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A25

**CONSTITUTIONAL
ASSEMBLY**

**THEME COMMITTEE 1
CHARACTER OF
DEMOCRATIC STATE**

29 MAY 1995

**ROOM M515
— 09H00**

DOCUMENTATION

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CONSTITUTIONAL ASSEMBLY

THEME COMMITTEE 1 CHARACTER OF DEMOCRATIC STATE

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

Date: Monday, 29 May 1995
Time: 09h00 - 13h00
Venue: Room M515 (Marks Building)

AGENDA

1. Opening
2. Apologies
3. Adoption of previous minutes
4. Matters Arising
5. Discussion of draft report for Block 4
6. Oreintation workshop for Block 8 (Foreign Relations and International Law)
7. Public Participation
8. General
9. Closure

H EBRAHIM
EXECUTIVE DIRECTOR
CONSTITUTIONAL ASSEMBLY

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

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

**MINUTES OF THE MEETING OF THEME COMMITTEE 1
MONDAY 22 MAY 1995 09H00 ROOM M515**

**Present
Marais PG (Chairperson)**

**Booi MS
Chiba L
Chikane MM
Chiwayo LLL
Fani LM
Gumede DM
Hangana NE
Janse Van Rensburg AP
Kekana NN
Khuzwayo NEK
Mabuza MC
Mahlangu NJ
Majola-Pikoli NT
Meshoe KR**

**Moorcroft EK
Mukhuba TT
Mulder PWA
Ncube BS
Routledge NC
Shope G
Sisulu AN
Streicher DM
Van Deventer FJ
Van Zyl ID
Williams AJ**

Apologies:

Schoeman EA

Technical Experts present:

Corder H

Apologies were noted from Adv Heunis and Mr Husain.

Leola Rammble and Susan Rabinowitz were in attendance.

1. OPENING

1.1 The meeting was opened by the Chairperson at 09h15.

2. ADOPTION OF PREVIOUS MINUTES

2.1 The Minutes of the Theme Committee meeting held on 15 May 1995 contained in Document A24 (Pages 5 - 8) were adopted with the

following amendment. It was agreed that Paragraph 6.1 on Page 7 dealing with Traditional Authorities should be amended to read:
"A member of the Theme Committee who had attended the Traditional Authorities Public Hearing gave a short report, namely that a conflict between the concept of equality and indigenous law arose sharply, and noted that the matters discussed did not directly concern Theme Committee One.

3. MATTERS ARISING

- 3.1 Prof Corder referred to Point 5.2 on Page 7 of the Minutes in which the Theme Committee had requested the Technical Experts to research the question of unpaid labour. He reported that research was still continuing on this issue and that a further report would be given at the next Theme Committee meeting.
- 3.2 With regard to Point 6.3 on Page 8 of the Minutes, the Secretary reported that the Community Liaison Department were in the process of arranging two CPM's in the Kwazulu/Natal province and the Theme Committee would be advised of the details as soon as these were available.

4. ADOPTION OF DRAFT REPORT FOR BLOCK 3: SUPREMACY OF THE CONSTITUTION (Document A23 Pages 6 - 33)

- 4.1 A proposal was made by the Technical Experts that, in order to accommodate the concerns raised in the Theme Committee meeting of 15 May 1995, the following amendment be made to the Draft Report for Block 3 dealing with Supremacy of the Constitution. Under Part Two A: General Discussion of the Material (Page 7), the second sentence should be amended to read as follows:

" While there were some superficial differences in approach to the matter in which the idea of constitutional supremacy was expressed, the notion that the Constitution should be the supreme instrument of government in a democratic constitutional state in the final constitutional text was supported by all parties.

The proposed amendment was accepted by the Theme Committee and it was agreed that the Report was now finalised and would be submitted to the Constitutional Committee.

5. ORIENTATION WORKSHOP ON BLOCK 6 (AGENDA ITEMS 7, 8, 9)

- 5.1 The briefing document for Block 6 dealing with Agenda Item 7: Representative Government, Agenda Item 8: Citizenship and Agenda Item 9: Suffrage contained in Document A24 (Extra Documentation) (Pages 1 -30) was tabled. Prof Corder talked to the document.

5.2 It was agreed that Prof Corder would make available to the members of the Theme Committee copies of the documents dealing with Alternative Electoral Systems and Penal Reform. It was further agreed that Prof Corder would research the issue of the voting age in other countries and would report back at the next Theme Committee meeting.

6. TABLING AND DISCUSSION OF PARTY SUBMISSIONS ON BLOCK 4: ACCOUNTABLE GOVERNMENT.

6.1 ACDP

The ACDP tabled and talked to its submission contained in Document A24 (Pages 9 - 12).

Questions of clarification were asked on the distinction between accountable and responsible government, on who are citizens and how the code of conduct for members of Parliament applies to those who do not acknowledge the Authority of God.

6.2 ANC

The ANC tabled its submission contained in Document A24 (Pages 13-14). The ANC talked to its submission and noted that the list of Institutional Mechanisms on Page 14 was not finalised and that references to a Gender Commission and the Attorney-General were still to be debated and may be added to the list.

Questions of clarification were raised around Point c) 2. (Page 13) on the appointment of judges.

6.3 DP

The DP tabled and talked to its submission contained in Document A24 (Page 15).

Questions of clarification were asked on what was meant by exceptional cases where the security of the state would be placed in jeopardy.

6.4 FF

The FF tabled and talked to its submission contained in Document A24 (Pages 16-18).

There were no questions of clarification.

6.5 NP

The NP tabled its submission contained in Document A24 (Pages 19-21) and talked to its submission.

Questions of clarification were asked as to whether the parliamentary control mechanisms referred to on Page 20 (b) could not be secured elsewhere than in the Constitution.

6.6 PAC

The PAC submission contained in Document A24 (Pages 22-23) was tabled. The PAC was not present and therefore no discussion took place on their submission.

6.7 It was agreed that the Drafting Sub-Committee would meet this week together with the Technical Experts to begin drafting the Report for Block 4. The Secretariat would make the arrangements for the meeting.

7. PUBLIC PARTICIPATION PROGRAMME

7.1 Reportback on CPM's on 20 May

Harrismith

A member of the Theme Committee who had attended the CPM in Harrismith gave a short report, noting that despite initial translation problems the meeting had gone well, although most questions posed related to socio-economic issues. A number of concerns were expressed by members who had attended the CPM including the fact that the programme was too long. It was suggested that the Management Committee should re-examine the Public Participation Programme to see whether workshops or briefings could be held in the areas prior to the CPM's in order to involve people and organisations in the process. The concern was also raised that Theme Committee members were not allowed to answer questions at the meetings.

It was agreed that these concerns and comments would be conveyed by the Secretariat to the Community Liaison Department.

7. GENERAL

7.1 None.

8. CLOSURE

8.1 The meeting rose at 12h25.

R. Masari 23/05/1995
CHAIRPERSON

CONSTITUTIONAL ASSEMBLY

***THEME COMMITTEE ONE
CHARACTER OF
DEMOCRATIC STATE***

***REPORT FOR
BLOCK 3***

***SUPREMACY OF THE
CONSTITUTION***

22 MAY 1995

REPORT FROM THEME COMMITTEE ONE

BLOCK 3: SUPREMACY OF THE CONSTITUTION

22 MAY 1995

PART ONE

- A) Summary Overview of submissions received and processed by Theme Committee from sources outside the Constitutional Assembly (Vols 15, 16 and 17) - see attachment.
- B) The Technical Committee conducted an Orientation Workshop on 27 March before parties made their submissions on the subject matter of this Block, for which a Briefing Document was compiled - see attachment.
- C) Public Participation Programme:
- None of the submissions received from the public during the CPMs was relevant to the agenda items being dealt with by the Theme Committee in Block 3.*
- D) No Public Hearings were held on this agenda item.
- E) The following Constitutional Principles refer:
- II) *Everyone shall enjoy all universally accepted fundamental rights, freedoms and liberties, which shall be provided for and protected by entrenched and justiciable provisions in the Constitution, which shall be drafted after having given due consideration to inter alia the fundamental rights contained in Chapter 3 of this Constitution.*
 - IV) *The Constitution shall be the supreme law of the land. It shall be binding on all organs of state at all levels of government.*
 - V) *The legal system shall ensure the equality of all before the law and an equitable legal process. Equality before the law includes laws, programmes or activities that have as their object the amelioration of the conditions of the disadvantaged, including those disadvantaged on the grounds of race, colour or gender.*
 - VI) *There shall be a separation of powers between the legislature, executive and judiciary, with appropriate checks and balances to ensure accountability, responsiveness and openness.*
 - VII) *The judiciary shall be appropriately qualified, independent and impartial and shall have the power and jurisdiction to safeguard and enforce the Constitution and all fundamental rights.*

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

PART TWO

AGENDA ITEM 4: SUPREMACY OF THE CONSTITUTION

A. GENERAL DISCUSSION OF THE MATERIAL

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

B. NON-CONTENTIOUS ISSUES

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

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

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

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

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

C. CONTENTIOUS ISSUES

None.

PART THREE

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

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

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

NO.	CONSTITUTIONAL PRINCIPLES	ISSUE	CONTENTIOUS ASPECTS	NON-CONTENTIOUS ASPECTS	REMARKS
1	II, IV, V, VI, VII AND XV	SUPREMACY OF THE CONSTITUTION	NONE	<p>1) CONSTITUTION SHALL BE THE SUPREME LAW.</p> <p>2) LAWS OR ACTS INCONSISTENT WITH THE CONSTITUTION SHALL BE INVALID.</p> <p>3) CONSTITUTION SHALL BIND ALL ORGANS OF STATE AT ALL LEVELS OF GOVERNMENT.</p> <p>-----</p> <p>4) CONSTITUTION SHALL BE JUSTICIABLE BY AN INDEPENDENT AND IMPARTIAL JUDICIARY.</p> <p>-----</p> <p>5) CONSTITUTION SHALL PROVIDE FOR FUNDAMENTAL RIGHTS AND FREEDOMS.</p> <p>-----</p> <p>6) THE CONSTITUTION SHALL NOT UNDULY SHACKLE LEGISLATIVE ACTION TO REDRESS PASS WRONGS</p> <p>-----</p> <p>7) CONSTITUTION SHALL BE AMENDED BY SPECIAL PROCEDURES INVOLVING SPECIAL MAJORITIES</p>	<p>THESE MATTERS FALL WITHIN JURISDICTION OF TC1 ALONE. A CLAUSE ALONG THE LINES OF SECTION 4 OF THE 1993 CONSTITUTION WILL HAVE TO BE DRAFTED.</p> <p>-----</p> <p>WITHIN THE JURISDICTION OF TC5</p> <p>-----</p> <p>WITHIN THE JURISDICTION OF TC4</p> <p>-----</p> <p>WITHIN THE JURISDICTION OF TC'S 2,3 & 4</p> <p>-----</p> <p>WITHIN THE JURISDICTION OF TC2</p>

SUMMARY OVERVIEW

**SUMMARY OVERVIEW OF SUBMISSIONS FROM
SOURCES OUTSIDE PARLIAMENT**

NAME AND LOCALITY	SUBJECT MATTER OF SUBMISSIONS GERMANE TO THEME COMMITTEE ONE	DATE SUBMITTED
	<u>INDIVIDUALS</u>	
A C Peterson Oosterse	Must include God in the Constitution - postamble and preamble	
K Penkin Cape Town	Members of Cabinet determined by merit	13/03/95
J Petrus Keimoes	Equality 11 Official languages enjoy equal status	
R W Sykes Cape Town	South Africa must be divided into independent, culturally based states	10/02/95
A Schrader Bloemfontein	Equality Democracy Universal Suffrage	07/02/95
T Sinyiswa Johannesburg	Skills requirement for running business and participating in economy Equality	15/01/95
M H Steger	Equality One sovereign state - supremacy of constitution	03/95
C Supra Johannesburg	Equality	26/02/95
C Stevenson Vlaeberg	Democracy - proportional representation	01/02/95
A A Saley Vereeniging	Receiver mediate where rights are violated due to unfair economic activities Equality	09/12/94
J Scheepers Pretoria	Environment protected in international treaties	
M A Thorpe Kloof	Equality	17/01/95
S P van der Westhuizen Murrayfield	Democracy - federalism, decentralisation of power Accountable government	
H Watkins Durban	Equality	
B I Zondo Durban	Accountable government	

W & S Friedman Westville	Market driven economy Central government - federalism as far as possible Democracy - proportional representation Accountable government - ombudsman English as language of central government Equality New flag and new anthem in English; new symbols needed - entirely neutral Duty to vote on citizens - failure, to be punished by nominal fine or community service	28/02/95
P M Archer Johannesburg	Equality Supremacy of constitution	05/03/95
M von Bentheim Cape Town	Accountability Equality	02/95
J Anderson Pretoria	Equality One Sovereign State	04/03/95
S Borsook Johannesburg	Accountable government Obligation to vote Federalism Equality Representative government	17/03/95
P H Grala Vanderbijlpark	Accountable government - ombudsman Equality Prevention of monopolies, cartels or price collusion Protection from external threats	09/03/95
E M Lelkhoa Brits	Sovereign state - federalism Linguistic diversity recognised - 11 official languages	24/02/95
R Makan Westville	English as official language - each province elect one second official language	10/03/95
J S Marais Cape Town	Democracy	18/01/95
A McGregor et al (12 individuals) Johannesburg	Supremacy of constitution Entrench free enterprise Co-operate in and become actively involved in international law Representative and accountable government Equality Multiple citizenship allowed English as official language No symbol and name change Federal system Democracy - proportional representation	03/03/95
Dr M Peer Odin Park	Equality Supremacy of Constitution One Sovereign State Representatively elected government	

J M Richfield Dennesig	Equality One sovereign state - federalism	
H van Randwyck Johannesburg (Rivonia)	Federalism All citizens over the age of 18 have the right to vote Representative government	18/03/95
P Rakare Mmabatho	Direct democracy Accountability and transparency - freedom of information Act is crucial	01/03/95
D H Swaine Johannesburg	Responsibility and accountability of all MPs	22/03/95
M H Stegen	Equality - woman is weaker than the man, and not wrong to give her extra consideration One sovereign state - supremacy of constitution	
Minister of Arts, Science, Culture & Technology B S Ngubane Cape Town	Principle of multilingualism	09/02/95
I L Rautenbach	Accountable Government	23/02/95
C Bowring Tzaneen	What is meant by "sovereign" state? Must be subject to democratic laws - unjust laws reviewed by Supreme Court. Avoidance of autocracy.	27/02/95
F R Corner Wilderness	1 official language, but groups allowed to use own language.	15/03/95
E P Cain (United Christian Action) Menlo Park	S.A. to officially be a Christian state.	10/03/95
K M N Dally Faerie Glen	Accountable Government, especially Parliamentarians	15/02/95
J S Du Plessis	Abuses of state power to be checked through co-operation of all South Africans. Will be ensured through self-determination. Elected representatives from each group to serve in central government. Function of President is reconciliation, not to "govern". Judiciary to control reconciliation process. Themes of self-determination to be reflected in national symbols.	16/01/95
P Eloff Diep River	One sovereign state - no provincial bias. Will ensure unity.	07/03/95
Y Gibbs Durban	Accountability: government must be free from corruption - application of fundamental rights must ensure fairness and equality.	05/03/95

M Hay Welkom	S.A. to be a federation with maximum power given to the provinces. Accountability - independent judiciary must guard the Constitution. Elected representatives must be accountable to the constituencies.	15/03/95
A Hoffenberg Birnarn Park	People are the source of power. Politicians are therefore accountable to them. Participation in government by all must be ensured through devolution of power to grassroots level. Ultimate sovereignty rests with the people. The Bill of Rights must enshrine this.	06/03/95
D Lusenga Rosalyn	One sovereign state - no splitting up into any groups - all are equal	07/03/95
C Le Hane Sea Point	Democratic ideals must be given concrete effect.	25/02/95
A Minies Richmond	S.A. is a Christian country - must be reflected in Constitution.	30/01/95
T L Marshall Monte Vista	Christian convictions to be protected in Constitution - government must be accountable - financial checks to ensure this.	08/03/95
B Mangena Trichardtsdaal	One sovereign state - incorporate all leaders.	03/03/95
S Mfafa Lady Grey	People to participate in governing - involvement in projects.	03/03/95
M J Mangali Vaal Reefs	Constitution to protect citizenship rights of South Africans - constitution must function as a binding mechanism.	16/02/95
P Mahlatsi Kagiso	Government must be accountable for its spending.	
R C Northover Pretoria	Accountability of government to be ensured through Constitution.	06/03/95
F J Potgieter Bloemfontein	S.A. must be one sovereign state to ensure unity. Equality to be ensured.	07/03/95
Anonymous	Increase local and provincial governments powers to ensure government is closer to the people Representation to be on mixed constituent and proportional basis	
M J Bester and others Bloemfontein	Government to be accountable - regular use of commissions of enquiry	27/02/95
R G Brown Kenilword	Christian principles to guide the state's use of power	08/03/95
C Bailey Elsies River	Application of fundamental rights of all	14/03/95

M L Bredenkamp Bellville	Fundamental rights to protect cultural rights	20/02/95
A D Barker	Nation to be built through "co-operative" communities	
D J Brand (Adv) Stellenberg	Constitution to protect individual's language and culture	20/02/95
M B Benoni	Democracy must include right to form "own" groups - democracy must engender responsibility	06/02/95
R Buthelezi Nongoma	S A to be a federation	
R O Barker Menlo Park	Power-sharing is the basis of unity - constitution must ensure this	15/02/95
N A Carpenter Johannesburg	S A to be one sovereign state - equality before the law for all	03/03/95
L T Du Plessis (Dr) O F S (Bloemfontein)	Promotion of all languages will foster sense of unity and reconciliation	10/03/95
J D P Du Preez Fisherhill	SA to be a sovereign state in terms of national interest but power to devolve to local level Federalism allows for creation of "group" states - allows for recognition of identity	08/03/95
K De Kock Witrivier	"General franchise" to be supplemented by "group franchise" which allows groups to elect their own representatives - protects group interests - counters domination by any one grouping	20/02/95
W Dabala Alberton	One sovereign state only - creation of "homelands" leads to racism - Regional government must be limited, must co-operate with central government - "power-sharing" can lead to divisions along racial lines	
N P Ferreira Linden	Federal system to be provided for in constitution Acknowledgement of "God" in preamble Recognition of language rights	16/02/95
P Fincham	Accountability of government - power to devolve to regional government - right to vote to all over 18 years	
M E Grobler Welkom	Law must be accessible to all to ensure accountability to people - SA should be a sovereign state	03/03/95
G Gibson Germiston	Public has right to elect officials being accountable - legal process to be simplified	18/02/95
A Gore Johannesburg	Application of fundamental rights	31/01/95

C Coetzee Pretoria	Constitution to be based on "original" principles - creation of 3-tier government system: central, provincial and local - protection of minority groups - conserve language and culture	
G M Hunter Pinetown	Equality before the law S A to be a sovereign state following model of USA	01/03/95
S M Hlatshwayo Clernaville	Must be continuity in transition phase	
A Hurribunce Maidstone	Equality for all	14/02/95
L E Igaloo Johannesburg	Constitution to have christian character	07/02/95
J E Krige Eikenhof	No rights without responsibilities	15/02/95
K M Klugman Houghton	Federal state will prevent domination by central government. Democracy means empowering people - follow USA model Government must be accountable for its actions	05/03/95
K Hlekane Johannesburg	Unitary system Strong central government	10\8/02/95
S J Krugel Sasolburg	"Volkstaat" allows own choices	
M Waldner Pretoria	Government must be accountable, especially for its spending	19/02/95
J O Kellerman Pretoria	Equality for all - must be strictly interpreted - ensures democracy One sovereign state	06/03/95
L E Laubscher Klerksdorp	Fair treatment of Afrikaans	20/02/95
M M Mokoena Witsieshoek	State to be unitary - powers to provincial and local levels as well	
J D Enraght-Moony Port Elizabeth	Democracy to be clearly defined - includes responsibilities to others Separation of powers Federal state to encompass diverse cultures in SA	17/02/95
R G L Mathiss Gregville	Rule of law - based on Biblical teachings	
C G F Morrison Benoni	S A to be a unitary state using 3 tier system - concepts of federalism and "volkstaat" rejected - proportional representation and power-sharing not to be entrenched	15/02/95

A M Mtshali Rossburgh	Government is accountable to everybody	
J J Malan Marble Hall	Government must be accountable - "top-heavy" structures serve no purpose	13/02/95
R Pentecost Oranjericht	Democracy is an unworkable concept - Government to be controlled by skilled experts Equality cannot exist	01/09/95
L V Read Touws Rivier	Government must consider the people - Federal state will prevent domination - create autonomous states - no racial inequality - power should be given to individuals, not to central government - achieved by more power to provinces	23/01/95
G T Robertson Camps Bay	S A can exist of various "nation-states" where groups exercise their rights - integrity of my "own" nation-state, i.e. where property owned, to be upheld	04/03/95
A T Roux Bloemfontein	Political power must be shared by all parties Allow for creation of "Volkstaat"	20/02/95
S Z Skhosana Middelburg	Government must be accountable - must act for the people, not in own interest	14/02/95
R Swemmer Lidgetton	One Sovereign State - no special group states - people must adapt themselves Equality for all	05/03/95
E Schultz Rivonia	Central government to allocate funds equitably - provincial and local authorities to interact - local authorities to be accountable to constituencies Provincial government to monitor activities in the interests of the people	22/02/95
S Thompson Johannesburg	Effect of government intervention to be checked	17/02/95
P Tsatsa Vanderbijlpark	Constitution to protect equality before the law One sovereign state will ensure unity and strength	
E Thози and others Hammersdale	Federalism will enure peace	02/02/95
J C Anderhay Nelspruit	Executive to be determined along racial lines	
V E Woodley High Flats	Government must be accountable New anthem	15/03/95
D J C Geldenhuys Suid-Afrikaanse Akademie vir Wetenskap en Kuns) Pretoria	Afrikaans to be retained as an official language Language rights are human rights Multi-lingual society is an asset	27/02/95

K van Wyk (Afrikaanse Handelsinstituut)	Government must be accountable for its financial activities - adhere to reporting by Public Entities Act	16/02/95
J Vermooten (Rentemeesterbellegings)	Government to reduce interference in economic affairs	13/02/95
	ORGANISATIONS	
Civic Information Consultants International -CICI Grahamstown	Democracy (part of submission illegible)	18/01/95
Methodist Church of SA. Kloof	Preamble - include after Almighty God the words "who is judge over all the universe, and whose principles we uphold..." Equality	
SACOB (SA Chamber of Business) Johannesburg	Supremacy of the Constitution Federalism, co-existing with national unity. Universal adult suffrage. Transparency and accountability.	04/04/95
Associated Magazines Cape Town	Equality One sovereign state - devolution of powers.	10/03/95
Community Law Centre, UWC Bellville	Equality - must be extended to women subject to Muslim law.	11/03/95
Kultuurraad en Die Rapportryers-korps	Entrench power sharing. Maintain 11 official languages. Provincial legislators determine own regional language. Mother-tongue education. Free market system - minimum interference from the state. Federal system - autonomous provinces. Suffrage for all over 18. Democracy - proportional representation.	08/02/95
Evangelical Fellowship of S.A. Mayor's Walk	Preamble - retain reference to Almighty God. Separation of powers. Equality - omit sexual orientation.	10/03/95

BRIEFING DOCUMENT

THEME COMMITTEE ONE
BLOCK 3: BRIEFING DOCUMENT

AGENDA ITEM 4: SUPREMACY OF THE CONSTITUTION

1. INTRODUCTION

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

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

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

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

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

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

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

2. TRANSITIONAL PROVISIONS

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

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

- II) *Everyone shall enjoy all universally accepted fundamental rights, freedoms and liberties, which shall be provided for and protected by entrenched and justiciable provisions in the Constitution, which shall be drafted after having given due consideration to inter alia the fundamental rights contained in Chapter 3 of this Constitution.*
- IV) *The Constitution shall be the supreme law of the land. It shall be binding on all organs of state at all levels of government.*
- V) *The legal system shall ensure the equality of all before the law and an equitable legal process. Equality before the law includes laws, programmes or activities that have as their object the amelioration of the conditions of the disadvantaged, including those disadvantaged on the grounds of race, colour or gender.*
- VI) *There shall be a separation of powers between the legislature, executive and judiciary, with appropriate checks and balances to ensure accountability, responsiveness and openness.*
- VII) *The judiciary shall be appropriately qualified, independent and impartial and shall have the power and jurisdiction to safeguard and enforce the Constitution and all fundamental rights.*

2.2 Certain matters are raised prominently by these Principles:

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

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

Preamble - Extract

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

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

SECTION 4

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

SECTION 7 (1)

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

SECTION 33 (2) AND (4)

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

SECTION 96

- (1) *The judicial authority of the Republic shall vest in the courts established by this Constitution and any other law.*
- (2) *The judiciary shall be independent, impartial and subject only to this Constitution and the law.*

- (3) *No person and no organ of state shall interfere with judicial officers in the performance of their functions.*

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

3. THE TASK OF THEME COMMITTEE ONE

- 3.1 Because of a degree of overlapping between the work of Theme Committees, it does not seem that detailed suggestions for provisions of the final Constitution are expected from Theme Committee One in respect of the following matters:

3.1.1 the scope of application of the Bill of Rights (Section 7(1) - Theme Committee Four);

3.1.2 the effect of the Bill of Rights on private legal relations, in particular as regards non-discrimination in the private sphere (sections 33 (2) and 33 (4) - Theme Committee Four);

3.1.3 the "suspendibility" of the Bill of Rights (section 34 - Theme Committee Four);

3.1.4 the authority and constitutional jurisdiction of the different courts (section 96 - Theme Committee Five);

3.1.5 the Public Protector, Human Rights Commission and Commission on Gender Equality (sections 110 - 120 - Theme Committee Six);

3.1.6 the horizontal separation of powers (Constitutional Principle VI - Theme Committee Two).

- 3.2 On the other hand, both the Preamble and the vital statement that the Constitution is supreme (see section 4(1)) fall squarely and exclusively within the jurisdiction of Theme Committee One.

4. THE SIGNIFICANCE OF THE NOTION OF CONSTITUTIONAL SUPREMACY

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

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

4.2 The adoption into South African law of the notion of constitutional supremacy amounts to a legal revolution, which brings this country into line with most democratic systems throughout the world. In our case (as happened in Canada in 1982), it marks a shift from the (British) Westminster system, whereby the sovereignty of the law-maker (Parliament) is the basis on which all constitutional law is founded to a constitutional model where the written word of the Constitution (as interpreted by the courts, primarily the Constitutional Court) rules supreme.

4.3 Several crucial consequences follow from this change:

4.3.1 the judiciary assumes a higher public profile, being involved in laying down the limits of political power in accordance with the courts interpretation of the Constitution;

4.3.2 all branches of government and organs of state function within the boundaries laid down in the Constitution, which is a sort of higher contract agreed upon in advance, according to which government must proceed; and

4.3.3 the Constitution (of course, depending on what it actually stipulates) will generally limit the powers of government absolutely, and relatively (as between government bodies).

4.4 A further concomitant of the acceptance of the supremacy of the Constitution, is the incorporation of the idea of "constitutionalism" into our law. This is in many ways, simply put, the equivalent of the "rule of law" in the Westminster system.

Its role has been described as follows:

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

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

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

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

5. CONCLUSION

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

PARTY SUBMISSIONS

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

SUPREMACY OF THE CONSTITUTION

The Origin of Constitutionalism

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

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

Biblical Perspectives

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

18th April 1995

[SUPREME.WPS]

ANC SUBMISSION

Supremacy of the Constitution

Constitutional Assembly Submission to Theme Committee 1 Block 3

Guiding principles

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

The democratic constitutional state

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

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

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

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

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

4.1 The doctrine of the separation of powers, and

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

The harmonisation of democratism and constitutionalism

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

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

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

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

³ As in the constitutional history of the USA.

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

8. The solution for a moderated constitutionalism and democratism should be sought along the following lines:

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

The role of the judiciary

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

DEMOCRATIC PARTY

T.C.1/3

THEME COMMITTEE ONE

BLOCK THREE "SUPREMACY OF THE CONSTITUTION"

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

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

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

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

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



VRYHEIDSFRONT

P.O. Box 74693
Lynnwood Ridge
2040
Tel. (012) 47-4477
47-4375
47-4450/54/14/58

1st Floor Atrium 4
Perseus Park
cor. Camelia and Priory Roads
Lynnwood Ridge
Fax (012) 47-4387

FREEDOM FRONT

THEME COMMITTEE 1

(b) SUPREMACY OF THE CONSTITUTION

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

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

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

NATIONAL PARTY SUBMISSION

THEME COMMITTEE 1

BLOCK 3: SUPREMACY OF THE CONSTITUTION

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

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

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

2.2.1 Inter-relationship between bill of rights and constitutional supremacy

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

2.2.2 Equality

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

2.2.3 Relationship between constitutional supremacy and separation of powers.

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

2.2.4 Impartial and independent judiciary

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

2.2.5 Horizontal application of the constitution

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

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

2.2.6 Entrenchment of the constitution

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

Conclusion

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

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



22 February 1994

PAC SUBMISSION TO THEME COMMITTEE 1 ON BLOCK 2 AND 3

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

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

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

M Dyani - MP

THEME COMMITTEE ONE

BLOCK 8: BRIEFING DOCUMENT

AGENDA ITEM 11: FOREIGN RELATIONS AND INTERNATIONAL LAW

1. **INTRODUCTION**

1.1 The agenda item foreign relations and international law falls exclusively within the domain of Theme Committee One.

1.2 The suggested framework for this agenda item involves the consideration of the following matters:

1.2.1 Head of State's powers and responsibilities.

1.2.2 Employment of military apparatus for external purposes.

1.2.3 International law and treaties.

2. **TRANSITIONAL PROVISIONS**

2.1 The constitutional principles which have relevance for the subject matter of this briefing document are the following (Revised Work Programme p.16, Block 8 refers only to the second one being quoted below but the first one is also regarded as being relevant):

I *"The Constitution of South Africa shall provide for the establishment of one sovereign state, a common South*

2 /.....

African citizenship and a democratic system of government committed to achieving equality between men and women and people of all races."

(The significance of the reference to South Africa being a single sovereign state has been canvassed previously and signifies that it is independent *vis-à-vis* other states and also that in terms of public international law it is the equal of all other states.)

XXI(3) *"Where there is necessity for South Africa to speak with one voice, or to act as a single entity - in particular in relation to other states - powers should be allocated to the national government."*

(The conduct of foreign relations is one of the most obvious competences which, of necessity, is the responsibility of the government at national level.)

2.2 The transitional Constitution of 1993 deals, in one way or another, with the subject matter in the following sections:

Section 1(1)

"The Republic of South Africa shall be one, sovereign state."

Section 35(1)

"(1) *In interpreting the provisions of this Chapter a court of law shall promote the values which underlie an open and democratic society based on freedom and equality and shall, where applicable, have regard to public international law applicable to the protection of the rights entrenched in this Chapter, and may have regard to comparable foreign case law.*"

Section 82(1)(f) and (i), (2)(a), (d) and (e), (3) and (4)

"(1) *The President shall be competent to exercise and perform the following powers and functions, namely -*

(f) *to appoint, accredit, receive and recognise ambassadors, plenipotentiaries, diplomatic representatives and other diplomatic officers, consuls and consular officers;*

(i) *to negotiate and sign international agreements;*

(2) *The President shall consult the Executive Deputy Presidents -*

(a) *in the development and execution of the policies of the*

national government;

(The "*national government*" is the Cabinet. **Basson: South Africa's Interim Constitution Text and Notes (1994)** at 118 states as follows:

"It is submitted that the policy of the Cabinet and the policy of the national government is one and the same thing and that this can be determined without need to do so in consultation with the Cabinet."

As has been pointed out below, the requirement that he or she "*shall consult*" with the Executive Deputy Presidents does not mean that he or she requires their consent but has the meaning ascribed to "*after consultation with*" in section 233(4).)

- (d) *regarding appointments under subsection (1)(f); and*
- (e) *before exercising any of the competences referred to in subsection (1)(g) to (k).*

(3) *The President shall exercise and perform all powers and functions assigned to him or her by this Constitution or any*

other law, except those specified in subsections (1) and (2) or where otherwise expressly or by implication provided in this Constitution, in consultation with the Cabinet: Provided that the Cabinet may delegate its consultation function in terms of this subsection, with reference to any particular power or function of the President, to any Minister or Ministers.

(4)(a) The President shall be the Commander-in-Chief of the National Defence Force.

(b) The President may -

(i) with the approval of Parliament, declare a state of national defence;

(ii) employ the National Defence Force in accordance with and subject to sections 227 and 228; and

(iii) confer upon members of the National Defence Force permanent commissions and cancel such commissions."

Section 227(1)(a) and (b), (2)(a)(i), (ii) and (iii), (d) and (e)

"(1) The National Defence Force may, subject to this Constitution,

be employed -

- (a) *for service in the defence of the Republic, for the protection of its sovereignty and territorial integrity;*
- (b) *for service in compliance with the international obligations of the Republic with regard to international bodies and other states;*

(2) *The National Defence Force shall -*

- (a) *exercise its powers and perform its functions solely in the national interest by -*
 - (i) *upholding the Constitution;*
 - (ii) *providing for the defence of the Republic; and*
 - (iii) *ensuring the protection of the inhabitants of the Republic,*

in accordance with this Constitution and any law;

- (d) *not breach international customary law binding on the Republic relating to aggression;*

- (e) *in armed conflict comply with its obligations under international customary law and treaties binding on the Republic;"*

Section 228(4) and (5)

- "(4)(a) *The President shall, when the National Defence Force is employed for service referred to in section 227(1)(a), (b) or (e), forthwith inform Parliament of the reasons for such employment.*
- (b) *If, in the case of such an employment referred to in section 227(1)(a) or (b), Parliament is not sitting, the President shall summon the joint standing committee referred to in subsection (3) to meet expeditiously, but not later than 14 days after the commencement of such employment, and shall inform the committee of the reasons for such employment.*
- (5) *Parliament may by resolution terminate any employment referred to in section 227(1)(a), (b) or (e), but such termination of employment shall not affect the validity of anything done in terms of such employment up to the date of such termination, or any right, privilege, obligation or liability acquired, accrued or incurred as at the said date under and by virtue of such*

employment."

Section 231

- "(1) All rights and obligations under international agreements which immediately before the commencement of this Constitution were vested in or binding on the Republic within the meaning of the previous Constitution, shall be vested in or binding on the Republic under this Constitution, unless provided otherwise by an Act of Parliament.*
- (2) Parliament shall, subject to this Constitution, be competent to agree to the ratification of or accession to an international agreement negotiated and signed in terms of section 82(1)(i).*
- (3) Where Parliament agrees to the ratification of or accession to an international agreement under subsection (2), such international agreement shall be binding on the Republic and shall form part of the law of the Republic, provided Parliament expressly so provides and such agreement is not inconsistent with this Constitution.*
- (4) The rules of customary international law binding on the Republic, shall, unless inconsistent with this Constitution or an Act of Parliament, form part of the law of the Republic."*

Section 233(3) and (4)

"(3) *Where in this Constitution any functionary is required to take a decision in consultation with another functionary, such decision shall require the concurrence of such other functionary: Provided that if such other functionary is a body of persons it shall express its concurrence in accordance with its own decision-making procedures.*

(4) *Where in this Constitution any functionary is required to take a decision after consultation with another functionary, such decision shall be taken in good faith after consulting and giving serious consideration to the views of such other functionary."*

3. **DISCUSSION ACCORDING TO THE SUGGESTED FRAMEWORK**

3.1 **Head of State's powers and responsibilities**

3.1.1 In terms of the interim Constitution of 1993 the President must as a general rule exercise and perform all powers and functions assigned to him or her by the Constitution or any other law in consultation with the Cabinet. Effectively this means that he or she requires Cabinet approval for the

exercise of such powers and functions. (See sections 82(3) and 233(3).)

3.1.2 There are, however, a number of exceptions to this rule which find expression in subsections (1) and (2) of section 82 of the Constitution. Thus the President can -

3.1.2.1 appoint, accredit, receive and recognise ambassadors and other diplomatic representatives; and

3.1.2.2 negotiate and sign international agreements,

without having to do so in consultation with the Cabinet. He must, however, consult the Executive Deputy Presidents before exercising any of these powers and functions. Basson *op cit* 116-117 convincingly argues that the requirement that the President "*shall consult the Executive Deputy Presidents*" in respect of the exercise of any of these powers and functions, does not mean that he or she has to act "*in consultation with*" the Executive Deputy Presidents but that he or she has to act "*after consultation with*" them.

3.1.3 Basson *op cit* 119 suggests that these powers and functions of the President should not be equated to the royal

prerogatives. **Rautenbach & Malherbe: Constitutional Law (1994)** at 150 is of the same view and state as follows:

"Although all these powers have been prerogatives, it makes no sense to continue to refer to them as 'prerogatives'; the prerogatives have now been enacted and the term usually refers to common law powers only."

3.1.4 Section 82(2)(a) provides that the President shall consult the Executive Deputy Presidents in the development and execution of the policies of the national government (Cabinet). It stands to reason that such policies can include policies in respect of foreign relations. Interestingly this is a matter in respect of which the President is not constitutionally obliged to act in consultation with the Cabinet nor to follow the advice of the Executive Deputy Presidents, although they have to be consulted. See **Basson** *op cit* 116-118, **Rautenbach & Malherbe** *op cit* 152-153.

3.2 **Employment of military apparatus for external purposes**

3.2.1 The employment of the military apparatus for external purposes clearly also involves certain powers and

responsibilities of the President which will be discussed under this heading.

3.2.2 In his capacity as Commander-in-Chief of the National Defence Force (section 82(4)(a)) the President may, with the approval of Parliament, declare a state of national defence (section 82(4)(b)(i)) and employ the National Defence Force, in consultation with the Cabinet, **inter alia** -

3.2.2.1 for service in the defence of the Republic, for the protection of its sovereignty and territorial integrity (section 227(1)(a)); and

3.2.2.2 for service in compliance with the international obligations of the Republic with regard to international bodies and other states (section 227(1)(b)).

(For example contributing to a United Nations Peacekeeping Force.)

3.2.3 When the National Defence Force is employed for service of this nature, the President must forthwith inform Parliament of the reasons for such employment or, if Parliament is not sitting, summon the joint standing committee referred to in

section 228(3) to meet within 14 days after the commencement of such employment and Parliament may, by resolution, terminate any employment of such nature (section 228(4) and (5)).

3.2.4 The provisions referred to in the preceding two subparagraphs represent an expression of the concept of separation of powers as well as that of accountability.

3.3 International law and treaties

3.3.1 For the first time (in section 231(4)) a South African Constitution expressly provides that customary international law forms part of the law of the Republic unless inconsistent with the Constitution or an Act of Parliament.

3.3.2 In its written submission of 15 February 1995 the Department of Foreign Affairs proposed that this subsection should be included in the new Constitution without amendment. It is submitted that the subsection can be improved upon from a drafting point of view by the deletion of the words "*binding on the Republic*" which appear to serve no purpose and beg the question. The suggestion that a section which achieves the same result should be included in the new Constitution is supported from a technical point of view.

3.3.3 It has been pointed out that in interpreting the provisions of Chapter 3 a court of law must, where applicable, have regard to public international law applicable to the protection of the rights entrenched in that Chapter as provided for in section 35(1) of the Constitution. **Du Plessis & Corder: Understanding South Africa's Transitional Bill of Rights (1994)** at 121 point out that the inclusion of this provision was not at all controversial among the negotiators at Kempton Park. It is submitted that there is no reason why it should not be retained and its retention will also be in conformity with Constitutional Principle II.

3.3.4 As far as treaties (international agreements involving other states or international organisations) are concerned, Foreign Affairs identified a number of difficulties with the present wording of section 82(1)(i) as well as with the wording of subsections (2) and (3) of section 231.

3.3.5 Section 82(1)(i) provides that the President shall be competent to negotiate and sign international agreements. Foreign Affairs experience practical difficulties with the provision as it stands:

"When South African delegates are invited to attend an

international conference where an agreement will be drafted, it is usually not clear at the outset what the parameters are within which the text will be negotiated. The conduct of international negotiations is a dynamic process of interaction between states. With regard to most international agreements it is extremely difficult to anticipate at the outset how the tactics of other role players will evolve. The mandate required from the President within which negotiations are to take place could therefore not be formulated concisely before the start of the process. Delegates attending such drafting conferences should in any event negotiate within the parameters of South Africa's foreign policy. When unforeseen circumstances arise, they can easily consult with their office telephonically or by means of fax to obtain further instructions. We therefore propose that the new Constitution should not include the requirement of Presidential approval for negotiating the text of an international agreement."

From a technical point of view this objection is regarded as valid and it is proposed that presidential authorisation to "negotiate" international agreements should be dispensed with. It is, after all, the actual conclusion of such agreements which is important. Consideration may also be given to the

desirability or otherwise of defining "*international agreement*".

- 3.3.6 The Department of Foreign Affairs has also suggested that there would be no need to retain a provision similar to the present section 231(1) which provides for the continued validity of international agreements which were binding on the Republic prior to the commencement of the Constitution unless otherwise provided by an Act of Parliament. In this regard the argument against its retention has been articulated as follows:

"The reason why it was included in the present Constitution, was to give parliament the opportunity to scrutinize agreements entered into by the previous unrepresentative government. When the new Constitution enters into force, parliament would have had ample opportunity to review previously entered into agreements which may not coincide with its policy. There will also be no reason to question agreements entered into under the present Constitution as the legality of the current Government is above board."

- 3.3.7 For the following reasons it is submitted that this reasoning is flawed and that the recommendation should not be

followed:

3.3.7.1 The fact that Parliament would have had ample opportunity to review previously entered into agreements does not mean that it would actually have done so when the Constitutional Assembly is called upon to approve the text of a new Constitution.

3.3.7.2 Any similar provision in the new Constitution will not be referring to the 1983 Constitution but to the interim Constitution of 1993.

3.3.7.3 The real reason why similar provisions appear in constitutions is not to afford the legislature an opportunity to review previously entered into agreements which may or may not coincide with government policy, but to signify to the international community at large an intention to honour international commitments.

3.3.8 The department's criticism of section 231(2) appears to be fully justified. This section provides for parliamentary approval for ratification of or accession to international agreements which have been negotiated and signed in terms

of section 82(1)(i). The department's concerns may be summarised as follows:

3.3.8.1 The inclusion of the negotiation requirement has already been dealt with in the context of section 82(1)(i).

3.3.8.2 The reference to international agreements signed in terms of section 82(1)(i) is problematic in respect of multilateral agreements (conventions) which are no longer open for signature but only for accession. As currently formulated section 231(2) allows only for accession to agreements negotiated and signed in terms of section 82(1)(i). It has consequently been proposed that the words "*negotiated and signed in terms of section 82(1)(i)*" be deleted to enable Parliament to agree to accession to agreements not open for signature, or which were not signed under section 82(1)(i).

3.3.8.3 The provision that Parliament is competent to agree to the ratification of or accession to international agreements of the nature contemplated in section 231(2) is open to two interpretations. Firstly, that all international agreements must be referred to

Parliament before they can bind the Republic. This would include (unnecessarily it is submitted) international agreements requiring neither ratification on an international level nor incorporation into municipal law and would place an unnecessarily heavy burden on Parliament which will be required to scrutinise and debate all international agreements. In terms of the second approach Parliament is merely competent, but not obliged, to agree to the ratification of or accession to international agreements. This competence would be exercised where a particular international agreement requires accession or ratification to bring it into force on the international plane or where international agreements require municipal application and have to be incorporated into South African law as contemplated in section 231(3).

- 3.3.9 It is submitted that the technical problems experienced with particularly subsections (2) and (3) of section 231 can be partly attributed to the fact that, as has been pointed out by **Dugard: International Law: a South African Perspective (1994)**, section 231(3) does not reflect what was agreed upon at the Multi-Party talks held at Kempton Park. At 341 he

states as follows:

"The draft Constitution approved by the Negotiating Council provided that an international agreement approved by Parliament for the purpose of ratification or accession would form part of South African law unless it was inconsistent with the Constitution or was 'excluded by express provision in an Act of Parliament' (s 192A(2)). This would have resulted in a treaty automatically becoming part of municipal law once approved by Parliament without more ado. Section 231(3) is substantially different. It requires Parliament, when it ratifies or accedes to a treaty, expressly to provide that the treaty is to form part of municipal law. At this stage it is not clear how this is to be done. An Act of Parliament is apparently not envisaged for this purpose. Thus it would seem that a resolution accompanying the resolution of ratification or accession approved by both Houses of Parliament, indicating that the treaty is to form part of municipal law, would be sufficient."

3.3.10 The Department of Foreign Affairs has confirmed the accuracy of Dugard's remarks and has proposed that the new Constitution should rectify this position by providing that

international agreements in respect of which Parliament has agreed to the ratification or accession, shall form part of South African law unless inconsistent with the Constitution or excluded by express provision of Parliament.

4. CONCLUSION

The above is an attempt to set the scene for a discussion of item 11. It will be expanded upon orally during the appropriate Orientation Workshop.



CONSTITUTIONAL ASSEMBLY

MEMORANDUM

DATE: 23 MAY 1995
TO: THEME COMMITTEE ONE MEMBERS
FROM: LEOLA RAMMBLE
SUBJECT: PUBLIC HEARING

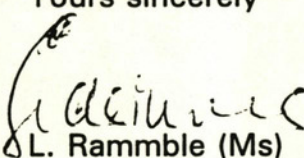
Please note that a Public Hearing on Language, Seats of Government and Name and Symbols will take place as indicated below:

Date: 10 June 1995
Time: 09h30
Venue: Old Assembly Chambers

Kindly note that we are unable to schedule this hearing for another date because of parliamentary sittings scheduled for June and our tight work schedule. We are however, urging members to make themselves available to attend. The programme for this hearing will follow shortly.

If there are any further queries or if you require information please do not hesitate to contact me.

Yours sincerely


L. Rammble (Ms)

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

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



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Now have your say

THE NEW CONSTITUTION

