CONSTITUTIONAL ASSEMBLY

SUBTHEME COMMITTEE 3 OF THEME COMMITTEE 6

SPECIALISED STRUCTURES OF GOVERNMENT

21 FEBRUARY 1995

DOCUMENTATION

Constitutional Assembly

Subtheme Commitee 3
Transformation, Monitoring and Evaluation

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CONSTITUTIONAL ASSEMBLY

SUBTHEME COMMITTEE THREE
TRANSFORMATION, MONITORING AND EVALUATION

OF

THEME COMMITTEE SIX
SPECIALISED STRUCTURES OF GOVERNMENT

TUESDAY 21 FEBRUARY 1995

Please note the following details for the meeting of the Subtheme Committee:

Date: **Tuesday 21 February 1995**

Time: **9:00 - 11:30**

Venue: **V227**

AGENDA

1.	Opening and Welcome
2.	Input on the Danish experience of National Machinery for Women - Ms Anna Grete Holmsgaard Chair of the Danish Gender Equality Commission.
3.	Confirmation of Minutes of the 14 February 1995
4.	Work Programme
4.1	Tabling of draft seminar report and Work Programme for Block 2/3/4
4.2	Discussion on report and Work Programme

5.	Meetings with other Theme Committee's and Subtheme Committee's
5.1	Report from Secretariat
6.	Political Party Submissions
7.	Any other business
8.	Closure

CONSTITUTIONAL ASSEMBLY

SUBTHEME COMMITTEE THREE
TRANSFORMATION, MONITORING AND EVALUATION

OF

THEME COMMITTEE SIX
SPECIALISED STRUCTURES OF GOVERNMENT

14 FEBRUARY 1995

PRESENT

Kgositsile B (Chairperson)

Inkosi B Luthuli
Louw L
Malan T J
Moatshe P
Mokoena L M
Mompati R
Ngubane H
Tshabalala M E
Turok M
Zitha D A

B Levy and C Albertyn were in attendance

1. Opening and Welcome

Ms Kgositsile opened the meeting at 15:00 and welcomed members.

2. Confirmation of minutes

2.1 Minutes 7 February 1995

The minutes were confirmed.

2.2 Minutes 8 February 1995

The minutes were confirmed with the following changes;

i) Pg 1, attendance, M T Tshabalala should be read as M E Tshabalala.

ii) Pg 28, 3.2, unclarity should be read as no clarity.

3. Draft report from the seminar programme

3.1 Tabling of draft report

The report of the seminar programme was tabled. Ms Kgositsile asked members to read through the report for the meeting on Tuesday 21 February 1995 (see annexure A).

3.2 Report from the Secretariat

Ms Levy reported that the Secretariat was in the process of compiling a draft Work and Public Participation Programme based on the issues raised in the seminars. This programme will be completed by Monday and distributed to members for discussion at the meeting on Tuesday 21 February.

Ms Malan thanked the Secretariat for drawing up the report.

3.2.1 Submissions

The meeting agreed that party political submissions on the Public Protector needed to be submitted to the Secretariat by Friday 17 February 1995. In addition it was agreed that the Technical Experts would need draw out the areas of agreement and differences in order to facilitate discussion.

3.2.2 Public Participation Programme

The meeting agreed that the way to proceed with the Public Participation Programme was firstly to hold public hearings from

stakeholders such as the legal profession and the public service. Secondly as these issues were quite complex and technical it would be important to take these debates to the broader community in the form of seminars.

4. Input by Dr C Albertyn on the Public Protector

4.1 Dr Albertyn presented an input on an alternative model of the Public Protector (see annexure B).

Dr Albertyn argued that there were essentially two models of the Public Protector:

i) The complaints driven model

ii) A model that takes in to account the complexity of modern governments through ensuring that individual concerns are dealt with in a fair manner as well as pro-actively identifying and resolving the underlying systemic causes of recurring unfairness.

The assumptions underlying the above model include the following:

* Administrative unfairness is complex and can also occur as a result of the management and administrative systems within and between government departments.

* The Public Protector needs to play both a reactive and proactive role with regard to investigations of systemic problems.

* The Public Protector's role needs to be viewed as part of a broader range of structures and programmes that resolve problems of unfairness.

* Provincial and National Public Protectors need to work together to combat unfairness. Provincial Protectors may need to be more complaints driven, while the National Protector may need to play more of a research role with regard to the patterns of complaints, as well as make proposals in terms of resolving the underlying problems.

* The relationship of the Public Protector with government in this model would be co-operative in terms of dealing with the need

to address systemic problems, however at points it would also be adversarial.

* As opposed complaints driven model, this alternative model can as part of a broader machinery potentially facilitate the development of a government that is fair open and accountable.

4.2 The Public Protector and the Courts

There is a need to examine the Public Protectors role with regards to the courts. Two approaches have been adopted in this regard:

i) In certain systems the Public Protector supervises the courts.

ii) In other systems this has been rejected as it is perceived as interference with judicial independence. However certain commentators have argued that the Public Protector would not intervene with regard to the decisions of the courts, rather his/her role would be dealing with any maladministration within the system of justice.

4.3 Issues arising from the discussion

i) The relationship between the Public Protector and Traditional Authorities: There is a need to examine the relationship between Amakhosi and the Public Protector. In many instances Amakhosi have played the role of the Public Protector, thus there is a need to examine their relationship. In other contexts the community may need to be protected from the maladministration of the Traditional Authority.

ii) The Public Protector and the culture of unfairness: The Public Protector can't deal with the culture of unfairness in South African society. This office needs to be seen as part of a broad range of strategies and institutions.

iii) The Public Protector and Private Institutions: While the Public Protector traditionally deals with maladministration in government there is a debate as where the state ends and the private sector begins. Universities are an example of an institution where the lines between public and private are blurred. The present Public Protector Act does not allow this office to examine these types of institutions.

4.4 The meeting agreed that the area of the role of the Public Protector extends beyond the scope of Subtheme Committee Three. It was proposed that the Secretariat set up meetings with other Theme Committee's in order to place the issue of the Public Protector on the agenda for discussion. This is important so that no duplication occurs. Meetings were suggested with the following Theme Committee's: Theme Committee five - Judiciary, Theme Committee two - Relations between levels of government, Subtheme Committee one - Public Service and Subtheme Committee four - Security Apparatus.

5. Date of the next meeting

The next meeting will be held on Tuesday 21 January 1995 at 9:00. Ms Holmsgaard from the Danish Gender Equality Commission will be addressing the Committee on Denmark's experience of a National Machinery for Women. The meeting will also discuss the Work Programme.

6. Any other business

6.1 Prof Ngubane reported that she had submitted a report on the Land Commission to the Secretariat. This report needed to be read in conjunction with Kgosi Mokoena's report.

7. Closure

The meeting rose at 16:30

(A)

CONSTITUTIONAL ASSEMBLY

SUBTHEME COMMITTEE 3

OF

THEME COMMITTEE 6

SPECIALISED STRUCTURES OF GOVERNMENT

14 FEBRUARY 1995

DRAFT REPORT OF SEMINAR PROGRAMME: JANUARY 30 - FEBRUARY 8 1995

This report attempts to draw together the issues and debates emerging from the information seminars. There are four common threads which have emerged from the information seminars:

* Many of the provisions in the Interim Constitution are too narrow in their conceptualisation of these specialised structures.

* The provisions in the Interim Constitution provide too much detail on the role and structure of these Commissions

* There is a need to look at the broadly at the central issues before examining the necessary structures which would give effect to transformation, monitoring and evaluation

* There is a need to look at the inter-relationship of the different structures so as to ensure that there is no duplication of roles.

1. HUMAN RIGHTS COMMISSION

1.1 The Commission cannot not be examined in isolation

* The Human Rights Commission needs to be examined in the context of the roles of the Judicial Authority, the Public Protector and the Gender Commission. The nature of the Human Rights Commission depends on the how the constitution looks in it's entirety.

1.2 The Human Rights Commission in the Interim Constitution

* The present provisions in the Interim Constitution with regard to the Commission are limited in that they do not consider human rights violations which are considered horizontally i.e between individuals. The main concern of the Interim Constitution is the violation of rights vertically i.e between the state and the people. However the protection vertical rights can be dealt with in the provisions relating to the Public Protector and the Judicial Authority. Hence the central function of the Human Rights Commission is to consider violations that occur horizontally.

1.3 International experience with regards to jurisdiction

* International experience suggests that the jurisdiction of Human Rights Commissions is specifically focused on human rights and non discrimination. With regards to non discrimination this jurisdiction can extend beyond actions of the government to include other areas of public life such as discrimination between individual citizens, discrimination by private employers, and discrimination generally against vulnerable groups.

1.4 The scope of Human Rights Commissions

* The standards and objectives of a national Human Rights Commission need to be based on international human rights instruments. In this way the Commission will facilitate the development of experience and international human rights jurisprudence in the relevant country.

1.5 Proposed Roles and Functions of South Africa's Human Rights Commission

i) Participation in the drafting of legislation: National Commissions which are responsible for the administration of human rights legislation will be best placed to examine areas where legislation requires improvement. They should not only audit human rights legislation, they should also be involved in auditing legislation in any area affecting human rights. In addition to the role of auditing legislation they should also be involved in their own initiatives to recommend legislative reform as governments are not always aware of human rights issues.

ii) Make determinations and have inherent quasi judicial powers: The Commission must have the power to receive complaints and endeavour to settle those complaints through mediation, negotiation and conciliation. This provision is not mentioned in the provisions contained in the Interim Constitution.

If the Commission is unable to reach a settlement it may, refer

the dispute to a Court of Law, or refer it to another separate tribunal or the Commission can be entitled to make it's own determination. The preferred view is that the Commission should have the power to make it's determination through the development of a specialist tribunal with enforceable jurisdiction attached to the it.

The motivation for a specialist tribunal arises out of the fact that; it would develop expertise in human rights and discrimination law which is an area of experience that the judiciary does not have, it could serve as an alternative to the Constitutional Court which will be primarily concerned with the vertical relationship whereas the Tribunal could be concerned with the horizontal relationship, hearings by Tribunal are less expensive, less formal and more accessible than court proceedings, and as opposed to the present judiciary a special tribunal could be made more representative in terms of class, race and gender.

iii) Promotion and protection of human rights: This role has been included in the provisions of the Interim Constitution. This role is important in terms of promoting human rights awareness. Promotion can include education, and information dissemination. In addition together with non governmental organisations the Commission could provide training for government officials.

iv) Public enquiry powers: The promotion and protection of socio economic rights is another area where the Commission could play a role. The Australian Commission has the power to conduct public enquiries which enables it to investigate and report on general socio economic rights problems. Thus the power of public enquiry will also be important for the Commission especially for people who do not have access to financial or social resources to lodge complaints.

v) Access: There needs to be a provision that allows for an individual affected by discrimination to complain not only on his or her behalf but on behalf of others similarly affected. This would result in the form of a Class Action before the Commission. Access may also be facilitated through representation by third parties or non governmental organisations.

1.6 Proposed Structure of the Commission

* While the Commission would be a national commission there is a need

to examine how it will be decentralised.

* The Commission needs to be an independent statutory body created by parliament. It must be subject to the law and not accountable to government, so that government is unable to dictate the Commissions programme.

* The Commissioners that are appointed need to have knowledge of human rights issues both nationally and internationally, they need to be politically independent and be respected broadly.

* The Chair and Vice Chair of the Commission should be permanent while the other Commissioners should operate as trustees and play a full time role. This is to ensure that the Commissioners maintain an independent mindset of the civil service.

* There is a need to appoint a director who will manage the structures under the jurisdiction of the Commission.

* There is a need to create four forums which would cover the work of the Commission:

  i) The law reform programme which would examine new and existing legislation.

  ii) The human rights and education promotion programme

  iii) Public enquiries which would be aimed primarily at addressing socio economic problems and fed through to government departments.

  iv) Tribunal and dispute resolution forums

1.7 The relationship between the Human Rights Commission and the Commission on Gender Equality

There is a debate as to whether the Gender Commission should fall under the ambit of the Human Rights Commission or whether the Gender Commission should be independent. This debate is dependent on how the role of the Gender Commission is envisaged. However it was suggested that the Human Rights Commission could have a specific forum that deals with gender issues so as to ensure that these matters are not marginalised from broader human rights issues, while a separate Gender Commission could deal with other issues.

1.8 Should the Human Rights Commission be constitutionalised ?

There is agreement that the Commission should be constitutionalised, however there is debate on the extent to which the powers, structure and functions should be written in to the new constitution. One view argues that these details need to be spelt out so that the Commission will not be subject to the whims of different governments. Another view is that the constitution should refer to the Commission however the detail should be spelt out in legislation.

1.9 The relationship between the Bill of Rights and the Human Rights Commission with regard to Second Generation Rights

There is an argument that maintains the Bill of Rights should protect First Generation Rights only. However Second Generation Rights also require positive acts by the state. Thus should second Generation Rights be justiciable or merely mentioned as directive principles of state policy which would place a moral obligation rather than legal obligation on the state.

2. COMMISSION ON GENDER EQUALITY

2.1 The need for National Machinery for Women

In order to understand the role, nature and functions of the Gender Commission one needs examine the Commission within the context of the need for National Machinery for women.

2.1.2 Role of National Machinery

* National Machinery refers to a co-ordinated set of structures, policies, strategies and programmes which aim to augment the status of women and promote gender equality.

* National Machinery provides for a political, administrative, legislative and judicial environment that allows women to exercise and defend their social, economic and political rights on an equal basis with men. At the level of legislation this can include the promulgation of a separate Act which can promote Equal Opportunities for women and address gender related issues as well as a code of conduct to ensure the implementation of the Act.

* National Machinery involves changes to the structures, procedures, consultative processes, budgetary allocations and the priorities of government.

2.1.3 Structures of National Machinery

* National Machinery can consist of the following structures:

i) Executive and Administration; a Department of Women's Affairs, an Office on the Status of Women in an existing Ministry, or Premier/Presidents office and/or desks or 'focal points' within government departments.

ii) Parliament; a Parliamentary Women's Caucus or a Select Committee on Gender.

iii) Civil Society; state-funded but independent Advisory and Consultative Councils. These Councils would consult with civil society, advise and lobby government in order to reorient existing policy, develop gender sensitive policy and integrate women's needs in to policy formulation, planning, monitoring and evaluation. In addition they would initiate and participate in educational programmes as well as monitor both government policy and action with regard to the status of women.

iv) Courts; National Machinery may also be broadened to include Courts and enforcement mechanisms so as to ensure the implementation and enforcement of both rights and policy. This can include international conventions such as UN Conventions.

v) Private Sector; National Machinery can also be extended to ensure both implementation and enforcement of rights in the Private Sector. This can include the development of a Private Sector Council voluntarily created by private sector employers in conjunction with women's organisations.

2.2 The location of the Commission for Gender Equality into National Machinery for Women

* There is a debate as to whether the Commission should form part of the National Machinery concerned with policy development, planning, education and monitoring **or** whether it should form part of the mechanisms concerned with the enforcement of rights **or** incorporate both policy and enforcement aspects.

2.2.1 An institution concerned with policy

* If the Commission was conceived to be a consultative institution whose central concern was with broad policy, strategic planning, research and monitoring issues, it would form part of a co-ordinated network of machinery that links with structures in the executive, administration and parliament. This type of Commission can be government funded however needs to be independent.

2.2.2 An enforcement mechanism

* The Commission could also be conceived as an enforcement agency to enforce both rights and policy such as human rights, civil rights or anti discrimination legislation.

2.2.3 Multiple Powers

* There are Commissions which fulfil both policy and enforcement roles. the powers of this type of Commission would include: inquiring in to complaints and affecting conciliation, investigate contravention of legislation, undertake research and educational programmes, promote the aims of Gender Equal Opportunity legislation, consult various organisations in order to examine ways of improving services and conditions affecting areas that are subjected to contravention of the specific gender legislation, investigate requests on exemptions to the gender equality legislation, formulate a Code of Conduct to ensure implementation of the legislation, ensure ratification of UN conventions and assist in preparing and presenting reports to the UN.

2.2.4 Provincial Offices

* These need to be established to assist the Commission with it's functions. However their role, structure and powers can only be clarified once the framework for the National Commission has been established.

2.2.5 Officials of the Commission

* Officials of the Commission need to be experts who have a detailed knowledge of gender, equal opportunities, affirmative action and appropriate legal issues on a national and international level. This will however also dependent on the nature of the type of Commission envisaged.

2.2.6 Issues that need to inform the decision on the nature of Gender Commission

* The availability of human and financial resources: An enforcement body would need more personnel and budget to operate effectively. A policy body can operate with a small expert staff and a lesser budget.

* Current debates: There is a need to take in to account the existing debates on enforcement mechanisms taking place such as the new

draft Labour Relations Act, Affirmative Action Act, Employment Equity Legislation and a possible Civil Rights Act.

* Duplication of functions: The Commission should not duplicate the functions and role of the Human Rights Commission. Women's rights need to be seen as part of human rights and not separate from them as this may result in the marginalisation of women's rights.

* The nature of inequality in South Africa: A separate Gender Commission would need to take in to account the complex ways in which inequality and discrimination manifests itself in South Africa.

* The needs of South African Women: The primary needs and concerns of South African Women need to inform the decision on the nature of the institution. For example some models of Gender Commissions have focused on the issue of development.

2.2.7 Should the Commission be entrenched in the final Constitution ?

* In terms of a legal imperative, the Commission does not need to be entrenched in the constitution in order to exist.

* There may however be a political imperative for the Commission to be entrenched:

  i) Women feel excluded from both policy and law making, thus the entrenchment of the Commission in the Constitution can be seen as a beacon of hope for women.

  ii) Constitutionalisation would mean that the Commission would be entrenched in a fixed way and not subjugated to legislation or the political or economic will of parliament.

2.2.8 In what manner should the Commission be entrenched ?

* There is debate with regards to the way in which the Commission should be entrenched.

  i) One argument posited is that the Commission should be entrenched in a very general way so that it's existence is protected. The structure, function and powers should not be specified as they may well need to change over time. These details need to be enacted through legislation.

  ii) Another argument posited is the need to include the details of

structures, functions and powers as well as enacting these details in further legislation.

2.2.9 The relationship between the Human Rights and the Gender Commission

* This relationship is dependent on the nature of the Gender Commission, whether it is a policy or enforcement institution. This will inform the extent to which there will be duplication with regards to the roles of the Human Rights and Gender Commission.

3. THE PUBLIC PROTECTOR

3.1 Need for an Public Protector

* According to a resolution of the International Bar Association (1980) there is a need to establish an office of an Ombudsman/Public Protector on a national, state, provincial and local levels in order to protect people against the violation of their rights by government official.

* The office of the Ombud/Public Protector needs to be provided for by the Constitution or by an action of the legislature or parliament and headed by an independent, high level public official. This official is responsible to the legislature or parliament. The official must receive complaints from aggrieved persons against government agencies, officials and employees. This official needs to act on his/her own motion and has the power to investigate, recommend corrective action and issue reports.

3.2 Debate with regards to the name

* There is a debate as to whether the name of this official should be the Ombudsman or the Public Protector.

  i) One view maintains that name Ombudsman is an appropriate one as this is a Swedish word which means legal representative, delegate or Commissioner. According to this view the term is an internationally accepted and recognised term whose function is to act as a buffer between the bureaucracy and the citizen.

  ii) The other view maintains that the name Ombudsman has sexist connotations thus there is a need to change the name to the Public Protector, which is the name reflected in the Interim Constitution.

3.3 Debate with regards to the function of the Public Protector

* There is a debate with regards to the function of the Public Protector which also manifests itself in the debate on the appropriate name for this official. There is a view that maintains that the choice of the name Public Protector has led to a misinterpretation of the role of this official. The Public Protector assumes that this office has the function to protect the public, however according to this view the function of this office is to investigate, to find a solution and to report to Parliament.

* In addition the above view maintains that the function of this office is not to protect anybody, rather the office needs to needs to investigate impartially and not to protect any specific party. Furthermore this view suggests that the administration may need to be 'protected' against unwarranted or unsubstantiated allegations. Thus the Public Protector should not favour the public or the officials concerned.

* Another point of debate with regard the function relates to the emphasis placed on the Public Protectors role with regard to whether he/she has the right to investigate on his/her own initiative. The Interim Constitution places emphasis on this function. There is however another view that maintains that while the right to investigate on one's own initiative should be included it should seldom be resorted to. This view places emphasis on investigation on receipt of complaint rather than on own initiative.

* The Public Protector would deal with the relationship between the individual and the government, however one needs to examine whether the Public Protector has any role in the Private Sector.

3.4 Criteria for selection of a Public Protector

* The Interim Constitution maintains that the criteria for the selection of the Public Protector is a person who is experienced in Public Administration or Public Finance. These criteria were deemed to be insufficient. One view held that it was important that the Public Protector should be qualified in law and should preferably be a judge in order to be able to deal with the nature of the complaints. Another view held that the Public Protector needed experience in broader fields such as sociology or social work in order to deal with the nature of the complaints which expand beyond the legal sphere.

3.5 Length of appointment

* The length of appointment needs to be examined, there is a view that

maintains that security of tenure is important and that continuity is important. Furthermore it has been argued that re-appointments may be undesirable as they may lead to lobbying. Another view however maintains that security of tenure may mean that it would be difficult to replace a problematic appointment.

3.6 Provincial Public Protector

* There is a need to clarify the roles and powers of the Provincial Public Protectors as well as the manner in which they are appointed.

3.7 Access to the Public Protector

* Creating mechanisms to facilitate access for those who are both marginalised and disadvantaged will be important, such as education and information programmes.

3.8 Should the Public Protector be written in to the New Constitution ?

* There is broad agreement that the Public Protector should be referred to in the New Constitution. However what needs to be debated is the extent of the detail with regard to the Public Protector's appointment, role, power and functions.

3.9 The relationship between the Public Protector and other specialised structures of government

* The role of the Public Protector cannot be seen in isolation from the other specialised structures of government such as the Human Rights Commission and the Gender Commission.

4. COMMISSION ON THE RESTITUTION OF LAND RIGHTS

4.1 Property clause and Restitution

Where there is a property right in a Constitution it needs to be balanced by a right to restitution, otherwise the property right of the current owners of land would override any restitution process. Thus it is not sufficient to deal with the right to restitution in legislation only, this right needs to be provided for in the Constitution.

4.2 The present functions of the Commission and Court

* Most of the description of the Commission and the Land Claims Court role is set out in the Restitution of Land Rights Act of 1994, rather than the constitution.

* The present Commission is multifunctional, it is meant to be the body that all people who have been dispossessed of land can go and lodge their claim with. However people who qualify to lodge claims are people who were removed after 1913 and people who were removed in terms of a racially discriminatory law. This scenario has already led to a certain set of anomalies given the complexity of the land rights issue in South Africa. However there is provision in the Act for people who do not fall within the aforementioned criteria. The Act states that where the Commission feels that a person/s have made a valid claim the Commission can advise the Minister what alternative process should be used to deal with their problems.

* People who were removed after 1913 or as a result of a racially discriminatory law will come to the Commission to lodge a claim. The Commission's role will be to assist them in formulating their claim. This will include helping the claimants collect the necessary evidence, the Commission has wide powers in terms of collecting information from both government departments and other parties. Once this process is completed the Commission will contact other interested parties and will try and reach a settlement in each instance through mediation. Once the parties have reached a settlement the Commission will record that settlement and submit it to the Land Claims Court for ratification. Where parties cannot reach agreement the Commission will simply refer the matter to the Court to make an award.

* The Commission also needs deal with other complexities such as to ensure that whoever comes forward to represent the claimants is a representative of the claimants or competing claims to the same piece of land. The Commission needs to ensure in whatever award is being made it does not discriminate against original members of that community.

* The Constitutional provisions with regard to restitution requires that a certificate of feasibility from the Minister is also necessary in addition to the above mentioned process before land is given back. There is a concern that the Commission process is designed to decide whether restoration is just and desirable where as the Minister decides on the basis of feasibility. Feasibility was designed as a protection in those difficult cases where for example people were removed from land which has been developed in to a hospital, and thus it may not be both difficult and not economically viable to return it to it's original owners.

* Once the Commission has made it's findings, the Court will have the power to make an award which determines the rights in land, the amounts of compensation that are payable and who will become the

owners of the land. The matter of who will become the owner of the land is a complicated issue as in many instances it will be more than one person.

* The Court is designed to hear fairly flexible forms of evidence, in many instances claimants by virtue of their circumstances will not always have the necessary documentary proof and will have to rely on other forms of evidence. The Court has the power to decide what award to make on the basis of four factors:

  i) The right to restitution

  ii) The desirability of remedying past violations of human rights

  iii) The requirements of equity and justice

  iv) The desirability of avoiding major social disruption

The Court has the power to order expropriations and to set the amount that will be payable in the event of an expropriation. There are various types of awards that are available, people can either be awarded the land that they lost, alternative land, compensation or other forms of redress. The Act provides that they may ask for specific state subsidies instead of the other types of compensation. The amount of compensation will be limited by the amount of compensation that they were paid at the time of the removal. People who were fully compensated cannot use this process. There are however complex circumstances where people got some compensation and it was far below market value and that then would have to be set up against the award.

There is an appeal process that is provided for, either at the Appellate Division or to the Constitutional Court.

* The structure of the Commission: The Land Commission does not operate in the same way as the other Commissions. The Commissioners are full time officials whose role is to manage the restitution process. They are not judges that sit on a panel and take decisions.

4.3 Controversial issues with regard to the present restitution process

* The Interim Constitution provides that a person or community is **entitled** to claim restitution, there is no clear provision that there is a right to restitution. This is a passive way of stating the right to restitution.

* Certificate of feasibility: The claim can go through an entire mediation process and court hearing but the Minister may independently decide whether the claim is feasible. This could be interpreted that this would not be feasible if there is not the budget to expropriate the land or to provide an alternative tract of land.

  The process is meant to be a fast and limited process, people are meant to lodge their claims within the first three years. It's envisaged that the Commission won't last longer than five years and the Court is also envisaged to have a limited life. This is as a result of pressure from those who have been forcibly removed, who want the process to be dealt with quickly. This is also important for the stability of property rights. Thus from both the point of view of the claimants and the current owners it has been important that this process is resolved as fast as possible. There is however a concern that people who get in first will use up the whole budget while other will be locked out. the counter argument is that the feasibility provisions relate to land only, this does not preclude the Court awarding other kinds of compensation.

* The cut of point being 1913: The reason for this cut off date arose from a study of Land Claims Courts from around the world. What emerged from this study was that Land Claims Court processes are only beneficial for people who are in a position to prove their case well. People whose claims go back more than 100 years are not likely to succeed in the Land Claims Court as they require a specific type of evidence that substantiates their claims. Thus in light of these factors the Commission and Court process was envisaged as dealing with those people who had lost land as a result of forced removal. The vast mass of people who were dispossessed through conquest and through exclusion would be dealt with by more politically directive redistribution policies that did not require this intricate type of proof. The Commission and Court process were only envisaged as one part of a broader package. There has always been a recognition that there is a need to have complimentary measures to deal with the claims and needs of the vast majority of landless people.

4.4 Commission for the future

* It is imperative that a Commission is provided for in the new Constitution for two reasons:

  i) There is a need to balance the property provision with a right to restitution, especially if the above mentioned process is not completed within the requisite timeframe.

  ii) Given the limitations with regards to the scope of present the

Commission there is a need to examine what mechanisms are required to deal with the matter of land hunger generally and whether a Commission is in fact an appropriate structure.

* While there is a need for a some kind of mechanism in the future Constitution it should not be provided for in as much detail.

'B'

CONSTITUTIONAL ASSEMBLY
THEME COMMITEE 6

COMMENTS ON THE PUBLIC PROTECTOR
(Alternative Models &
the Relationship with the Courts)

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1 The main submission on the public protector is that of the present South African "ombudsman", Judge van der Walt. However, Van der Walt's submission does not touch on a range of important issues relating to the role, functions and powers of the public protector. This memorandum attempts to raise some new issues for debate and consideration.

2 **Alternative Models:** At least two models of the Public Protector appear in the literature. The traditional vision of an "ombudsman" is that of a champion of the individual citizen, responding to individual complaints and righting individual wrongs. This appears to the model of an "ombudsman" that underlies the submission by Judge van der Walt. However some assert that this individual complaints-driven model is increasingly out of date, given the complexity of modern governments and their administration. It is unrealistic to expect that a single complaints bureau can ensure administrative fairness against state power, except in small jurisdictions or specialised fields. An alternative model debated in Canada, for example, calls for the creation of an office that

> "ensures individual concerns are resolved fairly, but also acts positively with government to identify and remedy the underlying systemic causes of recurring unfairness".[1]

A number of important assumptions underlie this model:

2.1 administrative unfairness is often systemic, hidden or complex, it does not only relate to the behaviour or action of a single official or state office, but also to management and administrative systems within and across government departments[2].

2.2 the Public Protector should be proactive as well as reactive, embarking on investigations of systemic unfairness and maladministration and making proposals for change.

2.3 the office of the Public Protector should be seen as part of a range of individuals, agencies, tribunals and programmes that seek to remedy unfairness. It can also work with relevant public accountability officials in government departments to ensure fairness and the eradication of systemic problems.

2.4 federal/national and regional Public Protectors should cooperate to address unfairness. For example, the role of the regional office could

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[1] S. Owen "Proposal for a Canadian Federal Ombudsman Office" at 5.

[2] The ombudsman of British Columbia, Canada, has issued major reports on such issues as cross-agency issues of access to information and privacy; the use of criminal record checks by public authorities; the cross-ministry integration of services to children and youth and the effective management of contracts for the private delivery of public services. (Owen at 13).

be more complaints based, whereas the role of the national office could be to analyse complaints trends and make timely and constructive recommendations on the administrative systems of public bureaucracies as they relate to individual citizens.

2.5 The Public Protector's role traditionally makes its relationship with government an adversarial one. This model seeks to develop a constructive relationship (although the adversarial aspects cannot and should not be lost).[3]

This is clearly a fairly complex model that goes beyond the office of the Public Protector to look at its relationship not only with institutions such as the Human Rights Commission, but with government departments and other specialised agencies. It seems as if it is important to do this not only to ensure that resources are used in the most economical way possible, but also to ensure the optimum efficacy of the Public Protector. It is suggested that unless the office of the Public Protector can address systemic problems, the resolution of individual complaints will only tinker with the status quo rather than assist in the provision of fair, open and accountable government.

This model of the Public Protector would also have implications for the powers and functions of the Public Protector, as well as his or her qualifications (this model suggests an understanding of the public administration systems is crucial). This requires further thought and research.

3 **The public protector and the courts:**

The present constitution states that

> "nothing...shall be construed as empowering the Public Protector to investigate the performance of judicial functions by any court of law" (section 112(2)).

It is suggested that the relationship between the Public Protector and the courts should be carefully considered. In the original ombudsman systems of Sweden and Finland, the ombudsmen successfully supervise the courts. In the anglo-american tradition, this has been resisted as interfering with judicial independence. However, this is being challenged from within these systems. A Canadian scholar writes the following:

> "One might well ask how the ombudsman could endanger the independence of the courts by calling the attention of judges to

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[3] Owen writes that "this relationship is more likely to be established where the federal ombudsman is not seen by the public bureaucracy to be enhancing the reputation of his or her office at the expense of the government and taking credit for remedying unfairness, rather than encouraging the public agency to resolve the concern and take the credit itself". (at 11).

illegalities in their behaviour or to arbitrary conduct in the courtroom...Admittedly the ombudsman should not be allowed to question the decisions of the courts. But he (sic) should be permitted to entertain complaints about the maladministration of the courts, the negligence of court officials, unnecessary delays, the personal conduct of court officers prosecutors and judges. This would in no way breach the dignity or intellectual independence of the judiciary but might go a long way in curbing the petty arbitrariness of many court officials, the practices of some crown counsel and even the ill-humoured impertinence of some magistrates towards parties, witnesses and counsel alike. Judicial independence is a cornerstone of our democracy, but it should not serve to hide abuse"[4].

Some examples of cases relating to the administration of justice in Finland and Sweden:

* a district court judge ordered a person into a mental hospital and put under guardianship on the basis of a deficient medical statement and without giving the person a hearing;
* a public prosecutor did not present all the available evidence to support a charge;
* through carelessness, a municipal court faultily calculated the detention time deducted from the time of imprisonment;
* the frequent failure of judges in Sweden to deduct the period of pretrial custody to from a prisoners sentence following a change in the law.

Many of the cases against judges concern delays or faults in procedure.

The role of the Public Protector in ensuring fairness in the administration of justice must be considered. At present the extent to which these issues will be able to dealt with under the interim constitution will depend on the interpretation of the ambit of the "performance of judicial functions by any court of law" in section 112(2). These may need to be changed.

4 Conclusion:

The aim of this memorandum is to raise these questions for consideration by the Committee as they are important questions of policy relating to the role, functions and powers of the Public Protector which have not been raised in the existing submissions. Clearly, further debate on both of the above points will require further research and input, as well as a more careful analysis of what exists at present to deal with the problems of unfairness and maladministration.

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[4] C.A. Sheppard "An Ombudsman for Canada" in (1964) 10 **McGill Law Journal** 291 at 301, 337.

PROF. H NGUBANE - 'C'

Commission on Land Restitution: Background Material

Preamble

In what follows is traced the sequence of events, mainly in the form of legislation, whereby African people were excluded from their land and from rights to use as they desired the land they were able to retain. This will help to clarify the problem of restitution and especially the nature of the measures required for its effective achievement.

The "Native Problem" and Laws to Deal with It

What has been unique to South Africa has been the preoccupation of successive governments with what is, or was, to be done about the indigenous population. Elsewhere the politics of the day usually revolve around economic issues, but in South Africa well before the advent of apartheid the overriding theme in White politics, reflected for instance in political discussion in the newspapers,was "the Native problem". The problem, it seemed, was to find ways of effectively controlling the African population and excluding them from participation in the Western-style society of the Whites, other than as the providers of labour. The exclusion was multiple, embracing all forms of social, economic and educational pursuits, etc., but central was the question of access to land and its productivity. A whole barrage of laws to deprive and exclude African people in respect of land was passed. Only some of the most outstanding ones are here mentioned.

The Native Land Act of 1913 reserved about 7% of the land of South Africa for exclusive occupation by Africans. They then became restricted within these areas, in that they could not live permanently outside them. Effectively, this Act is the mother of all discrimination in South Africa, for from it flowed a series of laws which exacerbated existing discriminatory practices in one way or another. *The Development Trust and Land Act of 1936* thus was supposed to release another 6% approximately of the land in order to provide about 13% of all the land in the country for African occupation.

Further, the African was not left alone to try as he or she was able to make a living on that restricted surface. More laws followed, serving together to so hedge any African in with impos-

itions and controls that her or his powers to make decisions on anything concerning economic advancement were nearly non-existent.

The Native Administration Act of 1927 included provisions in Section 5(1) (b) granting extensive powers to the Governor-General whereby he could remove large communities or even tribes from wherever they resided without any prior notice or scope for compensation. These powers to restrict and mandate were additional to those in the Native Land Act of 1913; the rationale for such additional powers emanated from the concept that the Governor-General enjoyed sovereignty and held a position of trusteeship over all Natives in the same way as a supreme tribal head supposedly exercised authority over his subjects when the Whites first came, dealing with land as he deemed fit - according to White perceptions.

Placing many people in a restricted space undoubtedly caused erosion and general deterioration of the soil. In an attempt at remedying this *Proclamation No. R31 of 1939* was published. This is regarded as the first piece of betterment planning for the reserves.

The Tomlinson Report of 1955 launched the overall scheme of separation that came to be known as grand apartheid. It emphasised planning, as well as the segregation of Africans according to their language groups. On this basis ten territories, demarcated mainly by linguistic region, were created, each with its own administrative machinery covering all spheres of life. The established principle of African land tenure that each family is entitled inherently to a portion of the community's land was rejected. Instead, it would be decided by Government officials who the actual active farmers were, and who were not such. The land then was divided into agricultural and grazing areas, and made available to those who were considered active farmers, while the rest were deprived and placed in concentrated settlements without any of the services which normally accompany that style of life. In this way the betterment schemes destroyed the customs and way of life of rural people without affording benefits in terms of any development concept.

What was also profoundly destructive of people's ability to control their own lives were the short distances of movement which the betterment schemes entailed. A man or woman would be forced to destroy a family home built through hard labour and at substantial expense, only to move a few kilometres to a site where he or she was expected to start all over again building a new home, all at one's own expense without any compensation for the deliberately destroyed house, and with no obvious long-term advantage.

The Group Areas Act of 1950 (Act No. 41) was replaced in 1957 and again in 1966; it is a

widely known piece of apartheid legislation because it brought racial groups other than Africans into the scheme of separation.

The Group Areas Development Act of 1955 (Act No. 69) however provided arrangements for assisting White, Coloured and Asian people to move if they were living in an area allocated in terms of Group Areas legislation to members of another population group. Compensation was paid where such removal was obligatory, and it was determined by the market value of property thus left behind (according to official records). This included an allowance for "goodwill" in calculating damages resulting from this obligatory relocation, where an occupation had been practised or a business operated. Generally speaking such a payment equalled the highest net profit for twelve consecutive months over the 36 months immediately before obligatory abandonment of such occupation or business. In other words people in this position got a lump sum equal to three years' earnings. By contrast, compensation was hardly ever provided for Africans for having to leave their houses behind, let alone having to abandon an occupation or business.

Removal in Urban Areas

As most of the removals of people in the White, Coloured and Asian groups applied in urban areas, it is appropriate here to summarize the process of urban removal of Africans.

The Native Urban Areas Act of 1923 (Act No. 21) was the focal point legislatively of South African urban policy for African people, and it was reviewed in 1930, 1937, 1945, 1952 and 1964. The main aim of these measureas was to supplement the Native Land Act of 1913 and later the Development Trust and Land Act of 1936, in order to channel permanent rights for Africans into the rural Reserves by discouraging and prohibiting such rights in and around White cities. This approach was based on the proposals of the Stallard Commission of 1922 - jointly known as the Stallard Principle - that urban areas were set aside for Whites, and Africans were to be allowed into them only to be of service to Whites.

The Native (Urban Areas) Consolidation Act of 1945 (Act No. 25) was aimed at restricting permanent rights for Africans in urban areas and applying influx control measures.

The approach slightly changed in 1952 when *Section 10* of the Native (Urban Areas) Consolidation Act of 1945 was amended. Statutory rights of residence were created, whereby birthright or extended employment could give security of residence subject to the availability of suit

able accommodation. At the same time influx control was made rigid by the provision that in a prescribed area no African person might otherwise remain for longer than 72 hours, if he did not qualify under the Section 10 regulation. To enter at all one would have to have a permit in the first place, as a sojourner in the city. This applied even between two adjacent African townships. Thus the boundary between Gugulethu and Nyanga, in the vicinity of Cape Town, is a road; if the police found you on the wrong side of that road after curfew, i.e. after 10 o'clock in the evening, you were charged, as you were not in your specific residence. The whole story of having to produce one's "pass", through which movements of African people were controlled in every way, is one of the most well-known aspects of the apartheid system.

1986 and After

The repeal of influx control measures in 1986 marked the first major change of direction in the control of African people by a White minority government. It enabled them to move about far more freely, in spite of a number of restrictions on access to land which still existed.

The most important step, however, was made when *The Abolition of Racially Based Land Measures Act* (Act No. 108) was passed in 1991. This Act repealed practically all the restrictions on access to land, including especially the 1913 Land Act and all the legislation flowing therefrom and embodying in law the concept of segregation. Not only were the previous racially based Acts repealed but a solution to the problem of reallocation of land to people who had been deprived of it by the "forced removals" under the racially based laws began to be sought at last. These removals were made under the Group Areas Act of 1950 as developed and enforced in the endeavour to achieve the goal of "grand apartheid" pursued by the National Party for most of its 46 years in power as from 1948.

Liberation and the Land Issue

From the foregoing sketch of the long series of laws which deprived Africans comprehensively of all but minimal access to land, and even then severely restricted what they were able to do with it, it should be plain that that this deprivation lay at the centre of the process of domination and systematic impoverishment of the indigenous population of South Africa. Accordingly, the liberation to which they looked forward, and which was the aim of the various African political movements they supported, was defined as above all the recovery of the land and the power to make effective use of this essential resource. What enhanced this commitment was

the significance of land in African society and culture, whereby it is far more than a commodity to be bought and sold. Directly contrary to the Western view of land as one kind of asset, or form of wealth. among others, Africans regard land as essential to life and society, and believe, as already noted, in the inherent right of every family to access to part of the community's land. It forms not only an essential asset for everyone - for in the last analysis life is impossible without the fruits of land - but is a means of ensuring equality of opportunity, if access to it is not prevented by exclusive ownership. Everyone who thus has access to land has a duty to preserve it for the use of later generations. In short, land as traditionally held and used is part of the very fabric of African society, and reducing access to it is a means of destroying that society.

Land Legislation under the Government of National Unity

Land legislation promoted since April 1994 has consisted of the Land Restitution Rights Act of November 1994 and the Land Aministration Bill tabled in January 1995.

The first of these enables people who were forcibly removed under the racially based laws of the past 47 years to claim restitution or compensation through the Land Commission and the Land Courts. The cut-off date for such claims is June 1913 - i.e. no claims for land lost before then can be entertained. Thereby (a) land available for claimants is only within the 13% or so to which the 1913 and 1936 Land Acts confined African people; and (b) the Act by implication resurrects the 1913 Native Land Act which was repealed by the Abolition of Racially Based Land Measures Act of 1991.

The Land Administration Bill, if it becomes an Act, will give extensive powers to the Ministry of Land Affairs and the State President. The former will be able to delegate powers to provincial officials, who will carry out his instructions in relation to land in all the former TBVC states and self-governing territories; and the latter will be able in addition by proclamation to initiate legislation, repeal existing Acts, transfer funds etc., at least until the end of 1995. The implications of this Bill , if it is passed into law, are above all that the people, all of them Africans, who were placed in these areas partly by history but more especially by apartheid are again to be administered by individuals outside of their society, not governed by their culture, and furthermore not living amongst them.

It should be noted that the Bill is silent on the question of people's participation in their own administration, as also on any means of consultation. In fact, it resurrects the 1927 Native

Administration Act in all its aspects.

Concluding Note

The above material is offered in order to provide fuller background for the Theme Committee to discuss the presentation on Restitution of Land Rights prepared by Kgosi Mokoena.

Appendix: Land Distribution to Date

Division of the Total Surface Area, Republic of South Africa (excluding Walvis Bay)

	hectares	%
TOTAL	122 340 886	
Owned by White farmers	77 000 000 approx	63 approx.
State-held	13 707 700	11,2
African Trust Land	18 242 876*	14,9

*including 3 168 935 hectares held by the Ingonyama Trust, formerly the territory of KwaZulu = 2,6%; most of the remainder previously consisted of the territories of the formally independent states (TBVC) and the five other self-governing territories. All of this, except the land belonging to the Ingonyama Trust, is now in State hands, bringing the total thus held up to 23,5%.

In addition about 11% of the land is held by local governments, especially the three big metropolitan areas, but including other urban areas; and also held by the mining houses, especially Anglo-American.

KGOSI MOKOENA - 'D'

TRANSFORMATIONS AND MONITORING

1. Commission on Restitution of Land Rights

a) In this sub-theme committee the following deserve attention

1) Right to Land
2) Appointment of Land Commission
3) Land Restitution
4) Land Redistribution
5) The creation of specialised land claims court
6) Compensation
7) Land Administration
8) Public

1. Right to land

People must have the right to land. All people despite their gender, racial or colour differences should have access to land in accordance with equity and justice.

2. Appointment of Land Commission

There is need of land commission which will investigate and report all land claims and its findings, the commission should be an independent commission, which will have the right to hear evidence form members or groups from the SA public.

3. Land Restitution

All land which was disposed by racially based laws and apartheid laws need to be restored to their rightful owners.

4. Land Redistribution

Unused or unutilised land need to be made available to the landless people for residential or farming purposes

5. Creation of specialised land claims court

There is need for an establishment of a specialised land claims court, which will specifically entertain cases concerning land and land claims in particular.

6. Land Administration

There exist a need for a clear and clean Land Administration machinery within the government administration structure.

7. Compensation

Where it is established that there is a clear right to a land, but nevertheless the right to a particular land cannot be restored to rightful owners, because of valid economic reasons there should be adequate compensation by the state.

NATIONAL PARTY OF SOUTH AFRICA

PRELIMINARY SUBMISSION ON THE PUBLIC PROTECTOR

(Theme Committee 6, Sub-theme 3)

Constitutional Principle XXIX stipulates that there shall be a Public Protector.

Consideration must be given whether the provisions in the IC regarding the Public Protector need amendments for the new Constitution.

Taking the IC as point of departure the NP comments as follows:

Section 110(1)	Consideration should be given whether the international accepted name of 'Ombudsman' should not be re-installed. Apart from the historic origin of the name, the function of the office is to "investigate" and not to "protect" (also refer to the "Memorandum on the office of the Public Protector" by the present Public Protector, Justice P J van der Walt, p 2,3,4)
Section 110(2) (a) & (b)	Agree
Section 110(3)	Delete
Section 110(4)	As is
Section 110(5)	It is to be debated whether the term of office of 7 years should not rather be prolonged.(See memorandum Justice van der Walt, p5) Appointment until retirement should be debated.
Section 110(6)	As is
Section 110(7)	Debatable (A judge can fulfil his duties at the Bench whilst in office as Public Protector — especially if the 7 year term ot office is applicable)
Section 110(8)	Removal from office could be almost impossible as apart from the **joint committee** of the Houses of Parliament and both the **National Assembly** and the **Senate** must request such removal.
Section 110(9)	As is
Section 111	As is
Section 112(1)(a)	The emphasis should be on investigation on receipt of a **complaint** and not investigation on his or her **own initiative**
Section 112(a)(ii)	"..... person performing a public function" needs clarification.

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FREEDOM FRONT

THEME COMMITTEE 6: SPECIALISED STRUCTURES OF GOVERNMENT

SUBTHEME COMMITTEE 6.3: THE PUBLIC PROTECTOR

The Freedom Front makes the following submissions concerning the creation of the office of Public Protector.

(i) The name Ombudsman should be retained by reason of the world-wide association that has been attached to this office. The name Public Protector is misleading in so far as it creates the impression that this important official is partisan and a spokesman for the public in its relations with the State. This is not in accordance with the true nature of the functions of this official, whose duty is to make impartial investigations and to report to Parliament.

(ii) As the functions of the Ombudsman should be performed in the public interest, the Ombudsman (the male to include the female) should be a South African citizen.

(iii) It is of fundamental importance that the Ombudsman should be legally qualified. The nature of his duties requires that he should evaluate evidence submitted to him and in an objective and impartial way come to conclusions that should form the basis of action by Parliament in the national interest. For this reason it is highly desirable that a former judge (having the necessary experience in these matters and being used to an objective assessment of evidence or data) should be the incumbent of this office. The Ombudsman could be assisted by persons experienced in other socio-political fields. He himself, however, need not have such background.

(iv) The Ombudsman should be completely independent of the

government and subject only to removal from office on limited specified grounds such as those set out in s 110 of the Transitional Constitution.

Provincial Ombudsmen should, mutatis mutandis, be subject to the same rules, so that it cannot be said that they (like the national Ombudsman himself) will be civil servants in the ordinary sense of the word.

(v) The Freedom Front rejects the view that the Ombudsman should supervise the courts or judicial activity in any respect. We agree with the provisions of s 102 (2) of the Transitional Constitution that 'nothing .... shall be construed as empowering the Public Protector to investigate the performance of judicial functions by any court of law'. In support of this submission we wish to state that judicial independence (which is guaranteed by the Constitutional Principles) does not contemplate any outside interference with or supervision of the exercise of the judicial function. If a judge or other judicial officer (e.g. a magistrate) should act capriciously, arbitrarily, irresponsibly or not according to law, the present legal system provides adequate remedies, such as appeal, review or even impeachment (dismissal from office) of the judge or judicial officer concerned.

(vi) The identity of a person who furnishes information to the Ombudsman should, if circumstances so require, not be publicly disclosed.

(vii) The Ombudsman should have the power to submit reports (final or interim) at any time and not only at particular times laid down by legislation.

(viii) As a general rule all findings or recommendations of the Ombudsman to Parliament should be made public forthwith, except in very exceptional circumstances in the national interest and in accordance with requirements laid down by law.

(ix) There should be statutory provisions similar to s 5(3) of the Public Protector Act (23 of 1994) which absolves the Public Protector from liability in respect of anything reflected in any report or finding, provided this was done in good faith.
