

2/4/2/1/1/27

TC2/23

CONSTITUTIONAL ASSEMBLY
THEME COMMITTEE 2
STRUCTURE OF GOVERNMENT
Theme Committee Meeting

MONDAY
26 JUNE 1995
09h00 - 10h00
GOOD HOPE CHAMBER

DOCUMENTATION

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CONSTITUTIONAL ASSEMBLY
THEME COMMITTEE 2
STRUCTURE OF GOVERNMENT
THEME COMMITTEE MEETING

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

Date: Monday 26 June 1995

Time: 09h00 - 10h00

Venue: GOOD HOPE CHAMBER

Members are reminded that an In-house workshop will be held shortly after this meeting.

AGENDA

1. **Opening and Welcome**
 2. **Minutes of previous TC meetings.**
(separate documentation pack)
 3. **Draft Report on Provincial Government**
(See this documentation pack pp 1-20)
 6. **Any Other Business**
 7. **Closure**
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THEME COMMITTEE 2

DRAFT REPORT ON BLOCK 3: PROVINCIAL GOVERNMENT

CP/SEC	CONSTITUTIONAL ISSUE	AGREEMENT	CONTENTION	COMMENT
	<p>1. TERMINOLOGY</p> <p>1.1. Provincial Legislatures</p> <p>1.2 Premier</p> <p>1.3 Executive Council or "cabinet"</p> <p>1.4 Members of Executive Council or "Ministers"</p>			
<p>CP XVII(2) s 160(2)</p>	<p>2. SHOULD PROVINCES RETAIN THEIR COMPETENCY TO DRAFT AN OWN CONSTITUTION?</p>			
	<p>3. OBLIGATION OR COMPETENCE TO DRAFT PROVINCIAL CONSTITUTION?</p>			<p>Prov. Admin Western Cape: obligation</p>
	<p>4. FRAMEWORK FOR PROVINCIALY-DRAFTED CONSTITUTIONS</p>			

CP/SEC	CONSTITUTIONAL ISSUE	AGREEMENT	CONTENTION	COMMENT
	5. PROVINCIAL LEGISLATURES - DEFAULT FRAMEWORK			
s 125(1)	5.1 Legislature for each province -	Yes		
s 125(3)	5.2 Legislative powers confined to the province			No submission received
s 127(1)	5.3 Composition of legislature: size			
	5.4 Electoral system			
s 128	5.5 Duration and dissolution of provincial legislature		5 years term (DP 4 years)	
	5.6. Date of polling 5.6.1 On same date for all provinces 5.6.2 On same date as Parliament			
s 129(1)	5.6.3 Election within 90 days of dissolution			
s 130	5.7 Sitting of provincial legislatures			

CP/SEC	CONSTITUTIONAL ISSUE	AGREEMENT	CONTENTION	COMMENT
s 131	5.8 Speaker and deputy speaker			
s 132	5.9 Qualifications for membership of provincial legislatures			
s 133	5.9.1 Members ordinarily resident in a province			
s 133	5.10 Vacation of seats and filling of vacancies 5.10.1 Vacation of seats: loss of party membership 5.10.2 Filling of vacancies			
s 134	5.11 Oath or affirmation by members			
s 135	5.12 Powers, privileges and immunities			
s 136	5.12a Penalty for sitting or voting when disqualified			
s 137	5.13 Rules and orders			
s 138	5.14 Quorum			
s 139	5.15 Required majorities			

CP/SEC	CONSTITUTIONAL ISSUE	AGREEMENT	CONTENTION	COMMENT
s 140	5.16 Assent to bills			
s 141	5.17 Signature and enrplment of provincial laws			
s 142	5.18 Public access to provincial legislatures			
	5.19 Legislative committees of oversight			
s 160(4)(b)	5A. PROVINCIAL MONARCHS			
	6. PROVINCIAL EXECUTIVES			
	6.1 PREMIERS			
s 145(1)	6.1.1 Election by legislature			
	6.1.2 Premier member of legislature			

CP/SEC	CONSTITUTIONAL ISSUE	AGREEMENT	CONTENTION	COMMENT
s 146 s 154(2) s 146(2)	6.1.3 Tenure of and removal from office of Premiers 6.1.3.1 Dissolution of legislature 6.1.3.2 Dismissal of premier by motion of no confidence 6.1.3.3 Impeachment			
s 147	6.1.4 Responsibilities, powers and functions of Premiers			
s 148	6.1.5 Acting premiers			
	6.2 EXECUTIVE COUNCILS			
	Framework only			
s 149(1)	6.2.1 Size: Premier and not more than 10 members			
s 149(2)	6.2.2 Composition: government of provincial unity			

CP/SEC	CONSTITUTIONAL ISSUE	AGREEMENT	CONTENTION	COMMENT
s 149(4)(b)	6.2.3 Appointed from the legislature			
s 149(7),(8),(10)	6.2.4 Oath, ethical provisions			
s 150	6.2.5 Executive Council procedure			
s 151	6.2.6 Temporary assignment of powers and functions to Executive Council members			
s 152	6.2.7 Transfer of powers and functions from one member to another member			
s 153	6.2.8 Accountability of members of Executive Councils			
s 154	6.2.9 Votes of no confidence in Executive Council			

CONSTITUTIONAL ASSEMBLY
THEME COMMITTEE TWO
STRUCTURE OF GOVERNMENT

REPORT ON SUBMISSIONS: PROVINCIAL GOVERNMENT STRUCTURES

A. INTRODUCTION

This part of the report should be read with the tabular analysis above. It deals with the structure and procedures of provincial governments under the following headings, which were identified on the basis of submissions received and discussions in the Theme Committee:

1. Terminology
2. Power of provinces of drafting own constitutions
3. Obligation or competence of provinces to draft an own constitution
4. Constitutional framework for province-crafted constitutions
5. Constitutional provisions in default of a provincial constitution.

B. SUBMISSIONS

Submissions on the structure of provincial governments were received from:

1. Parliamentary political parties (excluding the ANC; ACDP)
2. Other organisations (including non-parliamentary parties)
3. Individuals

C. CONSTITUTIONAL PRINCIPLES

The most important Constitutional Principle (CP) pertaining to the structure of provincial governments is CP XVIII(2) which provides:

"The powers and functions of the provinces defined in the Constitution, including the competence of a provincial legislature to adopt a constitution for its province, shall not be substantially less than or substantially inferior to those provided for in this Constitution." (emphasis added).

Every province is presently entitled to pass a constitution for its province by a resolution of a majority of at least two-thirds of all its members (s 160(1)). Such a constitution may be different from the interim Constitution (s 160(4)(a)), but should not be inconsistent with a provision of the interim Constitution including the Constitutional Principles (s 160(3)). Furthermore, a provincial constitution may provide for the institution of a traditional monarch (in KwaZulu-Natal it is compulsory) (s 160(4)(b)).

Four issues need to be addressed: First, would the competencies of provinces be substantially reduced if the entitlement to draft an own constitution is taken away? Secondly, can / should all provinces be compelled to draft their own constitutions? Thirdly, how different may the provincial constitution be without being inconsistent with the interim Constitution and the Constitutional Principles? Can / should a broad framework be provided for provinces for the drafting of their own constitutions? Fourthly, if provinces are not compelled to draft their own constitution, then for those provinces who do not wish to draft their own constitution, what should be the content of a "default" constitution? On these questions the following submissions were received.

D. CONSTITUTIONAL ISSUES

1. TERMINOLOGY

1.1. Provincial Legislatures

1.2 Premier

1.3 Executive Council

DP(Gauteng): Should be called "cabinet"

1.4 Members of Executive Council

DP(Gauteng): Should be called "Ministers"

2. SHOULD PROVINCES RETAIN THEIR COMPETENCY TO DRAFT AN OWN CONSTITUTION? - s 160(2)

IFP: Yes

DP: Yes

DP(G): Yes.

Other submissions

CPG: This competence should be retained in substantially undiminished form to comply with CP XVIII(2). There is no cogent reason to reduce the constitution-making powers of provinces. This competency is, however, limited. In compliance with CP IV which provides that the final constitution will be supreme law of the land, the present competence of provinces cannot be increased to draft constitutions which may be contrary to the final constitution or the Constitutional Principles.

3. OBLIGATION OR COMPETENCE TO DRAFT PROVINCIAL CONSTITUTION?

IFP: Final Constitution will come into force with already operational provinces and therefore the Constitution needs merely to indicate that the existing provincial legislative structures shall continue into force until otherwise modified by provincial constitutions. No further detail on the provincial executive and legislative structures and procedures should be contained in the Constitution.

DP: Provinces should have a choice whether to draft an own constitution.

DP(G): Constitution should compel each province to enact its own Constitution.

Other submissions

Prov. Admin Western Cape: Each province should be required to write its own constitution in terms of which it deals with elections and vacancies, oath of office, appointment of a Speaker and Deputy Speaker, rules and order, quorum, the name which is given to a provincial law.

4. FRAMEWORK FOR PROVINCIALY-DRAFTED CONSTITUTIONS

The interim Constitution provides that the provincial constitutions may be different but not inconsistent with the interim constitution including the Constitutional Principles. The question is how different. They should be in accordance with the Constitutional Principles VI (separation of powers), VIII (multi-party democracy, proportional representation), IX (open government), X (formal legislative procedures), XIV (participation of minority parties in legislature), and XVII (democratic representation at each level of government).

While some submissions have suggested a framework for provincial constitutions, none has clearly identified the basic provisions which would constitute such a framework. As the Constitutional Principles are not precise with regard to the legislature and the executive, the question is whether these Principles should be concretized into a framework. Another suggestion is that the permissible sizes of the legislatures and executive councils should be determined in the final Constitution.

DP: The parameters within which provincial constitutions may be drawn up and adopted should be dealt with in the final Constitution. Should the Constitutional Principles form the basis of a framework for future provincial constitutions, then they should specifically be included in the final constitution. The following Principles should be considered: VI, VIII, IX, X, XI, XII, XIV, XVI, XVII.

DP(G): Constitution should merely contain a framework for provincial constitutions.

CPG: A broad general framework for provincial governments should be established.

While the content of the framework for provincial constitutions is unclear, the provisions of a "default" constitution for provincial government received more attention.

5. PROVINCIAL LEGISLATURES - DEFAULT CONSTITUTION

5.1 There shall be a legislature for each province - s 125(1)

ANC: Legislature for each province.

FF: Retained.

Thuynsma: No provincial government, only provincial council representative of all local councils.

5.2 Legislative powers confined to the province - s 125(3)

ANC: Provincial laws applicable only to the relevant province.

5.3 Composition of legislature: size not less than 30 not more than 100 - s 127(1)

NP: In view of the idea of decreasing the size of legislature, a reduction in number of members of provincial legislatures may also be considered.

FF: Number of MPLs should be determined by the functions and powers allocated to provinces.

DP: The number of members should be the same as the number of constituency members' elected to the National Assembly from each province plus another 25% more in number with a minimum number of 25 members.

CPG: Constitution should specify permissible size of legislature as presently (30-100 members). An act of Parliament should determine a national norm for the determination of the number of members giving weighting to sparsely populated areas.

5.4 Electoral system: pure proportional representation - s 127(1)

ANC: Election on the basis of proportional representation and constituencies.

NP: Members to be elected via a party list system on the basis of a voters' role. After election, elected members should be designated to specific magisterial districts.

DP: Multi-member constituencies and party list system to ensure proportional representation.

DP(G): Mixture of party lists and constituencies.

CPG: Constitution should stipulate that electoral system should be a combination of proportional representation and constituencies. The electoral system should be provided for by an Act of Parliament.

Prov. Admin. Western Cape: Voters' roll for provincial elections. Provinces should have the choice of using only pure proportional representation, or using constituencies or a mixture of the two.

Borsook: Mixture of PR and constituencies as in Germany.

5.5 Duration and dissolution of provincial legislature: five year term - s 128

ANC: Five year term

NP: Five year term

FF: Five year term

DP: Four year term.

DP(G): May be shorter period than 5 years, arguably 4 years.

CPG: Five year term

5.6. Date of polling

5.6.1 On same date for all provinces

CPG: Not possible in view of premiers' powers to dissolve legislatures before 5 years' expiry.

Prov. Admin. Western Cape: Provinces should have option to hold provincial and local elections on same day in the province.

5.6.2 On same date as Parliament

DP(G): Provincial elections should be held on different days from the national election.

CPG: Not necessary or possible to hold on same day as national election.

5.6.3 Election to be held within 90 days of dissolution of the legislature - s 129(1)

ANC: After dissolution, Premier shall call for elections within 90 days.

CPG: Retain s 129(1)

5.7 Sitting of provincial legislatures:

S 130(1) Secretary of a provincial legislature shall convene such legislature within 7 days after an election.

S 130(2) Provincial legislature shall determine its sittings; provided that Premier may summon legislature to an extraordinary sitting for the dispatch of urgent business.

ANC: Each provincial legislature will determine days, hours and periods of its sitting.

NP: Retain s 130

FF: Retains 130

CPG: Retain s 130

5.8 Speaker and deputy speaker: elected by the legislature, election presided over by a judge - s 131

NP: Retain s 131

FF: Retain s 131

CPG: Retain s 131

5.9 Qualifications for membership of provincial legislatures: same as for National Assembly - s 132

ANC: Qualification of membership at national level will also apply to provincial legislatures.

NP: Retain present position: same as for Parliament.

FF: Retain s 132

5.9.1 Candidates should ordinarily resident in a province; but limited exceptions - s 132(3) read with s 40(2) & (3).

DP: A candidate should be registered voter in the province concerned.

CPG: Only persons who are ordinarily resident in a particular province at the time of their nomination should be entitled to become members of a provincial legislature.

5.10 Vacation of seats and filling of vacancies - s 133

5.10.1 Vacation of seats: Members vacate seat with loss of party membership - s 133(1)(b)

ANC: Members will lose their seats if:

- (a) they resign; (b) absent themselves voluntarily from the sittings for more than a period stipulated by the rules, or (c) he or she becomes a member of the National Assembly.

FF: Delete s 133(1)(b)

DP: Delete s 133(1)(b)

DP(G): S 133(1)(b), preventing the crossing of the floor, should be scrapped.

CPG: Retain s 133 but termination of party membership should not result in termination of membership of legislature.

5.10.2 Filling of vacancies

CPG: Depends on electoral system.

5.11 Oath or affirmation by members - s 134

FF: Retain s 134

CPG: Retain s 134

5.12 Powers, privileges and immunities - s 135

ANC: Provision should be made for suitable privileges, benefits and immunities of members.

NP: Retain s 135

FF: Retains 135

CPG: Retain s 135

5.12a Penalty for sitting or voting when disqualified - s 136

FF: Retain s 136

5.13 Rules and orders: provincial legislature empowered to make rules and orders - s 137

ANC: Each provincial legislature will make its own rules and orders.

NP: Retain s 137

FF: Retain s 137

CPG: Retain s 137

5.14 Quorum: One third, or when vote taken on a Bill, at least half of all member - s 138

ANC: Retain s 138

NP: Retain s 138

FF: Retain s 138

CPG: Retain s 138

5.15 Required majorities: unless otherwise required by the Constitution, all questions shall be determined by a majority of votes - s 139

FF: Retain s 139

CPG: Retain s 139

Borsook: Legislation by simple majority

5.16 Assent to bills by Premier - s 140

ANC: Premier has power of assenting, signing and promulgating bills.

NP: Retain s 140

FF: Retain s 140

CPG: Retain s 140

5.17 Signature and enrolment of provincial laws at Appellate Division - s 141

NP: Retain s 141

FF: Retain s 141

CPG: Retain s 141

5.18 Public access to provincial legislatures - s 142

NP: Retain s 142

FF: Retain s 142

CPG: Retain s 142

5.19 Legislative committees of oversight

CPG: There should be effective committees of legislatures to ensure proper accountability, openness and responsiveness on the part of the executive.

5A. PROVINCIAL MONARCHS - s 160(4)(b)

CPG: A general enabling provision is needed. No specific reference to a particular monarch should be included in the final constitution.

6. PROVINCIAL EXECUTIVES

Framework

DP(G): The tenure of office, responsibilities, powers and functions of Premiers and executive councils should be regulated by provincial constitutions.

Prov. Admin. Western Cape: Institutional issues pertaining to executive council and premier should be dealt with in a provincial constitution.

6.1 PREMIERS

6.1.1 Election by legislature - s 145(1)

ANC: Premier shall be elected from the members of the provincial legislature.

NP: Retain s 145

FF: Retain s 145

DP(G): Directly elected by electorate.

CPG: Parliamentary-elected premiers for provinces without constitutions.

Borsook: By legislature

Fein: Either popularly or by legislature

Mentz: Appointed by Provincial Councils and central government

6.1.2 Premier member of legislature

CPG: In pursuance of the principle of separation of powers, Parliamentary-elected Premiers should vacate their seats on election.

6.1.3 Tenure of and removal from office of Premiers - s 146

6.1.3.1 Term of office is terminated on dissolution of legislature - s 146(1) & 154. Legislature is dissolved:

(1) On expiry of 5 year term;

(2) On a motion of no confidence in Executive Council and Premier, Premier may dissolve legislature - s 154(1)

(3) On a motion of no confidence in Executive Council excluding Premier, then Premier may dissolve legislature - s 154(3)(c)

ANC: Premier elected for 5 years. On motion of no confidence in Executive Council and the Premier, the Premier shall dissolve the legislature and call for elections.

FF: Retain s 146

CPG: Retain s 146 & 154

6.1.3.2 Dismissal of Premier by motion of no confidence in Premier alone - s 154(2)

ANC: If vote of no confidence in Premier alone, then he or she shall resign and the provincial legislature will elect another Premier within 30 days from the date of resignation.

NP: Retain s 154(2)

CPG: Retain s 154(2)

6.1.3.3 Impeachment - s 146(2)

CPG: Retain s 146(2)

6.1.4 Responsibilities, powers and functions of Premiers - s 147

ANC: Executive authority for each province shall vest in the Premier.

NP: Retain s 147. Could be considered that the Premier should be compelled to consult with the leaders of the other parties in the Executive Council before exercising certain of his or her powers.

FF: Executive authority of a province shall vest in the Premier of the province who shall exercise and perform his or her powers and functions subject to and in accordance with the Constitution.

CPG: Retain s 147

6.1.5 Acting premiers, appointment of by Premier - s 148

FF: Retain s 148

CPG: Retain s 148

6.2 EXECUTIVE COUNCILS

Framework

DP(G): Responsibilities, powers and functions of executive councils to be determined by provincial constitutions.

6.2.1 Size: Premier and not more than 10 members - s 149(1)

NP: Consider reduction of number of members in case of smaller provinces.

FF: Retain s 149(1)

DP: Executive Council should constitute of between 5 and 10 members, providing that the number of members of the Executive Council do not exceed on fifth (20%) of the number of members of the Provincial Legislature.

DP(G): If province desires to increase size of Executive Council beyond 10 should require the permission of the President in consultation with the Minister of Finance.

CPG: No need to increase number or appoint deputies. Size of executive council should have some bearing to size of legislature.

6.2.2 Composition: government of provincial unity - s 149(2)

NP: Favours government of provincial unity - s 149(2) unamended.
Decisionmaking on the basis of consensus - s 150(2).

FF: Premier shall determine portfolios, appoint members of Executive Council, terminate appointments for the purposes of the Constitution and in the interest of good government, and fill vacancies when necessary.

DP: Reference to government of provincial unity should be deleted.

DP(G): No government of provincial unity after 1999.

CPG: There should no enforced proportional allocation of membership to Executive Councils. While the government of provincial unity is not obligatory until 1999, it should be included in the final constitution until 1999.

Prov. Admin. Western Cape: Ambivalent over the issue.

Fein: No proportional representation in executive.

Mentz: Elected by electorate.

6.2.3 Appointed from the legislature - s 149(4(b))

CPG: Should be able to appoint persons from outside the legislature. Such appointees should have the right to speak but not vote in the legislature. In order to satisfy the concept of separation of powers, it may be necessary to require that members of the legislature vacate their membership on appointment to the Executive Council.

6.2.4 Oath, ethical provisions - s 149(7),(8),(10)

CPG: Retain

6.2.5 Executive Council procedure: meeting presided over by Premier - s 150(1)

ANC: Premier chair meetings

FF: Retain s 150.

CPG: Retain s 150

6.2.6 Temporary assignment of powers and functions to Executive Council members - s 151

NP: Retain s 151

FF: Retain s 151

CPG: Retain s 151

6.2.7 Transfer of powers and functions from one member to another member - s 152

NP: Retain s 152

FF: Retain s 152

6.2.8 Accountability of members of Executive Councils - s 153

ANC: The executive councils shall be accountable to the Premier and the provincial legislature for the performance of their day to day administration and collectively for the administration of the province as a whole.

NP: Retain s 153

FF: Retain s 153

CPG: Retain s 153

6.2.9 Vote of no confidence in Executive Council alone, then Premier may resign, reconstitute of the Executive Council, or dissolve the legislature - s 154(3)

NP: Retain s 154

FF: Retain s 154

CPG: Retain s 154