

CONSTITUTIONAL ASSEMBLY

MINUTES OF THE 21st MEETING OF THE CONSTITUTIONAL COMMITTEE

WEDNESDAY 14 JUNE 1995

Present

Ramaphosa MC (Chairperson)
Wessels L (Deputy Chairperson)

Bhabha, M	Mchunu, E S
Chabane, O C	Meshoe, K R
De Beer, SJ	Meyer, R P
De Lange, JH	Moosa, M V
Du Toit, D C	Moosa, M W
Eglin, C W	Mulder, C P
Fourie, A	Myakayaka-Manzini, YL
Ginwala, FN	Ngcuka, B T
Gogotya, N	Nzimande, B E
Gordhan, P J	Pahad, E G
Green, L M (Alt)	Pandor, G N M (Alt)
Groenewald, P J (Alt)	Rabie, J A
Hofmeyr, W A (Alt)	Radue, J (Alt)
Holomisa, S P	Ripinga, S S
Kgoali, J L	Schutte, D P A
Love, J (Alt)	Selfe, J (Alt)
Mahlangu, M J	Sifora, T V
Mahlangu, N J	Sizani, R K
Makhanya, D W	Van Breda, A
Malatsi, D M (Alt)	Van De Venter, F
Marais, P G	Van Heerden, F J

Alternates for this meeting: the NP gave notice that S J de Beer, F J Jacobsz, G. Marais, and R Radue would stand in for full members who could not attend the meeting.

Apologies: C Ackermann, K Asmal, A Fourie, B Kgosisile, T King, Z Kota, B Mabandla, D Makhanya, Z Skweyiya, and C Viljoen.

Absent: G Fraser-Moleketi, M Ligege, D Lockey, L Mtshali, S Mzimela, R Rabinowitz, P Smith.

In Attendance:

Staff: M Sparg, L Zondo, G Grové, N Msizi, M Ndziba, and M Keegan.

Technical Committees: J Heunis (TC1), I Raubenheimer (TC4), S Liebenberg (TC4), J Dugard (TC4)

1. OPENING

Mr. Ramaphosa opened the meeting at 09h15. The Agenda was adopted.

2. MINUTES

The Minutes of the 20th Meeting of the Constitutional Committee of 26 May 1995 were adopted with the following amendments:

- i. The ANC requested that an addition be made to paragraph 3.A.7(i), to record that the meeting agreed that the Constitutional Assembly would declare publicly what it understood the "secular state" to be, based particularly on Mr. Corder's views on the matter.
- ii. The ANC requested that the phrase "It was suggested" replace "The meeting agreed" in paragraph 3.1.4(iii). The Chair ruled that this amendment would be considered when the meeting dealt with the sub-committee report on "Public Administration."
- iii. It was agreed that paragraph 7.8.1 would be corrected to reflect that the NP did not agree to Option 2, and that the meeting was of the view that a third option could be developed which would combine parts of Option 1 and 2.

3. MATTERS ARISING

None: included in agenda items below.

4. THEME COMMITTEE 1 REPORT ON BLOCK 4: ACCOUNTABLE GOVERNMENT

4.1 Mr. Mahlangu presented the document entitled, "*Theme Committee 1 Report on Block 4: Accountable Government*," included in the documentation.

4.2 The meeting noted the following concerns:

4.2.1 The PAC requested that the meeting consider a limited accountability of the public service. It was agreed that the matter would be referred to the Theme Committee 6.1 (which deals with the Public Administration and the Public Service Commission) and Theme Committee 6.3 (which deals with the Public Protector).

4.2.2 The ANC expressed its concern that popular or direct mechanisms for accountability, like referenda, initiatives and the recall, needed consideration. It suggested that the Management Committee decide where to refer the matter.

4.2.3 The ANC also expressed concern that the issue of "transparency" be given concrete form and shape. The meeting noted:

- i. Theme Committee 6.1 dealt with access to information in its report on the Public Administration; and
- ii. Theme Committee 4 would deal with the right of access to information and administrative justice.

4.2.4 Finally, the ANC expressed its concern that the issue of financial accountability needed further consideration. Theme Committee 1 said it would deal with the matter in its upcoming report on the economy.

4.3 The meeting recalled that Theme Committees could liaise with one another of their own volition and encouraged different Theme Committees to meet to discuss overlapping issues.

4.4 The ANC queried whether it was proper for the Constitutional Committee to refer matters to Theme Committees once they had passed the relevant blocks in their work programmes. The Chairperson ruled that in such cases, Theme Committees could instruct their Technical Committees to deal with the matters referred, to move the process forward. The referrals would be considered once a single, integrated draft text was available.

5. THEME COMMITTEE 4 REPORTS AND DRAFT FORMULATIONS

5.1 "NATURE AND APPLICATION OF THE BILL OF RIGHTS"

5.1.1 Ms. Pandor presented the document entitled, *"Report on Nature and Application of Bill of Rights,"* contained in the document titled *Additional Documentation* tabled at the 26 May 1995 meeting of the Constitutional Committee.

5.1.2 Regarding the contentious aspects of No. 1 of the *"Analytical Survey"*, which reads:

"Bill of Rights should be a document enforcing the 'heritage of divine authority' - ACDP"

- i. The ANC requested clarification on:
 - a. What "divine authority" meant precisely, given the multiplicity of religions in South Africa;
 - b. How the Bill of Rights would enforce this; and

- c. Whether the ACDP submission allowed freedom of religion and freedom of association; and
- ii. The Freedom Front reminded the meeting that Constitutional Principle II required that the Bill of Rights be founded on "universally accepted human rights". The ANC expressed concern that the ACDP submission demanded that this foundation be fundamentally changed.
- iii. The meeting agreed that:
 - a. The ACDP could present its views on the matter in a draft formulation that would be forwarded to the Constitutional Committee for its consideration.
 - b. The draft formulation might be along the lines of a proposed preamble to the Bill of Rights.

It is noted, however, that Theme Committee 4 objected to this decision.

- 5.1.3 Regarding the non-contentious aspect of No. 5 of the *"Analytical Survey"* which reads:

"Shall bind all levels and organs of government"

The ANC asked to flag *"organs of government"* to clarify:

- i. Whether commissions and structures created outside the three branches of government were *"organs of government"*; and
- ii. Whether the Bill of Rights was binding on them.

5.2 "HUMAN DIGNITY"

- 5.2.1 Ms. Pandor presented the document entitled, *"Theme Committee 4 Report and Draft Formulation, Right to Human Dignity,"* contained in *"Additional Documentation"* for the 26 May 1995 meeting of the Constitutional Committee.

- 5.2.2 The NP expressed concern that the term "human dignity" found in the Interim Constitution had been changed to *"dignity."*

- 5.2.3 Regarding the distinction between the right to dignity and the right to a good name:

- i. The DP queried whether this distinction came from the CA submissions or international examples, which were to guide the Theme Committee, or from South African common law.
- ii. The Technical Experts responded that it originated in a recent court decision and common law.
- iii. The meeting agreed that the Technical Experts would amend the proposed draft text by deleting paragraph 6.1.2 and reformulating 6.1.1.
- iv. The amended formulation would be forwarded to the Constitutional Committee for its consideration.

5.2.4 The meeting agreed that the Constitutional Committee would consider paragraph 6.2 of the proposed draft formulation when it dealt with the amended formulation.

5.2.5 The meeting noted that Theme Committee reports had incorporated and taken into account the viewpoints and proposals from the IFP. It was agreed, as a matter of courtesy, that amended formulations would also be forwarded to the IFP, as they were also part of the process.

5.3 "SERVITUDE AND FORCED LABOUR"

5.3.1 Ms. Pandor presented the document entitled "*Theme Committee 4 Report and Draft Formulation, Right Against Servitude and Forced Labour,*" included in the documentation.

5.3.2 Regarding the "Contentious/Outstanding Aspects" of No. 6 in the "*Schematic Report,*" which reads:

"FF: Possible application to unlawful immigrants"

The FF clarified that they meant that illegal immigrants should be included as "natural persons" and thus bear this right. The meeting agreed that the matter was not contentious and that it would be removed from the list of contentious matters.

5.3.3 Regarding the last paragraph of No. 7 of the "*Schematic Report*" which reads:

"- PAC: The right does `not allow derogation'."

The PAC clarified that it did not mean that the right should not be limited, but that it should not be suspended during a State of

Emergency.

5.3.4 The meeting agreed to the *"Provisional Text, The Right Against Servitude and Forced Labour,"* contained on page 75 of the documentation.

5.4 FREEDOM AND SECURITY OF THE PERSON

5.4.1 Mr. Radue and Ms Liebenberg presented the document entitled, *"Theme Committee 4 Report and Draft Formulations, Freedom and Security of the Persons,"* included in the documentation.

5.4.2 Regarding the first sentence of 7.1 of the *"Provisional Text,"* which reads:

"Every person shall have the right to freedom."

- i. The ANC, DP and FF argued that the paragraph was very confusing and should be reformulated.
- ii. The meeting suggested two possible options to help guide redrafting:
 - a. The DP suggested: "Every person shall have the right of freedom from arrest and detention which is either arbitrary or for unjust cause." Or,
 - b. The Technical Committee suggested: "Every person shall have the right not to be deprived of their liberty."

5.4.3 Regarding the second sentence of paragraph 7.2 of the *"Provisional Text,"* which reads:

"No person shall be arrested or detained arbitrarily or for an unjust cause."

- i. Regarding the issue of "detention without trial":
 - a. The PAC requested that *"detained"* be extended to specify "detained without trial".
 - b. The Theme Committee responded that "detention without trial" would be dealt with in that section of the Bill of Rights which dealt with the state of emergency and suspension of rights.

- c. The ANC, however, requested that the Technical Committee provide an alternative formulation which reflected the PAC's concerns, to state clearly in the new Constitution that there would be no detention without trial.
 - d. The NP agreed that the PAC concerns needed to be accommodated and suggested that the phrase be amended to read: "No person shall be arrested or detained arbitrarily, for an unjust cause, or without trial."
- ii. The ANC expressed its concern that the term "*unjust cause*," put the onus on the individual and not upon the state; it proposed that the phrase be reformulated to use the term "just cause". The DP added that there was a question as to whether "unjust" was justiciable. It was agreed the Technical Committee would look into the matter.
 - iii. The ANC expressed concern that the right to freedom should be extended to cover arrest or detention that occurred in the private sector, e.g. on farms.

5.4.4 Regarding paragraph 7.2 of the *Provisional Text* which reads:

"Every person shall have right to security of the person which shall be respected by all and protected by the state.

The ANC queried why the clause, "*which shall be respected by all and protected by the state*" accompanied this right and not all the others. The Technical Committee responded that it had included the clause to put a positive obligation on the state, not only to refrain from doing certain activities, but to also protect the right of individuals to security. The Theme Committee added that this particular aspect of the text had received much attention in submissions from women.

5.4.5 Regarding paragraph 7.3 of the *Provisional Text* which reads:

No person shall be subject to torture of any kind, whether physical, mental or emotional, nor shall any person be subjected to cruel, inhuman or degrading treatment or punishment.

- i. The ACDP expressed its concern that the text be amended to include the unborn person as a bearer of this right.
- ii. The Chair ruled that the Constitutional Committee had to

bear in mind Constitutional Principle II when dealing with fundamental rights; however it might at some point need to look at a provision of general application which would address the issues raised by the ACDP.

5.4.6 The Chair ruled that the Technical Committee would take note of the discussion, reformulate paragraph 7.1, and revisit various other sub-clauses to see whether they could not accommodate concerns raised in the Constitutional Committee.

5.5 FREEDOM OF RELIGION, BELIEF AND OPINION.

5.5.1 Mr. Radue presented the document entitled "*Theme Committee 4 Report and Draft Formulation, Freedom of Religion, Belief and Opinion,*" included in the documentation.

5.5.2 The PAC reported that the Administration had not included its submission in the Theme Committee Report and outlined its views as follows :

- i. Academic Freedom did not warrant a separate clause or separate mention in the new Constitution; and
- ii. Section 14(2) and (3) might be given specific mention, although religious observance in state-aided schools should only be allowed so long as it was voluntary and equitable.

5.5.3 The following concerns were raised in discussion:

- i. Regarding academic freedom:
 - a. The Technical Committee had prepared a memorandum on the matter which would be forwarded to the Constitutional Committee for its consideration.
 - d. The ANC expressed concern that the memorandum also address the issue of the transformation of academic institutions such that academic freedom should not be interpreted as maintaining the status quo in academic institutions. The Technical Committee responded that the matter might be handled in a limitations or affirmative action clause, which they anticipated would be included in the Constitution.
- ii. The PAC and ANC said they would not be opposed to

retaining a reformulation of section 14 (2) and (3).

- iii. The DP expressed concern that an "omnibus" clause was needed, linking the right to freedom, belief, and opinion to the right to *assert* these freedoms in practise and expression. The Technical Committee responded that, as proposed in footnote 6 of the provisional text, a sentence could be inserted to accommodate this concern.
- iv. The ANC expressed concern that freedom of ideology needed to be specifically included in the text. The Technical Committee said that the matter was covered by the text, but could be given specific mention if any doubts remained.
- v. The ANC also expressed concern that limitations may be needed to disallow the practises of Nazism, Fascism and Apartheid. The Technical Committee responded that this could be dealt with in a limitations clause.

5.5.4 The Chair ruled that the Technical Committee would redraft the text, taking into account the concerns expressed, and forward the amended formulation to the Constitutional Committee for its consideration.

6. REPORTS FROM CONSTITUTIONAL COMMITTEE SUB-COMMITTEES

6.1 THE COURTS AND ADMINISTRATION OF JUSTICE (THEME COMMITTEE 5)

The meeting noted that the sub-committee's work was progressing and it would report at the next meeting of the Constitutional Committee.

6.2 PUBLIC ADMINISTRATION (THEME COMMITTEE 6.1)

6.2.1 Mr. Vadi presented the document entitled "*Amended Formulation: Public Administration*," tabled at the meeting.

6.2.2 The meeting noted the PAC's concern that, because it was not able to attend sub-committee meetings, it might be at a disadvantage discussing the document on the same day it was tabled. The Chairperson said, however, that this was the third time the Constitutional Committee discussed the matter, and although there were some new amendments, the meeting would ensure that no parties were disadvantaged in participating in the debate.

6.2.3 The meeting accepted page 1 of the document containing sub-

clauses 1(1)(a) - 1(1)(e).

6.2.4 Regarding sub-clause 1(1)(h), which reads:

"Public administration shall be broadly representative of the South African people. Employment and personnel management practise in the public administration shall be based on competency, objectivity and fairness."

- i. The ANC expressed its concern that the sub-clause did not adequately address the need for affirmative action, as requested at the 26 May 1995 meeting of the Constitutional Committee.
- ii. It was agreed that the matter would be referred to the Law Advisors and further considered by a sub-committee of the Constitutional Committee.
- iii. There was consensus about the following proposals:
 - a. The DP proposed that the sub-clause be viewed in the context of a "affirmative action" or "equality" clause in the Bill of Rights, that would ensure that the principle pervades the whole Constitution and not only specific structures. The Constitutional Assembly would, then, have to ensure that the sub-clause did not negate or dilute this principle.
 - b. The DP also pointed out that the first sentence of the sub-clause was required by Constitutional Principle XXIX and had to remain.
- iv. However, regarding the second sentence of the sub-clause, beginning with *"Employment..."* there were two points of view:
 - a. The ANC, supported by the PAC, proposed that this sentence be deleted and replaced with the following:

"To achieve this the government shall put in place mechanisms to redress past imbalances."
 - b. However, the DP, supported by the NP, proposed that this sentence be put in a separate clause, which could be worded something like:

"It shall be efficient, non-partisan, career-oriented,

and function on the basis of fairness."

These principles would then be tested against the "Equality principle" in the Bill of Rights, and if not in compliance, adjusted.

6.2.5 Regarding sub-section (2), which reads:

(2) The terms and conditions of service of employees in the public administration shall be regulated by law. Employees shall be entitled to a fair pension in terms of a pension scheme as regulated by law.

- i. The meeting agreed to delete the words "*in terms of a pension scheme*".
- ii. Regarding the term "*public administration*":
 - a. The ANC initially suggested that the term "public service" replace "public administration," to follow the Constitutional Principle exactly.
 - b. The CA Law Advisor, Mr. Grové, suggested that the whole of sub-section (2) be moved to Section 3.
 - c. The meeting agreed, however, that the matter was quite complicated and needed further consideration. The meeting agreed to refer the matter to a CC sub-committee for finalisation.

6.2.6 Regarding sub-section (3) which reads:

(3) A limited number of political appointments in the public administration may be made within the framework of the above principles and as regulated by law.

- i. There was agreement that the term "*political appointments*" was unsuitable.
- ii. The meeting agreed to refer the matter to a CC sub-committee, which would consider the following proposals for amending the sub-section:
 - a. Referring to Option 1 of the footnote, which reads:

"(3) A limited number of persons may, as regulated by law, be appointed in the public administration by

reasons of their political commitment to particular government policy objectives, provided such appointments are otherwise within the framework of the above principles."

The DP proposed the adoption of this option with the following amendments:

- (i) "Personal commitment" would replace "*political commitment*";
- (ii) If possible, "to government policy objectives" would replace "*to particular government policy objectives*"; and
- (iii) "and as regulated by law" would be added at the end of the last sentence.

b. The ANC proposed the following reformulation:

"Appointments by the executive in managerial posts in public administration [on account of the particular policy considerations of the executive] shall not be precluded."

6.2.7 Regarding sub-section 2(1) which reads:

"2.(1) ...

i. The sub-committee recommended that the Constitutional Committee consider the following formulation:

"There shall be a Public Administration Commission for the Republic as prescribed by national law."

ii. The meeting agreed that the recommended amended formulation would be typed and forwarded to a CC sub-committee for its consideration, and that the committee would report back to the Constitutional Committee.

6.2.8 Regarding sub-section 2(3) which reads:

"2(3) The Public Administration Commission shall perform such functions to safeguard the basic values and principles governing the public administration as prescribed by a national law."

The meeting agreed that "promote" would replace "*safeguard*".

6.2.9 Regarding sub-section 2(5) which reads:

"Provincial representatives in the Public Administration shall be competent to exercise and perform such powers and functions of the Commission with regard to provinces as prescribed by a national law."

i. The sub-committee recommended to the Constitutional Committee the following amendment to this formulation:

"2.(5) Each of the provinces shall be entitled to participate in the Commission through a special representative nominated by the province. Such special representatives shall be competent to exercise and perform such powers and functions of the commission with regard to his or her provinces as prescribed by national law."

ii. The ANC queried whether this meant that the Commission would only deal with provincial issues. The sub-committee responded that the phrase intended to convey that each province would be represented by a person nominated by the province and that this representative would exercise the powers of the commission in his or her province.

iii. The meeting agreed to type this recommended amendment and forward it to a CC sub-committee for its consideration. The committee would report back to the Constitutional Committee.

6.3 PUBLIC PROTECTOR (THEME COMMITTEE 6.3)

6.3.1 The meeting noted that the sub-committee had progressed with its work, but that certain issues were still outstanding.

6.3.2 The meeting agreed that the Management Committee would decide whether to refer the matter back to the sub-committee for finalisation or to another CC sub-committee.

7. THEME COMMITTEE 6.2

7.1 REPORT BACK ON THE RESERVE BANK

The meeting noted that the sub-Theme Committee was progressing in its work.

7.2 TABLING: REPORT ON THE AUDITOR GENERAL

The meeting noted that the Theme Committee was progressing in its work on the Auditor General but had not yet completed its report. The report was therefore not tabled at the meeting.

8. FOR NOTING: COMMISSION ON PROVINCIAL GOVERNMENT SUBMISSIONS

The meeting noted the document entitled, *Preliminary Submissions on Provincial Government Systems*," from the Commission on Provincial Government ,included in the documentation.

9. ANY OTHER BUSINESS

9.1 RESCHEDULING OF CONSTITUTIONAL ASSEMBLY WORK

9.1.1 Mr. Ramaphosa spoke to the memorandum entitled, "*CA Schedule*", tabled at the meeting.

9.1.2 The meeting agreed to reschedule CA work, giving over the last week in June to Parliament to allow for an urgent legislative programme, and regaining that time between 31 July and 15 August 1995. The CA would retain Friday 23 June and Monday 26 June 1995 for meetings of CA structures.

9.2 PROPOSAL TO ESTABLISH A CONSTITUTIONAL COMMITTEE SUB-COMMITTEE

9.2.1 The Chairperson spoke to the document entitled, "*Proposal for the Establishment of a Sub-Committee of the Constitutional Committee*," tabled at the meeting.

9.2.2 The meeting agreed that the matter would be forwarded to the Management Committee for finalisation and implementation.

9.2.3 The meeting agreed that the current Constitutional Committee sub-committees would continue to discuss the matters referred to them pending the establishment of the proposed permanent sub-committee.

10. CLOSURE

The Deputy Chairperson closed the meeting at 16h50.