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TC2/30(2)

CONSTITUTIONAL ASSEMBLY

THEME COMMITTEE 2

STRUCTURE OF GOVERNMENT

THEME COMMITTEE MEETING

**Monday
04 September 1995
9h00-13h00
M46**

DOCUMENTATION

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CONSTITUTIONAL ASSEMBLY
THEME COMMITTEE 2
STRUCTURE OF GOVERNMENT

REPORT:
PROVINCIAL GOVERNMENT
STRUCTURES

DRAFT FORMULATIONS
(As at 30 August 1995)



CONSTITUTIONAL ASSEMBLY

MEMORANDUM

TO: THEME COMMITTEE 2

FROM: JAMES NENE
MANAGING SECRETARY, TC2

SUBJECT: DRAFT FORMULATIONS ON PROVINCIAL GOVERNMENT
STRUCTURES

Members' attention is drawn to the First draft prepared by TC2 technical Advisers and CA law advisers (As at 30 August 1995).

We wish to point out that further discussions between the Advisers will be held this Saturday (02/09/95). It has been suggested by our Administration that we distribute the available draft so that members will have an opportunity to read the formulations before the meeting.

Amendments, if any, emanating from the Saturday meeting between Prof Steytler and Mr Z Titus, will be effected in the TC meeting on Monday.

HASSEN EBRAHIM
EXECUTIVE DIRECTOR
CONSTITUTIONAL ASSEMBLY

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You've made your mark



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THE NEW CONSTITUTION

FIRST DRAFT - 30 AUGUST 1995

Status: Draft by TC2 technical advisers and CA law advisers. Prepared for consideration by TC2.

Chapter ...

**PROVINCES, PROVINCIAL LEGISLATURES, PROVINCIAL GOVERNMENTS,
PROVINCIAL FINANCE AND FISCAL AFFAIRS AND PROVINCIAL
CONSTITUTIONS**

(a.) Provinces

Establishment of Provinces

1. The following provinces are hereby established, and they shall, for the purposes of this Constitution, be recognised as the provinces of the Republic:

(a) ...

(b) ...

Provided that Parliament shall at the request of a provincial legislature alter the name of a province in accordance with the request of such legislature.¹

Provincial Boundaries

2. The areas and boundaries of the respective provinces shall be as defined in the Constitution of the Republic of South Africa, 1993 (Act No. 200, 1993).

¹ See Constitutional Principle XVIII as amended by section 13(a) of Act No 2 of 1994.

(b.) Provincial Legislatures

Provincial Legislatures and their authority

3. (1) There shall be a legislature for each province.

(2) The legislative authority of a province shall, subject to this Constitution, vest in the provincial legislature, which shall have the power to make laws for the province in accordance with this Constitution.

(3) Laws made by a provincial legislature shall, subject to any exceptions as may be provided for by an Act of Parliament, be applicable only within the territory of the province.

(4) A provincial legislature shall have such other powers and authority as may be conferred on it by this Constitution or any other law.

Legislative competence of provinces

4. ...²

Composition of provincial legislatures

5. (1) A provincial legislature shall consist of not fewer than ... and not more than ... members elected in accordance with an electoral system which shall be based on a common voters' roll and, in general, proportional representation as provided

² This matter is still under discussion.

for by national law.³

(2) The number of seats in a provincial legislature shall be determined in accordance with ...⁴

(3) The members of a provincial legislature shall be elected from ...⁵

Duration and dissolution of provincial legislatures

6. (1) A provincial legislature, as constituted in terms of an election of such legislature under this Constitution, shall, subject to subsection (2), continue for five years as from the date of such election, at the expiry of which it shall be dissolved.

(2) If during the period referred to in subsection (1) a provincial legislature is dissolved in terms of section ...⁶ the provincial legislature as constituted therein, shall continue for the period up to the day immediately preceding the commencement of polling for the election of the provincial legislature held in pursuance of such dissolution.

(3) Notwithstanding any dissolution of a provincial legislature -

(a) every person who at the date of the dissolution is a member of the provincial legislature shall remain a member thereof;

(b) the provincial legislature shall remain competent to perform

³ See section 4 of the fourth draft (dated 21 August 1995) of the Chapter dealing with Parliament.

⁴ This depends on agreement on the electoral system.

⁵ This depends on agreement on the electoral system.

⁶ Gaps will be filled in once there is certainty on all the sections dealing with dissolution

its functions; and

- (c) the Premier of the province shall be competent to summon the provincial legislature by proclamation in the *Provincial Gazette* to an extraordinary sitting for the dispatch of urgent business,

during the period for which the provincial legislature continues in terms of subsection (2) after the dissolution.

Elections

7. (1) If a provincial legislature is dissolved in terms of section ...⁷ the Premier of the province shall upon such dissolution, by proclamation in the *Provincial Gazette* call an election of such legislature, which election shall take place within 90 days after the dissolution of the legislature on a date or dates specified in the proclamation.

(2) An election referred to in subsection (1), shall be conducted in accordance with the ... Act, 19...⁸

(3) An election contemplated in subsection (1) shall be held on...⁹

⁷ Gaps will be filled in once there is certainty on all the sections dealing with dissolution.

⁸ Formulation depends on agreement regarding future electoral laws.

⁹ Further particulars hinge on similar provisions relating to national elections.

Sittings and recess periods of provincial legislature

8. (1) The secretary of a provincial legislature shall convene such legislature within seven days after an election of such legislature.

(2) A provincial legislature shall sit during such periods and on such days and during such hours as it may determine: Provided that the Premier of a province may at any time by proclamation in the *Provincial Gazette* summon the provincial legislature to an extraordinary sitting for the dispatch of urgent business.

(3) A provincial legislature shall determine the duration of its recess periods.

(4) A provincial legislature shall determine the place where all sittings shall ordinarily take place, subject to such exceptions as it may make.

Speaker and Deputy Speaker of provincial legislature

9. (1) At its first sitting after it has been convened under section 8, and after the election of the Premier of the province, a provincial legislature with a judge of the High Court designated by the Chief Justice¹⁰ acting as the chairperson, shall elect one of its members to be the Speaker and shall thereafter elect another member to be the Deputy Speaker of such legislature.

(2) The Speaker shall be vested with all powers and functions assigned to him or her by this Constitution, an Act of a provincial legislature and the

¹⁰ The use of Constitutional Court judges, who are limited in number, may lead to practical difficulties. The practice has always been to rely on the services of the provincial judges.

rules and orders.

(3) If the Speaker is absent or for any reason unable to exercise or perform the powers or functions vested in the office of Speaker, or when the office of the Speaker is vacant, the Deputy Speaker shall act as Speaker during the Speaker's absence or inability or until a Speaker is elected.

(4) If any of the circumstances described in subsection (3) applies with reference to both the Speaker and the Deputy Speaker, a member of the National Assembly designated in terms of the rules and orders shall act as Speaker whilst the said circumstances prevail.

(5) The Deputy Speaker or the member designated under subsection (4), while acting as Speaker, may exercise the powers and shall perform the functions vested in the office of Speaker.

(6) The Speaker, the Deputy Speaker or any other member of a provincial legislature designated for that purpose in terms of the rules and orders, shall preside over sittings of a provincial legislature.

(7) While presiding at a sitting of a provincial legislature, the Speaker, Deputy Speaker or other member presiding shall not have a deliberative vote, but shall have and exercise a casting vote in the case of an equality of votes.

(8) The Speaker or Deputy Speaker shall vacate his or her office if he or she ceases to be a member of a provincial legislature, and may be removed from office by resolution of the provincial legislature, and may resign by lodging his or her resignation in writing with the Secretary to the provincial legislature.

(9) If the office of Speaker or Deputy Speaker becomes vacant, the provincial legislature, under the chairpersonship of a judge designated by the Chief Justice shall elect a member to fill the vacancy: Provided that the Speaker shall, if the Deputy Speaker has to be elected, preside over such election.

Qualification for membership of provincial legislatures

10. (1) No person shall be qualified to become or remain a member of a provincial legislature unless he or she is qualified to become a member of the National Assembly.

(2) A member of a provincial legislature who is elected as the Premier or appointed as a member of the Executive Council of a province shall for the purposes of section ...¹¹ be deemed not to hold an office of profit under the Republic.

(3) ...¹²

Vacation of seats and filling of vacancies

11. (1) A member of a provincial legislature shall vacate his or her seat if he or she -

(a) ceases to be eligible to be a member of the provincial legislature in terms of section 10;

¹¹ The section depends on final agreement in respect of a new section similar to section 42(1)(c) of the IC.

¹² Residence requirements may, depending on the electoral system, also be added.

- (b) ceases to be a member of the party which nominated him or her as a member of the provincial legislature;^{13(a)}
- (c) resigns his or her seat by submitting his or her resignation in writing to the Secretary of the provincial legislature;
- (d) absents himself or herself voluntarily from sittings of the provincial legislature for 30^{13(b)} consecutive sitting days, without having obtained the leave of the provincial legislature in accordance with the rules and orders; or
- (e) becomes a member of the National Assembly, the ...¹⁴ or a local government.

(2) The provisions of section ...¹⁵ shall apply *mutatis mutandis* in respect of the filling of vacancies in a provincial legislature, and in any such application a reference to the National Assembly shall be construed as a reference to a provincial legislature.

Oath or affirmation by members

12. Every member of a provincial legislature, before taking his or her seat,

^{13(a)} This contentious matter is still under discussion.

^{13(b)} Note that TC2 seems to favour 15 days.

¹⁴ This gap will be filled in once there is agreement on the details relating to a second chamber.

¹⁵ See in this regard section 44 of the IC. This section will be finalised after agreement on the electoral system and after agreement on a similar clause on Parliament.

shall make and subscribe an oath or solemn affirmation in the terms set out in ...¹⁶
before a judge of the Supreme Court designated by the Chief Justice for this purpose,
or, in the case of a member nominated under section 11, before the Speaker of the
provincial legislature.

**Powers, privileges and immunities of provincial legislatures and [benefits of
members]¹⁷**

13. (1) A provincial legislature shall have full power to control, regulate
and dispose of its internal affairs and shall have all such other powers, privileges and
immunities as may, subject to this Constitution, be prescribed by a law of such
legislature.

(2) Subject to the rules and orders of a provincial legislature there shall
be freedom of speech and debate in such legislature and any committee thereof, and
such freedom shall not be impeached or questioned in any court.

(3) A member of a provincial legislature shall not be liable to any civil or
criminal proceedings, arrest, imprisonment or damages by reason of anything which he
or she has said, produced or submitted in or before or to such legislature or any
committee thereof or by reason of anything which he or she may have said, produced
or submitted in or before or to such legislature or any committee thereof.

(4) (Salaries) ...

¹⁶ The oath will be included in a Schedule.

¹⁷ To be revisited.

Penalty for sitting or voting when disqualified

14. Any person who in terms of this Constitution is disqualified to sit as a member of a provincial legislature and who, while so disqualified and knowing that he or she is so disqualified, sits or votes as such a member, shall be liable to a penalty determined by the rules and orders for each day on which he or she so sits or votes, which may be recovered for credit of the Provincial Revenue Fund concerned by action in a court of law.

Rules and orders

15. (1) A provincial legislature may make rules and orders in connection with the conduct of its business and proceedings.

(2) The provisions of section ...¹⁸ shall apply *mutatis mutandis* in respect of a provincial legislature.

Quorum

16. The presence of at least one third or, when a vote is taken on a Bill, of at least one half of all the members of the provincial legislature other than the Speaker or other presiding member, shall be necessary to constitute a sitting of such legislature.

¹⁸ This section will be drafted once there is agreement on the rules and orders for Parliament.

Requisite majorities

17. Save where otherwise required in this Constitution, all questions before a provincial legislature shall be determined by a majority of votes cast.

Assent to Bills

18. (1) A Bill duly passed by a provincial legislature in accordance with this Constitution shall without delay be assented to by the Premier of the province subject to section 25(1)(b).

(2) A Bill referred to in subsection (1) to which the Premier has assented and a copy of which he or she has signed, shall upon its promulgation be a law of the provincial legislature in question.

Signature and enrolment of provincial laws

19. (1) A law of a provincial legislature referred to in section 18(2) shall be enrolled of record in the office of the Registrar of the Constitutional Court in such official languages as may be required in terms of section ...¹⁹ and copies of the law so enrolled shall be conclusive evidence of the provisions of such law.

(2) In the case of a conflict between copies of a law enrolled in terms of subsection (1), the copy signed by the Premier shall prevail.

(3) The public shall have the right of access to copies of a law so enrolled, subject to such laws as may be passed by a provincial legislature to protect

¹⁹ The section referred to is the one dealing with languages.

the safety and durability of the said copies and with due regard to the convenience of the staff of the Constitutional Court.

Public access to provincial legislatures

20. Sittings of a provincial legislature shall be held in public, and the public, including the media, shall have access to such sittings: Provided that reasonable measures may be taken to regulate such access, and to provide for the search of and, where appropriate, the refusal of entry or the removal of any person.

Administration of provincial legislatures

21. (1) The Speaker shall appoint a Secretary and such other staff as may be necessary for the discharge of the work of such legislature.

(2) Persons appointed under this section shall be remunerated out of and as a charge on the Provincial Revenue Fund of the province.

(c.) Provincial Governments

Executive power of the provinces

22. (1) The executive power of a province shall vest in the provincial government consisting of the Premier and the other members of the Executive Council of a province, who shall exercise and perform their powers and functions subject to and in accordance with this Constitution.

(2) A province shall have executive authority over all matters in respect of which such province has exercised its legislative competence, matters assigned to it by or under section ...²⁰ or any law, and matters delegated to it by or under any law.

Election of Premiers

23. (1) (a) The provincial legislature of a province shall at its first sitting after it has been convened in terms of section 8 elect one of its members as the Premier of the province.

(b) A provincial legislature shall thereafter, as often as it again becomes necessary to elect a Premier, elect one of its members as the Premier of the province.

(c) The provisions of ...²¹ shall apply mutatis mutandis in respect

²⁰ This refers to the section empowering the President to assign laws.

²¹ This hinges on the electoral system and on the procedure for the election of the State President.

of the election of the Premier of a province.

(2) A judge of the Supreme Court designated by the Chief Justice for this purpose, shall preside over an election referred to in subsection (1).

(3) The election of a Premier in terms of subsection (1)(b) shall take place at a time and on a date fixed by the judge so designated: Provided that -

- (a) if such election of a Premier is occasioned by reason of a dissolution of the provincial legislature, it shall take place within 14 days after the election of the provincial legislature held in pursuance of such dissolution; or
- (b) if such election of a Premier is occasioned by reason of a vacancy in the office of Premier, it shall take place within 30 days after the vacancy arose.

Tenure of and removal from the office of Premiers

24. The Premier of a Province elected in terms of section 23(1) shall, subject to subsection (2) and section 32 hold office-

- (a) for the period referred to in section 6²²; or
- (b) if the provincial legislature is dissolved during such period, for the period until such dissolution,

and shall thereafter remain in office until a Premier has been elected in terms of section 23(1)(b) after dissolution and has assumed office.

²² Will there be a limit to the number of combined years a premier may serve?

Responsibilities, powers and functions of Premiers

25. (1) The Premier of a province shall at all times be responsible for the observance of the provisions of this Constitution and all other laws by the Executive Council of the province, and shall, acting alone, be competent to exercise and perform the following powers and functions, namely -

- (a) to assent to, sign and promulgate Bills duly passed by the provincial legislature;
- (b) in the event of a procedural shortcoming in the legislative process, or where he or she is of the opinion that a Bill is inconsistent with the Constitution or that it has not been passed in accordance with the law, to refer a Bill passed by the provincial legislature back for further consideration by such legislature;
- (c) to convene meetings of the Executive Council;
- (d) to appoint commissions of inquiry;
- (e) to make such appointments as may be necessary under powers conferred upon him or her by this Constitution or any other law; and
- (f) to proclaim referenda and plebiscites in terms of this

²³ The impeachment provisions have been omitted in the light of decisions taken.

Constitution or a provincial law.

- (2) The Premier of a province shall exercise and perform all powers and functions assigned to him or her by this Constitution or any other law, except those specified in subsection (1) or where otherwise expressly or by implication provided in this Constitution, in consultation with the Executive Council of the province: Provided that the Executive Council may delegate its consultation function in terms of this subsection, with reference to any particular power or function of the Premier, to any member or members of the Executive Council.

Acting Premiers

26. (1) The Premier of a province shall appoint one of the members of the Executive Council of the province to act as Premier during his or her absence or temporary incapacity.

(2) Should it be necessary that an Acting Premier be appointed and the Premier is absent or unable to make such an appointment, or if the office of Premier is vacant, the other members of the Executive Council shall make such appointment.

(3) An acting Premier shall while acting as Premier have all the powers and functions vested in the office of Premier.

Executive Councils

27. (1) The Executive Council of a province shall consist of the Premier and not more than 10 members appointed by the Premier in accordance with this section.

(2) (a) The Premier shall appoint the members of the Executive Council from amongst the members of the provincial legislature to administer the various portfolios for which the provincial government is responsible.

(b) A member of the Executive Council shall hold office for as long as it pleases the Premier, but shall vacate office if he or she resigns from office or ceases to be a member of the provincial legislature.²⁴

(3) The Premier or a member of the Executive Council shall assume office within ... days and shall, before formally assuming office, make and subscribe an oath or solemn affirmation in the terms set out in ... before a judge of the High Court designated by the Chief Justice for this purpose.

(4) Members of an Executive Council shall at all times act in accordance with a code of ethical conduct which shall be prescribed by a national law. It shall be particularly forbidden for Ministers and Deputy Ministers -

(a) to take up any other paid employment;

²⁴ This subsection is based on one of the two approaches preferred by the drafters of the third draft on the national executive.

- (b) to engage in activities inconsistent with that of their office or to expose themselves to any situation involving the risk of a conflict between their official responsibilities and private interests; and
- (c) to use their position, or any official information entrusted to them, to enrich themselves or any other person.

(5) There shall be paid out of and as a charge on the Provincial Revenue Fund of a province to the Premier or a member of an Executive Council of such province such salary and allowances, and upon his or her retirement, or to his or her widow or widower upon his or her death, such pension and pension benefits, as may be prescribed by a law of the provincial legislature²⁵.

Executive Council procedure

28. (1) Meetings of the Executive Council shall be presided over by the Premier.

(2) The Executive Council shall determine its own procedure and shall, in so doing, take into account the need for effective government.²⁶

²⁵ See footnote 16: to be revisited.

²⁶ It is uncertain whether this matter has received consideration.

Temporary assignment of powers and functions to Executive Council members

29. (1) Whenever a member of an Executive Council of a province is absent or for any reason unable to exercise and perform any of the powers and functions assigned to him or her, or whenever a member of an Executive Council has vacated his or her office and a successor has not yet been appointed, the Premier may appoint any other member of the Council to act in the said member's stead, either generally or in the exercise or performance of any specific power or function.

Transfer of powers and functions from one member to another member

30. (1) The Premier of a province may assign the administration of a law which is entrusted to any particular member of the Executive Council or which entrusts to any particular member of the Council any power or function, to any other member of the Council.

(2) Any reference in such a law to a particular member of the Executive Council as the member to whom the administration of such a law is entrusted, shall upon the assignment under subsection (1) of the administration of such a law to another member of the Council, be construed as a reference to the latter.

Accountability of members of Executive Councils

31. (1) A member of an Executive Council of a province shall be accountable individually both to the Premier and the provincial legislature of the province for the administration of the portfolio allocated to him or her, and all members

of an Executive Council shall correspondingly be accountable collectively for the performance of the functions of the provincial government and for its policies.

(2) A member of an Executive Council shall administer his or her portfolio in accordance with the policy determined by the Executive Council.

(3) If a member of an Executive Council of a province fails to administer his or her portfolio in accordance with the policy of the Executive Council, the Premier of the province may require the member concerned to bring the administration of the portfolio into conformity with such policy.

(4) If the member concerned fails to comply with a requirement of the Premier under subsection (3), the Premier may, after consultation with the member remove the member from the office.

Votes of no confidence

32. (1) If a provincial legislature passes a vote of no confidence in the Executive Council, including the Premier, the Premier shall, unless he or she resigns, dissolve such legislature and call an election in accordance with section 7.

(2) If a provincial legislature passes a vote of no confidence in the Premier, but not in the other members of the Executive Council, the Premier shall resign.

(3) If a provincial legislature passes a vote of no confidence in the Executive Council, excluding the Premier, the Premier may-

(a) resign;

- (b) reconstitute the Executive Council in accordance with section 27(2); or
- (c) dissolve such legislature and call an election in accordance with section 7.

(4) The Premier shall where required, or where he or she elects, to do so in terms of this section, dissolve the provincial legislature by proclamation in the *Provincial Gazette* within 14 days of the vote of no confidence.

(d.) Provincial Finance and Fiscal Affairs²⁷

Provinces' share of revenue collected nationally

33. ...

Levying of taxes by provinces

34. ...

Raising of loans by provinces

35. ...

Revenue allocations by national government

36. ...

Provincial Revenue Funds

37. ...

²⁷ This matter is still under discussion.

(e) Provincial Constitutions

Adoption of provincial constitutions

38. (1) A provincial legislature shall be competent to pass a constitution for its province by a resolution of a majority of at least two-thirds of all its members.

(2) A provincial legislature may make such arrangements as it deems appropriate in connection with its proceedings relating to the drafting and consideration of a provincial constitution.

(3) A provincial constitution shall not be inconsistent with a provision of this Constitution, and shall be subject to the constitutional principles set out in Schedule ... : Provided that a provincial constitution may provide for legislative and executive structures and procedures different from those provided for in this Constitution in respect of a province.

(4) The text of a provincial constitution passed by a provincial legislature, or any provision thereof, shall be of no force and effect unless the Constitutional Court has certified that none of its provisions is inconsistent with a provision referred to in subsection (3). Subject to the proviso to that subsection.

(5) A decision of the Constitutional Court in terms of subsection (4) certifying that the text of a provisional constitution is not inconsistent with the said provisions, shall be final and binding, and no court of law shall have jurisdiction to enquire into or pronounce upon the validity of such text or any provision thereof.²⁸

²⁸ The constitutional principles are still being debated and this clause will be revisited.

CONSTITUTIONAL ASSEMBLY
THEME COMMITTEE 2
STRUCTURE OF GOVERNMENT

REPORT:
PROVINCIAL GOVERNMENT
STRUCTURES

THIRD DRAFT
(As at 28 August 1995)

THEME COMMITTEE 2

REPORT ON BLOCK 3: PROVINCIAL GOVERNMENT

Third Draft as at 28 August 1995

BLOCK	CP/SEC	CONSTITUTIONAL ISSUE	AGREEMENT	CONTENTION	COMMENT
1.		1. TERMINOLOGY 1.1. Provincial Legislatures 1.2 Premier 1.3 Executive Council or "cabinet" 1.4 Members of Executive Council or "Ministers"	1. Clear distinction should be drawn between national and provincial structures of government.	Terminology for 1. Provincial legislature 2. Executive Council 3. Members of Executive Council	
2.	CP XVII(2) s 160(2)	2. SHOULD PROVINCES RETAIN THEIR COMPETENCE TO DRAFT AN OWN CONSTITUTION?	Provinces should retain their competence to write own constitution		
3.		3. OBLIGATION OR COMPETENCE TO DRAFT PROVINCIAL CONSTITUTION?	There should be no obligation on a province to draft its own constitution.		DP (Gauteng) and Prov. Admin Western Cape: obligation

BLOCK	CP/SEC	CONSTITUTIONAL ISSUE	AGREEMENT	CONTENTION	COMMENT
4.		4. FRAMEWORK FOR PROVINCIALY-DRAFTED CONSTITUTIONS	1. There should be a framework for provincially-drafted constitutions. 2. Provincial Constitutions may not be inconsistent with the Constitution.		The application of Constitutional Principles to provincial constitutions should be revisited
4.a-h		4a. CONTENT OF FRAMEWORK: a. Terminology b. Constitutional Principles c. Adoption of provincial Constitution by two third majority vote d. Size of legislature e. Duration of legislature f. Determination of salaries g. Size of Executive Council h. Government of provincial unity until 1999	c. Adoption by two third majority vote		

BLOCK	CP/SEC	CONSTITUTIONAL ISSUE	AGREEMENT	CONTENTION	COMMENT
5.		5. PROVINCIAL LEGISLATURES - STANDARD CONSTITUTION Where should it be contained? In the Constitution or a schedule to the Constitution?			
5.1	s 125(1)	5.1 Legislature for each province	Retain s 125(1)		
5.2	s 125(3)	5.2 Legislative powers confined to the province	Retain s 125(3)		
5.3	s 127(1)	5.3 Composition of legislature: size	Legislatures may be smaller than at present		Need to revisit size of provincial legislatures in the light of demographics and functions
5.4		5.4 Electoral system			Should be dealt with under block on electoral system
5.5	s 128	5.5 Duration and dissolution of provincial legislature	5 years term (DP 4 years)		

BLOCK	CP/SEC	CONSTITUTIONAL ISSUE	AGREEMENT	CONTENTION	COMMENT
5.6	s 129(1)	5.6. Date of polling 5.6.1 On same date for all provinces 5.6.2 On same date as Parliament 5.6.3 Election within 90 days of dissolution			Revisit the harmonisation of polling dates Revisit matter in light of harmonisation of polling dates
5.7	s 130	5.7 Sitting of provincial legislatures	Retain s 130		
5.8	s 131	5.8 Speaker and deputy speaker	Retain s 131		
5.9	s 132 s 133	5.9 Qualifications for membership of provincial legislatures 5.9.1 Members ordinarily resident in a province	Should be same as for National Assembly	No agreement on whether this requirement is necessary, or, if it is, whether it should be contained in the Constitution	

BLOCK	CP/SEC	CONSTITUTIONAL ISSUE	AGREEMENT	CONTENTION	COMMENT
5.10	s 133	5.10 Vacation of seats and filling of vacancies 5.10.1 Vacation of seats: loss of party membership 5.10.2 Filling of vacancies			It will depend on the electoral system to be adopted.
5.11	s 134	5.11 Oath or affirmation by members	Retain s 134		
5.12	s 135	5.12 Powers, privileges and immunities	Retain s 135 except with subsection (4) (salary determination)		The determination of salaries should be revisited
5.12a	s 136	5.12a Penalty for sitting or voting when disqualified	Retain s 136		
5.13	s 137	5.13 Rules and orders	Retain s 137		
5.14	s 138	5.14 Quorum			To be revisited as the same formulation is used for National Assembly

BLOCK	CP/SEC	CONSTITUTIONAL ISSUE	AGREEMENT	CONTENTION	COMMENT
5.15	s 139	5.15 Required majorities	Questions other than the adoption (and amendment) of the Provincial Constitution, should be by the majority of half of the members present		The required quorum for a valid decision should be revisited
5.16	s 140	5.16 Assent to bills	Retain s 140		
5.17	s 141	5.17 Signature and enrolment of provincial laws	Laws should be lodged with the Constitutional Court		
5.18	s 142	5.18 Public access to provincial legislatures	Retain s 142		
5.19		5.19 Legislative committees of oversight	There should be committees of oversight		CPG will forward further submissions on the topic
5A.	s160(4)(b)	5A. PROVINCIAL MONARCHS			Issue to be dealt with in conjunction with the ad hoc Committee on Traditional Authorities. The issues should be revisited

BLOCK	CP/SEC	CONSTITUTIONAL ISSUE	AGREEMENT	CONTENTION	COMMENT
6.		6. PROVINCIAL EXECUTIVES Framework			To be dealt with under the general framework for Provincial Constitutions
6.1		6.1 PREMIERS			
6.1.1	s 145(1)	6.1.1 Election by legislature	Premier to be elected by the legislature (except for DP)		
6.1.2		6.1.2 Premier member of legislature			This matter should be revisited.
6.1.3	s 146 s 154(2) s 146(2)	6.1.3 Tenure of and removal from office of Premiers 6.1.3.1 Dissolution of legislature 6.1.3.2 Dismissal of premier by motion of no confidence 6.1.3.3 Impeachment	5 year term of office (except DP: 4 years) Termination of term of office by motion of no confidence	Necessity of Impeachment	
6.1.4	s 148	6.1.4 Acting premiers	Retain s 148		

BLOCK	CP/SEC	CONSTITUTIONAL ISSUE	AGREEMENT	CONTENTION	COMMENT
6.2		6.2 EXECUTIVE COUNCILS Framework only			To be dealt with under the general framework for Provincial Constitutions
6.2.1	s 149(1)	6.2.1 Size: Premier and not more than 10 members			Size of executive councils to be revisited
6.2.2	s 149(2)	6.2.2 Composition: government of provincial unity. Retention of principle to 1999.	There is agreement that the principle of government of national unity be extended to the provinces until 1999.	The issue of a government of provincial unity remains a contentious issue (NP proposal)	
6.2.3	s149(4)(b)	6.2.3 Appointment of MECs a. appointed from legislature b. on appointment MECs should vacate their seat	MECs should be appointed from the legislature and they should retain their seats.		
6.2.4	s 149(7), (8),(10)	6.2.4 Oath, ethical provisions	Retain s 149(7),(8),(10)		

BLOCK	CP/SEC	CONSTITUTIONAL ISSUE	AGREEMENT	CONTENTION	COMMENT
6.2.5	s 150(1)	6.2.5 Executive Council procedure	Meetings of the Executive Council to be presided over by the Premier - retain s 150(1)		
6.2.6	s 151	6.2.6 Temporary assignment of powers and functions to Executive Council members	Retain s 151		
6.2.7	s 152	6.2.7 Transfer of powers and functions from one member to another member	Retain s 152		
6.2.8	s 153	6.2.8 Accountability of members of Executive Councils	Retain s 153		
6.2.9	s 154	6.2.9 Votes of no confidence in Executive Council	Retain s 154		

BLOCK	CP/SEC	CONSTITUTIONAL ISSUE	AGREEMENT	CONTENTION	COMMENT
7.		7. INTER GOVERNMENTAL CONSULTATIVE COUNCILS			DP suggests the establishment of Councils to assist in achieving the necessary co-operation and agreement between the provinces on matters of mutual interest.

THEME COMMITTEE TWO

REPORT ON SUBMISSIONS: PROVINCIAL GOVERNMENT STRUCTURES

A. INTRODUCTION

This part of the report should be read with the tabular analysis above. It deals with the structure and procedures of provincial governments under the following headings, which were identified on the basis of submissions received and discussions in the Theme Committee:

1. Terminology
2. Power of provinces of drafting own constitutions
3. Obligation or competence of provinces to draft an own constitution
4. Constitutional framework for province-crafted constitutions
5. Constitutional provisions in default of a provincial constitution.

B. SUBMISSIONS

Submissions on the structure of provincial governments were received from:

1. Parliamentary political parties
2. Institutions referred to in the interim Constitution - the Commission for Provincial Government.
3. Other organisations (including non-parliamentary parties) and individuals

C. CONSTITUTIONAL PRINCIPLES

The most important Constitutional Principle (CP) pertaining to the structure of provincial governments is CP XVIII(2) which provides:

"The powers and functions of the provinces defined in the Constitution, including the competence of a provincial legislature to adopt a constitution for its province, shall not be substantially less than or substantially inferior to those provided for in this Constitution." (emphasis added).

Every province is presently entitled to pass a constitution for its province by a resolution of a majority of at least two-thirds of all its members (s 160(1)). Such a constitution may be different from the interim Constitution (s 160(4)(a)), but should not be inconsistent with a provision of the interim Constitution including the Constitutional Principles (s 160(3)). Furthermore, a provincial constitution may provide for the institution of a traditional monarch (in KwaZulu-Natal it is compulsory) (s 160(4)(b)).

Four issues need to be addressed: First, would the competencies of provinces be substantially reduced if the entitlement to draft an own constitution is taken away? Secondly, can / should all provinces be compelled to draft their own constitutions? Thirdly, how different may the provincial constitution be without being inconsistent with the interim Constitution and the Constitutional Principles? Can / should a broad framework be provided for provinces for the drafting of their own constitutions? Fourthly, if provinces are not compelled to draft their own constitution, then for those provinces who do not wish to draft their own constitution, what should be the content of a "standard" constitution? Furthermore, should the standard constitution be contained in the final constitution itself or in a schedule to the Constitution. On these questions the following submissions were received.

D. CONSTITUTIONAL ISSUES

1. TERMINOLOGY

1.1. Provincial Legislatures

NP: Should be called "Provincial Parliament"

PAC: Should be called "Provincial Assembly"

1.2 Premier

1.3 Executive Council

NP: Should be called "Provincial Cabinet"

Organization and individual submissions

DP(Gauteng): Should be called "cabinet"

1.4 Members of Executive Council

NP: Should be called "Provincial Ministers"

Organization and individual submissions

DP(Gauteng): Should be called "Ministers"

2. SHOULD PROVINCES RETAIN THEIR COMPETENCY TO DRAFT AN OWN CONSTITUTION? - s 160(2)

NP: Yes

IFP: Yes

DP: Yes

Institutional submissions

CPG: This competence should be retained in substantially undiminished form to comply with CP XVIII(2). There is no cogent reason to reduce the constitution-making powers of provinces. This competency is, however, limited. In compliance with CP IV which provides that the final constitution will be supreme law of the land, the present competence of provinces cannot be increased to draft constitutions which may be contrary to the final constitution or the Constitutional Principles.

3. OBLIGATION OR COMPETENCE TO DRAFT PROVINCIAL CONSTITUTION?

IFP: Final Constitution will come into force with already operational provinces and therefore the Constitution needs merely to indicate that the existing provincial legislative structures shall continue into force until otherwise modified by provincial constitutions. No further detail on the provincial executive and legislative structures and procedures should be contained in the Constitution.

DP: Provinces should have a choice whether to draft an own constitution.

Organization and individual submissions

Provincial Administration of Western Cape: Each province should be required to write its own constitution in terms of which it deals with elections and vacancies, oath of office, appointment of a Speaker and Deputy Speaker, rules and order, quorum, the name which is given to a provincial law.

DP(Gauteng): Constitution should compel each province to enact its own Constitution.

4. FRAMEWORK FOR PROVINCIALY-DRAFTED CONSTITUTIONS

The interim Constitution provides that the provincial constitutions may be different but not inconsistent with the interim constitution including the Constitutional Principles. The question is how different. They should be in accordance with the Constitutional Principles VI (separation of powers), VIII (multi-party democracy, proportional representation), IX (open government), X (formal legislative procedures), XIV (participation of minority parties in legislature), and XVII (democratic representation at each level of government).

While some submissions have suggested a framework for provincial constitutions, none has clearly identified the basic provisions which would constitute such a framework. As the Constitutional Principles are not precise with regard the legislature and the executive, the question is whether these Principles should be concretized into a framework. Another suggestion is that the permissible sizes of the legislatures and executive councils should be determined in the final Constitution.

DP: The parameters within which provincial constitutions may be drawn up and adopted should be dealt with in the final Constitution. Should the Constitutional Principles form the basis of a framework for future provincial constitutions, then they should specifically be included in the final constitution. The following Principles should be considered: VI, VIII, IX, X, XI XII, XIV, XVI XVII.

Institutional submissions

CPG: A broad general framework for provincial governments should be established.

Organization and individual submissions

DP(G): Constitution should merely contain a framework for provincial constitutions.

While the content of the framework for provincial constitutions is unclear, the provisions of a "standard" constitution for provincial government received more attention.

5. PROVINCIAL LEGISLATURES - STANDARD CONSTITUTION

5.1 There shall be a legislature for each province - s 125(1)

ANC: Legislature for each province.

FF: Retained.

Organization and individual submissions

Thuynsma: No provincial government, only provincial council representative of all local councils.

5.2 Legislative powers confined to the province - s 125(3)

ANC: Provincial laws applicable only to the relevant province.

5.3 Composition of legislature: size not less than 30 not more than 100 - s 127(1)

NP: In view of the idea of decreasing the size of legislature, a reduction in number of members of provincial legislatures may also be considered.

FF: Number of MPLs should be determined by the functions and powers allocated to provinces.

DP: The number of members should be the same as the number of constituency members' elected to the National Assembly from each province plus another 25% more in number with a minimum number of 25 members.

Institutional submissions

CPG: Constitution should specify permissible size of legislature as presently (30-100 members). An act of Parliament should determine a national norm for the determination of the number of members giving weighting to sparsely populated areas.

Organization and individual submissions

Northern Cape Provincial Legislature (Constitutional Committee): Size should be left to the provinces. The present minimum number is too low.

5.4 Electoral system: pure proportional representation - s 127(1)

ANC: Election on the basis of proportional representation and constituencies.

NP: Members to be elected via a party list system on the basis of a voters' role. After election, elected members should be designated to specific magisterial districts.

DP: Multi-member constituencies and party list system to ensure proportional representation.

Institutional submissions

CPG: Constitution should stipulate that electoral system should be a combination of proportional representation and constituencies. The electoral system should be provided for by an Act of Parliament.

Organization and individual submissions

Northern Cape Prov. Legislature (Const Committee): A system of partial constituency and partial party list system should be adopted. The precise electoral system should be dealt with in the provincial constitution.

Provincial Administration of Western Cape: Voters' roll for provincial elections. Provinces should have the choice of using only pure proportional representation, or using constituencies or a mixture of the two.

Borsook: Mixture of PR and constituencies as in Germany.

5.5 Duration and dissolution of provincial legislature: five year term - s 128

ANC: Five year term

NP: Five year term

FF: Five year term

DP: Four year term.

PAC: Five year term

Institutional submissions

CPG: Five year term

5.6. Date of polling

5.6.1 On same date for all provinces

Institutional submissions

CPG: Not possible in view of premiers' powers to dissolve legislatures before 5 years' expiry.

Organization and individual submissions

Northern Cape Prov Legislature (Const Committee): Provincial and National elections should be held simultaneously.

Provincial Administration of Western Cape: Provinces should have option to hold provincial and local elections on same day in the province.

5.6.2 On same date as Parliament

Institutional submissions

CPG: Not necessary or possible to hold on same day as national election.

Organization and individual submissions

DP(G): Provincial elections should be held on different days from the national election.

5.6.3 Election to be held within 90 days of dissolution of the legislature - s 129(1)

ANC: After dissolution, Premier shall call for elections within 90 days.

Institutional submissions

CPG: Retain s 129(1)

5.7 Sitting of provincial legislatures:

S 130(1) Secretary of a provincial legislature shall convene such legislature within 7 days after an election.

S 130(2) Provincial legislature shall determine its sittings; provided that Premier may summon legislature to an extraordinary sitting for the dispatch of urgent business.

ANC: Each provincial legislature will determine days, hours and periods of its sitting.

NP: Retain s 130

FF: Retains 130

Institutional submissions

CPG: Retain s 130

5.8 Speaker and deputy speaker: elected by the legislature, election presided over by a judge - s 131

NP: Retain s 131

FF: Retain s 131

Institutional submissions

CPG: Retain s 131

Organization and individual submissions

Northern Cape Prov. Legislature (Const. Committee): The problem of the deliberative vote for the Speaker in small legislatures should be addressed.

5.9 Qualifications for membership of provincial legislatures: same as for National Assembly - s 132

ANC: Qualification of membership at national level will also apply to provincial legislatures.

NP: Retain present position: same as for Parliament.

FF: Retain s 132

Organization and individual submissions

Qualification for membership of provincial legislatures must be set out at a national level.

5.9.1 Candidates should ordinarily resident in a province; but limited exceptions - s 132(3) read with s 40(2) & (3).

NP: Candidate should be on the voters' roll of the province.

DP: A candidate should be registered voter in the province concerned.

Institutional submissions

CPG: Only persons who are ordinarily resident in a particular province at the time of their nomination should be entitled to become members of a provincial legislature.

5.10 Vacation of seats and filling of vacancies - s 133

5.10.1 Vacation of seats: Members vacate seat with loss of party membership - s 133(1)(b)

ANC: Members will lose their seats if:

(a) they resign; (b) absent themselves voluntarily from the sittings for more than a period stipulated by the rules, or (c) he or she becomes a member of the National Assembly.

FF: Delete s 133(1)(b)

DP: Delete s 133(1)(b)

Institutional submissions

CPG: Retain s 133 but termination of party membership should not result in termination of membership of legislature.

Organization and individual submissions

DP(G): S 133(1)(b), preventing the crossing of the floor, should be scrapped.

5.10.2 Filling of vacancies

CPG: Depends on electoral system.

5.11 Oath or affirmation by members - s 134

FF: Retain s 134

Institutional submissions

CPG: Retain s 134

5.12 Powers, privileges and immunities - s 135

ANC: Provision should be made for suitable privileges, benefits and immunities of members.

NP: Retain s 135

FF: Retains 135

Institutional submissions

CPG: Retain s 135

5.12a Penalty for sitting or voting when disqualified - s 136

FF: Retain s 136

5.13 Rules and orders: provincial legislature empowered to make rules and orders - s 137

ANC: Each provincial legislature will make its own rules and orders.

NP: Retain s 137

FF: Retain s 137

Institutional submissions

CPG: Retain s 137

5.14 Quorum: One third, or when vote taken on a Bill, at least half of all members - s 138

ANC: Retain s 138

NP: Retain s 138

FF: Retain s 138

Institutional submissions

CPG: Retain s 138

5.15 Required majorities: unless otherwise required by the Constitution, all questions shall be determined by a majority of votes - s 139

FF: Retain s 139

Institutional submissions

CPG: Retain s 139

Organization and individual submissions

Northern Cape Prov. Legislature (Const. Committee): Ordinary votes and special votes must be standardized at national and provincial level.

Borsook: Legislation by simple majority

5.16 Assent to bills by Premier - s 140

--- ANC: Premier has power of assenting, signing and promulgating bills.

NP: Retain s 140

FF: Retain s 140

Institutional submissions

CPG: Retain s 140

5.17 Signature and enrolment of provincial laws at Appellate Division - s 141

NP: Retain s 141

FF: Retain s 141

Institutional submissions

CPG: Retain s 141

5.18 Public access to provincial legislatures - s 142

NP: Retain s 142

FF: Retain s 142

Institutional submissions

CPG: Retain s 142

5.19 Legislative committees of oversight

Institutional submissions

CPG: There should be effective committees of legislatures to ensure proper accountability, openness and responsiveness on the part of the executive.

5A. PROVINCIAL MONARCHS - s 160(4)(b)

Institutional submissions

CPG: A general enabling provision is needed. No specific reference to a particular monarch should be included in the final constitution.

6. PROVINCIAL EXECUTIVES

Framework

Organization and individual submissions

DP(Gauteng): The tenure of office, responsibilities, powers and functions of Premiers and executive councils should be regulated by provincial constitutions.

Provincial Administration of Western Cape: Institutional issues pertaining to executive council and premier should be dealt with in a provincial constitution.

6.1 PREMIERS

6.1.1 Election by legislature - s 145(1)

ANC: Premier shall be elected from the members of the provincial legislature.

NP: Retain s 145

FF: Retain s 145

Institutional submissions

CPG: Parliamentary-elected premiers for provinces without constitutions.

Organization and individual submissions

DP(G): Directly elected by electorate.

Borsook: By legislature

Fein: Either popularly or by legislature

Mentz: Appointed by Provincial Councils and central government

6.1.2 Premier member of legislature -

Institutional submissions

CPG: In pursuance of the principle of separation of powers, Parliamentary-elected Premiers should vacate their seats on election.

6.1.3 Tenure of and removal from office of Premiers - s 146

6.1.3.1 Term of office is terminated on dissolution of legislature - s 146(1) & 154.

Legislature is dissolved:

(1) On expiry of 5 year term;

(2) On a motion of no confidence in Executive Council and Premier, Premier may dissolve legislature - s 154(1)

(3) On a motion of no confidence in Executive Council excluding Premier, then Premier may dissolve legislature - s 154(3)(c)

ANC: Premier elected for 5 years. On motion of no confidence in Executive Council and the Premier, the Premier shall dissolve the legislature and call for elections.

FF: Retain s 146

Institutional submissions

CPG: Retain s 146 & 154

6.1.3.2 Dismissal of Premier by motion of no confidence in Premier alone - s 154(2)

ANC: If vote of no confidence in Premier alone, then he or she shall resign and the provincial legislature will elect another Premier within 30 days from the date of resignation.

NP: Retain s 154(2)

Institutional submissions

CPG: Retain s 154(2)

6.1.3.3 Impeachment - s 146(2)

Institutional submissions

CPG: Retain s 146(2)

6.1.4 Responsibilities, powers and functions of Premiers - s 147

ANC: Executive authority for each province shall vest in the Premier.

NP: Retain s 147. Could be considered that the Premier should be compelled to consult with the leaders of the other parties in the Executive Council before exercising certain of his or her powers.

FF: Executive authority of a province shall vest in the Premier of the province who shall exercise and perform his or her powers and functions subject to and in accordance with the Constitution.

Institutional submissions

CPG: Retain s 147

6.1.5 Acting premiers, appointment of by Premier - s 148

FF: Retain s 148

Institutional submissions

CPG: Retain s 148

6.2 EXECUTIVE COUNCILS

Framework

Organization and individual submissions

DP(Gauteng): Responsibilities, powers and functions of executive councils to be determined by provincial constitutions.

6.2.1 Size: Premier and not more than 10 members - s 149(1)

NP: Consider reduction of number of members in case of smaller provinces.

FF: Retain s 149(1)

DP: Executive Council should constitute of between 5 and 10 members providing that the number of members of the Executive Council do not exceed on fifth (20%) of the number of members of the Provincial Legislature.

Institutional submissions

CPG: No need to increase number or appoint deputies. Size of executive council should have some bearing to size of legislature.

Organization and individual submissions

Northern Cape Prov. Legislature (Const. Committee): Size of the executive council should be limited but should be realistic in terms of the number of provincial competencies.

DP(Gauteng): If province desires to increase size of Executive Council beyond 10 should require the permission of the President in consultation with the Minister of Finance.

6.2.2 Composition: government of provincial unity - s 149(2)

NP: Favours government of provincial unity - s 149(2) unamended. Decision making on the basis of consensus - s 150(2).

FF: Premier shall determine portfolios, appoint members of Executive Council, terminate appointments for the purposes of the Constitution and in the interest of good government, and fill vacancies when necessary.

DP: Reference to government of provincial unity should be deleted.

Institutional submissions

CPG: There should no enforced proportional allocation of membership to Executive Councils. While the government of provincial unity is not obligatory until 1999, it should be included in the final constitution until 1999.

Organization and individual submissions

Northern Cape Prov. Legislature (Const. Committee): If there is provision at national level for a government of national unity, there would have to be similar provisions at the provincial level.

DP(G): No government of provincial unity after 1999.

Provincial Administration of Western Cape: Ambivalent over the issue.

Fein: No proportional representation in executive.

Mentz: Elected by electorate.

6.2.3 Appointed from the legislature - s 149(4)(b)

Institutional submissions

CPG: Should be able to appoint persons from outside the legislature. Such appointees should have the right to speak but not vote in the legislature. In order to satisfy the concept of separation of powers, it may be necessary to require that members of the legislature vacate their membership on appointment to the Executive Council.

Northern Cape Prov. Legislature (Const. Committee): MECs should be members of the legislature.

6.2.4 Oath, ethical provisions - s 149(7),(8),(10)

Institutional submissions

CPG: Retain

6.2.5 Executive Council procedure: meeting presided over by Premier - s 150(1)

ANC: Premier chair meetings

FF: Retain s 150.

Institutional submissions

CPG: Retain s 150

6.2.6 Temporary assignment of powers and functions to Executive Council members - s 151

NP: Retain s 151

FF: Retain s 151

Institutional submissions

CPG: Retain s 151

6.2.7 Transfer of powers and functions from one member to another member - s 152

NP: Retain s 152

FF: Retain s 152

6.2.8 Accountability of members of Executive Councils - s 153

ANC: The executive councils shall be accountable to the Premier and the provincial legislature for the performance of their day to day administration and collectively for the administration of the province as a whole.

NP: Retain s 153

FF: Retain s 153

Institutional submissions

CPG: Retain s 153

6.2.9 Vote of no confidence in Executive Council alone, then Premier may resign, reconstitute of the Executive Council, or dissolve the legislature - s 154(3)

NP: Retain s 154

FF: Retain s 154

Institutional submissions

CPG: Retain s 154

7. INTER GOVERNMENTAL CONSULTATIVE COUNCILS

DP: Provinces should be able to establish inter governmental consultative councils to assist in achieving the necessary co-operation and agreement between the provinces on matters of mutual interest.

CONSTITUTIONAL ASSEMBLY
THEME COMMITTEE 2
STRUCTURE OF GOVERNMENT

TRADITIONAL AUTHORITIES
(BLOCK 4)

DRAFT FORMULATIONS

(As at 21 August 1995)

SECOND DRAFT - 21 AUGUST 1995

Status :-

Draft by Ad-Hoc Committee technical advisers.

Chapter X

INDIGENOUS LEADERSHIP¹

Recognition of indigenous leadership²

1. (1) The institution of indigenous leadership is hereby recognized.

(2) The status, role and functions of indigenous leaders shall be spelt out in legislation subject to the provisions of the Constitution and of indigenous law³.

(3) Provincial legislatures shall have the competence to make provisions relating to the institution, role, authority and status of any monarch in the provincial constitution, subject to section 1(2) above.

¹ The change from the common appellation, "traditional leadership", is occasioned by the need to explore alternatives to the old language which, it has been strongly argued by CONTRALESA and others, does not distinguish between genuine incumbents and the "untraditional" elements that have crept into the institution. There remains a measure of support for the old nomenclature.

² The Theme Committee recommended that the question of the legitimacy and authenticity of indigenous leaders be referred as a matter of urgency to a Commission of Enquiry which will determine such issues on the basis of indigenous law.

³ Should the need be felt to protect in a more direct fashion the traditional relationship between monarchs and the other levels of leadership a proviso could be inserted here, in the form:

"PROVIDED that such legislation shall not disrupt the traditional hierarchy of leadership as constituted under indigenous law"

The effect of such language would be to ensure that neither national nor provincial legislation had the ability to turn the hierarchical pyramid upside down.

CONSTITUTIONAL ASSEMBLY
THEME COMMITTEE 2
STRUCTURE OF GOVERNMENT

TRADITIONAL AUTHORITIES
(BLOCK 4)

DRAFT FORMULATIONS

(As at 31 August 1995)

SECOND DRAFT - 1 SEPTEMBER 1995

Status: Prepared by TC 2 Technical Advisers and Law Advisers for debate in the Constitutional Committee.

TRADITIONAL LEADERSHIP¹

Recognition of Traditional Leadership

1 (1) The institution, status and the role of traditional leadership, according to indigenous law, shall be recognised subject to the Constitution.²

(2) The powers and functions of Traditional Authorities shall be spelt out in national law subject to the Constitution.³

(3) Provincial Legislatures shall have the competence to make provisions relating to the institution, role, authority and status of any monarch in the provincial Constitution, subject to Section (1) above.⁴

¹ There was a debate in the CC about the appropriate term to be used here *viz* Traditional Leadership or indigenous law. The use of the term traditional leadership here is not intended to pre-empt the debate of the CC but it is used for case of reference as it is a term that is used in CP XIII(1) and was also used by the Theme Committee to facilitate the debate in the CC the Technical Advisers have been requested to provide more detail on the term Indigenous Leadership.

² This is per agreement of the Theme Committee as contained in Block 1 of its Schematic Report. It is also in compliance with CP XIII(1) from which the formulation is drawn.

³ This is per agreement in the TC as contained in Block 2 of its Schematic Report. The formulation is also in keeping with other draft particularly on specialised structures.

⁴ This is in compliance with CP XIII(2).

CONSTITUTIONAL ASSEMBLY

THEME COMMITTEE 2

STRUCTURE OF GOVERNMENT

REPORT :

TRADITIONAL AUTHORITIES

(BLOCK 4)

THEME COMMITTEE 2**REPORT ON BLOCK 4****TRADITIONAL AUTHORITIES****A. INTRODUCTION**

This report was drawn up on the basis of submissions received from political parties, organisations of civil society, individuals, the public participation programme and other activities of the Constitutional Assembly.

The report is divided into two sections. The first is a tabular summary of the submissions received by the Theme Committee. The second is an elaboration of the table: i.e it is a more extended discussion of the views summarized in the table.

MATERIAL CONSIDERED

1. Submissions received from parliamentary political parties¹ (in alphabetical order):
 - African Christian Democratic Party (ACDP)
 - African National Congress (ANC)
 - Democratic Party (DP)
 - Freedom Front (FF)
 - National Party (NP)
2. Submissions received from the public and organisations of civil society:
 - 2.1 Individuals:
See attached Appendix 1
 - 2.2 Organisations:
See attached Appendix 2

¹ The General Submissions of the Inkatha Freedom Party of 24 February 1995 before that party withdrew from the Constitutional Assembly were also scrutinised, and will be referred to in this report as and when necessary.

B. SCHEMATIC REPORT ON TRADITIONAL AUTHORITIES

CONST. PRINC; SECT	CONSTITUTIONAL ISSUES	AGREEMENT	CONTENTION	COMMENT
XIII; s181(1), (2)	1. Recognition of institution, status and role of traditional leadership and of indigenous law.	<p>1. The Constitution should expressly recognise traditional leaders in accordance with CPXIII. ACDP,ANC, DP, FF, NP, CONTRALESA, CPG and 46 individual (and group submissions) all endorse this position.</p> <p>2. Indigenous law should be recognised and made subject to the Constitution and any other law.</p>		<p>1. A minority (21) of the individual and group submissions was against any mention of traditional leaders in the Constitution, seeing the institution as : outdated; having no relevance in a multi-ethnic society; expensive, undemocratic,etc.</p> <p>2. Corresponding roughly to the same group of submissions, there were suggestions that communities should decide by referendum whether they wanted traditional leaders, and if they did they should pay for them - e.g by additional taxes, etc.</p> <p>3. There was no serious challenge to the view of the NP, SANCO, CONTRALESA, CPG, and two individual submissions that recognition should be conferred only on "authentic" or "legitimate" traditional leaders; that the determination of disputes over these matters be undertaken as a matter of urgency.</p>

CONST. PRINC; SECT	CONSTITUTIONAL ISSUES	AGREEMENT	CONTENTION	COMMENT
CP XIII; Chap.11	2. Role and functions of traditional leaders, generally	1. The status, functions and role of traditional leaders should be spelt out in separate legislation	1. Whether traditional leaders should have powers and functions over and above those they currently enjoy under indigenous law, and whether these should be spelt out in the Constitution	
CP XIII; XVII; Sec 184; ss36, 40(1); 48(1)	3. Accommodating traditional leaders at National level	1. Traditional leaders must have a role to play at National level : ACDP, ANC, FF, NP, CONTRALESA, CPG are in agreement on this. The DP did not make proposals on this specific issue.	1. There are divergent views regarding the nature and the form of representation: ACDP prefers traditional leaders to be a nominated component of the Upper House; FF also strongly favours the accommodation of traditional leaders in Senate without proposing any procedures. ANC, NP, CPG and CONTRALESA support the establishment of a Council of traditional leaders. 2. A minority of individual submissions supporting a continued role for traditional leaders in the Constitution rejected any participation at National level.	

CONST. PRINC; SECT	CONSTITUTIONAL ISSUES	AGREEMENT	CONTENTION	COMMENT
CP XIII, XVII; Sec 183	4. Accommodating traditional leaders at Provincial level	<p>1. Traditional leaders must play a role at Provincial level. All parties agree : DP did not submit on this specific issue.</p> <p>2. General support for sec 183 providing for the establishment of Provincial Houses of Traditional Leaders</p>	<p>1. In KwaZulu-Natal the Zulu King's Council proposes a structure in which the King shall be Monarch of the Province and supreme head of the House of Traditional Leaders and in which traditional leaders are disqualified from Ministerial appointments.*</p> <p>2. ANC and NP view traditional leaders participation at National level as advisory only: CONTRALESA envisages a more interventionist role</p>	<p>1. Seven individual (and group) submissions wished the role of traditional leaders to be restricted to Provincial level (i.e - no National or Local role). Three favoured advisory powers: four opted for stronger intervention (with one favouring a veto where matters concerning the community were concerned)</p>

CONST. PRINC; SECT	CONSTITUTIONAL ISSUES	AGREEMENT	CONTENTION	COMMENT
CP XIII, XVII, Sec182	5. Traditional leaders and Local Government	<p>1. Traditional leaders must be part of local government;</p> <p>2. Service-provision must be limited to elected and accountable officials;</p> <p>3. Where elected, traditional leaders must relinquish traditional position</p>	<p>1. Whether relinquishing post upon election should be permanent or temporary: CONTRALESA favours re-instatement by community if it so wishes.</p>	<p>1. Eight individual (and group) submissions believed that the role of traditional leaders should be restricted to local level (i.e - no National or Provincial role).</p> <p>2. Issues of contention are not constitutional ones: they relate to details of traditional leaders participation in local government.</p> <p>3. These issues revolve around: procedures for appointment (ex officio vs election); role as service-providers; boundaries.</p> <p>4. Three individual submissions favoured a purely ceremonial role for traditional leaders at local level.</p>

CONST. PRINC; SECT	CONSTITUTIONAL ISSUES	AGREEMENT	CONTENTION	COMMENT
CP XI, XIII ss182, 183	6. Traditional leaders and Indigenous Law and Practices	1. Traditional leaders and indigenous law go together as a cultural 'package': one strengthens the other*		<p>1. Though not necessarily amounting to contention, many divergent views were expressed on this topic. They ranged from organisations and individuals who saw traditional leaders and indigenous law as "good for discipline / unity / respect" and those who criticised the patriarchal nature of these institutions or individual customs such as circumcision and other initiation rituals.*</p> <p>2. Matters relating to customary law courts are dealt with by TC5</p>
CP XIII; Chap 3	7. Traditional leaders and the Bill of Rights	1. Traditional leaders and indigenous law are subject to the Bill of Rights*		<p>1. Many of the opinions expressed in the submissions revolved around the Equality clause and the concern that traditional leaders operated systems that oppressed women. Hereditary succession and the exclusion of women from chieftaincy was another recurring concern.</p> <p>2. There was also a fair sampling of views suggesting that it is rigidified, 'distorted' custom which poses a problem for the Bill of Rights: pure custom is dynamic and adapts to change.</p>

* See full text of Report for IFP position

C. REPORT ON SUBMISSIONS

1. Introduction

This part of the report should be read together with the tabular analysis reproduced above. It deals with Traditional Authorities under the following headings, which were identified on the basis of submissions received by the Theme Committee:

- 1.1 Recognition of the Institution, Status and Role of Traditional Leadership and Indigenous Law
- 1.2 Role and Function of Traditional Leaders generally
- 1.3 Accommodating Traditional Leaders at National Level
- 1.4 Accommodating Traditional Leaders at Provincial Level
- 1.5 Traditional Leaders and Local Government
- 1.6 Traditional Leaders and Indigenous Law and Practices
- 1.7 Traditional Leaders and the Bill of Rights

2. Constitutional Principles

The Following Constitutional Principles have a direct bearing on the issues discussed in this Report : XI (protection of cultural diversity and language); XIII (recognition of traditional leaders and indigenous law); XVII (democratic representation at each level of government); XXXIV (self-determination by communities sharing a common cultural and language heritage)

3. Submissions received on Traditional Authorities

3.1 Recognition of the Institution, Status and Role of Traditional Leadership and of Indigenous Law

There was general consensus across the board that the Constitution should contain some language explicitly recognising the institution of traditional leadership and Indigenous Law. There were no major disagreements also about the current wording of Constitutional Principle XIII, except for the feeling that "status and role" are matters of detail to be dealt with in a separate enactment. Even this exception was muted: Constitutional Principle XIII is widely regarded as an adequate formulation and a proper basis for the recognition of traditional leaders in the New Constitution.

Out of a hundred private submissions (i.e those that do not come from parliamentary political parties), twenty one stood squarely against any formal recognition of traditional leadership. One individual contended that such recognition was racist given the fact that white people did not have chiefs. A fair number of individuals criticized the expense involved.

The recognition of customary law within the constraints of the Constitution raised no controversies. [There is language in both the IFP General Submissions and in CONTRALESA's Supplementary Submissions which suggests that, in its own sphere, indigenous law should be assessed on its own terms and not be subjected to any other law].

There were two organisations which proposed a radically different structure for the governance of the country. The Free Africa Foundation of Washington DC submitted an "indigenous African constitution" which proposed a Monarchy based on a "bill of native rights". Proposing a "Constitution for the United Kingdom of South Africa", the House of Royal submitted details of a hierarchy composed of levels ranging from the lowest (the House of Delegates) to the House of Majesty.

3.2 Role and Functions of Traditional Leaders Generally

While there was agreement that the status, role and function of traditional leaders were matters of detail and could await legislation, there was disagreement on the question whether or not Constitutional Principle XIII required the restriction of traditional leaders to their customary law roles. CONTRALESA, for instance, believes that in the nature of things, the new dispensation will demand new inputs from traditional leaders if their participation is being taken seriously. The CPG favours no new grants of competency to traditional leaders in the Constitution but accepts that legislation based on section 182 of the Interim Constitution could confer new powers.

3.3 Accommodating Traditional Leaders at National Level

The submissions revealed widespread support for the principle. (The Democratic Party's silence on the issue is simply the result of their submissions having been limited to the question of traditional courts, dealt with by TC5). Alternative approaches to the issue of giving effect to the principle included : adding a House of Traditional Leaders in a tricameral parliament; accommodating traditional leaders in an expanded Senate; or an expanded National Assembly.

The same unanimity on the principle of accommodation was reflected in the endorsement of the notion of the Council of Traditional Leaders (even by those parties who supported additional alternatives).

[One should bear in mind the submission mentioned above, that South

Africa be a monarchy].

3.4 Accommodating Traditional Leaders at Provincial Level

All parties shared the belief that perhaps the strongest role for traditional leaders will be at provincial level. The principle of the Houses of Traditional Leaders was generally supported, with the inevitable differences of opinion over whether their role should be advisory or more "legislative".

In KwaZulu-Natal a specific controversy revolves around the call by the Royal Council of the Zulu King that section 160(3) (b) of the Interim Constitution as amended, (providing for determination of the status and role of the Zulu King) should be complied with. This is based on the philosophy that matters of traditional leadership cannot be finally determined until the authority and status of the monarchs (around the country) have been settled, since there exists a necessary link between the two. This is in direct contrast to the *de jure* situation in the Province, where the House of Traditional Leaders asserts a right to jurisdiction over monarchical affairs.

3.5 Traditional Leaders and Local Government

There were many varied views expressed under this heading, but they were mostly about matters of detail. Of constitutional significance is the agreement over the need to incorporate the institution of traditional leadership into local government. Needless to say there is no unanimity as to how this might be achieved.

Agreement can also be detected on the issues of limiting the service-provision role to elected officials; acknowledging the right of traditional leaders to stand for election; and insisting that when they are elected they should take their seats as ordinary citizens. The CPG submits that where traditional leaders enjoy *ex officio* status on elected structures, the arrangement should be subject to periodic review. ANC proposals supporting the participation of traditional leaders in local government stress democracy and accountability. The NP supports a strong representation of traditional leaders at local government level. The FF proposes the undertaking of in-depth research by the technical advisers with a view to producing a report on the complexities of accommodating traditional leaders to form the basis on which parties could formulate or update their own proposals.

3.6 Traditional Leaders and Indigenous Law and Practices

There is no controversy over the link between the institution of traditional leadership and indigenous law: it is accepted that the institution finds its legitimacy in that system of law; in turn, indigenous law thrives under traditional systems of governance. CONTRALESA, ANC and NP are in agreement in this regard. So are the submissions of Dikwankwetla Party of

South Africa and Manala Tribal Authority; the latter asserts that the traditional leadership/indigenous law "package" has been largely responsible for the relative stability of Botswana, Lesotho and Swaziland after independence, as opposed to Mozambique, Angola and Uganda where those systems broke down.

Most of the individual submissions in favour of recognition of traditional leadership mentioned in 3.1 gave "cultural legitimacy" as the reason for their position. Criticism of the package ranged over a wide territory, as set out in the table.

[IFP submissions stress the centrality of communal land to the well-being of both traditional leadership and customary law. For this reason they propose a provision entrenching communal land-holding, as well as traditional leadership and indigenous law. They seek to provide also for the voluntary subjection of members of communities to customary law].

3.7 Traditional Leaders and the Bill of Rights

Always a controversial subject, the question of traditional leadership under a Bill of Fundamental Rights was the focus of a wide variety of views. Agreement appeared to be only over the principle that traditional leadership, like indigenous law, should be under the superintendence of the Constitution and the Bill of Rights, in accordance with Constitutional Principles XIII.

The Parties did not address the meaning of "subject to the Bill of Rights" directly : there appeared to be a general assumption that there was enough language in the Interim Constitution to establish the subjection of the institution to the Bill of Rights. Problem areas might well lie in the view expressed, for instance, by the Zulu King's Council (and heard frequently at the Public Hearing on Traditional Leaders) that the Bill of Rights in its pure western form may not be suitable for the South African reality and that it may have to 'absorb' certain positive aspects of the traditional way of life.

Comments on the negative aspects of traditional leadership in a human rights context revolved around women, equality and hereditary succession.

CONCLUSION

The volume of submissions received indicates the interest which the general public has in issues of traditional leadership and indigenous law. Predictably, many of the views expressed (being concerned with detail or real life experience) were not capable of formulation in constitutional terms. Nevertheless, for purposes of completeness it may be instructive to list the national concerns underlying some of the examples and opinions offered. Recurring themes included: the nomenclature to be adopted in respect of traditional leaders (the NP and some Provincial organisations, for instance, feel strongly

that indigenous names should be used); the linking of cultural values to religious values (for instance, in the many suggestions that these values should be taught in schools); the question of checks and balances against abuse of power by traditional leaders (apparently animated by a suspicion in some quarters that, left unsupervised, traditional leaders can be autocratic).

Submissions from individuals and organisations in KwaZulu- Natal showed a significant percentage of preoccupation with the position of the Zulu King. Proposals ranged from conferring powers on the King to advise the State President on cultural matters, to granting him a role in demarcating 'tribal' boundaries. The issue of remuneration also surfaced: while three individuals proposed that the King should control salaries of traditional leaders, four favoured placing him on the Central Government payroll. The view that both Kings and other traditional leaders should be above party politics was widespread among those who did make submissions on the issue.

APPENDIX 1

SUBMISSIONS RECEIVED FROM INDIVIDUALS
(in alphabetical order)

NAME	S/NO.	NAME	S/NO.
1. Abiot L	438	28. Govind GK	3
2. Anonymous	133	29. Griggs R	4
3. Anonymous	212	30. HlongwaneJK	301
4. Anonymous	224	31. Hloyi M	5
5. Anonymous	357	32. Hoffenberg A	359
6. Anonymous	439	33. Holderness VF	229
7. Anonymous	440	34. Holliday CI	216
8. Anonymous	(misc)	35. Hutchinson CH	230
9. Bethuel SGD	134	36. Jamjam F	442
10. Bhoola AI	213	37. Jivananda S	360
11. Bill PLA et al.	225	38. Kearney J	231
12. Biyela I M	1	39. Kgoale SM	6
13. Borchers V	358	40. Khumalo SW	232
14. Burke L	296	41. Koyana DS	PPP
15. Buthelezi TR	297	42. Lavenpos A	233
16. Chonco AM	226	43. Longden-T'good	234
17. Christopher F	227	44. Lowther PM	217
18. Chowdree R	PPP	45. Lubisi PM	235
19. Clerkin E	135	46. Lugalo T	12
20. Coates D	298	47. Lunn DL	236
21. Coetzee E	299	48. Mabitle MD	361
22. Coetzee J&P	441	49. Mahlehla WT	362
23. Dawling P	359	50. Maki D	363
24. Delarey R	2	51. Maliza MH	218
25. Dludla BK	215	52. Maphosa J	444
26. Gaetsewe J	228	53. Masemola L	7
27. Glendining DW	300	54. Mashane J	446

55. Mathivha MER	364	80. Nyembe W	142
56. Matjie & Mutsou C	445	81. Phathu M	370
57. Mc Intyre CL	303	82. Rapportryers S	371
58. McLoughlin MA	219	83. Reid WH	239
59. Miya B	365	84. Robertson J	372
60. Miya E	8	85. Sondzaba Res.	143
61. Mkhize C	223	86. Spero CA	13
62. Mlangeni ME	367	87. Spiegel AD	240
63. Mncibi M	448	88. Swemmer CA	144
64. Mofokeng PR	136	89. Sykes RW	145
65. Mokoena TG	368	90. Tsotetsi PL	305
66. Molete TA	449	91. Van den Heever DJA	373
67. Monareng A	137	92. Venson P	PPP
68. Motimane J	304	93. Vilakazi ET	146
69. Mthokwa JM	237	94. Viljoen FJZ	308
70. Naicker UA	9	95. Vogt B	375
71. Nala MO	138	96. van Niekerk HCD	306
72. Nare TP	369	97. Venson P	PPP
73. Ndaki F	PPP	98. Vilakazi ET	146
74. Ninow G	10	99. Viljoen FJZ	308
75. Noord Transvaler	11	100. Vogt B	375
76. Ntshangase M	238	101. Vroom GJ	307
77. Ntsele B	139	102. Williams PR	309
78. Ntuli MM	140	103. Yeadon ND	220
79. Ntuli PM	141	104. Zungu S & Vilakazi H	310

APPENDIX 2**Submissions received from Organisations
(in alphabetical order)**

- **Afrikanerbond**
- **Commission on Provincial Government**
- **Congress of Traditional Leaders of South Africa**
- **Dikwankwetha Party of South Africa**
- **Five Freedoms Forum**
- **Free Africa Foundation**
- **Free State Municipal Association**
- **Gender Research Project (Centre for Applied Legal Studies)**
- **House of Royal**
- **KwaZulu/Natal House of Traditional Leaders**
- **Manala Traditional Authority**
- **National Coalition of Women**
- **Provinces :**
 - Eastern Cape
 - Free State
 - Northern Transvaal
 - North West
- **Redemption Centre**
- **Rural Women's Movement**
- **South African National Civic Organisation**
- **Women's Group (Transkei)**