

NATIONAL PARTY SUBMISSION

THEME COMMITTEE 1

BLOCK 3: SUPREMACY OF THE CONSTITUTION

As pointed out in the briefing document made available by our Technical Committee, the principle that the constitution shall be the supreme law of the land is a non-contentious issue. We strongly support the principle that the state and all its organs shall be subject to a constitution in which their structures and powers, as well as the relationship between the state and its citizens, are defined.

We agree that the supremacy of the constitution will be the most important feature of the final constitution. The consequences of this for the position of parliament as the highest legislature, the executive as the authority that execute those laws, and the judiciary as the authority responsible for the application of the constitution to the actions of those other branches are indeed as far-reaching as expounded in the briefing document.

In particular, we wish to react as follows to the issues raised in paragraph 2.2 of the briefing document:

2.2.1 Inter-relationship between bill of rights and constitutional supremacy

We believe that the notion of an entrenched, justiciable constitution is actually very closely related to a justiciable bill of rights. A bill of rights enforced by the courts, but not part of the supreme law of a land, cannot be an effective instrument of law, as it can be amended or abolished too easily. In order to be such an instrument, it needs

to be a part of an entrenched supreme constitution. As a matter of fact, a bill of rights will and should form an integral and prominent part of the constitution.

2.2.2 Equality

This matter has been addressed in a previous submission of the National Party.

2.2.3 Relationship between constitutional supremacy and separation of powers

In a very direct sense, supremacy of the constitution will not be effective if the courts are not afforded the authority to review the actions of other branches of Government. This presupposes at least a measure of separation between the different branches of government which will enable the judiciary effectively to exercise its review function. In a broader, more indirect sense, the idea of the separation of powers, its underlying premise of preventing an over-concentration of power and effecting meaningful checks and balances is, of course, an essential feature of a constitutional state. Again the separation of powers can be provided for effectively only in a written, entrenched constitution that has higher status than the government bodies, the powers of which it seeks to control.

2.2.4 Impartial and independent judiciary

We can only reiterate that a supreme constitution, which includes a bill of rights, - cannot be an effective instrument of law if there is no effective way of enforcing it. We believe that an impartial and independent judiciary is the most suitable instrument for this purpose. As a matter of fact, in our view, an independent judiciary goes hand in hand with the idea of a supreme constitution.

2.2.5 Horizontal application of the constitution

In our understanding this matter will be dealt with extensively and exhaustively by Theme Committee 4. Suffice to say that the transitional constitution provides for limited horizontal application of the bill of rights in particular, and that it should be retained in the final constitution.

2.2.6 Entrenchment of the constitution

We believe that the principle of the entrenchment of the constitution should also be considered by this Theme Committee. A supreme constitution that is not entrenched, and that can be amended easily, cannot be an elective instrument to control state action. In actual fact, entrenchment is one of the ways in which a constitution is afforded higher status or, put another way, in which the supremacy of a constitution is given real and practical meaning. To explain: if the constitution provides that it is supreme, but that particular section can be amended by an ordinary majority, that is a majority of a quorum, that supremacy can be abolished almost by the stroke of a pen and cannot mean very much.

Conclusion

By way of summary, one can conclude that the following concepts are inextricably bound to one another and should all be provided for in the final constitution:

- (i) constitutional supremacy;
- (ii) justiciability of the constitution;
- (iii) entrenchment of the constitution,

- (iv) the separation of powers; and
- (v) effective protection of fundamental rights and freedoms.