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A24

**CONSTITUTIONAL
ASSEMBLY**

**THEME COMMITTEE 1
CHARACTER OF
DEMOCRATIC STATE**

22 MAY 1995

**ROOM M515
09H00**

DOCUMENTATION

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CONSTITUTIONAL ASSEMBLY

MEETING OF THEME COMMITTEE 1 CHARACTER OF THE DEMOCRATIC STATE

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

Date: Monday, 22 May 1995
Time: 09h00 - 12h30 - Session One
14h00 - 15h30 - Session Two
Venue: Room M515

AGENDA SESSION ONE

1. Opening
2. Apologies
3. Adoption of Previous Minutes
4. Matters arising
5. Adoption of draft Report for Block 3
[See: Document A23]
6. Orientation workshop on Block 6
[Input by Dr. J Heunis and Mr. Z Husain]
7. Public Participation Programme
8. General
9. Closure

H EBRAHIM
EXECUTIVE DIRECTOR:
CONSTITUTIONAL ASSEMBLY

Enquiries: L. Rammble and S. Rabinowitz (Tel: 24 - 5031 Ext 266)

CONSTITUTIONAL ASSEMBLY

MEETING OF THEME COMMITTEE 1 CHARACTER OF THE DEMOCRATIC STATE

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

Date: Monday, 22 May 1995
Time: 09h00 - 12h30 - Session One
14h00 - 15h30 - Session Two
Venue: Room M515

AGENDA SESSION TWO

1. Opening
2. Apologies
3. Tabling and discussion of Party submissions on Block Four
ACDP
ANC
DP
FF
NP
PAC
4. General
5. Closure

H EBRAHIM
EXECUTIVE DIRECTOR:
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**CONSTITUTIONAL ASSEMBLY
THEME COMMITTEE ONE
CHARACTER OF THE DEMOCRATIC STATE**

**MINUTES OF THE MEETING OF THEME COMMITTEE 1
MONDAY 15 MAY 1995 09H00 ROOM M515**

**Present
Marais PG (Chairperson)**

**Booi MS
Chiba L
Cwele CS
Fani LM
Gumede DM
Hangana NE
Janse Van Rensburg AP
Kekana NN
Lekgoro MK
Mabuza MC
Mahlangu NJ
Majola-Pikoli NT
Meshoe KR
Momberg JH
Moorcroft EK**

**Mulder PWA
Ncube BS
Nobunga BJ
Nzimande BE
Ripinga SS
Shope G
Shope NR
Sisulu AN
Streicher DM
Van Deventer FJ
Van Zyl ID
Vilakazi BH
Williams AJ**

APOLOGIES:

**Chikane MM
Goosen AD
Macozoma SJ
Niehaus CG
Routledge NC
Schoeman EA**

Technical Experts present:

**Corder H
Heunis JC**

Leola Rammble and Susan Rabinowitz were in attendance.

1. OPENING

- 1.1 The meeting was opened by the Chairperson at 09h15.

2. ADOPTION OF PREVIOUS MINUTES

- 2.1 The Minutes of the Theme Committee meeting held on 8 May 1995 contained in Document A23 (Pages 2 -5) were adopted.

3. MATTERS ARISING

- 3.1 None

4. DISCUSSION OF DRAFT REPORT FOR BLOCK 3

- 4.1 The Draft Report for Block 3 dealing with Supremacy of the Constitution contained in Document A23 (Pages 6 -33) was tabled.

- 4.2 Prof Corder talked to the document.

- 4.3 After discussion of the ACDP's emphasis under Point B II) (Page 8), the ACDP stated that this was not a matter of contention, that they were in agreement with Points i-vii under B I) and requested that amendments be made to the first paragraph on Page 8 to reflect this. It was agreed that this paragraph should be amended to read as follows:

ACDP : Argued for the Supremacy of the Constitution which acknowledges the Supremacy of God and for a non-secular republic, based on biblical principles. Expressed concern at the fact that any final Constitution will have to be approved, in terms of the Constitutional Principles, by the Constitutional Court; on the basis that the Principles "were drawn up by a non-elected, non-representative body" and that they are not subject to the "fixed and certain principles expounded in the Bible".

- 4.4 The ANC raised an objection to the use of the word "entrenched" in Point B I) vii) and stated that it preferred the use of the wording in Constitutional Principle XV which states "Amendments to the Constitution shall require special procedures involving special majorities".
- 4.5 Dr Heunis informed the meeting that according to his view the Constitution cannot be the supreme law of the land if it is not entrenched.
- 4.6 It was agreed that Point B I) vii) would be replaced with the wording

of Constitutional Principle XV.

- 4.7 Prof Corder drew the meeting's attention to the Analytical Survey on Page 9 and noted that under Non-Contentious Aspects a new Point 6 reading "the provision of the Constitution should not unduly shackle legislative action to redress past wrongs" should be added in accordance with Point B I) vi) of the Report. In the Remarks column, a note should be included that this is within the jurisdiction of TCs 2,3 and 4.

Point 7 in the Analytical Survey should read "The Constitution shall be amended by special procedures involving special majorities" to comply with Point B I) vii) of the Report.

Prof Corder further noted that the first three non-contentious aspects fall within the jurisdiction of Theme Committee 1 alone and would require drafting.

- 4.8 The ANC raised the concern that emphasis on a democratic constitution appeared to be omitted from the Report and expressed the view that the concept of democratic constitutionalism should be included in the Report under Part Two A: General Discussion. It was agreed that this matter would be further discussed at the next Theme Committee meeting.

5. ORIENTATION WORKSHOP FOR BLOCK 5 (THE ECONOMY)

- 5.1 The Briefing Document for Block 5 dealing with The Economy contained in Document A23 (Pages 34 - 40) was tabled. Prof Corder talked to the document.
- 5.2 The Theme Committee requested the Technical Experts to research whether there is any Constitution which has dealt with the issue of unpaid labour and to report back at the next Theme Committee meeting.
- 5.3 The Chairperson reminded the parties that the deadline for Party Submissions for Block 5 was Thursday 25 May 1995.

6. PUBLIC PARTICIPATION

- 6.1 Report on Public Hearings held on 12 and 13 May

Traditional Authorities

A member of the Theme Committee who had attended the Traditional Authorities Public Hearing gave a short report and noted that the

matters discussed did not directly concern Theme Committee One.

Children's Rights

A member of the Theme Committee who had attended the Children's Rights Public Hearing gave a short report and noted that most of the matters discussed related to the work of Theme Committee 4.

6.2 CPM'S on 20 May 1995

The Secretary informed the meeting of the CPM's to be held on 20 May in Upington (Northern Cape), Harrismith (Free State) and Taung (North West). It was agreed that the names of members wishing to attend these meetings would be submitted to the Secretary by 10h00 on Tuesday 16 May 1995.

6.3 CPM'S in Kwazulu/Natal

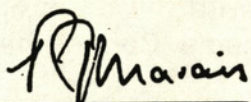
Concern was expressed that the province of Kwazulu/Natal should not be excluded from the Constitutional Public Meetings. It was agreed that this matter would be referred for discussion at the Management Committee meeting on Thursday 17 May.

7. GENERAL

7.1 None

8. CLOSURE

8.1 The meeting rose at 11h25.


CHAIRPERSON 16.05.1995.

**AFRICAN CHRISTIAN DEMOCRATIC PARTY
(ACDP)**



**SUBMISSION TO THE CONSTITUTIONAL ASSEMBLY
THEME COMMITTEE ONE**

ACCOUNTABLE GOVERNMENT

Government is inherently seen to turn on the twin axes of power and money. The erroneous idea is accepted that curbing those elements will bring accountable government. Let it immediately be said that the ACDP fully supports measures to control the abuses of power and finances as these will go some way towards establishing responsible government, but we clearly wish to state this is not enough.

All authority and its limitations are delegated. According to the Bible, which 78% of South Africans accept as the ultimate truth, all authority comes from the Creator God. Therefore, no person or group has any rightful power over others, which is not derived from God. The government that God instituted in Romans 13 is to be His servant to the good of all citizens.

This provides a clear test for any government anywhere in the world. The citizens who base any code of conduct for their leaders on this simple and profound truth will indeed prosper.

It is further impossible to deny that it is crucial to grasp the question of the source and function of governmental authority. The authority of any system of thought is the god of the system. If a national government establishes the will of the people, an elected elite, a court of law, or an individual as the ultimate authority, that is the nation's god.

Hugo Grotius (1583 - 1645) said it well when he spoke of the importance of commanding authority in ever-growing spheres when he stated:

"He knows not how to rule a kingdom, that cannot manage a Province, nor can he wield a Province, that cannot order a City, nor he order a City that knows not how to regulate a Village, nor he a Family that knows not how to Govern himself, neither can any Govern himself unless his reason be Lord, Will and Appetite her Vassals, nor can Reason rule unless herself be ruled by God, and (wholly) be obedient to Him."

This is indeed the key to responsible government: begin with responsible individuals.

In Exodus 18:21 (N.I.V.), we see that the first civil government was to consist of able men who feared God, [a primary consideration], men of truth, and those who hated dishonest gain. [It is the duty of the citizens to know those being selected.]

He must manage his own family well and see that his children obey him with proper respect...He must also have a good reputation...they must first be tested; and if there is nothing against them, let them serve..."

It is clear that the accountability starts with the individual - and the same goes for accountable government: A self-governed individual is someone who can regulate his attitudes and actions without the need for external coercion. A self-governed individual will exercise control and obey the law of God from the heart, while someone who lacks self-control must be forced to obey.

This is the reason why the Bible states in no uncertain terms "that the law is not made for [the] righteous, but for those who are lawless and rebellious, for the ungodly and sinners, for the unholy and profane, for those who kill their fathers or mothers, murderers and immoral men and homosexuals and kidnappers and liars and perjurers and whatever else is contrary to sound teaching. (1 Timothy 1:9-10).

The ACDP maintains that it will be a pointless exercise to draw up codes of conduct for parliamentarians and government officials at all levels, without recognising the aspect of morality.

Any society that has a history of self-control among its citizens has a foundation stone of biblical morality. The nations that attempt to copy the fruit of such a moral society, without also incorporating the root, is destined for ultimate collapse. Christian virtues will be counterfeited and attempts will be made by those in civil government to force a humanistically conceived morality in the name of "the people" in a sincere desire for a man-centred utopia. Such regimes will never succeed and indeed, history has shown that it will breed discontent, injustice and denigration of traditional values.

It is important to realise that power, and consequently, the abuses thereof, flows in hierarchies. It most often happens that power-abuses take place where the individuals at the top of the pyramid perceive themselves to be accountable only to themselves. Because they, at that point, become a law unto themselves, they will seize more and more power.

The best way to counter this is to ensure that power is divided equally. It is submitted that a two chamber system of government will allow one chamber to keep members of the other in check, which will be conducive to a balance in power.

The ACDP proposes the following to be included in any proposed code of conduct:

- A member shall at all times adhere to the constitution and its principles. He or she shall acquaint himself or herself with the constitution of the country.

- A member will at all times behave in keeping with his/her status, as a representative of this country - both nationally and internationally. He or she will adhere to all the laws of the country, irrespective of the level of government promulgating them, and will, at all times, behave in a self-controlled and dignified manner - as befits a representative of the people.
- A member will put the interests of the citizens before his or her own, whenever possible - this illustrates the character of servanthood.
- A member will, at all times, be honest in business and personal matters. Dishonesty in any form must be strictly dealt with.
- A member will render all possible assistance to the Offices of the Receiver of Revenue, the Auditor-General and for any other bodies concerned with the auditing of his or her matters of finance.
- Members will respect the religious convictions of others.
- Members will lead by way of example in observing basic human rights and in personal and business matters.
- Members will acknowledge the spheres of Authority of God, of the family, the Church, and civil government after first acquainting themselves with these.

AFRICAN NATIONAL CONGRESS SUBMISSION TO THEME COMMITTEE 1

BLOCK 4:

ACCOUNTABILITY

In a democratic South Africa there shall be democratic accountability of all organs of state power. This should be underpinned by principles of transparency, freedom of information, creation of a culture of human rights and promotion of appropriate participation in government decision making processes.

SEPARATION OF POWERS

There shall be a separation of power between:

1. Executive,
2. Parliament, and
3. Judiciary

STRUCTURAL ACCOUNTABILITY

a) Executive Accountability

1. The Executive shall be accountable to parliament.
2. There shall be a parliamentary committee system, structured to ensure executive accountability to an informed parliament. The committee shall have a right to consider forthcoming legislation and to initiate new legislation to the relevant ministry.

b) Parliament

1. There shall be regular elections every five years.
2. The constitution shall be the Supreme Law of the country.
3. The parliament shall be the Supreme Law maker of the country and shall be the expression of the will of the people.

c) Judiciary

1. There should be an independent judiciary within the context of a democratic society.
2. The appointment of judges shall be democratised to reflect the composition

and aspirations of South African society.

INSTITUTIONAL MECHANISMS

There shall be:

1. Constitutional Court and Public Protector.
2. Financial and Fiscal Commission.
3. Effective and independent Auditor General and Reserve bank.
4. Public Service Commission.
5. Human Rights Commission.

To: Ms Leola Rammable
Managing Secretary
Constitutional Assembly

Ref: T.C.1/4

DEMOCRATIC PARTY SUBMISSION TO THEME COMMITTEE ONE
ON ACCOUNTABLE GOVERNMENT

In respect of Accountable Government, the Constitutional Assembly is required to give effect to the following Constitutional Principle.

Schedule 4
IX

"Provision shall be made for freedom of information so that there can be open and accountable administration at all levels of government".

By "Accountable Government" the DP understands the right of every citizen to hold the government to account for the manner in which it discharges its responsibility towards the powers which have been vested in it. These powers include the capacity which a government might have to influence an individual's rights to life, equality, human dignity, freedom, security, privacy, religion, belief, opinion, expression, association, movement, demonstration, residence and any other right generally contained in the category known as "fundamental human rights".

Accountability also includes the right of any individual to hold the government to account for the manner in which it has discharged its duties towards the administration of the Department of State for which it is responsible. This particular right is exercised through granting an individual the right to vote in a free and fair election.

Constitutional provision for accountable government should be made by binding all legislative and executive organs of state at all levels of government to certain fundamental rights as contained in the constitution.

The DP proposes that this might best be effected by devoting a chapter of the Constitution to fundamental rights and then making provision for the application of these rights to government.

Accessibility to government information is an indispensable adjunct to accountability and should be provided for, except in exceptional cases where the security of the state would be placed in jeopardy by disclosure.



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THEME COMMITTEE 1

CHARACTER OF THE DEMOCRATIC STATE

SUBMISSIONS ON ACCOUNTABILITY

1) General

The concept of accountability in the context of the new Constitution is of a dual nature, legal and political. There is a link between the two: the broad parameters of political accountability are drawn by law, as will appear from the Constitutional Principles referred to below. Reference to legal accountability is therefore necessary as a background for submissions in respect of political accountability.

2) Legal accountability

Legal accountability is the result of the concept of 'the rule of law', according to which not only citizens but even the government itself is subject to law (both common law and statute law).

Legal accountability means that the government can be held civily accountable as a defendant or respondent in a court of law for unlawful acts committed by persons officially representing the state, from ministers of state down to the humblest officials. (The government cannot be held criminally responsible, although government officials can incur personal criminal liability for official acts, unless indemnified by law).

The legal accountability of the state or state officials is governed by administrative law, which is technically a subdivision of constitutional law that has developed considerably in South Africa during the past three or four decades.

Administrative law prescribes that official acts performed outside the scope of enabling statute are ultra vires and therefore void or invalid; that executive or administrative discretions that are performed with an ulterior motive (ie an

object not contemplated by the enabling legislation), or capriciously (not taking relevant considerations into account), or mala fide, etc. are invalid. In the case of so-called quasi-judicial administrative acts additional rules apply, i.e. the so-called 'rules of natural justice', viz that the official or body concerned must not be biased and must hear other interested parties before making a decision. Some of these rules are reflected in section 24 (Administrative justice) of the transitional Constitution.

Legal accountability is the first curb on government powers where illegal action by or on behalf of the state is alleged, as legal rules, when invoked in a court of law, must be complied with. Political accountability, however, is not dependent on a breach of the law and is therefore enforced not in courts of law but in the political arena, according to political expediency.

3) Political accountability

There are a number of examples of political accountability reflected in the Constitutional Principles contained in Schedule 4 of the transitional Constitution, some of which are mentioned below.

- 1) The concept of 'a democratic system of government' (Constitutional Principle 1) implies political accountability inherent in the concept of democracy, the essentials of which have been noted elsewhere.
- 2) The 'separation of powers' referred to in Constitutional Principle VI refers to appropriate checks and balances to 'ensure accountability, ...' etc. (stress supplied). In this context not only legal accountability (responsibility of the government, executive or state administration to the courts - see the reference to administrative law above) is meant, but also political accountability (responsibility of the executive to the legislature).
- 3) The 'representative government' referred to in Constitutional Principle VIII implies political accountability of the government to the electorate, as this Principle requires regular elections, universal adult suffrage, etc.
- 4) Constitutional Principle XIV requires 'participation of minority political parties in the legislative process in a manner consistent with democracy'. This requirement implies political accountability of majority political parties towards minority political parties.
- 5) Constitutional Principle XXIX requires the 'independence and impartiality of a Public Service Commission, a Reserve Bank, an Auditor-General and a Public Protector'. This requirement is aimed at ensuring the

professional accountability (legal and political) of the said institutions and persons to the public service and to the public generally.

6) Constitutional Principle XXX, describing the attributes of the public service, reflects the legal and political accountability of the public service towards the public and towards the government of the day whose lawful policies it must execute.

7) Constitutional Principle XXXII requires the national executive to function 'substantially in the manner provided for in Chapter 6 of this Constitution' (ie the transitional Constitution). This duty reflects political accountability of the government towards the country as a whole.

8) Constitutional Principle XXXIV provides for the possibility of 'constitutional provision for a notion of the right of self-determination by any community sharing a common cultural and language heritage, whether in a territorial entity within the Republic or in any other recognised way'. This Principle reflects the legal and political accountability of the Constitutional Assembly towards particular communities.

This above-mentioned accountability should be considered in conjunction with the mandatory provisions of Constitutional Principle XII (protection of collective rights of self-determination in forming, joining and maintaining organs of civil society) and the more general provisions of Constitutional Principle XI (acknowledgment and protection of diversity of diversity of language and culture). Both Principles XI and XII impose political and legal duties and therefore accountability on the Constitutional Assembly

4) Submission by the Freedom Front

Theme Committees generally (and in this instance Theme Committee 1) should give effect to the exposition of legal and political accountability set out above.

NATIONAL PARTY SUBMISSION

THEME COMMITTEE 1

BLOCK 4: ACCOUNTABLE GOVERNMENT

In terms of Constitutional Principle VI, there shall be a separation of powers between the legislature, the executive and the judiciary, *with appropriate checks and balances to ensure accountability, responsiveness and openness.* (Italics added.) This commitment refers to a crucial aspect of any democratic constitutional system. In the final analysis, any democratic system is based on two indispensable premises, namely *representative* government (those in government must be representative of the people, which can be determined only through free and fair elections) and *responsible* government (the elected government must be responsible to the representatives of the people and to the people themselves and may govern only with their continuous support). The reference to accountability in Constitutional Principle VI can be said to represent this latter essential component of a democratic system.

For this reason, we, *firstly*, concur with the inclusion of an express commitment in the constitution (for example, in the Preamble), to the principle of responsible (or, in the words of Constitutional Principle VI, accountable) government as suggested by the Technical Committee. For the reasons advanced below, this, however, is not essential and in itself will have no concrete effect.

The principle of responsible or accountable government can be given effect only through specific arrangements and,

therefore, we, *secondly*, support the approach of the Technical Committee to refer to all the various mechanisms and instruments without which a mere commitment to responsible government will have no substance. We also agree with the categories of mechanisms mentioned by the Committee, namely (i) judicial review (mainly on the basis of the bill of rights), (ii) the separation of powers and concomitant checks and balances, including an express provision on executive responsibility to the legislature (sections 92 and 153), (iii) access to information and transparency, and (iv) various offices and commissions.

However, without going into detail, and only to complete the picture, we wish to add the following aspects to the list of mechanisms that need to be employed to comply with the principle of responsible government:

(a) free, fair and *regular* elections, which is probably the most important mechanism to ensure responsibility, because it enables the voters to express themselves on the government's performance, either to demonstrate rejection or continuous support;

(b) the full range of *parliamentary control mechanisms*, such as motions of no-confidence, approval of the budget, questions, interpellations and hearings, and reports by the auditor-general. Parliament remains the primary arena for enforcing government responsibility and these mechanisms must be provided and protected in full;

(c) distribution of powers among different *levels of government*, because it brings government closer to the people and facilitates accountability.

As pointed out by the Technical Committee, the detail on these as well as the other aspects mentioned by the Committee, will be provided by the appropriate Theme Committees.

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9 MAY 1995

PAC SUBMISSION ON GOVERNMENT ACCOUNTABILITY

The issue of Government accountability is well established and a widely accepted democratic principle. The present government has committed itself to the principles of accountability and transparency.

There are different mechanisms which one could put in place in order to ensure that government is accountable and views have been expressed in this regard. At issue is the fact that there is a tendency to reduce government accountability only to elected representatives of government and forget about the bureaucracy, the administrative arm of government which wields enormous discretionary power. The history of forced removal and building of toilet cities bears testimony to this.

In the new dispensation there has been an inheritance of the bureaucracy (which has and is still unable to annihilate skewed administrative procedures of the past. The fact that a new policy guideline in the form of RDP which is essentially geared to delivery (especially to the previously neglected communities) means that more than ever, mechanisms of accountability should be in place. Where a particular administrative body fails to carry out its duty, the public must be able to question that immediately. This does not mean that his mechanism should enjoy constitutional status for it is designed to change the framework from which the administration operates in this transitional phase.

One could cite examples to support the need for this namely: The then Minister of Housing - Joe Slovo had to appoint a new Director -General

Minister of Public Works had the same schisms.

Minister of Water Affairs and Forestry voiced the same frustration.

There is more a pre-occupation with paperwork than with assisting the communities which are in dire need. Thus the need to formulate procedures that are going to expose the inactivity of the bureacracy notwithstanding the other mechanisms that have been developed by the courts of law.

M M Z DYANI

MP -PAC

