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**A06**

**CONSTITUTIONAL  
ASSEMBLY**

**THEME COMMITTEE 1**

**CHARACTER OF  
DEMOCRATIC STATE**

**30 JANUARY 1995**

**ROOM M515**

***DOCUMENTAION***

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# CONSTITUTIONAL ASSEMBLY

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## MEETING OF THEME COMMITTEE 1

### CHARACTER OF THE DEMOCRATIC STATE

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

**Date:** Monday, 30 January 1995  
**Time:** 08h00  
**Venue:** Room M515 (Marks Building)

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#### AGENDA

1. Opening
2. Previous minutes
3. Matters arising
4. Public Participation Programme
  - a) Report from Core Group
  - b) Report from Directorate
5. Submissions and Work Plan
  - a) Report from Core Group
  - b) Processing Synopsis  
(See document: *Synopsis as at 12 January 1995*)
6. General
7. Closure

**[NB: ALL MEMBERS ARE REQUESTED TO BRING TO THE MEETING COPIES OF THE CONSTITUTION AND THE STANDING RULES OF THE CONSTITUTIONAL ASSEMBLY]**

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**H EBRAHIM  
EXECUTIVE DIRECTOR:  
CONSTITUTIONAL ASSEMBLY**

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**Enquiries: L. Rammble and K. Radu (Tel: 403 - 2268)**

**CONSTITUTIONAL ASSEMBLY  
MINUTES OF THE FIRST MEETING OF THEME COMMITTEE 1**

**CHARACTER OF THE DEMOCRATIC STATE  
WEDNESDAY 25 JANUARY 1995 (08H30)**

Present  
Mahlangu NJ (Chairperson)

|                 |                       |
|-----------------|-----------------------|
| Booi MS         | Chiba L               |
| Chikane MM      | Chiwayo LLL           |
| Cwele CS        | Fani LM               |
| Goosen AD       | Gumede DM             |
| Hangana NE      | Janse van Rensburg AP |
| Kekana NN       | Lekgoro MK            |
| Mabuza M        | Macozoma SJ           |
| Marais A        | Marais PG             |
| Meshoe RK       | Mngomezulu PG         |
| Mohale M        | Mokaba P              |
| Moorcroft EK    | Mtshali LPHM          |
| Mukhuba TT      | Mulder PWA            |
| Ncube D         | Niehaus CG            |
| Nobunga BJ      | Nzimande BE           |
| Ripinga SS      | Routledge NC          |
| Seaton S        | Shope GN              |
| Shope NR        | Sisulu AN             |
| Streicher DM    | Tshivase TJ           |
| Van Deventer FJ | Van Zyl ID            |
| Vilakazi BH     | Zondi MK              |

**Apologies: EA Schoeman  
W Felgate**

**1. OPENING**

The meeting was opened by the chairperson.

**2. MINUTES**

The minutes of the previous meeting were adopted.

**3. MATTERS ARISING**

None

#### 4. CORE GROUP REPORT

The Secretariat gave a brief report of the decisions taken at the Core-Group meeting held on the 24 January 1995.

#### 5. Workplan and schedule of meetings

The meeting agreed to endorse the Core Group decision to extend deadlines for Blocks 1. The Core Group was mandated to produce a work schedule for Theme Committee 1, wherein Theme 1 concerns, deadlines for drafts and submissions together with our public participation programme would be clearly highlighted.

Realising, the need for a two-pronged strategy the meeting decided that a targeted approach and an all-inclusive approach would have to be developed when dealing with organised and unorganised sectors of the community.

Provincial forums, workshops and seminars would also have to be used within the limited time constraints.

The Core-Group was further mandated to consolidate the various party pronouncements on the Community Liaison Programme and present it to the Theme Committee for discussion.

#### 6. Technical Committees

Mr. PG Marais reported that the technical committees are in the process of being set-up.

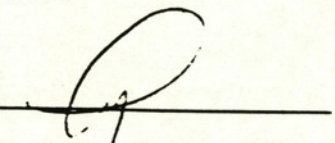
#### 7. Submissions

The core group proposed to the meeting that the secretariat together with the Technical Experts should collate and process the submissions received and that it would remain the responsibility of the Theme Committee to give political meaning to the process.

The meeting agreed to the proposal whilst mandating the core group to discuss the process of submissions since the Technical Committees have still not been set up.

The meeting rose at 09h50.

CHAIRPERSON SIGNATURE: \_\_\_\_\_

  
F. 26/01/95

NATIONAL PARTY PROPOSALS : DEMOCRACY AND THE CHARACTER THE STATE

The concept of "democracy" as encapsulated in the letter and spirit of the Constitutional Principles, implies the following fundamental characteristics:

1. A Constitutional State (Rechtsstaat) based on an entrenched Constitution which constitutes the supreme law. The formal aspects of the Constitutional State include:
  - (i) the vertical and horizontal separation of powers in a balanced way, and which will prevent the abuse of power by any organ of state at all levels;
  - (ii) the principle of legality viz the basis of all state action is the law, of which the Constitution forms the basic normative standard;
  - (iii) the protection of fundamental rights and freedoms in a justiciable and entrenched bill of rights;
  - (iv) state action shall be transparent, predictable and proportional to the objective(s) it sets out to achieve;
  - (v) an independent judiciary shall protect and enforce the

Constitution and all fundamental rights;

- (vi) the exercise of state power shall be controllable and within set limits.

The material aspects of the Constitutional State imply that all organs of state will exercise their powers with a view to the advancement of the higher values which are encapsulated in and reflected by the spirit of the Constitution and which, e.g., include the promotion of a rights culture and respect for the Constitution by all state organs as well as by the citizenry.

2. One sovereign state, a common citizenship, and adult suffrage based on a common voter's roll.
3. Representative Government at all levels of government viz national, provincial and local. This principle implies proportional representation in all legislative and executive structures.
4. A multi-party system and regular elections.
5. An electoral system based on proportional representation, which may possibly include elements of geographical representation.
6. Transparent, anti-totalitarian and accountable government.



7. The vertical separation of power shall be founded on autonomous and original powers for each level of government.
8. At the national level Parliament shall comprise of two Houses viz, the National Assembly and the Senate. The Senate shall represent the provinces at national level and its members shall be empowered to act authoritatively on behalf of the provinces.
9. Levels of decision-making will be determined with regard to the quality and effectiveness of the rendering of services in accordance with the principle of subsidiarity.
10. The role and function of civil society and its institutions shall be recognised and protected as will collective rights of self-determination of inter alia, linguistic, cultural and religious groups. The viability of corporate self-determination, as a method for furthering these objectives and the letter and spirit of Constitutional Principle XII, should be explored.
11. Loyalty to the single sovereign state shall be premised on the enhancement of national reconciliation whilst, simultaneously, the richness of the diversity of language, culture and religion shall be protected and conditions for their promotion be encouraged.

12. The preamble shall embody the encompassing and encapsulating philosophy of the Constitution and should, as such, have normative value.
13. The principle of the Constitutional State (Rechtsstaat) and the Constitution as the Supreme Law, shall be inviolable and non-repealable.
14. Proposals regarding national symbols and official languages will be put forward in due course.

In the final analysis the "democracy" envisaged in the Constitutional Principles and with which the new Constitution shall comply, shall be premised on the values of freedom and equality. Those values imply:

- that the state obtains its value by securing the liberty of the people;
- that no discrimination on whatever grounds shall be tolerated or allowed in the pursuit to achieve substantive equality for all;
- the minority must have the right to political opposition and the chance to itself becoming the majority;

- that the majority has to respect the liberty of the people and the rights of the minority. Hence, "the majority" is not identical with "the people" and "the state" is not identical with "society".



# INKATHA

Inkatha Freedom Party

Iqembu leNkatha Yenkululeko

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## THEME COMMITTEE No. 1 CHARACTER OF THE DEMOCRATIC STATE

### FIRST REPORT ON DEMOCRACY AND CHARACTER OF THE STATE<sup>1</sup>

#### SUPREMACY OF THE CONSTITUTION:

1. The Constitution in its entirety shall be the supreme law of the land. Therefore, the Constitution shall be fully and entirely justiciable by means of a Constitutional Court, and shall be the parameter for the validity and legality of the legislation of Parliament.
2. The constitution shall bind not only all organs of the Republic but shall also apply to all legal relations.
3. In relation to their respective areas of constitutionally recognized autonomy, the Constitution shall be implemented not by the national government but rather by the Provinces, and by social and cultural formations, or by individuals, respectively. For instance, the constitutional right to health entrenched in the national constitution shall be implemented exclusively by the provincial legislation and administrative action.

#### SEPARATION OF POWERS (Form of State):

1. There shall separation of powers between national and provincial levels of government.
2. Provinces shall be the primary government of the people and shall be entitled to exercise any type of power and function which can adequately and properly be exercised at provincial level.
3. Only the powers of the national government ought to be listed in the constitution, while all other powers should be left to the Provinces.
4. Provinces shall have full judicial powers in all matters of their competence.

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<sup>1</sup>. The IFP makes this submission under protest, for the Constitutional Committee should withhold consideration of the matters covered in this report and further development of the work program so as to allow international mediation to take place.

5. National government shall have no overrides and, as a rule, Provinces shall have exclusive powers. Both the national and the provincial levels of government shall enjoy exclusive powers. Relations between the two levels of government shall be regulated by checks and balances, intended as a predetermined set of mutual interferences among the powers of each level of government, also based on the extension by relevancy or implication of the exclusive powers of the national level of government into the areas of competence of the Provinces, as in theory is the case in the U.S. system (i.e.: interstate commerce). In specific areas of provincial competence, the techniques of national framework legislation regulating exclusive provincial powers could also be used in matter which requires concurrence between the national and provincial levels of government, provided that national legislation shall not be so detail to actually regulate, or exercise the actual function in the matter concerned.
6. There shall be separation of powers between all levels of government and civil society.
7. Individuals as well as social, cultural, political and economic formations shall be recognized and guaranteed a sphere of protected constitutional autonomy defined by the interests which they are capable of self-regulating and administering and in respect of which no government has a compelling reason of public interest to intervene.

**WHAT TYPE OF DEMOCRACY:**

1. The principle of participatory and/or direct democracy should be constitutionally entrenched in addition to the principle of representative democracy [see *infra*].
2. The principle of the autonomy of individuals as well as of economic, social, political and cultural formations should also be entrenched with respect to all activities for which any level of government does not have a compelling justification of public or national interest to regulate, control or directly exercise.  
*Inter alia*, the foregoing principle recognizes the autonomy of churches, political parties, professional associations, chambers of commerce, universities, arts and culture organization, family structures, traditional communities, economic enterprises, civics, private contractual autonomy in economic and personal matters, et cetera.
3. The principles of (a) transparency, (b) political accountability and (c) civil accountability of governmental structures shall be constitutionally entrenched.

**REPRESENTATIVE DEMOCRACY:**

1. The principle of political representation of government and regular elections should be constitutionally entrenched with respect to national, provincial and "primary" local governments (excluding local government substructures, including traditional communities)<sup>2</sup>.
2. The implementation of this principle with respect to provincial and local government shall be within the exclusive competence of the Provinces.

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<sup>2</sup>. This principle relates to what the constitution should require. The law may extend proportional representation to substructure.

3. The electoral system is a fundamental element characterizing the form of government and the type of democracy. Therefore the constitution should set out the general principles of the national electoral system, leaving to the law the task of implementing such principles, so as to leave sufficient flexibility for future developments<sup>3</sup>. The provincial electoral systems should be within the exclusive competence of provincial constitutions.

#### **PARTICIPATORY DEMOCRACY:**

1. The constitution shall entrench the notion of participation of affected public and private interests in the formative process of an administrative action or regulation.
2. The constitution shall entrench the notion of participation of affected public and private interests in the legislative process.
3. Provision shall be made for referenda at all levels of government to be held at the request of a reasonably small number of dissatisfied citizens.
4. Provision shall be made for the recognition of the right to petition any government structure.

#### **TRANSPARENT AND ACCOUNTABLE DEMOCRACY**

1. The right of access to all government information and private data banks information shall be recognized in the constitution, with customary qualifications and exclusions, subject to judicial review.
2. The notion of administrative justice and judicial reviewability of all administrative actions shall be constitutionally entrenched.
3. Public officials shall be personally responsible for gross negligence and malice.
4. War shall be prohibited as a means to solve international controversies and shall only be allowed to defend the State's sovereignty over its territory.

#### **TYPE OF STATE**

1. South Africa should be a social but not a socialist state.
2. Private property and free-market enterprise shall be protected and the direct interference of government in economic matters shall be severely limited<sup>4</sup>.
3. The constitution should contain all recognized socio-economic rights along with constitutional imperatives which mandate the legislature to operate to remove social injustice, and promote the social growth of all South Africans.

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<sup>3</sup>. The details of the IFP proposals on suffrage, proportionality and electoral systems will be tabled in the IFP submission for the as 7th Report, per approved work program.

<sup>4</sup>. The detailed aspects of this principles will be set out in the third Report to this Theme Committee relating to the Economic Constitution, as per approved work program.

# **ANC SUBMISSION TO THEME COMMITTEE ONE ON THE CHARACTER OF THE STATE AND DEMOCRACY**

## **CHARACTER OF STATE**

- 1) South Africa shall be a united and undivided nation.
- 2) The Constitution shall commit the country to a non-racial and non-sexist order based on the inherent dignity of all persons.
- 3) There shall be a Bill of Rights guaranteeing all accepted human rights including socio-economic rights that shall be, where appropriate, applicable against all sources of power.

## **DEMOCRACY**

- 4) There shall be elected government at Regional and Local levels whose powers shall be set out in the Constitution, but whose powers shall be subject to the need for national uniformity, national reconstruction and development and the values in the Bill of Rights.
- 5) Parliament shall, subject to the Constitution, be the supreme law-maker, and the expression of the will of the people. The executive will be accountable to Parliament.
- 6) Government shall be formed by the majority party that may enter into coalitions with other parties represented in parliament.

THEME COMMITTEE ONEDEMOCRACY AND THE CHARACTER OF THE DEMOCRATIC STATESubmission by the Democratic Party

The Democratic Party believes that the hallmark of the democratic state is the existence of a representative system of government which makes possible the reasonably regular alternation of government, or the realistic possibility of this through free and fair elections at regular intervals.

In our deeply divided society, in which voting along racial lines was a characteristic of our first free election, the problem is very much that of how will democracy prove compatible with the racially based voting that seems likely to continue? Put another way, how does one avoid the tyranny of the majority which has so characterized other deeply divided societies in Africa and elsewhere? In these societies the nationalist party wins the founding election, further entrenches itself in power in future elections and forms a mutually parasitical relationship with the state until removed by a coup or, after long decades, by a convulsive election.

The DP believes that 50% + 1 gives a party the right to govern (because that is democracy), but 50% + 1 does not give a party exclusive right to unfettered power. In any democratic state worthy of the name there have to be checks on the executive.



Examples of these include regular free and fair elections, freedom of the media and information, and the protection of Human Rights.

In terms of constitutional principle XIV of Schedule 4 of the interim Constitution, the final Constitution is obliged to provide for the "participation of minority political parties in the legislative process in a manner consistent with democracy". The Democratic Party believes that this constitutional injunction will be best furthered by a constitution containing the following provisions:

- (1) Supremacy of the Constitution over the ordinary law. (The Interim Constitution (I.C.) provides that the constitution shall be the supreme law - Sec.4 and principle 4)
- (2) The maximum devolution of power. For this reason the DP supports federalism, since it distributes power, brings government closer to the people, is a defence against tyranny and accommodates pluralism. (The I.C. makes provision for the establishment of provinces and local government with provincial legislative and executive authorities with exclusive and coordinate powers principles - 16, 18, 19, 20, 22.)
- (3) The power of the Federal Government and the States to be specially defined and entrenched. (The I.C. lays down the powers of the provinces in Schedule 6 of the Constitution Sec 61 provides for limited entrenchment.)

- (4) A system of voting based on Proportional Representation (P.R.). (The I.C. makes provision for P.R. in Sec. 40 principle 8.)
- (5) Protection of all basic human rights of each citizen under a justiciable Bill of Rights. (The I.C. makes provision for the protection of Fundamental Rights in Chap 3 principle 2).
- (6) A separation of powers between the legislature, executive and judiciary, with appropriate checks and balances to ensure accountability, responsiveness and openness. (This is provided for in Schedule 4 (VI) of the I.C.)
- (7) The creation of the office of Public Protector and a Commission to safeguard Human Rights and gender rights. (The I.C. makes provision for both of these under Chap. 8)

