

2/1/2/10

**CONSTITUTIONAL
ASSEMBLY**

**CONSTITUTIONAL
COMMITTEE**

**MONDAY
27 FEBRUARY 1995
(14H00)
OLD ASSEMBLY
CHAMBER**

***ADDITIONAL
THEME COMMITTEE REPORTS***

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CONSTITUTIONAL ASSEMBLY

THEME COMMITTEE 2

STRUCTURE OF GOVERNMENT

SEPARATION OF POWERS

(BLOCK 1)

REPORT AS AT 2 FEBRUARY 1995

1. INTRODUCTION

1.1 The Theme Committee 2 by 30 January 1995 had received submissions from the following parties, organisations and individuals.

PARTY SUBMISSIONS

**ACDP
ANC
DP
FF
IFP
NP
PAC**

ORGANISATION SUBMISSIONS:

**ANCC
EFSA
ODISA**

INDIVIDUAL SUBMISSIONS:

**Bothma, O
Brijraj, R
Carsar, A
Dimba, MS
Gottschalk, K
Stratten P & N**

1.2. The constitutional Principle to which the Constitutional Assembly is required to give effect to in the new Constitutional Text is the following:

VI

"There shall be separation of powers between the legislature, executive and judiciary, with appropriate checks and balances to ensure accountability, responsiveness and openness."

- 1.3. It was understandable that many submissions on the "Separation of Powers" also focused on aspects of the "Structure of Government," which is the next subject for detailed information-gathering and report by Theme Committee 2. The Theme Committee will not report on this latter aspect of the submissions at this stage but will confine its report to the issue of "Separation of Powers".

2. AREAS OF AGREEMENT

2.1. SEPARATION OF POWERS

- 2.1.1. There was general agreement in the submissions that the new Constitution must contain specific provisions in which the separate legislative, executive and judicial powers are vested.

2.2. LEGISLATURE

- 2.2.1. There should be a parliamentary form of government.
- 2.2.2. Parliament shall be the expression of the will of the people.
- 2.2.3. The Legislative authority of the Republic shall, subject to the Constitution, vest in Parliament, which shall have the Supreme power to make laws for the Republic.

2.3. EXECUTIVE

- 2.3.1. The Constitution shall make specific provision for an executive authority.
- 2.3.2. The executive shall be accountable to Parliament.

2.4. JUDICIARY

- 2.4.1. There shall be an independent, impartial judiciary, subject to the Constitution.**
- 2.4.2. There shall be an independent Constitutional Court with the powers to nullify any Act of Parliament if such Act is in conflict with the Constitution.**

2.5. CHECKS AND BALANCES

- 2.5.1. There shall be checks and balances that will restrain each branch of government. (Checks and balances to be revisited and tabulated under block 2 and 3)**

**CONSTITUTIONAL
ASSEMBLY**

THEME COMMITTEE 2

STRUCTURE OF GOVERNMENT

SUBMISSIONS AS AT 30 JANUARY 1995

VOLUME TWO

THEME COMMITTEE 2

**OVERVIEW OF POLITICAL PARTY SUBMISSIONS
RECEIVED AS AT 30:01:95**

NUMBER OF SUBMISSIONS	
Party Submissions	7
ACDP	
ANC	
DP	
FF	
IFP	
NP	
PAC (x2)	

PARTIES

SUBMISSION BY THE A.C.D.P.

CHARACTER OF DEMOCRATIC STATE

1. FORM OF STATE

To ensure that the government is kept as close to the people as possible, the A.C.D.P. recommend a small central government and strong provincial and local governments. History has shown that centralisation of governmental power destroys the liberty and the rights of man. The way to have good and safe government is to divide the power among the people and the localities, instead of entrusting it to one central body.

We would like to see a multi-party democracy in this country. Everything possible must be done to make a one-party state, both unconstitutional and impossible. Because of the diversity of our cultures and beliefs, a system of multi-party democracy will be most suitable for our situation.

2. SUPREMACY OF THE CONSTITUTION

The constitution must be the supreme law of the land. It must be binding to all citizens and organs of the state. This is with the proviso that it is a constitution that was drawn and accepted by those it would bind. It should only be amended with the consent of the people and the local and provisional governments

In a true democracy, the people must form their own constitution and consent to it. Hence, they establish a government of people's law, not of ruler's law. Both the people and the rulers must be subject to the constitution. This is essential for protecting the individual's rights to life, liberty and property. Citizens must not only be protected from harmful acts of other citizens, but also from abuses by their own government. Since the law is supreme and not the ruler's, the people will be protected from ruler's tyranny.

For everyone to be proud of our constitution, it is important for its contents to be acceptable to the majority, if not all the people of South Africa. It is therefore, unfortunate that Section 71.2 of Chapter 5 says "the new constitutional text passed by the Constitutional Assembly, or any provision thereof, shall not be of any force and effect, unless the Constitutional Court has certified that all the provisions of such text comply with the Constitutional Principles referred to in subsection (1)(a).

The A.C.D.P. wants to argue that, because the majority of South Africans were not party to the drawing up of the 34 Constitutional Principles, it will be unfair and not right to expect their wishes to be denied by the Constitutional Court, as proposed in Section 71.2 of Chapter 5.

Before the A.C.D.P. can endorse Section 71.3 of Chapter 5, we would like to see an amendment to Principle III of schedule 4, that speaks about "all other forms of discrimination." This should not include "sexual orientation" as we have it in section 8.2 of chapter 3 of the interim constitution. The majority of South Africans are not atheists with no morals, but they are, both religious and moral. We argue that this section 8.2 undermines African culture, Biblical teaching, Islamic belief and beliefs of other religions of significance. This section 8.2 must be revisited and endorsed by the majority.

3. SEPARATION OF CHURCH AND STATE

The A.C.D.P. believes in the separation of Church and State as we have it at the moment. The State should not authorise, promote or support any church or religious group. This does not mean that individuals who are members or working for the State should not have religious opinions and beliefs. The State as an institution, has functions that are totally separate from the church or any other religious body. Therefore, the State should not be permitted to interfere with what churches are doing, except if such churches are breaking the law.

The Church, as a separate institution has functions and a clear mandate that is different from that of the State. The Church as an institution, should not try to run a government, although individuals in the church can, and should be part of the team that runs a government.

It cannot be expected that only unbelievers should form a government. Any citizen of this country, including a believer that goes to church, must always be in a position to be part of a government.

4. NAME AND SYMBOLS

Changing the name of this country would be both, unwarranted and very expensive. The A.C.D.P. proposes retaining the name "South Africa", because it explains best our geographic location. We are both in Africa and in the South.

5. SEPARATION OF POWERS

Governmental powers must be separated into three executive branches, with different personnel running each branch. Every government, whether a monarchy or democracy, exercises these three functions:

- the legislative
- the executive
- the judiciary

These three branches should be independent of each other with no one branch having total control of another. As an example, the legislative branch should not be able to remove the executive or judiciary very easily and the executive should not be able to dissolve the legislative or judiciary. While independent, these branches should not be completely separate, but should band together through a system of checks and balances. This will permit each branch to guard against one department encroaching into another, which would result in tyranny. The legislative must be limited to making the laws; the executive to enforcing and carrying out the laws and the judiciary to interpreting the laws.

27 January 1995

African National Congress

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OFFICE OF THE SECRETARY GENERAL

MR H. Ebrahim
The Executive Director
Constitutional Assembly
Cape Town

25.01.95

Dear Mr Ebrahim


ANC SUBMISSIONS TO THEME COMMITTEES

We forward herewith preliminary submissions of the ANC to the Theme Committees, in respect of Block One of the adopted CA work programme. We wish to advise that, as these are preliminary submissions, the ANC will be forwarding further submissions in due course.

We trust you find same in order.

Yours Sincerely

C. Carolus
DEPUTY SECRETARY GENERAL


The People Shall Govern!

ANC. SUBMISSION: THEME COMMITTEE 2

A There should be a separation of powers in the South African National Government; viz. Legislative, Executive and Judiciary. This principle should be designed to restrict the power of each branch, whilst at the same time ensuring and fostering co-operation amongst them.

B. Separation of powers is meant to enhance accountability, independence and checks and balances.

C Specific form of separation of powers in South Africa will have to be functional and suitable for our South African Situation.

D. The system of checks and balances restrains the separate branches from seeking to centralize power to dominate the others.

1. LEGISLATURE/S

- legislature/s shall be the embodiment of the will and the aspirations of the people.
- Parliament shall subject to the Constitution be the supreme law maker and the expression of the will of the people.
- The political parties will have to discuss the question of bicameralism.
- The composition, powers and functions of such a bicameralis of agreed upon will be defined in the Constitution.
- The executive will be accountable to the legislature.

2. EXECUTIVE:

- The head of the State shall be the President
- The President will appoint and supervise the functioning of the Cabinet.
- The President will consult with the cabinet when taking important decisions.
- There shall be a deputy president who will be accountable to the president and Parliament.
- The executive will govern the Country.
- The executive will be accountable to Parliament
- The separation of powers between different levels of government shall be provided for in a manner that ensures the accountability of the executive to Parliament and shall not undermine the principle of majority rule.

3. Judiciary.

- There shall be an independent judiciary, impartial subject to the Constitution and law.
- The independent Constitutional Court shall have the power to nullify an Act of Parliament if it finds that the law is in conflict with the Constitution.
- The South Africans shall have recourse to independent Courts of law and other tribunals.- The judiciary must be protected from Political interference.

26 JAN 1995



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Democratic Party. 5th Floor. Marks Building. Parliament Street. Cape Town 8001

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Demokratiese Party
Democratic Party

532

To: Mr Hassen Ebrahim
Executive Director
Constitutional Assembly
11th Floor
Regis House

25 January 1995

**DEMOCRATIC PARTY: SUBMISSION TO THEME COMMITTEE 2
ON "SEPARATION OF POWERS"
(Ref T.C. 2 no 1)**

1. In respect of the heading "Separation of Powers" the Constitutional Assembly is required to give effect to the following Constitutional Principle.

**Schedule 4
VI**

"There shall be a separation of powers between the legislature, executive and judiciary, with appropriate checks and balances to ensure accountability, responsiveness and openness."

2. To achieve the above in respect of the separation of powers, the Constitution must contain specific provisions in which the separate powers are allocated. The DP proposes the following provisions:

2.1 Legislative authority of Republic

"The legislative authority of the Republic shall, subject to this Constitution, vest in Parliament, which shall have the power to make laws for the Republic in accordance with this Constitution." (See Interim Constitution Section 37)

2.2 Executive Authority of the Republic

"The executive authority of the Republic with regard to all matters falling within the legislative competence of Parliament shall vest in the President, who shall exercise and perform his or her powers and functions subject to and in accordance with this Constitution." (See I.C. Sect 75)

"On being elected, the President shall vacate his or her seat in the National Assembly." (See I.C. Sect 77 (4))

2.3 Judicial Authority

- *(1) The judicial authority of the Republic shall vest in the courts established by this constitution and any other law.
- (2) The judiciary shall be independent, impartial and subject only to this Constitution and the law.
- (3) No person and no organ of state shall interfere with judicial officers in the performance of their functions." (See I.C. Sect 96)

3. There are a number of mechanisms/structures that should be included in the Constitution to ensure "accountability, responsibility and openness."

e.g. certain provisions in a Bill of Rights, a Human Rights Commission, an Auditor General, a Public Protector, regular elections, accountability at Provincial and Local level etc.

However, the most important "checks and balances" are to be found in the relationship between the President and his Cabinet on the one hand and Parliament on the other.

4. There should be no ambiguity about the Executives accountability to Parliament. Accordingly, the Democratic Party proposes, inter alia, the following provisions:

4.1 Accountability of Ministers and Cabinet

"A Minister shall be accountable individually both to the President and to Parliament for the administration of the portfolio entrusted to him or her, and all members of the Cabinet shall correspondingly be accountable collectively for the performance of the functions of the national government and for its policies." (See I.C. Sect 92 (1))

4.2 Votes of no confidence

- *(1) If Parliament passes a vote of no confidence in the Cabinet, including the President, the President shall, unless he or she resigns, dissolve Parliament and call an election in accordance with section 39.
- (2) If Parliament passes a vote of no confidence in the President, but not in the other members of the Cabinet, the President shall resign.
- (3) If Parliament passes a vote of no confidence in the Cabinet, excluding the President, the President may -
 - (a) resign;
 - (b) reconstitute the Cabinet in accordance with section 88(4); or
 - (c) dissolve Parliament and call an election in accordance with section 39.

- (4) The President shall where required, or where he or she elects, to do so in terms of this section, dissolve Parliament by proclamation in the Gazette within 14 days of the relevant vote of no confidence."
(See I.C. Sect 93)

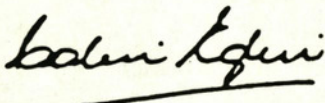
4.3 National Revenue Fund

- "(1) There is hereby established a National Revenue Fund, into which shall be paid all revenues, as may be defined by an Act of Parliament, raised or received by the national government, and from which appropriations shall be made by Parliament in accordance with this Constitution of any applicable Act of Parliament, and subject to the charges imposed thereby.
- (2) No money shall be withdrawn from the National Revenue Fund, except under appropriation made by an Act of Parliament in accordance with this Constitution: Provided that revenue to which a province is entitled in terms of section 155(2)(a), (b), (c) and (d) shall from a direct charge against the National Revenue Fund to be credited to the respective Provincial Revenue Funds."
(See I.C.Sect 185)

4.4 Annual budget

"The Minister responsible for national financial affairs shall in respect of every financial year cause to be laid before the National Assembly an annual budget reflecting the estimates of revenue and expenditure, which shall, *inter alia*, reflect capital and current expenditure of the government for that year."
(See I.C. Sect 186)

5. This submission is made without knowing which structure of government the Constitutional Assembly will decide on. The provisions may have to be adjusted dependant upon the nature and details of such structure of Government.



Colin Eglin MP
Democratic Party



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Mr Hassen Ebrahim,
Executive Director,
Constitutional Assembly,
Room 104.

TK2-02

28 January 1995

Dear mr. Ebrahim,

FREEDOM FRONT: SUBMISSION TO THEME COMMITTEE 2 BLOCK 1 - SEPERATION OF POWERS

INTRODUCTION

1. The constitution is the skeleton or essential framework of orderly government and the fundamental concept of democracy, ie the concept of restraints upon government is the main underlying principle of orderly government. What is important in this respect is the functional built-in systems of control, which is not there for the sake of academic correctness but to accommodate the hopes, fears, aims, prejudices, fundamental drives and conflicts of the people involved in the state - both individuals and groups. The constitutional built-in mechanisms is there to give them existential security, which can facilitate happiness and make people content.
2. The traditional seperation of powers, which goes back a long way, between legislative, executive and judicial powers, is perhaps the main built-in mechanisms designed to put certain restraints on the use of power in government. The purpose is to avoid the accumulation of all governmental power in a single individual or institution.
3. It was particularly Montesquieu in the 17th century that articulated this constitutional device to ensure civil liberty. The concentration of and the monopoly over power is under all circumstances not conducive to the functioning of a true democracy. Hence the strict seperation of powers.

Montesquieu pointed out that it is the separation of powers that best ensure that the nature of government remain that of a servant of and not of a master over the people.

4. The Freedom Front, with its main emphasis on Freedom under all circumstances will insist on this principle of separation of powers being honoured in the writing of the constitution in accordance with Constitutional Principle VI, which states:

"There shall be a separation of powers between the legislature, executive and judiciary, with appropriate checks and balances to ensure accountability, responsiveness and openness."

5. From the point of view of its constituency and their precarious position within the political changes in the country, the Freedom Front find even more reason now to support this basic principle of democratic government as the constitution of South Africa will be decisive for the establishment of a volkstaat and is thus seen by our supporters as also securing their existential security within South Africa.

6. This principle must also be employed at all levels of government as far as it may be applicable.

THE LEGISLATURE

7. "The legislative authority of the Republic shall, subject to this constitution, vest in Parliament, which shall have the power to make laws for the Republic in accordance with the Constitution." (1993 Constitution, Section 37).

8. "Parliament consists of the National Assembly and the Senate." (1993 Constitution, Section 36).

9. The National Assembly. The National Assembly or Lower House, should represent the electorate on the principle of democratic elections based on the equality of all voters on an individual basis. Representation can be arranged through the delimitation of constituencies and the nomination of candidates for the election process, through proportional representation or through a combination of both. The duration of office should be five years.

10. The Senate. (See Appendix A for "The Role of the Senate in South Africa".) The Senate or Upper House, must reflect the true soul and

character of peoples of South Africa. It is this House that should distinguish South Africa from any other democracy in the world. The Senate should therefore have the following Functions:

- 10.1 The protection of provincial interests. It should also ensure that centralist monopolistic behaviour and bureaucratic red tape do not frustrate the efficient functioning of provincial and local government.
- 10.2 Nation building and the protection and development of the different languages and cultures of South Africa.
- 10.3 The protection of minorities and minority rights within the framework of the constitution.
- 10.4 To seek consensus through dialogue without violating the democratic process.
- 10.5 The protection of the Constitution. Thus the Senate must have the power to:
 - a. Review, revise or even veto legislation related to the functions of the Senate. There should however be a deadlock breaking mechanism.
 - b. To initiate judicial review of legislation.
- 10.6 To seek consensus through dialogue without violating the democratic process.

The Upper Chamber is of such importance that the Freedom Front proposes that a workshop be held as soon as possible to determine the possible roles and functions of the Senate in South Africa.

THE EXECUTIVE

11. The Freedom Front proposes that Sections 75 and 76 of the 1993 Constitution should be maintained. Thus:
 - 11.1 The Head of State shall be the President. Because of the workload involved, the separation of the offices of the Head of State and Head of Government should seriously be considered.

11.2 The President shall appoint the Cabinet, supervise the functioning of the Cabinet and consult with the Cabinet on important issues.

12. The President must be elected by parliament and could be a member of the National Assembly or the Senate.

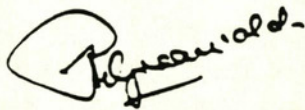
13. Due to the workload, the President must be assisted by a Deputy President or a Prime Minister.

14. The executive must be accountable to both the Head of Government and Parliament.

THE JUDICIAL AUTHORITY

15. The Judiciary must be independent, impartial and subject only to the constitution and the law.

16. There must be an independent Constitutional Court that has the power to nullify an Act of Parliament if the act is in conflict with the Constitution.



(Senator P.H. Groenewald) maj-genl
Freedom Front.

THE ROLE OF THE SENATE IN SOUTH AFRICA

INTRODUCTION

The composition of Upper Chambers such as the Senate in the USA and the House of Lords in the UK differs. They can be constituted through election, nomination or qualification. The Upper House is usually a smaller chamber and is used in the overall system of democratic government as a mechanism of control and moderation for the sake of stability and peace.

Upper Chambers have in recent times, drastically declined in stature and usage in Western Democracies. Relatively weak institutions, such as the House of Lords in the UK, the Canadian Senate or the French Senate still play an important role in polishing and clarifying legislation. But they have become distinctly secondary in nature and stature in that they have become chambers of reflection, revisionary debate, protest and delay. Many of them have become the dumping grounds of failed politicians or even worse; political Siberias. The British House of Lords is a relic of the insistence of feudal barons that they should advise and in a way control the monarch whose power constituted a threat to their own domains.

But society has changed. Class orientation is diminished. The need for effective government with as little frustration as possible, is overriding and a second chamber which is little more than a duplication of the first chamber, without a "distinctly defined" nature and task, has become an irritation in majoritarian democracy. It can then be seen as an unnecessary expensive luxury and irrelevant to the real political process. Many of the existing second chambers are also not clearly democratic in its composition and purpose.

THE FREEDOM FRONT PROPOSAL

Serious consideration should be given to the second chamber in the South African parliament to ensure that its nature is representative of South African society and of that which is good and noble in our people. Its role within the overall political process must be defined in such a way that it becomes a cost effective goal orientated institution which will command respect and earn dignity in fulfilling a crucial role in government. It should not frustrate democracy but play an indispensable role in facilitating not only effective and stable government but also the building of culture and common purpose in Southern Africa. Constitutionally, the South African Senate should give the world something truly South African.

2.5 The protection of minorities and minority rights within the democratic system.

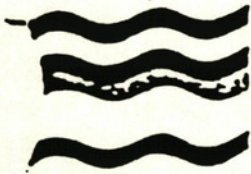
WORKSHOP TO DETERMINE THE ROLE AND FUNCTIONS OF THE SENATE

The Upper Chamber is of such importance that the Freedom Front proposes that a workshop be held as soon as possible to determine the possible roles and functions of the Senate in South Africa.

Freedom Front.
28 January 1995.

The Freedom Front thus proposes that:

1. The Senate should, without increasing the number of Senators, be elected as follows:
 - 1.1 Equal representation from the provinces. (60% of its members).
 - 1.2 The true pluralistic nature of South African society must be represented. Thus the Traditional Leaders and any community seeking self-determination should each elect a fixed number of representatives to the Senate.
 - 1.3 The larger and nationally organised corporate entities in South African society, which in their constitutions honours the constitutional demands and criteria, should also elect a fixed number of representatives. Examples of such institutions are:
 - a. Organised labour,
 - b. Organised business,
 - c. Organised agriculture,
2. The Senate should have the following Functions:
 - 2.1 The protection of provincial interests. It must ensure that that centralist monopolistic behaviour and bureaucratic red tape do not frustrate the efficient functioning of provincial and local government.
 - 2.2 Nation building and the protection and development of different languages and cultures of South Africa.
 - 2.3 The protection of the Constitution. Thus the Senate must have the power to:
 - a. Revise or even veto legislation related to the functions of the Senate. There should however be a deadlock breaking mechanism.
 - b. To initiate judicial review of legislation.
 - 2.4 To seek consensus through dialogue without violating the democratic process.



INKATHA

Inkatha Freedom Party

Iqembu leNkatha Yenkululeko

THEME COMMITTEE No. 2 STRUCTURES OF GOVERNMENT

1ST REPORT ON SEPARATION OF POWERS¹

SEPARATION OF POWERS (Form of Government):

1. There shall be a pure parliamentary form of government.
2. Head of State and Head of Government shall be separate. Parliament shall sit for a five year term.
3. The President shall be elected by parliament in joint session for a seven year non renewable term and shall have the task to ensure the proper functioning of the constitutional and institutional machine.
4. The President shall appoint the head of government who shall form the cabinet in his/her discretion.
5. Cabinet shall be in a fiduciary relationship with Parliament which shall freely exercise its no-confidence vote without being dissolved.

HEAD OF STATE AND HEAD OF GOVERNMENT

1. In order to secure greater democracy and improve checks and balances, the office of the Head of State and that of the Head of Government should be separate.
2. The Head of State should ensure the preservation of the constitutional order and the proper functioning of the constitutional machinery while the Head of Government shall be in charge of the daily operation of Government.
3. Important functions related to the composition of other constitutional organs, such as the Constitutional Court and the defense forces² could be ascribed to the Head of State

¹. 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.

². The IFP has proposed that the Defense Force be under the control of a collegial civilian body headed by the Head of State, who is also the Commander-in-Chief of the Defense

rather than to the Head of Government.

4. The Head of State shall own exercise functions with respect to the representation of the state in international relations, ceremonial functions, the political resolution of conflicts within the institutional machine, and clemency and granting of honours.

EXECUTIVE AND PARLIAMENTARY FORM OF GOVERNMENT

1. South Africa should have a pure parliamentary system in which cabinet is collegially responsible to parliament, with which cabinet is to entertain a fiduciary relation.
2. Parliament's vote of no-confidence should not be impaired.
3. After consultation with the leaders of the political parties the Head of Government (Prime Minister) shall be appointed by the Head of State (President).
4. The Head of Government shall form the Cabinet and submit it for ratification by means of a vote of confidence of both Houses of in joint session.

MONO-CAMERALISM OR BI-CAMERALISM

1. There shall be a bicameral system and the Senate shall represent the Provinces.
2. The Senate shall have as much legislative power as the National Assembly.

RECONCILIATION OF DIFFERENT TEXTS ADOPTED BY THE TWO HOUSES

1. Differences between the texts adopted by the two Houses should be reconciled by a Joint Standing Committee of the two Houses in which the Senate and the National Assembly have an equal number of representatives.
2. The text so reconciled shall be approved by both Houses separately.
3. If one of the Houses does not approve it, the legislation is not enacted.

THE SENATE

1. The Senate should not have less legislative authority than the one given to the National Assembly.
2. The Senate should represent the provinces and its members should derive directly from the provinces either through appointment or through indirect elections.
3. Each province shall be equally represented in the Senate.
4. Legislation affecting the powers, functions and boundaries of Provinces may only be introduced in the Senate. Legislation affecting one of more specific Provinces must be approved by the senators of the Province(s) concerned.

COMPOSITION AND APPOINTMENT/ELECTION OF THE SENATE

1. Senators should be elected for a five year term by the Provincial Legislatures in consultation with the provincial Cabinet.
2. The Premiers of the Provinces shall have the privilege of the floor for themselves and/or for their ministers or designees.

Forces.

ROLE OF SENATE WITH RESPECT TO SOME EXECUTIVE FUNCTIONS

1. The Senate should have a special role in monitoring the function of the Executive branch of government with respect to some activities which are outside the competence of the Provinces such as defense and armed forces³.

COMPOSITION OF CABINET

1. Members of Cabinet shall be appointed by the Head of Government and shall serve at his or her pleasure, subject to the power of Parliament to vote its no confidence with respect to Cabinet in its entirety.

POWER SHARING OR ROLE OF MINORITIES IN CABINET

1. The IFP does not believe in constitutionally mandated power-sharing arrangements.
2. The IFP believes that the protection of minorities should be provided for by means of a federal system and by means of very effective protection of minorities in Parliament⁴.

RELATION BETWEEN HEAD OF GOVERNMENT AND MINISTERS - COLLECTIVE OR PERSONAL RESPONSIBILITY OF CABINET

1. The Ministers shall be chosen by the Head of Government and shall serve at his/her pleasure, provided that any substitution shall be ratified by a resolution of at least one House of Parliament.
2. Cabinet shall be collegially responsible to Parliament.
3. Each Minister shall be responsible to Cabinet for his/her Department, provided that Parliament may ask any Minister to provide information or to tender his/her resignation to Parliament.

CONSTITUTIONAL COURT

1. A portion of the justices of the Constitutional Court shall be appointed by the Provinces from their own judicial systems and legal fraternities.

TRADITIONAL LEADERS AND THEIR STRUCTURES

The separation of powers of government should be cross-referenced with the recognition of the role of traditional leaders and the preservation of traditional communities.

In fact, traditional communities are autonomous societies, organised by traditional and

³. For instance, the Senate could be charged with the special task to authorize the execution by the Executive of international treaties or the employment of armed forces outside the country or even within the country for civil protection reasons.

⁴. As a part of the second Report of this Theme Committee, the IFP will address the issue of protection of political minorities in Parliament.

customary law and administered by traditional leaders. Within a traditional community, legislative and executive and judicial functions are exercised in terms of indigenous and customary law, which also determines the degree and the modalities of the separation of these powers. Among the most significant aspects which regard the exercise of these powers is the institution of communal property.

Given its speciality, this matter will be treated in the third Report of this Theme Committee as per the approved schedule.



**National Party
Nasionale Party**

**Federal Council
Federale Raad**

26 January 1995

Mr Hassen Ebrahim
The Executive Director
Constitutional Assembly
Regis House
Adderley Street
CAPE TOWN

Dear Mr Ebrahim

Enclosed please find the National Party proposals regarding subject matters pertaining to Theme Committee 2, and included in the Work Schedule, Block 1.

Kind regards

Jac Rabie

THEME COMMITTEE 2

NATIONAL PARTY PROPOSALS REGARDING THE SEPARATION OF POWERS

The proposals contained in this document deal with the separation of powers as envisaged in Constitutional Principle VI viz. horizontal separation between the legislature, executive and judiciary. The proposals, furthermore, deal with principles (and not detail) and accordingly entail broad outlines which will be filled in as the work of the theme committee progresses.

1. As a general point of departure, the new Constitution must improve the current checks and balances provided by the division of powers between the legislature, the executive and the judiciary.
2. The legislature at the national, provincial and local levels shall comprise of elected representatives who directly represent the voters. Such representatives shall act independently from the respective executive authorities.
3. In order to enhance the objectives set in the previous paragraph, an electoral system based on proportional representation and which may include elements of geographical representation, shall be devised. The viability of corporate self-determination, as a method for

furthering collective rights of self-determination, should be explored.

4. The concept of representative government, apart from what has been stated above, also entails that the role of opposition parties in the legislatures must be clearly defined e.g. regarding meaningful consultation and participation in decision making.
5. At the national level, the legislature shall comprise of the National Assembly and the Senate.
6. The Senate shall represent the provinces at the national level and its members shall be directly elected and empowered to act authoritatively on behalf of the provinces, jointly and separately.
7. Decreasing the number of members of the National Assembly, should be considered.
8. The method of appointment, the functions and the functioning of the Head of State, the Head of Government and the Cabinet (including its composition) should best serve the nation's interests.
9. All executive(s) should be completely responsible to the relevant legislature(s)

In this regard the advisability to define the rights of the legislature viz-a-viz the executive in the Constitution should be explored. The same applies to Parliament's control over the administration of laws by the executive.

10. Provision must be made for Cabinet members to also be appointed from outside the ranks of Parliament, and on the grounds of expertise.
11. Government at all levels must be transparent, accountable and responsive.
12. The complete independence of the judiciary as the interpreting authority and protector of the Constitution shall be ensured. In particular, the judiciary shall protect and enforce the Constitution and all fundamental rights.
13. The mechanisms and procedures for the appointment of judges must be credible and transparent.
14. The exercise of all state powers shall be controllable and within set limits.

**PAN AFRICANIST CONGRESS (P.A.C.)
OF AZANIA**



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30 JANUARY 1995

THEME COMMITTEE 2 - SUBMISSION BY THE PAC

SEPARATION OF POWERS

The PAC believes that if the objectives of efficiency and political freedom are to be served, complete separation of powers is neither feasible nor effectual in preventing malpractices. 'Checks and balances' are more effective than total separation: though too great a degree of direct control of one government organ over another would constitute interference and would stand in the way of efficient government, a measure of control and partial separation of powers is conducive to the basic principle of limited government.

Although the doctrine of separation of powers cannot, by itself, furnish adequate guarantees of protection against excess of power by any organ of government, it certainly has an important contribution to make if interpreted in a limited sense. The PAC proposes enforceable limitation of powers, the following being the minimum requirements:

- (i) The legislature shall not administer laws.
- (ii) The legislature shall not function as a court of law except with regard to internal disciplinary action.
- (iii) The executive shall not exercise legislative powers (except when such powers have been delegated to it by the legislature.)
- (iv) Control by the legislature over the executive authority in the sense that the former has to vote funds for the latter.

- (v) The executive shall not function as a court of law.
 - (vi) The judiciary shall not exercise legislative powers.
 - (vii) The judiciary shall not perform executive functions.
- (a) The relationship legislature/executive.
- (i) Members of the executive shall have seats in any legislative body.
 - (ii) Members of the executive shall not appoint any member to any legislative authority.
 - (iii) The executive shall have no powers with regard to the holding or not holding of elections, which matter shall be regulated exclusively by the constitution.
 - (iv) The executive shall have no power to convene or to terminate assemblies of the legislature arbitrarily, since this should be regulated either by the constitution or by the legislature itself.
 - (v) The executive shall have no powers to determine or to change the salaries, pensions, conditions of service and working conditions of members of legislative assemblies, such powers to be laid down solely in the constitution or by the supreme legislature to enable voters to exercise control thereof in elections.
 - (vi) The legislature shall control the country's budget, and the executive shall account for the funds appropriated to it without any secrecy.
 - (vii) No legislature may delegate legislative powers to the executive without retaining control. Such control should include at least direct parliamentary control over delegated legislation, for example by a parliamentary public protector or committee, and in any case the powers of review of the courts should be retained as they exist at present.
 - (viii) The executive shall execute valid legislation.
- (b) The relationship of the legislature and the executive vis-a-vis the judiciary.
- (i) An Independent Judiciary is imperative.
The judiciary should be independent in the following respects:
 - * Judicial officers shall not be elected, appointed or dismissed by the legislature or the executive.
 - * The term of office of judicial officers shall not be laid down by the

legislature or the executive, but the term of office and reasons for dismissal shall be laid down in the constitution.

- The salaries and pensions of judicial officers shall not be controlled by the legislature and the executive, save as is provided in the constitution.
-
- (ii) An entrenched, justiciable bill of human rights is fundamental to the principle of the separation of powers, checks and balances, and the limitation of powers.
 - (iii) Judicial review of administrative and executive acts is likewise fundamental; like a bill of human rights, this should be entrenched.
 - (iv) Formal, judicial acts should be supplemented by a strong public protector institution.
 - (v) It shall be compulsory for the executive to carry out court orders, which shall mean inter alia that legislation and executive acts which have been declared unconstitutional or ultra vires by the courts shall not be administered or carried out.
-
1. It is self-evident that sanctioning is a function of a court of law, and pre-eminently a constitutional court.
 2. It follows therefore that any citizen should be given the locus standi to institute an action to enforce the above-mentioned principles which must be embodied in the constitution.

A G Ebrahim - MP



31 January 1995

PAC SUBMISSION TO THEME COMMITTEE 2

The basic question is that we have been mandated to draw up a new constitution. In fulfilling this task we must of necessity put the interest of the electorate up front and then examine our own experiences and those of others to assist us in drawing up the new constitution.

The PAC is cognizant of the fact that there is consensus about the constitution being the supreme authority. The fundamental objective, therefore, of the new constitution must be to ensure democracy, guard against abuse of power or rights and contribute towards nation building.

It has been argued that democracy can best be protected by enshrining into the constitution check and balances. The separation of the Executive, Legislature and the Judiciary, it is said, can introduce the necessary check and balances.

The PAC would like to see the doctrine of separation of powers enshrined in the new constitution. However, whilst applying the doctrine of separation of powers, the PAC believes the objective must be to ensure democratic practice and to avoid abuse of power and not to render instruments of governance ineffective. Elections are basically an exercise to seek a mandate to govern under a set of rules or policies and consequently democratically elected representatives must be allowed to carry out that mandate.

The PAC, from the outset, opposed enforced coalition, and in particular enshrining it in the Constitution. In principle we support the concept of government of national unity, but such a government must evolve out of voluntary negotiations and not forced upon. If it is possible for any component of a Government of National Unity to leave the coalition unilaterally, it is only correct that they should go into it voluntarily.

The PAC is against including into the Constitution enforced coalition.

The interim constitution provides for a National Assembly and a Senate. Basically the Senate has been assigned two tasks; act as custodian of the interest of the provinces and participate, through the Constitutional Assembly, in the drafting of the New constitution.

In the view of the PAC the role of the Senate is largely confined to looking after the interest of the provinces. If that will remain their sole task in the new Constitution then we do not need 10 from each province to say the same thing. We, moreover, believe they should be directly elected so that they are accountable to the electorate.

Since the Senate will be pre-occupied with provincial issues, there should exist some link between the Senate and provincial assemblies. After all the provincial assemblies are involved in the day to day running of the provinces.

The issue of a ceremonial, above politics State President or an Executive President must be carefully examined. Experience in Africa and elsewhere has shown that such separation has led to tension and even bitter conflict. For instance the conflict between President Azikiwe and Prime Minister Tafawa Balewa paved the way for a military take over. Nearer home, in Lesotho, the Head of State (the Monarchy) overthrew a democratically elected government.

Namibia, on the other hand, has an executive President as well as a Prime Minister. If work load is a problem we could look at the Namibian model. Tanzania also has an Executive President and a Prime Minister.

An Executive President must come from the ranks of elected representatives and be accountable to Parliament. Accountability is the essence of democracy!

A G Ebrahim

CONSTITUTIONAL ASSEMBLY

THEME COMMITTEE 5

JUDICIARY AND LEGAL SYSTEMS

PROGRESS REPORT

***ENTIRE DOCUMENT EMBARGOED UNTIL MONDAY,
13TH FEBRUARY 14H00***

CONSTITUTIONAL ASSEMBLY

THEME COMMITTEE 5

JUDICIARY AND LEGAL SYSTEMS

PROGRESS REPORT

9TH FEBRUARY 1995

WORK PROGRAMME:

Theme Committee 5 adopted its Work Programme which is as follows:

<p>Block 1 to 4</p>	<p>1. The Structure of the Court System</p> <p>2. The Relationship between the different levels of Courts</p> <p>3. The Composition of courts and appointment of Judicial Officers</p> <p>4. Access to the Courts including lay participation.</p> <p><u>Relevant Constitutional Principles:</u> II, IV, V, VI, VII <u>Relevant sections of Interim Constitution:</u> Chapter 7 and sections 241 and 242</p> <p><u>Relevant constitutional principles:</u> II, VII <u>Relevant sections of Interim Constitution:</u> 96, 97, 101, 102, 241 and 242</p> <p><u>Relevant Constitutional Principles:</u> II, IV, VII <u>Relevant sections of Interim Constitution:</u> 96, 97, 98, 99, 100</p> <p><u>Relevant sections of Interim Constitution:</u> Section 101(3) to (6)</p> <p><u>See</u> CP VII and section 103</p> <p><u>See</u> CP VII and section 104, 105 and 109</p>
<p>Block 5</p>	<p>5. Traditional Authorities & Customary Law</p> <p><u>See</u> CP XIII(I) and section 103</p>

Block 6	6. Attorneys-General and other judicial appointment <u>See</u> section 108
Block 7	7. General <u>See</u> sections 35, 107, 231 and 232
Block 8	8. Legal Education and Legal Profession
Block 9	9. Transitional Arrangements <u>See</u> Chapter 15

PROCESS WITH REGARD TO OUR WORK PROGRAMME:

(A) Reports to the Constitutional Committee:

- (i) Theme Committee 5 will submit One Report on the issues covered in Block One to Four. This Report will be submitted at end of February 1995.
- (ii) Block Five will be submitted as One Report.
- (iii) Block Six to Nine will be submitted as One Report.

We have no specific dates for submission of reports from Block Five to Nine. This can only be assessed after our First Report.

Public Participation Programme:

Theme Committee 5 has embarked on a particular process regarding Public Participation: This process includes hearings at Theme Committee meetings which would culminate in a workshop when the different views (Issues in Block One to Four) would be crystallised.

HEARINGS:

This list comprises names of organisations/individuals who have already given evidence.

ORGANISATION	REPRESENTATIVE	DATE OF EVIDENCE GIVEN	AWAITING CONFIRMATION
Supreme Court, Cape Town	Judges IG Farlam & S Selikowitz	1st February 1995	
UCT, Senior Lecturer, Public Law	Prof H Corder	" "	
Supreme Court, Cape Town	Judge President G/ Friedman	7th February 1995	
UWC, Director Community Law Centre	Prof. N. Steytler	" "	
NADEL	Adv Siraj Desai Mr Vincent Saldanha Dr Vela Sibisi Mr Brian Hurwitz	8th February 1995 " "	
Lawyers for Human Rights	Mr Riaz Saloojee Mr Wesley Pretorius	" " "	
UCT, Institute of Criminology	Prof Daniel Nina, National Manager (Research)	9th February 1995	
SANCO, Eastern Cape Region	Fikile Kobese, Acting President & Chairperson & Chairperson, Anti-Crime, Human Rights and Popular Justice dept.	" "	
Joe Modise Camp, Alexandra township	Martin Monyela, Community Mediator	" "	

Workshop: (Programme Attached)

ROLE OF TECHNICAL EXPERTS (T/E)

- The T/E's will formulate a report on the different positions (Block One to Four) as contained in the "Codesa" Submissions, Written submission received by the Theme Committee as well as Oral Submissions.
- The T/E's will work closely with the Core Group structuring the Workshop (27th February) and facilitating discussion i.e. A set of questions on Block One to Four is being drafted. The different Constitutional Models on Block One to Four is being prepared. A report on the different positions will be given to all the role players attending the workshop.

PUBLIC PARTICIPATION EVENT

The Theme Committee intend having a Public Hearing before/after our Workshop (27th February) in Pretoria. The details still have to be finalised.

GENERAL DIFFICULTIES/PROBLEMS BEING ENCOUNTERED

- (1) The delay in retrieving the files of Codesa and the World Trade Centre. We need the files urgently to prepare for our workshop.
- (2) The delay in appointing the Technical reports seriously hampered progress.
- (3) We need to streamline the CA administration as we experience certain problems with regard to the organising of the workshop.
- (4) Inadequate advertising of the Theme Committee's invitation to the public and others to make inputs.
- (5) The slowness and even reluctance of key players to submit their submissions and the scantiness of some submission.

POSITIVE ASPECTS:

The Theme Committee Core Group feels various positive factors could be emphasized, such as:

1. Good attendance by our members.
2. A high standard of debate.

3. A good team spirit is being developed in the Theme Committee.
4. Efficient staff members in Noel Taft and Ms Van Eck.
5. A clear vision of our task and the road ahead is developing.

CONSTITUTIONAL ASSEMBLY

THEME COMMITTEE 5

JUDICIARY AND LEGAL SYSTEMS

WORKSHOP ONE

27TH FEBRUARY 1995

UNISA - PRETORIA

The Workshop will be divided into Three Sessions. The 3 Sessions will be chaired by the 3 Rotating Chairpersons.

Session One - 8:30 - 11:00 a.m.

Chairperson - W. Hofmeyer

Constitutional Issues:	The Structure of the Courts The Relationship between the different levels of courts
Inputs by:	(1) Chief Justice/nominated Judge (15 minutes) (2) Association of Law Societies of S A (15 minutes) (3) Nadel (15 minutes)
Respondents:	(1) Judge - L. Ackerman (10 minutes) (2) Black Lawyers Association (10 minutes) (3) General Council of Bar (10 minutes)
Discussion:	(2 hours)

TEA

10:45 - 11:00

Session Two - 11:00

Chairperson - J. Van der Merwe

Constitutional Issue:	The Composition and appointment of Judicial Officers.
Inputs by:	(1) Judicial Service Commission (15 minutes) (2) Lawyers for Human Rights (15 minutes) (3) Legal Resources Centre (15 minutes)

Discussion: (2 hours)

TEA

4 pm - 4:15 pm

Session Three: 4:15 pm - 6:15 pm

Chairperson - Adv D Schutte

Constitutional Issue: Access to courts including lay people.

Inputs by: (1) National Para-Legal NGO (15 minutes)
(2) Magistrate's Association (15 minutes)
(3) Judicial Service Commission (15 minutes)

Respondents: (1) Legal Aid Board (10 minutes)
(2) Para-Legal NGO (10 minutes)

Discussion: (2 hours)

CLOSURE

CONSTITUTIONAL ASSEMBLY

THEME COMMITTEE 6
SPECIALISED STRUCTURES OF
GOVERNMENT

PROGRESS REPORT

9 FEBRUARY 1995

CONSTITUTIONAL ASSEMBLY

THEME COMMITTEE 6 SPECIALISED STRUCTURES OF GOVERNMENT

PROGRESS REPORT

1. INTRODUCTION

This report is a presentation of progress on the work of the Theme Committee 6 ("the Committee"). As the Committee is divided into four Subtheme Committees ("the Subcommittees"), the report will capture the activities of each Subcommittee.

All Subcommittees have revisited their workplans as per ANNEXURE "A".

2. SUBTHEME COMMITTEE 6.1 (PUBLIC ADMINISTRATION)

This Subcommittee started its activities by hosting a workshop on 25-6 January 1995 under the theme of public administration and constitution.

The Subcommittee has produced a report, a copy of which is attached hereto and marked ANNEXURE "B", from the proceedings of the workshop. This report will be utilised as a framework for inviting submissions from stakeholders, identified by the Subcommittee, in the arena of public administration.

The Subcommittee has complemented its workplan by a comprehensive programme, a copy of which is attached hereto and marked ANNEXURE "C".

3. **SUBTHEME COMMITTEE 6.2 (FINANCIAL INSTITUTIONS AND PUBLIC ENTERPRISES)**

This Subcommittee began its work at the end of last year by hosting a series of information seminars discussing topics like the Auditor General (AG), the Reserve Bank (RB) and the Financial and Fiscal Commission (FFC). This cycle of seminars was completed on the 23 January 1994.

The Subcommittee has discussed preliminary submissions by all political parties, save the PAC, represented in the assembly. The Subcommittee is presently organising meetings to listen to oral evidence from outside organisations.

From the preliminary discussions that have taken place in the Subcommittee, it would appear that all parties favour a retention of the provisions of the interim constitution on financial institutions, with relatively minor amendments, in the final text of the constitution. This has prompted the Subcommittee to call the political parties to concretely spell out the details of the said amendments by 22 February 1995.

In early December 1994, in the absence of guidelines from the Constitutional Assembly on the process of calling for submissions, the Subcommittee sent out more than a hundred letters, calling for submissions, from very significant stakeholders. To date there has not been responses from these stakeholders. The complaint from these organisations is that the invitations for submissions reached them during the christmas dead-time period. The Subcommittee will be sending reminders for submissions on the AG, RB and procurement. The net effect of all this is that the period of dedicated CA work could not be utilised productively by this Subcommittee.

4. **SUBTHEME COMMITTEE 6.3 (TRANSFORMATION, MONITORING AND EVALUATION)**

This Subcommittee has had a string of information seminars addressed by eminent experts. This seminars covered all areas of the scope of work of the Subtheme Committee, i.e, the Public Protector, the Commission on Gender Equality, the Commission on Restitution of Land Rights and the Human Rights Commission.

The Subcommittee is in the process of distilling issues arising out of the aforesaid seminars. However, it should be said, the Subcommittee has found the notion of restitution of land rights to be too limiting in so far as it fails to address the question of land redistribution. For this reason the Subcommittee has decided broaden its approach to the question of land.

5. SUBTHEME COMMITTEE 6.4 (SECURITY APPARATUS)

This Subcommittee has had discussion on submissions from the ANC, IFP, NP, PAC and DP.

A debate has already taken place on the content and form of the constitutional provisions on the Security Apparatus and the general view is that such a provision need only to cover long standing principles, albeit with a measure of elaboration on these principles, given the history of our country.

Some debate has also taken place on the location of the provision on security apparatus in the final constitutional text. Four possibilities have been mooted, i.e, the preamble, the bill of rights, separate chapters dealing with each arm of the Security Apparatus and a chapter dealing with all Security Apparatus. The debate is continuing and finality has not been reached on this matter.

The Subcommittee held an information seminar on Correctional Services on 7 February 1995 addressed by Professor Dirk Van Zyl-Smit (Dean of the Faculty of Law, University of Cape Town). The seminar prompted a discussion as to the appropriateness of deliberating on correctional services as a security arm.

The Subcommittee is in the process of organising a workshop on the security apparatus to be held in the next two to three weeks. On 9-10 March 1995, the Subtheme Committee will meet the Canadian delegation of defence experts.

6. CONCLUSION

The assessment of the Committee on the work of its Subtheme Committees is that it is reasonably satisfactory.

A few areas worrying the Committee need to be raised:

- 6.1 The Committee is concerned about the poor dissemination of the decisions of the CC to Theme Committees;

An example here, although this matter was resolved at the meeting with the Chairpersons on 6 January 1995, is the exclusion of the subject of traditional authorities from the scope of work of the Committee without consultation and without informing the Committee of the change.

6.2 There is concern over the CC's approach of controlling the constitution-making process from the centre.

In this connection the Committee feel that there is a need for Committees to be given more space and powers, without too much prescription from the centre, to approach their work in accordance with their specific needs and conditions.

The pertinent question is whether Theme Committees that have specific needs such as participation - on TV's agenda, face the facts, good morning South Africa and phone-in programmes - can have these planned through the CA's media department outside of the CA's centrally planned public participation programme.

ANNEXURE "A"

**THEME COMMITTEE 6
SPECIALISED STRUCTURES OF GOVERNMENT**

Workplan as at 9 February 1995

Block	Subtheme Committee 6.1	Subtheme Committee 6.2	Subtheme Committee 6.3	Subtheme Committee 6.4
1	Public Service	Auditor General; Reserve Bank; and Procurement.	Information seminars on all areas of work.	Accountability and control of the security forces.
2	Public Service	Auditor General; Reserve Bank; and Procurement.	Identification and isolation of issues arising out of the seminars and preparation of report.	Accountability and control of the security forces.
3	Public Service	Auditor General; Reserve Bank; and Procurement.	The Public Protector	
4	Public Service	Auditor General; Reserve Bank; and Procurement.	The Public Protector	
5	Public Service	Auditor General; Reserve Bank; and Procurement	The Human Rights Commission.	
6	Election Commission	Finance and Fiscal Commission; and Public Enterprises.	The Human rights Commission.	
7	Election Commission	Finance and Fiscal Commission; and Public Enterprises.	Commission on Gender Equality.	
8	Election Commission	Finance and Fiscal Commission; and Public Enterprises.	Commission on Gender Equality.	
9	Public Service	Finance and Fiscal Commission; and Public Enterprises.	Commission on restitution of land rights.	
10		Finance and Fiscal Commission; and Public Enterprises.	Commission on restitution of land rights.	

FIRST REPORT

**SUBTHEME COMMITTEE 6.1
PUBLIC ADMINISTRATION**

**THEME COMMITTEE 6
SPECIALISED STRUCTURES OF GOVERNMENT**

1 INTRODUCTION

This report emanates from discussions in Theme Committee 6 on the theme of Public Administration and the Constitution. The discussion in the Theme Committee suggests that a constitutional provision on the Public Service may be desirable. It is the subject of debate, however, what level of detail should be covered in such provision. The weight of opinion is that a constitutional provision on the Public Service should contain as little detail as possible, in order to provide room for adaptation, flexibility and innovation.

The key issues identified for further discussion were:

- (a) the need or otherwise for a constitutional provision on the Public Service/public administration;
- (b) the nature of that provision in terms of brevity and flexibility;
- (c) key themes including:
 - the role of the Public Service;
 - politics and administration;
 - the Public Service Commission structures at national and provincial levels; and
 - the Public Service as an agent of development.

Questions:

- 1.1 Should the Public Service be regulated by way of a constitutional provision? If so, what should the content and form of the constitutional provision be?

2 THE ROLE OF THE PUBLIC SERVICE

The Public Service can be characterised as an institution which should be:

- 4.2 What should be the respective roles and responsibilities of the Ministry for the Public Service and the Commission? What, if any, should be the relationship between the Ministry and the Commission?
- 4.3 What role should Parliamentary Select Committees play in relation to the Public Service and the oversight of policy formulation and implementation? Should the Public Service Commission be accountable to a Select Committee on the Public Service?
- 4.4 Should the Public Service Commission act as a body of appeal for public servants or should this role be entrusted to an independent agency?
- 4.5 Who should represent the state as employer in the bargaining process and who mandates these representatives of the state as employer?
- 4.6 Should there be provincial Public Service Commissions? If so, what should their role be? What should be the relationship between the national and provincial Commissions? Should the Constitution contain any provisions on the above?
- 4.7 How should norms and standards of public administration and management be developed and what, if any, should be the instruments of delegation from national to provincial governments?

5 THE PUBLIC SERVICE AS AN AGENT OF DEVELOPMENT

The kernel of the debate is that South Africa's transition provides the opportunity for building a new type/culture of public sector administration which serves to deepen democracy and implement "people-centred" and sustainable development. It has been suggested that the state can play a critical role in development through:

- creating mechanisms for open and interactive policy-making between citizens, communities and government and promoting social partnerships for service delivery;
- forms or forums for effective communication between the administration and the public, user and consumer groups and public employees themselves;

Questions:

- 3.1 Should there be a separation of powers between policy-making and administration?
- 3.2 Should provision be made for limited political appointments in the South African Public Service? If so, what should be the procedure and criteria for such appointments?

4 THE PUBLIC SERVICE COMMISSION

Under South Africa's Interim Constitution, the Public Service Commission is given wide competence to make recommendations and issue directives on public service-departmental organisation, conditions of service, personnel practices including appointment and promotion, the promotion of efficiency and effectiveness and the drawing up and monitoring of a Code of Conduct.

Questions have been raised about the powers which reside with the Commission. It has been argued that such wide powers present a real danger of the Commission usurping the functions of government and undermining the role and responsibilities of elected political representatives, especially the Ministry for the Public Service and Administration.

Critics of the role of the Commission, as presently defined in the Interim Constitution, argue that a more appropriate role for the Commission should be:

- To ensure merit, equity and representivity in the appointments and promotions process;
- To act as an agent of change, development and administrative reform.

Questions:

- 4.1 Should an institution such as the Public Protector be embodied in the final text of the constitution? Is there a need for another body, such as the Public Service Commission, that deals exclusively with ombuds aspects relating to the Public Service? If so, what should be its role, particularly in relation to appointments, promotions, human resource development and performance evaluation of departments and employees? How should it be composed? By whom should it be appointed and what are the appropriate mechanisms for public accountability? Should any provisions for the above be made in the Constitution?

- professional;
- career-oriented;
- non-partisan;
- efficient, effective and responsive in terms of service delivery;
- loyal in its service to the public and the elected government of the day;
- accountable to the public and Parliament.

The role of the Public Service should be considered in the context of transformation to a democratic state and society with a bias towards reconstruction and development. This will require a high quality of human resources, as well as the establishment of frameworks which create a climate for open and interactive involvement in policy making and implementation processes between government and the public.

Questions:

- 2.1 How is the Public Service to be defined and which institutions of government should be incorporated in the definition? For example, should the army, police, health, education, local government and parastatals, as well as administrative personnel in the judiciary, be covered in this definition?
- 2.2 What should be the guiding values and principles for the Public Service?
- 2.3 What would be appropriate, speedy and effective mechanisms for ensuring accountability of public servants for their actions or inactions?
- 2.4 How should the concept of a representative Public Service be defined and what affirmative mechanisms and procedures will assist in achieving such representivity?
- 2.5 Does representivity entail both deracialisation, as well as transformation of state institutions?
- 2.6 Should the public and public employees be entitled to participate in formulating policy on public services and should public service managers be responsible for creating the mechanisms for such participation?

Put differently, should there be a duty on public service managers to consult employees and the public in relation to the provision of public services?
- 2.7 Should there be an obligation on public managers to monitor and evaluate the implementation of public policy and what would be the appropriate mechanisms?

- implementation of RDP programmes and projects which establishes a bias towards redressing the inequalities caused by apartheid.

According to the proponents of the concept of a developmental public service, there is a need to shift the contours of the debate beyond mere restructuring and deracialisation to fundamental transformation of the state administration and a governance approach. This implies a shift from a rule-driven culture towards a strategic planning and strategic management approach, with an emphasis on change management processes. It also requires an approach to human resource development which will ensure the increasing capacity of the state to meet the needs of communities and the challenges of development.

Questions:

- 5.1 Should the Public Service act as an agent for development? If so, how can the Constitution create an enabling framework for such action or should this matter be dealt with elsewhere?

6 CONCLUSION

The purpose of this report is to invite comment from the public and to provide a framework within which comments may be drafted. However, submissions need not be limited to the questions posed, and the Assembly welcomes the broadest range of views and comments on the theme Public Administration and the Constitution.

The brief of Subtheme Committee 6.1 (which is a substructure of Theme Committee 6) is to focus on the Public Service and administration and it will be appreciated if all submissions relevant to this report can address themselves to this issue.

ANNEXURE "C"

**SUBTHEME COMMITTEE ON PUBLIC ADMINISTRATION
WORKPLAN
[7 February - 27 March 1995]**

Block	Date	Event	Time
1	06/02/1995	Submission: 1st draft report on the Public Service workshop by the Secretariat.	
2	07/02/1995	Discussion: 1st draft report on the Public Service by the Subtheme Committee.	14:30-17:00
	08/02/1995	Discussion: 1st draft report on the Public Service by the Subtheme Committee.	09:00-13:00
	09/02/1995	Discussion: 1st draft report on the Public Service by the Subtheme Committee.	14:30-17:00
	14/02/1995	i. 1st draft report on the Public Service tabled for consideration by the Theme Committee; and	08:30-09:00
		ii. Public hearing: Volkstaat Council.	09:00-13:00
15/02/1995	i. 1st draft report on the Public Service submitted to the Constitutional Committee; and ii. Workshop: Provincial Legislatures.	10:00-16:00	
3	20/02/1995	Public hearing: Ministry of the Public Service and the Public Service Commission.	09:00-12:00
	27/02/1995	Public hearing: Director Generals' Forum	09:00-12:00
4	06/03/1995	Public hearing: Public Service Bargaining Chamber.	09:00-17:00
	13/03/1995	Public hearing: Academic Institutions and the Public Service Institutes.	09:00-12:00
5	20/03/1995	Public hearing: All interest groups at local government level, i.e, Town Clerk's forum, United Municipal Executive, Transitional Local Councils, Transitional Metropolitan Chambers, Civics and Municipal Employee Organisation.	09:00-16:00
	27/03/1995	2nd draft report on Public Administration tabled for consideration by the Theme Committee.	18:00-21:30

