

2/4/6/6/3/2

CONSTITUTIONAL ASSEMBLY

**SUBTHEME COMMITTEE 4
THEME COMMITTEE 6
SECURITY APPARATUS**

TO : ALL MEMBERS OF THEME COMMITTEE 6.4

Attached please find:

- 1 A draft programme for the workshop on defence (Members are requested to submit any proposed changes that they may have to the secretariat)
- 2 The first draft of the police report for discussion at the meeting of 19 April 1995

**H EBRAHIM
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REPUBLIC OF SOUTH AFRICA
CONSTITUTIONAL ASSEMBLY

**THEME COMMITTEE 6.4
SECURITY APPARATUS**

WORKSHOP : 21 APRIL 1995

VENUE: Old Assembly chamber

DRAFT PROGRAMME

- 08:45** Registration and tea
- 09:00** Opening and Welcome
Ms Jenny Schreiner, Chairperson Theme Committee 6.4
- 09:15** **The interim Constitution and a brief comparative audit of other constitutions**
Speaker: Prof Deon Fourie, Unisa
- 09:35** Discussion
- 10:00** **Role and functions of the Defence Force: overview**
Speaker: Mr Fana Hlongwane, Ministry of Defence
Respondent: Mr Gavin Cawthra, Military Research Group
- 10:40** Discussion
- 11:00** Tea
- 11:20** **Role and functions of the Defence Force: The Part time Forces and personnel procurement**
Speaker: Brig Joan van der Poel, SANDF
Respondent: Mr S J Macintosh, African Armed Forces
- 12:00** Discussion

12:20 **Civil/military relations: national security doctrine**
Speaker: Mr Laurie Nathan, Centre for Conflict resolution

12:40 **Discussion**

13:00 **Lunch**

14:00 **Civil/military relations: The Defence Secretary as a mechanism of civilian control**
Speaker: Brig Jack Grundlingh, SANDF

14:20 **Civil/military relations: Chain of Command**
Speaker: Lt Gen W Kritzinger

14:40 **Discussion**

15:00 **Civil/military relations: Oversight mechanisms and civilian control**
Speaker: Geoff Brown, Idasa

15:20 **Discussion**

15:40 **Rights and duties of members of the defence force**
Speaker: Mr Fana Hlongwane, Ministry of Defence
Respondent: Paul-Bolke Mertz, Military Research Group

16:00 **Tea**

16:20 **Discussion**

16:40 **Arms industry and arms trade**
Speaker : Mr Krish Naidoo, Armscor

17:00 **Discussion**

17:30 **Closure**

DRAFT

Theme Committee 6.4

**Specialised structures of government:
Security Apparatus**

Second report to the Constitutional Committee

"Policing and the police service in the constitution"

10 April 1995

Embargoed until 19 April 1995

PART TWO

Note: a) This Report refers to the police service as either a national police service or provincial police services as is relevant, and does not name the service(s). It is now proposed that the Constitution should not name the security apparatuses. This is a shift from the Report on Accountability and Control of the Security Apparatuses.

b) Points in this draft report marked with an asterisk * are for the Sub Theme 6.4 Committee to decide on.

1 PREFACE TO THE SECTION OF CONSTITUTION DEALING WITH SECURITY APPARATUSES.

1.1 ANC

The Preamble should state that security is an all encompassing and holistic concept that enables people to live in peace and harmony, enjoy equal access to resources as well as transform and develop their lives.

The objective of national security policy shall therefore go beyond achieving an absence of war and physical violence to include the consolidation of democracy, respect for human rights, social justice, sustainable socio-economic development and protection of the environment.

Threats to security shall not be interpreted as being limited to external military aggression but shall include poverty, social injustice, socio-economic deprivation, abuse of human rights and destruction of the environment.

* **Contention:** See Accountability and Control Report Point 6 Contention 1

* **Further Clarity:** Does above proposal fall under the Preamble of the constitution or under the Preface to the section dealing with security apparatuses? Submission appears contradictory on this.

* **Draft:** Security is an all encompassing and holistic concept that enables people to live in peace and harmony, enjoy equal access to resources as well as transform and develop their lives.

The objective of national security policy shall therefore go beyond achieving an absence of war and physical violence to include the consolidation of democracy, respect for human rights, social justice, sustainable socio-economic development and protection of the environment.

PART ONE

PARTICULARS OF MATERIAL PROCESSED BY THE THEME COMMITTEE

1 SUBMISSIONS RECEIVED

The following submissions have been received by the Subtheme Committee:

1.1. Political parties

- * African National Congress
- * Democratic Party
- * Inkatha Freedom Party
- * National Party

1.2 Government Institutions

Ministry of Safety and Security
South African Police Service

1.3. Organisations of civil society

- * Community Peace Foundation, University of the Western Cape
- * Centre for the Study of Violence and Reconciliation
- * Military Research Group
- * Police and Prisons Civil Rights Union (POPCRU)
- * Public Servants Association (PSA)
- * South African Police Union (SAPU)
- * South African National Civics Organisation (SANCO) Anti Crime Commission

1.4. Individuals

Lt Gen Hein de V du Toit, RAU
Prof Ben Smit, Unisa

Deliberations have focused on submissions from political parties and participants in the seminar on Police. The submissions received from the public so far have tended to be broad and short.

2 SEMINARS ORGANISED BY THE COMMITTEE

A seminar on Policing, police service and the constitution was held on 20 March 1995.

Embargoed until 19 April 1995

Threats to security shall not be interpreted as being limited to external military aggression but shall include poverty, social injustice, socio-economic deprivation, abuse of human rights and destruction of the environment.

2 SUPREMACY OF THE CONSTITUTION

2.1 ANC

The Constitution as the Supreme law must be binding on the security apparatus. The role of the Police is to adhere to and protect the Constitution.

2.2 IFP

Members of the SAPS will make an oath or affirmation to protect and serve the Constitution. The SAPS shall enforce the law and shall act only as authorised by the law and in terms of the Constitution.

Members of the SAPS shall not be delegated powers which in any way exceed the Constitution.

- * **Agreement:**
1. The Constitution is the supreme law in South Africa
 2. The Constitution must be explicitly binding on the security apparatus
 3. The Constitution should prohibit the Police from acting on their own and bypassing Parliament and the Executive.
 4. The Constitution should state that the Executive cannot use the Police to violate the Constitution.

- * **Draft:** The constitution should address these principles in relation to all of the security apparatuses in the Preface to the section dealing with the Security Apparatuses:

Final responsibility for national security rests with the President, the Executive and Parliament which have the security apparatuses as instruments in that protection of security.

Security apparatuses cannot act on their own but rather under the guidance of and with the functions defined by Parliament and the Executive.

3 POWERS AND FUNCTIONS OF THE POLICE SERVICE

3.1 ANC

The function of the Police Service shall be the prevention of crime, investigation of any offence or alleged offence, the maintenance of the rule of law and protection of the safety and security of the

citizens through community policing.

The duties of the National Commissioner should be those contained in the interim Constitution.

The establishment of police substructures at local level shall be the responsibility of the relevant provincial government official, probably the MEC.

3.2 DP

All police officers should be vested with the same basic powers as peace officers and all police officers should have jurisdiction throughout South Africa.

At national level police should be tasked with maintenance of criminal records, the office of serious economic offences, drug trafficking countermeasures, a rapid deployment force to deal with terrorism and insurrection, enforcement of international agreements, Inspector General, funding formula.

At provincial level police should be tasked with highway patrol, detective branch, forensic services, enforcement of national and provincial laws, carrying out court orders, establishing police stations and lock ups.

At local level the police should be tasked with traffic services, visible policing, crime prevention, community policing, community liaison forums.

3.3 IFP

Members of the (national) SAPS will be responsible for all aspects of enforcement of national legislation with the exception of frame-work legislation.

The SAPS will be responsible for:

- a) the investigation and prevention of organised crime which requires investigation in terms of national legislation.
- b) international police liaison
- c) central support for the keeping of national data, criminal records and statistics
- d) assistance to provincial training establishments to service the provincial services
- e) assistance with forensic laboratory services
- f) the establishment of a special task force or high risk operations related to crimes of a national nature.
- g) such unctions related to border, import and export control as may

be assigned to the service by the law.

h) national protection services

i) provision of technical support services and logistical technology in support of provincial police services.

*** Agreement:** Functions of police service shall be the prevention of crime, investigation of any offence or alleged offence, the maintenance of the rule of law and protection of the safety and security of the citizens and the community.

*** Note:** The Draft presented by CA Law Advisors on 29 March contradicts this in terms of language using 'law and order' and 'internal security', both of which have been opposed in the Subtheme Committee.

*** Contention:**

1. Powers of national police service -
Option 1 - powers of national police service should be national residual powers with provincial powers being specified in the constitution;
- Option 2 - powers of provincial police forces being residual powers with national powers being constitutionally specified.

*** Note:** These two options run through the entire report as contentions. The report refers to them as Option 1 and Option 2, and tries to identify areas of agreement and contention within each of the Options, while continuing to note the contention between the Options.

2. Specific national and provincial tasks -

Option 1 - as from DP

Option 2 - as from IFP

*** Agreement in Option 1: Tasks of National Commissioner as in Interim Constitution**

4 EXECUTIVE CONTROL

4.1 ANC

Final responsibility for national security rests with the President, the Executive and Parliament.

Security institutions cannot act on their own but rather under the guidance of and with the functions defined by Parliament and the Executive.

The President shall appoint the National Commissioner after consultation with the relevant Minister.

*** Agreement:** Police service as one of security apparatuses used by

President, Parliament and Executive in performance of their task of ensuring safety and security for citizens.

- * **Draft:** Covered in draft of preface to security section and functions of police service (see above).
- * **Agreement:** The President shall appoint a National Commissioner in consultation with the relevant Minister.
- * **Draft:** The President shall appoint a National Commissioner in consultation with the relevant member of the Executive..

5 STRUCTURES

5.1 ANC

There should be one national police service in the country with structures devolved to the Provinces.

5.2 DP

The Police Service should be structured on national, provincial and local government levels. There should be one police structure dedicated to upholding one body of law. Emphasis should change from over-centralisation to devolution to local communities.

Provision should be made for one level of police to perform services on an agency basis for another level. The Police Act should provide for one level the integration of existing police services to accommodate this structure and s221(3) of the Constitution amended accordingly.

Provision should be made in the Constitution for the President to "federalize" all police officers under national command during declared states of emergency, war or national disaster.

5.3 IFP

There shall be established and regulated by an Act of Parliament (national) a SAPS

Provinces shall be competent to adopt legislation to establish and regulate Provincial Police Services, Public Order Forces, Metropolitan or Municipal Police Services.

Policing will primarily be the responsibility of Provinces in all areas which are not specifically devolved to the national government. The Constitution (national) shall list the areas of competence of the National police with emphasis on responsibility for specialised

functions. Framework legislation defining standards, entry requirements and training requirements may be set by Parliament.

Policing shall primarily be within the residual competence of the Province. Provinces shall have their own separate and distinct police services which they shall be responsible to structure, organise and administer in terms of provincial law. All powers will accrue to the Province unless specifically stated in terms of the principal of subsidiarity.

National framework legislation related to policing shall leave all administrative activity to the provinces, and should be sufficiently general to require or allow implementing legislative action by the Provinces. such framework legislation will relate to maintenance of standards, entry requirements and other aspects such as training and reporting procedures.

5.4 NP

The SAPS must be one national service with different clearly defined responsibilities, functions and competencies at national, provincial and local level.

*** Contention:** **Option 1 - There should be one police service structured on national, provincial and local level**

Option 2 - There shall be a national police service and provinces shall be competent to establish and regulate provincial police services, public order forces, metropolitan or municipal police services.

*** Contention within Option 1:** **1. There should be one police service dedicated to upholding one body of law and integration of all existing police services at all levels must be facilitated by the amendment of S221(3) of Constitution.**

2. Establishing of municipal/metropolitan police and any other substructures at local level shall be the responsibility of the relevant provincial government official, probably the MEC as in S221 (3)

*** Agreement within Option 1:** **In event of states of emergency, war or national disaster President shall have power to place all police officers directly under national command.**

6 CIVILIAN CONTROL

6.1 ANC

The National Commissioner shall appoint the Provincial Commissioners after consultation with the relevant MEC. The MEC shall have responsibility to monitor effective policing in Provinces, together with the Provincial Commissioner, and to see to the establishment of appropriate structures for community policing, and oversee the work of Provincial Commissioner. The constitution must provide for an executive structure consisting of the Minister and the relevant MECs.

6.2 DP

The day to day management of the police at all levels should vest with a Commissioner, who should report to the member of the Executive in charge of police services. Metropolitan Commissioners would be responsible to Provincial Commissioners for standards, efficiency and discipline as provided for in the Police Act.

6.3 IFP

There shall be a civilian Commissioner of the SAPS.

*** Contention: Civilian or professional career nature of National Commissioner**

7 LABOUR RELATIONS AND HUMAN RIGHTS

7.1 ANC

Members of the Police Service shall have their rights subject to the limitation clause (s33).

Details of labour regulations will be covered in regulations and law. The constitution should state that the classification of the Police Service as an essential service should dealt with in the Police Act.

Compulsory collective bargaining, dispute resolution and arbitration should be provided for in law. Those provisions should curtail the rights of members of the Police Service to strike.

7.2 IFP

The right to strike may be limited by relevant legislation.

Members of the Police Services may join unions and are entitled to collective bargaining.

Compulsory labour dispute mechanisms will be defined by law.

- * **Agreement:** Rights of members of the police service(s) subject to limitations clause as in S33, with legislation defining compulsory arbitration procedures, etc.

8 BORDER POLICING

8.1 ANC

Border patrols should be the responsibility of the police, except under certain conditions such as a state of war. Details of this can be dealt with in law.

- * **Agreement:** Border policing should be included in national powers and functions.

9 PARLIAMENTARY OVERSIGHT

9.1 ANC

There shall be a multi-party oversight committee.

9.2 IFP

Parliamentary committees on policing shall be representative of all political parties to oversee all aspects relating to the Service. or this purpose they may hold hearings, investigations, take evidence and subpoena witnesses.

They shall have the power to authorise the submission of the budgets of the service prior to its inclusion into the national budget.

A joint Committee shall have oversight over the SAPS and advise the Minister on policy formulation and strategy.

Parliamentary committees shall make recommendations on legislation and regulations relating to the service, interdepartmental co-operation, rationalisation, demarcation of line functions and investigate complaints made against the service.

Parliamentary Committees will be empowered to refer allegations against the service to the Human Rights Commission.

They will submit a report annually to the President and Minister on the activities of the Committee.

They will have foresight of all activities of the SAPS.

- * **Agreement:** The Constitution should provide for oversight by a multi-party parliamentary Committee. The functioning of the Committee to

be defined in Rules of Parliament or if necessary in legislation.

10 PUBLIC ORDER POLICING

10.1 ANC

No details should be in the Constitution. This is a national competency and there may be a need or the establishment of a rapid response unit which could only be activated by the national Minister or national Commissioner.

10.2 IFP

There should be another Force located between the Military and the Police. This would be an institution responsible for supporting the Police when there was a breakdown of civil order, they would be available in times of war to assist the Defence Force and in times of natural disaster.

Under normal circumstances they would fall under the control of a civilian ministry at a provincial level and in times of war of a state of emergency to a national minister.

Standards for entry should be higher than for Police officers working at a community level, and careful training and selection requirements should be imposed.

This force should take over the paramilitary responsibilities that the Police Force presently have. Their role should carefully limited by the Constitution to make sure that their functions do not overlap with those of the Police or Military. The Police would then be a totally civilian police force which used the minimum amount of force.

Final accountability would rest with a Ministry such as the Ministry of the Interior. This force would be resourced and funded from provincial budgets and deployment determined by the National Minister. Their actual use on a day to day basis would be the responsibility of the provincial MEC.

This force would allow for the civilian Police to be totally removed from the political realm, and it would take over some of the duties presently performed by the Internal Stability Division.

* **Agreement:** Option 1 - public order policing is national function/competency. This should be addressed in section dealing with powers and functions of police service.

* **Contention:** Constitution should provide for a separate paramilitary force to

be concerned with public order policing.

11 CRIME INTELLIGENCE

11.1 ANC

The Constitution should define the relationship between civilian, military and crime intelligence services under the auspices of a co-ordinating structure.

- * **Agreement:** The police service can only collect crime intelligence in relation to its executive function in relation to alleged crime. Access to necessary intelligence will be facilitated through participation in intelligence co-ordination structure under the member of the executive responsible for intelligence.

12 COMMUNITY POLICING

12.1 ANC

The principle of community policing must be defined in the Constitution as a guiding principle of the police. The details of structure must be defined in law.

12.2 IFP

Community forums will guide policing at national, provincial and local level.

- * **Agreement:** The police service shall be guided in all areas of police work by the concept of community policing.

13 OMBUD STRUCTURES

13.1 IFP

There shall be national and provincial Police Services Public Protectors.

- * **Contention:** No proposal for ombud structure in relation to police from other parties.

14 RIGHTS OF MEMBERS OF THE POLICE SERVICE IN RELATION TO THE STATE

14.1 IFP

Members of the Police Service may hold membership of political parties but may not hold office in such parties or act in any manner which is prejudicial.

There shall be Police Service Commissions at both national and provincial level.

A member of the Police Service shall be obliged to disobey any unlawful command.

*** Agreement:** Members of the security apparatuses should be obliged to obey all lawful commands and disobey any unlawful commands.

*** Draft:** Members of the security apparatuses should be obliged to obey all lawful commands and disobey any unlawful commands.

15 MINIMUM FORCE

15.1 IFP

Members of the police service will be obliged at all times to use minimum force in the execution of their duties.

*** Agreement:** Members of the police service will be obliged at all times to use minimum force in the execution of their duties.

*** Draft:** Members of the police service will be obliged at all times to use minimum force in the execution of their duties.

16 DISCRIMINATION

16.1 IFPZ

No member of the SAPS may be discriminated against on the basis of gender, race and conviction.

*** Agreement:** No member of the security apparatuses may be discriminated against on the basis of gender, race, sexual preference or conviction.

*** Draft:** No member of the security apparatuses may be discriminated against on the basis of gender, race, sexual preference or conviction.