

09/06/95

NATIONAL PARTY PRELIMINARY SUBMISSION

THEME COMMITTEE 1

Block 8: Agenda Item 11: Foreign Relations and International Law

1. Introduction

1.1 Foreign relations and international law are dealt with in the Constitution in relation to three issues: the powers of the head of state to conduct foreign relations, the deployment of the military beyond South African borders and international law and treaties.

2. Constitutional principles

2.1 Constitutional Principle I states that the Constitution shall provide for the establishment of one sovereign state.

2.2 Constitutional Principle XXI(3) provides that where there is necessity for South Africa to act as a single entity, as is the case in respect of foreign relations, powers should be allocated to the national government.

3. Head of State's powers and responsibilities

3.1 Section 82(1)(i) of the Constitution of the Republic of South Africa, Act 200 of 1993 ("the Constitution") states that the President may 'negotiate and sign international agreements', whilst section 82(1)4 empowers him or her to appoint and receive diplomatic representatives.

3.2 Section 35(1) inter alia directs courts of law to have regard to public international law applicable to the fundamental rights entrenched in the Constitution when adjudicating the charter of fundamental rights. Indirectly, therefore, functions exercised by the head of state having relevance to fundamental rights will need to be exercised in accordance with regard to public international law.

3.3 The principle relating to the head of state having to exercise his or her powers in consultation with the Executive Deputy Presidents and Cabinet is not at present in issue, as this matter more properly should be dealt with by Theme Committee 2, although the exercise of powers and performing of functions by him or her in respect of foreign relations needs to be assessed

subject to consensus on the principle of consultation between the President and other functionaries. Subject to the National Party's submission to Theme Committee 2, it is submitted that the present situation in this regard be retained, so that the President shall exercise his or her powers vis-à-vis foreign relations after consultation with the Executive Deputy Presidents.

3.4 It is submitted that the so-called royal prerogatives previously contained in South African constitutions have been replaced by the statutory provisions of section 82. There is no need to retain these prerogatives as the powers listed in section 82 adequately provide for the effective performance of duties by the head of state.

4. Employment of the military beyond South African borders

4.1 Section 82(4)(a) of the Constitution states that the President is the Commander-in-Chief of the SANDF. This provision, as well as paragraph (b) which lists the President's powers in this respect, should be retained in principle.

4.2 Section 227 of the Constitution lists the functions of the SANDF. Subsections (1)(a) and (b) state that the SANDF may be employed for service in the defence of the Republic, for the protection of its sovereignty and territorial integrity and for service in compliance with the international obligations with regard to international bodies or other states. Section 228(4) provides for the President having to inform Parliament of his or her decision to employ the SANDF under the aforementioned circumstances.

4.3 It is submitted that these provisions be retained in principle, as they provide for accountability of the President's decisions and as the separation of powers between the Executive and the Legislature is also re-emphasized.

4.4 Section 227(2)(d) and (e) provides that the SANDF shall not breach binding international customary law relating to aggression, and that it shall in armed conflict comply with binding international customary law and treaties. Reflecting the values underlying an open and democratic society based on freedom and equality and respect for the rule of law, these measures should be retained.

5. International law and treaties

5.1 The retention of this section 231 of the Constitution is of vital importance. The increasing role that bi- and multi-lateral relations play in the South African agenda, the global nature of many problems and the need for South Africa to deal with other nations underlines the necessity for a measure dealing with international agreements. It is also important that the Legislature have a say in something which directly affects the progress of the country and its people. In support of the concepts of openness and accountability which permeates the Constitution, it is important that the power to enter into or accede to international agreements be balanced by empowering Parliament to ensure that checks and balances are placed on the exercise of the Executive (and the President in particular) of its powers in this regard.

5.2 Certain changes to section 231 are however proposed.

5.2.1 Subsection (1) can remain as it is except for the deletion of the words 'within the meaning of the previous Constitution'. These words no longer have any significance in view of the changed position in respect of the territory of the Republic.

5.2.2 Subsection (2) can remain as it is except for the deletion of the words 'negotiated and signed in terms of section 82(1)(i)'. Many (multilateral) international agreements are no longer open to negotiation and signature, but only to accession. Furthermore, a number of international agreements are in their particular nature not law-making, but create a platform for good relations between countries and therefore do not need ratification. The retention of the above-mentioned phrase in those circumstances creates a contradiction. Furthermore, Parliament need not be occupied with non-law-making agreements, or pro forma agreements establishing diplomatic and consular relations. Parliament would therefore be competent to ratify agreements where a particular agreement requires accession or ratification to bring it into force on an international plane.

5.2.3 Subsection (3) can largely be retained. It might, however, be useful to qualify the word 'expressly' by adding the phrase 'by Act of Parliament', thereby removing any doubt which may exist.

5.2.4 Subsection (4) can be retained without amendment.

6. Ancillary matters

6.1 Section 218(1)(e) of the Constitution provides that the National Commissioner of the SAPS shall be responsible for international police liaison. This provision should be retained.

6.2 Section 116(2) of the Constitution provides that the Human Rights Commission shall report to a relevant legislature any legislation which may be contrary to the relevant norms of international human rights law. This measure should be retained in principle.