her seat if he/she ceases to be a member of the party which nominated him/her. Is this provision consistent with Principle VIII ('representative government' and multiparty democracy)?

Broadly speaking and in accordance with internationally accepted principles of democracy and freedom of association, Section 133(1) (b) is in conflict with constitutional principle VIII. We acknowledge that the different political parties have different views on this particular issue and we request them to make submissions in this regard through the different channels available to them.

3.d According to Principle VIII, 'regular elections should be held:-

If national and provincial elections were held at different times, could it strengthen the provinces' focus on politics and issues?

Simultaneous elections should (b) be required, unless circumstances such as a vote of no-confidence dictate otherwise.

3.e In terms of Principle XX, "Each level of government shall have appropriate and adequate legislative and executive powers and functions that will enable each level to function effectively". Do you believe that an extensive or vibrant committee system would contribute to the effectiveness of the legislative process?

Yes.

3.f Should provincial legislatures' staff fall under the Public Service Commission, the executive, or the legislature itself?

This should fall under the Legislature itself.

PROVINCIAL EXECUTIVES

4.a Should each province be allowed to decide the composition and powers of its executive? If so, are safeguards needed to prevent provinces from establishing undemocratic institutions?

Yes, in both instances

4.b Principle VI requires that legislature and executive be separated. At present, the provincial executives are composed of 11 members of the provincial legislatures. Is this an adequate form of separation of powers?

This does not indicate separation of powers one way or the other. It depends on how it is run.

Executive may be established in various ways. The executive should be appointed by the chief executive (Premier), who is elected directly, from among the members of the legislature.

- It is possible for an executive to be elected directly by the citizenry. Are you in favour of such a system?

No

- At present, the MECs may form a large proportion of the legislature. Is this satisfactory?

- (i) Should MECs be members of the legislature at all?

Definitely

- (ii) Should legislature be enlarged?

Yes, they must be enlarged to become four or five times the size of the executive. (The number of elected representatives at National level should be reduced.)

- (iii) Should the size of the executive be limited?

Yes, but this should be realistic in terms of the number of provincial competences.

- At present, the constitution provides for the appointment of staff of the legislature by the province. Is this satisfactory? Should there be a separation between the national Public Protector and the Provincial Public Protector?

No this is not satisfactory. Yes there must be a separation.

- Is the present relationship between the national Public Protector and the Provincial Public Protector satisfactory?

Only time will tell.

- 4.c What should the position be when the connection Premier or MEC with the party list is severed?

The caucus of that party would then have to decide on a new candidate (In the case of the MEC). In the case of the Premier it would have to be submitted to the house.

- 4.d Should there be constitutional provisions relating to governments of unity at the provincial level?

If there is provision made at national level for a government of unity, there would have to be similar provisions at the provincial level.

- 4.e Should there be uniform provisions in the national Constitution for procedural matter relating to provincial executives, as contained in section 145 to 154 of the interim Constitution?

Procedural matters relating to provincial executives should be determined by the provincial Constitution.

5. PROVINCIAL STAFF MATTERS

- 5.a Should all provincial staff (other than a legislatures staff) be part of the Public Service? If so-

Yes

- * Is there a need for a Provincial Service Commission for each province?

Yes, there is need for Provincial Services Commission for each province

- * What should be the powers and functions of a Provincial Service Commission, vis a vis the Public Service Commission?

The power of Provincial Service Commission should be related specifically to the Provincial Civil Service, whereas the Public Service Commission should deal with the nationally appointed civil servants. The question of standardization of service condition needs to be addressed.

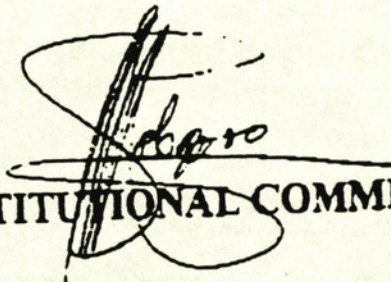
- * In view their limited powers and functions under the present Constitution, how many members should served on such commissions and should they be full-time or part-time?

A chairperson and vice chairperson must be appointed full-time with three part-time members. However decision on this should remain under the control of the Provincial Legislature.

- * Should the new Constitution provide for Provincial Service Commissions?

Yes.

MR GG MOKGORO
CHAIRPERSON
PROVINICIAL CONSTITUTIONAL COMMITTEE



OFFICE OF THE COMMITTEE SECRETARY

NORTHERN CAPE LEGISLATURE

FACSIMILE

TO: FAX NUMBER 012 - 3418452

ORGANISATION Commission on Provincial Government

REFERENCE

ATTENTION Mr J P Vermaak

TELEPHONE NUMBER 012 - 44 2297

FROM: FAX NUMBER: (0531) 814776

SECTION: The Office of the Committee Secretary

REFERENCE

PERSON: Mr LA Jones

TEL. NUMBER: (0531) 814760 Ext 2347

DATE 12/04/95

NO. OF PAGES: 5 incl. Fax sheet

Att: Mr J. P. Vermaak.

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PROVINCIAL CONSTITUTIONAL COMMITTEE

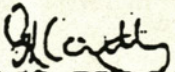
11 April 1995

KEY CONSTITUTIONAL ISSUES

Dear Sir/Madam

Attached is a copy of the submission (Question 6) to be submitted to the Commission on Provincial Government by the Northern Cape Constitutional Committee.

Yours Sincerely


MS GH COUTTS
COMMITTEE SECRETARY

PROVINCIAL LEGISLATURE OF THE NORTHERN CAPE

KEY CONSTITUTIONAL ISSUES

PROVINCIAL AND LOCAL GOVERNMENT

SUBMISSION BY THE CONSTITUTIONAL COMMITTEE

6. FINANCIAL AND FISCAL ISSUES

6.a Which economic "principles" or criteria should play a dominant role in determining the revenue powers assigned to provinces by the Constitution?

An optimal system of subnational government financing would be based on the principles of equity, stability, efficiency, autonomy, and simplicity. It would be transparent, and based on objective, stable criteria as well as being administratively cost-effective and efficient. All of the other criteria suggested are covered by this statement of principle and could be expanded by appropriate legislation as required.

6.b What constitutional provision should be made for:

- * exclusive revenue (tax and non-tax) powers to central and provincial levels (separation of revenue powers); and
- * concurrent powers over revenue source (sharing of revenue bases)?

Are the existing provisions adequate?

The Constitution should not deal explicitly with the matter of revenue collection at the various government levels. Specific controls need to be provided through legislation and all taxation, etcetera, should be negotiated by a forum representative of all spheres of government. The constitution should, however, make non-specific provision for revenue collection at all levels, but with a strongly worded protection clause to ensure that no revenue contributor would be discriminated against.

6.c How explicit should be the assignment of revenue sources in the constitution?

The constitution needs to make non-specific provision for the sharing of revenue bases as in Constitutional Principle XXVI. It should not, however, attempt to determine an explicit assignment of revenue, this should rather be dealt with in the budget of each level of government for each year, again dependent on agreements reached by the forum representative of each level of government (as already referred to in 6b).

6.d Should provinces have borrowing powers? For what purposes? Should these be constitutionalised? Is the existing constitutional provision adequate or should it be amended?

All subnational levels of government should have borrowing powers which should be linked to the ability of each of these levels to repay the loan. There must, however, be a safeguard on this i.e each province's borrowing ability should depend on 1) the ability to repay the loan according to certain limitations, and that 2) these loans must be used for capital expenditure and not for recurrent expenditure.

6.e How could a rational, accountable and predictable structure of intergovernmental transfers be safeguarded?

The constitution should only specify that inter-governmental transfers should be rational, accountable and predictable. This should be dealt with in separate legislation passed by the respective legislative levels of government as a result of

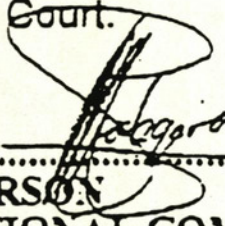
recommendations from that forum representative of all spheres of government.

6.f What financial arrangements, if any, should provinces be able to enter into with foreign parties? e.g. aid, trade agreements, etc.

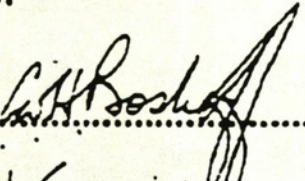
Provinces should be able to enter into financial arrangements with foreign parties such as aid and trade agreements subject to the conditions already given in 6d. and subject to being within the realm of provincial competences.

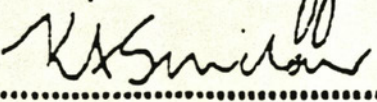
6.g How should fiscal disputes between provinces and the national government be settled?

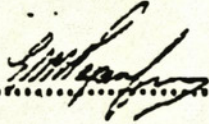
There must be provision in the constitution that disputes be settled by the Constitutional Court.


MR MOKGORO (ANC)
FACILITATING CHAIRPERSON
PROVINCIAL CONSTITUTIONAL COMMITTEE

COMMITTEE MEMBERS:

PROF BOSHOFF (FF)


MR SINCLAIR (NP).....


MRS PAPENFUS (DP)




CONSTITUTIONAL ASSEMBLY

CONSTITUTIONAL ASSEMBLY

MEMORANDUM

TO: THEME COMMITTEE 2

FROM: EXECUTIVE DIRECTOR

DATE: 30 May 1995

RE: NOTIFICATION OF MATTERS REFERRED

Please note that the following matters have been referred to Theme Committee 2 for its consideration:

1. *The Law Advisors' Analytical Survey of Report by TC1 on Block One, 8 March 1995* referred the following matters to Theme Committee 2 for its consideration:

1. Political System: the comment in the document reads:

No. 2, Constitutional Principle VIII, Political System; Non-contentious aspects:

- (1) *Multi-party system*
- (2) *Regular elections*
- (3) *Universal adult suffrage*
- (4) *Common voters roll*

Remarks: ...Agreement on non-contentious aspects requires further development before drafting can commence. TC 1, 2 and 4 will flesh out the detail in Block Six.

2. Electoral System: the comment in the document reads:

No.3, Constitutional Principle VII, Electoral System: Non-contentious aspects:

- (1) *Basis to be proportional representation*
- (2) *Constituency representation to be explored*

Remarks: ...Agreement lacks specifics. Further clarity needed. TC2 will provide further clarity on national and provincial electoral systems in Block Six.

P. O. Box 15, Cape Town, 8000
Republic Of South Africa

Tel: (021) 245 031, 403 2252 Fax: (021) 241 160/1/2/3, 461 4487. E-mail: conassem@iaccess.za



You've made your mark



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THE NEW CONSTITUTION

3. **Accountability:** the comment in the document reads:

No. 6, Constitutional Principle VI, Accountability: Non-contentious aspects: "Executive to be accountable to Parliament; Remarks: the manner in which the executive will be accountable to Parliament to be developed further by TC2 in Block Two."

4. **Levels of Government:** the comment in the document reads:

No. 10, Constitutional Principle VXi, Levels of Government: Non-contentious aspects: National, Provincial, Local; Remarks: Levels of government need to be further developed. Falls within TC 2's mandate."

5. **Parliamentary Structure:** the comment in the document reads:

No. 13, Constitutional Principle XVI, Parliamentary Structure: Contentious aspects: Whether Parliament should be bi- or unicameral; Remarks: Question of second chamber is to be dealt with by TC 2 in Block 2.

6. **Minority Party Participation in Executive Structures:** t h e comment in the document reads:

No. 15, Constitutional Principle XIV, Minority participation in government: Contentious aspects: (1) Coalition government "forced" by Constitution; (2) Majority party government; Non-contentious aspects: Participation by minority parties in legislative structures on basis of proportional representation. Remarks: Question of minority parties' participation in executive structures will be dealt with by TC2.

2. On 27 February, the Constitutional Committee discussed the report of Theme Committee on Block 1. During that discussion, the following matters were referred to Theme Committee 2:

1. **Constituency Size:** the minute reads:

5.3.ii Regarding point 3, which reads:

"The democratic principles of representation, accountability, responsiveness and openness are best served by government being as close as possible to the people."

The meeting noted the FF's concern that the phrase, "being as close as possible to the people" should require some consideration of the size of constituencies, to allow close contact between elected officials and the people they represent. The meeting agreed that this would be taken forward by Theme Committee 2 when it considers "Structures of Government".

2. "Separation of Powers": the minute reads:

5.3.v. Regarding point 13, which reads:

"There shall be separation of powers among levels of government in a balanced way to prevent concentration of power:

the meeting agreed to retain point 13 on the understanding that it would be take up when discussing the report from Theme Committee 2."

3. On 5 May 1995 the Constitutional Committee discussed the report of Theme Committee 1 on Block 2. The "Analytical Survey" of that report referred the following matters to Theme Committee 2:

1. Provincial legislative and executive competence and national concurrent powers: the survey noted:

"No. 2, Constitutional Principles I, XI, XIII, XIV, XVI, XVII, XIX, XX, XXII and XXXIV, One Sovereign State: Contentious aspects: (1) Extent of provincial legislative and executive competence and of national concurrent powers. Remarks: Wide ranging views of parties. Details to be worked out by Theme Committees Two and Three.

2. Minority Participation: the survey noted:

No. 2 ... [same as above] ...: Contentious aspects (2) Minority participation as a constitutional requirement. Remarks: CP XIV. Again an issue for Theme Committees Two and Three.

3. Community self-determination: the survey noted:

"No. 2 ... [same as above] ...: Contentious aspects (3) Community self-determination (including "Volkstaat". Remarks: At what level should self-determination be set - the community or centrally. Again issue for Theme Committee 2.

4. Traditional Monarchies: the survey noted:

"No. 2 ... [same as above] ...: Contentious aspects (4) Traditional Monarchies, the extent of their recognition and protection. Remarks: An issue which interlinks TCs 1, 2, 3, 4 and 5.