

**CONSTITUTIONAL ASSEMBLY
CONSTITUTIONAL COMMITTEE**

**Monday 13 March 1995
Old Assembly**

DOCUMENTATION

CONSTITUTIONAL ASSEMBLY

MEETING OF THE CONSTITUTIONAL COMMITTEE

Please note that a meeting of the above committee will take place as indicated below :

Date : Monday 13 March 1995
Time : 14h00 - 18h00
Venue : Old Assembly Chamber

AGENDA

1. Opening
 2. Minutes : Page 2 - 11
 3. Matters Arising (None)
 4. Cont. of Discussion of Theme Committee 6.4 Report : Page 37 - 45 of Constitutional Committee documentation of 6 March 1995
 5. Discussion of Theme Committee One Report : Page 46 - 91 of Constitutional Committee documentation of 6 March 1995
 6. AOB *Tech and Report*
 7. Closure *Amend UN/Prog -*
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PLEASE NOTE THAT YOU SHOULD BRING TO THE MEETING THE CONSTITUTIONAL COMMITTEE DOCUMENTATION OF 6 MARCH 1995 AS THEY CONTAIN THE REPORTS OF THEME COMMITTEE 6.4 AND 1

**H EBRAHIM
EXECUTIVE DIRECTOR**

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CONSTITUTIONAL ASSEMBLY

**MINUTES OF 14TH MEETING OF THE CONSTITUTIONAL
COMMITTEE**

MONDAY 6 MARCH 1995

Present

Ramaphosa MC (Chairperson)

Bhabha M	Meshoe KR
Camerer S	Meyer RP
Chabane OC	Moosa MV
De Beer SJ	Mtshali LPHM
De Lange JH	Mulder CP
De Lille P	Myakayaka-Manzini YL
Du Toit DC	Ngcuka BT
Eglin C	Pahad EG
Gogotya NJ	Pandor GNM
Gordhan PJ	Rabie JA
Green LM	Rabinowitz R
Hofmeyr WA	Radue R
Holomisa SP	Ripinga SS
Kgositsile B	Selfe J
King TJ	Sifora TVT
Kota ZA	Sizani RK
Ligege MG	Smith PF
Lockey D	Van Breda A
Mabandla BS	Van Heerden FJ
Mahlangu MJ	Viljoen CL
Marais PG	Wessels L (Deputy Chairperson)
Mchunu ES	

Apologies : Mzimela S, Mahlangu NJ, Mdladlana MMS, Ackerman C, Fourie A, Makhanya DW, Schutte DPA.

Absent : Asmal K, Fraser-Moleketi GJ, Ginwala FN, Kgoali JLB, Moosa M (Sen), Ngwane LB, Nzimande BE.

1. OPENING

Mr Ramaphosa opened the meeting at 14h10. The agenda was adopted with the following amendments :

- 1.1 It was agreed that various issues raised by Mr Ramaphosa as additional Matters Arising from the Minutes of the 13th Meeting of the Constitutional Committee of 27 February 1995 would be discussed as item 4.4 on the agenda. These issues are :
- i) Point 5.6 iv) on page 7 of the documentation for discussion in the next meeting of the Constitutional Committee;
 - ii) Point 5.6. v) on page 7 of the documentation for discussion in the next meeting of the Constitutional Committee;
 - iii) Point 5.6.vii) on page 8 of the documentation for discussion in the next meeting of the Constitutional Committee.
- 1.2 On behalf of the IFP Mr Smith pointed out that various issues requiring clarity or input from the IFP were also listed. It was agreed these would also be dealt with as item 4.4 as above.
- 1.3 It was further agreed that a letter from the IFP regarding the minutes of the 12th meeting of the Constitutional Committee of 13 February 1995 would be dealt with as item 10.1 under AOB. It was noted that this letter had been received too late for consideration in the meeting of 27 February 1995.

2. MINUTES

The minutes of the 13th Meeting of the Constitutional Committee on Monday 27 February 1995 were adopted.

3. MATTERS ARISING

These were set out in agenda items for the meeting.

4. THEME COMMITTEE THREE REPORT

4.1 DRAFTING INSTRUCTIONS

4.1.1 Mr Ramaphosa reported that the Management Committee had agreed to recommend to the Constitutional Committee that the non-contentious issues confirmed in this report at the meeting of 27 February 1995 should be referred for drafting by the Constitutional Committee. The Constitutional Assembly would be requested to ratify this decision at its next meeting.

4.1.2 In discussion the following concerns were noted :

i) The non-contentious issues referred to were very broad principles or norms and did not constitute adequate material for drafting purposes;

ii) In preparing these drafts, the technical experts should not anticipate work that Theme Committees would commence in following blocks;

iii) Sample texts of constitutions from other countries should be obtained and studied to assist the Constitutional Committee in deciding what style should be adopted before issuing drafting instructions; and

iv) The Constitutional Committee should move from process matters to matters of substance.

4.1.3 Mr Ramaphosa explained that drafting procedures had been agreed upon by the Management Committee. However, in view of the concerns raised, it was agreed that all parties would look at the Drafting Proposals circulated in previous meetings again, and communicate their views if any to their representatives on the Management Committee which would finalise the procedures at its next meeting.

4.2 CONTENTIOUS ISSUES ARISING FROM 27 FEBRUARY 1995

It was agreed that points 5 and 8 listed on page 44 of the Constitutional Committee documentation of 27 February 1995 would be discussed with other matters arising under point 4.4. of the agenda.

4.3 DISCUSSION OF REMAINDER OF REPORT

4.3.1 Mr Gordhan explained that the remainder of Section I of the report dealt with general points which overlapped with future blocks of the Theme Committee's work programme. It was agreed these issues would therefore be revisited as a matter of

course as the Theme Committee progressed with its work and that discussion was not needed now.

- 4.3.2 The meeting noted a concern also that Theme Committees should apply their minds more closely to the Constitutional Principles. Many of the points identified as contentious in the Theme Committee report were already covered by the Principles and should therefore not be in contention.
- 4.3.3 A suggestion was also made, drawing the meeting's attention to an earlier agreement, that Theme Committees should use the Interim Constitution as a point of reference and should not "reinvent the wheel". It was stated specifically that Section 126 and Schedule 6 were useful points of reference for issues such as the definition of powers and functions, overrides and national standards which all were within the terms of reference of Theme Committee Three.
- 4.3.4 The non-contentious issues listed in Section II of the Report on pages 48 and 49 were endorsed as general statements that impact on the broad overview of local government.
- 4.3.5 However with regard to the first non-contentious issue listed on page 50 which reads :

" Local government should have guaranteed, transparent, predictable and equitable sources of revenue " :

It was agreed this required further elaboration as the Theme Committee continued with its work, in light of the various interpretations it could give rise to.

4.4 MATTERS ARISING FROM 27 FEBRUARY 1995

- 4.4.1 Regarding Point 5.6 iv) on page 7 which reads :

" The exercise of state power shall be controllable within set limits " :

Mr Meyer explained on behalf of the NP that this should be seen in the context of the concept of a constitutional state or "*rechtstaat*". It was agreed that this issue would be left with the Theme Committee as a contentious issue to be further considered as it continued its work.

- 4.4.2 Regarding Point 5.6.v) on page 7 which reads :

" Uniformity is a vital national objective to pursue in the context of massive disparities

and inequalities that prevail in South Africa " :

It was agreed that the Theme Committee and later drafters would treat this as a general political goal to strive towards which would be developed further as the work of the Theme Committee continued.

- 4.4.3 Regarding Point 5.3 iv) on page 5 and all other issues in the report not fully dealt with on 27 February 1995 because of the IFP absence on 27 February 1995 :

It was agreed these would also be left with the Theme Committee as contentious issues to be further considered as it continued its work.

- 4.5 In conclusion, the Constitutional Committee accepted the report from Theme Committee 3 on Block 1 of the work programme on the understanding that the various contentious issues listed above would be developed further as the work of the Theme Committee continued.

5. **THEME COMMITTEE FOUR REPORT**

- 5.1 Mr Ramaphosa referred the meeting to the report from Theme Committee 4 on Block 1 of the Work Programme on pages 88 - 91 of the documentation of the meeting of 27 February 1995.

- 5.2 Regarding Point 1 on page 88 which reads :

"Everyone shall enjoy ..." (Whether the term "everyone" includes juristic persons, structured and unstructured groups, and organs of civil society, etc.):

It was agreed that this was an outstanding issue on which expert opinion had been obtained by the Theme Committee and would be the subject of a further report to the Constitutional Committee.

- 5.3 Regarding Point 1.2 on page 89 which reads :

"Vertical and horizontal application of rights ":

It was agreed that this was also an issue which the Theme Committee continued to debate and on which expert opinion had been obtained and would emerge in the next report to the Constitutional Committee.

- 5.4 Regarding Point 2 on page 89 which reads :

"all universally accepted fundamental rights, freedoms and civil liberties" (which rights

etc., qualify as universally accepted fundamental rights) :

It was noted that expert opinion had been received which had proved useful and that further submissions from parties had been received. A supplementary report was being prepared.

5.5 Regarding Point 3 on page 90 which reads :

"entrenched and justiciable provisions" :

It was accepted these were all non-contentious issues. However the Constitutional Committee requested the Theme Committee to apply its mind to the extent of entrenchment referred to in 3.1.1

5.7 Regarding Point 4 on page 90 which reads :

"after having given due consideration to inter alia the fundamental rights contained in Chapter 3"; and

5.8 Regarding Point 5 on page 90 which reads :

"General discussion of Related Constitutional Principles such as I, III, V, IX, XI, XII, XIII(1), XXXIV " ; and

5.9 Regarding Point 6 on page 91 which reads :

"Suggested approaches as to the identification of rights not covered by Constitutional Principle II " :

It was accepted this had been covered by discussions on the previous point.

5.10 Regarding Point 7 on page 92 regarding outstanding issues :

It was agreed outstanding issues would be covered in further reports.

5.11 In response to a query on outstanding issues from Mr De Lange on whether the Theme Committee had considered the principle of the interdependency of fundamental rights, Ms Pandor explained this had not been dealt with in Block 1 but the Theme Committee had already begun to delve into this matter in Block 2 of the work programme.

5.12 In conclusion, the meeting accepted the report from Theme Committee Four on Bloc 1 of the work programme, noting that the Theme Committee had gone some way to clarifying issues at a conceptual level and would table a more substantial report to the

Constitutional Committee.

6. THEME COMMITTEE 6.4 REPORT

6.1 Ms J Schreiner introduced the report from SubTheme Committee Four of Theme Committee Six on pages 9 - 45 of the documentation.

6.2 On the point under 2 on page 12 which reads :

"Further clarity:

That correctional services is not part of security apparatus and should be dealt with under Theme 5 in relation to the judiciary and the legal system" :

It was noted that Theme Committee 5 had already met with SubTheme Committee 4 of Theme Committee 6 on this issue and would report to the next meeting of the Constitutional Committee.

6.3 On point 3.4 on page 13 which reads :

"The constitution should state that the Executive cannot use the Security Apparatus to violate the constitution" :

6.3.1 The following points were raised in discussion :

- i) The statement was an attempt to ensure that the security apparatus could not be used by the executive outside constitutional provisions;
- ii) The concern should be reflected in a positive manner by stating that one of the main functions of the security apparatus is the protection of the constitution;
- iii) The statement needed to be understood against the background of the misuse of the security apparatus in South Africa and that this point needed to be clearly stated in the constitution because of the history of South Africa; and that
- iv) There was value in phrasing the concern in both a positive and negative manner.

6.3.2 It was agreed that the statement reflected a broad agreement; that the Constitutional Committee would apply its minds to the later draft provision of the new constitutional text and that the points raised in discussion were noted and would be taken on board for drafting purposes.

6.4 Regarding point 1 of the areas of agreement on page 37 which reads :

" The constitution should provide for presidential power to declare a state of emergency, and to regulate suspension of human rights in that context, and right of parliament to review/overturn such decisions. " :

It was agreed that the suspension of rights could only be properly dealt with by Theme Committee 4 and that this aspect should be referred to them to tease out the implications for the Bill of Rights.

6.5 Regarding points 4.1 and 4.2 of the areas of contention on page 37 which read :

- 1. The powers of Provinces to deploy police in a provincial state of emergency*
- 2. The right of Provinces to review or overturn the declaration of a state of emergency in that Province. " :*

6.5.1 The following points were raised in discussion on the issue of *whether provinces should have the right to declare a State of Emergency* :

- i) Mrs Rabinowitz stated on behalf of the IFP that the issue would only be decided once there was an agreement on the degree of provincial autonomy and that a decision on international mediation was awaited. She further stated that the right of Provinces to overturn a national decision on State of Emergency could prevent violence in the country.
- ii) Mr De Lange stated that the ANC was opposed to provinces having such powers referred to; and further, that if there was a possibility either implicit or explicit in these two points that human rights could be suspended in one part of the country with only those in that part of the country being party to that decision this would also be opposed by the ANC since one could not allow the limitation of rights to become a power game to two different structures in the country.
- iii) Mrs Camerer asked whether this was a departure from the Constitution which regulated a State of Emergency through an Act of Parliament and that this would now be regulated more directly in the constitution itself or by means of a Presidential decree ? Ms Schreiner responded that the committee had not yet applied its mind to this question.
- iv) Mr Green stated on behalf of the ACDP that the declaration of a State of Emergency was a national issue and there were dangers in giving such powers to provinces;
- v) Gen Viljoen stated that Premiers should have the right to declare a State of Emergency and to review their own but in no way should Province have right to review or overturn a State of Emergency declared by national government;

- vi) Mr Eglin stated that he was opposed to provinces having such powers and that if protagonists of this point of view were to produce draft clauses it would facilitate discussion in the Constitutional Committee;
- vii) Mr Meyer stated that point 1 was anomalous in that a State of Emergency related to deployment of the Defence Force and that Premiers at present had no powers over the Defence Force; and further that utilisation of police in a particular part of the country should perhaps fall under provisions of the Police Act.
- viii) Mrs Kgositsile stated that it was important to flesh out the understanding of what constituted a State of Emergency and the different situations at provincial level;
- ix) Prof Du Toit requested the IFP to provide a comparative study of other federations where provinces had the power to declare a State of Emergency;
- x) Mr Meyer supported Prof Du Toit citing the example of the United States where interesting case studies existed on this point;
- xi) Mr Chabane said that the declaration of a State of Emergency may be in contravention with Constitutional Principle 31 which required that the security forces " exercise their powers in the national interest..."; and further suggested a legal opinion be sought on this matter;
- xii) Mr Van Heerden referred the meeting to Section 34(3) of the Constitution and said that in the event of a dispute on the declaration of a State of Emergency, one could have recourse to the courts for a decision in this regard.

6.5.2 In summary Mr Ramaphosa said it appeared the IFP strongly supported the view that provinces have the powers to declare a State of Emergency and that the Freedom Front had also indicated a degree of support for this view. It was agreed this matter should be debated further in the Constitutional Assembly. In the meantime parties could discuss the matter to attempt to reach agreement.

6.5.3 It was agreed that those issues listed as requiring further clarity on page 37 of the documentation should continue to be dealt with by the Theme Committee in the manner suggested.

6.5.4 The report was not completed and discussion would be continued in the next meeting on the remainder of the report.

7. AOB

7.1 IFP LETTER

It was agreed to correct the minutes of the 12th meeting of the Constitutional Committee on 13 February 1995 to better reflect the position the IFP adopted at the meeting. Item 4.1 of the minutes would read :

" The IFP rejected the substantive Theme Committee reports and requested that they be returned to the Theme Committees for redrafting to comply with the CA's resolution of 31 October 1994."

7.2 PROCESS

Various issues of process arose during the meeting :

7.2.1 ATTENDANCE OF THEME COMMITTEE MEMBERS

It was agreed that Theme Committee members could attend meetings of the Constitutional Committee to present reports and clarify issues when requested to do so but not to participate in debate.

7.2.2 DISCUSSION OF THEME COMMITTEE REPORTS

The Chairperson stated that the Constitutional Committee should avoid referring matters back to Theme Committees and should remain seized with issues once reports were received by the Constitutional Committee.

7.3 NEXT MEETING

It was agreed the Constitutional Committee would meet on Monday 13 March 1995 from 14h00 - 18h00.

8. CLOSURE

The meeting rose at 17h00.

