

THEME COMMITTEE SIX SUBCOMMITTEE ON MONITORING

SUBMISSION FOR BLOCK No. 2 ON THE PUBLIC PROTECTOR

February 20, 1995

Introduction

The IFP believes that the functions of the Public Protector shall be determined and structured on the basis of the following relevant considerations:

1. The functions of the Public Protector shall recognize and adjust to the chosen "Form of State" of South Africa. The national Public Protector shall not act with respect to the area of provincial autonomy. However, the national Constitution may prescribe that provincial Public Protectors be established in terms of provincial constitution and/or legislation. The national Constitution shall not be prescriptive on the form, fashion and manner to be chosen by provinces to define the role and scope of provincial Public Protectors'. (Provincial Constitutions and legislation should be empowered to create a special public protector appointed by, and accountable to the House of Traditional Leaders of the Province to act with respect to the government of traditional communities. We must tailor public protector's function to the nature of traditional forms of societal organization so as to avoid any type of cultural colonialism and the prevarication of Westernized perspectives on African phenomena. The plural and diverse nature of our society is to be recognized, and the same interests are to be protected in different forms and fashions depending on the nature of the social or cultural formations concerned. For this reason the provincial public protector's functions with respect to traditional communities shall be split into two independent offices: one charged with the task of protecting, the autonomy and customs of a traditional community from the lack of understanding of any government bureaucracy, while the other office shall protect the rights of members of traditional communities vis-a-vis those who are the traditional administrators of such community.) Therefore the IFP believes that Provinces should have greater autonomy in structuring their Public Protectors than what they enjoy at present in terms of the interim constitution. In any case the Constitutional Principle XVII (2) does not allow the Constitutional Assembly to give Provinces less autonomy in this respect than what they have in terms of the interim constitution. Therefore, the functions of the Public Protector to be consider in the drafting of the next Constitution should be limited to the area of competence to the national level of government.
2. The functions of the Public Protector shall relate not only to the protection of citizens visa-vis government, but should also extend into at the broader relations between citizens and relevant centers of private power. Specifically the Public Protectors should be competent within the area of consumer protection exercised by the National Government within it's prerogatives deriving from the central government's power to regulate "inter-provincial government". In the past the IFP proposed the establishment of a Consumer Protection Commission and an Environmental Commission with powers and functions which are closely related to those of

the Public Protection. In this respect, the IFP believes that it is necessary to consider the following issues:

- a. whether these functions are to be provided for and regulated in the Constitution.
 - b. whether these functions should be left with government's departments, or whether they should be merged with the Public Protector's competence, or whether they should be ascribed to the prerogative of independent commissions.
 - c. what are the best avenues not only to defend the rights of individuals in situations in which the violation of the right affects only a specific individual but also with respect to situations in which the violation affects and damages a large number of people.
3. There must be a connection between protection of rights and constitutional adjudication related to the definition and interpretation of such rights, so as to ensure inputs in the formulation of relevant constitutional policies by the Constitutional Court. The issue of "direct access" to the Constitutional Court should be considered in this respect. IFP's proposals in this respect are set out *infra*.

The Public Protector

- a. The Public Protector shall be independent and subject only to the Constitution and to the law.

No public official shall interfere with the exercise of the Public Protector's functions or shall refuse full assistance as it may be needed.

The office of the Public Protector shall draft and propose to Parliament its own budget.

- b. The Public Protector shall either be a judge, a lawyer or an advocate.

The Public Protector shall be appointed by the President (Please note that the IFP has proposed that the President be a Head of State but not the Head of Government, which latter office shall be separate) on a nomination of Parliament adopted on the basis of a pool of names recommended by the Judicial Service Commission.

The Public Protector shall hold office for a non-renewable six year term, so as to not coincide with the terms of political offices and to avoid "political accountability".

The functions of the Public Protector shall include the investigation of the complaints of with respect to any level of government concerning

- violations of rights and freedoms,
- abuse or use of power for political purpose,
- corruption, maladministration and misappropriation of public monies,
- unfair, harsh, insensitive or discourteous treatment of anyone in the Republic by a public official, including but not limited to police, defense forces and prison personnel,

- manifest injustice, or conduct of a public official which would properly be regarded as unlawful, oppressive or unfair.

The Public Protection shall have exclusive competence which shall not exceed the competence of the national government in terms of the Constitution, and shall exercise any function related to the competence of other levels of government only in consultation with the Public Protector of the Province concerned.

- c. The Public Protector shall have the power to take appropriate action to call for the remedying, correction and reversal of injustices and violations of laws and regulations through the most fair, proper and effective means, including:
 - negotiation and compromise between the parties concerned,
 - causing the complaint along with the Public Protector's findings to be reported to the superior of the offending party,
 - referring the matter to the Director of Public Prosecution, with a recommendation,
 - bringing proceedings in a competent Court for suitable remedies to secure the termination of the offending action or conduct, the compensation of the victims and/or the modification of the offending procedures,
 - bringing proceeding before the Constitutional Court to challenge the constitutionality of legislation, or before a court to challenge the validity of regulations,
 - reviewing laws in force before the enactment of this constitution to ascertain their consistency with the principles and provisions of this constitution so as to make recommendations to the President and Parliament.
- d. The Public Protector shall have the power to compel the appearance of witnesses and the production of documents and records relevant to his or her investigation.

The Public Protector shall also have the power to cause anyone contemptuous of his or her subpoenas to be prosecuted before a competent Court.

- f. The Public Protector shall submit an annual report to Parliament on the exercise of his or her powers and functions.
- g. The Public Protector may be removed from office before the end of his or her term by the President acting on the recommendation of the Judicial Service Commission.

The Public Protector may be removed from office only on the grounds of mental incapacity or for gross misconduct. The Judicial Service Commission shall conduct the investigation and report to the President and Parliament.

- h. The Public Protector shall empower assistant district Public Protectors who shall serve in decentralized offices on the basis of districts designated by the Public Protector with the aim of maximising the accessibility of the Public Protector's services and protection.

Environmental Commission

- a. The Environmental Commission shall consist of thirteen members, one appointed by the President, three by the Senate, two by the Judicial Service Commission, two by the Chambers of Commerce and four by representatives of environmental groups registered with Parliament and convened for this purpose by a standing committee of Parliament. The members of the Commission shall be qualified experts on environmental sciences or social sciences.
- b. The Commission shall investigate matters related to the protection of the natural and human environment, may introduce legislation at national and provincial level to protect and enhance the quality of the natural and human environment, and may make recommendations to national and provincial Departments of the Environment.
- c. The Commission shall investigate and report on complaints concerning the improper utilisation of non-renewable natural resources, the degradation and destruction of ecosystems and the failure to protect the beauty and character of the South Africa.
- e. The Environmental Commission shall prepare a yearly report on the status of the environment in the Republic expressing any applicable recommendations, and may provide testimony in Parliament and in hearings held by Government, as required.

Consumer Affairs Commission

- a. The Consumer Affairs Commission shall consist of thirteen members, one appointed by the President, three by the Senate, two by Judicial Service Commission, two by the Chambers of Commerce and four by representatives of consumer groups registered with Parliament and convened for this purpose by a standing committee of Parliament. The members of the Commission shall be qualified experts on consumer protection, environmental problems or social sciences.
- b. The Consumer Affairs Commission shall investigate matters related to the protection of consumers, and may introduce legislation at national and provincial level to protect consumers. Of its own power the Commission may request that general terms and conditions of adhesion contracts be negotiated with and approved by the Commission as a condition of their validity and enforceability.
- C. The Commission shall have the power to determine the requirements for product labelling including product information and warnings.
- d. The Commission may be delegated by the State or regional legislature to set prices and rates for services and products rendered in conditions of natural monopoly-
- e. Any immediately adversely affected interest may seek judicial review of any decision of the Commission.

- f. The Consumer Affairs Commission shall prepare a yearly report on the status of consumer protection expressing any applicable recommendations, and may provide testimony in Parliament and in hearings held by Government, as required.

Direct Access to Promote Constitutional Adjudication

- a. Political parties represented in Parliament, the Public Protector as well as trade unions, civic and consumer groups, major media of mass communication and other social, religious and cultural formations registered with the Constitutional Court in accordance with its rules, may commence an action to declare the unconstitutionality of laws. One hundred members of a political party may commence an action to review the democracy of their political party statute.
- b. Any member State, the Federal Republic of South Africa, the Public Protector and any power of the Republic may commence an action to resolve a conflict among government organizations.
- c. Individuals and social, cultural, religious and political formations when exercising their powers or their autonomy within the freedom and liberties recognized and guaranteed by the Constitution, shall have equal standing as the powers of the Republic.

Related Functions

There is need to relate this submission to the submissions which the IFP made to the Constitutional Assembly and the other Theme Committees or sub-Committees with respect to matters which are related to those covered herein, to which reference is made.

In fact, it should be mentioned that economic freedoms and liberties shall also be entrenched in the constitution, and they shall include

- c. the right of free market enterprise and the liberty of contractual autonomy,
- b. the prohibition of burdensome and unnecessary regulations and controls, and
- c. limitation on government's direct involvement in economic affairs when the private sector may offer the same service/product with comparable reliability and efficiency.

The violation of these freedoms and liberties by action of government is often difficult to detect and there is often no or little possibility of resorting to a court of law to redress the undue interference of government in economic affairs. For these reason the IFP has proposed a Regulatory Relief Commission which emanates directly from civil society. These freedom and liberties are also violated when the government is not efficient, or is corrupted or is otherwise malfunctioning. For these reason the IFP has proposed a very strong and effective Public Service Commission.