

2/4/6/6/1/14

CONSTITUTIONAL ASSEMBLY

Theme Committee 6.4

SECURITY APPARATUS

**12 June, 1995 (24th meeting)
14:00**

Room G26

DOCUMENTATION

**CONSTITUTIONAL ASSEMBLY
24th MEETING
THEME COMMITTEE 6.4
SECURITY APPARATUS
MONDAY, 12 June 1995**

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

Date: 12 June 1995

Time: 14:00

Venue: G26

AGENDA

1. **Opening and welcome**
2. **Minutes of the previous meeting**
 - 2.1 Minutes of the twenty third meeting, 5 June 1995 (pg 1-5)
3. **Matters arising**
4. **Party submissions on intelligence**
5. **Outstanding items from Police Text (pg 6-10)**
 - 5.1 Structure of the Police Service
 - 5.2 Powers of the Police Service
 - 5.3 Executive Control
6. **Any other business**
7. **Closure**

**H EBRAHIM
EXECUTIVE DIRECTOR**

Enquiries: Katharine McKenzie (Tel 24 5031 or 403-2174)

CONSTITUTIONAL ASSEMBLY

**MINUTES OF THE TWENTY THIRD MEETING OF SUBTHEME COMMITTEE 4,
THEME COMMITTEE 6**

**SPECIALISED STRUCTURES OF GOVERNMENT
SECURITY APPARATUS**

MONDAY, 5 JUNE 1995

PRESENT

Schreiner J (Chairperson)

Alant TG	Appelgryn MS
Bloem D	Breytenbach WN
Ebrahim EI	Gogotya NJ
Jordaan JA	Mabudafhasi J
Makana S	Marais J A
Mashimbye JN	Mpahlwa MB
Mti LM	Mtintso, TE
Selfe J	Sisulu L
Sosibo J	Waugh JCN
Yengeni T	

Apologies: Motshabi C; Nhlanhla JM; Phillips IM; Selfe J; Van Eck J

A Cachalia; K McKenzie and A Seegers were in attendance.

1 OPENING AND WELCOME

Ms Schreiner opened the meeting at 09:10 and welcomed the members.

2 MINUTES OF PREVIOUS MEETINGS

2.1 Minutes of the twenty second meeting, 29 May 1995

The minutes were adopted subject to the following changes:

2.1.1 The third paragraph under item 4.1 was amended to read: "The DP stated that the Constitution should not allow a situation in which the President was able to undergo a ritualistic consultation with the parliamentary committee and then

appoint whoever the President desired to."

2.1.2 The fourth paragraph under item 4.11 was amended to read:
"It was agreed that the term Ombud, rather than Defence Commissioner should be used."

3 MATTERS ARISING

There were no matters arising.

4 OUTSTANDING ITEMS FROM THE DEFENCE REPORT

4.1 Role of the parliamentary committee in the appointment of the Chief of the Defence Force and the Secretary of Defence (item 1)

The NP stated that the President shall nominate candidates for the Chief of the NDF and Secretary of Defence and that these appointments would be confirmed by the parliamentary committee. The parliamentary committee would exercise veto power over these appointments.

The DP supported this.

4.2 Military Service Commission (item 4)

The NP stated that service conditions of members should be determined by a Service Commission. The NP agreed that there were special circumstances which required special measures for members of the defence force but that this could be through a branch of the Public Service Commission. The details of this should be contained in legislation.

The DP stated that details of a service commission for the military should be left out of the Constitution but contained in legislation governing the Public Administration Commission.

It was agreed that the report should include details of the debate about the Military Service Commission and that various options should be provided by the drafters.

4.3 Relationship between the defence force and the police when deployed under a state of emergency or national defence/war

It was agreed that this should be contained in subordinate legislation and not in the Constitution.

4.4 Parliamentary oversight (item 7)

The report was amended to indicate that there would be parliamentary oversight committee(s).

4.5 Declaration of a state of national defence/war

It was agreed that two formulations should be provided in the draft text: one setting out a seven day time period within which parliament should be convened in order to ratify the declaration of a state of national defence/war by the President; and a formulation in which this detail is left to legislation.

Attention was drawn to Prof Deon Fourie's submission (on page 25 of volume 14 of submissions) in which he highlighted the fact that in the USA the Constitution provided for the President to be Commander-in-Chief of the armed forces and for Congress to declare war. On some 200 occasions Presidents, including Bill Clinton, have evaded the impact of the second provision by not declaring war but alleging that the status of Commander-in-Chief enables them to order the armed forces into military operations, thereby bypassing Congress.

It was agreed that the legislature should be the primary base from which troops are deployed and that provision should be made to ensure this.

5 SUBMISSIONS VOLUMES 13 AND 14

5.1 Submission from the Conscientious Objector Support Group (COSG)

The COSG submission (on page 1 of volume 14 of submissions) stated that the Bill of Rights should include the right to conscientious objection to military service.

The ANC stated that it was in favour of this and believed that the right to conscientious objection should be entrenched in the Bill of Rights.

The NP believed that this would only apply when there was conscription and that this should be contained in legislation.

Mr Cachalia stated that the Constitution would provide for freedom of conscience and that this would provide for conscientious objection. The right to conscientious objection should be detailed in legislation.

It was agreed that this would be included in the report as a point of contention.

5.2 Arms production

It was noted that several submissions had been received dealing with arms production and that the committee would deliberate on this once

the findings of the Cameron Commission were available.

6 DRAFT CONSTITUTIONAL TEXT ON PROVISIONS DEALING WITH POLICE

The draft Constitutional text on the police service was adopted after the following discussion and changes were made. The amended report, some of which requires redrafting, is attached as annexure "A".

6.1 Preface to the section of the Constitution dealing with security apparatus

It was agreed that this section be drafted after the Committee had finalised its discussion on all of the security apparatus.

6.2 Supremacy of the Constitution

It was agreed that it was unnecessary to include a supremacy clause in the draft text, as a clause to this effect had been drafted by Theme Committee One.

6.3 The security services shall consist of the national defence force, the police service and such intelligence services as may be established by law

It was agreed that this was the preferable formulation.

It was agreed that intelligence was a national function, and this should be contained in the Constitution.

6.4 Code of conduct

It was agreed that subsection (c) should be drafted for each section of the security apparatus as the doctrine of minimum force had different applications for each of the security apparatus.

6.5 Structure of the police service

The NP and the ANC supported (A2) under option (1). It was agreed that further discussion on this would take place, and that submissions would be made to the secretariat by 9 June 1995.

6.6 Powers of the police service

It was agreed that parties would formulate positions on whether the powers of the police service should be contained in the Constitution or in legislation. This issue would be revisited at the next meeting of the Committee.

6.7 Appointment of the National Commissioner

It was not clear if different procedures should be adopted for the appointment of the National Commissioner and the Chief of the Defence Force and Secretary for Defence.

It was agreed that parties would formulate positions on this, including whether the details of appointments should be included in legislation.

6.8 Community policing

It was agreed that a clause would be drafted providing for the guiding principle of community policing. This would be accompanied by a footnote explaining some of the problems with including community policing in the Constitution.

6.9 Discrimination

It was agreed that the prohibition against discrimination in the security services should be properly covered in an equality provision in the chapter on fundamental rights.

7 ANY OTHER BUSINESS

7.1 Next meeting of the Committee

Party submissions on intelligence would be tabled at the next meeting of the Committee. It would take place at 14:00 in G26.

Submissions on intelligence and the draft constitutional text on police should be submitted to the Secretariat prior to the meeting.

8 CLOSURE

The meeting rose at 14:35.

FIRST DRAFT

**Status: Prepared by Theme Committee 6.4 Technical
Advisors considered by the Theme Committee on 5 June
1995**

POLICE SERVICE

Preface to the section of the Constitution dealing with security apparatus¹

General section on all security structures

1. (1) The security services shall be structured by law and shall at all times act in accordance with and within the confines of the law.²

(2) The security services shall consist of the national defence force, the police service and such intelligence services as may be established by law.

(3) The President, the Executive and Parliament shall be responsible for safety and security.

¹ This will be drafted after the completion of discussion on police, defence and intelligence. There are four places in which this can be included within the Constitution, namely:

1. Within the provisions of the Constitution
2. In a preface to the Chapter dealing with the security apparatus
3. In the preamble
4. In the directive principles, which are being discussed by Theme Committee 4

² This section is repeated from section 214(1) of the Interim Constitution. It covers the agreement reached by all parties and it is suggested that it be maintained in this form.

Obviously the section is not only applicable to the police, but to other arms of the security apparatus as well and as such should be included in a general section.

(4) The security services shall at all times act subject to the direction of the competent political authority.

Code of conduct for members of the security services

2. (1) Members of the security services shall at times act in accordance with the standards of political neutrality, impartiality and professionalism required of the security services in terms of the Constitution. In particular, members of the security services -

- (a) shall be obliged to comply with all lawful orders;
- (b) shall refuse to comply with a manifestly illegal order which would constitute an offence or would breach international law on armed conflict binding on the Republic;
- (c) shall at all times be obliged to use force that will not exceed the requirements of the circumstances;³
- (d) shall not be entitled to hold office in any political party or political organisation;

³ It was agreed that a clause to this effect should be drafted for each of the security apparatus, as the doctrine of minimum force had different applications for each.

- (e) shall refrain from furthering or prejudicing any party political interest.⁴

Structure of the police service

Option 1

3. (1) The police service shall be structured to function at both national and provincial levels under the direction of the national and provincial governments, respectively.
- (2) A local government may establish a police service to function within its area of jurisdiction.

Option 2

3. (1) There shall be a national police service functioning under the direction of the national government.
- (2) The provincial government shall be competent to establish and regulate provincial, metropolitan or municipal police services and the public order force.

⁴ A Constitutional prohibition on the furthering or prejudicing of party political interests by members of the security service is required by Constitutional Principle XXXI.

Option 3

3. (1) There shall be a national police service functioning under the directions of the national government.

(2) A provincial and local government shall be competent to establish and regulate provincial and metropolitan or municipal police services: Provided that an Act of Parliament shall lay down uniform norms and standards for policing at all levels.⁵

Functions of the police service

4. (1) Functions of the police service shall be:

- a) the prevention of crime;
- b) the investigation of any offence or alleged offence; and
- c) the protection of the safety and security of the Republic⁶ and all people within the Republic⁷

Powers

⁵ The third option was added pursuant to a letter received from the Democratic Party.

⁶ It is necessary to insert the word Republic to cover both the maintenance of the safety and security of persons as well as the state itself.

⁷ Alternative formulation: the protection of the safety and security of the Republic and all its inhabitants.

5. No drafting has been done.⁸

Executive control

6. The President shall appoint the National Commissioner.⁹

Parliamentary oversight

7. A (joint)¹⁰ multi-party committee of Parliament shall be established and maintained for the purpose of continuous Parliamentary oversight of all matters pertaining to police.¹¹

Community policing

(Clause still to be drafted)¹²

⁸ It is considered inappropriate to draft when there is no agreement on exactly what functions will be dealt with at a national and provincial level. Reference should be had to section 218 and 219 of the interim Constitution which sets out the responsibilities of the national and provincial commissioners respectively. This example will be followed if it is desirable to set out the full list of functions in the Constitution. The appropriate approach is for the functions to be set out in legislation. The advantage of the former approach is that it will put an end to any political controversy after the Constitution is adopted. The advantage of the latter approach is that functions can be included at, say, provincial or local levels where the police service has developed in a way which allows for this. With reference to the agreements on order and public order policing, this will be dealt with under the functions set out under the responsibilities of the National Commissioner.

⁹ Presidential powers will be dealt with as a general provision within the Constitution. Clarity is sought as to whether the role of the parliamentary committee in confirming appointments is placed in the Constitution.

¹⁰ Whether or not there are two Chambers of Parliament remains a matter for debate.

¹¹ This clause may be covered by clauses being drafted in Theme Committee 2 relating to parliamentary committees.

¹² Community policing is not a self evident concept and it may not be appropriate to mandate this in a Constitution, while the important content of the concept could be included as a principle to guide policing.