2/4/2/1/1/37

TC2/30/(1)

CONSTITUTIONAL ASSEMBLY

THEME COMMITTEE 2

STRUCTURE OF GOVERNMENT

THEME COMMITTEE MEETING

MONDAY
04 SEPTEMBER 1995
09h00-13h00
M46

DOCUMENTATION

CONSTITUTIONAL ASSEMBLY

THEME COMMITTEE 2
STRUCTURE OF GOVERNMENT

THEME COMMITTEE MEETING

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

Date : Monday 04 September 1995

Time : 09h00-13h00

Venue : M46

AGENDA

1. **OPENING AND WELCOME**

2. **MINUTES OF PREVIOUS MEETING**
   (see separate documentation pack (TC2/30(2))

3. **FEEDBACK ON TC2 REPORTS TO CONSTITUTIONAL COMMITTEE**

4. **REPORT ON THE SENATE**
   (see this documentation pack pp 2-22)

   Decision required: Approval and referral to CC

5. **DRAFT FORMULATIONS: PROVINCIAL GOVERNMENT STRUCTURES**
   (see separate pack TC2/30(2)

   Decision required: Approval and referral to CC

6. **DRAFT FORMULATIONS: CONSTITUTIONAL AMENDMENT**
   (see this documentation pack pp 23-30)

   Decision required: Approval and referral to CC

7. **DRAFT FORMULATIONS: TRADITIONAL AUTHORITIES**
   (see separate pack TC2/30(2)

   Decision required: Approval and referral to CC

8. **PROF. RAATH'S SUBMISSION ON SELF-DETERMINATION**
   (see this documentation pack pp 31-40)

HASSEN EBRAHIM
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CONSTITUTIONAL ASSEMBLY

THEME COMMITTEE 2

STRUCTURE OF GOVERNMENT

REPORT ON THE SENATE

FORTH DRAFT

(As at 31 August 1995)

THEME COMMITTEE 2

INTERIM REPORT ON BLOCK 2

FOURTH DRAFT OF THE SENATE REPORT

INTRODUCTION

This interim report deals with the Senate.

The report consists of two parts. The first is a numbered, tabular summary of the conclusions reached by the Theme Committee on each of the matters listed. In other words, it reflects the most recent state of the discussion in the Theme Committee.

The second part, also in summarised form and in the same sequence as in the table, contains the gist of the written submissions received by the Committee. The two parts of the draft should be read together.

It should be noted that a position adopted by a political party in a written submission, as reflected in the second part of the draft, may differ from that ascribed to the party in the table. During the discussion of the relevant issues and the various submissions in the Theme Committee, political parties had reserved the right to reconsider their position in order to ascertain areas of agreement and contention. As far as possible, such a change in position has been reflected in the summary of submissions.

Proposals made by the Commission on Provincial Government, are referred to separately in the draft.

In the "Comment" column of the table, reference is also made to the gist of the submissions of individuals and other organisations, where such submissions had been received. These references are made in italics.

NOTE: At its meeting of 12 June 1995, the Theme Committee considered the question whether the Technical Advisors should be instructed to draft the provisions on the Senate. It was agreed that it would not be a fruitful undertaking in view of the difference among political parties on fundamental issues relating to the Senate (such as the nature and purpose of the Senate, and its powers and functions). The Technical Advisors have discussed the matter with Mr Grové, Legal Advisor to the CA, who indicated that it would be better to wait for greater clarity before drafting.

THE SENATE

CP/SEC	CONSTITUTIONAL ISSUE	AGREEMENT	CONTENTION	COMMENT
	1. Terminology	Senate		
	2. Nature and purpose of the Senate	1. There should be a second chamber of the Legislature, the Senate [see PAC position under "Comment"]. 2. The primary function of the second chamber is to represent the provinces and provincial interests. 3. Parliamentary laws affecting provincial interests can only be passed with the concurrence of the Senate. 4. In respect of other parliamentary legislation, the Senate will have a power of review.	The definition and representation of interest groups in the Senate.	1. **PAC:** the need for a second chamber has to go beyond the representation of provinces if the position and powers of the latter are clearly stated in the Constitution. 2. The **FF** would see the Senate represent cultural and other interest groups; to be a nation-building and reconciliation institution, and to reduce conflict potential. 3. The **ANC** submission raises the question whether, in view of the "completely new character" of the Senate, the term "Parliament" should be confined to the NA; and whether the Executive should be accountable to the NA only (see also "Relationship towards the Executive"). 4. The **NP** sees the Senate as a fully-fledged second chamber of Parliament, with a power of review of all parliamentary legislation. 5.The **CPG** is in favour of a second chamber if it is designed to provide internal control over government and broaden representation of e g provinces or other significant interests in society.
				Individual and other submissions: The DP (Gauteng region) proposes that the Senate should be more powerful, not merely representing provincial interests, but also interacting with the provinces on a meaningful basis. O Bothma: Provinces to send delegates to second chamber to advise State President; K Gottschalk questions the existence of a senate, the function of which is merely to duplicate the NA; Senator J Selfe proposes that the primary purpose of the Senate should be representation of provincial interests (he proposes a number of mechanisms to achieve this), with as secondary purpose review (again with suggestions as to how this could be effected).

CP/SEC	CONSTITUTIONAL ISSUE	AGREEMENT	CONTENTION	COMMENT
	3. Composition and size: 5, 7, 8 and 10 per province	Equal number of senators per province.	Number of senators per province	**1. The CPG expressed itself satisfied with equal representation of provinces, and would appear to favour ; the current 10 per province; it did not voice an opinion on the representation of other interest groups, but draws the attention of the CA to this matter.** ***For individual submissions on the size of Parliament, see also the report on the NA under the heading "Size of the NA". The DP (Gauteng region) proposes equal representation for each province. JA Louw proposes that the Senate should be composed on an ethnic basis; Senator J Selfe proposes a Senate of 10 members per province; PS Clark proposes equal representation of provinces, one third the size of the NA; CG Snyman proposes a Senate with equal representation of minority groups; AH Taute proposes 60 members.***
	4. Appointment/nomination		**1. Whether or not Senators to be elected/nominated by and from Provincial Legislatures.** **2. Whether, in the appointment/nomination of Senators, the principle of proportionality should apply.**	**1. The CPG proposed that senators be elected members of the provincial legislatures, nominated by the legislatures on a proportional basis.** ***Individuals and others: The DP (Gauteng region) proposed direct election on a list system. JM Vosloo merely proposes election of a Senate; N Athinodorou proposes that the Senate should consist mainly of competent academics appointed by the President; Senator J Selfe proposes that the Senate be elected on a 10 member party list basis, to allow smaller parties to be represented as well; PI du Preez proposes 10 Senators per province, serving for 6 years; RH Addison proposes a Senate directly elected by members of professional and other organisations of civil society; J Glyn favours a directly elected Senate representing provinces; PJ Sousa proposes a 50 member Senate (5 per province and 5 appointed by the President from 5 important functional areas); PS Clark would like Senators to be at least matriculated land owners.***

CP/SEC	CONSTITUTIONAL ISSUE	AGREEMENT	CONTENTION	COMMENT
	5. Recall		**1. The ANC expressed itself in favour of the principle of recall of Senators by the provincial legislatures and/or executives. The FF and the DP, during the first discussion, also indicated that they were not in principle against the notion of recall. The NP is against recall.** **2. Question of rotation of Senators.**	**To be revisited.**

CP/SEC	CONSTITUTIONAL ISSUE	AGREEMENT	CONTENTION	COMMENT
	6. Powers and functions	1. Senate to maintain close relationship with provinces. 2. Legislation relating to provinces may be introduced in Senate. 3. Senate to have an effective say on bills relating to provinces, including allocation of resources.	1. Powers i r o ordinary bills (excluding those affecting provinces, and financial bills): whether concurrent/equal powers or less influence for Senate (see item 1 under "Comments"). 2. Powers i r o financial bills (excluding bills dealing with resources to provinces): whether equal/concurrent powers of less influence for Senate (see 2 under "Comments"). 3. Procedure in the event of disputes between NA and Senate (see 3 under "Comments").	1. ANC: less influence, power of review, DP/IFP/NP: Equal powers. FF: Not explicit. 2. ANC/DP: NA has final say (FF as well?) NP/IFP: equal powers with NA. 3. Only the NP expressly referred to dispute resolution between NA and Senate. 4. In terms of the ANC's proposal for the Senate, the Senate may not be required to consider all bills dealt with by the NA, as under the IC. 5. Other matters raised by parties, affecting the powers and functions of the Senate: 5.1 ANC: (i) disputes between national and provincial levels i r o concurrent legislative powers; (ii) specific role for Senate in approval of framework legislation i r o exclusive executive functions for provinces; (iii) Senate as channel through which provinces participate in fiscal matters, in particular the budget. 5.2 FF: (i) Senate to interact with corporate groups; (iii) initiate judicial review of legislation (compare NP position); (iii) to seek consensus and dialogue; (iv) to protect the Constitution; (v) to protect minorities/minority rights.

CP/SEC	CONSTITUTIONAL ISSUE	AGREEMENT	CONTENTION	COMMENT
			4. Whether all bills dealt with by the NA, have to be considered by the Senate as well (see 4 under "Comments").	5.3 DP: Participate through Joint Parliamentary Committees in ratification of treaties, international agreements, appointment of ambassadors and High Commissioners, appointment of key personnel in the security services. 5.4 NP: (i) Extended role in certain top executive and judicial appointments, other constitutional bodies, and national Commissioner of Police Service and Chief of Defence Force; (ii) watchdog over constitutionality of bills (compare FF position). 6. General comments: The ANC would like to see the judicial determination of the pre-eminence of national legislation replaced by the provinces themselves through the Senate determining the desirability of the national legislation. 7. The CPG - a. supports the present sec 59(1) on separate adoption of bills b. in the case of disagreement between the NA and the Senate, proposes that if the joint committee's proposals are rejected, the bill be introduced in both houses after six months, and only then, failing agreement, be submitted to the houses sitting together resolution before the introduction of bills c. is in favour of the current arrangement on money bills, but proposes that administrative processes be strengthened to provide for dispute d. proposes that bills i r o the functional areas of provinces be introduced in the

CP/SEC	CONSTITUTIONAL ISSUE	AGREEMENT	CONTENTION	COMMENT
				Senate first, and only be passed with the concurrence of the majority of a province's senators if the matter relates to a specific province e. supports the current provisions on constitutional amendment f. proposes the incorporation of CP XVI, XX, XXI, XXII, XXIII, and XXVI into the final Constitution. *Individuals/organisations: **ODISA** would see the Senate evaluate the working of Parliament and the Executive on an ongoing basis. It would further see Senators giving up party affiliations and stand as representatives of their regions, committed to an impartial and objective approach. **N Athinodorou** proposes that the Senate be able to veto bills detrimentally affecting the PR provinces and that bills concerning the provinces be introduced in the Senate only; **Senator J Selfe** proposes equal powers for the NA and Senate, with the Senate in addition having other constitutionally distinct tasks and possibly representing other interests as well; **PI du Preez** proposes that provincial disputes be resolved by the Senate, and that the Senate has the sole power to impeach the President (for legislation a 66% majority will be needed); **T Sonjica** would see money bills introduced at a joint sitting of the NA and the Senate; **RH Addison** proposes a veto power and the election of the Ministers of Defence, Law and Order and Justice.*

CP/SEC	CONSTITUTIONAL ISSUE	AGREEMENT	CONTENTION	COMMENT
	7. Relationship towards the executive		Whether the Executive should be accountable to the Senate as well.	**1. ANC:** Proposes that the Executive should not be accountable to the Senate. **2. Other parties** propose accountability to Parliament (see "Relationship towards the Executive" in report on NA). *Submissions from individuals/organisations:* ***ODISA*** *proposes that the Senate can mediate between Parliament and the Executive.*
	8. Relationship towards provinces (see also "Nature and purpose of the Senate" and "Powers and functions" above)		Nature and form of relationship	**1. The ANC** proposes a close and ongoing relationship between the Senate and the provinces by virtue of the composition of the Senate. **2. The DP** proposes Standing Consultative Committees with the provinces. **3. The FF** proposes a constitutional mandate for the Senate to interact with the provinces **4. The IFP** would give the provincial premiers and/or their ministers or designees the "privilege of the floor" in the Senate. ***The DP (Gauteng region) is in favour of a constitutional requirement of meaningful interaction; constitutionally provided committees of the Senate to achieve this.***

CP/SEC	CONSTITUTIONAL ISSUE	AGREEMENT	CONTENTION	COMMENT
	9. Party discipline		Extent to which Senators subject to party discipline	1. The ANC proposes that in order to avoid voting along party lines, the Executive should not be accountable to the Senate. 2. The NP proposes that a convention be developed that senators are not required to vote along line on matters directly affecting the provinces.
Section 49	**10. President and Deputy President**	Current provision		1. The FF proposes retention of the current provision. 2. The CPG is also in favour of a provision resembling sec 49.
Section 50	**11. Qualifications for membership**		1. Whether Senators should be members of Provincial Legislatures/Executives. 2. Whether they should be registered voters in their province/have ordinary residence there.	1. ANC: A senator has to be a member of a provincial legislature/executive 2. DP: Registered voter in province 3. FF: Current provision, and registered voter in province 4. NP: same as for NA, with requirement of ordinary residence in the province. 5. CPG: Unless its proposal of Senators being members of provincial legislatures is accepted, it is in favour of the current provision, coupled with the requirement of ordinary residence. *The DP (Gauteng region) proposes a residential requirement in addition to any other qualifications.*

CP/SEC	CONSTITUTIONAL ISSUE	AGREEMENT	CONTENTION	COMMENT
Section 51	**12. Vacation of seat and filling of vacancy**		Right of recall.	1. ANC: In support of recall and replacement by provincial legislatures/executives. 2. FF: Current provision. 3. NP: Current provision, in terms of stated position. Whole issue of vacancies to be revisited after clarity on nature and purpose of the Senate. CPG: a. Would retain sec 51(1) (resignation etc) b. In favour of free mandate (i e change of party does not terminate membership of Senate) c. Following a dissolution of a provincial legislature, the Senators concerned should resign and be replaced i t o CPG proposals for nomination of senators d. Vacancy to be filled for remainder of term.
Section 53	**13. Sittings of Senate**		Whether the Senate should be a perpetual body, as proposed by the ANC.	1. The ANC's proposal of the Senate as a perpetual body, may affect the question of sessions/sittings. 2. FF: Current provision. 3. NP: current provision, i t o stated position. 4. CPG: Current provision.

CP/SEC	CONSTITUTIONAL ISSUE	AGREEMENT	CONTENTION	COMMENT
Section 54	**14. Quorum**			**1. FF:** Current provision **2. NP:** Current provision i t o stated position. **3. CPG:** Current provision. This matter might be contentious depending on which powers are given to the Senate. If the IFP model is followed of concurrent legislative power then the same quorum as that of the National Assembly might be required.
Section 55	**15. Powers, privileges, immunities and benefits**	Current provision, subject to revisiting of benefits of Senators (depending on the kind of Senate).		Revisit benefits (sec 55(4)) in conjunction with kind of Senate. **CPG:** Current provision.
Section 56	**16. Sitting when disqualified**	Current provision.		**CPG:** Current provision.
Section 57	**17. Joint sittings**			Revisit after finalising powers of the Senate. **CPG:** Current provision.
Section 58	**18. Rules and orders**	Current provisions, except for joint committees and sittings (depending on kind of Senate).		Revisit. **CPG:** Current provision.
	19. Oath or affirmation	Current provision.		

CP/SEC	CONSTITUTIONAL ISSUE	AGREEMENT	CONTENTION	COMMENT
	20. Other issues not addressed by parties, but dealt with under National Assembly (see report on NA): 1. Summoning of Senate 2. Sessions 3. Term and dissolution (see also "Sittings of Senate") 4. Continuation of membership after dissolution of Senate 5. Rights of non-members entitled to be in Senate (see also "Relationship towards provinces") 6. Voting right of presiding officer 7. Committees (see also "Relationship towards provinces") 8. Majorities for decisions (but see "Powers and functions") 9. Assent to bills 10. Public access to the Senate 11. Role of minority parties (see also "Composition", "Appointment/election", "Powers and functions").			Revisit after powers and functions have been finalised.

REPORT ON SUBMISSIONS: THE SENATE

1 Introduction

This part of the report should be read with the tabular summary above and the sections on the National Assembly, the Presidency and the Cabinet. It deals with the Senate under the following headings, which were identified on the basis of relevant Constitutional Principles, submissions received, and after discussion by the Theme Committee:

1 Terminology

2 Nature and purpose of the Senate

3 Composition and size

4 Appointment/election

5 Recall

6 Powers and functions

7 Relationship towards the Executive

8 Relationship towards provinces

9 Party discipline

10 President and Deputy President

11 Qualifications for membership

12 Vacation of seat and filling of vacancy

13 Sittings of Senate

14 Quorum

15 Powers, privileges, immunities and benefits

16 Sitting when disqualified

17 Joint sittings

18 Rules and orders

19 Oath or affirmation

20 Other matters

The purpose of this part of the report is to summarise the gist of submissions received. It should be noted that the IFP was not present during the discussion of this part of the report.

2 Submissions

Submissions on the Senate were received from -

1 Parliamentary political parties
2 The Commission on Provincial Government

3 Other organisations (including non-parliamentary parties)

4 Individuals

3 Constitutional Principles

The following Constitutional Principles have a direct bearing on the aspects of the Senate dealt with in this report: IV (Constitution supreme law of the land, binding all organs at state at all levels of government); VI (separation of powers and checks and balances); VIII (representative government and proportional representation in general); X (formal legislative procedures); XIV (participation of minority political parties in the legislative process); XVII (democratic representation at each level of government); XVIII.4 (if there is a second chamber, two-thirds majority for change of powers, boundaries, functions or institutions of provinces).

4 Submissions received on the aspects of the Senate listed above

4.1 *Terminology* .

All parties, the CPG and individual submissions that expressed themselves on a second chamber, agreed that it should be called the Senate.

4.2 *Nature and purpose of the Senate*

4.2.1 The ANC proposes, within the context of "cooperative governance", and with a view to "good government", the senate as a perpetual body and a forum for provinces to bear co-responsibility for the management of the country as a whole. The Senate should be the main player in the relationship between the national and provincial levels. The Senate should be a working, as opposed to a reasoning and debating, body.

4.2.2 The DP proposes the Senate as second chamber of Parliament, with as primary but not exclusive functions review of legislation and representation of provincial interests.

4.2.3 The FF proposes that the Senate should reflect the diverse nature of the country and society, and that its primary function should be to look after provincial and cultural interests.

4.2.4 The IFP proposes that the Senate should represent the provinces, and should monitor the Executive i r o certain activities which fall outside provincial competencies.

4.2.5 The NP proposes the Senate as the second chamber of Parliament with as main purpose representation of provinces, and control and revision and the promotion of good government as secondary purposes. The Constitution should contain an express reference to the main purpose of the Senate.

4.2.6 The PAC regards the Senate as redundant if its primary function is to look after provincial interests in a system in which the position and powers of the provinces are clearly circumscribed in the Constitution.

4.2.7 The CPG is in favour of a second chamber if it is designed to provide internal control over government and broaden representation of e g provinces or other significant interests in society.

Individual submissions:

O Bothma: Provinces to send delegates to second chamber to advise State President; K Gottschalk questions the existence of a senate, the function of which is merely to duplicate the NA; Senator J Selfe proposes that the primary purpose of the Senate should be representation of provincial interests (he proposes a number of mechanisms to achieve this), with as secondary purpose review (again with suggestions as to how this could be effected).

4.3 *Composition and size*

4.3.1 The ANC proposes a senate of 5 or 10 members per province, drawn from provincial legislatures and/or executives, and possibly local government, as a single delegation.

4.3.2 The DP is in favour of 7 members from each province.

4.3.3 According to the FF, the size of the Senate would depend on its functions: it specifically proposes 8 Senators per province nominated by parties in the provincial legislature; 8 nominated by the "National Council of Traditional Authorities"; 8 elected by voters on the "community voters roll" (at least the Afrikaner one); an undefined number for other "cultural self-determination" entities. (In an earlier proposal, reference was also made to representation for "corporate entities", such as organised labour, organised business and organised culture.)

4.3.4 The IFP proposes equal representation of provinces (number unnamed).

4.3.5 The NP proposes 10 Senators per province.

4.3.6 The CPG is satisfied with equal representation of provinces, and would appear to favour the current 10 per province; it does not express an opinion on the representation of other interest groups, but draws the attention of the CA to this matter.

For individual submissions on the size of Parliament in general, see also the report on the NA under the heading "Size of the NA". JA Louw proposes that the Senate should be composed on an ethnic basis; Senator J Selfe proposes a Senate of 10 members per province; PS Clark proposes equal representation of provinces, one third the size of the NA; CG Snyman proposes a Senate with equal representation of minority groups; AH Taute proposes 60 members.

4.4 *Appointment/election*

4.4.1 The ANC proposes that senators be appointed from the members of the Provincial Legislature and/or Executive.

4.4.2 The DP proposes indirect election by the provincial legislatures on a proportional basis for 4 years.

4.4.3 The FF suggests that 8 senators per province be nominated by the parties represented in the Provincial Legislature.

4.4.4 The IFP supports election by the provincial legislatures for 5 years, in consultation with provincial cabinet.

4.4.5 The NP is in favour of indirect election by the provincial legislatures on proportional basis, with a change in the present formula in favour of smaller parties.

4.4.6 The CPG proposed that senators be elected members of the provincial legislatures, nominated by the legislatures on a proportional basis.

4.4.7 The DP (Gauteng region) proposed direct election on a list system.

Individuals: JM Vosloo merely proposes election of a Senate; N Athinodorou proposes that the Senate should consist mainly of competent academics appointed by the President; Senator J Selfe proposes that the Senate be elected on a 10 member party list basis, to allow smaller parties to be represented as well; PI du Preez proposes 10 Senators per province, serving for 6 years; RH Addison proposes a Senate directly elected by members of professional and other organisations of civil society; J Glyn favours a directly elected Senate representing provinces; PJ Sousa proposes a 50 member Senate (5 per province and 5 appointed by the President from 5 important functional areas); PS Clark would like Senators to be at least matriculated land owners.

4.5 *Recall*

The ANC expressed itself in favour of the principle of recall of Senators by the provincial legislatures and/or executives.

4.6 *Powers and functions*

4.6.1.1 The ANC proposes a fourfold function for the Senate:
a. To have a close and ongoing relationship with the provinces
b. To have real say over NA bills relating to provinces, and articulate provincial interests at national level
c. Initiate legislation relating to provincial interests, and be co-responsible for the country as a whole
d. Less influence over national legislation dealing with exclusive national competencies.

4.6.1.2 The ANC specifically proposes the following i r o legislative competence:
a. disputes between the national and provincial levels on concurrent legislative powers:
i. if approved by the Senate, such a bill will be deemed necessary and desirable for the purposes of the "national interest, norms and standards"
ii. if a dispute cannot be resolved by judicial interpretation of the Constitution, precedence will be given to national legislation;
b. specific role for Senate in the approval of framework legislation i r o exclusive executive functions for provinces
c. Senate's consent to be obtained i r o allocation of resources to provinces.

4.6.1.3 The ANC further proposes that the Senate should have a say over the content of national subordinate legislation affecting the provinces.

4.6.1.4 The Senate should also be the channel through which the provinces participate in fiscal matters, in particular the budget.

4.6.1.5 The Senate would have no power to block financial legislation.

4.6.1.6 The Senate would have the power to block or delay bills dealing with provincial matters, and to review other legislation.

4.6.2 The DP is in favour of equal powers with the NA, except -
a. i r o money bills (excluding money bills allocating funds to provinces), where the NA would have overriding powers; and
b. legislation affecting powers, functions and boundaries of provinces.

4.6.3 The FF proposes that the Senate be empowered to interact with provinces and/or corporate groups, and review, revise and veto legislation relating to the provinces; also to initiate judicial review of legislation; to seek consensus and dialogue; to protect the Constitution; to protect minorities and minority rights.

4.6.4 The IFP maintains that the Senate must have concurrent legislative power with the National Assembly.

4.6.5 The NP would see the Senate:
a. consider all bills
b. in the case of ordinary bills that after disagreement with the NA have been considered by a joint committee, consider the bill separately again
c. retain its powers i t o sec 61 i r o provincial boundaries
d. have the same powers i r o money bills as in the case of ordinary bills
e. retain its current powers i t o bills relating to provincial finance and constitutional amendments
f. be the chamber where bills affecting the provinces should be introduced (also for the provinces) on bills referred to in e.
g. having an extended role in certain top executive and judicial appointments, other constitutional bodies, and national Commissioner of Police Service and Chief of Defence Force
h. be represented in the CPG and Financial and Fiscal Commission
i. be a watchdog over constitutionality of bills.

4.6.6 The CPG -
a. supports the present sec 59(1) on separate adoption of bills
b. in the case of disagreement between the NA and the Senate, proposes that if the joint committee's proposals are rejected, the bill be introduced in both houses after six months, and only then, failing agreement, be submitted to the houses sitting together
c. is in favour of the current arrangement on money bills, but proposes that administrative processes be strengthened to provide for dispute resolution before the introduction of bills
d. proposes that bills i r o the functional areas of provinces be introduced in the Senate first, and only be passed with the concurrence of the majority of a province's senators if the matter relates to a specific province
e. supports the current provisions on constitutional amendment
f. proposes the incorporation of CP XVI, XX, XXI, XXII, XXIII and XXVI into the final Constitution.

Individuals/organisations: ODISA would see the Senate evaluate the working of Parliament and the Executive on an ongoing basis. It would further see Senators giving up party affiliations and stand as representatives of their regions, committed to an impartial and objective approach.
N Athinodorou proposes that the Senate be able to veto bills detrimentally affecting the provinces and that bills concerning the provinces be introduced in the Senate only; Senator J Selfe proposes equal powers for the NA and Senate, with the Senate in addition having other constitutionally distinct tasks and possibly representing other interests as well; PI du Preez proposes that provincial disputes be resolved by the Senate, and that the Senate has the sole power to impeach the President (for legislation a 66% majority will be needed); T Sonjica would see money bills introduced at a joint sitting of the NA and the Senate; RH Addison proposes a veto power and the election of the Ministers of Defence, Law and Order

and Justice.

4.7 *Relationship towards the Executive*

4.7.1 ANC: Proposes that the Executive should not be accountable to the Senate.

4.7.2 Other parties propose accountability to Parliament (see "Relationship towards the Executive" in report on NA).

Submissions from individuals/organisations: ODISA proposes that the Senate can mediate between Parliament and the Executive

4.8 *Relationship towards provinces*

(see also "Nature and purpose of the Senate" and "Powers and functions" above)

4.8.1 The ANC proposes a close and ongoing relationship between the Senate and the provinces by virtue of the composition of the Senate.

4.8.2 The DP proposes Standing Consultative Committees with the provinces.

4.8.3 The FF proposes a constitutional mandate for the Senate to interact with the provinces

4.8.4 The IFP would give the provincial premiers and/or their ministers the of designees the "privilege of the floor" in the Senate.

4.9 *Party discipline*

4.9.1 The ANC proposes that in order to avoid voting along party lines, the Executive should not be accountable to the Senate.

4.9.2 The NP proposes that a convention be developed that senators are not required to vote along line on matters directly affecting the provinces.

4.10 *President and Deputy President*

4.10.1 The FF proposes retention of the current provision.

4.10.2 The CPG is also in favour of a provision resembling sec 49.

4.11 *Qualifications for membership*

4.11.1 ANC: A senator has to be a member of a provincial legislature/executive.

4.11.2 FF: Current provision

4.11.3 NP: same as for NA, with requirement of ordinary residence in the province.

4.11.4 CPG: Unless its proposal of Senators being members of provincial legislatures is accepted, it is in favour of the current provision, coupled with the requirement of ordinary residence.

4.12 *Vacation of seat and filling of vacancy*

4.12.1 ANC: In support of recall and replacement by provincial legislatures/executives.

4.12.2 FF: Current provision.

4.12.3 NP: Current provision, in terms of stated position.

4.12.4 CPG: a. Would retain sec 51(1) (resignation etc)
b. In favour of free mandate (i e change of party does not terminate membership of Senate)
c. Following a dissolution of a provincial legislature, the Senators concerned should resign and be replaced i t o CPG proposals for nomination of senators
d. Vacancy to be filled for remainder of term.

4.13 *Sittings of Senate*

4.13.1 The ANC's proposal of the Senate as a perpetual body, may affect the question of sessions/sittings.

4.13.2 FF: Current provision.

4.13.3 NP: current provision, i t o stated position.

4.13.4 CPG: Current provision.

4.14 *Quorum*

4.14.1 FF: Current provision

4.14.2 NP: Current provisions i t o stated position.

4.14.3 CPG: Current provision.

4.15 *Powers, privileges, immunities and benefits*

The parties did not address this issue.

CPG: Current provision

4.16 ***Sitting when disqualified***

This matter was not addressed by the political parties.

CPG: Current provision.

4.17 ***Joint sittings***

This matter was not addressed by political parties (but see report on NA).

CPG: Current provision.

4.18 ***Rules and orders***

Parties did not express themselves on this issue.

CPG: Current provision.

4.19 ***Oath or affirmation***

1. FF: Current provision

4.20 ***Other matters***

Other issues not addressed by parties, but dealt with under National Assembly (see report on NA):

1. **Summoning of Senate**
2. **Sessions**
3. **Term and dissolution (see also "Sittings of Senate")**
4. **Continuation of membership after dissolution of Senate**
5. **Rights of non-members entitled to be in Senate (see also "Relationship towards provinces")**
6. **Voting right of presiding officer**
7. **Committees (see also "Relationship towards provinces")**
8. **Majorities for decisions (but see "Powers and functions")**
9. **Assent to bills**
10. **Public access to the Senate**
11. **Role of minority parties (see also "Composition", "Appointment/election", "Powers and functions").**

CONSTITUTIONAL ASSEMBLY

THEME COMMITTEE 2

STRUCTURE OF GOVERNMENT

CONSTITUTIONAL AMENDMENT

(BLOCK 7)

DRAFT FORMULATION

(As at 21 August 1995)

FIRST DRAFT - 21 AUGUST 1995

Status: Prepared by TC 2 Technical Advisers

PART 1

DRAFT FORMULATION

This Constitution shall be amended only by a bill adopted by at least two-thirds of the members of the National Assembly.[1]

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[1] (a) Depending on the nature and function of the Senate it should be determined whether an amendment requires a joint sitting of both houses or whether the required majority should be achieved in each house sitting separately.

(b) The NP proposes the entrenchment of the Constitution at four levels:

(i) absolute entrenchment of the commitment to a democratic form of state and democratic mechanisms;
(ii) general entrenchment of the constitution by requiring a two-thirds majority for all other provisions;
(iii) specific entrenchment of provincial matters by retaining s 62(2) of the interim Constitution; and
(iv) 'judicial entrenchment' of the most basic fundamentals of a democratic state, articulated in a schedule to the Constitution, by requiring that the Constitutional Court certifies that any amendment is in accordance with these fundamental principles.

(c) When considering this issue the CC should take cognisance of Constitutional Principle XVIII (4) which reads:

> Amendments to the Constitution which alter the powers, boundaries, functions or institutions of provinces shall in addition to any other procedures specified in the Constitution for Constitution amendments require the approval of a special majority of the legislatures of the province, alternatively if there is such a chamber a two-thirds majority of a chamber of Parliament composed of provincial representatives, and if the amendment concerns specific provinces only, the approval of the legislatures of such provinces will also be needed .

CONSTITUTIONAL ASSEMBLY

THEME COMMITTEE 2

STRUCTURE OF GOVERNMENT

CONSTITUTIONAL AMENDMENTS

(BLOCK 7)

DRAFT FORMULATIONS

(As at 31 August 1995)

FIRST DRAFT - 31 AUGUST 1995

Status: Prepared by TC 2 Technical Advisers and CA Law Advisers for TC 2 discussion.

AMENDMENT TO THE CONSTITUTION

1. Parliament may by law repeal or amend any provision of this Constitution.[1] Any such repeal or amendment[2] shall require the approval of at least two- thirds[3] of the total number of members of the National Assembly[4]

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[1] **Should this section not be subject to repeal or amendment, the words "except this section" must be inserted at the end of the sentence.**

[2] **The NP proposes the entrenchment of the Constitution at four levels:**

- **(i) absolute entrenchment of the commitment to a democratic form of state and democratic mechanisms;**
- **(ii) general entrenchment of the constitution by requiring a two-thirds majority for all other provisions;**
- **(iii) specific entrenchment of provincial matters by retaining section 62(2) of the interim Constitution; and**
- **(iv) 'judicial entrenchment' of the most basic fundamentals of a democratic state, articulated in a schedule to the Constitution, by requiring that the Constitutional Court certifies that any amendment is in accordance with these fundamental principles.**

[3] **When considering this issue the CC should take cognisance of Constitutional Principle XVIII(4) which reads:**

> **Amendments to the Constitution which alter the powers, boundaries, functions or institutions of provinces shall in addition to any other procedures specified in the Constitution for Constitution amendments require the approval of a special majority of the legislatures of the province, alternatively if there is such a chamber a two-thirds majority of a chamber of Parliament composed of provincial representatives, and if the amendment concerns specific provinces only, the approval of the legislatures of such provinces will also be needed.**

[4] **This provision might have to be revisited once finality is reached on the question of the second House.**

provided for in this Constitution.[5]

[5] **This number relates to total number as provided for in this Constitution, disregarding any casual vacancies.**

THEME COMMITTEE 2

DRAFT REPORT ON BLOCK 7

CONSTITUTIONAL AMENDMENTS

INTRODUCTION

1 This draft report deals with constitutional amendments. As in the case of the electoral system, submissions received from political parties on constitutional amendments were, in general, brief. The same applies to the small number of other submissions (cf volume 27 of the submissions made to Theme Committee 2).

2 Only two political parties (the ANC and the NP) made separate submissions on constitutional amendments. Other parties (the ACDP, the DP and the IFP) referred to amendments in other submissions.

3 In its deliberations on constitutional amendments, the Committee was guided by Constitutional Principle XV, which provides that amendments to the Constitution require special procedures involving special majorities. It was also mindful of section 74 of the Interim Constitution which prohibits the amendment of specified parts of the Constitution (eg the amendment of the Constitutional Principles), and, similar to section 62, contains the principle of a two-thirds majority. The Committee also noted the principle contained in section 62(2) of a special procedure for the amendment of certain sections affecting the provinces.

4 This draft report consists of three parts. The first is a numbered, tabular summary of the conclusions reached by the Theme Committee on each of the matters listed. The positions of political parties are briefly reflected in the "Comments" column of the table. The second part of the report deals with the written submissions received by the Committee. The third part consists of a draft formulation.

5 In view of the fact that the written submissions of the political parties were brief, they are included in full in the second part of the report. As far as other submissions are concerned, useful and accurate summaries have been prepared by the CA Administration. These summaries are included in the second part of the report.

PART 1

CP/SEC	CONSTITUTIONAL ISSUE	AGREEMENT	CONTENTION	COMMENT
	1. Constitutional provisions not subject to amendment.		No agreement on issue	The ANC (and by implication the DP) propose that all provisions of the Constitution should be open to amendment. The NP suggests that the commitment to a democratic form of state and democratic mechanisms should be entrenched absolutely.

CP/SEC	CONSTITUTIONAL ISSUE	AGREEMENT	CONTENTION	COMMENT
XV	1 Special majorities for constitutional amendment	Most parties agree		1 The ACDP (vol 2 p 3) refers to amendment with the consent of the people and local and provincial governments. 2 The FF and PAC are silent on this issue. 3 The ANC, DP (Political Party Submissions Block 2/3 (composite edition) p 3), the IFP (IFP's General Submissions as at 24 Feb 1995 p 24), and the NP agree that there should be special majorities.

CP/SEC	CONSTITUTIONAL ISSUE	AGREEMENT	CONTENTION	COMMENT
XV	2 Special procedures	Most parties agree	Nature of procedures	1 The ANC refers to "relevant constitutionally prescribed majorities and procedures". 2 The DP, FF, and PAC do not address this matter specifically. 3 The IFP proposes, in addition to special majorities, a "cooling off period", two separate legislative processes or a single legislative process and a referendum. 4 The NP is in favour of certain aspects of the Constitution being beyond amendment; and besides specific majorities, a special procedure for the amendment of provincial matters, and a schedule of

CP/SEC	CONSTITUTIONAL ISSUE	AGREEMENT	CONTENTION	COMMENT
	3 Where/how majority should be obtained			1 The ANC and NP refer to the total number of both houses* of Parliament. (The NP states specifically "in a joint sitting" of both houses.) 2 The ACDP, DP, FF, IFP, and PAC are silent on this issue. * *This is dependent on clarity about the position of the Senate.*
XV	4 Extent of majority	Two thirds		1 The ANC, the IFP and the NP support a two-thirds majority. (The IFP refers to "no less than two thirds".) 2 The other parties are silent on this issue.

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1995-08-31

To :The Secretary TC2

From: Prof A W G Raath

Dear Mr Nene,

REPORT ON THE INCLUSION OF REFERENCES IN THE TEXT OF THE CONSTITUTION IN TERMS OF PARAGRAPHS (f) and (g) OF THE REPORT OF TC2 OF 28.08.1995.

Please find enclosed the requested report for the next meeting of TC2.

Yours sincerely

PROF A W G RAATH
TECHNICAL ADVISOR

SUBMISSION ON REFERENCE(S) IN THE TEXT OF THE CONSTITUTION IN TERMS OF PARAGRAPHS (f) AND (g) OF THE REPORT OF THEME COMMITTEE 2 OF MONDAY 28 AUGUST 1995

Background

This presentation is the outcome of agreements reached at Theme Committee 2 and contained in paragraphs (f) and (g) of the report of Monday 28 August 1995. In terms of the agreement reached that "reference(s) should be included, somewhere in the text, substantiating this principle" and that "(t)he most appropriate form of constitutional provision is one that would not preclude the pursuit and/or realisation through negotiations of the right of self-determination in some form, the outcome of which will be binding on any future government" (my emphasis) the following report is submitted.

The gist of these formulations is that Constitutional Principle XXXIV should be accompanied by a formulation in the body of the Constitution conconcretizing Principle XXXIV and to make it enforceable.

The right of self-determination

Self-determination, being a right recognised in the international world, needs to be harmonized synthesized and correlated with the other rights contained in the Constitution. There is no doubt that only a handful of statist, ideologists and doctrinaire authors still nurture the idea that the right to self-determination is no human right. The absurdity of this approach becomes clear in the light of an analysis of the current international law position.

Article 1 of the International Covenant on Economic, Social and Cultural Rights reads:

"All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic social and cultural development."

Article 1 of the International Covenant on Civil and Political Rights has an identical provision and in both Covenants the right of self-determination of peoples flows from the statement contained in the Preamble, recognising the inherent dignity and "the equal and inalienable rights of all members of the human family" and based on "the inherent dignity of the human person".

With reference to the Universal Declaration of Human Rights, both Covenants state "the ideal of free human beings enjoying freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy his economic social and cultural rights, as well as his civil and political rights".

Together with the Universal Declaration of Human Rights the two Covenants form the International Covenant of Human Rights.

In their recent authoritative work Human Rights in Perspective Asbjorn Eide and Bernt Hagtvet (eds.) (p.146) state:

"Though some doctrinaire authors still dispute this, the United Nations General Assembly has repeatedly sustained the position and, as is well known, the right of self-determination of peoples appears as article 1 of both the International Covenant of Civil and Political Rights and of the International Covenant of Economic, Social and Cultural Rights, the two instruments make up the international Bill of Rights. Contemporary international human rights law thus considers the right of self-determination to be a human right".

The extent to which not only academics but also representatives of States consider self-determination of peoples to be a fundamental human right appears from the proceedings of the Economic and Social Council and the Commission on Human Rights at its fifty first session, held at Geneva on 2 February 1995. Representatives expressed themselves as follows on the topic of self-determination as a basic human right: Mr. Zhang Yishan (China) said that the right to self-determination was one of the fundamental human rights; Mr. Peres Novoa (Cuba) said it was regrettable that there were those who considered the concept of the right to self-determination to be no longer relevant; Mr. Kamal (Pakistan) said that the right to self-determination was an inalienable right which formed the cornerstone of the international order, was enshrined in the Charter of the United Nations, was recognised as a binding principle of international law and its application could help to eliminate conflict and maintain the conditions needed for the full enjoyment of political, economic, social and cultural life and failure to respect that right could lead to dissatisfaction and strife. He continued:
"At the very time when, as a result of the exercise of the right to self-determination, the United Nations family had grown substantially, the question had arisen as to whether the right to self determination was absolute. However, the idea

that some peoples should be free while others had their freedom abridged in the name of stability and national integrity could not but lead to a new kind of colonialism."

Mr. Goonetilleke (Sri Lanka) said that the right to self-determination remained an integral part of individual and collective rights and that awareness had continued to bind people together into groups which were entitled to determine their own fate; Mr. Widodo (Indonesia) said that for his country, the question of self-determination was more than just a matter of conviction, it was also a historical legacy and, indeed, a constitutional mandate; Mr. de Santa Clara (Observer for Portugal) said that the right to self-determination was a firmly established and uncontested right enshrined in the Charter of the United Nations and reiterated in a number of General Assembly resolutions, it was based on the equalities of States and peoples, it was an essential prerequisite for international peace and security and its denial led to violations of other human rights such as the right to freedom of expression or assembly ; Mr. Saldamando (International Indian Treaty Council) said that, for indigenous peoples, the enjoyment of all other human rights and fundamental freedoms was dependent on the exercise of the inherent right to self-determination and added:

"According to the Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities, the principle of equal rights of peoples and that of self-determination were two basic parts of one norm. Furthermore, there was no doubt that the right to self-determination had preceded the appearance of the corresponding norm enshrined in the Charter of the United Nations, which had been a point of departure for the dynamic development of the principle and its legal content.

"Indigenous peoples had enjoyed the right to self-determination since time immorial. The United States of America had begun the process of nation building by recognizing the sovereignty of the indigenous nations and concluding treaties with them. The ultimate failure of self-determination in that country had been a result of the fact that many of those treaties and other early legal decisions had not been honoured or had been systematically violated.

"Other States, particularly in Latin America, had recognized the right of indigenous peoples to self-determination in their constitutions and legal systems even providing communal lands for some of them. The failure to realize fully the right

to self-determination in many of those countries arose not only from chronic failure to observe the law but also from sudden and arbitrary changes in those laws which had deprived indigenous peoples of their fundamental rights, as had recently occurred in Mexico and Peru."

In exercising his right to reply Mr Kamal (Pakistan) once more emphasized that self-determination was fundamental to the enjoyment of human rights.

Facilitating consensus on provisions on self-determination in the Constitution.
A compromise will have to be reached between on the one hand those who do not accept self-determination as a first generation human right and on the other hand those who see their struggle for self-determination in terms of Principle XXXIV and the reasonable realization thereof dependant on the State to assist them to accomplish this aim.

Such consensus could be reached by dealing with self-determination in terms of Principle XXXIV as a second generation human right.

In terms of the progressive Constitution and Bill of Rights we have at the moment, there are real prospects of reconciling democracy and self-determination by dealing with the latter as a second generation human right. Sometimes the argument is raised that the inclusion of such a right in a Bill of Rights could lead to a conflict of rights. This is no valid argument because it could be said of all other human rights, for example section 10 (the right to respect for the protection of dignity) and section 15 (the right to freedom of speech and expression); section 18 (right to freedom of movement anywhere within the national territory) and sections 13 and 28 (respectively dealing with privacy and rights to property); section 29 (the right to an environment which is not detrimental to a person's health) and section 26 (the right to economic activity).

It is one of the major functions of any Constitutional Court to interpret the Constitution to solve conflicts of rights. In Germany this is called Grundrechtskonflikt and the methodological approach of the Court in that instance is to work towards the optimal realization of all the rights involved.

We have had an unacceptable history of legal positivism in this country. In the Interim Constitution the door has now been opened for an approach by our Constitutional Court to give effect to the fundamental principles in the Constitution in

an imaginative fashion in order to accommodate the reasonable expectations living in the hearts and minds of all the people in this country.

As far as the principle of self-determination is involved there is the impression in the minds of many people in this country that what is in provided with the one hand is in effect taken away with the other, and that nothing concrete and of real significance has been accomplished even at this late stage of the Constitution making process. It is the duty of all of us (technical advisors included) to make all the necessary inputs to make the final Constitution a document of trust and supported by the whole population.

Sometimes a different ~~agreement~~ argument is raised namely that human rights may not be included in the Bill of Rights which has not formed part of our Common Law and legal history. If this was true it would mean that at least 80% of the human rights contained in Chapter 3 of the Interim Constitution had to be scrapped.

There are, however, many examples from our Common Law (both Roman Dutch and English Law) where the right of self-determination featured prominently. In his well-known works De Jure Belli ac pacis and Verantwoordingh Hugo Grotius went so far as to make provision for the right of sencession of peoples in certain instances. Before him the writer Althusius advocated the principle of self-determination and since then the notion of self-determination has been accepted as a fundamental principle of International Law.

In English Law self-determination as a legal concept developed rapidly since the American War of Independence and culminated in 1917 in the so-called Balfour Declaration in terms of which Great Britian committed itself to the realization of this principle.

Self-determination as second generation human right

The inclusion of social and economic rights in State Constitutions and other constitutional instruments have progressed rapidly over the last fifty years. At the heart of these developments lies the idea of the Social Law State. In his article "Human Rights - A Re-examination" (1980) D.M. Davis, a well-known South African author, also involved in the Constitution writing process, writes:

"The focus on human rights has resulted chiefly from two major developments in the twentieth century .. The old relationship between the state and the indivi-

dual has been radically altered by the emergence of a new relationship, that between the state and the social group. In this connection the emergence of growth of trade unions, employers' associations, business cartels and the press have contributed to a re-examination of the structure, content and administration of traditionally recognized rights, which were based on the kind of viewpoint pinpointed by philosophers such as John Locke, who saw individuals concluding a social contract by which they joined together to form a society. The relationship was thus predicated upon a right-duty relationship between the state and the individual."

He continues:
"The twentieth century has, however, witnessed trade-union struggles and national liberation movements that have resulted in the focus being switched to group, rather than individual, rights."

In particular Davis refers to the safeguarding of cultural and religious minority groups as a result of these developments.

It was the German scholar Hans Peter Ipsen, in particular, who campaigned for the idea of the Social Law State as state goal and derived from the State's responsibility, willingness, ability and duty to concretize the social order in order to provide a legal order for the security of human dignity in all its manifestations.

The German constitutional expert Otto Bachof refined the formulations of this idea (within the parameters of the Law State) with the principle that the legislature, executive and judiciary should be compelled (like other human rights) to give effect to a just social order. This perspective contributed much towards the realization that the State had to accept the main responsibility to secure a humanitarian existence for all and the elimination of deprivations in society. These developments lead to the acceptance in Germany of many second generation (so-called red) rights to accomplish the principle of the Social State.

As a result hereof a vast number of social and economic rights form part of most progressive constitutions in the world. In South Africa it has been Alby Sachs who has campaigned for the recognition and acceptance of these second generation human rights. In "Conservation and third generation rights: The right to beauty" he writes:

"The rights to education, to health, to nutrition , to shelter, could not be easily fitted into the classical scheme of individually based rights... The concept of social, economic and cultural rights began to emerge and today is firmly established"

Included in this category of Human Rights Alby Sachs mentions "the right to development, peace, social identity" etc. and "the so-called peoples' rights or the rights of solidarity (and)... the right to self-determination..."

He adds that rights have always evolved over a period of time, both in terms of their substance and in relation to their modes of enforcement, thereby explaining the emergence of three generations of rights.

In this authoratative work Minority Rights : A comparative analysis Jay Sigler stated:

"(S)ince 1960 over 130 new constitutions have been written, and many of them do consciously recognize some right for minorities. Although many minorities are protected by treaties, by political custom, by national laws, and by judicial interpretation, it can be said that recognition of minority rights claims in constitutions is a growing and significant trend that shows a reversal of the 'tendency of classical democracy to affirm the individual but to deny the group'".

Quite a number of these second and third generation human rights are included in the Bill of Rights of the Interim Constitution (for example section 27 providing for the right to collective bargaining; section 26 providing for the promotion of the quality of life, economic growth, human development, social justice etc.)

The main purpose of second and third generation human rights is to promote social justice and the technical realization of the principle of the Social State. This is usually accomplished by formulating State goals and obligations in terms of which the State accepts responsibility for the realization of basic social rights. A typical example of the way in which States can accept these binding goals (in an external sense) is the formulation we find in the Balfour Declaration of 1917.

Formulations of paragraphs concretizing Principle XXXIV

As a first draft I proposed a formulation of a possible paragraph substantiating Principle XXXIV under the heading "Human rights and self-determination of peoples". This draft was cloathed in typical first generation Human Rights termino-

logy and after consulting with the other Technical Advisors it was decided to present a compromise formulation in second generation Human Rights fashion. Further discussion and liason with the other Technical Advisors has resulted in the following compromise draft:

"Acceptance and recognition of the right of ethnic, cultural and linguistic self-determination of peoples.

The State accepts and recognises the right of ethnic cultural and linguistic self-determination of peoples and with reference to Principle XXXIV accepts the responsibility to assist communities and/or peoples sharing a common ethnic, cultural or language heritage to express such right in territorial entities of their choice in so far as it is reasonably possible, provided that nothing shall be done which may prejudice the civil and cultural rights of existing communities of different ethnic, cultural, or linguistic origin in such territorial entities or the rights and political status enjoyed by people of similar ethnic, cultural or linguistic origin outside such entities."

There was general agreement among the Technical Advisors on the content of this compromise formulation.

There are seven aspects pertaining to this formulation which must be emphasized:

(a) The State accepts responsibility with regard to self-determination as it would with the other second and third generation human rights.

(b) This formulation gives expression to the body of Principle XXXIV and concretizes it.

(c) This is an open-ended formulation and is in line with the proposals accepted by TC2 so far.

(d) The exercise of the right to self-determination is limited in order to protect the basic rights of individuals and cultural communities inside and outside the entities envisaged by Principle XXXIV.

(e) There is a similarity of approach to the way which second generation rights are being dealth with in other constitutions.

(f) It gives effect to the principle of Ubi jus, ubi remedium: if there is need for the recognition of a right, a procedure for the realization thereof must be found.

(g) Although this proposal has a bearing on the work done by other Theme Committees (e.g. Human Rights) it is the respectful submission that TC2

should express itself on the suitability of giving effect to paragraphs (f) and (g) of the said report in this manner.

CONSTITUTIONAL ASSEMBLY

THEME COMMITTEE 2

STRUCTURE OF GOVERNMENT

SELF-DETERMINATION / VOLKSTAAT

Fourth Progress Report of the Ad hoc Committee on Self-determination

29 August 1995

Contents **Page**

1. Overview

1.1 The Constitutional Assembly's mandate is set out in Principles XI, XII and XXXIV (Schedule 4) and Section 184B of the 1993 Constitution, as amended.

1.2 The specifics of this mandate are:

- Should the final Constitution provide for self-determination?
- If so, should this take the form of a territory, Volkstaat, for example - or are there other recognised ways of expressing such a desire?
- What types of community (eg. language and culture) could be said to share such a heritage so as to justify a form of self-determination?
- What level of support should be shown within a community as a prerequisite for self-determination?

1.3 The Volkstaat Council (established in terms of the 1993 Constitution, Section 184B) recently published its First Interim Report in May 1995. It was officially referred to this Ad hoc Committee on Self-determination, for further consideration. This was made available at the time of the In-House Workshop on Self-determination.

1.4 An In-House Workshop on Self-determination took place on Monday 26 June 1995.

1.5 Some 68 individuals, organisations (including the Volkstaat Council and the Commission on Provincial Government) and political parties, have made submissions, the latest being the Freedom Front.

2. Issues

Comment: The right of self-determination constitutes a major issue. International law recognises that all peoples have the right of self-determination. But the question is whether minorities and/or cultural communities within the boundaries of existing states can be acknowledged as "peoples". These and other issues, such as the right to secession, were dealt with comprehensively during the In-House workshop. Speakers did not reach consensus on these issues. In its report, the Commission on Provincial Government, also deals with these problems, but concludes that concepts such as these remained vague

The problem in South Africa is that the Constitution of 1993 initially dealt only with the more inclusive concept, i.e with collective self-determination for all South Africans, which the Constitution states, had to be recognised and protected (Principle XII). The rest of the body of the Constitution is in line with this general principle. But for the sake of securing the widest possible acceptance of the Constitution, certain pre-election agreements were made, including the addition of Principle XXXIV, which also refers another form of self-determination, namely that "communities sharing a common cultural and language heritage, whether in a territorial entity within the Republic or in any recognised way", shall also be entitled to self-determination. The problem is, however, that the body of the rest of the Constitution of 1993 was, except for the inclusion of the sections on the Volkstaat

Council, not brought in line with this principle. The substance of this, became the subject of negotiations, as well as much of the submissions to TC2. But this process is far from settled. It therefore seems advisable that constitutional provisions would not preclude the pursuit and/or realisation, through negotiations, of this principle in some form.

Current constitutional issues and the 1993 Constitution which govern them, are:

2.1 **"Self-determination"** is not listed as a fundamental right in Chapter 3.

Comments : In its response to the First Interim Report of the Volkstaat Council, the Commission on Provincial Government reports (on 15 August 1995) that it finds the Volkstaat Council's recommendations problematical, also in the context of Principle XXXIV, which it regards as "vague". It elaborates by stating "the fact that internal self-determination as a concept is still evolving and may assume various forms, not necessarily territorial based and falling short of full self-government for the group as such, as distinct from the general rights of political participation enjoyed by all citizens" (par 3.7 of CPG Report).

The CPG also interprets paragraph 3 of Principle XXXIV as follows: "if a territorial entity referred to in paragraph 1 is established before the new constitutional text is adopted, the continuation of such entity, including structures, powers and functions, shall be entrenched in the new constitution. The provisions will therefore lapse if such entity is not created before the new Constitution is adopted". Its proposal in this respect, is incorporated in par 6(f) hereunder.

2.2 **Citizenship :** Section 5, 20 and 33(1) of the Constitution are relevant.

Section 5: There shall be a South African citizenship, the right to which (including the loss of citizenship), shall be regulated by an Act of Parliament, subject to sections 20 and 33(1).

Section 20 : Every citizen shall have the right to enter, remain in and leave the Republic, and no citizen shall, without justification, be deprived of his or her citizenship.

Section 33(1) : The rights entrenched in the Constitution may be limited by law, but only in prescribed ways.

2.3 **Language, culture and community :** Principle XI and Sections 3, 31 and 32 are relevant.

Principle XI: The diversity of language and culture shall be acknowledged and protected, and conditions for their promotion shall be encouraged.

Section 3: Afrikaans is one of the 11 official languages at the national level and conditions must be created for the promotion of their equal use and enjoyment. Rights relating to language must not be diminished and an Act of Parliament must make provision for rights relating to language and the status of languages existing only at regional level to be extended nationally.

An Act of Parliament will establish an independent Pan South African Language Board to promote these goals.

Section 31: Every person shall have the right to use the language and to participate in the cultural life of his or her choice.

This section should be read in conjunction with the right to freedom of association (section 17), the limitations clause (section 33(1)) and the existence of no less that 11 official languages (section 3).

Section 32: Every person shall have the right to basic education, equal access to education, instruction in the language of choice (where it is reasonably practical), but there shall also be a right to educational institutions based on a common culture, provided that there shall be no discrimination on the grounds of race.

These rights should be read in conjunction with the provisions on equal treatment (s8(2)), affirmative action (s8(3)(a)), and the right to establish private schools, provided these are inclusive and non-discriminatory (s 32(c).

2.4 **Self-determination and the Volkstaat as an integral (provincial) part of South Africa:** Sections 48, 50, 61 and 62 are relevant.

See, **comments** under 2.1 above.

Section 48(1): The Senate shall be composed of an equal number of senators from each province, nominated by the parties represented in a provincial legislature.

Section 50: No person shall be qualified to become or remain a senator unless he or she is qualified to become a member of the National Assembly.

Section 61 : Bills affecting the boundaries or the exercise or the performance of the powers and functions of the provinces shall be deemed not to be passed by Parliament unless passed separately by both Houses, and in the case of a Bill, other than a Bill referred to in section 62, affecting the boundaries or the exercise or performance of the powers and functions of a particular province or provinces only, unless also approved by a majority of senators of the provinces in question.

Section 62: Any Bill amending the Constitution shall, for its passing by Parliament be required to be adopted at a joint sitting of the National Assembly and the Senate by a majority of at least two-thirds of the total number of members of both Houses. For the amendment of sections 126 (on the legislative competencies of provinces) and 144 (on the executive authority of provinces), separate passage by both Houses by a two-thirds majority of each House is required for amending the constitution: provided that the boundaries and legislative competences of a province shall not be amended without the consent of a relevant provincial legislature.

2.5 **Provincial boundaries:** Section 62, Chapter 9, and Schedules 1, 4 and 6 are applicable.

Section 61 prescribes the procedures for a Bill affecting either boundaries or power of provinces: these must pass separately, and in the case of boundaries, also by a majority of senators of the provinces concerned.

Section 62 prescribes the procedures for the amendment of the constitution (see 2.4 above).

Chapter 9 contains extensive provisions on provinces, provincial legislative authority, provincial executive authority, finance and fiscal affairs, provincial constitutions and a Commission on Provincial Government.

Schedule 1 defines the boundaries of each of the nine provinces.

Schedule 4 sets out 34 principles which are to serve as norms for the finalisation of the new constitution to be written by the Constitutional Assembly. This is to be read in conjunction with sections 71-74 of the Constitution.

Schedule 6 lists the competences of provinces, which, read in conjunction with other provisions in the Constitution (s 126), imply concurrent rather than exclusive powers.

2.6 **Provincial constitutions: Sections 160-162** are relevant, and refer to the adoption of provincial constitutions, the development of provincial dispensations and the election of new provincial governments. However, no mention is made of a Volkstaat (i.e a different kind of province), but there is nothing that prohibits the creation of another province, subject to provisions set out in the Constitution (e.g another province in the Eastern Cape).

2.7 **Popular support:** what level of support should be shown within a community as a prerequisite for self-determination?

Principle XXXIV(2) is relevant where it stipulates that the Constitution may give expression to any particular form of self-determination provided there is substantial proven support within the community concerned for such a form of self-determination.

Comment : According to the Accord signed between the Freedom Front, the ANC and the National Party on 23 April 1994, the parties agreed:

* that "substantial proven support" for the idea of self-determination and the concept of a Volkstaat, will be a requirement for the process (S 3.1.1); and

* that "electoral support", which parties with a specific mandate to pursue a Volkstaat, have gained in the 1994 election, will indicate such support. The Freedom Front gained 640 000 votes within the provincial legislative elections. The FF regards this as "majority" Afrikaner support (par 4.1 of FF submission), although independent analysts calculated this to be about 14%

of white support and 37% of AFRikaner support (the FF calculated the stayaway factor, as advocated by the Conservative Party, as part of the Volkstaat mandate).

2.8 **Incrementality:** is enough scope provided for in the case of an incremental approach to self-determination, e.g minority autonomy and/or cultural or community councils and/or corporate self-determination and/or ethnic self-determination and/or Cultural Councils and/or local and regional councils and/or tenth province and/or relations with other institutions and/or autonomous Volkstaat, its territory and boundaries?

Sections 1(1), Chapters 3 and 9, and Principle XXXIV are relevant.

Section 1(1), read in conjunction with Principle XXXIV, does **not** provide for secession, be that ethic or otherwise. Self-determination is therefore, in terms of the 1993 Constitution, to be exercised only **within** the existing boundaries of an single, sovereign South African state.

Chapter 9 and **Principle XXXIV** apply to processes of federalisation/ provincialisation (i.e sub-national autonomy), but without providing for "escape clauses" e.g secessionism.

Chapter 3 on fundamental rights, likewise, stops short of legitimising ethnic self-determination (it does however provide for freedom of association and political rights). Minority rights in the form of religion, language and culture, are expressly recognised in the sections on basic human rights in the 1993 Constitution.

2.9 **Contextual Comment:** The central issue in this report as well as in the submissions received so far (see 3 hereunder), related to the question of "self-determination" in South Africa.

In the light of hereof, many proponents of self-determination / Volkstaat in their submissions to the Constitutional Assembly pointed out that Principle XXXIV was included in the 1993 Constitution at a late stage, without amending the rest of the Constitution in any significant way, except for the inclusion of sections 184A and B, providing for the establishment and functions of the Volkstaat Council.

The Freedom Front also argues that agreements made before the April 1994 elections, notably the tripartite Accord (referred to under 2.7 above: see **Appendix A** of the FF's submission to Theme Committee 2, dated 8 August 1995), should be evaluated from a South African perspective and the Constitutional Assembly "should be guided" by them (par 2 of the FF's submission).

The interpretation of the list of issues (2.1 to 2.8 above) should therefore be seen in this light. Much of this is unfinished business. Hence our proposal in paragraph 6, where an "open-ended" approach is suggested. The Commission on Provincial Government makes a similar type of proposal. The implication of this is that other Theme Committees should also be notified about this problem, otherwise coherence may be lost.

3. Submissions

In response to Constitutional Assembly invitations for submissions on self-determination / Volkstaat, the following have been received (as at 08 August):

3.1 Individuals

A total of 68 individuals have responded as follows:

* approximately one-third said "No" to self-determination / Volkstaat;

* approximately two-thirds gave a qualified "Yes":

  - over half of those proposed an Afrikaner Volkstaat;

  - approximately one-third of those proposed self-determination, (i.e stopping short of a Volkstaat); and

  - a few made diverse, non-related, proposals e.g two said apartheid should be re-introduced; one requested a Zulu Volkstaat; one a Griqua Volkstaat; and one said something about vehicle registration numbers.

3.2 Organisations

Four organisations have responded so far: the Afrikanerbond; the Afrikaner Freedom Foundation; the Volkstaat Council and the Commission on Provincial Government.

3.3 Political Parties

Four political parties in Parliament have responded so far: the ANC, the National Party, the PAC and the Freedom Front. The Conservative Party (not represented in parliament) also responded.

4. Agreements

4.1 There are very few non-contentious issues, between individuals, organisations and parties.

4.2 Those who **agree** that there should be **no** territorial self-determination / Volkstaat in whatever form, are approximately one-third of the individuals and the PAC.

4.3 Those who **agree** that the process of seeking solutions to self-determination / Volkstaat should or could continue, include 38 of the 68 individuals, the Afrikanerbond, the Afrikaner Freedom Foundation, the Volkstaat Council, the Commission on Provincial Government, the Freedom Front, the ANC, the NP and the Conservative Party. However, they all differ on details.

4.3.1 Agreements on an Afrikaner Volkstaat:

A total of approximately one-third of the 68 individuals, the Afrikaner

Freedom Foundation, the Volkstaat Council (not the Afrikanerbond), and the Conservative Party and the Freedom Front, proposed a Volkstaat. On substance, however, there is very little agreement, except that all tend to say that a Volkstaat (as an expression of self-determination) is a fundamental right, also linked to the rights to language, culture and community and the freedom of association. For the Conservative Party, this implies a separate citizenship.

Otherwise there are very few, or no agreements on boundaries, the details of a Volkstaat constitution, required degrees of popular or proven community support (see the Freedom Front's arguments about the 1994 election outcome), and whether the Volkstaat could be introduced incrementally. The Volkstaat Council and the Freedom Front are the only bodies that provide for incrementalism. It is also implicit in the proposals of the Afrikaner Freedom Foundation.

4.3.2 Agreement of self-determination : Cultural Councils

A total of approximately one-sixth of the 68 individuals, the Afrikanerbond and the National Party, agreed that self-determination (without a Volkstaat) should be investigated further.

The Afrikanerbond and the National Party propose the establishment of Cultural Councils, as an expression of self-determination in respect of language, culture and community. Their proposals have no implications for citizenship, boundaries, provincial constitutions, popular support or incrementality. They emphasise the voluntary aspect, but do provide for statutory recognition.

The proposals of the Afrikanerbond are the most comprehensive, and include not only the question of Cultural Councils, but other aspects of the new Constitution as well. It does however not provide for the listing of self-determination as a fundamental right in the chapter on Fundamental Rights.

While the NP also proposes Cultural Councils, the details are different from those of the Afrikanerbond.

The Freedom Front also proposes elected Afrikaner Community Councils at the local level and provincial representation (in the absence of a Volkstaat). For the FF however, the provincial level will fall away once a Volkstaat is established. As such, this is the clearest expression of incrementalism so far.

4.3.3 Agreements that negotiations should continue

The ANC, the Freedom Front and the Commission on Provincial Government (as some of the others) propose that negotiations on forms of self-determination for communities concerned should continue. The outcome should be the result of negotiations.

5. Disagreements

5.1 The biggest disagreements relate to the position on (a) no self-determination in the ethnic and/or cultural sense at all; (b) proposals on cultural self-determination, and (c) proposals on territorial self-determination, including secession.

5.2 The ANC tends to say "let the process develop" (see, 4.3.3 above), while neither opposing self-determination / Volkstaat, nor endorsing any specific form of it.

5.3 On the form of self-determination, the major disagreements are between the proponents of cultural self-determination (e.g Afrikanerbond and NP) and the proponents of territorial self-determination (e.g Afrikaner Freedom Foundation, Volkstaat Council, the Conservative Party and the Freedom Front).

5.3.1 **Cultural Councils:** The Afrikanerbond provides for voluntary Cultural Councils, linked mainly to language communities. Councils are appointed, not elected, and their functions are mainly advisory. There may be provincial and local councils. Councils ought to be recognised by statute.

The NP's proposals are slightly different. Under NP proposals, Councils shall generally be elected, not appointed, and in addition to advisory functions, also have decision-making powers on a specified list of culture-related competences.

The Freedom Front also provides for elected councils, for the local level, called Community Councils. It also includes a specific list of culture-related competences. But the FF goes further: Community Councils should supplement local authorities and should therefore, presumably, be statutory, because they are to be entitled to a reasonable share of national and local revenues. Another difference, is the proposal that the Afrikaner community should have one elected member per province in the Senate.

5.3.2 **Volkstaat:** Two models are proposed: a Volkstaat as part of South Africa, i.e in a federal-type set-up (e.g the Volkstaat Council and the Freedom Front); and a Volkstaat outside South Africa, i.e proposals in favour of a sovereign, secessionist state (e.g Afrikaner Freedom Foundation and the Conservative Party). However, the CP proposes a confederal framework for the relations between the Boer Republic (see hereunder) and South Africa.

The Volkstaat Council rejects the idea of a tenth province. It proposes, instead, the establishment of a constituent Afrikaner state within the existing South African boundaries. It emphasises strongly that this is not corporate self-determination either. Eventually an independent Volkstaat must be pursued - whether inside or outside South Africa is not quite clear. The proposals also provide for boundaries.

In the light hereof, the Volkstaat Council's proposals may be seen as incremental, together with those of the Freedom Front.

The other model, that of immediate partition, is proposed by the Afrikaner Freedom Foundation and the Conservative Party.

The Afrikaner Freedom Foundation addresses the issues of an own Volkstaat citizenship, relations with the RSA, a Bill of Rights, the position of Afrikaners not residing within the borders of the Volkstaat, and finally, takes the Northern Cape as the region in which the Volkstaat should be considered.

The Conservative Party proposes a sovereign Boer Republic (within a South African Confederation), with its own citizenship, legislative authority, executive authority, President, public service, judiciary, military and local government. The proposals make no mention of specific Volkstaat boundaries, nor of how much popular support will be necessary for the establishment, or whether incrementality is acceptable.

6. Possible approaches relating to conflicting positions

In the light of the issues identified in paragraph 2.1 to 2.8, especially 2.9, as well as the nature of the submissions received (see paragraphs 3, 4 and 5), the Ad hoc Committee on Self-determination / Volkstaat is not in a position to formulate consensus positions.

The Committee therefore proposes:

a. that the political process continues; the Constitutional Assembly should issue guidelines in this respect;

b. that the Constitutional Assembly should express itself on the status of the agreements made before the April 1994 elections; especially on the issue of "proven support", as argued by the Freedom Front;

c. that the constitution-makers adopt an open-ended approach to the issue of self-determination, while further deliberations take place, including the formulation of positions on self-determination that may assist in expediting the draft constitution;

d. that except for only one party and some individuals who totally reject any form of self-determination/Volkstaat, there appears to be an emerging consensus on at least two issues: negotiations should continue; and some form of cultural self-determination may be provided for at the local level: constitution-makers must take cognisance of that;

e. since the deadline for the publication of the draft final constitution is approaching fast, other Theme Committees ought to take note of the thinking and implications emanating out of our deliberations so far;

f. if the deadline is reached without further clarity on the issues concerned, the Constitutional Assembly should perhaps consider, as an interim measure (i.e before the final constitution is adopted in 1996), that Principle XXXIV be retained, in some form, depending on the outcome of a, b, c and d above. And, if so, reference(s) should be included, somewhere in the text, substantiating this principle. It also seems desirable that provision be made

in the draft of the final constitution for the continuation of negotiations which may lead to some form of self-determination after the adoption of the final constitution for such groups;

g. members of the ad-hoc committee, after consultation with Theme Committee 2, propose the following: "The most appropriate form of constitutional provision is one that would not preclude the pursuit and/or realisation through negotiations, of the right of self-determination in some form, the outcome of which will be binding on any future government"; and

h. The NP and FF insist that the principle of cultural self-determination at least be accepted and provided for in the final constitution, the details of which may be the subject of further negotiations.

9. SUMMARY

	ISSUES	CONST. PRIN.	AGREEMENTS	DISAGREEMENTS	OUTSTANDING	COMMENTS
1.	Self-determination	XII & XXXIV	None	On the extent of the right of self-determination		The body of the 1993 Constitution does not reflect sufficiently the references to all those forms of self-determination as envisaged in CP XXXIV
2.	Citizenship	I	That present arrangements be retained	CP & AFF propose separate citizenship		Changes only if secession is pursued
3.	Language, Culture and Community	II, XI	Wide consensus on continuation of said rights	None	Manner of expressing these rights at local & national levels	
4.	Within South Africa	I, XVI	Most parties oppose secession	CP & AFF propose secession	The issue of an Afrikaner state and/or Cultural Councils within South Africa	
5.	Boundaries	I, XVIII(1) +(3)	None on details	Existing proposals don't coincide		Tenth territ entity and/or sovereign volkstaat: parties must investigate further
6.	Constitutions	None				Only if territorial expression arises

ISSUES	CONST. PRIN.	AGREEMENTS	DISAGREEMENTS	OUTSTANDING	COMMENTS
7. Support	XXXIV(2)	None	FF points to outcome of 1994 elections		Parties must consider FF proposal
8. Incrementality	XXXIV	Negotiations must be pursued	None		In order to preserve maximum flexibility, a provision, which ought to be general and broad, may be included in the final Constitution (see par 6(g)) to facilitate the principle of self-determination to those communities who have negotiated this right

Note : The drawing up of this summary was made very difficult by the complexity of the subject matter, such that not all points could be included above. THe body of this report, rather than this summary, should be consulted in cases of doubt.

PROF W J BREYTENBACH
Convenor Ad hoc Committee (after consultation with Professors Corder and Raath)