

2/4/6/6/4/1

DRAFT

THEME COMMITTEE 6 SUB THEME 4

SPECIALISED STRUCTURES OF GOVERNMENT SECURITY APPARATUS

REPORT ON CONSTITUTIONAL ACCOUNTABILITY AND CONTROL OF SECURITY APPARATUSES (BLOCK ONE AND TWO)

[NOTE:

1. Current titles of Ministries have not been used as this is not conventionally a constitutionally defined matter. Names of the forces/services have been used as this should be defined in the constitution.
2. No submissions relating to prisons/correctional services have been included pending the outcome of the debate about the judiciary and legal system.
3. The term "security apparatus" is used throughout to avoid wordiness due to service and force and agency all being stated.]

WHAT GOES INTO A CONSTITUTION ON SECURITY APPARATUSES?

Agreement: Constitution should cover long standing principles. However it may be necessary to flesh out these principles because South Africa is a new democracy with a particularly trouble security apparatus history.

WHERE SHOULD SECURITY APPARATUS BE LOCATED WITHIN THE CONSTITUTION

Agreement: Four possible places - Preamble, Bill of Rights, separate chapters dealing with each of security apparatuses, or one chapter dealing with all of them. No finality at this stage, will be an ongoing thread of discussion in work of Sub Theme 4.

Further clarity: That correctional services is not part of security apparatus and should be dealt with under Theme 5 in relation to judiciary and legal system.

1. SUPREMACY OF THE CONSTITUTION

ANC: Both the Constitution and the Bills of Rights are supreme and South African National Defence Force(SANDF), South African Police

Service (SAPS) must be bound by that supremacy.

IFP: Security apparatuses must operate within constitution and bill of rights.

IFP: Constitution must state that operations and policy formulations of security apparatuses must reflect the national interest and be consistent with the letter and spirit of the constitution.

IFP: All members of security apparatuses shall make solemn affirmation or oath to uphold and defend the constitution.

DP: Constitution shall be supreme law, with which all executive action and legislative measures should have to conform. Constitution should describe the architecture of government and relationships which exist between various levels and different institutions of government. Constitution should lay down powers, duties, responsibilities and entitlements of levels and institutions of government, procedures for adhering to these and avenues to resolve disputes which may arise between various levels or institutions of government.

NP: Constitution should be supreme law of Republic, binding on all legislative, executive and judicial organs of government. The security apparatuses should not be used, nor should they demand, to defend or protect the constitution.

NP: SANDF should conform to international law on armed conflict which is binding on South Africa.

PAC: Constitution is supreme law but cannot on its own regulate defence force.

Agreement: That 1. Loyalty to Constitution must be binding on Defence Force.

2. Defence Force could never act on its own and bypass Parliament and the Executive

3. The Executive could not use the Defence Force to violate the Constitution.

2. DECLARATION OF STATE OF EMERGENCY AND STATE OF WAR

ANC: Only declaration of State of emergency or State of War should lead to some regulated suspension of human rights.

IFP: Any suspension of some human rights will only be regulated through declaration of a state of Emergency or of War which will bind both SAPS and SANDF.

IFP: Head of Government may declare an emergency in Republic or in determined areas thereof.

IFP: Declaration of Emergency shall provide a general indication of type of emergency and shall indicate in general terms which powers and resources of Government, the Provinces and local governments, or of citizenry the Head of Government intends to employ to respond to the emergency, how such powers and resources are expected to be employed and for how long, and other measures and action the Government intends to undertake.

IFP: Within twenty four hours the Head of state shall summon Parliament to a joint session to ratify the Declaration of Emergency. Parliament may modify the Declaration of Emergency.

IFP: If the emergency is such that Parliament may not be summoned into session, the declaration shall be submitted to the Constitutional Court for approval. Should this not be possible, the Declaration of Emergency shall be submitted for approval to the President of the Constitutional Court, the President of the Senate or the Speaker of the National Assembly, in this order.

IFP: The Head of Government shall modify the Declaration of the Emergency to provide additional information, to detail information previously provided and to report on the action undertaken to respond to the emergency.

IFP: Parliament or the Constitutional Court may terminate or modify the terms of the Declaration of Emergency at any time.

IFP: The Head of State may require that Parliament or the Constitutional Court meets behind closed doors to discuss any matter related to the emergency, and that the contents of the Declaration of Emergency be kept secret.

IFP: Any action taken during a situation of emergency shall respect to the fullest extent possible under the circumstances the rights and liberties of the citizens of the State recognised and guaranteed in the constitution.

IFP: The declaration of emergency shall employ the defence force only when and to the extent that the police services are not sufficient to respond to the emergency.

IFP: Provinces shall have the right to declare State of Emergency and shall have the right to lift State of Emergency. This shall include right to deploy police in provincial State of Emergency

IFP: South African troops may be employed in possible combat situations outside the country only on the basis of a declaration of war in hostility, the latter including so called peace-keeping exercises.

IFP: The constitution must state that South Africa shall strive to respect and maintain all its international law obligations, and shall reject the use of war or international violence as means to resolve international conflicts.

IFP: The Head of State in consultation with the Head of Government may declare war or the status of international hostility. The Declaration of War or hostility shall provide a general indication of the type of military and logistical resources to be employed and effects of the declaration on the Government of the Republic, the Provinces and the citizenry. The declaration must indicate for how long the status of war or hostility is expected to last and the measures which the Government in undertaking to try to solve by diplomatic means the underlying international crisis.

IFP: Within twenty four hours the Head of State shall summon Parliament to a joint session to ratify the Declaration of war or hostility. Parliament may modify the Declaration of War or hostility. If the situation is such that Parliament may not be summoned into session, the Declaration shall be submitted to the Constitutional Court for approval. Should this not be possible the Declaration shall be submitted for approval to the President of the constitutional Court or the President of the Senate or the Speaker of the National Assembly in that order.

IFP: Parliament may terminate or modify the terms of the Declaration of War or Hostility at any time. The President may require that Parliament meets behind closed doors to discuss any matter related to war and that the contents of the Declaration of War or Hostility are kept secret.

IFP: Any government's action taken within the Republic during a situation of war shall respect to the fullest extent possible under the circumstances

the rights and liberties of the citizens of the State recognised and guaranteed in the constitution.

DP: Constitutional limitations of power of executive(s) to deploy security apparatuses in the form inter alia, of limiting power of executive(s) to declare state of war or emergency, requiring executive(s) to report to legislature(s) and/or for legislature(s) to endorse action taken by executive(s) by resolution, and requiring legislature(s) be convened within a defined period after deployment of forces by executive.

NP: Constitution should provide for definition of separate state of national defence. Separate provision for declaration by President of state of war or national defence, subject to ratification by Parliament within 7 days, and that such state of war/national defence may only be declared upon attack originating from outside the borders of Republic of South Africa

NP: President must be empowered to suspend certain fundamental rights in state of war/emergency, in terms of criteria laid down in Bill of Rights.

NP: Provision must be made for crisis or interim Parliament of reduced number which could, in time of crisis through natural disaster or war and at a time when the President has been incapacitated declare immediate state of emergency or state of national defence/war subject to ratification by full parliament within 14 days.

NP: President should be able with the approval of Parliament to declare a state of national defence/war. The President must inform Parliament of reasons for the deployment of SANDF where such deployment relates to the defence of Republic, compliance with international obligations or the maintenance of internal law and order. Parliament should have the power to terminate any such deployment.

Point of Contention: Powers of provinces to deploy police in provincial state of emergency due to disagreement on provincial competency re police.

3. DEFINITION OF ACTION IN NATIONAL INTEREST/DEFINITION OF NATIONAL DEFENCE AND NATIONAL SECURITY

ANC: National security policy shall seek to protect and promote the security of both the state and its citizens, through promotion of military, social, economic and political dimensions of security.

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

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

IFP: SAPS must operate only to ensure prevention and investigation of crimes rather than act on the basis of the broad "national interest".

NP: SANDF must perform its power solely in the national interest by providing for the defence of Republic and ensuring the protection of inhabitants of Republic.

4. PARLIAMENTARY OVERSIGHT

ANC: There must be parliamentary oversight of security apparatuses.

ANC: There must be a portfolio committee with multi-party representation on proportional basis to oversee police.

IFP: Parliamentary committees, representative of all political parties, on defence, intelligence and police shall have special functions to oversee all aspects related to these apparatuses. They may hold hearings, investigations, take evidence and subpoena witnesses.

IFP: Parliamentary committees shall have the power to authorise the submission of budgets of the security apparatuses prior to the inclusion into the national budget.

IFP: Joint committees drawn from both the National Assembly and the Senate shall have oversight over both defence and intelligence apparatuses.

IFP: Parliamentary committees shall consider and make recommendations on all legislation relating to the security apparatuses and related matters and initiate legislation in connection with the relevant security apparatus.

IFP: Parliamentary committees will be empowered to review and make

recommendations on regulations pertaining to the security apparatuses, inter-departmental cooperation, rationalisation, demarcation of line functions, and investigate complaints made against the apparatus.

IFP: Parliamentary committees will be empowered to refer any alleged violations of human rights committed by a security apparatus to the Human Rights Commission.

IFP: Parliamentary committees shall submit to the President and the Minister concerned, within two months of the opening of Parliament, a report on the activities of the committee.

DP: Constitution should draw clear distinction between command and control. Legislature should control security apparatuses.

DP: Legislative control should include a legislative framework which lays down powers and functions of security apparatuses and imposes limitations on their powers. Constitution must establish definite relationships between executive deployment of security apparatuses and legislative control or review of this deployment.

DP: There must be oversight and prior sight of executive action or [proposed action by an appropriate multi-party committee or committees of legislature, meeting if necessary in camera. Issue of secrecy is warranted because in balance between national security and effective parliamentary control. Committee(s) should have power to sub poena witnesses, including responsible members of executive, take evidence and call for papers, and should present reports to legislature at regular intervals.

NP: Constitution should provide for establishment of Multi Party Joint Parliamentary Committee on Defence, with powers inter alia, to deal with defence related bills and monitor, investigate, inquire into and make recommendations relating to any aspect to the Department of Defence. Committee should have power to convene itself as a commission of inquiry into any matter related to Department of defence. Membership of the committee should be as inclusive as possible. Further regulation of the committee should occur in terms of rules and orders of Parliament.

NP: Parliament must annually approve defence budget.

PAC: Parliamentary Select Committee should be allowed an important

role in defence matters.

ANC: Defence review necessary in order to ensure that Parliament received sufficient information to make informed choices and avoid merely rubber-stamping decisions.

IFP: Parliamentary oversight through joint Intelligence/Defence Committee which would enjoy relationship of trust with executive.

Further Clarity: Parliamentary oversight before, during and after executive action.

Further Clarity: Number and nature of oversight committees

5. EXECUTIVE CONTROL

ANC: The President shall appoint the National Commissioner of the SAPS, who shall in turn appoint a Provincial Commissioner for each province in consultation with the Provincial MEC responsible for police.

ANC: The National Commissioner shall be accountable in the first instance to the Minister responsible for police. Powers and functions of both the Provincial MEC and Provincial Commissioner must be spelt out including clear lines of command that reflect the unitary nature of the South African state.

Further clarity: Constitutional provisions relating to powers of provincial MECs and Provincial Commissioners

DP: In line with clear distinction between command and control, executive should command security apparatuses.

DP: Parliament must have right to sufficient information, including regular report by the executive to the legislature, parliamentary questions, mechanism of control over expenditure via select committees of finance and public accounts and the approval or variation of security apparatus budgets by Parliament after public debate.

NP: President shall be Commander-In-Chief of SANDF.

NP: President shall appoint Chief of SANDF, who shall exercise military executive control subject to directions of Minister responsible for Defence, and during a state of national defence/war, of the President..

NP: No Deputy Minister should be part of executive chain of command between either President and Chief of SANDF or Minister and Chief of SANDF. No person such as a Secretary for Defence shall be appointed in executive command chain above Chief of SANDF

NP: President must charge a Minister and appoint a National Commissioner who are responsible for SAPS. National Commissioner must have executive command of SAPS subject to the competence of Provincial Commissioners.

NP: Premier of province shall charge a member of Executive Council for performance of provinces police service and such member must have certain specific powers of control.

6. CIVILIAN CONTROL OF MINISTRY

ANC: Defence Force and Police shall be under civilian control with Ministers appointed by the President. Such Ministers shall report annually to Parliament and be accountable to Cabinet and Parliament for all defence and police related matters respectively.

ANC: Ministry concerned with defence shall have Secretary for Defence whose responsibility should be inter alia to assist in formulation of defence policies and designation and overseeing of programmes of Defence Force.

ANC: The Ministry concerned with police should be staffed largely by civilians

DP: Civilian control of security apparatuses. This should mean that political control should be firmly located with a member of executive who should be accountable to legislature for activities of each force. The constitution should provide for mechanisms for the legislature to censure this member.

NP: The Minister responsible for Defence must be accountable to Parliament for the SANDF.

PAC: Defence Force should be under civilian control through constitutional provision. Accepts need for Secretary for Defence.

Further clarity: Concept of civilian control needs to be clarified since not clear if ex-soldier or police in civilian position is civilian control.

Further clarity: General acceptance of civilian control, but chain of command and its relationship to civilian control need further clarity.

7. OMBUD STRUCTURES

ANC: Parliament shall appoint an independent Ombudsperson for each Security Apparatus to deal with complaints, labour related disputes etc.

ANC: There must be relevant Inspectors General for each security apparatus.

IFP: There shall be an internal ombudsperson appointed for each apparatus charged with the task of addressing internal conflicts and disputes related to the human rights of members of the security apparatuses.

DP: Institution of military Ombudsperson or defence commissioner who has right to investigate alleged violations of Code of Conduct and report his/her findings directly to Parliament.

NP: Do not support separate office of Ombudsperson as scope of Human Rights Commission and Public Protector cover the need.

Agreement: Need for Ombudspersons in relation to each of security apparatuses.

8. DEMILITARISATION

ANC: There should be a civilian wing of the SAPS as part of the demilitarisation of the SAPS. Clear lines of command and control must be stipulated.

ANC: There should be a change away from military ranking in the SAPS as part of the demilitarisation process.

9. RIGHTS OF SECURITY APPARATUS MEMBERS IN RELATION TO THE STATE

ANC: SANDF shall respect the rights and dignity of its members, subject to normal constraints of military discipline as provided for in Defence Act.

ANC: SANDF shall ensure that composition of leadership and rank and file reflect racial, ethnic and gender composition of South Africa. SANDF shall not discriminate against any of its members on grounds of race, ethnicity, sexual preference, religion or gender.

ANC: Ministry responsible for defence and Secretary for Defence shall design and oversee equal opportunities programme within SANDF and shall report annually to parliament on the implementation of this programme.

ANC: There must be a Security Service Commission, separate from Public Service Commission, to see to the conditions of service, promotions, salary scales, working conditions etc of members of the SANDF, SAPS and Intelligence Services.

ANC: There should be a Code of Conduct for all who join the security services.

IFP: Members of the security apparatuses shall have the right to disobey a clearly unlawful order.

IFP: The law may provide for special sanction for desertion of duty, mutiny, and treason. With respect of the SANDF, special differentiation may be allowed between times of peace and a declared state of war.

IFP: The law may provide measures to restrict the right to strike, setting out compulsory dispute resolution mechanisms. The law could draw a differentiation between members of the civilian apparatuses and members of the SANDF in limiting the right to strike.

IFP: There shall be gender equality in all of the security apparatuses including the SANDF.

IFP: Members of the security apparatuses may hold membership of political parties, but may not hold office in them.

Agreement: Members of security apparatuses can be members of political parties, cannot hold office.

DP: Constitution must contain a justiciable Bill of Rights, supplemented by Code of Conduct for security apparatuses which would be contained in appropriate legislation. Code of conduct should establish rights and entitlements of members of security apparatuses as well as limitations of their ordinary civil rights while serving. Constitution should provide for enactment of such a Code.

NP: Members of security apparatuses should not have right to strike and

to assemble and demonstrate. Provision should obviously be made elsewhere for effective dispute resolution mechanisms.

NP: Members of SANDF must be entitled to refuse to execute any order where such execution would constitute an offence or would breach international law on armed conflict which is binding on South Africa.

NP: Separate Security Apparatuses Commission should be established to perform the same functions as Public Service Commission, with the same competencies as Public Service Commission. All employees of security apparatuses would fall under this Commission, not only those "in uniform".

PAC: Defence force should not fall under Public Service Commission because of peculiar nature and functions.

Agreement: Should be separate Security Apparatus Service Commission

NP: Principles of international humanitarian law and in particular the basic values of freedom and equality shall apply to all members of the security forces. Within the security forces no discrimination on any grounds will be allowed. To extent that justifiable differentiation, as opposed to discrimination is allowed by international humanitarian law principles, members shall be deployed in ways which best suit their ability.

PAC: Members of the Defence Force should be bound by the constitution equally. No regard to anything except citizenship should be taken into account in eligibility for defence Force and exercise of rights and privileges.

PAC: Defence Force members shall unconditionally execute constitutional and legal commands of the Defence Force, but shall reserve the right of refusing to execute immoral, amoral and unlawful commands from an officer of the Defence Force.

10. POLITICAL NEUTRALITY OF SECURITY APPARATUSES

ANC: Education of members of security apparatuses shall equip members to uphold the constitution by covering the Constitution, international law on armed conflict and human rights.

PAC: Defence Force should be educated to be conversant with constitution, law, international law on armed conflict and human rights.

Agreement: Members of Security apparatuses should be educated to be conversant with the law, constitution, international law on armed conflict and human rights

IFP: The SANDF, SAPS and Intelligence apparatuses should be specifically excluded from any involvement in political activity.

NP: No party-political activity should be allowed on premises occupied by or under the control of the security apparatuses. Regular members of the security apparatuses should not be allowed to stand for election to public office.

NP: The SANDF must refrain from furthering or prejudicing any party political interest.

11. CONTROL OF INTELLIGENCE FUNCTIONS

ANC: There will be a Military Intelligence Division of the SANDF, which will gather, correlate, evaluate and use foreign military intelligence relating to national strategic intelligence to the National Intelligence Co-ordinating Committee, operating only in an overt manner; will gather, correlate, evaluate and use domestic military intelligence excluding covert collection, except when deployed by the Cabinet or President internal to South Africa; to institute counter-intelligence measures within the SANDF.

ANC: Police intelligence should be restricted to crime intelligence by constitutional provision. Oversight of crime intelligence must be constitutionally situated firmly under the Parliamentary Intelligence Oversight Committee, along with Military Intelligence, and Civilian Domestic and Foreign Intelligence.

12. CONTROL OF ARMS INDUSTRY:

ANC: Constitution must clearly stipulate conditions of production, procurement and of arms trade.

DP: Parliament must have right to information about arms production, arms procurement and arms sales.

PAC: Arms production should fall outside of duties and functions of Defence

Force.

Further Clarity: No clarity on how Special Defence Account would be seen in future. Once Cameron Commission has reported Sub Theme 4 will have to consider proposals relating to arms industry and arms procurement.

13. COMMUNITY POLICING:

ANC: The philosophy of community policing should be constitutionally entrenched. The role, function, structure and funding of Community Police Forums must be established.

Further clarity: Funding of community policing as determined by allocation of national and provincial powers

14. STRUCTURE OF SECURITY APPARATUSES:

ANC: There shall be only one national defence force, the SANDF.

ANC: There shall be one police service, SAPS, for the country, with powers, functions and personnel decentralised to the Provinces.

NP: Police service must be structured at both national and provincial level and clear division of responsibilities must be made between National and Provincial levels of policing. Division of responsibilities should be entrenched in constitution. Those aspects relating to "normal" policing must fall within the legislative competence of the various provinces.

PAC: All agencies of defence Force shall be viewed by constitution as constituting single unit within SANDF and shall therefore exercise no autonomy.

IFP: Defence is competence of national government and armed forces are not under authority of provinces. Regimental structure to be maintained whereby regiments can be drawn from communities and mobilised in times of war.

Further clarity: Revisit issue of deployment of defence force within South Africa and relationship between police and defence force within this deployment.

IFP: Constitution should provide for paramilitary force between defence force and police service. Would be responsible for supporting police when

breakdown of civil order and available in times of war to support defence force. Under normal circumstances would fall under control of civilian ministry at provincial level and in times of war and state of emergency to a national minister. Role should be carefully limited by constitution to make sure functions do not overlap with defence force or police. Police would then be totally civilian force which uses minimum force. Final accountability would rest with a Ministry such as Ministry of Interior. Paramilitary force would be resourced and funded from provincial budgets and deployment determined by National Minister. Use on a day to day basis would be responsibility of provincial MEC. Jurisdiction of police would be determined by nature of legal system.

Disagreement: Provincial competency in relation to police services and particularly the nature of and location of paramilitary force.

15. MONOPOLY OF FORCE:

IFP: The State shall not suppress the citizens right to bear arms, but may limit it in special cases and circumstances.

Agreement: Constitution should enshrine individuals right to self defence, but not to enshrine right to bear arms.

IFP: Provincial constitutions may regulate matters such as police reserve and neighbourhood watches to supplement police action.

IFP: Provincial legislation should regulate community protection formations.

16. FREEDOM OF INFORMATION:

IFP: The right to access all government information and private data bank's information shall be recognised in the constitution, with customary qualifications and exclusions, subject to judicial review which can take place in camera when necessary.

IFP: Intelligence information may not be classified as secret information without showing of their sensitiveness with respect to national security.