

CONSTITUTIONAL ASSEMBLY

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disposal of Item 1 in the agenda.

Item 2: Are the 20 verbal apologies besides those with the secretariat?

-Mr Simons

-Dr Schoeman and Mr Van Zyl

-Dr Middel

-Mrs Rouledge

Item 3: Adoption of previous minutes. NO COMMENT

MINUTES ADOPTED AND SPONSORED

THEME COMMITTEE 1 MEETING

Item 3.4: Why

DATE: 28 AUGUST 1995

of these drafts, particularly

Speaker:

Thank you Sir. On page 26, you'll see that there is a first report dated 1st to August, prepared by us, on instruction of the Theme Committee. It's an attempt to encapsulate those contentious aspects out of the narrative report in draft constitutional language.

'A1' - reflects the agreement about what should be the national languages.

'A2' - every person should have the right to use one of these languages in communication with Government and in the courts.

'A3' - with due recognition to 'A2', the national and each provincial Government may designate certain of the national languages as the official means of communication within its sphere of competence and may devise practical mechanisms to implement such designations. It's an attempt to put into constitutional form the agreements reached on communications in languages.

Chairperson:

Ladies and gentlemen, it is a pleasure to meet again during this last part of our work. And it's pleasing that we are still so energetic as when we started. That disposes of Item 1 in the Agenda.

Item 2: Are there any verbal apologies besides those with the secretariat?

-Mr Sisulu

-Dr Schoeman and Mr Van Zyl

-Dr Mulder

-Mrs Routledge

Item 3: Adoption of previous minutes: NO COMMENT.

MINUTES ADOPTED AND SECONDED.

Item 5: Perhaps we should allow our technical experts to lead us in the presentation of these drafts, particularly 5 only at this stage.

Speaker:

Thank you Sir. On page 26, you'll see that there is a first report dated 17th August, prepared by us, on instruction of the Theme Committee. It's an attempt to incapsulate those noncontentious aspects out of the previous report in draft constitutional language.

'A1' - reflects the agreement about what should be the national languages.

'A2' - every person should have the right to use one of those languages in communication with Government and in the courts.

'A3' - with due recognition to 'A2', the national and each provincial Government may designate certain of the national languages as the official means of communication within its sphere of competence and may devise practical mechanisms to implement such designation. It's an attempt to put into constitutional form the agreements reached as noncontentious on languages.

As to 'B' - Again two noncontentious points:

- The stature of the court of the Republic of South Africa
- The national territory of the republic shall comprise the areas which form the Republic of South Africa on 27 April 1994, including all islands and waters deemed to be part of such areas.

I don't have much to add to that.

Chairperson:

Thank you very much. The draft constitutional provision, which will probably come into the constitution if it's finally approved by the CC and the CA, is tabled then for the members to discuss. The matter is on the table. I'll see by the raise of hands.

Mr Gumede:

Thank you Mr chairperson. The ANC, on looking at this draft and its policy, has decided to issue another draft in response to this draft, to try and make its position clearer and to try and be in a position to meet with the positions of other parties, whilst not losing the essence of its proposal. And hence, the draft formulation which I think is in front of each member, in essence:

1. Adds the issue of sign language.
2. It says that all eleven languages shall be official languages. The difference between national and official being that official has more authority and is much stronger than national. And we believe that this puts all the languages on par.
3. It adds the issue of practical demands with due recognition of '1' above: 'a national government based on practical demands may designate certain official language(s) of communication.'

4. The provincial government may designate certain of the official languages based on demographics and practical demands of languages in the province as language of communication.

For instance, in the Western Cape, the demographics may demand that Afrikaans should be an official language, whereas that may not be the case in the Eastern Cape. This is what we mean by adding the word 'demographics.'

Thank you, Chairman.

Mr Marais:

Thank you, Chairperson. I want to refer firstly to the new proposal that has been tabled here by the ANC, which makes provision, amongst others, for the elevation of sign language also as an official language. Now, firstly, we wouldn't like to appear to be without compassion for people who are compelled to use that language. We would like to go into the matter of the practicability of that. We don't have certainty as to whether sign language can be regarded as a language, or whether it is perhaps a technique. For instance, when a person uses that in Parliament, I can imagine it wouldn't be too difficult to interpret. But how is it going to be recorded? So we do not say, at this stage, that that is unacceptable to us. As a matter of fact, we would like something to be written into the constitution - perhaps in the chapter on fundamental rights - catering for the needs of people who are so unfortunate that they cannot speak, see or hear. So, that's our only reservation. Then, in regard to the second subparagraph of the new proposal '*every person shall have the right to communicate with Government, Parliament or court in his/her own language, including sign language,*' once again we believe that the matter of practicability will have to be dealt with

Then, in regard to the draft that has been talked to by Professor Koda, on the third point there referring to official means of communication, *'the continuation in force of section 3-2 of the 1993 constitution.'* I don't think we need to debate it because I believe it has been debated quite extensively last time. As long as we noted the particular reference to the right of the Government to declare a language(s) as the official means of communication. From our point of view, it must be subject to that contentious point. I believe that's all that I have to say at this point in time.

Mr Green:

I think it is commendable of the ANC to have thought of those persons who cannot express themselves in an ordinary language. Secondly, the question that arises as far as sign language is concerned, is how many persons would be included in using the sign language? If it's very few people, then the question that one asks here is, why should sign language be included as an official language when there are other languages that are not included, but might be having more persons that are using it.

Mrs Chiwora:

With regards to the sign languages, it involves about four million people in South Africa. May I add that it should be considered that this sign language could be accommodated because they are able to read the natural language. The sign language is international and it transcends all other languages. So, it is imperative that such a thing could be done, so that it doesn't have to exclude anybody.

Mr Marais:

Perhaps we should request the technical experts to enlighten us on that because from our point of view it's just a matter of practicability of whether sign language or a technique. Wouldn't it be possible to accommodate that in another part of the constitution? We are not rejecting that. We are trying to look for ways and means to accommodate the people concerned.

Chairperson:

Mr Marais, before we refer this matter to the technical experts, in the light of the last two paragraphs, the provisions that the National Government/province will be able to designate certain languages as languages of communication, depending on the demands of the language concerned. For instance, what would happen if, in the future, we have quite a number of deaf people in Parliament, who are efficient except for the disability concerned. Will that reach an objection of the NP?

Speaker:

No, we won't object to anything that could facilitate the participation of those unfortunate people in any human activity whatsoever in South Africa. As long as it is practicable.

Technical experts:

I think that the only technical point that we could make is that it is possible that people in that position could rely upon the provision in the current Bill-of-Rights which will certainly be included in the final Bill-of-Rights relating to nondiscrimination on the basis of disability. That would be a way in which people in that position could insist upon their right to equality under the constitution in this regard as well. Unfortunately, neither of us has any expertise in the area of whether sign language is a technique or is a language, because presumably, as I understand it, sign language interpretes words from different languages. But we can't really say anything further on that.

The only suggestion I might have in regard to thesecond last point, *with due recognition of (1) above...*, may I suggest that the word 'a' be substituted by 'the' because presumably there will be only one national government in the future. Just to make it easier perhaps to understand, the words '*based on practical demand*' be moved to the end of the sentence so that it might read: '*With due recognition of (1) above, the National Government may designate certain official language(s) of communication based on practical demands.*' Those are just two technical suggestion.

ALL PARTIES AGREE WITH THE SUGGESTION

Chairperson:

With the comments that have been made, can we say therefor that the amended draft is acceptable? Can I put that question to the Theme Committee?

Speaker:

I just want to find out from our technical experts what their opinion is on chapter 1 under 'Languages' - the inclusion of development and promotion. Can we just take it for granted that the State will be obliged to promote and develop those languages that were marginalised in the past?

Speaker:

The short answer is 'No.' Whatever goes into the final constitution itself will be what the constitutional provision is then. But nothing in this draft submission goes counter to development and promotion of languages. In other words, in the future, any Parliament operating under constitution which has this in relation to languages, nothing would prevent that Parliament from making as much legislation as it likes to promote and develop the position of other languages. It just isn't mentioned in the constitution.

Mr Marais:

I would like to remind the members that it's the NP's position that we should broadly follow the provisions of the present section 3 of the interim constitution. And in the CC we intend arguing that, and ofcourse, part of that is the development provisions which, from our point of view, is of crucial importance. So we are going to refer back to our full submission when we argue this point in the CC; perhaps in the mean time the ANC could consider the possibility of supporting us in that particular respect. We wouldn't mind at all if you do.

Chairperson:

In the light of what Mr Kekana and Mr Marais has said, is it not possible Mr Koda and Dr. Heunes to coin a phrase which instructs the future government to consider mechanisms for development and promotion of South African languages, so that it's not left to the government whether it feels like doing it or not. It seems in the present constitution there is some kind of persuasion for the promotion of languages. I don't have a specific phrase, but something along those lines. Just to have an instruction, not pinning the Government to a particular way of promoting because you might find that in 10 years time that way is not the best way to do it.

Speaker:

May I suggest that I work on that while Dr. Heunes is talking to the next item on the Agenda, which is The Foreign Relations issue. Then I can come back with a proposal. Can I just also ask. In referring to the promotion and development of languages, does this refer to the 11 official languages or also other languages e.g Hindi, Portugese, etc.

(11 languages are proposed by all parties)

Mr Marais:

Ofcourse we would like to see the continuation or the inclusion of a provision similar to what is included in the present constitution under 10C. While I'm on this subject, and having referred to the Pan South African Language Board, perhaps Professor Koda could think about it and let us have his views later. In view of section 10B, would it be necessary to get a recommendation from the Pan African Language Board before we agree eventually on a new language clause in the constitution. It states th the following: *'The Pan South African Language Board shall be consulted and given the opportunity to make recommendations in relation to any proposed legislation contemplated in this section.'* To my mind, that could apply to any legislation relating to languages.

Chairperson:

So, what exactly are we saying? It seems that in the present constitution there was an instruction to promote all the languages which might be available in South Africa. Are we now only including the 11 official languages, and excluding the rest?

Mr Kekana:

I think it depends entirely on the opinion of our technical experts. The present constitution talks about the establishment of the Pan South African Language Board. If we take it for granted that by the time this new constitution is enforced, this board shall have been established, it is up to our technical experts to advise us whether it is proper for us to include it in the final constitution. The Senate will have to come with a legislation which recognises this board, its function and its composition.

Speaker:

I may just make this response just to direct members' attention to Constitutional Principle number 11 which is binding on us: *'The diversity of language and culture shall be acknowledged and protected, and conditions for their promotion shall be encouraged.'* This doesn't refer to any particular language or culture. That's in relation to the first point about confining it to 11 languages or more. On the second point about the Pan South African Language Board, to my knowledge it doesn't exist yet. But perhaps if and when it established, as the interim constitution demands, then reference to the Pan South African Language Board could be included at that stage. Perhaps it is slightly premature to be including reference to a body which doesn't as yet exist. That's the only response that I would give at present.

Chairperson:

Isn't that then a general phrase that instructs the government to create circumstances in which languages could be promoted and developed, without specifying which languages it is referred to? Isn't that the answer to the principle concerned?

Speaker:

Such a general provision would certainly fit well within constitutional principle 11.

Mr Gumede:

Infact, I'm posing this question to the house. Did we have anything in mind about the bottom limit on the numbers of people speaking a certain language? In other words, what is the minimum number of people required speaking a certain language for them to enjoy the protection of this clause in the constitution?

Mr Mokaba:

In fact that is my concern. I think we should give this matter some time before we can arrive at any formulation that is going to say that South Africa should be developed in all languages of the world. I think our government has got a responsibility develop indigenous languages (the 11 languages). But any other community that forms as a result of people migrating to South Africa will have the right to develop their own language. What we are trying to say is that the government would not be responsible for that. I do not think we can then begin to commit future government to developing any other language.

Chairperson:

Thank you. While Professor Koda is to make formulation concerned, we leave this matter in our hands, and continue with the rest of the matter so that after the formulation, we have a short tea break to consider that formulation. We will then come back on this matter. Can I get your consent? (CONSENT GIVEN).

We can now go to the next Item B on page 26: The formulation regarding the name and territory. Do we have any problem with that? (NO PROBLEM)

Can we approve this for the presentation to the CC as our formulation? (APPROVED)

That concludes our discussion on Blocks 7 & 9.

Item 6: Finalisation of draft constitutional provisions for Block 8 (Foreign Relations and International Law.

Dr Heunes: Chairperson, thank you. It seems that we are faced with something of a majestic problem. According to the revised work programme, it was the responsibility of this Theme Committee to deal with Foreign Relations and International Law. And then follows the usual suggested frame work for Agenda item 11, which is Foreign Relations and International Law. According to that same programme, Theme Committee 5 was tasked with the responsibility of what was referred to as "General Matters." And then one finds in the suggested framework for Agenda item 9, which is the 'General Matters', a reference to International Law. Probably because cognisance wasn't taken of the areas of responsibility of this Theme Committee, Theme Committee 5 has forwarded to the Constitutional Committee a report on International Law, in which that committee says that the proposed new section 231 (the one that deals with Customary International Law, the status thereof, the conclusion of treaties and the incorporation thereof) is their main concern. I would submit that that is not so. The fact of the matter is that we are now faced with a situation where Theme Committee 5 has already presented a report to the CC. I would like to say at the outset that it is actually a very good report prepared by probably the foremost expert in International law in South Africa, Professor Dugard. But the practical situation is that we are now faced with a situation where the CC is already ceased of a report regarding International Law, dealing with all the aspects of International Law with which this committee has dealt, and in relation to which it has before it a draft report. I don't know, Chairperson, how you propose to deal with that problem. I could perhaps, in order to be of some assistance to you, say that at this point it has become very technical because what will be going to the Constitutional Committee essentially, are two drafts of clauses in a future constitution regarding International Law, its application and the ratification of treaties.

Perhaps both reports could go to the drafts people who will be working with this, and they can then take from the reports that which they think will fit in best with the scheme of the new constitution. But before I refer to the draft report itself, I think I should inform the other members, through you Sir, of the fact that we've got something of a logistical problem now, in the sense that there is one report before the CC; and a draft report of this Theme Committee in the process of going to the Constitutional Committee.

Mr Marais:

Chairperson, this is really a problem that I also identified. I spoke to Dr. Heunes about it this morning. I don't know how we should deal with this. Wouldn't it be one way of handling the matter to ask Dr. Heunes to discuss this with Professor Dugard, and to see if they can come to some sort of an arrangement, so that we can go back to the CC and report that we tabled this after the technical experts have discussed it. We can then go along with what they have reported, and what has happened up till now in the Constitutional Committee. I've had the benefit of the briefing document and the discussions, I've read all their documentation and I'm also a lawyer, but this is above my comprehension. This is a difficult one.

Prof. Koda:

As somebody who has knowledge of Intentional Law, may I suggest that all the International Law aspects become the subject of an adhoc Technical Committee which could consist of Dr. Heunes and Professor Dugard, and perhaps a couple of other people. They could just sit together, perhaps once, and produce a formulation and put that forward before the CC or the Theme Committees again, because it is a very technical area which is governed by precepts of International Law to a large degree.

Chairperson:

It's not a question of technical experts sitting together in a corner and rounding up issues. It must comply with party policies which are involved. So, it's not a question of Dr Heunes and Prof. Dugard sitting in a corner and formulating. The parties are to have a say on the direction in which they want to handle International Law. Perhaps we should look it along those lines.

Mr Niehaus:

Chairperson, I can't agree more with you that we can't simply leave it in the hands of technical experts. But I think what is necessary is that we request the technical experts to look at the documentation that comes from this Theme Committee, and the documentation from the other Theme Committee, and see if we can marry it. But then it has to come back to this Theme Committee for further consideration. And only after that process has happened, can it be tabled truly as having been checked by all the different political parties to the CC. Any other approach I think is going to lead us into even further difficulties.

Mr Marais:

I'm quite prepared to go along with that suggestion that's been made by Mr Niehaus. Perhaps we should also consider another interim step. If it becomes clear that it could be of value/assistance after the discussion between Dr. Heunes and his colleague, perhaps we could, together with them, have a meeting of the two core-groups before we refer the matter back to this committee. In the final instance, I'm in agreement with Mr Niehaus. This committee must accept the responsibility to finalise it politically.

Speaker:

I think the suggestion from the NP is okay that we then have a meeting of the core-groups. But I must emphasise that it has to come back to this committee after that for final approval.

Chairperson:

So, if I understand, the general consensus is that the two technical committees should meet, see what has been produced by both Theme Committee and try to combine the two. After having processed that, it must then come to the Theme Committee for final direction as to what is to be done.

Dr Heunes:

Chairperson, could I ask for a mandate to liaise also with the law advisors of the Department of Foreign Affairs, as well as those of the Department of Justice and also the drafts persons attached to the Constitutional Assembly. We are now really into the field which requires expertise in drafting firstly. And secondly, I know that the two departments which I mentioned first have a real interest and particular concerns as regards this matter.

Speaker:

Chairperson, I don't think we can have any objection to that. These are very technical matters, and if we can get those other expertise involved, that would be helpful.

Chairperson:

Thank you very much. It seems there is no problem with the approach. Then we can approve it along those lines, and that will, for a moment, dispose of Item 6.

Item 7:Public Participation: Is there any comment? (NO COMMENT)

Item 8:General:We don't have anything under 'General.'

Instead of concluding, we have requested Professor Koda to make a formulation, then perhaps after getting that formulation, we should adjourn for five minutes to allow parties to have a look at it, so that we can have meaningful approaches when we return. Is the formulation available?

Prof. Koda:

I just relied upon the kind of languages used in the interim constitution and in the constitutional principle, and I've got two alternatives. One is that *'conditions shall be created for the development and promotion of the equal use and enjoyment of South Africa's official languages.'*

The other one is: *'Conditions shall be created for the development and promotion of the use and enjoyment of all South Africa's languages.'*

So, the first one emphasises *'equality'* between the 11 languages. In the current chapter on Fundamental Rights, section 31 already provides that *'Every person shall have the right to use their language and to participate in the cultural life of his/her choice.'* I should imagine without knowing that that right will go in, more or less, as it is in the final constitution. So that if there were 5000 Mongolian speakers in South Africa, they would be entitled to use their language and participate in the culture of their choice, in any case, as a fundamental right. So, that right or its successor in the final constitution would back up if the first alternative was gone for. If the emphasis was placed on official languages, there would still be a fundamental human right looking after the people whose home language is not included among the official languages. On the other hand, the fact that there will be a fundamental right doesn't place any duty on the government to develop and promote those other languages other than the 11 official languages. So, those are the suggestions. The first one's emphasis is on *'equality'* and *'official languages'*, the second one has the emphasis on development and promotion of the use and enjoyment of all South African languages, not just the official languages. But it excludes equality.

Chairperson:

Thank you Professor Koda. I hope the parties have heard what has been said, so that they will be able to consider it in a short break of five minutes. Can I ask one question before we adjourn. Do both options comply with the constitutional principles?

Speaker:

Dr Heunes thinks that the first one doesn't. I think it does. Can I say why? The constitutional principle 11 says: *'The diversity of language and culture shall be acknowledged and protected, and conditions for their promotion shall be encouraged.'* Now, the protection of everybody's language and culture, as in that human right, if included in the final constitution, would constitute conditions for the promotion of languages.

Chairperson:

Thank you. Let's have the 10 minutes break.

(TEN MINUTES RECESS)

Chairperson:

Thank you very much for cocasing and giving us also the opportunity of cocasing. As you all know, it is almost the difficult part of our work now, when you come to these emotive issues where one would like to take sufficient care. I think the results of our discussion will be communicated by some of our members. I can say that we are agreed on the first formulation given by Professor Koda. The other people are included already in that one. We would go along with that one. We'd like to suggest a slight amendment on (I) of our submission. Mr Gumede will do that.

Mr Gumede:

Thank you, Mr Chairperson. On (i) we propose that everybody shall have the right to communicate with Government, Parliament or court in any of the above official languages.

Chairperson:

I hope the suggested amendment of the ANC has been heard. What comment do other parties have?

Speaker:

Always with reservation that I've made initially, Chairperson, this is a better formulation. You have done good work.

Professor Koda:

Can I just suggest that the word 'above' be left out because the official languages are the only ones listed above. It will be deleted technically later on, so we might as well do it now.

Chairperson:

It seems we are agreed on the outstanding matter, which was this formulation. We hope then that the technical experts will formulate this in the light of what we have said. In the absence of any other matter, that should bring our meeting to a conclusion, except if somebody wants to raise something.

Mr Marais:

It's a very straight forward and easy matter. In view of what I've said earlier, that we would like the present section 3 to be retained in principle, in the Analytical Survey on page 24, the second contentious issue, we would be more happy if that '2' is deleted so that it reads: '*The continuation in force of section 3 of the 1993 constitution...*' That will actually reflect our position. In broad terms, I think the other parties' approach is different. The other parties would support elements and subclauses of section 3. But section 3 as a whole, I believe, is not acceptable to any of the other parties.

Prof. Koda:

From a technical point of view, we would need to recast the second sentence on page 21 because the piece in the Analytical survey is merely an attempt to put in summary form for those people who are not prepared to read the whole report. If you look at point 2 at the top of page 21: *'The NP proposes that the status of Afrikaans and English and any other languages as envisaged in section 3.32 of the 1993 constitution should not be diminished.'* Now that will have to be changed because what is in that sentence is what is in fact in section 3-2, not what is in the whole of section 3. Section 3 in the current constitution has got 10 subsections. It includes provisions relating to the Pan South African Language Board, legislation relating to languages, etc. So, that sentence couldn't any longer stand as it is in my submission if the piece in the analytical survey is to be changed.

Speaker:

Chairperson, all that needs to be done is that once again reference to subsection 2 should be deleted, because we refer to Afrikaans and English and any other languages. In our submission, that's actually what we proposed.

Chairperson:

Perhaps Mr Marais, just to get it more clearer, you want section 3 as a whole to be retained, but then the other parties are not against that. They are against one portion in that. In other words, what is in contention is only a portion of what you want to be retained, not the whole thing. Only 3-2 is contentious.

Mr Marais:

If everyone could just look at section 3. Section 3-2 actually permeates into the whole section. Take, for instance, 3-9F. It states something about a principle of non-diminution of rights relating to status of languages, etc. So, it cannot only refer to 3-2.

Speaker:

I don't think there would be any sort of problem if the NP decides to do that. It is within their right to say that everything is in contention. However, one should sight that for us to be able to guide the debate at the level of the CC, it might be proper for us to specifically refer to certain sections. For instance, we had no problem with section 3-1. We all agreed with that. Subsection 9F deals with legislation anyway. We don't want that in our constitution because by the time the new constitution is in force, that section will fall off completely. So, the NP is free to debate it at the level of legislation. But I think we really have specify what is in contention for us to guide the debate at the level of the CC.

Speaker:

Thank you. I'm not going to enter into a lengthy debate on that. As long as it is made clear somewhere that we have reserved our position, and that in the CC we would like to argue once again, as a basis for the debate on the whole of section 3. As long as that is made clear, I have no specific difficulty with that. We can let it stay as it is.

Mr Gumede:

Perhaps, it will be better now to look at where we are - whether what the NP says makes contention or noncontention. And I believe that if it is not contentious, the issue then becomes outstanding. But I think the status has got to be cleared.

Perhaps to then clarify, the NP has to declare that something is contentious, so that at the next stage, it becomes easier to carry on with the issue. Thank you.

Mr Niehaus:

All that we want is that in the CC we are going to argue for the retention of most of what is said in section 3. That's all. As long as we have that right, I have no problem. This is going to lead to a fairly lengthy debate in the CC as well. We want to take part in the debate from as broad a basis as possible, so that the whole process of give and take can then actually start. Because that's the place where this matter is going to be really negotiated.

Chairperson:

I think it is clear enough that we have understood the NP as saying they would like to have English, Afrikaans and other languages retained. I don't know if we should take the matter any further.

Mr Niehaus:

Chairperson, I don't think we need to really. But perhaps we can help the NP by simply saying that '*continuation in force of section 3 with regards to the status of English and Afrikaans and any other languages as envisaged in the 1993 constitution should not be diminished*' is contentious. Let's just leave that little (2) out. It's clear that it's then with regards to that issue that they are concerned about section 3. I would have a problem if we simply declare open the whole section 3 as contentious, while there are many matters in section 3 that other parties do not disagree with, and which is clearly not in contention.

Chairperson:

Will the technical committee be able to coin that for us. Thank you very much. Then in the absence of that, I hope there's no other issue which is being raised. The meeting is declared closed. Thank you.

