REPUBLIC OF SOUTH AFRICA

DEBATES

OF THE

CONSTITUTIONAL ASSEMBLY

24 January to 25 August 1995

(Vol 2)

ISBN 0 621 16998 6 (Vol 2)
ISBN 0 621 16999 4 (Set)

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§ The sign * indicates a translation. The sign †, used subsequently in the same speech, indicates the original language.

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Abbreviations: (A) = Amendment; CA = Constitutional Assembly; HC = House Committee; JSC = Joint Standing Committee; (NA) = National Assembly; (R) = Reading; (S) = Senate; SC = Select Committee

CONSTITUTIONAL ASSEMBLY

INDEX TO SUBJECTS

Abbreviations:

AC = Appropriation Committee
HC = House Committee
JC = Joint Committee
JSC = Joint Standing Committee
NA = National Assembly
R = Reading
S = Senate
SC = Select Committee

CONSTITUTIONAL ASSEMBLY

REPUBLIC OF SOUTH AFRICA

DEBATES
OF THE
CONSTITUTIONAL ASSEMBLY

(HANSARD)

SECOND SESSION—FIRST PARLIAMENT

The sign * indicates a translation. The †, used subsequently in the same speech, indicates the original language.

PROCEEDINGS OF THE CONSTITUTIONAL ASSEMBLY

Members assembled in the Chamber of the National Assembly at 14:15.

The Deputy Chairperson took the Chair and requested members to observe a moment of silence for prayers or meditation.

PERSPECTIVES ON A NEW CONSTITUTION

(Subject for Discussion)

The CHAIRPERSON OF THE CONSTITUTIONAL ASSEMBLY: Mr Deputy Chairperson, Deputy President Mbeki, Deputy President De Klerk, hon members, ladies and gentlemen, today is an important day in the rather short history of the Constitutional Assembly. We meet in plenary session today to do much more than we have done before. Today we as parties and members are meant to give our perspectives on and our vision of what the new South African constitution should look like.

Before going into what needs to be done and what has been done already, I think it is important that I take this opportunity of welcoming members back to the Constitutional Assembly after the recess. I hope that everyone used the past few weeks to rest and that we are now ready to embark on the arduous task that lies ahead—drafting the new constitution. In view of the programme that we have developed, it clearly is going to be a hectic period for us.

I would like to thank members for agreeing to come back to Cape Town for the work of the Constitutional Assembly much earlier than they ordinarily would have done. We have three weeks before the official opening of Parliament—three weeks which we have agreed to

allocate to the work of the Constitutional Assembly. Our eagerness and willingness to start this early is, once again, a clear demonstration of our determination to ensure that we achieve the task given to us by the electorate of this country.

We have exactly 16 months and seven days in which to draft and conclude the new constitution. The major part of our work in drafting the constitution has to be done in 1995. It is for this reason that we in the administration of the Constitutional Assembly have dubbed 1995 as the Year of the New Constitution.

We start this year on a rather high note, as many people from across the length and breadth of our country have already demonstrated a keen interest in the constitution-making process. We have been receiving telephone calls, memorandums and letters from ordinary men and women in the streets of our country, wanting to make inputs in the constitution-making process. This session marks the beginning of the process of dealing with substantive issues that touch on various aspects of the constitution.

There has been a lot of talk in our country about reconstruction and development. The process that we embark upon today—that of drafting the constitution—must be the cornerstone of the process of reconstructing and developing our country into a truly democratic South Africa, a South Africa that will be prosperous and a South Africa that will have reconciled all its people.

Quite a lot of work has already been done in terms of preparing for the drafting of the constitution. Extensive preparations have been made and many of us, if not all, have been part of the entire process of preparing for this whole process that we start in earnest today.

The Constitutional Assembly itself has met a few times and has agreed on the rules, the structures and the procedures that are going to guide us as we draft the constitution. We have agreed on the modalities. We have also set clear timeframes. We have developed an outstanding work programme that sets out the type of work that we will need to do. The structures of the Constitutional Assembly itself are functioning very well. The Constitutional Committee meets on a regular basis and the management committee processes various matters that require the attention of the Constitutional Assembly.

What is more important, is that the six theme committees that we agreed to set up, have been set up and each theme committee has already worked out its own work programme. The theme committees start in earnest tomorrow and will be dealing with the various themes that have been allocated to them.

Theme Committee 1 commences tomorrow to discuss the character of the democratic state. Theme Committee 2 also commences its work tomorrow to deal with the substance of the separation of powers. Theme Committee 3 will be digging its teeth into provincial and local government issues. Theme Committee 4 will be dealing with the whole question of fundamental rights or, better still, the bill of rights. Theme Committee 5 will dedicate its time to dealing with the question of the judiciary. Theme Committee 6 has divided itself into four subcommittees, the first dealing with the Public Service, the second with finance in terms of the Financial and Fiscal Commission, the third with gender equality and the fourth with the control of the security forces.

The core groups that were set up to facilitate the work of the theme committees are also working and making sure that the management of the theme committees is properly executed.

The chairpersons have been doing their work in an admirable way. All these theme committees will be dedicating quite a lot of their time to receiving submissions and holding hearings, and some of them will even be going around the country to engage our people in the whole process of drafting the constitution.

We have appointed seven experts. They are almost ready to start their work. The administration will be finalising negotiations with them on the terms of their appointment.

The technical committees which will assist the theme committees are soon going to be appointed. We are discussing all of this with the various theme committees.

We have already established relations with a number of other bodies and institutions that are also going to help in the drafting of the constitution.

Approaches have already been made to the Constitutional Court. A meeting will be held with the judges serving in the Constitutional

Court to explain to them how we propose to go about the drafting of the constitution and also to gain more knowledge of how the Constitutional Court itself would prefer us to refer matters to the court whenever the need arises in terms of the Constitution.

We have established relations with the Commission for Provincial Government. A meeting has been held with them and more meetings will be held with them to discuss their own interventions in the whole constitution-making process.

We have made contact with the provincial governments and we will be holding meetings with them to discuss ways in which they can make meaningful inputs in the process in which we are involved.

We have also worked out a very clear strategy on the media, in terms of ways in which we are going to ensure that we broaden participation and educate the people of our country on constitutional matters.

As far as the media are concerned, the SABC has agreed to broadcast the sessions of the Constitutional Assembly live. I am told that this session is the first to be broadcast live to the people of our country. We wish to thank and congratulate the SABC for having agreed to be part of this history-making process in our country.

We launched an advertising campaign in January. The launch was extremely successful. It was attended also by international media people. We have also launched a publication we call *Constitutional Talk*. It will be published on a fortnightly basis, and we are looking into the cost implications of publishing it in a number of languages. A brochure explaining how the Constitutional Assembly functions, has already been published and distributed widely across the country.

A precedent-creating aspect of this whole media strategy also involves the participation of banking institutions. We are in negotiation with a number of banks which have tentatively agreed that they would be willing to print certain aspects of the Constitutional Assembly's work on the receipts people get when they use their ATMs. We are informed that up to 6 million people utilise the services of these ATMs on a monthly basis. They are also investigating the possibility of publicising Constitutional Assembly issues when they print bank statements for people who use banking facilities.

A number of chain stores, ie the supermarkets, have agreed that they would also want to be part of this whole constitution-making process. They have agreed that the receipts that are printed out at the end of each transaction could contain inserts on Constitutional Assembly issues.

Computer technology is going to be utilised to its limits in the work in which we are involved. Arrangements are far advanced to work out, with various universities, how we could computerise the issues that come up on an ongoing basis in the Constitutional Assembly.

Firstly, we are going to have the reports and the submissions of the World Trade Centre negotiation process on computer, and this will be housed in a number of places. Secondly, all current submissions made by many people and by organisations will also be put on computer. We are also going to utilise electronic bulletin boards to publicise the work of the Constitutional Assembly.

The net effect of all this would literally be that the whole concept of transparency and openness will be able to reach its highest levels. Any person anywhere in the world who has a computer or a modem will have the opportunity of gaining instant access to the work in which we are involved here. Someone in Iceland will be able to plug into a computer and see what we are dealing with and how we are advancing towards finalising a new constitution.

The Public Participation Programme, what I would call the real cornerstone of the CA process, is also being finalised. We have already made contact with a number of organisations across the country. We have made contact with universities and we are finalising a programme which is going to enhance public participation more fully. We are looking at how we are going to conduct public forums in the various provinces, in the urban areas and in the rural areas.

I am rather excited about the interest that has been shown by the public in the whole process of constitution-making. There has been an overwhelming and—may I add—unprecedented response to the invitation that we have extended for submissions. Between 15 December, when the invitation was first extended, and 10 January, we have received no less than 70 submissions. These have largely come from individuals, as well as from organisations. This must be very

exciting in the whole process, because it means that the decisions which the CA took in terms of broadening participation amongst our people are beginning to take effect and that our people are becoming interested on an ongoing basis in the whole process of drafting the constitution.

Today's sitting is a special sitting. It is of great significance to the people of our country in that, for the first time since the CA was elected, we are going to afford political parties and members of the CA an opportunity of putting forward the views of their parties on what type of constitution we should have. Essentially, when we stand to speak here, we will be talking about the future of this country. We will be talking about what type of democracy South Africa should have—what should underpin the Reconstruction and Development Programme which we have all accepted.

It is therefore important that, as we put our vision to the whole country, we should do so directly, knowing that people out there want to be part of the process and will be responding, because in the end the drafting of the constitution must not be the preserve of the 490 members of this Assembly. It must be a constitution which they feel they own, a constitution that they know and feel belongs to them. We must therefore draft a constitution that will be fully legitimate, a constitution that will represent the aspirations of our people. [Applause.]

Mr T M MBEKI: Mr Deputy Chairperson, first of all I would like to extend our appreciation to you, the Chairperson of the Constitutional Assembly and the leadership of the CA generally for the preparatory work you have done so that we can indeed engage in this important process that the Chairperson has been talking about, that of determining what the constitutional future of our country will be. We are pleased that you have taken the steps on which the Chairperson has just reported, as this enables us to carry out this work with the necessary speed.

During the course of the negotiations which led to the adoption of the Constitution under which the country is being governed, it was agreed that once a representative body was elected, it would be important that that body revisit this matter of the Constitution. This Constitutional Assembly is that body. As the Chairperson of the Assembly has said, our people have many expectations concerning what should come out of this body.

We must make the point that we are committed to the adoption of a constitution which is supported by the overwhelming majority of our people. We think it is important that this constitution should be accepted by the majority of our people as being their own. Therefore, although we ourselves are an elected assembly, we believe it is indeed important that we engage the generality of our people in the processes which the Chairperson of the Constitutional Assembly has just described.

We believe it to be critically important that we draft and adopt a constitution which is the result of a process in which the people of our country, both Black and White, men and women, the poor and the rich, will have participated.

The necessary efforts have to be undertaken to ensure that we reach every corner of our country, and that we devise all the necessary means and methods to empower those who might be disempowered so as to ensure that the African women in the rural areas, for instance, become part and parcel of this process. We should not to allow a situation in which only those who are rich and educated, those who are in other ways well positioned, are the only ones who participate in this constitution-making process. Therefore, we are very grateful for what the Chairperson of the Assembly has reported with regard to the steps that have been taken to ensure that popular participation is effected.

We believe that in drafting this new constitution, we must be guided by our deep and firm commitment to a South Africa that is nonracial, nonsexist and democratic. To achieve these goals, we require that these matters do not merely appear in the constitution, but that in fact a fundamental transformation and democratisation of our society is effected. In order to ensure that, we need to overcome the legacy, the injustices, the divisions, the antagonisms and the oppression of the past.

We believe that the constitution should make it clear that seeking to achieve substantive equal rights and opportunities for those who were discriminated against in the past should not be regarded as a violation of the principles of equality, nonracialism and nonsexism but rather as the fulfilment of these principles. We believe that unless special interventions are made, the patterns of structured advantage and disadvantage created by apartheid and patriarchy will

replicate themselves from generation to generation.

In looking at various options in addressing the matter of the form and the content of the structure of Government we should proceed from the basis that the will of the people should be expressed in regular, free and fair elections.

In terms of guaranteeing the acceptance of those elections as free and fair we further believe that it is important that we agree on independent election mechanisms to ensure that those elections are indeed free and fair.

We further believe that it ought to be a normal consequence that the party that wins the majority of the votes in these elections should form the government. [Applause.] Coalitions or agreed co-operation among parties represented in Parliament should not be prescribed, but should be a matter of negotiation and voluntary co-operation. [Applause.]

We further believe that a multiparty system is critical to the establishment of a democratic order. Therefore people should not only be afforded the opportunity of having regular elections at all levels of government to vote for the party of their choice but, if they so should wish, they should also be afforded the opportunity to remove any party exercising power in a context which allows for the existence of a multiparty system.

We further believe that it is important that we maintain the system of proportional representation. We also believe that we need to address the feeling that exists among our people, that their representatives are perhaps a little bit distant from them. Therefore, the matter of constituency representation is a matter we believe this new constitution will have to address. [Applause.]

We believe a bill of rights, as the Chairperson of the Assembly has just said, is fundamental to the new constitutional order. A bill of rights which would guarantee both individual and collective human rights, including socio-economic rights, is essential. In this regard, we believe that the point must be noted that in this country the property rights of the majority of people have been systematically ignored and violated by the system of apartheid. Therefore, a new system of just and secured property rights must be created—one which is regarded as legitimate by the people as a whole. We should, of course, mention in this regard a matter that is important, given the history of our country, namely that that bill of rights should also establish the principles and procedures in terms of which land rights will be restored to those deprived of them by the apartheid statutes.

A land claims court tribunal functioning in an equitable manner, according to the principles of justice laid out in legislation, should, wherever feasible, restore such rights.

The new constitution must, given our history and given what we are trying to do, direct the State and the Government to deracialise all institutions and organs of state. We need to take demonstrable steps towards redressing the racial and gender imbalances of the past. We have to address the needs of the homeless, the aged and the disabled. We need to take special steps to uplift the conditions of those who have been dumped in the rural areas. In other words, the constitution must indeed ensure that the Government puts right the wrongs of the apartheid system.

We further believe that Parliament should, subject to the constitution, be the supreme law-maker and the expression of the will of the people. We believe that the constitution should be framed in such a way that it does not take away the right of an elected assembly to express the will of the people that would have elected it and, therefore, that the proper balance should be maintained between the constitution and the role of Parliament as the supreme law-maker. The executive, which would have the task of governing the country, should of course be fully accountable to Parliament.

Similarly, we are also firmly of the view that we should have a judiciary that is impartial, representative and independent of the executive. We believe that the courts should be composed in a manner which maximises their legitimacy in the eyes of ordinary South Africans, and that we should have an order which upholds the rule of law. We are also of the view that our constitution should be upheld by an independent constitutional court.

We do want to ensure that the Government must be as close to the people as possible, so that it is responsive to their needs and so that it is accountable to the people whom it governs.

Therefore, indeed, we believe that there should be elected government at both provincial and local level whose powers should be spelt out in the Constitution, subject to the need for national uniformity, national reconstruction and development, as well as the values enshrined in the Chapter on Fundamental Rights.

In this context we shall clearly have to deal with the matter of the traditional leaders. The institution, status and role of such traditional leadership according to indigenous law should be recognised and protected by the Constitution. We believe that indigenous law, like common law, should be recognised and applied by the courts, but subject to the fundamental rights contained in the Constitution and to legislation dealing specifically with this matter.

Provisions, of course, that would appear in the provincial constitutions relating to the institution of traditional leadership would be recognised and protected in the Constitution. However, clearly we are working to establish a democratic order and therefore it cannot be that the institution of traditional leadership can in its demands take precedence over the democratic society.

We are saying that we need to have a situation in which the Government is as close to the people as is possible. But we need to pay close attention to the due balance between considerations of national unity, and Balkanisation and fragmentation of the country when we address the matter of the devolution of powers to lower levels of government.

We believe that in that context we might have to take another look at the question of the role and place of the Senate, which could play an important role in the quest to ensure that we achieve and sustain national unity.

Another point which we believe is of importance is that institutions such as the Office of the Auditor-General, the Reserve Bank and the Financial and Fiscal Commission should be insulated from political manipulation. The constitution has to reflect this position. [Time expired.]

*Mr R P MEYER: Mr Chairperson, it is indeed a privilege to participate in this historic debate of the Constitutional Assembly this afternoon. I say historic, because it truly represents the beginning of the negotiations and debate that lie ahead in the next few months regarding the drafting of a new constitutional text for South Africa.

The Chairperson of the Constitutional Assembly correctly pointed out that only 16 months remain in which this task must be completed. In fact, substantial progress will have to be made within the next six months to determine whether the Constitutional Assembly will succeed in meeting the deadline of May 1996. A substantial amount of work has already been scheduled in the constitutional programme. If we do not succeed in making significant progress in the next six months, it is my opinion that we will not succeed in completing it before May 1996 either.

I should therefore like to say, on behalf of the NP, that we commit ourselves to getting everything operational to execute the task within the envisaged time. However, at the same time we are faced with this important prerequisite, namely that we must ensure that the task is executed in a thorough manner, as provided for in the transitional constitution.

†South Africa's new constitution will be harvested from crops which are already germinating in the political field. The principles for the new constitutional text have already been accepted as part of the transitional Constitution. Deputy President Mbeki has just outlined most of those principles. The essence of these principles is that the new constitutional text shall be the supreme law of the land. All State organisations at all levels of government will be bound by the constitution in what is called a "rechtstaat" or a constitutional state.

The Constitutional Principles will shape the new constitutional text in the following ways: Firstly, multiparty democracy for all South Africans will be entrenched, based on participation by all without discrimination.

Secondly, accountable government and administration will exist at all levels of government.

Thirdly, protection of fundamental rights, freedom and civil liberties will be entrenched in the constitution through a set of fundamental rights.

Fourthly, participation by political minority groups as well as collective rights of self-determination, including the rights of traditional authorities, shall be recognised.

Fifthly, vertical division of government at all three levels will exist, with specific provision regarding the powers and functions of provincial government.

Finally, the horizontal division of power between the legislature, the executive and the judiciary will be created with appropriate checks and balances.

One can therefore summarise by saying that the new constitutional text must provide for a modern, democratic constitutional state. Governmental authority must be exercised in a predictable, responsible and legally regulated way to the satisfaction of civil society. To our minds the spirit of the constitution will therefore create the following points of departure—a balanced charter of fundamental rights, representation of all relevant interests in the structures of Government through a system of multiparty political participation, public accountability by all state structures for all their actions, and a balanced horizontal and vertical division and devolution of powers and functions.

Although the brief of the Constitutional Assembly is to draw up the new constitutional text, it is certainly not involving a second transition. It is essentially the conclusion of the constitutional negotiating process which started a number of years ago.

It is quite clear from the Constitutional Principles that not only should they be adhered to as the framework for a new constitutional text, but that specific consideration should be given to the contents of the transitional Constitution itself. Specific reference in this regard can, for example, be found in Constitutional Principle II which states, *inter alia*, that "due consideration to *inter alia* the fundamental rights contained in Chapter 3 of this Constitution" must be given.

Constitutional Principle XVIII, subsections 2 and 3, state the following:

> 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. The boundaries of the provinces shall be the same as those established in terms of this Constitution.

These are Constitutional Principles that we have to adhere to.

It will therefore be of prime importance to study the application of the constitutional principles already under the present Constitution before embarking on a process of drafting a new Constitution.

*Finally, I should like to refer to two specific matters. In order to best serve the citizens of the country, governmental authority in South Africa should be effectively distributed with a balanced division of power to the national, provincial and local levels of government. The position of each level relative to the other must be constitutionally balanced.

The principle that should be at issue here, is that of subsidiariness. According to that, the constitution must continually allocate authority to the lowest level of government at which that authority can be effectively exercised. A say in government on the part of the citizens of the country is also increased in this way because citizens have convenient access to lower levels of government.

Particularly the rendering of services such as education, housing and health are at issue here. The improvement of the living conditions of all South Africans, thus viewed, also becomes a constitutional goal. The people of KwaZulu-Natal, the Eastern Cape or Northern Transvaal will find it easier and more convenient to ask for services in their respective areas than in Cape Town or in Pretoria. They can obtain easier access to their provincial headquarters in Pietermaritzburg/Ulundi, Bisho or Pietersburg/Seshego, respectively .

Therefore the devolution of power is not only an ideological matter, but a practical, realistic approach to the needs of the people of South Africa and the country's governmental needs.

At the same time and in the same spirit, each province need not be vested with the same authority and functions. The constitution should make provision for each province to possess those functions which the legislature and government of that province can manage. The principle of asymmetry should thus be recognised.

†I would like to refer to the need for representative government in such a way that the relevant interests of the whole nation will be taken care of. In this regard, to my mind there are two principles which we have to look into. The first is the abuse of power and to restrict that or prevent that as a possibility which could occur. The second one is that the Government of South Africa should be structured in such a way that the

best interests of the nation as a whole will be served.

In this regard, it will be important for the Constitutional Assembly to look into different models and systems which exist elsewhere. The different executive authority systems could provide for, *inter alia*, the methods of appointment, the functions and the functioning of the head of state and the head of government, and could also include different ways of composing the Cabinet in order to meet these two principles, namely to prevent the abuse of power and to take care of the interests of the nation as a whole.

Mr L P H M MTSHALI: Mr Chairperson, hon members of the Constitutional Assembly, it is with great trepidation that I take this platform to speak on behalf of the IFP on constitutional matters which have been the background of so much political confrontation over the past few years.

Since its creation, the IFP has been inspired by what our leader iNkosi Buthelezi has often referred to as a constitutional faith, which is a deep conviction that a proper and just constitution may fundamentally assist us in solving the problems of our country.

Part of our constitutional faith is also the unshakable belief that freedom and democracy are values which cannot be compromised for the sake of political expediency and for short-sighted party-political gains. [Interjections.]

Since the early 80s, the IFP has stood firm on its constitutional grounds when it first rejected the 1983 Constitution which gave rise to the Tricameral system because we knew it to be wrong for the country. It compromised on the fundamental values of freedom and democracy. It was because of our constitutional faith that we embraced the course of federalism as the only constitutional path which could lead us to a system of government which reflected the complexity of our country and the needs of our people.

We have often been alone in defending our constitutional faith, yet we have not been discouraged. We have constantly known that reality and history will eventually catch up with the political wisdom and foresight of Inkosi Buthelezi. [Interjections.] With the IFP's political guidance the first stage of constitutional negotiation was closed with an interim Constitution which contained some diluted elements of federalism only because of the firm and obstinate political commitment of the IFP.

However, the battle for federalism is far from being completed. The interim Constitution has established a system of government which in its overall characteristics has little or nothing to do with the type of federalism which the IFP has been advocating as the only system which would work in the South African context. [Interjections.]

We know that federalist demands in South Africa often have been defeated because of the centrist and authoritarian tendencies which prevail in the country. [Interjections.] The new constitution must break the mould of this centrism and authoritarianism. Accordingly, we believe that the South African federalism should be entirely shaped on the basis of the principle of subsidiarity which requires that the higher level of government should not do that which the lower level can do adequately and properly.

Therefore, the provinces must become the primary government of the people and as a rule the provinces shall be entitled to exercise those powers and functions which they can manage adequately and properly. Only those powers and functions which cannot be exercised adequately and properly by the provinces must be allocated to the central government.

Accordingly, the IFP will contend in the constitutional debate to ensure that the constitution lists only the powers of the central government, leaving all the so-called residual powers to provinces. [Interjections.] Amongst these residual powers are essential and extremely important legislative and executive functions which relate to the organisation of society and which include fields of law such as family law, inheritance, contracts, corporate law, administrative law, criminal law and common law. The provinces shall also have exclusive judicial functions with respect to any matter over which they have legislative and executive competence. [Interjections.]

We must also ensure that the notion of concurrent powers and national government overrides are eliminated from the new constitutional text in favour of mechanisms of co-ordination between levels of government which are typical of true federal systems. Since the beginning of

constitutional negotiations at Codesa the IFP transcended its original federalist political philosophy to embrace a broader vision of political, social, cultural and economic pluralism of which federalism is a component. Because we believe in pluralism, we have promoted the idea that the new constitution must recognise, protect and entrench the integrity and pre-eminence of civil society. In fact, it is the people who shall rule and it is not for the government to rule over people and over the constitution.

The IFP is of the view that the constitution shall entrench the autonomy of political, social, economic and cultural formations, including universities, trade unions, political parties, traditional communities, religious organisations, chambers of commerce, art, culture and so on. We must preserve the vibrant plurality and diversity of our society, rejecting any attempt to make it homogeneous and uniform. [Interjections.]

Our commitment to pluralism is especially strong with respect to the importance of entrenching in our system of government the free-market system. We believe that it should not be the role of government to continue to own what are presently referred to as public enterprises.

An HON MEMBER: Why not?

Mr L P H M MTSHALI: The Government should be allowed to intervene in economic affairs only when the private sector cannot provide the same service or product with comparable reliability and efficiency.

The system of checks and balances must be perfected by a strong constitutional court with exclusive jurisdiction over constitutional adjudication and whose composition shall also reflect the provinces. The IFP is driven by a constitutional faith which underlines our dedication to the values of liberty, freedom and democracy for all.

It is for this reason that the IFP believes that fundamental issues such as federalism and pluralism may not be decided upon by virtue of majoritarian rule, no matter how large the majorities are that decide on such issues. [Interjections.]

*Dr C P MULDER: Mr Chairperson, it is an honour and a privilege for me to be able to take part in this very important debate this afternoon. This debate deals with the views and standpoints of those parties that are represented here in the Constitutional Assembly because they obtained sufficient support for their standpoints.

†1995 will become known as the year of the constitution. Today, at the beginning of this historical process, we from the FF would like to take this opportunity to inform the CA on what spirit and vision we believe should be contained in the new constitution.

*However the question is how history will one day judge 1995 as the year in which the foundation for the new constitutional dispensation was laid. This involuntarily reminds me of the so-called Peace of Versailles in 1919 after the First World War. History looked back on 1919 and the Treaty of Versailles as the foundation that did not bring peace and prosperity, but paved the way for a much bigger and more devastating war, namely the Second World War. This must not happen here. The foundation that is laid in 1995 must ensure true peace, prosperity and progress.

†It is therefore vital that the constitution must command the respect of all South Africans, and due regard must therefore be given to all opinions and the search for consensus must be painstaking. In the end, the constitution must win the hearts and the minds of all the people and segments of our society.

*According to the views of the FF such correct perspectives are necessary for the spirit and vision which should be contained in the new constitution, and such misconceptions which are mere illusions, and which will be disastrous for the existence of any new constitution, must be kept out of the Constitution.

I would now like to dwell for a moment on the following four perspectives which the FF regards as being of real importance, either in a positive or a negative sense. They are, firstly democracy; secondly, power-sharing; thirdly, structures and building-blocks, and fourthly, self-determination.

With respect to democracy, I want to mention the following. Democracy is one of the most important building-blocks of the new constitution that must be negotiated on. That is why it is also a very high priority of Theme Committee 1. Democracy has become one of the constitutional magic words of the twentieth century. Let us see what Finer says about democracy in his book *Comparative Government*. I quote:

> No political term has been so subjected to contradictory definitions as democracy, since it has become fashionable and profitable for every and any state to style itself in this way.

Democracy has for a long time now not merely meant one man, one vote and the counting of heads to obtain a majority to us in the FF. It is important to note that in its evaluation of states as democracies, the International Monetary Fund examines how those states treat minorities and groups in order to determine whether or not it really is a democracy. We agree with this.

Secondly I would like to discuss power-sharing, an important aspect in which there is a great deal of potential for conflict. At the NP's recent congress, it was decided that power-sharing must continue, also after April 1999, when the Government of National Unity will come to an end according to the current Constitution. This means that the NP wants power-sharing to be extended for all time, in the new constitution, too.

At the recent ANC congress in Bloemfontein, and also by speaking through Mr Mbeki this afternoon, the ANC made it clear that power-sharing must come to an end at the end of the life of the Government of National Unity in April 1999. This means that the ANC wants power-sharing abolished in the new Constitution. Here we clearly have two conflicting points of departure that can cause a lot of conflict in the future.

It is clear to the FF that power-sharing is a misconception or illusion that cannot serve as a meaningful perspective or point of departure for the new constitution. It causes frustration for the majority party and it does not offer any real security for other minority groups and parties. As recently as yesterday, *Die Burger* stated the following in its editorial:

> Vir die NP lê daar nou 'n groot stryd voor om die regte van Suid-Afrika se minderhede behoorlik in die grondwet te verskans. Verteenwoordiging van minderheidspartye in die Kabinet . . .

This is now the NP's recipe for power-sharing—

> . . . is op die duur geen toereikende beskerming nie.

It is precisely this that we have spelt out to the NP time and again. The power-sharing illusion which was to have given the Afrikaner and other minorities security for the future, has come to an end as was predicted. It was clear from the beginning that no majority would commit itself to a power-sharing coalition indefinitely. One must remember that the NP built its entire current philosophy around the concept of power-sharing. The NP built its entire 1992 referendum campaign for the yes-vote around power-sharing. [Interjections.]

In his opening speech to Parliament on 24 January 1992 the former State President stated the NP's minimum requirement as being power-sharing without domination. Later, during the 1992 referendum, the former State President said that he was asking for a mandate for negotiation, but that if he did not succeed in achieving certain goals, he would go back to the voters. He would, and I quote:

> Hom beywer vir 'n groot of gelaaide meerderheid vir besluitneming . . .

Nothing came of this.

> 'n Roterende presidensie . . .

Nothing came of this. [Interjections.]

> 'n Veto-bevoegdheid vir minderheidspartye deurdat besluite by wyse van konsensus geneem moet word . . .

Nothing came of this.

> Magsdeling as 'n permanente beginsel wat op 'n permanente basis in die Grondwet verskans moet word . . .

Nothing came of this either.

Do hon members remember the words and assurances to the Afrikaners and other voters that the NP would not budge from the negotiation table before power-sharing was entrenched and built in for the future? [Interjections.] The NP sits here and wails like a bunch of cats. [Interjections.] I now come to self-determination. The hon member must just sit tight, the answer is coming.

However, this state of affairs cannot come as a shock to the NP. Why not? As long ago as 6 May 1993 in this very Place we spelt out to the NP negotiators what the ANC's standpoint on power-sharing was. What did the ANC have on occasion to say to the NP about power-sharing? The ANC said:

In short, NP power-sharing means that all parties, regardless of the number of votes they receive, would be equals in the government. This makes a mockery of elections and ensures that an electoral victory for the ANC is rendered meaningless. Our objection to power-sharing is therefore based on principle. The composition and function of the Government of National Unity, while being as inclusive as possible, must not stand in contradiction to the principle of majority rule.

The fact of the matter is that the NP built its entire philosophy on power-sharing and that the ANC, at their congress and again today, have drawn a line through it.

A further aspect is the question of building-blocks. The point which I wish to make is that the nine provinces currently constitute the building-blocks. Our view is that a further building-block must be added for what is known as the concept of a volkstaat, but that this matter must be taken further. The Belgian constitution can be taken as an example. A structure need not only consist of geographical areas, but communities can also be involved. That is why we say that it also applies to the Afrikaner community.

Next I come to the aspect of self-determination, about which these members are complaining and crying because they themselves no longer have any policy concerning this. What is the reality as regards self-determination? [Interjections.] If they listen, they may learn something and then they will also know what is going on. [Interjections.]

The problem of satisfying the Afrikaner's desire for self-determination is a very complex matter. The reality of history has left us without any area that is big enough to immediately be a volkstaat without the relocation of Afrikaners, which will have to take place over a period of time.

In the second place, the principle of Afrikaner self-determination is clear to everyone, but because the Afrikaner is woven into the South African situation the principle can only succeed in the long term if there can be mutual agreement with the rest of the country regarding its implementation.

Thirdly, forcefulness and the making of demands are things of the past. Particularly in this complex situation, the political reshuffling which is necessary in order to establish a volkstaat will affect the entire country. In short, a volkstaat is not available off the shelf. It also affects some people's vision of an undiluted and true self-determination. Naturally this is and remains the ideal, but the FF believes that its systematic realisation must occur by means of the process in which we are currently engaged.

The FF has the following strategic plan for this: firstly, to bargain for the central area of a volkstaat, attached to a type of Balfour declaration, in order to give the Afrikaner the opportunity to prove himself in that area by means of voluntarily relocation and economic development within an agreed period of time. This is the recognition of self-determination within a territorial area, that which is provided for in Constitutional Principle XXXIV.

Secondly, to bargain for a number of cantons or areas where Afrikaner majority occupation already exists. These cantons or areas must in all respects serve as the generators and support bases of the already agreed upon central area. Thirdly, to bring about maximum agreement amongst all Afrikaners and parties about self-determination for communities at local government level.

The FF invites all parties that have Afrikaner interests at heart to stand together. Let party interests take a back seat and let us, together with the other inhabitants of this country, develop a vision that can bring about stability and peace—also for the Afrikaners in the NP that are sitting here today and do not understand it. [Time expired.]

Mr C W EGLIN: Mr Chairperson, I feel privileged to be able to take part in this discussion today, as the Constitutional Assembly starts the next important phase of its historic mission—that of trying to find a constitution which will be owned, respected and loved by all the people of our country.

We have been asked to set out the visions and perspectives of our respective political parties. Let me say that the DP has, for some time, had a clear perspective on the new constitution. In fact, some hon members will say that it is well known. It is that a constitution for South Africa should essentially be liberal, democratic and federal. We have this perspective, this vision, not for any ideological reason, and not because we are committed to political labels—we would be

quite happy to abandon the political labels—but because we believe that this kind of constitution is best suited to meeting the needs of our people, and reflecting the realities of our country.

A constitution that protects the fundamental rights of all South Africans will assist in the process of reconciliation and nation-building. A constitution that creates conditions which are conducive to economic growth will enable reconstruction and development to be converted from a policy to a reality. A constitution that encourages the development of a strong and vigorous civil society will strengthen both the culture of democracy and the culture of self-reliance.

Many features of such a constitution are already itemised in the constitutional principles, and I will not repeat them because they are binding on this Constitutional Assembly, and others, to a certain extent, are given effect in the present interim Constitution.

We in the DP believe that the constitutional principles, which are binding and which, in essence, define the character of the next constitution, together with the text of the present interim Constitution without its transitional and interim features—those features must go, because we are not going to have an interim Constitution any more—provide a useful working document for the Constitutional Assembly when it considers the next constitutional text.

I am not suggesting that the text of the present interim Constitution, should be accorded any formal status by the Constitutional Assembly. However, what I do suggest is that the interim Constitution could prove to be a valuable working document in the process of constitution-making. After all, the interim Constitution provides some illustration of how the Constitutional Principles could be put into practice.

Secondly, the interim Constitution refers to constitutional structures which are now in place and which, in our opinion, could be improved, but which we believe should not simply be scrapped before they have been tested in practice. Let me give a few illustrations of these.

There is the bicameral national legislature. The hon the Deputy President Mr Mbeki referred to the Senate as well. We do not think that the Senate should be scrapped, but it can be improved and remodelled. There is the question of having an executive President. We do not think that that should be scrapped. Another issue is the concept of a Cabinet directly accountable to a popularly elected Parliament. This could be changed in detail, but should not be scrapped. The concept of provinces and provincial governments can be altered, but will not be scrapped. A few other examples are the concept of a Constitutional Court, a fundamental bill of rights, a public protector, a commission on gender equality, a human rights commission and a financial and fiscal commission. There are illustrations of the structures that have been set up in terms of the interim Constitution. What we say is that the interim Constitution should be used as a working document. It should not be followed slavishly, but should be used as a working document to establish how it can be incorporated or improved and embodied in the next constitution.

Because the principles are laid down defining the constitution, I want to deal only with certain matters which the DP believes are priorities in improving the Constitution and in drafting a constitution which the people will want. I shall raise six matters. The first is that the new constitution should bring government closer to the people. Correspondingly, it should bring people closer to the government. Whenever possible, people should be empowered to take decisions on matters affecting their daily lives and the lives of their communities.

We believe that this can be done through strengthening the provincial system by allocating more original powers to the provincial governments and ensuring their financial and fiscal viability. In addition, there should be effective, people-driven local governments in both the urban and rural areas through which communities can exercise a considerable degree of local authority. That is taking government to the people.

The second issue is that the constitution should maximise openness and accountability at all levels of government. This involves introducing strong checks on the executive government and on the decisions of bureaucrats. Here I want to support what the hon the Deputy President Mr Mbeki has said with regard to the introduction of direct constituency accountability for those people who are public representatives. We have to replace the direct link between the public representatives and the people in the constituencies. The public should have the right of access to information relating to executive and administra-

tive actions. There has to be openness, and that has to be written into the constitution.

The third priority is that the bill of rights in the new constitution should guarantee fundamental human rights, civil liberties and equality before the law to all the people of our country. However, such a bill of rights should be written in a language which can be understood and which is meaningful to the ordinary citizens of our country. If they do not understand their rights, they will never enjoy them.

Fourthly, if the new constitution with its bill of rights is to provide the legal framework within which our society will function and governance can take place, it is essential that there should be a strong and truly independent judiciary free from political interference. The courts as well as the legal system should be readily accessible to the ordinary citizens of our country. We can no longer tolerate a situation in which ordinary citizens are simply priced out of exercising their legal rights.

Fifthly, the new constitution should totally reject all forms of racial and gender discrimination. However, it should also provide for the cultural, religious and language diversity that is part of our country's rich heritage. We believe that each South African, whether he is acting as an individual or together with others who share a common heritage, should feel comfortable and secure under the new constitution.

South Africans, whether they define themselves as part of majorities or of minorities, must say: "Because this Constitution protects our rights, we, in turn, respect this Constitution."

Sixthly, something that is a mundane matter, representivity and accountability make it necessary for South Africa to have a range of legislative, executive and judicial structures. However, a developing country like ours has to take the cost—the financial cost factor—into account. Accordingly, we believe that government structures under the new constitution should be as small and as cost-effective as possible.

In conclusion, our perspective of the future is not limited to the new constitution in isolation. The new constitution will provide an important framework within which our society can function in an orderly and democratic way. However, the new constitution itself does not guarantee our society. Our vision of a constitution is also a vision of a society. We see a South Africa in which there is social justice, economic opportunity, and where the attitude of dependency is gradually replaced by a spirit of self-fulfilment. We see a South Africa which is committed to democracy and where the culture of human rights is not merely written into the Constitution, but pervades all corners and all sections of our society. We see a South Africa where South Africans live as free men and women under the rule of law, where there is freedom of speech, of religion and of association. We see a South Africa where there is freedom from discrimination and oppression, but also freedom from poverty and hunger, and from ignorance and disease. We see a South African society in which its citizens, amidst what we know is the diversity of race, language, culture and religion, live at peace with themselves and are able to say with pride: "Under this new South African constitution, we are all South Africans."

We in the DP look forward to playing some part in the months ahead as we, together, try to look for a constitution based not on the will of the elite, but on the will of the people of South Africa.

Mr R K SIZANI: Mr Chairperson, from the outset the PAC argued that a true and genuine South African constitution should be drafted by an elected and unfettered Constitutional Assembly.

The present Constitutional Assembly is, of course, fettered by 34 principles which are unamendable. In addition, its final product is subject to certification by the Constitutional Court. The PAC has reservations about this process. The reason is that this may limit creativity and result in a constitution that may reflect unbalanced power relations between the disadvantaged masses and the existing privileged groups.

When we draft the new constitution the question should be: "What is the best constitution for our country and its people?" This is the only guiding principle that the PAC is going to follow in this process. If this happens to be in conflict with the constitutional principles, it will not deter us from saying so or from fighting for what we believe in.

When we talk about conceptualising a South African constitution, the PAC accepts that constitutions are products of political forces and

reflect the emotions, prejudices, interests and capabilities of dominant social forces in a particular society at a particular point in time. No constitution can be abstracted from the society it seeks to govern. A South African constitution should, therefore, attempt to reflect the interests of all the social forces constituting the South African society.

It certainly cannot afford to be viewed as another device to perpetuate minority rule and privileges. It also cannot afford to be seen as a product of one or two dominant forces or religious forces. It must be an end result of a national effort and must be seen to be a national document.

As I stated in my speech in this Chamber on 15 August 1994, a genuine South African constitution must have more functions than merely to limit governmental power. It should have redefining, rewriting, aspirational, facilitating and legislating functions.

It should redefine our society and rewrite our history and the history of this country, so as to show that South Africa is not a European country which happens to be in Africa. It is an African country.

Public institutions and processes must therefore reflect the composition of our society and where power is situated in it. Equally, the constitution should ensure that the institutional processes to be established will enable the Government to meet the aspirations of at least the majority of our people, without any unfair discrimination.

In that regard it should therefore, apart from limiting governmental power, also facilitate the use of that power in a social engineering mode. It is by meeting these conditions that the new constitution can legitimise the exercise of governmental power over the lives of the majority of our people. The PAC will participate in this process with the sole objective of ensuring that the new constitution will facilitate the transformation of our society into a truly nonracial, democratic and egalitarian society.

I now wish to deal with a few PAC standpoints on the electoral process. The PAC has always stood for the supremacy of the will of the people. Proportional representation has been accepted as the most democratic electoral process, and the PAC supports it. However, we will not be opposed to the introduction of some constituencies, but this must be at a lower percentage than proportional representation.

The PAC is aware that the issue of whether South Africa should be a unitary or federal state has never been canvassed with the voters. The creeping federalism that has been introduced by the interim Constitution has been smuggled in or imposed from above. The question of the form of state is either an election manifesto issue or a referendum matter. The PAC is still going to argue for a unitary state with some soft provincialism.

We support provincialism with purely administrative centres, and with very soft borders. This will bring government and services closer to the people. However, we are convinced that South Africa, with its particular problems, still needs a strong central government.

While we accept that provinces can play a role in economic management and development, the PAC believes that they should not have any taxation powers. Equally, they should have delegated powers from central Government and no exclusive powers. The present nine provinces should be reviewed with a view to reducing their number. We have too many structures which are sapping off the resources that should build houses, roads and schools.

The spectre of overgovernance is looming. In addition, some of the provinces are already showing signs of being glorified bantustans, with the same old allegations of rampant corruption, nepotism and incompetence raising their ugly heads again. They need to be controlled and supervised.

In drawing the boundaries, we also need to take into account the question of land claims. We do not want to have tribal border wars in this country again.

I now come to public institutions. The PAC stands for a strong executive presidency and a President who is a member of the National Assembly and the leader of the majority party. Ministers must be appointed by the President. They must be members of Parliament and should be responsible to Parliament. We are, of course, against constitutionally enforced coalitions or enforced power-sharing. Coalitions must be a voluntary consequence of the political process.

We stand for a unicameral legislature. In South Africa the case for a second chamber has not been made. If it has been made, it certainly has not been proved. Our present Senate obviously does not as yet represent provinces. It is a mirror image of the National Assembly. Hon Senators who are sitting here in front of me represent their parties and not their provinces, with the exception, of course, of the IFP, for obvious reasons!

Secondly, with due respect to hon Senators, it cannot be said that they are doing a better job of reviewing legislation than the select committees of the National Assembly. Rather than reducing the number of the members of the National Assembly, I would suggest instead that we need to strengthen the select committees of the National Assembly, and probably abolish the Senate, because it is a very expensive duplication! [Interjections.] We think that this issue must be seriously debated.

An independent judiciary is the pillar of any democratic society. The PAC stands for this and will ensure that the judges of both the ordinary courts and the Constitutional Court will be appointed upon recommendation by an independent body, following a transparent and open selection process. We stand for a single judiciary, as opposed to a split one.

Of course, as far as the Public Service is concerned, we support a professional one that is career-orientated and impartial.

Regarding the armed forces, there should be one professional, politically neutral Defence Force which is subject to civilian control. It must be established by the Constitution, subject to constitutional control. This should include a civilian Minister, who is responsible to Parliament for its activities. Furthermore its budget must be approved by Parliament and a parliamentary standing committee must review its activities.

I want to deal with the question of a bill of rights. The Constitutional Assembly is expected to draw up a comprehensive bill of rights. It must be one that will protect the rights of individual citizens while allowing the State to provide for the well-being of all members of our society without any discrimination. This implies, therefore, that not only civil and political rights must be included, but also socio-economic and solidarity rights.

While this bill of rights should not ignore South African realities, it should meet international norms and standards and must be compatible with South African obligations under international law. The PAC does support the concept of an entrenched and judicable bill of rights. Indeed, it is imperative that it should not be a document composed of ringing declarations of human rights that are more impressive in terms of literary style than in practical enforceability. Furthermore we submit that enforceability does not mean in the courts only. It should go further than that.

A South African bill of rights, therefore, should clearly reflect the shift of power from an oppressive minority group to a more democratic and representative dispensation. It must answer unambiguously the question of: "A bill of rights—by whom and for whom?". I want to comment on a few more aspects pertaining to a bill of rights.

Firstly, the PAC has never believed in the so-called unbridled market economy. It may have its merits, but we cannot expect market forces alone to protect the poor against the rich, the workers against employers, nor can we expect them to provide housing, free education and social security. The PAC would strive for some form of State regulation of the economy.

Secondly, my organisation would never support the entrenchment of the same apartheid property regulations. Protection of private property cannot be absolute. In our case it must be accompanied by a strong land restitution clause, allowing land claims dating from 1652. I will deal with some more aspects later. [Time expired.]

Rev K R MESHOE: Mr Chairperson, ladies and gentlemen, the drafting of the new Constitution of South Africa is the most important and greatest challenge this House will ever face. It is a process that will determine whether this country is going to be stable or not. It will produce responsible and disciplined citizens or irresponsible and undisciplined ones.

The fact that the judiciary is empowered to enforce it on all citizens, organisations and organs of the State further necessitates the need to have a product that will be acceptable to the majority of, if not all, South Africans.

Although the previous speaker has said that constitutional principles cannot be amended, the ACDP would like to see an amendment made to

the set of 34 Constitutional Principles which the Constitutional Assembly has to abide by during the process of the drafting of the final constitution of this nation.

Principle III of Schedule 4, which refers to all other forms of discrimination, should not include sexual orientation as we have it under Chapter 3, section 8(2) of the present Constitution. This section promotes homosexuality, which is against family values, African culture and biblical teachings.

Not a single person in this House, including the one on the floor, is a product of homosexuality, therefore it cannot be right. If this Government is truly a government of the people, then it must listen to the people of South Africa who do not agree with that clause.

Our chairperson, Mr Ramaphosa, said through the official newsletter of the CA that members of that body would be travelling around the country, to give every South African an opportunity to make a contribution in the process of writing the new constitution. That is excellent. Those members must be mandated to make sure that ordinary people, especially those in the townships, the informal settlements and the villages, understand the content of our present Constitution, to enable them to make intelligent and well-thought-out contributions based on their convictions, and not on ignorance.

Statistics have proven that most South Africans are religious people. Their voices must be heard and listened to. On the question of this sexual orientation clause in our interim Constitution, I am speaking on behalf not only of millions of Christians, but also of Muslims, Jews, Hindus, other religions of significance, and Africans who still believe in moral values. True sons and daughters of the soil who have not forgotten their roots agree with me on this issue.

I wish to remind those of us who have forgotten that in the beginning God created Adam and Eve, and not Adam and Steve. [Interjections.] To build a family, Adam needed Eve, and not Steve! Even today, Eve needs Adam, and not Madam, to build a family. Nation-building cannot be possible while we try to legally destroy family values and the moral fibre of our society with clauses in the Constitution that promote a lifestyle that is an embarrassment even to our ancestors.

We must build the nation by building the families. The ACDP would like to see a constitution that is the supreme law of the land, a constitution that protects not only the rights of individuals, but also those of unborn children. The ACDP wishes to see a constitution that will be legitimate, enduring, and that upholds biblical, family and traditional values. Values that have stood and passed the test of time must be upheld, and not destroyed by the final constitution of this beautiful land.

Finally, the ACDP would like to have a constitution that would bring people closer to the Government, and the Government closer to the people. Regular elections must be held to promote a multiparty democracy. The final constitution must make it impossible to create a one-party State in South Africa.

Blessed is the nation whose God is the Lord. Thank you and God bless you.

Prof K ASMAL: Mr Chairperson, "dames en here" [ladies and gentlemen], "molweni maqabane" [good day, comrades]. It is a deep honour for me to follow Deputy President Mbeki in presenting the perspective of the ANC on the future constitution. I shall merely supplement what he has said.

With your permission, Mr Chairperson, I will begin by revisiting a statement made yesterday in the National Assembly by Mr Koos van der Merwe of the IFP, who described the interim Constitution as being "fatally flawed" and the "instrument of all our woes". He was referring to both the content of the Constitution and the process of drafting it.

Such a description was more aptly used to describe past constitutions of South Africa. It is churlish and dangerous to describe the remarkable document which at present forms the basis of the South African democracy in that manner. The interim Constitution has made it possible for us to manage the transition, with Mr Van der Merwe's party benefiting so much, but contributing so little. [Laughter.]

Mr Van der Merwe and his associates have a choice. They have a choice now, they had a choice yesterday and they will have a choice in the future. Parties can sulk, they can hold themselves aloof and they can attempt to frustrate the will of the majority. That is their right, but it will simply mean that, as happened at

crucial stages of the last constitutional negotiations, they will find the caravan moving on, despite the barking hounds, and the new constitution will emerge even without their contribution. [Applause.] Let us hope that this does not happen.

No party can have a veto. What Mr Van der Merwe does not accept is that South Africa has made its successful transition to democracy under a constitution forged in the most adverse circumstances. There was endemic violence in the country. Historic enmities dogged the work of peacemakers. Centrifugal forces kept hurling parties out of the process, with most being brought back before the elections of April 1994 and with the promise of financial assistance from the Independent Electoral Commission.

The constitutional challenge was enormous: How to construct from the chaos of apartheid workable arrangements whereby South Africans could move from fear and repression to confidence and democracy. It seemed impossible, but hope prevailed and South Africans began discovering one another.

I make no excuse for recalling the magic of those moments, because they must determine the progress of our work now. It is not a matter of being overly romantic. These events should be our inspiration in this Assembly, as a practical reality that can spur us on to new and possibly greater heights. They reflect the dogged optimism of the Irish poet, Seamus Heaney, who wrote these unforgettable lines:

> So hope for a great sea change
> On the far side of revenge.
> Believe that a further shore
> Is reachable from here.
> Believe in miracles
> And cures and healing wells.

What we achieved last time, in a gazelle-like leap to democracy, makes for a fascinating story which does not bear repeating in detail here. Now we face the task of consolidating the victory, because victory has been ours and no churls can take it away, and of turning our makeshift building blocks into a durable edifice.

Let us admit it. Our Constitution is untidy, messy, disjointed and beautiful, just like South Africa. [Laughter.] It is too detailed. Many of the matters in it should be left for legislation, for the forum of Parliament. There are excessive sets of structures and duplication of functions boosting, as Colin Eglin said, the costs of Government. There is too much emphasis on the powers and competences of provincial authorities, but not enough on the powers and competences of central Government and local government.

It has proved, despite warts and blemishes, to be more than an adequate vehicle to transport us from an evil order to one where justice is a distinct prospect for all. It has taken us appreciably closer to a sincere goal of the Government that is honest, accountable, transparent and, I hope, cost-effective.

The job ahead of us in this Constitutional Assembly is, therefore, to build on this foundation. We should do so not in conclave, but by involving, as many speakers have said, those whom the constitution is meant to benefit—all the people of South Africa.

The constitution should be made by the people for the people. It is a sovereign force in the land. It should represent the interests of the people; otherwise it means nothing. This Constitutional Assembly, therefore, is the agent of the people and we have had the mandate from April last year.

Enough about the process. What about the content of the Constitution? The recent 49th national conference of the ANC viewed the writing and the adoption of the new constitution as one of the most immediate and critical tasks. The conference resolved that it should be "a truly democratic constitution which empowers people, brings majority rule and protects human rights". This means that the new constitution should have values which mean something.

It must not be a compendium of codewords and neo-apartheid sharp practice. The ANC conference, while recognising the strength of our cultural, religious and language diversity, laid heavy stress on building a single nation, which must be done at all levels. We must beware of a system which envisages the battle for unity being won only at national level, and being resoundingly lost in the regions and localities where codewords such as traditional values, community values or the protection of hearth and home mask the neo-apartheid reality they represent.

There must of necessity be checks and balances in our constitution. However, "checks and balances" can be codewords for all checks and no balance. Therefore participation in the political process cannot be based on the concept of a

minority veto, nor should other codewords such as provincial autonomy and geographical self-determination be used in ways that will frustrate the national will or lead to the effective dismemberment of South Africa. The sovereign constitution must be the bulwark against a return, in any shape or form, to the past.

Private status and private power must never darken the lives of the majority. The constitution, therefore, must apply to all levels of power, to all aspects of relations. That is what we mean when we say that the constitution is the supreme law of the land.

As the century draws to a close, we have been given a rare chance to lift the hopes of those who have for so long seen no hope of justice, who existed in the dark and dank vastness of our country and who suffered so heinously under apartheid and the repression that was employed to enforce it. Let us therefore be clear about the fact that our permanent constitution must not simply be a piece of paper, a liberal-sounding document which receives genteel "hear, hears" from leather chairs in gentlemen's clubs.

It is accepted, as Executive Deputy President Mr Mbeki has said, that the liberal values of a multiparty democracy form the bedrock of our Constitution. However, a constitution of that type is remote from the needs and aspirations of the mass of our people. That way we shall have produced nothing of value. Worse, we shall have heaped coals on our heads, for if the constitution does not adequately serve the people, the latent centrifugal forces in our country, nurtured for so long by apartheid, could manifest themselves anew in untamed form and threaten what we have been trying to achieve for the past five years and more.

The final constitution, in the vision of the ANC, must be a tribute to our history, our wounded, our dead and all our people. It must draw on the deep reserves of an alternative vision of how our society can be organised, not on the dull legalism of lawyers. Its language must be user-friendly, as the present interim Constitution is not.

Our constitution must therefore be intellectually inspiring, it must have a legal and moral content, but it must also reflect durable values. It must provide the structures and mechanisms to empower the powerless, to clothe and feed the poor, and to educate the masses. It must recognise the equality of women and their rights as well as those of workers, children and the disabled. It must be the people's friend. It must earn the respect and support of all South Africans.

Of crucial importance is the fact that the constitution must be the enabling mechanism whereby the democratic order achieves a redistribution of power. The constitution must be the driving force of the march to social democracy. It must enable the Government to transform our people's lives with the RDP in the vanguard. The constitution must therefore place, within the Bill of Rights, social and economic rights of all South Africans on a firm and indisputable footing. It must give real hope in legal form to those without hope. It must guarantee the twin goals of a better life for all—because the right to life is meaningless without the right to a better life—and a dramatically transformed life for the poor.

It must indeed be a constitution that creates a physical and spiritual environment in which all our citizens may truly grow and flourish, because experience elsewhere in the world has laid bare the shallowness of a narrow civil liberties revolution only. Our people did not give their lives in exchange for the mere freedom to walk the streets relatively unharassed, nor to suffer continued deprivation while the architects of the old rules lived in splendour.

In negotiating the interim Constitution, we ensured that the principle of social and economic rights was recognised in spite of fierce resistance at Kempton Park. The interim constitution, for instance, explicitly guarantees the right of a child to nutrition. We have won the debate on whether economic and social rights should or should not be included in the constitution. The battle should not be fought anew. What we need to do is work out how far the new and relevant rights should go.

Is it practical or ethical that a child's right to nutrition can be secured while the mother and father starve? Can the child's right to nutrition be realised in the absence of the right to water? Can the ultimate aim of nutrition, good health, be assured if a child has a full stomach but no home to live in? Can we realistically expect that a homeless child will have a full stomach? The interim Constitution, which bears the mark of a compromise, was of necessity to provide coher-

ent answers to such questions. This must be done now.

Finally, in relation to the last speaker, we must recognise that the minorities in our country are not only ethnic minorities. A democratic system imposes an obligation on us, notwithstanding what the previous speaker has said, to respect and give due weight and attention to all forms of minority views. These views have to be consistent with the Constitution and to minority practises. Therefore we must respect and uphold the right of people to believe and participate in the religious activities of their choice. There should be a clear separation of church and State, much clearer than our interim Constitution. This also means the right of the nonbeliever, as well as that of a believer, to believe according to his conscience. [Time expired.]

*Mr S J SCHOEMAN: Mr Chairperson, on an important occasion such as this, when we come to the next chapter in the process of drafting the Constitution of South Africa, it is surely important to pause for a moment and ask one another the following question and reply to it, namely how it is possible, in spite of the differences which existed between us when we initially started drafting a Constitution, that we in South Africa have arrived at the point where we have succeeded in finding common ground, in contrast to other countries in which there are fewer differences than in South Africa and in which bloody wars are being waged today. That is the question which we must pause to ask one another today.

The answer lies in the fact that we are standing here today and that all the parties are participating in the further chapter in the writing of the constitutional history of South Africa, precisely because important agreements were reached during the negotiation process on these matters that are important for a country such as South Africa, which has a multiparty culture. In those countries in which peaceful settlements are not reached one of the reasons for this is that this factor is being ignored.

In this Constitution we have succeeded in ensuring—not only for the transitional period, but also in the Constitutional Principles—that this solution which we have found for South Africa will serve as a framework for the further process of drafting the Constitution. I think it is important for us to know and understand that the further process of drafting the Constitution is bound by Constitutional Principles which in fact provide for those things which made it possible for us to find a peaceful solution.

I should like to mention a few examples. It is a fact that the present Constitution allows for the differences which exist in respect of language, culture and freedom of religion. It is precisely these matters which enabled us to come to an agreement.

That is why it is essential for us to tell one another today that we in South Africa have not really progressed to a democratic culture yet. Yes, we have taken the first important step towards democracy. We have given everyone the opportunity to vote and to participate, and these elected representatives sitting here can attest to that. All of us—everyone in a position of authority and every representative—have a responsibility to cherish this fragile plant, democracy, so that it will grow strong and will not be threatened, by the important agreements we have reached.

Secondly, I should like to ask the hon Executive Deputy President Mr T Mbeki whether I understood him correctly. I understood him to say that we must move away from the idea of a constitutional state and give Parliament sovereign authority again. I understood him to have said that, but I see he is shaking his head, indicating that that is not what he meant. I am grateful for that, because it is stipulated in the Constitutional Principles that we are going to have a constitutional state. This means that the Constitution will be the highest authority in this country, and that Parliament will not have the sovereign power to draft laws dealing with matters which run counter to the Constitution.

I should like to associate myself with what the Minister of Provincial Affairs and Constitutional Development, Mr R P Meyer, said on a previous occasion. This concerns the important point which we envisaged and which he mentioned here in the framework, namely the vertical separation of power in South Africa according to which it is important that there is a balanced division between the national, provincial and local tiers of government.

I would now like to discuss a matter which in my opinion is being used totally incorrectly in South Africa. We think the solution lies in the word. We use the word "federalism", and then we

think the solution lies in the word. Solutions do not lie in words. Solutions lie in content, and in my opinion we have a fair amount of confusion in South Africa in so far as words such as "federalism", "democracy", "human rights" and "minority" rights are concerned I should like to give a few examples.

When democracy is discussed, the ANC are inclined to equate the word "majority" in the concept "majority rule" with the concept "the people", which implies that the winner takes all and the minorities do not really have rights. In this way we go back to the Westminster system. The point is that in terms of the constitution, majority rule and democracy do not, in fact, and never will have that connotation.

The DP's understanding of the expression "human rights" and their conception of "constitutional state" are typically based on the USA model, whereas the "fundamental rights" and the "constitutional state" to which the Constitution refers, are based on the German model.

The FF's understanding of minority rights and the protection of culture implies that cultural and language rights can only be exercised in a geographically demarcated area which they call a "volkstaat".

In South Africa we must therefore develop our own ethos of values which emphasises the uniqueness of the constitutional state which already exists and the process underlying this way of thinking and these concepts. [Time expired.]

Mr V B NDLOVU: Mr Chairperson, hon members, I wish to follow up on the comments made by my hon colleague Mr Mtshali relating to the constitutional faith which has driven the political work of the IFP. I feel that South Africa as a whole lost something when the constitutional issues raised by the IFP were considered in isolation without relating them to the fundamental constitutional drive, which has moved IFP political action since the founding of the Inkatha Inkululeko ye Sizwe in 1975. [Interjections.]

An HON MEMBER: Where were you at that time?

Mr V B NDLOVU: I was there.

We were the first political organisation to propagate the need to have the Constitution as the supreme law of the land, thereby moving away from the Westminster system in which Parliament is sovereign. We were also in the forefront of the battle for the establishment of a strong bill of rights to limit the powers of government at the time when the ANC's official policy was against an entrenched bill of rights.

The IFP tempered its political strength and convictions in the constitutional struggle which has taken place over the past three years. In fact, while other political parties were intent on using the opportunity of constitutional negotiations to cut deals and achieve compromises, which would accommodate their respective politics and secure their political success, the IFP stood firm on positions of principle, which were often taken at great political cost for the greater good of South Africa.

It is because of this stand, which was taken by the IFP, that the present interim Constitution has some elements of federalism. The truth of this fact can be verified by comparing the interim Constitution, as it now stands, with a document which was bilaterally approved and finalised by the ANC and the NP at the World Trade Centre.

The IFP of today carries the legacy of the constitutional struggle of the IFP of yesterday. We are moving into the next stage of constitutional negotiation being intimately convinced that the struggle for the liberation of the people of South Africa is not finished, but that it has just commenced with the adoption of the 1993 Constitution. We need to take the struggle into the next stage, and to free the people of South Africa from the evils which still characterise the legacy of apartheid.

We need to transform South Africa into a libertarian country which is committed to the social and economic upliftment of the victims of apartheid. For this reason, we must improve the bill of rights to extend its application horizontally, so that human rights cannot be violated in the workplace or in any other significant legal relation under the control of the State. We must also entrench second and third generation human rights and commit our Republic to heal, feed and educate its children and create general opportunities to better the conditions of all South Africans.

The work of freedom and democracy has just begun. Today, as it was yesterday, the IFP carries the burden of being at the forefront of the

new struggle. Federalism and pluralism are the new horizons of the frontier of our liberation. Today the new frontier of the struggle for liberation leads us towards the achievement of a true social, cultural and economic pluralism in our country to enable the rich diversity of our nation to be finally recognised and capitalised as an element of strength rather than a factor of weakness.

The time has come to free the people of our country, ensuring that their primary government is closer to them and does not sit in Pretoria or Cape Town. Each province must be the primary government of the people, and the central Government must only be left with those powers which cannot be exercised at provincial level. We must also ensure that the people of our country are finally free to organise, administer and regulate their interests in autonomy and free of interference from any government with respect to all social, cultural and economic matters which fall within their individual and collective autonomy.

We strongly believe in this type of pluralism as the only possibility of turning South Africa into the common home for the many nations and social groups which inhabit it, all of which have their own cultures, laws and traditions and codes of moral and social conduct. The call of pluralism must be especially strong in economic matters and government must be severely limited so as to empower the energy and resources of the free-market system and the entrepreneurship of our people in terms of an economic constitution which opens up economic opportunities for all, and not only for the privileged few.

It is also time to return the individuals and the people of South Africa to the role of pre-eminence which was usurped by the state apparatus of this country. The call for autonomy and recognition of diversity must entrench and preserve traditional communities as an essential element of our Africanism. It would be a tragedy if, in drafting the new constitution of South Africa, we yielded to new forms of cultural colonialism which ignored the realities of our country, including the important roles which traditional forms of societal organisation have played for centuries.

We also need to look at each province differently. I want to make it quite clear here that the IFP is a national party committed to the national interests of everyone living in South Africa. As I say this, I also wish to restate the commitment of the IFP to the province of KwaZulu-Natal, which it has the special responsibility of governing. At this juncture and in constitutional terms there is a very close relationship between the interests of South Africa as a whole and the demands for self-rule and autonomy of KwaZulu-Natal within the parameters of a unified, federal South Africa. I feel I can state categorically that what is good for KwaZulu-Natal is good for the country as a whole. [Interjections.]

For this reason the autonomy of KwaZulu-Natal can no longer be delayed, and we must ensure that the constitution-drafting process does not proceed from a breach of that fundamental agreement which gave birth to the new South Africa, the Agreement for Peace and Reconciliation signed on 19 April 1994 by the president of the ANC, Mr Nelson Mandela, the president of the IFP, Inkosi Mangosuthu Buthelezi and the then State President, Mr F W de Klerk. That agreement calls for international mediation to settle the issue of the autonomy of the provinces in general and the autonomy of KwaZulu-Natal in particular, with special attention to the need for restoring that province as the autonomous kingdom of KwaZulu-Natal. [Interjections.]

Time is running out for international mediation which, in terms of that agreement, was supposed to take place as soon as possible after the April election. [Interjections.] In fact, the purpose of international mediation is to ensure that the constitution-making process can proceed from an agreement reached on the fundamental issues of pluralism and federalism, with specific attention to the issue of the kingdom of KwaZulu-Natal . . . [Time expired.]

*Mr J CHIOLÉ: Mr Chairperson, constitutional changes and constitutional processes are taking place throughout the world at an increasing rate today. There are four major forces which are influencing the constitutional processes to a lesser or greater extent and which are steering and directing them to a certain degree, as is the case in South Africa as well. These four forces are: in the first instance, the New World Order, or, as it is referred to in certain circles, the melting-pot system, which is advocated by the American government; secondly, nationalism or nationalisms, based on ethnicity and in respect of which a reawakening is now increasingly being detected; thirdly, the rise of Islam and pressure

by the so-called Islamic fundamentalists, and, fourthly, communism, which the NP thought was dead in 1990 and which they have now discovered is no longer dead.

†South Africa's 1993 interim Constitution is a New World Order Constitution. Already, in its preamble, it is stated clearly, and I quote:

> . . . there is a need to create a new order . . .
>
> 1.(1) The Republic of South Africa shall be one, sovereign state.

President Mandela, in his address to the United States Congress on 6 October 1994, also made it quite clear and he used the opportunity to call for support for the New World Order.

The Citizen, on 7 October 1994, reported that—

> . . . his speech was described afterwards as the most eloquent and effective definition of the New World Order any of us have ever heard. "The American concept of a melting pot had begun to address a reality that encompasses the globe", President Mandela said. Manifestly, the world is one's stage.

MacIllvaney describes the New World Order in his *Intelligence Adviser* of February 1992 as follows, and I quote:

> It is the world of global government under the United Nations which international elitists in the financial and power corridors of America, Europe, Japan, South Africa, believe they can install by the middle 1990s.
>
> The New World Order has been pushed by the world's most powerful socialists, communists, internationalists.

*It is therefore an order in the world in which the real political rulers are the international moneyed interests. Moreover, it was precisely this system of government that the NP wished to establish in South Africa, as appeared from Minister Pik Botha's speech in Parliament on 24 April 1992, which was followed up on the same day by Mr Marthinus van Schalkwyk of the NP in a speech in support of the New World Order.

He said (Hansard 1992, col 5178):

> "New World Order" is a concept . . . to which often unnecessarily sinister connotations are attached . . .

He went on to say (Hansard 1992, col 5179):

> The fact that the New World Order also has an influence on the sovereignty of a state is of greater practical interest to us in . . . South Africa. We in South Africa . . . have realised . . . that sovereignty can and may never be absolute.

That links up with what President Mandela said. The NP's and the ANC's political principles therefore share a common basis, which will, in future, necessarily lead to attempts being made to strengthen the basis of communality.

Mr Van Schalkwyk himself spelt out the dangers of the New World Order in his conclusion (Hansard 1992, col 5180):

> . . . I should also like to refer to one of the great dangers for the New World Order, namely exaggerated and radical nationalism and ethnicity. We know that is the one thing with which Africa has been cursed.

In other words, to the NP, Afrikaner nationalism is also a curse.

Awakening nationalisms, the yearning for full political independence, are, throughout the world, just as they are for the Afrikaner, the inexorable force which is rebelling against the New World Order and communism. There are numerous examples of this, such as in Yugoslavia, the old Soviet Union and Burundi. As I have said, there are numerous examples of this.

In South Africa the FF is the parliamentary spearhead of Afrikaner nationalism. We say that cultural differences between peoples in South Africa should be accommodated in the new constitution. [Interjections.] To ignore nationalisms and associated cultural differences would, just as in the rest of the world, be a recipe for continuous and escalating conflict and tension. Provision for self-determination in the constitution is a prerequisite for and a key component of the accommodation of nationalisms.

Mr N J GOGOTYA: Mr Chairperson, although some of us might choose different languages to describe the meaning of freedom for our country, few, if any, would take serious issue with the NP standpoint on this matter. We prize our political, social and economic liberties. They are the starting point for any definition we have of ourselves as a people.

In subscribing to this view, the NP is on firm ground and in line with true democracies world-

wide. The necessity to link freedom to the wellbeing of all, and especially of the most vulnerable of our society, is an integral part of our mandate. This ANC-led and controlled Government is pandering more and more to the needs of its client groups, to the utter neglect of the most decent and law-abiding South Africans. Government of the toyi-toyi by the toyi-toyi and for the toyi-toyi seems to be the order of the day. [Laughter.]

We are witnessing a profound and dangerous redistribution of power. The ANC would have us believe that it is transferring power to the people. In fact, nothing of the sort is taking place. What is happening, is the transfer of power from the people to the ANC. [Interjections.] Hence, history teaches us that the danger of abuse of power is far greater among those who have power. We can have an accountable system, a more just society, when there is transparency of government and distribution of power.

Surely the first step in such a process is to guarantee to every citizen in this country, irrespective of colour or political affiliation, the basic necessities of life on which we all depend for survival. I think it was Milton who contended that "the business of business is business". I want to argue that the business of government is true and accountable governance.

Political change and reform can only be durable if sustained by a commitment to accountability. The nature and character of communism in the ranks of those hon members is to govern behind closed doors. Like the Sword of Damocles, the real threat of authoritarianism continues to hover over South Africa because of the existence of communists within the ANC. [Interjections.] These people operate in secrecy. They hold meetings behind closed doors, under the cloak of darkness. How, then, can these people be trusted with accountability, transparency and openness? [Interjections.]

The SACP exercises power out of proportion to its size within the ANC, a classic case of the tail wagging the dog. These left-over communists are threatening this country with a sham democracy, manipulated by an elitist group. The terms accountability and transparency are used and bandied about purely as a smokescreen and euphemism to hide inefficiencies, inadequacies and hidden agendas. [Interjections.]

The conviction that both ruler and subject have rights and duties has found acceptance within the NP as one of the foundation stones of good governance. This standpoint is spelt out in our policy document, which contains some of these specific insights, if hon members will only listen. I think it was Robert Nozick who said, and I quote:

> The proper role of the state is that of a protective agency against force, theft, fraud and violation of contracts.

As the NP we seek to ensure that life in the new South Africa under the new Constitution will in some measure secure all South Africans against acts of violence, whether these be political or criminal. Secondly, South African society seeks to ensure that promises once made will be kept or that agreements once undertaken will be carried out. I am not referring to the promises of the election when people were promised free houses, fridges, et cetera. [Time expired.]

Mrs B S MABANDLA: Mr Chairperson and hon members, I must say that the performance of our entertainer, Mr Gogotya, can be very difficult to match, especially when one seeks to engage seriously. [Interjections.] Please forgive me, I do not think I will entertain the House as much.

We, the elected representatives of our people assembled here today as the CA, are charged with the task of drafting a constitution for South Africa. The drafting of a constitution signals a new era for our people, as thousands sacrificed their lives for freedom, justice and equality. Accordingly, the majority of members assembled here are mindful of the fact that the process we are involved in is a result of decades of struggle by the majority of our people against oppression. Indeed, the balance of forces in this Assembly attests to the truth of this assertion.

Our people have voted. They have expressed their will and voted for a better life. We should therefore draft a constitution which enables our people to realise these goals. It is therefore essential that our constitution should be home-grown, that is, it should be informed by the experiences of our people. I think that this is a very important point.

Whilst we advocate that the constitution should be informed by the experiences of our people, we are also committed to learning from the experiences of other countries, as well as meet-

ing the legal and technical requirements for the drafting of an appropriate constitution. In this regard, we and the PAC are of the same mind.

The ANC, which is the majority party in this Assembly, represents the aspirations of millions of South Africans. Our vision for a new constitution is therefore informed by the needs of the people. Essentially, our vision is that South Africa should be constituted as a united and democratic state in which the human rights of our people are upheld. I would like to stress the point "the human rights of our people" precisely because there is a distortion in the conceptualisation of what rights are. There is an assumption that civil and political rights are the only fundamental rights.

We believe that a Bill of Rights for a democratic South Africa should entrench the human rights of our people. In our view, rights are indivisible and should not be treated in a hierarchical manner. For example, to millions in South Africa, the right to vote is as important as the right to clean water and a clean environment, and the right to nutrition.

The ANC leads in striving for the promotion of human rights for women. We believe that the Bill of Rights should entrench equality between men and women, and that the clauses of the Bill of Rights should be drafted in a manner that enables women to attain substantive equality. We therefore need to determine the necessary degree of specificity in recasting rights to embody the human rights of women. For example, the right to dignity and the right to protection against inhuman treatment should be understood to incorporate the prohibition of violence and abuse against women and children.

If the Bill of Rights is to benefit our people, it should apply both vertically and horizontally where appropriate. It therefore makes no sense to have a Bill of Rights which only applies vertically. By contrast, it makes good sense that a person who believes that his or her right has been infringed should be able to make a claim against the offender, whether such offender is the Government, a private person or a corporate body.

It is important that our people should be told that the representatives of business, during negotiations for the interim Constitution at the World Trade Centre, ensured that the definition of "person" encompassed corporate bodies, whilst opposing the horizontal application of the Chapter on Fundamental Rights. That shows what interests they were protecting. In addition, I may say that they opposed the inclusion of social rights, as comrade Kader has already said.

It is important to understand the implications of this. It means that they can, like individuals or private persons, claim against the Government should there be a perceived infringement of their corporate "rights". However, as we all know, it is common knowledge that, in the context of our history, companies have abused and violated the human rights of citizens.

In conclusion, I would also like to state that the ANC is committed to the protection of the rights of the South African child. We recognise that the children of our country bore the brunt of the vicious system of apartheid. We should never forget that for decades millions of children were denied the security of a home life, adequate nutrition and appropriate education. Today thousands of children are victims of both political and domestic violence. They are also largely unprotected against exploitative labour practices. We therefore believe that a Bill of Rights should protect the rights of our children.

Mr J SELFE: Mr Chairperson, the constitutional proposals of the DP are based on a distinctive view of the relationship which should exist between individual citizens and the Government.

We believe that the State is instituted to serve, assist and empower the citizen, and not vice versa because, in our view, citizens are themselves the best judge of what is in their best interests. We believe in limited government which confines itself in general to those things which individuals cannot obtain or regulate for themselves.

Because of this, we also believe in the devolution of power. We believe that there is no better way of ensuring that the people govern than by locating the sites of power as close to the people as possible. This ensures that government is accessible and accountable, that it provides opportunities for popular participation in the process of government and that the people on the ground get what they want out of government.

It is these beliefs that have always drawn us towards federalism. Ours is not a sudden Damascus-like conversion to federalism, nor do we support federalism to preserve and perpetuate the wealth and income disparities which exist in our country and which apartheid helped further to distort.

We support federalism because, in the last resort, the people, particularly in a country as big and as varied as South Africa, have distinctively different needs which have to be addressed in different ways, ways in respect of which the people on the ground are the best arbiters.

In order to accommodate these needs and to overcome these problems, our view is that the provisions of the new constitution further should strengthen provincial and local government, giving to each both exclusive and co-ordinate responsibilities. Precisely to avoid federalism being used as a mechanism to perpetuate the past, any devolution of power to provincial or local government needs to be subjected to a justiciable bill of rights guaranteeing equality.

More practically, devolution of power needs to be accompanied by a satisfactory formula which ensures that all citizens, wherever they happen to live, can lay claim to services of a substantially equal nature. Much work still needs to be done by this Constitutional Assembly to devise a fiscal equalisation mechanism which will achieve this goal.

It will also be necessary to devise a mechanism to ensure that relationships between the various levels of government promote the interests of the people and of efficiency. Some practical and administrative steps have already been taken to ensure co-ordination of government activity as between the central and the provincial governments.

However, what has not yet been defined is the role of the Senate in this process. Perhaps this is because the Senate has few substantive and distinctive responsibilities contained in the interim Constitution. It is only the election of members of the Senate and the powers that the Senate has in terms of section 61 that imply that the Senate is a House of provincial interests. However, this role has still to emerge.

The result is that a perception has taken root that the Senate is simply an expensive and unnecessary replication of the National Assembly. From its side the Senate has recently appointed a committee on provincial liaison, the purpose of which will be to fulfil its task of highlighting provincial issues and concerns in the national debate.

Let me say that I am not aware of a single constitution characterised by provincialism or federalism which does not have a senate or a similar institution to represent the views of the provinces and to integrate those views into the debates of the central parliament. Belgium, Switzerland, Australia, Canada, the United States and Germany provide examples of this mechanism.

Finally, it may be that in South Africa's final constitution other distinctive responsibilities may appropriately be a reserve for the Senate, for example, the confirmation of senior appointments in the Public Service, the endorsement of treaties, and the review of certain specialised agencies of government.

Mr R K SIZANI: Mr Chairperson, before I was interrupted, I was talking about our vision of a bill of rights. I now want to deal with our second point on this issue.

My organisation would never support the entrenchment of the same apartheid property relations. Protection of private property cannot be absolute. In our case, it must also be accompanied by a strong land restitution clause allowing land claims from 1652. Restitution must be a right and restitution of land must be a priority, with money and other forms being exceptions. Our White compatriots must be informed that lasting peace in this country will never be built on the maintenance and protection of their monopoly over conquered African land.

I now want to address the issue of affirmative action. This clause is necessary in the constitution, and must be strengthened by antidiscrimination legislation, and the willingness to use political power where necessary.

The PAC calls for a different affirmative action to the United States' version. It is unfortunate that, in South Africa, we have chosen to use this term, while our own situation demands much more than the American concept. The majority of the people have been disadvantaged; they were fighting for national self-determination as opposed to civil rights. If the national question in

South Africa is resolved on a democratic basis the people must, therefore, be in power.

This calls for the transformation of the entire society; the overhauling of all institutions, be they political, economic, social and military becomes necessary so as to reflect the shift of power. This, of course, is not an overnight process. It has to be structured and properly managed. However, it requires much more than mere accommodation in existing institutions, values, etc. It demands the transformation of the existing institutions, values, processes and personnel.

We submit, therefore, that the use of the term "affirmative action" is both unfortunate, unimaginative and could also be misleading in our situation. In South Africa, we are talking about a controlled and managed transformation into a new African state which has different social, economic, political and military values to those of the former apartheid state. This Government should therefore use its political power, where necessary, in the interests of the people.

This is just a brief overview of our perspective of this new constitution. We sincerely hope that the Constitutional Assembly will draw up a constitution which is new and will not merely seek to revise and amend the interim Constitution. The PAC will do all in its power to assist in the drafting of a genuine, legitimate South African constitution within the stated period.

Mr L M GREEN: Mr Chairperson, hon members, the ACDP believes the future of our country will be best secured by a form of government which we should like to refer to as a "constitutional republic" with an entrenched bill of rights based on biblical principles. We need to define what we mean by a "constitutional republic" and what the word of God has to say concerning a framework for a godly government.

The first biblical principle which our constitution should promote is that of a decentralised form of government. In a democracy, power resides in the people who delegate this power to the government for a short period, because power has the tendency to corrupt, especially if it is centralised in the hands of a few. Governments should always be kept as close to the people as possible. This can be accomplished by establishing a small national government and strong local and regional governments.

A constitution which ensures decentralised government will be a safeguard against the tyranny of centralisation, since it will allow the people to participate most fully in government, and to keep watch over the flow of power through the governing officials.

History has shown that the centralisation of governmental power destroys the liberty and the rights of the people. A legitimate, representative and democratic government is not enough to ensure that the rights of people will not be abused.

Man is sinful, and although a government is an institution of God, we must recognise that an initially good and representative government can easily degenerate into a tyranny in the absence of sufficient checks and balances. Therefore, the way in which to have a good and safe government, is to divide the power among the people at the lowest levels, instead of entrusting it to one body.

The power of each level of government should be clearly defined and sovereign in those defined areas. No level of government should be able to usurp the jurisdiction of another. The powers of the national government should be clearly defined and should only involve those matters which affect the country as a whole, such as defence, foreign policy, the regulation of interregional and foreign commerce, citizenship laws, the coining of money and copyrights. All other powers should remain with the people in the form of local and regional government.

Mr R J RADUE: Mr Chairperson, I wish to deal briefly with the NP's perspective of basic human rights in the new constitution. The NP has a very clear vision in this regard.

The negotiators at Kempton Park recognised the need to secure and entrench basic human rights in the interim Constitution. Deeply conscious of the denigration of the basic human rights of many South Africans under apartheid, and painfully aware of the abrogation of human rights in the Steve Biko case, the Matthew Goniwe case, the MK bomb blasts at Amanzimtoti and in Pretoria, the devastation of human rights at the King William's Town golf club, the St James Church and the Heidelberg Tavern, and at Quatro and other ANC camps in Angola and elsewhere, the representatives of the multiparty conference at the World Trade Centre, after

vigorous debate and negotiations, drafted Chapter 3 of the present Constitution, embodying first-generation human rights.

However, they went much further than that. They also drafted Schedule 4 of the Constitution, which lays the very foundation of the new constitution. Schedule 4 contains 34 principles which, in terms of section 71 of the present Constitution, must—I repeat, must—be contained in the new constitutional text. Moreover, the Constitutional Court must certify that these principles have all been complied with within that text.

Constitutional Principle II in Schedule 4 reads as follows, and I quote:

> Everyone shall enjoy all universally accepted fundamental rights, freedoms and civil liberties, which shall be provided for and protected by entrenched and justiciable provisions in the Constitution, which shall be drafted after having given due consideration to *inter alia* the fundamental rights contained in Chapter 3 of this Constitution.

Firstly, therefore, the NP's view is that the new constitution must enshrine fundamental human rights, and that the Constitutional Assembly must be guided by these human rights contained in Chapter 3, and is in fact bound to include them in the new text in an undiluted form.

Secondly, the NP will work to ensure that those basic rights not yet adequately catered for in Chapter 3, such as children's rights and family rights, are fully embodied in the new constitution.

Thirdly, the NP will seek to ensure that the cultural and language rights of all minorities in South Africa are adequately protected in the new constitution.

Fourthly, the NP believes that so-called second-generation rights—for example, rights to social benefits, which perhaps are desirable for socio-economic reform—should not be entrenched as rights against the State. The State could simply not afford the cost of them. Second-generation rights should rather be prescribed in the constitution as directive principles of government policy. Let us look at India as an example.

Finally, the NP is of the view that basic human rights carry with them concomitant responsibilities. The State can only guarantee basic rights effectively if individuals and groups of individuals meet their responsibilities to society, obey the law, pay their taxes, uphold their family ties and encourage the work ethic.

The NP is committed to a real culture of human rights. South Africa's human rights culture is now but 9 months old. It is fragile. It needs to be nurtured and nourished. In drafting this new constitution we must ensure the realisation of that dream. These, in brief, are the NP's basic perspectives on the provisions necessary to secure human rights in the new constitution for our future.

Mr O C CHABANE: Mr Chairperson and hon members, the previous speakers have dealt at length with the contents of the new constitution that we are drawing up. The ANC believes that the process through which we are going to achieve that goal will have a direct bearing on the outcome of that constitution. Therefore I will depart from the trend followed by the previous speakers.

The interim Constitution provides for this sovereign assembly alone to write and adopt the new constitution. People are only to be consulted as a deadlock-breaking mechanism. It places no obligation on representatives to consult with the people in this most important task. We cannot afford a repeat of what happened at the World Trade Centre, where only the educated and those representing nobody wrote the Constitution on behalf of our people.

The ANC insists that the CA cannot escape the requirement placed on all public institutions to be transparent and accountable in all people-centred and driven processes. In order to ensure that our people's views are reflected in the new constitution, the CA must ensure that a multifaceted and dynamic public participation programme is implemented. The ANC will ensure that every step we take towards a truly democratic order takes our people along with it. The steps taken by the CA so far will go a long way towards realising our goal.

However, the biggest challenge will be to enable the views of the disadvantaged and illiterate rural communities to be heard. Our priority is to ensure that the process is not confined to these walls. We need to ensure that the communities along the Limpopo Valley also have their views heard in this Chamber and in our committee

rooms. The final draft must reflect the views of our people in the villages, informal settlements, hostels, factories, towns and cities.

Our experience gained in the defence campaign of the eighties, the mass action of the nineties and the people's forums of the election campaign will assist this House in bringing the people into the process. We are mindful of the fact that this campaign will be costly. We need to understand that we have a choice to sit here and write the constitution without any consultation beyond our parties. To us this is not an option at all, because society will be expected to respect a constitution in the drafting of which they had no say and which may not necessarily reflect their views nor those of their representatives.

We should remember that thousands of South Africans perished in the streets, jails, mountains and valleys across the country in pursuit of what we have been charged to do. The only way we can ensure a democratic constitution is by being prepared to sacrifice. We are convinced that involving our people is a process which society will never regret. We are determined to bring lasting democracy, peace and prosperity to our people.

It is probably also important to respond to some of the statements made by the previous speakers. While the IFP rejected the 1983 constitution, it did not reject the bantustans, as it stood to benefit from their continued existence. It would seem that the IFP is looking for a constitution that would guarantee its survival in the Government. The ANC seeks a constitution that will not guarantee the future of any party.

In response to the DP, we should not draw the new constitution using the interim Constitution as a basis. However, we are committed to taking some sections or chapters of the present Constitution into account when writing the new constitution. If we end up with a text that is close to the present Constitution, it should not be as a result of us amending this Constitution with that in mind, but rather as a result of the debates entered into.

The ACDP has suggested that we should amend the Constitutional Principles. The interim Constitution makes it very clear that we cannot do that, and that we should instead draw up the new constitution within the framework of those principles. However, the ANC believes that we cannot continue to entrench these Constitutional Principles in the new constitution.

In response to what Mr Schoeman said . . .

The DEPUTY CHAIRPERSON OF THE CONSTITUTIONAL ASSEMBLY: Mr Chabane, I am afraid that will have to stay over for another time because your time has expired! [Laughter.]

Mrs G N M PANDOR: Mr Chairperson, you are a very strict taskmaster! Recent events prompt one to reflect on the model that we adopted to establish this Government of National Unity. There has been much debate on this point, but it needs to be emphasised that it was fearful to note how this kind of enforced coalition, rather than being a device for peace and reconciliation, has within it characteristics that can fuel chaos and uncertainty.

The fact that the events of the indemnity week threatened to disrupt the governing process is cause for serious reflection as to whether this is a path we wish to tread in the future. The existence of a multiparty Parliament is not in question, but we have to ask ourselves whether a multiparty Cabinet really serves our needs.

We need a structure that will help us to arrive at our common objectives, and through which we can strive equally and faithfully towards their achievement. The task of the opposition parties would then be very clear, since they would be in Parliament to challenge principles and policies that are determined by a united Cabinet.

In partnership with this more workable model of governance, our constitution must provide a clear description and framework of the mechanisms that would make South Africa's new ideals a reality. There would be nothing gained from a new constitution if our citizens cannot exercise their rights as citizens governed under a constitution.

In fact, as we draft our constitution, let us take steps to ensure that the structures for monitoring our access to constitutional rights are up and running shortly after the adoption of a new constitution. It is an indictment against this Parliament that we have taken so long to put in place structures to monitor the exercise of our rights.

As we proceed with the work of the Constitutional Assembly, we are sure to hear much more

on the federal argument. I move towards my concluding remarks by reasserting that my organisation's task is to ensure that all South Africans enjoy real opportunities for development through access to free education at school level, affordable health care, housing, jobs, peace and security.

The federal model will not guarantee access to these benefits. Given our history, we believe that firm control from the centre will ensure that these rights to development are not only ensured, but are also delivered to all our people.

We also believe that the rights of women must be ensured and asserted by more than a passing reference to a gender commission. Our Constitutional Assembly has a major task in this area; it is in fact a matter of concern that very little reference has been made to women in this debate.

We are saddened by the discriminatory utterances of the leader of the ACDP concerning the question of discrimination against people with a particular sexual orientation. We hope our country is part of the modern society that has begun to accept and recognise that we need to have a range of provisions protecting all members of our society. Furthermore, I believe that we need to beware of some of these so-called Christian utterances that can lead our country into a situation where we impose an inquisition which would deny rights to our people. [Time expired.]

Mr A FOURIE: Mr Chairperson, obviously we in the NP welcome this opportunity today once again to put into perspective what we have in mind for a future South Africa. The fact is we are still very much the same NP that started the process of reform under Deputy President F W de Klerk in 1989. [Interjections.]

Throughout the entire negotiating process, until the implementation of the transitional Constitution, we worked within very clearly defined guidelines in order to achieve our goal. In the process, in the spirit of give and take, obviously we did not achieve 100% of our goals, but we were satisfied with the result. However, what surprises us, is that it appears we are dealing with a different ANC. Different, because whilst our point of departure is the transitional Constitution, the ANC's point of departure appears to be to start all over again as if the World Trade Centre never happened.

Mr Chabane surprised us this afternoon when he referred to those who represented nobody at the World Trade Centre. I want to ask who the ANC members were who were negotiating on behalf of the ANC? It appears as if the elected ANC has no faith in the ANC numbers who negotiated the transitional Constitution. [Interjections.]

I can understand if the IFP and the FF want to start from scratch. We should respect that, because they were not part of the negotiating process, but heaven knows why the ANC all of a sudden wants to start afresh. Nevertheless, we emerged from the Federal Congress of our party with a fresh mandate and I would like to deal with one of the legs which was pointed out by Minister Roelf Meyer when he explained the spirit in which we are going to negotiate.

The other point which worries me, is the indication that I received from Mr Chabane that even the principles contained in the transitional Constitution should be changed. Is that the ANC standpoint? We from the NP commit ourselves to negotiating within the framework of the agreed set of principles.

The spirit of the Constitution should come into fruition and I want to deal specifically with the representation of all relevant interests in the structures of Government through a system of multiparty political participation.

Why do we take this particular standpoint? It is for the simple reason that we are convinced that power-sharing in some form or the other is still in the best interests of South Africa. The present method of power-sharing is within a Government of National Unity which we do not want to follow rigidly. However, judging by the reaction from our friends in the outside world, from local and overseas investors in South Africa and, I want to make bold to say, from moderate, responsible South Africans, some form of power-sharing is required in South Africa. [Interjections.]

In the heat of the moment President Mandela might have dismissed the importance of Mr De Klerk's presence in the Government of National Unity, but this is not the reaction that we detect from outside. It surprises me that the ANC does not recognise the red lights coming on when they want to move away from this point of view.

South Africa once again reacted vehemently when there was an indication that the NP might

leave the Government of National Unity. The world over there is a very clear barometer that one should always watch, and that is the stock exchange. If one wants to see whether a country has political and economic stability, one should watch the stock exchange. What happened? In June last year, when there was only speculation that Mr De Klerk was going to leave the Government of National Unity, the stock exchange took a dip. When there was an indication that Mr Mandela's health was in jeopardy, the stock exchange took a dip. Now, once again, when there was an indication of a crisis, the stock exchange took another dip. [Interjections.]

Let me refer hon members to a contradictory statement. Here I have a clipping from a newspaper report which states that Mr Mandela said:

> Daar sal nie eens 'n rimpeling deur die land gaan as mnr De Klerk uit die RNE loop nie.

On the very same page, just two lines down, it says, "Effektebeurs sidder". Does that red light not indicate to hon members that that is what the people of South Africa want? Does that red light not say that the people who must create the jobs in South Africa, who must invest in South Africa, will not do so if the ANC has straightforward majority rule in South Africa? [Interjections.]

The Government of National Unity is not a coalition, but rather a compulsory partnership. We should rather consider ways and means to make that system work in South Africa. I say that conflict of the mind produces the best results, but obviously the attitude of the partners within such a government of national unity must be transparent and must be looked into.

I should like to say that the spirit in which we will be negotiating will, at least for the foreseeable future, be one in which all interests will in some way or another be accommodated in a multiparty participatory democracy.

We say that we should move away from the Westminster system which we inherited from the British colonial days. We must start afresh in South Africa. We must come up with a new deal for South Africa, otherwise we will not survive.

We are still a developing country. We are still vying for the interest of foreign investors in South Africa. We are still working towards reconciliation. For this reason we have always maintained that the Westminster concept of the winner takes all is not the answer for our diverse society in this country. [Interjections.] This has nothing to do with racism, because the NP has aborted its philosophy of ethnic national states for South Africa and has opted for the concept of the political party being the representative of minorities in South Africa.

I am quite surprised by and disappointed in the speech by the Deputy President Mr Mbeki. He closed the door for negotiations about anything else but the Harare Declaration and majority rule in South Africa. [Interjections.] I say that that is not a good message for South Africa. It is going to be reflected on the Stock Exchange of South Africa once again. [Laughter.]

People so easily talk about democracy. I find it very funny that the vociferous elements of the SACP and Cosatu talk about democracy. What do they know about democracy? [Interjections.] The philosophy that they have in mind for South Africa is not democracy, but a totalitarian socialist communist state. [Interjections.]

I want to tell Parliament the story of a very respected traditional leader who asked, when the concept of democracy was explained to him, what would happen if the majority was wrong. Democracy is a relative term. Democracy does not only mean majority rule for South Africa. [Interjections.] Therefore we must look for our own unique solution in this country. [Time expired.]

Mr P F SMITH: Mr Chairperson, I would like to follow the earlier speaker in talking about the process rather than the substance of the Constitution. My colleague, Mr Ndlovu, highlighted the necessity of international mediation getting off the ground as soon as possible. I want to pursue this first by way of a general comment and secondly by locating mediation within the Constitutional Assembly process itself.

It does not take a genius to realise that the whole concept of international mediation is anathema to the ANC. It does not want mediation and it never has. During the last year in particular, one got the distinct impression that it was highly uncomfortable with the commitment it had made prior to the elections. It would rather the whole problem simply disappeared. This is precisely what would have happened if the IFP had not kept on reminding both the ANC and, might I

add, an equally recalcitrant NP of the need to fulfil its obligations.

International mediation cannot be removed from the constitution- making agenda. It is an intrinsic part of the process and those who believe it is merely a sop to the IFP, a means of duping us to get us into the elections, are wrong. It is a solemn pact, not a possible option that could be considered later. That is why we have constantly reminded the ANC and the NP to keep their word. It is our view that they signed an agreement and we would like them to honour it. We do not really appreciate people getting apoplectic every time the word mediation is mentioned and when they are accused of prevarication by the IFP.

We are therefore delighted that there is now consensus on the need for mediation and that it can take place on, *inter alia*, outstanding constitutional issues. We are also pleased that a special committee, comprising Messrs Moosa, Mzimela and Meyer, has been charged with the task of taking the process forward. Having agreed on this, the next problem is how mediation relates to the process in this Assembly.

The facts are as follows: Firstly, unless we are collectively really looking forward to mediation assuming prominence at a later stage in the constitution-making process, which I believe no sane person in this Chamber will really welcome, then it is self-evident that mediation should take place as soon as possible. There is little point in mediation taking place at the end of the process or when it is too late to influence the deliberations of this body. It should have occurred already, but on the premise of better late than never, mediation can still be expected to play a constructive role in the constitution-making process.

Secondly, I stress the possible beneficial role of mediation and reject the notion totally that mediation will have the effect of slowing down the process. Mediation will promote a consensus solution, reducing highly protracted, if not endless deliberations, and will also minimise the real possibility of the deadlock-breaking mechanism having to come into effect.

Furthermore, the IFP is really astonished to find today that it is the only party that has matched the 23 January deadline for the submission of theme committee reports. Our party is really taking its role seriously. What possible reason can there be for parties to have wasted the two month recess and not produced the papers that we all collectively agreed had to be submitted by yesterday's date? [Interjection.]

Ms Y L MYAKAYAKA-MANZINI: It was done by one person only and that is why this is the case. [Laughter.]

Mr P F SMITH: Any party which is of the view that mediation will have the effect of slowing down the process, should consider its own actions very carefully before throwing stones at the IFP.

Thirdly, the Constitutional Assembly is responsible for determining the processes involved in its constitution-making. It is therefore obliged to ensure that it makes adequate provision for the contribution that mediation can make to the process. It has made provision for commissions, for political parties, civil society and public fora ad nauseam. The question is, how does it bring mediation on board as well?

Fourthly, at present the Constitutional Assembly has devised a process which makes no provision for mediation at all. This is deliberate and the ANC is making a concerted effort to ensure that mediation does not comprise part of the Constitutional Assembly agenda. We should recognise that despite their own President's acceptance of mediation, among many ANC figures there is a disturbing factor which one would call a Pavlovian reflex that comes into play at the mere mention of the word mediation.

It is all very well for people to talk about flexibility in the agenda as though it could accommodate mediation if necessary. However, as it stands now this is patently not the case. If mediation were to take place, the process would have to be adjusted.

I would like to make a constructive proposal that the Constitutional Assembly confirm the views of President Mandela, Mr Buthelezi and Deputy President De Klerk that mediation has an important role to play in the constitution-making process. [Interjections.] I believe that the Constitutional Committee and the management committee working with the special committee appointed by the three presidents should be charged with the responsibility of reviewing the work programme, schedule and processes to maximise the opportunity that mediation offers

all of us to reach consensus on the new constitution. The presidents of the three parties involved, to whom more than 90% of us owe allegiance, have given the Constitutional Assembly its lead and it is now up to us in the Constitutional Assembly to capitalise on this.

Maj Gen P H GROENEWALD: Mr Chairperson, in the process of creating a new constitution we seek constitutional legitimacy which is often validated more by historic and cultural realities than by formal and legal criteria. The historic and cultural forces that underlie the constitutional process in any country will have a direct bearing on the successful creation and also the long-term maintenance of the constitution. The closer government comes to the people on the ground, the more valid this statement becomes.

At the level of local government, this statement cannot simply be ignored by the Constitutional Assembly. Local government has become an urgent issue. We have already entered the political struggle at local level without having started the political debate on this issue. There is no doubt that as the political campaign hots up and the debate on local government intensifies, people will become confused. They will not know what kind of constitutional dispensation is being created at local level. However, soon after the elections, when parties have committed themselves, the new constitution will have to give us a new political dispensation at local level. Such a situation is highly undesirable.

Some of the critical questions about local government to be answered before the elections take place are, amongst others, the following: The role of rural communities and traditional authorities in local government, the implementation of the principle of freedom of association, self-determination at local level, the fiscal powers of local authorities, matters pertaining to the establishment of stability and peace at local level and the identification of local communities.

*The FF believes that culturally homogeneous and language-bound groups at the local level should have the highest say, both within and outside the volkstaat. Political power should therefore be fully devolved to local authorities.

†If we are serious about bringing government closer to the people, or as close as possible to the people, we should consider exclusive powers for local authorities.

*The FF therefore requests that at the local level, both within and outside the volkstaat, provision be made for, among others: the diversity of population composition in each town and city, and the protection and extension of the rights at the local level of each culturally homogeneous and language-bound community.

This includes, among others: control over mother-tongue education; health services; the maintenance of local safety and security; the socio-economic upliftment of underprivileged communities and areas, including the subsidising of services in deserving cases; the promotion of cost-effective and efficient management at the local level, even through further privatisation; and a uniform taxation system. The FF accepts that communal services such as water and electricity supply can be handled jointly at substructural or regional level.

The principle of self-determination as contained in Constitutional Principle XXXIV goes to the core of the FF's policy on local level. While the Afrikaner has a responsibility to play a key role in the political development of Southern Africa and in the socio-economic upliftment of all the people in this region, and while the FF is not planning to shirk its responsibility in this regard, the FF, however, demands self-determination for the Afrikaner in his own volkstaat where he alone, within the framework which God has planned for us, can decide on his survival. The majority of Afrikaners will, however, for a long time continue to live outside the volkstaat.

While the essence of his survival is directly determined by government at the local level—this applies also to other peoples in South Africa—it is necessary that our people obtain peace of mind and feel safe. This can only happen when a community knows that it is itself responsible for the matters which influence it directly, such as its church, its school, its clinic, its safety and its municipal services, without the rights of others being prejudiced in this regard.

Mr J H DE LANGE: Mr Chairperson, I am going to respond to a few issues raised in this debate. I must say that it is always great fun having the hon member Mr Fourie in the House and participating in the debates. Of course, the only problem with it is that he can take any well-disciplined and well-reasoned debate and really enmesh it into a quagmire. At the end of the day it is really difficult to make out what the

NP policies and positions are on any issue after Mr Fourie has spoken. [Interjections.] Be that as it may, I must say that he is always good entertainment value, particularly at this time of the afternoon when we are all half asleep.

Maybe we should respond to some of the issues that he has raised. Firstly, he completely misquotes Mr Chabane. Under no circumstances has Mr Chabane said that the ANC should not be bound by the Constitutional Principles or not deal with nor in any way abide by them. Constitutionally, legally as well as politically, we are bound by the Constitutional Principles. What Mr Chabane said was simply that once this constitution has been drafted, then these Constitutional Principles will no longer be binding on any structure of Parliament and that those Constitutional Principles should not bind us any longer. If anyone followed our recent conference then they would have seen that this was a position which was taken at our conference. This straightens out that position.

Secondly, there is the matter of power-sharing. It is very difficult to make out what the position of the hon member Mr Fourie's party is on power-sharing. One day they want to walk out of the Government of National Unity and the next day they want to stay there for twenty years. [Laughter.] Therefore, it is very difficult for us on this side to make out what their intentions are. The NP has, on two occasions to date, wanted to walk out of the Government of National Unity and not on issues of principle but on issues and conflicts that have arisen in the Cabinet.

Let us deal with what Mr Radue says is a principle. What was the first principle? No NP members were given committee chairperson positions in Parliament. [Laughter.] Is that a matter of principle?

Mr A VAN BREDA: [Inaudible.]

Mr J H DE LANGE: Mr Van Breda says I am talking rubbish. [Interjections.] The second issue is the indemnity row.

Mr A VAN BREDA: Yes, it is a question of trust.

Mr J H DE LANGE: What principle do we have here? Mr Pik Botha tells us that there was no indemnity and some in the NP tell us that there may have been indemnity. What principle are we talking about? If Mr Fourie wants to take part in this debate, then he should do it on the basis of knowing what he is saying. I would like to say this to the hon member and to emphasise what our Deputy President has said. We in the ANC stand for undiluted majority rule within the purview of the concepts and parameters of the Constitutional Principles. We are bound by those principles and within those principles we stand for majority rule, and undiluted majority rule at that.

What I would like to say to Mr Fourie in Afrikaans, so that he can understand, is to take that word "magsdeling" or power-sharing . . .

*Write it on your stomach and wipe it off with a wet cloth, because you will never see it again! [Interjections.]

†I would also like to respond to Mr Smith on the matter of international mediation. We have told him many times that we agree that as far as the ANC, NP and IFP are concerned there was an agreement for international mediation. We also agree that he must go and discuss the matter with the political parties and come to an agreement on how to deal with it. However, under no circumstances will that process hold up Parliament or the Constitutional Assembly. When the political parties reach an agreement on those issues as political parties they can bring it back to Parliament or the Constitutional Assembly so that we can deal with it accordingly. That is our position on that issue.

I would also say to Mr Smith that I would not brag too much about his representations being submitted. If we had Mr Ambrosini and had a one-man show running, it would be easy for us to make our representations as well. We have definitely gone through a consultation process and that is what we abide by and have not, in any way . . . [Time expired.]

Mr P F SMITH: Mr Chairperson, on a point of order . . . [Interjections.]

The DEPUTY CHAIRPERSON OF THE CONSTITUTIONAL ASSEMBLY: Order! Mr Smith, I can hear you.

Mr P F SMITH: Mr Chairperson, on a point of order: I want you to note my objection to the statements made by Mr De Lange regarding the one-man band story. It so happens . . .

The DEPUTY CHAIRPERSON OF THE CONSTITUTIONAL ASSEMBLY: Order!

Sorry, that is not a point of order. Would you please take your seat. [Interjections.]

Mr A J LEON: Mr Chairperson, at the commencement of proceedings this afternoon we were told by the Chairperson of the Constitutional Assembly that the South African nation would be watching us. [Interjections.] Well, maybe that is a pity. [Laughter.] Whether that is a good idea or not, remains to be seen, because if South Africa expects us to take our task here seriously, then the question arises whether simply trading on the normal level of parliamentary heckling, interjection and point-scoring is the best way of preparing or proposing a constitutional vision. The people of South Africa will have to decide.

However, there is one thing that came to the fore today which I really think we must take seriously. It is something, I suppose, which is best called "the fallacy of genesis". Regardless of whether an idea is good or bad, there is a tendency—it is a natural tendency—just to dismiss it simply because of the person, the group or the party proposing it. If that is what we are going to do over the next year, then we should not go through this exercise at all. Then we must simply take the majority or two-thirds' view, push it through, and not actually have a debate or a constructive engagement. In fact, if one took a whole lot of the ideas that are percolating around on the constitution and constitution making, and one did not actually have the usual crowd of speakers and the usual parties associated with them, one would probably come up with some very surprising results, because there are good and worthwhile ideas which do not just happen to come from one particular forum in this Assembly. That, presumably, is the purpose of our deliberations over the next year or so.

The second issue which we should look at, is this: No constitution, however good it is, however we embolden it and however permissive it is, can actually deliver a better life for South Africans. No constitution can deliver a house, put bread on the table, or put children through school. People themselves and government programmes are going to have to address that from day to day. Equally, nothing in the constitution should prevent the realisation of a better and more worthwhile life for all South Africans. All a constitution can and should be, and its best purpose should be, is to provide a framework within which all that becomes attainable.

However, if we are going to put into our constitution the very necessary, immediate and urgent issues which we have to address today, then that constitution in and of itself is not going to be a document which is going to serve South Africa for the next 100 years or even 50 years, because those priorities, those programmes and those policies are going to change from time to time. If we looked at the majority party, which had a very important conference in Bloemfontein last month, we would find that the ANC's own constitutional position has significantly, if not radically, shifted in the past five years—say between 1989 and 1995. It perhaps bears a relationship in principle to what it was, but the detail—and the devil is always in the detail—has changed substantially.

We should not burden South Africa or South Africans with a constitution which contains the policies or even the paper promises—some would say—of today, but we must craft and forge a document which is going to last and which is going to be respected.

When American schoolchildren stand up in the morning and pledge allegiance to their constitution, they do not do so because of the specific detail, but because of the idea of what that constitution means and because of the protection it gives to each and every citizen. That is the kind of constitution that we in the DP believe South Africa deserves.

Mrs P DE LILLE: Mr Chairperson, I have to conclude the PAC submission for the day and I want to start by thanking the staff of the Constitutional Assembly and the two chairpersons for the work well done so far. I would like to make a few observations after listening to all the debates here this afternoon.

First of all, it is very strange today to listen to the proponents of federalism in this House. They are the very same people who used a unitary state very effectively to oppress us all these years. Now they have changed and they have realised that a unitary state and a strong central government will correct the imbalances of the past. That kind of hypocrisy causes people to change for the sake of change and not support. They must just say they do not support the RDP, because federalism means the destruction of the RDP—that is what federalism means to our country. [Applause.]

I want to put a question to the hon the Executive Deputy President Thabo Mbeki. For how long is he going to allow the NP to blackmail this country and our people? Then they are in the Government of National Unity, then they are out. The Executive Deputy President must use his right under section 95 of our Constitution to deal with them. The ANC can continue to rule as the majority party if they threaten to walk out now. [Applause.]

Listening to the debate here this afternoon, Mr Fourie is now saying that they want the Government of National Unity again, whereas in yesterday's debate they threatened to pull out. What message are we sending the people of this country? Confusion and more confusion! We are really asking the ANC-led Government and the Government of National Unity to do something about this. [Interjections.] No, if they want to pull out they must do so. [Laughter.]

In conclusion, the PAC also wants to restate our view that public participation is most vital for our people in this country. We must ensure that the submissions made by the public are published, considered and heard by political parties. Otherwise the R20 million which we are going to spend on public participation will be wasted. We appeal to the CA to put mechanisms in place that will allow and ensure that we achieve exactly that. [Applause.]

Mr L M GREEN: Mr Chairperson, hon members, there are two issues to which I would like to respond. These are the issue of the separation of powers, and the issue of an independent judiciary in a constitution. The ACDP also believes that another important principle which limits excessive power at central level is to ensure a division of functions and personnel between legislative, executive and judicial branches.

No person should serve in any two branches at the same time. This serves as an internal control of abuse of governmental power. While independent, these three branches should not be completely separate, but should band together through a system of checks and balances.

When coming to an independent judiciary, another check on sinful man's abuse of governmental power, is having a court system with judges independent of the executive or legislative branch and by having trials by jury. In a nation under law any violation of the law requires a judge. Wrongdoers must be punished and required to make restitution in order to deter crime. There must be an orderly process of justice in which the guilty are distinguished from the innocent. Judges should not only be knowledgeable of the law, but should also be honest. They should refuse bribes and not show any favouritism.

I also wish to respond to the hon member who referred to the ACDP's stand on the sexual orientation clause as not being conducive to the promotion of human rights. We believe that immorality should not be dressed up in the cloak of human rights to give it some decency. Both the Bible and the Koran condemn homosexuality outright. Believing, practising Christians and Muslims should not be a party to a constitution that would entrench this right. It is said that a democratic constitution should not legislate morality. Should we be silent if it protects immorality? We do not condemn homosexuals, but the practice of homosexuality, because it cannot be defended biblically.

The DEPUTY CHAIRPERSON OF THE CONSTITUTIONAL ASSEMBLY: Ladies and gentlemen, before I announce the final speaker, I would just like to draw the attention of all the members of Theme Committee 6 to the fact that documents for tomorrow's meeting have been placed in their pigeonholes. They have a very important international conference tomorrow and will need the documents that were placed in their pigeonholes during the course of the debate this afternoon.

Prof E S MCHUNU: Mr Chairperson, judging from what has been said from our side of the House, it is quite clear that it is the purpose of the ANC to create an equal person, equal opportunity society. To this end we believe it is necessary to reinstate in our constitution the ancient values which are enshrined in the old instruments of constitutional law, instruments such as Magna Carta, the Petition of Right and the so-called French Declaration of the Rights of Man.

The aim of the ANC's participation in government is that when its office comes to an end, as it must eventually do, we shall be able to view the social terrain and observe an equal, contented society composed of equal, contented individuals. It is because of this belief that the ANC rejects the FF's idea of exclusive local powers,

which is what they have been pleading for. It is also because of this that the idea of political truncation is unacceptable to the ANC.

The entrenchment of regional, political fiefdoms is unacceptable. Regional dictatorships are not compatible with freedom. Freedom is indivisible. We believe that the people of KwaZulu-Natal and other areas are just as much South African citizens as people from Cape Town, and they are entitled to the protection and help of the central Government in order to have their needs and aspirations addressed by that central Government. To this end we argue that the basic inequalities must be redressed by constitutional action. We do so in the knowledge that it is only by means of constitutional action that the imbalances of the past may be addressed, but we reject the principle of consensus as it has been purveyed in this Chamber this afternoon.

It is quite clear that a minority veto is not compatible with democratic majoritarianism, as Prof Asmal has indicated. We are of the view that although this constitutional device is sometimes used, it always creates a skewing of the democratic majoritarian will. Whether such a device is acceptable or not is another question altogether. Public law has been the terrain in which dictatorship was created in the past, which enforced suppression mercilessly in our country.

We need an urgent review of the public Statute Book of our country since people are exposed to government at that level. We are of the view that when governments act intolerantly, as our governments have done in the past, a whole miasma of intolerance is created and this, in turn, creates a denial of rights. It is in this context that we welcome the IFP's public commitment to pluralism in this forum, because the history of the IFP has not reflected the acceptance of pluralism.

The ANC would like to challenge the IFP to commit itself to democratic and constitutional processes, and to allow such processes to be opened up in Natal, thereby allowing a free election of local governments in KwaZulu-Natal. [Interjections.]

Mnuz V B NDLOVU: Sanishaya eNatali, MaCingwane! [Mr V B NDLOVU: We defeated you in Natal, MaCingwane!]

Prof E S MCHUNU: Ngiyamuzwa uGatsheni lapha ethi basishaya. [Uhleko.] [Ihlombe.] [I can hear Gatsheni saying that they defeated us.] [Laughter.] [Applause.] [Time expired.]

The DEPUTY CHAIRPERSON OF THE CONSTITUTIONAL ASSEMBLY: Ladies and gentlemen, allow me, in closing, to thank you all for your attendance and participation this afternoon. After having listened to the debates, I am sure that everybody knows that in order truly to become the constitutional fathers and mothers of the constitution of 1996, there is still a lot of hard work to be done. We rely on the participation, support and tolerance of all of you.

Debate concluded.

The meeting adjourned at 17:44.

ANNOUNCEMENTS, TABLINGS AND COMMITTEE REPORTS

ANNOUNCEMENTS:

The Chairperson of the Constitutional Assembly:

The following persons have been appointed to Technical Committees:

1. Theme Committee One:

   Prof H M Corder, Dr J C Heunis, Mr Z Husain, Prof E A Thomashausen

2. Theme Committee Two:

   Adv A M M Motimele, Prov V Dlova, Prof N Steytler, Prof D Van Wyk.

3. Theme Committee Three:

   Prof D Basson, Prof D Davis, Prof B Majola, Prof F Venter.

4. Theme Committee Four:

   Prof H Cheadle Prof J Dugard, Ms S Liebenberg, Prof I Rautenbach.

5. Theme Committee Five:

   Prof P Benjamin, Adv J Gauntlett, Mrs L Gcabashe, Judge P Olivier.

6. Theme Committee Six:

   Subtheme Committee 1:

   Ms L Nyembe, Prof P van der Merwe.

   Subtheme Committee 2:

   Mr C Rustomjee, Mr N Morrison.

   Subtheme Committee 3:

   Dr C Albertyn, Prof R Erwee.

   Subtheme Committee 4:

   Mr A Cachalia, Prof A Seegers.

7. Ad Hoc Technical Committee on Traditional Leaders:

   Prof C Dlamini, Ms T Madonsela, Prof T Nhlapo.

PROCEEDINGS OF THE CONSTITUTIONAL ASSEMBLY

Members assembled in the Chamber of the National Assembly at 14:20.

The Chairperson took the chair and requested members to observe a moment of silence for prayers or meditation.

AMENDMENT OF CONSTITUTIONAL COMMITTEE REPORT

(Draft Resolution)

The CHAIRPERSON OF THE CONSTITUTIONAL ASSEMBLY: With regard to the first item on the Agenda, I have the privilege of moving the draft resolution printed in my name as follows:

That the provisions of section 5.1.1 of the report of the Constitutional Committee dated 28 October 1994 and adopted by the Constitutional Assembly on 31 October 1994, be amended as follows:

5.1 Appointment

5.1.1 (a) Technical Committees assisting Theme Committees 1 to 5 shall consist of not more than four members; and

(b) the Technical Committee assisting Theme Committee 6 shall consist of not more than eight members, of whom not more than two shall be allocated to each Subrtheme Committee of that Theme Committee.

The background to this resolution is that the Constitutional Committee has agreed to increase the number of members of the Technical Committees, thus also making provision for the Subtheme Committees of Theme Committee 6.

Since this is a process matter, which the Constitutional Committee is empowered to decide on, the matter is put to the Constitutional Assembly without debate. The question before the Assembly is the draft resolution in the name of the Chairperson, which is Item 1 on the Agenda.

Agreed to.

PROGRESS IN CONSTITUTION-MAKING PROCESS

(Statement)

The CHAIRPERSON OF THE CONSTITUTIONAL ASSEMBLY: Order! The second issue we have to deal with is a progress report from the Deputy Chairperson of the Constitutional Assembly. In this regard I have the honour of calling upon Mr Leon Wessels to table the report.

The DEPUTY CHAIRPERSON OF THE CONSTITUTIONAL ASSEMBLY: Mr Chairperson, I wish to present the report, which has been tabled and which members have all received. I would, however, like to go through the report and highlight some of the matters that have been placed before this Assembly.

The first has to do with the Constitutional Committee. The Constitutional Committee has met since the previous session of the Constitutional Assembly and is scheduled to meet once again on 27 February.

The matter of the Technical Committees has been explained to the Assembly and we have just adopted what was suggested by the Subtheme Committee appointed to deal with the Technical Committees.

The Work Programme and the Public Participation Programme have received the attention of the Management Committee. It will still rest with the Management Committee to ensure that, as we learn from experience, we adapt to that specific programme. In this regard I would also like to report that at a meeting on 13 February I received reports on Block 1 of the Work Programme from two Theme Committees. That is the why this particular session will be used to listen to the progress that has been made in the Theme Committees. Once again, after the Progress Reports have been heard, the detailed reports will be referred to the Constitutional Committee where they will be discussed. This is, therefore, a session to keep members informed who do not serve on either Theme Committees or the Constitutional Committee. We wish to keep them informed in a transparent manner, as we indicated we would love to do during this process.

The Management Committee meets on a regular basis, mainly to deal with matters relating to the process. May I just refer members to point 1.3.4. It is not on 20 October that we shall be having these Progress Reports, but on 20 February, namely today.

As far as the Work Programme is concerned, the Constitutional Committee met on 2 December 1994, and received reports from the Theme Committees on their Work Programmes. These were compiled into a comprehensive Work Programme, which was referred to the Law Advisers and revisited. I merely wish to reiterate and emphasise that this Work Programme is flexible and will need regular evaluation and adjustment as the process unfolds before us.

We now have the benefit and knowledge of at least one particular Community Liaison Public Participation Programme activity, namely the launching of this whole programme in Paarl on 11 February. Gaining from that experience, we will continue to implement this programme as outlined during various meetings at Management Committee level. Community Liaison thus far has consisted mainly of a host of hearings and workshops which have taken place at the request of various Theme Committees. Further events of this kind are being planned.

As far as point 2.2.6 is concerned, we have had the launch of our media advertising campaign. A discussion did take place at the most recent meeting of the Management Committee with regard to the language in which *Constitutional Talk* was being published, and the gist of that discussion was that we should be sensitive to the multicultural nature of our society. A Subtheme Committee has been set up to attend specifically to that.

Up to the end of January we had received 700 submissions. These submissions are processed by the Administration and forwarded to Theme Committees. The concern has been raised that the reports received thus far do not contain reports on the substance of the public submissions in particular. Theme Committees have been requested to include this in future reports and to list all submissions from individuals and organisations by name.

As far as the drafting procedure is concerned, the Management Committee applied its mind to this matter on 10 February, and adopted a drafting procedure. The meeting noted the objection of the IFP. The details of this drafting procedure are being forwarded to Theme Committees. The principles which will guide the procedure are that political decision-making should guide the process as a whole, and that the new constitutional text should be drafted in simple language that can be understood by all. The drafting process will involve members of the Technical Committees, the Law Advisers and the Panel of Experts.

I take pleasure in tabling this report.

BRIEFING ON PROGRESS IN THEME COMMITTEES

The CHAIRPERSON OF THE CONSTITUTIONAL ASSEMBLY: We will now have presented to us reports from Theme Committees 1 to 6. Theme Committee 6 will present four reports from its various Subtheme Committees.

This is the first opportunity we have had to present the reports of Theme Committees to this Assembly. The presentation of the reports indicates that progress has been made. We have now started dealing with substantive issues. The Constitutional Committee still has to go through the various reports, discuss them, and present reports regarding recommendations and so on to this Assembly. The Constitutional Committee felt it was important that the progress made be reported to the Assembly and that an opportunity be given for debate or discussion on the various reports.

I call upon Mr Mahlangu to table the report of Theme Committee 1.

Theme Committee 1:

Mr N J MAHLANGU: Mr Chairperson, members of the Constitutional Assembly, it is a pleasure for Theme Committee 1 to present a Progress Report, which should not be regarded as a final report in this regard, but which shows what work has been done so far.

I may say that a supplementary report will still be filed with the Constitutional Committee. The report will deal with the public's submissions made thus far. The Technical Experts, together with the Subtheme Committee, are dealing with that, and this afternoon the Theme Committee will be considering that supplementary report. Further, more flesh will be given to contentious issues which are tabled in this report, and a

further supplementary report in that regard will also then be filed with the Constitutional Committee.

It is a pleasure for me to announce that Theme Committee 1, after long deliberations, has come up with a number of ideas which form the cornerstone of our new constitution. There has been consensus on this matter, except for the IFP which objected to the whole structure of the report.

In brief, the noncontentious issues which have emerged from the discussion concerned are the following. Firstly, the supremacy of the law, which means that the constitution will be the supreme law of the country which binds all organs of the State. Secondly, one will have a multiparty political system, premised on a regular and universal adult suffrage and common voters' roll.

Thirdly, fundamental rights shall be protected in an entrenched bill of rights, justiciable by an independent judiciary. Fourthly, the normative values underlying the constitution shall be accountability, democracy, equality, freedom and transparency. In the fifth place, there shall be a common South African citizenship. In the sixth place, elections shall proceed in general on the basis of proportional representation. The possibility of constituency representation shall be explored.

In the seventh place, South Africa shall be a sovereign, independent and undivided State. I must say that on this point parties felt that it must be noted that this shall not anticipate that the State will be structured along federal or unitary lines, nor shall it preclude any party from arguing in favour of federalism or unitarianism. In the eighth place, there shall be three levels of government, ie national, provincial and local. In the ninth place, there shall be separation of legislative, executive and judicial powers in the State. The executive shall be accountable to Parliament.

The tenth and last noncontentious point is the recognition and protection of collective rights of self-determination in forming, joining and maintaining organs of civil society, including linguistic, cultural and religious associations on the basis of non-discrimination and free association and possible constitutional provision for a notion of the right of self-determination by any community sharing a common cultural and language heritage, whether in a territorial entity within the State or in any other recognised way.

Further then, certain points which are still to be elaborated upon by the Theme Committee are the points of contention. I shall mention only a few. Among the contentious issues are the nature and extent of the powers of the various levels of government, whether Parliament shall have a bilateral or unilateral structure, Parliament's supremacy as a lawmaker, the nature and extent of representation and rights of cultural and linguistic minorities, including group self-determination, the constitutional entrenchment of minority party participation in government, and the content and constitutional entrenchment of participatory democracy.

Government shall be by majority rule. South Africa shall be a secular state. I must say that all parties were agreed on these noncontentious issues, except, as I have said, the IFP which challenged the entire structure and the content of the report.

I should also mention that Technical Experts are helping to shape the supplementary report which is to be considered by the Theme Committee later this afternoon after the adjournment of this meeting. It has been a pleasure to present this report for discussion. We shall accept any constructive criticism which will build on this cornerstone already agreed upon by the parties.

The CHAIRPERSON OF THE CONSTITUTIONAL ASSEMBLY: Thank you, Mr Mahlangu. I thank you for inviting criticism on your report. The second report, ie the report of Theme Committee 2, will be presented by Mr Rabie.

Theme Committee 2:

Mr J A RABIE: Mr Chairperson, it is a pleasure to table this report. By 30 January 1995 Theme Committee 2 had received submissions from the following parties, organisations and individuals. Party submissions came from the ACDP, the ANC, the DP, the FF, the IFP, the NP and the PAC. Submissions by organisations were received from the ANCC (African National Council of Churches), the EFCSA (Evangelical Fellowship of Churches of South Africa) and the ODISA (Organisation Development Institute of Southern Africa). Individual submissions came from

O Bothma, R Brijraj, A Carser, M S Dimba, K Gottschalk and P N Stratten.

Theme Committee 2 is required to give effect to Constitutional Principle VI in the new constitutional text, namely:

> There shall be a separation of powers between the legislature, executive and judiciary, with appropriate checks and balances to ensure accountability, responsiveness and openness.

It is understandable that many submissions on the separation of powers also focused on aspects of the structure of government which is the next subject for detailed information-gathering and report by Theme Committee 2. The Theme Committee will not report on this latter aspect of the submissions at this stage but will confine its report to the issue of the separation of powers.

The following areas of agreement were identified with regard to the separation of powers. There was general agreement in the submissions that the new constitution should contain specific provisions in which the separate legislative, executive and judicial powers are vested.

With regard to the legislature it was agreed that there should be a parliamentary form of government. Parliament shall be the expression of the will of the people. The legislative authority of the Republic shall, subject to the constitution, vest in Parliament which shall have the supreme power to make laws for the Republic. The constitution shall make specific provision for an executive authority. The executive shall be accountable to Parliament.

With regard to the judiciary it was agreed that there shall be an independent, impartial judiciary, subject to the constitution. There shall be an independent constitutional court with the power to nullify any Act of Parliament if such Act is in conflict with the constitution.

It was agreed that there should be checks and balances to restrain each branch of government, but these checks and balances will be revisited and tabulated under Blocks 2 and 3.

The Theme Committee furthermore decided to place advertisements for submissions from political parties and the general public on the Structure of Government both at national and provincial level. The closing date for party submissions is 22 February 1995 and for public submissions 10 March 1995.

The CHAIRPERSON OF THE CONSTITUTIONAL ASSEMBLY: Order! I am informed that the interpreting system has developed a virus and they are working on it now. Will those who are having difficulty in obtaining translations kindly bear with us, as the technicians are at present working on the interpreting system.

Theme Committee 3:

Mrs P DE LILLE: Mr Chairperson, the Theme Committee has re-ordered its programme in terms of the following headings: Firstly, the Nature of Systems of Provincial and Local Government; secondly, National and Provincial Legislative and Executive Competencies; thirdly, Local Government; and fourthly, Fiscal and Financial Matters. We have also created a Miscellaneous category to include, *inter alia*, overlapping matters such as the Senate.

All parties, except the ACDP which waived its right, made submissions to Block 1. Arising out of the nature of these submissions and in anticipation of meeting future needs, it was decided that parties' submissions should preferably follow a predetermined framework.

On 8 February 1995 a one-day workshop was convened and facilitated by two discussants: Mr Richard Humphries and Prof Willie Breytenbach. Members benefited greatly from the intensive deliberations on both basic constitutional models and key concepts.

The Theme Committee's report is divided into two parts. The first one will deal with party submissions and the one covering submissions from civil societies will follow later. In the light of South Africa's specific situation, the Theme Committee asked the questions: To what extent does our history have a bearing on the constitution and what historical considerations and factual elements should be taken into account? We then identified as a noncontentious issue the fact that South Africa is a deeply divided society with huge social inequalities. We also identified as a contentious issue the fact that the different regions of South Africa have distinct identities. For example, the people of KwaZulu-Natal in particular have a distinct political identity in wishing to preserve the autonomy of the Kingdom of KwaZulu-Natal.

Under Democratic Principles, we asked the question: What are the fundamental principles of democracy which should shape the system of

provincial government? We identified as a noncontentious issue the fact that the constitution in its entirety shall be the supreme law of the land. Identified, among others, as a contentious issue is the fact that uniformity is a vital national objective to pursue in the context of massive disparities and inequalities which prevail in South Africa. I am just quoting one or two of the contentious and noncontentious issues, because the hon members have a copy of the full report in front of them.

Under Provincial Government Principles, we asked the question: What are the principles which should shape the system of provincial government? As noncontentious we identified the fact that there should be democratic structures of government at national, provincial and local level. Under contentious issues, we identified the principle of subsidiarity and various formulations thereof, and there members can refer to the parties' submissions.

Under Elements of a Provincial System, as to what characteristics should to be taken into account in addressing the system of provincial government, we have identified the boundaries of provinces, the number of provinces, whether they want to maintain the existing nine provinces, government structures, etc. Under contentious issues, we identified the point that provincial constitutions shall determine any matter relating to the organisation and operation of the legislative, executive, judicial and administrative branches of the provincial government.

We also created a column under Miscellaneous and the Theme Committee has not fully discussed the issue of Transitional Measures and the Senate.

Section II of our report deals with Local Government and again we followed the same framework. Of South Africa's specific conditions, one is listed as noncontentious. We all agree that there is a universal demand for the transformation of local government in South Africa. South Africa's past experience of apartheid-based local government entailed a massive differentiation between Black and White local government in the areas of legitimacy, resources and service delivery.

Under contentious we identified that the viability of corporate self-determination as a method for furthering the rights of self-determination of linguistic, cultural and religious minorities shall be explored. We also identified that there is a need to discourage political mobilisation on the basis of race, ethnicity or language, and especially to prevent State power at any level from being used for purposes of ethnic or racial domination and intolerance.

Under Principles of Local Government we all agreed on the following as noncontentious: That local government shall be elected on the basis of universal suffrage. As contentious we identified that local government must be entitled to regulate its own affairs within the context of the national policy.

Then we have also identified elements of local government as being noncontentious. The Constitution shall provide the framework as prescribed in Constitutional Principle XXIV. The elements we have identified as contentious are: In order to reflect local administrative needs and pluralism, the national constitution should entrench the notion that local government should be entirely regulated by means of provincial constitutions and legislation.

Theme Committee 4:

Mr R J RADUE: Mr Chairperson, Theme Committee 4 is, of course, charged with receiving and reporting on submissions on Fundamental Human Rights and it has submitted its report to the Constitutional Committee. That report is before members.

Suffice it to say that Block 1 of the Theme Committee's Work Programme dealt with Constitutional Principle II in Schedule 4 of the interim Constitution. The report was submitted to the Constitutional Committee within the timeframe required; however, two aspects of Constitutional Principle II, namely the question of "universally accepted fundamental rights" and the question of "juristic persons", were not finalised at the time of the original report. These questions were referred to the Technical Experts of the Theme Committee and are to be the subject of a supplementary report to the Constitutional Committee. This fact was recorded in the original report.

The Constitutional Committee considered the report and referred it back to Theme Committee 4 with the request that it be amended to include a statement dealing with any relevant public submissions. Although numerous submissions have

been received on Fundamental Human Rights from the public, none of these, in fact, specifically dealt with the issues raised by Constitutional Principle II. We have, however, amended that report to include a statement to this effect and have noted that, as we proceed with our work in future, we will draw from the guidelines already laid down by the Constitutional Committee and make certain that we include such details in the future.

Next week Theme Committee 4 will conclude its work on the supplementary report and on the outstanding issues in Block 1, and will also debate the nature and application of a bill of rights. Party submissions in this regard have, in fact, already been received. A deadline of 27 February 1995 has also been set for party submissions on Equality which is the first substantive fundamental right to be dealt with by Theme Committee 4 in Block 2.

The Technical Committee of four experts has begun its work by submitting papers on the two concepts of "universally accepted fundamental rights" and "juristic persons" to the Theme Committee. The Technical Committee has also framed a series of questions to assist the Theme Committee and the Secretariat in framing an advertisement for public submissions in respect of Block 2. The Technical Committee has also been requested to process all public submissions and to categorise the issues raised in those submissions into the relevant Blocks of our Work Programme.

Generally speaking, Theme Committee 4 has found its feet, it has begun to acclimatise to its task and the spirit among the members is very good. To date we have dealt with general principles, theories and concepts. We will shortly begin to deal with individual substantive fundamental rights.

In conclusion, may I raise just a few matters which have given us some difficulty. On the question of sufficient notice we in the Core Group just today received an injunction from Management that we, Theme Committee 4, must send two delegates to each of the six provincial constitutional public meetings on Saturday, 25 February, that is next Saturday.

Our Theme Committee is only meeting next Monday, 27 February 1995. Members of our Core Group met this morning. We are all busy parliamentarians and have parliamentary and party commitments. Every one of our Core Group members had long standing commitments for this coming Saturday, 25 February. The Constitutional Assembly letter, dated 16 February, was not able to provide any details of the venue of the proposed meetings. Theme Committees and their members must be given reasonable notice of any such proposed gatherings in future, in order for us to do the job properly.

Another aspect is the Public Participation Programme. Theme Committee 4 is still grappling with ways and means of implementing this programme efficiently and properly. With the busy parliamentary programme, members are finding it difficult to conceive of Theme Committee outreaches to outlying areas of South Africa. When can we go? Who will organise the workshops locally, and how can we get away from Cape Town? These are practical problems for the members and we must look at them more clearly and more carefully.

Finally, a small but important administrative malfunction came to my notice today. The Administration of the Constitutional Assembly is not functioning efficiently enough in regard to our experts and their private arrangements. Two experts arrived, one last night and one this morning, to attend our Core Group meeting. No one was at the airport to pick either of them up. Furthermore, last night's accommodation for the one expert had not been reserved. They had to make their own arrangements. This is something that must be sharpened up or it will affect our Theme Committee's work, especially if the experts arrive too late for the meetings. In the circumstances, apart from these hiccups, Theme Committee 4 . . .

Ms Y L MYAKAYAKA-MANZINI: Mr Chairperson, on a point of order: I participate in Theme Committee 4 and right now Mr Radue is giving his own opinion whereas he is supposed to give a Theme Committee report. [Interjections.]

The CHAIRPERSON OF THE CONSTITUTIONAL ASSEMBLY: Thank you, Ms Manzini. Mr Radue, if this matter was not raised in your Theme Committee Core Group, I think . . . [Interjections.] Could members be quiet, please. I think it is a matter that one could raise during the open time debate today. If there has not been consensus in your Theme Committee that this matter should be raised as you are

raising it now, I would request you not to proceed in raising that matter, but you can raise it during open time today.

Mr R J RADUE: Mr Chairperson, I understand. It was raised in the Core Group this morning and there was consensus.

The CHAIRPERSON OF THE CONSTITUTIONAL ASSEMBLY: Was there consensus?

Mr R J RADUE: Yes, there was.

The CHAIRPERSON OF THE CONSTITUTIONAL ASSEMBLY: Well, if there was consensus then very well. [Interjections.]

Mr R J RADUE: Thank you, Mr Chairperson, that concludes the Theme Committee report. [Laughter.]

The CHAIRPERSON OF THE CONSTITUTIONAL ASSEMBLY: Thank you, Mr Radue, may I say that the issues you have raised, the concerns that have been raised, will be noted and will certainly be attended to. An apology has to be given to the experts who had to wait at the airport. We will go into that matter and find out what led to it.

We will now proceed to ask Mr Hofmeyr to give a report on Theme Committee 5.

Theme Committee 5:

Mr W A HOFMEYR: Mr Chairperson, in Theme Committee 4 we have consolidated the work of . . . [Interjections.]

An HON MEMBER: Theme Committee 5!

Mr W A HOFMEYR: I am sorry! I meant to say Theme Committee 5. [Laughter.] I was listening too intently to the debate.

We have consolidated the work done in Blocks 1 to 4 into one entity, because we found that the topics we were dealing with overlapped to a large degree, and that many of the submissions we got dealt with different issues from the first four Blocks. We will only submit our first formal report at the end of Block 4, and from there on we will follow the same pattern as the other committees.

Public participation in our committee has taken a number of forms. Over the past three weeks we have had an intensive programme of hearings, listening to evidence from various interested groups in the legal sector. We have thus far heard from 12 organisations or institutions represented by 24 people. Our plan is to have this process culminate in a workshop to be held at Unisa, in Pretoria, on Monday, 27 February, to which all the main role-players have been invited. We hope that at that meeting we will start to crystallise the various issues which have been raised in the submissions which were made to us.

On February 28, while still in Gauteng, we will have three public participation events. We will be visiting a community court in Alexandra, we will be going to the University of the Witwatersrand where we will meet legal professionals, and we will hear submissions from the public in Johannesburg.

I am going to list some of the issues which have been submitted to us, not in the form of contentious or noncontentious issues, because we have not progressed sufficiently to classify them as such. However, there are issues on which various views have been expressed.

The first one is: How detailed should the constitution be in the future? There is a feeling amongst a number of role-players that there is too much detail in the Constitution at the moment, and that it should rather spell out only the broad general principles.

The second issue which has arisen is: Which courts should have constitutional jurisdiction? Firstly, the issue has been raised as to whether we should continue to have a separate Constitutional Court and Appellate Division. Secondly, if there is a separate Appellate Division, should it have constitutional jurisdiction or not? Thirdly, the issue has been raised as to whether the Supreme Court should have the power to overturn national legislation or to declare it unconstitutional. At the moment it does not have that power. Lastly, under that point, the issue has been raised as to whether members of the public should have direct access to the Constitutional Court on certain issues, without having to go through lower courts, or by going through only limited lower courts.

The second major issue which has been raised is whether the current split between the judiciary or the Supreme Court and the lower courts or magistracy should be retained, or whether we should have a single system of judges that will include all the magistrates as well. I am not going to elaborate on that.

The next point is whether there should be changes to the structure of the Supreme Court and, in particular, the question has been raised as to whether a provincial division of the Supreme Court should be vested in each of the provinces.

The next point deals with the composition of the courts and the appointment of judges. The issue has been raised as to whether the constitution should specify certain qualifications or attributes for appointment as a judge, and whether these qualifications should be the same for constitutional judges and other judges or whether they should be different.

The issue about the method by which judges should be appointed has been raised. Firstly, the members of a judicial service commission appoint those people at present. The question has been asked whether we should retain that commission. Secondly, if the commission were to be retained, it was suggested that its composition should be changed. Thirdly, the issue about what role should be played by career judicial officers has been raised. Fourthly, the question has been raised whether the provinces should play a role in the appointment of provincial judges.

The final submissions relate to access to courts and how the constitution can assist in that area, whether we should make more definite provision for financial assistance for legal advice, whether we should give recognition in the constitution to new types of courts, such as community courts and, finally, whether the constitution should contain some provision to provide for lay participation in the courts, either in the form of juries or in the form of lay assessors.

Subtheme Committee 1 of Theme Committee 6:

Mr I VADI: Mr Chairperson, our Subcommittee's work began with a two-day information seminar on public administration and the constitution, which was held on 25-26 January this year.

On the first day, six international experts provided us with information on the structuring of the civil service in the US, Britain, France, Germany, Italy and the Netherlands. On the second day, a panel of South African experts critically evaluated our own Public Service, focusing on its structures, powers and functions.

The information gleaned from the seminar was used to draft a framework report for our Subtheme Committee. It is a consensus document which has been supported by all the parties. This has been submitted to the Constitutional Committee as our first report.

This document sets out a broad framework for a constitutional dispensation on a future public service in South Africa. In addition, it has identified a number of key issues that need to be debated by political parties in the committee.

The report has also been distributed to major stake-holders and role-players in the public sector to elicit responses from them and to assist them in preparing further submissions to our Committee. Over the next few weeks our Committee is to embark on an extensive programme of public hearings and consultations with governmental and nongovernmental organisations.

Structures such as the Volkstaat Council, the Public Service Commission, the Ministry for Public Service and Administration, the Provincial Services Commissions, the Directors-General's Forum, the Public Service Bargaining Chamber and several local government and civic structures have been invited to present oral evidence to our Subtheme Committee. At present we are in the process of scheduling these public hearings.

There has been a steady flow of written submissions from the public over the past few weeks. We have received a total of 25 submissions to date, of which two are from political parties, namely the ANC and the IFP, 20 from individuals and three from nongovernmental organisations. These submissions are being processed by our Technical Experts and a synthesis report is to be made available to us on Friday this week.

As far as the media is concerned, we intend arranging a debate on the Public Service on *Agenda* on TV1 and several talk shows on radio. We seek clarity from the Constitutional Assembly's media liaison section with regard to practical arrangements and also on who should take responsibility for organising these media programmes.

Finally, we intend submitting our final report to the Constitutional Committee by 29 March this year, after which we intend addressing the issue of the South African Elections Commission.

Subtheme Committee 2 of Theme Committee 6:

Dr R H DAVIES: Mr Chairperson, Subtheme Committee 2 deals with financial institutions and public enterprises. It is covered by Constitutional Principles XXVII and XXIX which will require the establishment of a Reserve Bank, an Auditor-General and a Finance and Fiscal Commission, and also that provision be made in the constitution for the independence and impartiality of the Reserve Bank and the Auditor-General's office.

We have decided to operate in the following way. We will deal with the Reserve Bank, the Auditor-General and the constitutional provisions relating to the Budget at the end of Block 5. At the end of Block 10, we will deal with the more complicated question of the Finance and Fiscal Commission which is a new institution, and which is related to the issue of financial relations between levels of government. We will also deal at that stage with any proposals which we may receive for constitutional provisions in relation to public enterprises.

Since there are constitutional principles and since there has been considerable negotiation around these clauses in the interim Constitution, there is in fact a fairly wide level of support for consensus on the idea that the Reserve Bank and the Auditor-General should have administrative autonomy, and be free from partisan interference. There is, however, also a view that this does not mean that these institutions should be isolated from the broader society, and that they should not be subject to accountability.

Given this situation, most of the submissions which we have received so far, both from interested parties in broader society and from political parties, have proposed relatively small amendments to the text in the interim Constitution rather than proposals which would drastically alter what is there. Some of the proposals would move in the direction of giving greater strength to the idea of independence and autonomy for these institutions, whilst others would firm up provisions on lines of accountability, and on the relationship to the broader society.

Since there is a fair degree of consensus, we have decided that the parties will, in their submissions which are due on the 22 February, spell out in some detail precisely what kind of changes they are proposing and why.

Although we have given quite a considerable amount of notice to the broader society, we are actually facing a situation in which the rate at which we have received submissions is rather slow. Since all the political parties have indicated that they are willing to be influenced by the debate in the society outside, this is a pity, because we are faced with the possibility of having to make our reports without the benefit of the rate of submissions which we would like.

The Finance and Fiscal Commission, as I have said already, raises fundamental issues about the financial relations between different tiers of government, and is a new body which has only begun functioning. We will be asking for submissions to be made to us later in the programme, and we are hoping to be able to present a report on this at the last block in June.

Subtheme Committee 3 of Theme Committee 6:

Ms B KGOSITSILE: Chairperson, the Subtheme Committee's programme for Blocks 1 and 2 has been to embark on a series of information seminars on transformation, monitoring and evaluation in order to familiarise members with the central issues and debates of the four specialised structures under the Subtheme Committee.

The seminars highlighted matters arising from the international as well as the South African experience with regard to these structures. These seminars served as a mechanism for members to isolate gaps in the way these structures operated in the past, and in the way they have been provided for in the present interim Constitution.

It is our intention to give a basis for the Constitutional Assembly to agree on the best way for these structures to be provided for in the new constitution. The structures we are dealing with are the Human Rights Commission, the Commission on Gender Equality, the Public Protector and the Commission on the Restitution of Land Rights.

The following common threads have emerged from these information seminars. Firstly, many of the provisions in the interim Constitution are too narrow in their conceptualisation of these specialised structures. The Subtheme Committee has thus decided to broaden its scope of discussion, in particular with reference to the Commission on Gender Equality and the Commission on the Restitution of Land Rights. This

has been endorsed by Theme Committee 6 as a whole.

In terms of the former it has been decided that the role of this commission needs to be examined within the context of the need for a broader national machinery for gender equality, as well as in relation to the other structures---especially the Human Rights Commission.

With regard to the Commission on the Restitution of Land Rights, the current commission in the interim Constitution deals mainly with the issue of land restitution. We have thus decided that our discussions need to go beyond the area of restitution, so as to include mechanisms that will facilitate dealing with the matter of land hunger. We have also proposed a workshop for April, the brief of which will be to examine in particular the experience of other African countries and Australia in terms of how they dealt with the issue of land hunger.

Secondly, the provisions in the interim Constitution give too much detail and I think that this issue has also been raised by Theme Committee 5. We find that there is too much detail on the role and structure of commissions that are provided for in the interim Constitution.

The third issue is that there is a need to take a broad look at the central issues before examining the necessary structures which would give effect to transformation, monitoring and evaluation. For example, we found that when we had the information seminar on the Human Rights Commission it became necessary for us to look at the issue of the rights themselves. The debate was broader than the structure, actually dealing with what rights would be provided for in the bill of rights in the new constitution.

The issue of socio-economic rights in particular was raised quite sharply, because it was felt that we should relate the work of the Human Rights Commission to those rights that are of relevance to the lives of the majority of the people in this country. Hence the need to actually address the question of the provision of socio-economic rights in the bill of rights of the new constitution.

The fourth issue is that there is a need to look at the interrelationship of the different specialised structures so as to ensure that there is no duplication of roles.

Fifthly, the role of these structures overlaps with the work of other Subtheme and Theme Committees. This issue has emerged in particular in our discussions on the Public Protector. We have thus resolved to set up meetings with other Theme Committees in order to ascertain whether they are considering the issue of the Public Protector.

The following meetings have been proposed. Firstly, a meeting with Theme Committee 2 in order to ascertain whether they have conceptualised the relationship between the Public Protector and Traditional Authorities. A second meeting will be with theme Committee 5 in order to ascertain whether they have conceptualised any role for the Public Protector with regard to supervision of the courts. Thirdly, we are arranging a meeting with Subtheme Committee 1 of Theme Committee 6 in order to ascertain how they have considered the role of the Public Protector with regard to the Public Service. In the fourth place there will be a meeting with Subtheme Committee 4 of Theme Committee 6 so as to ascertain how they have considered the role of the Public Protector with regard to the security apparatus in the country.

The CHAIRPERSON OF THE CONSTITUTIONAL ASSEMBLY: Order! I shall allow the hon member one more minute.

Ms B KGOSITSILE: Mr Chairperson, I am about to wind up with a word about our future Work Programme. We have rearranged this Work Programme in such a way that the first report to the Constitutional Committee will only be completed at the end of Block 4.

Subtheme Committee 4 of Theme Committee 6:

Ms J A SCHREINER: Mr Chairperson, our deliberations so far have focused mainly on submissions from political parties, dealing with Accountability and Control of the Security Apparatuses. We have had information seminars and in addition we have taken a decision to be pro-active in soliciting submissions for the blocks that we are going to go into from here, dealing with police, intelligence and defence in more detail.

In addition, we have decided to hold provincially-based public hearings in relation to the security apparatuses at a stage when we are more or less in control of our current Work Programme. So far, our information seminars have

dealt with correctional services and the location of the correctional services within the constitution, and that is a point I shall return to later on.

Secondly, we focussed broadly on accountability and control in relation to intelligence, defence and police. We are in the process of planning an information seminar which would look at policing in more detail and what needs to go into the constitution relating to policing. We shall follow that up with a similar information seminar dealing with defence and the same with intelligence.

At the moment we are preparing a report on the first topic of our work, which is Accountability and Control. I encourage members who are interested in this area to get copies of that draft from their representatives on the Subtheme Committee, and to feed into the process of discussion thereof.

We have reached a fair degree of agreement on the basic approach. Firstly, the constitution should cover principles and not operational details of security apparatuses. However, in a South African context, given our history and the role that the security forces have played in our history, we may need more detail than one would expect in the constitution of an established democracy.

Secondly, there is agreement that the constitution is the supreme law, it must be binding on security apparatuses and should stipulate that security apparatuses may not act on their own and bypass Parliament and the executive. Neither can the executive use the security apparatuses to violate the constitution.

In addition, areas that we have reached agreement on relate to powers around the state of emergency, the suspension of human rights in that context and the right of the legislature to review or overturn that declaration. Similarly, we have agreed on powers in relation to a declaration of war, and again Parliament's right to confirm or reverse that decision.

In addition, the areas of multiparty parliamentary oversight for defence and intelligence have been agreed upon. Clear lines of political accountability, command and operational accountability having been agreed upon as an important part of what the constitution covers. There is agreement on the need for ombudspeople to be defined for each of the security apparatuses, the need for the constitution to deal with the restriction of human rights for members of the security apparatus and the need to explore alternative measures for the resolution of disputes within the security forces.

In addition, there is agreement that there should be a code of conduct covering the members of the security apparatuses, that party political activity within the security apparatuses should be prohibited by the constitution and that involvement of the security forces in partisan political life should also be prohibited.

Finally, agreement has been reached on the importance of the members of the security apparatuses being properly educated about South African law, the constitution, human rights and international law on armed conflict.

The emerging points of contention have related to national and provincial powers relating to the police and defence, the provincial powers of declaring a state of emergency, as well as the definition of the national interest and how that relates to the action mandates of each of the security apparatuses. Furthermore, they have related to rights of members of security apparatuses in terms of membership of political parties and political activity.

Finally, there are three areas where our work overlaps with or relates to work of other Theme Committees. The first is the issue of correctional services and whether it does in fact fall within the ambit of the security apparatuses or whether it fits more easily into that section of the constitution dealing with the judiciary and the legal system. On that issue we request that there be a meeting with Theme Committee 5, to explore the debate in more detail.

Secondly there is a proposal that there be a security apparatus service commission, and that members should not fall under the Public Service Commission. This calls for a meeting with Subtheme Committee 1 of Theme Committee 6 to resolve that issue.

Finally, the point that Subtheme Committee 3 of Theme Committee 6 has already referred to, we need to deal with the question of the relationship between the ombudspeople or inspectors-general, the Public Protector and the Human Rights Commission.

The CHAIRPERSON OF THE CONSTITUTIONAL ASSEMBLY: Order! I wish to thank all the members who presented reports on behalf of their Theme Committees. We now have 30 minutes of open time debate, in which hon members will have an opportunity to comment on any subject, either by making suggestions or by putting forward any criticisms they might have.

There is no limit as to the contributions, but the total time allocated to each party will be in proportion to their strength in the Constitutional Assembly, reflected by their representation.

I now give hon members the opportunity to participate in this open debate on the work of the Constitutional Assembly. I do not have a list of speakers, therefore those wishing to speak may raise their hands, and we shall recognise them. Members should identify themselves. I think Mr Smith at the back there has raised his hand. He may speak.

OPEN DEBATE ON PROGRESS IN THEME COMMITTEES

Mr P F SMITH: Mr Chairperson, as this is a report-back, I think it would be useful to inform members about why we reject the reports, in the light of one or two comments that were made by previous speakers. I will not take long. I just want to present a synopsis of what is at stake.

There are six reports in total, and we have no problem with those that are merely Progress Reports. However, of the reports on substance, of which there are four, we have no problem with the report of Theme Committee 3, but are unhappy with the reports of Theme Committees 1, 2 and 4. Last week at the Constitutional Committee meeting, we urged that Committee to reject the reports and refer them back to the Theme Committees with the instruction that they be redrafted before they were resubmitted. That is still our position, and we request that this be done.

The problem that we have is very simple. If one takes the reports—let us concentrate on the report of Theme Committee 1 as an example—they lack the detail which is required of them in terms of the Constitutional Assembly's own resolution. Secondly, the reports tend to subsume the positions of parties into vague generalisations, something which we believe is not a useful exercise. Thirdly, the reports do not have anything on the submissions of civil society.

I wish to refer members to the big, thick document which they should all have in front of them. If members would take the liberty of looking at page 11 of that document, they would see a list of nine points presented by one particular party. Each of those nine points is included in the Theme Committee's report.

If they then turn to page 8, they will see another party's report which comprises three pages of points. Of that party's submission, only the first sentence of the first paragraph and one sentence in the second paragraph are included in the Theme Committee's report; the rest is totally ignored. When we say that the reports lack detail, this is just the kind of thing that we are referring to.

Having said that, this is perhaps an appropriate moment to thank the Secretariat of the Directorate for having taken cognisance of our concerns. Members are all aware of the document presented to the House, which comprises guidelines for the drafting of reports. We believe that the guidelines are very useful, and we are happy to accept them as is, even though I am sure there will be room for improvement as we go along. However, we suggest that is the spirit that . . . [Time expired.]

Dr P J STEENKAMP: Mr Chairperson, my name is Johan Steenkamp from the National Party, and that is my whole point—National Party. Could I request that in future documentation we should be referred to as National Party rather than Nationalist Party, as it appears in today's document. [Laughter.]

The CHAIRPERSON OF THE CONSTITUTIONAL ASSEMBLY: Thank you, Dr Steenkamp. Your point will be noted and corrected.

Mr M S MANIE: Mr Chairperson, this is the old ANC and I am Salie Manie. [Laughter.] I would like to refer to paragraph (k) under noncontentious points in the report of Theme Committee 1. This is an amended report of two pages which was handed out. I am not sure if everybody has this copy, but I would like to read from it quickly. It states the following:

> The recognition and protection of collective rights of self-determination, informing, joining and maintaining organs of civil society,

including linguistic, cultural and religious associations on the basis of nondiscrimination and free association . . .

I do not even want to continue with the sentence, because the point I wish to make is that in reading this report one does not know what the intention of paragraph (k) is. If the intention is that it should make allowances for certain things, then I think that it is very ambiguous. I wonder, even if it is seen as a noncontentious point, if this Assembly cannot agree that this point be rewritten so that people can understand it when they read it, because it is too difficult to understand it as it now stands.

The CHAIRPERSON OF THE CONSTITUTIONAL ASSEMBLY: This is a suggestion that Mr Manie is making to Theme Committee 1 and it will be noted. We will request Theme Committee 1 to apply their minds to this issue once more.

Dr C P MULDER: Mr Chairperson, I think I can help Mr Manie. The fact that this point was drafted in this fashion is simply because it is in line with the wording of the Constitutional Principle itself. I would rather warn against our trying to rephrase Constitutional Principles, because by doing so we will have to do so with all principles, and that is dangerous. The reason it was phrased in this fashion was in order to stick to the Constitution and I would suggest that we keep it like this.

The CHAIRPERSON OF THE CONSTITUTIONAL ASSEMBLY: Thank you for clarifying this issue, Dr Mulder.

Ms M SMUTS: Mr Chairperson, I have a question for Subtheme Committee 3 of Theme Committee 6, and want to put it to Ms Kgositsile. May I ask whether in the process of consulting other parties in order to ascertain their conceptualisation of various things, the Subtheme Committee has considered consulting the Minister of Labour, although he stands outside the constitution-making process. It is very difficult to decide and to know to what degree a future Gender Commission and also the present one, which has to be constituted under the interim Constitution, ought to address the role of an equal opportunity commission.

I have hunted high and low in the new Bill dealing with labour for the resolution or conciliation of individual discrimination disputes and found that this matter is clearly not addressed in this Bill. However, one does need to know, although this falls outside the constitution-making process, whether the Minister is going to address this matter. If such a body is to be set up, then this perhaps deals with the matter. However, if it is not, then one has to think of this matter.

The CHAIRPERSON OF THE CONSTITUTIONAL ASSEMBLY: I do not know whether Ms Kgositsile would like to respond to this issue. I take it that this point goes even beyond the Minister of Labour. It could also involve those civil society organisations that have something to do with labour matters, including trade unions.

Ms B KGOSITSILE: Mr Chairperson, you are correct in pointing out that the degree to which the work of the Government and the Ministries impacts on women's lives needs to be looked at. I wish to go back to the issue of this not really being an issue for the Commission on Gender Equality. In my report I said that we are now looking at the concept of a national machinery. If we are to have a Gender Commission, it should be within the context of this machinery.

We have not come up with what this machinery will consist of. We are not looking at such a commission in the new constitution. We are aware, however, that there is one in the interim Constitution. In terms of the new constitution, we are looking at the broader concept of this machinery. Perhaps we will then have a commission as part of this machinery.

Ms M P COETZEE: Mr Chairperson, I would like to ask Theme Committee 4 what they discussed in their report under contentious and noncontentious issues.

Mr R J RADUE: Mr Chairperson, the report has already been tabled and I assume, therefore, that members have already read this report. One of the contentious issues arose simply from the question of the wording of Constitutional Principle II, namely the word "everyone" and what it means. The question was whether this word covered individuals or juristic persons. This matter is still the subject of debate in the committee.

The other matter which has been labelled as contentious is the question of the vertical and horizontal application of rights. Will these be vertical, horizontal or both? This question is very important and is a contentious issue. There is no

contention in regard to the actual applicability of the United Nations Universal Declaration on Human Rights and other international covenants. We are going to look at all these issues when we make our decisions. Another contentious issue was the question of universally accepted fundamental rights. This too is still being debated in the committee.

What was not contentious, however, was that the bill of rights should be entrenched, justiciable and enforceable. It was also agreed that other organs of enforcement like the Human Rights Commission should be looked at. All the parties supported a very strong and independent judiciary. The parties further agreed that there should be a provision allowing for further additions to be made to the bill of rights. This suggestion was made by the FF and the IFP.

I have already dealt with the question of the outstanding issues in my previous report, but basically these were the issues that were contentious and noncontentious.

The CHAIRPERSON OF THE CONSTITUTIONAL ASSEMBLY: Order! Would Dr Rabinowitz like to ask a question? The IFP has already exhausted its speaking time, but I will allow her so speak.

Dr R RABINOWITZ: Mr Chairperson, some of the Theme Committees are not willing to give details in their reports, in particular the one dealing with the most sensitive issue, namely the federal versus the unitary status of the state. This Theme Committee has given us the compromise solution of having detailed submissions of the parties included with the report to the Constitutional Committee. What is the status of those submissions which include details of contentious issues, which are not allowed to be included in the reports?

The CHAIRPERSON OF THE CONSTITUTIONAL ASSEMBLY: We did address this matter in the Constitutional Committee and agreed that the annexures to the reports would become the documents of the Constitutional Assembly. Dr Rabinowitz wanted to know whether they have a status. Yes, they do. They are attached to the reports.

We also said that the parties that felt strongly about their submissions have every right, just as anyone else, to put forward their views and positions. To this end a number of Theme Committees have attached the submissions of the political parties to the reports they have put forward. These are documents of the Constitutional Assembly—that is the status they have.

Is there anyone else who wishes to raise any other point? If not, I should like to thank the members of the Theme Committees for the hard work they have put into producing these reports. This meeting was essentially a briefing session to allow members of the Constitutional Assembly to know what progress is being made.

We have to date received 1 700 submissions. Those that have been processed by the administration amount to about 700, as Mr Wessels reported. There is a clear indication that the South African public has a very keen and deep interest in participating in this process. We as members of the Constitutional Assembly need to reciprocate by participating in the debates that are going to ensue here.

The Constitutional Committee will be going into the reports that have been submitted here and will present its own reports to the Constitutional Assembly in the form of recommendations and issues that need to be debated further. We will be doing so at our next meeting. With those words I should like to thank everyone for attending.

Debate concluded.

The meeting adjourned at 15:37.

PROCEEDINGS OF THE CONSTITUTIONAL ASSEMBLY

Members assembled in the Chamber of the National Assembly at 09:10.

The Chairperson took the Chair and requested members to observe a moment of silence for prayers or meditation.

ANNOUNCEMENTS, TABLINGS AND COMMITTEE REPORTS—see col 140.

SUSPENSION OF STANDING RULES

(Draft Resolution)

The CHAIRPERSON OF THE CONSTITUTIONAL ASSEMBLY: Order! This is our eighth meeting as the Constitutional Assembly meeting in plenary, and our third this year. Today's meeting is somewhat historic in that the Constitutional Assembly will, for the first time, commence substantive debate on various aspects of the Constitution. In most of the meetings that we have held, we have tended to concentrate on process matters, but today we begin debate on the various provisions that should go into the Constitution.

We have four items for discussion and consideration today. The first has to do with the Rules which the Deputy Chairperson will deal with. The second is the report from the Constitutional Committee which will be accompanied by an open-time debate. Thereafter we will spend time discussing and debating the draft formulations and the report on public administration, and also give consideration to the South African Reserve Bank. We will ask various people to come to the podium to address these issues.

The DEPUTY CHAIRPERSON OF THE CONSTITUTIONAL ASSEMBLY: Mr Chairperson, it was proposed at the Constitutional Committee meeting on Friday 12 May that today's debates on the Theme Committee formulations should not be structured debates conducted in accordance with a list of speakers, but that they should be conducted on an open and interactive basis, analogous to committee procedure. Accordingly, we shall not have a list of speakers. Instead, members will be called upon to speak at the discretion of the Chairperson. At the same time, note will be taken of the time taken in the debate by each party, with a view to ensuring that parties do not take up a disproportionate amount of speaking time.

Members may speak from floor microphones, but it is essential that they identify themselves before speaking by stating their name and their party. In order to conduct a debate in this fashion, it is necessary to suspend the operation of certain Standing Rules, and I accordingly move the draft resolution as it appears in my name on the Agenda under Item 1, namely:

> That the provisions of Standing Rules 117 and 118 be suspended for the duration of today's sitting.

Question agreed to.

ADOPTION OF REPORT OF CONSTITUTIONAL COMMITTEE

(Draft Resolution)

The DEPUTY CHAIRPERSON OF THE CONSTITUTIONAL ASSEMBLY: Mr Chairperson, the resolution for the adoption of this Report is being utilised to afford this Assembly the opportunity for a brief general question-and-answer debate, conducted on the now familiar basis of open-time. In other words, a period of 30 minutes has been set aside in which parties are allocated set times which they can use as they see fit. Fourteen minutes are set aside for responses to questions by the Chairperson or other functionaries of the Constitutional Assembly.

I would just briefly like to take members through the Report. I begin by reiterating that this sitting of the Constitutional Assembly takes place on the eve of the first anniversary of the Constitutional Assembly, namely 24 May 1995. A detailed Report on Constitutional Assembly activities in its first year of existence is currently being prepared by the Chairpersons with the assistance of the Administration.

This is the first occasion on which the Constitutional Assembly has had the opportunity to discuss matters of substance. The Theme Committee Reports which are included in this Report are the first Theme Committee Reports which the Constitutional Committee has forwarded to the Constitutional Assembly for its consideration.

In paragraph 2 of the Report we set out the meetings held by the Constitutional Committee,

and in paragraph 2.2 the work done by the various Theme Committees is spelt out. I also draw members' attention to the fact that at Management Committee level we have adopted a certain procedure relating to the drafting of the Reports which will assist in the more speedy conclusion of the process. In other words, as is stated in the Report, once a Report has been finalised, draft formulations will be prepared immediately.

The Management Committee has also met on a number of occasions, and is, in fact, meeting on a regular basis. The work done by the Theme Committees is reported on in paragraph 4.

In conclusion, I believe it is appropriate to say that we really appreciate the work done by the members of the various Theme Committees who have spent hours in Theme Committee meetings. I would also like to thank the members who attend various other public participation programmes conducted by the Constitutional Assembly. They have to travel to these meetings and seldom have the time or opportunity to speak in the Senate or the National Assembly as they would like to. Instead they have to listen to what other people are offering in terms of constitution-building. We are also indebted to those members for the time that they set aside to participate in these events.

I would also like to address a word of appreciation to the Administration as well as the Technical Advisers who assist us, and add that we are looking forward to a period of further action and interaction with members of the Constitutional Assembly.

I now move the draft resolution as printed in my name on the Agenda:

> That the report of the Constitutional Committee tabled on 19 May 1995, be adopted.

The CHAIRPERSON OF THE CONSTITUTIONAL ASSEMBLY: That is the report from the Constitutional Committee detailing the work that has been done by both the Constitutional Committee, the Management Committee as well as the Theme Committees. It is not as comprehensive as we would have wanted it to be, but a more comprehensive report will be published dealing with the work that has been done during the course of the year.

I therefore put the resolution before the House. Is there any objection to the adoption of this Report? Essentially, we should have the debate, and thereafter the open- time debate. We shall then deal with the adoption of the Report. Possibly, the issues that hon members may want to raise could come up in the open-time debate.

We now proceed to the open-time debate. We have allocated 30 minutes for this and as in the past, we are open to speakers standing up near their microphones to address us. Members may pose questions, make comments, suggestions, or say whatever they may want to say.

Ms B KGOSITSILE: Mr Chairperson, I simply want to point out a correction on the second last page of the Report, with regard to the work done by Theme Committees, under "Progress Reports", Theme Committee 6.3, Finalising Report. I would like to point out that the Report was completed some time ago. However, what is being finalised is the second draft of the constitutional text.

The CHAIRPERSON OF THE CONSTITUTIONAL ASSEMBLY: Order! The report has been finalised. This will be noted and corrected.

We are now in open time. Is there anybody who would like to utilise this opportunity to make any input in the form of comments, remarks, questions or suggestions?

Dr W J BOTHA: Mr Chairperson, I refer to page 14, paragraph 3.4, which deals with limited political appointments in the Public Service.

*I want to place on record that the FF does not agree with the first line, which reads:

> All parties agree in principle on the need for a provision in the . . .

The DEPUTY CHAIRPERSON OF THE CONSTITUTIONAL ASSEMBLY: Mr Chairperson, on a point of order, may I make a suggestion? I think the hon member's point may well be accommodated when we deal with it under the next item. I kindly suggest that he be asked to defer this debate until then.

The CHAIRPERSON OF THE CONSTITUTIONAL ASSEMBLY: Order! In a minute or so we will be discussing the rough formulation of the Theme Committee Report on Public Administration. If the hon member could hold on to what he was about to say, we shall then call upon him when we discuss the matter.

Is there any other person who would like to utilise this opportunity? In the absence of any contribu-

tors, seeing that the Report is quite clear, I would now like put the Report before hon members to be adopted. Are there any objections to the Report being adopted?

Debate concluded.

Question agreed to.

DRAFT FORMULATIONS ON PUBLIC ADMINISTRATION

(Draft Resolution)

The CHAIRPERSON OF THE CONSTITUTIONAL ASSEMBLY: Order! This brings us to Item 3 on the Agenda. I call upon Mr Vadi, the Chairperson of Theme Committee 6.1, to address us. We have asked the Chairpersons of Theme Committees, together with some of the Theme Committee members, to be on stand-by to deal with the Reports from their Theme Committees, as well as to present to us the draft formulations which we have before us. After the presentation of the Reports in the draft formulation, we shall proceed to debate those Reports.

Mr I VADI: Mr Chairperson, it is my pleasure to present to the Constitutional Assembly the first set of draft constitutional formulations on the Public Service on behalf of Theme Committee 6.1.

These draft constitutional proposals are endorsed by members of political parties participating in our Committee. With the exception of clause 3 on page 3 of the document, there are no areas of material disagreement. The constructive spirit and co-operative relationship cultivated in our Committee augurs well for the Constitutional Assembly and the entire constitution-making process.

It needs to be noted that these constitutional proposals emanate from an extensive programme of public participation and involvement which have shaped their design and texture. Our Committee received a total of 129 written submissions, six from political parties, 29 from organisations and institutions in civil society, 88 from individuals from different parts of the country and six from Government departments.

In addition, we held consultations with over 200 representatives of national, provincial and local government structures, including leaders of civil society organs from the education, health, Public Service, academic and legal sectors. Members of our Committee have also addressed community participation meetings in the Eastern Transvaal, the Eastern Cape and the Free State.

I am especially pleased to report that specialists from Mozambique, Namibia, Zambia, Tanzania, Kenya, France, Britain, America, Germany, Italy and the Netherlands provided invaluable theoretical and comparative perspectives on public administration to our Committee. There is no doubt that, as we were interacting with these international and local stake-holders in public administration, we were on a sharp upward learning curve.

On behalf of our Committee I would like to extend a warm word of appreciation and thanks to members of the public and organisations in civil society that have responded so positively and enthusiastically to the work of our Committee. In more ways than one, their inputs have clarified issues for us and have shed light on a host of complex questions confronting our Committee. For this we thank them.

Our draft formulations are divided into four parts or sections. Section one sets out the core values and principles that should govern all components of public administration. This includes national, provincial and local government structures, as well as parastatals, public corporations and those institutions that receive public funds.

The key principles that shall govern public administration are the following: a high standard of professional ethics, effective use of human resources, efficiency, accountability, transparency, impartiality and equity in the delivery of services, public participation in policy-making, representativeness and fair employment practices. Constitutional Principle XXX is entrenched, which entitles employees to a fair pension scheme.

Clause 3 is a contentious point, with the DP and the FF objecting to its inclusion in the constitution. I think the member has already pointed this out to the House. This clause explicitly allows for political appointments in the Public Service, within the framework of the core values that I outlined earlier on.

Clause 4 creates constitutional space for different sectors within public administration to be regulated by separate legislation, such as a separate Police Act, Defence Act, or Education Act.

Section 2 of the Report outlines the national structure for public administration. It proposes the establishment of a Public Administration Commission, consisting of a chairperson and 11 commissioners, with each province in the Republic of South Africa being entitled to nominate one commissioner.

The Public Administration Commission shall be independent and impartial. Its principal functions shall be to advise on, monitor and inspect various aspects of public administration. It shall be accountable to Parliament, and reports relating to public administration at provincial level shall be tabled at the provincial legislature. The members of the Public Administration Commission shall be appointed by the President, subject to parliamentary approval.

Section 3 deals with Provincial Commissioners. It states that their particular functions and powers in the provinces will be spelt out in law. It allows for the Premier of a province to appoint, if necessary, two Deputy Commissioners, subject to approval by the provincial parliament. It also stipulates that the Provincial Commissioners shall table all their reports both in the national Parliament and in the provincial legislature.

Section 4 simply affirms Constitutional Principle XXX. It merely states that there shall be a Public Service, and that it shall loyally execute the lawful policies of the Government of the day.

Finally, I would like to thank our technical advisers, Prof Piet van der Merwe, Ms Lucy Abrahams and Adv Gerrit Grové, for their specialist input and assistance. A very special word of thanks should go to our administrative support staff for the wonderful work they have done, and the thorough and meticulous organisation of the entire process.

Having presented this Report, I would like to put before the House, with your leave Mr Chairperson, an amended version of the resolution in my name. The resolution reads:

> That this Assembly, noting that the draft formulations on Public Administration dated Friday, 19 May 1995, submitted by Theme Committee No 6.1—
>
> (1) are the product of the integration of ideas of all role-players at several hearings involving stake-holders and international experts; and
>
> (2) are the subject of continuing debate and discussion within the structures of the Constitutional Assembly;
>
> resolves that the Constitutional Assembly authorises the Constitutional Committee to amend the said draft formulations in accordance with proposals made in today's debate, and thereafter, to publish the draft formulations for public comment and for further consideration.

Mr S J DE BEER: Mr Chairperson, colleagues, I would with pleasure like to support the hon member Mr Ismail Vadi in what he has just said. I believe that this Report and draft formulation is, as Mr Vadi has indicated, the culmination of a long process of workshops, hearings, many representations, and hours of deliberations and discussions. This all happened under the leadership of Mr Vadi, and I would like to thank him for the way in which he conducted the business. I think he made a very good job of it; he also made it possible for us to have an open debate, which was of great value to all the members of the Subcommittee.

I believe the fact that consensus could be reached by all parties on virtually all the issues at hand, is an achievement. It is more so an achievement if we take into consideration the subject which we are discussing this morning, because the Public Service is of the utmost importance to the future of our country. Because the Public Service has such an important role to play, it is meaningful that we could reach consensus to this extent.

It is important to note that while the present Constitution refers to the "Public Service", this draft document refers to a "Public Administration", and this is a very important difference. We are, therefore, actually dealing with a much broader concept than the Public Service only. When we refer to the basic values and principles governing public administration, we are therefore not only referring to the Public Service as such, but to public administration at all levels of government, including the institutions which are dependent on Government funds. I think it is important that our members should note this.

Another thing which I would like to point out is the fact that during the workshops, which were held with many international experts participating, the so-called political appointments became one of the focal points of discussion. This is a matter which is widely discussed internationally. I

think this must have influenced members of our Subcommittee to feel that this matter should, therefore, be reflected in the constitution.

For my part, I would like to say that this is perhaps a matter which can be revisited after the final draft of the constitution has been completed, to make a final decision as to whether it should be reflected in the final constitution or not. This is the only matter which did reflect a difference in approach. The DP and FF, in particular, felt that it should not be reflected in the constitution.

*When we give consideration to the draft formulation which is the subject under discussion today there is one other matter that is, to my mind, of the utmost importance and to which I should like to make reference. That is indeed the composition of the Commission for Public Administration as mentioned in this Report.

The composition of the Commission comprising 12 members—a chairperson and 11 commissioners who will be nominated by the provinces—as far as I am concerned, after we have followed this procedure and members have had the opportunity to influence one another during the course of their discussions, is an improvement on the present dispensation which is entrenched in the constitution.

According to this description in the draft formulation every province will have to be represented on the Commission and also have a say. The decisions that are taken there will therefore result in the important fact that the line of communication between the Commission and the provinces will be decreased to a great degree. This is one of the matters which we find problematic at present.

Furthermore, each Commissioner will also have the authority to perform the functions and powers of the Commission in his or her province. Some members may perhaps feel that it is superfluous to make such detailed reference to the composition of the Commission in the constitution, but I would, however, like to plead with hon members to understand this.

This issue is of the utmost importance in particular to the minority parties in this meeting. It is therefore as far as we are concerned also of the utmost importance that this formulation should be reflected in the constitution as completely as it is here in the draft formulation. We believe that a complete formulation in this regard, which is included in the constitution, will create a greater degree of security as regards public servants and people who are affected by this and who are at present fairly uncertain about many issues.

Greater certainty in this regard is of the utmost importance because I believe that we should still strive for a stable Public Service, because the Public Service is an indispensable building block as far as the successful implementation of the RDP is concerned. We think that a stable Public Service has the most important role to play in a prosperous South Africa.

With these few remarks I would like to conclude, and I would like to associate myself with the remarks that were made by our Chairperson. I would like to convey my thanks to everyone who made a contribution to bring us to the stage where we find ourselves this morning.

Dr W J BOTHA: Mr Chairperson, this concerns the limited political appointments in the Public Service, and especially the first line under that heading. It is on page 14, under paragraph 3.4.

I do not feel we can let line 1 pass as it is there, because the FF does not believe in principle that there is a need for a provision in the constitution allowing for limited political appointments in the Public Service. I want to state our position clearly as far as this is concerned. I can accept that the reasons that are given here why it should be so are well meant, and I want to make the point that, although they may be well meant, they are idealistic as far as we are concerned. We have had experiences in the past where exactly this happened and I would say it was not always in the interest of the country. I am afraid that the same may happen again in future and then we will have nothing left of all these ideals and all these good reasons why it should be so.

*In the past, the Government appointed people from a small élite group to key positions. I am afraid that the same thing may happen here again, namely that a political post will simply become the reward of someone who has supported one well and who does not necessarily have the knowledge required to do the work well.

Mr M V MOOSA: Mr Chairperson, I am not going to comment on what Dr Botha has said concerning the question of political appointments. I think that what is contained in this document is really an internationally accepted practice. I think it is quite the opposite of his interpretation, but I am sure other speakers will comment on that.

I want to make some general remarks and perhaps ask a few questions. The first point I would like to make is that we need to congratulate the Theme Committee for the tremendous work that they have done. This is the first actual draft which is being placed before the Constitutional Assembly and it therefore makes this debate quite a historic event for the Constitutional Assembly. It is also noteworthy that members of the Theme Committee have been able to work in such a manner that they could come together to produce a Report and put before us what in general is a very creative and a very good Report in my view.

Having made the obligatory introductory comments, I am quite certain that the Theme Committee did not expect the Constitutional Assembly merely to rubber stamp what they have put before us. I think we are all agreed that the new constitution should be one which is lean, short, simple and easy to understand, unlike the interim Constitution, and that the new constitution should not require one to be a law professor in order to be able to read or understand it.

It is for that reason that the Panel of Constitutional Experts presented a report to the Constitutional Committee last week and I hope that this report will be distributed to all members of the Constitutional Assembly at some point.

In that report they raised a few important issues. In one section they suggest that we ask ourselves certain questions before we insert any clause into the Constitution. They have four questions which I would like to read to you. The first is:

> Does the implementation of democracy and the constitutional state based on the values recognised in the constitution require its inclusion?

Secondly—

> Is it necessary for effective and democratic government?

Thirdly—

> Is it necessary in order to address a vital constitutional agreement reflected in a constitutional principle?

Fourthly—

> Would it be conducive to an integrated approach?

In other words, is it not sufficiently dealt with or likely to be dealt with elsewhere in the constitution?

I would like to use those criteria to make a few comments about the Report which has been put before us. However, apart from those criteria, my view is that we should also take into account the overall consensus in South African society that we should have a lean Public Service and that Government spending should, in the long term, be reduced.

We are all aware of the fact that the present public servants are demanding higher and greater salaries. In the past, in the old order, there were five members of the Public Service Commission. In the present interim order we have something like 40 members of the Public Service Commission. [Interjections.] Mr Skweyiya is saying it is even more than that. However, there is a large number of members of the Public Service Commission. The proposal before us suggests at least something like 30 members if one takes into account the 12 in the Public Service Commission and the various other people that would be joined with them in the provinces.

Members might not be aware of the fact that Public Service Commissioners enjoy a very substantial remuneration package. They earn more than directors-general. What you are in fact creating here is 30 new director-general posts. We have to ask ourselves whether those resources could not be used in a much more efficient manner.

It is also best for us in the drafting of the new constitution to avoid unnecessary details so that the constitution becomes a durable constitution and so that it does not become obsolete after a few months, requiring numerous amendments. In the draft before us the first paragraph sets out—I think, very creatively—the principles on which the Public Service and the Public Service Commission should operate.

Those are principles which I think are commendable. We would certainly like to endorse those principles. However, from paragraph 2 onwards we go into a whole range of unnecessary detail which, in my view, can best be dealt with in legislation because it is the kind of detail which requires frequent changes.

In paragraph 2(1) numbers are mentioned and, once we have put such numbers in a constitution,

we could find after a year or two that those numbers are wrong. The need to change them again would begin to question the actual durability of our constitution.

We would therefore suggest that the question of numbers and actual detailed structuring of the Public Service Commission should not feature in the constitution. It is really not the business of the constitution. It is this kind of detail that would turn the constitution into gobbledygook. Once we complete all such detail, we would have a very thick document, which very few hon members would actually want to read through from time to time, because it would be inaccessible.

I would therefore suggest that it is possible for us to reduce paragraphs 2 and 3 very substantially, if not remove them altogether from the constitution. We could provide very adequately in statutes for this kind of structuring and numbers, and how one organ relates to the other.

Paragraph 3 provides for all of these Provincial Commissioners, and it provides for Deputy Commissioners. We should ask ourselves, quite honestly, do we need this kind of structure in order to have an impartial, independent, autonomous loyal Public Service? Do we need to go into this kind of expense? Could we not perhaps strengthen the Public Service in other areas with the kind of resources that would have gone in here?

I would like to ask whether consideration of the cost of making the constitution lean and mean, and the criteria as set out by the Panel of Constitutional Experts, have been taken into account.

I would like to express the view here that we should remove paragraphs 2 and 3 completely. Perhaps paragraph 4 may be necessary, because we have to take into account the fact that the Constitutional Principles must be covered in this draft, and that whatever we have before us should not violate these Constitutional Principles.

Mr A VAN BREDA: Mr Chairperson, I am from that august House, the Senate. I am Alex van Breda of the NP, also of South Africa. [Laughter.]

Mr Chairperson, because of the uniqueness of our situation many an occasion is nowadays termed as historic. However, as today is merely five days off a year since the Constitutional Assembly was established, I think this might be termed as an historic occasion.

After almost a year, today is the first occasion on which a report of substance is being discussed by this Assembly. Do I need to fear contradiction when I say that this is really a historic occasion? I regard it as fitting that we start with the Report on the Public Administration as a tribute to that body of men and women who are and will be responsible for the administration of our country.

From the Senate's perspective it is particularly gratifying to witness in what one can term as draft legislation the extent of recognition which is given to the provinces. In the composition of the commission representation is given to all provinces, whatever their shape or size and whether they are rich or poor.

*In the draft resolution which served before the Constitutional Committee the powers of the provinces to nominate a representative to the central commission were not as explicit as in the Report serving before us today. It is very clear that the exclusive power of each province will be to nominate its own representative to the central commission. Other legislation will naturally determine the procedure in terms of which the central Parliament will deal with the appointment of such a commission.

However, it is important to note that it does not give the central Parliament an absolute veto. The individual nominating of provinces could in fact be questioned, but it is not within the power of the central Government to change a recommendation of the provinces without consultation. It is precisely this fact which is of particular importance to us in the Senate, because that is where we should watch over the interests of the provinces.

†It could be argued, as Mr M V Moosa did this morning, that in the new composition of the commission there will be a considerable increase in the number of members from the present five. However, at this stage the constitution is not concerned with the details as far as the numbers are concerned. There I tend to agree with him.

However, the constitution is in other ways not concerned with the details of the remuneration of members, and their service conditions, etc. It is not concerned with what the remuneration would be at central level. The fact that these Commissioners will also be serving in that same capacity in the provinces, possibly to a much larger extent in the provinces, could well be looked at in

the scale of remuneration at central level and at provincial level.

On the other hand, we should not underestimate the function of the Commission, be it central or be it the provincial commissions. If they can succeed, and that is one of their explicit duties, in rationalising the service, and if they can in that process succeed in reducing the number in the Public Service, they would have paid for themselves, and that would have been a small price to pay for an increased Commission.

*If this report, which is serving before us today, is a preview of what we can expect of the constitution-making process in the future, particularly as far as the powers and responsibilities of the provinces are concerned, it augurs well. In spite of the amended resolution which the Chairperson of the Subtheme Committee has tabled, we trust that those facets affecting the powers and responsibilities of the provinces will therefore not simply be changed.

†We commend the Subcommittee on an excellent job well done.

*Mr J A JORDAAN: In the first place I simply want to concur with the hon Senator Van Breda in his reply to what Mr Valli Moosa stated here as regards his approach. In the first place, it is a pity that the report to which he referred is obviously not yet in our possession. I agree that it should be distributed to all members.

However, what I feel Mr Moosa is discounting, is the whole discussion surrounding the fact that we do not speak of a Public Service Commission but of a Public Administration Commission, and that there are certain facets which inevitably came to the fore in the discussions which were not included in the report on the role which that Public Administration Commission should play in the future. If Mr Moosa wishes to subject himself to discussions in our committee in this regard, then he should realise, as regards that role—I suppose this also applies to Mr Roelf Meyer—that this is a case in which true consensus was reached in the Committee concerning functions and the matter of supervision of public administration in its totality. Look, for example, at some of the clauses which refer to all instances in which all officials in that service receive funds from the Government to carry out functions.

You who are involved in Constitutional Development should know that you are faced with a dilemma at the moment regarding local government in our rural areas. You are saddled with a concept such as that of district councils, which was unfortunately introduced, where staff must be created for those people and they are to play a critical role in the success of the RDP. We foresee a role for the Public Administration Commissioners in the province, for the help which they should receive there at the central level and the help which they should receive in the province, with a maximum of two members. We foresee a role for them in that respect. We do not need the Intelligence Services to evaluate whether people are playing their role effectively on that level, but we do specifically see the role of the commission in that regard. These are ideas which were suggested in our Theme Committee, which I briefly wish to raise.

Mr De Beer praised Mr Vadi here, and I agree with him 100%. The process of teamwork was a wonderful experience in that Committee. That is why it is a pity that one must also refer here, with a slightly bitter taste in the mouth, to the Report which was eventually tabled before the Constitutional Committee. I am referring to the very clause referred to by my hon colleague from the Freedom Front, Dr Botha. It is the one on page 14, namely the case of limited political appointments. When one looks at that report, one realises that the fact that it went through like this is indicative of certain deficiencies in the process.

In the first place, there is no way in which the DP could approve political appointments as contained in the report. Secondly, there is no way whatsoever in which we could go along with the motivation which is stated there, namely that it should take place by means of contract and so on, the so-called jobs for pals clause.

What we do, in fact, see is that there is a need to strengthen the staff at certain levels in the Public Service by way of appointments where the necessary expertise does not exist. The way in which this must then be done, is by means of open advertising, possibly written to suit a certain need, which is a transparent process. For our part we could by no means support a "jobs for pals" approach, and we do not think it belongs in the constitution either. We must decide whether we are going to retain the current system or whether we wish to change over to the American system, where the officials in senior positions work concurrently with the political office-bearers and their terms of office.

I want to refer once more to the bitter taste in one's mouth as one now has to read this in this document. We are creating the impression among the public out there that these processes of ours are coming along just fine. Once again I wish to emphasise that we had fantastic co-operation in our Committee, but we faltered here at the end.

†There was supposed to be a core group meeting in which this final Report would have been tabled. However, that core group meeting did not take place because we did not have a Chair to officiate and we did not have a quorum. I think it is these things that actually lead to the type of misunderstanding that we had to the extent that we are upset that things like these are published and sent out into the world as if we support them. I believe this, and I wish to say in all sincerity that unless all the members of the Constitutional Assembly and this Parliament actually commit themselves to a code of discipline in writing the constitution in the attendance of meetings etc, we are not serving the people who elected us to serve in this institution.

I make a call on you, Mr Chairperson, and on the Deputy Chairperson to ensure that we get discipline into the system and that we do not have meetings at which we do not have quorums, because then we end up with misunderstandings which, as I have said, actually leave a bitter taste in one's mouth instead of going through this whole process in total agreement.

Mr O C CHABANE: Thank you, Mr Chairperson. I would like to take issue with the previous speakers, because in terms of the proposal which was made regarding whether we need this type of detail in the constitution, I did not find a sufficient argument against it. The suggestion was not mainly about the question of numbers. The question is whether, at a provincial level, one has to specify in the constitution that one needs two or three Commissioners. What happens if one, in future, discovers that those two are not sufficient? What does one do then? Does one amend the constitution in order to add more? I think that is the central question.

Section 3 of the Report deals with Provincial Commissioners. Our understanding of the constitution-making process at present is that one has several Theme Committees dealing with the relationship between provinces and the national Government and all sorts of things. My question is, if the Constitutional Assembly adopts this Report without having the opportunity to synchronise this Report with other Theme Committees dealing with similar matters, are we not going to run the risk of having to come back to it and having to revisit this particular section?

Is it not proper for us to say that this one should be referred to the Constitutional Court which would enable it to have a bird's-eye view in terms of the entire process, which might enable us to synchronise all these provisions which impact on the relationship and the powers of provinces and the national Government? We can then conclude on those which have a very direct and clear directive from the Constitutional Principles.

With regard to the others I think we may need a situation which will enable us to look into the entire spectrum of how they interact with other sections of the Constitution. I would therefore support the view that we then do not have to adopt the resolution as it stands. We may have to send this particular section to the Constitutional Court for further consideration, in the light of the interaction which is supposed to take place with other Theme Committees.

Lastly, I would like to remind this House that in terms of the rules of the Constitutional Assembly and the procedures we have adopted with regard to how the structures of the Constitutional Assembly relate, Theme Committees are not negotiating for us. The Constitutional Assembly and the Constitutional Court are the places where negotiations and trade-offs are likely to take place. I would therefore like to remind members that the Reports from the Theme Committees and the work which has been done are appreciated. However, at the same time we should not make the mistake that discussions in the Theme Committees are taken as negotiations in terms of the process of the Constitutional Assembly itself, unless we have to change that process in terms of the Rules.

*Mr A WATSON: Mr Chairperson, I would like to join my fellow committee members and also mention the very high quality of co-operation and consensus in our Committee.

In the one or two minutes at my disposal I do not wish to cross swords with Mr M V Moosa, but I would just like to defend the reasons why these items are defined in this manner with regard to the Public Service Commission, which we are now going to call the Public Administration Commis-

sion, and tell him that the issue of how important the Public Service Commission is has been raised, not only at national level but also at provincial level, as recently as yesterday at a seminar in Brackenfell. It was mentioned that it was precisely as a result of the provincial commissions that the administration eventually got off the ground at provincial level and that the obstacles were removed.

Mr Moosa spoke about the numbers, and I agree that one must avoid numbers in any constitution, but if he examines the realities, he will see that at present we have a Public Service Commission at national level as well as a public service commission in each province. If one adds those amounts together—let us mention this just for argument's sake; nine times nine is 81, plus the central committee—that is an enormous group of people.

However, we are now only speaking about a chairperson and 11 members of a central committee, nine of whom come from the provinces. That provincial representative is then ipso facto the commission at provincial level. The provision for one or two deputies is then only to assist him in the case of larger provinces where his task may perhaps be more comprehensive.

However, the Secretariat are the people who are going to do the work and the issue of these large salaries to which Mr Moosa referred, is therefore beside the point. It envisages a scaling-down of numbers and therefore also expenditure, without losing efficiency and without severing the ties between provincial and national levels, in order also to promote transparency in this way.

†Also on the question of these Committees, be it the national committee or the Commissioner and his substructure at provincial level, I think it is important to look at the footnotes, and it is really a pity that there are not more footnotes containing all the deliberations that took place before these decisions were formulated in the form that we have in front of us today.

What we should look at, is the very important factor of transparency. We are now adopting the same system that was adopted in Parliament by the Joint Standing Committee on Public Accounts, in terms of which those items highlighted by the Report of the Auditor-General are tabled by the Joint Standing Committee on Public Accounts investigated, and the Report is tabled back to Parliament.

That is transparency, and we are now proposing the very same thing, not only at national level in regard to national affairs on the question of public administration, but also in regard to public administration at provincial level, tabling it in a similar committee in the legislature.

Ms P G MLAMBO-NGCUKA: Mr Chairperson, I would also like to thank Comrade Vadi for the manner in which he handles the Theme Subcommittee, and congratulate him for having been able to get all the parties to work together, and to achieve this Report in which there is a high degree of consensus, I would say rather advisedly.

I think our Theme Committee is not necessarily married to dictates. We probably would not violently oppose the deletion of numbers. I would just like to plead, however, that whatever formulation emerges, it should not reduce our argument to that of down-sizing, because we are really talking about right-sizing. I think the concern about the economy and fiscal discipline must not override the need for having a Public Service that is need-driven. Therefore the issue of size should also be in context with what we want the Public Service to do.

Regarding the fears that have been expressed by the DP and the FF about ministerial or political appointments, I really feel that the substance of that issue needs to be put on the table in front of these parties, because there is overwhelming international evidence that the fears that they are expressing are not well-founded, unless they think that South Africans have a greater propensity for misuse of State structures. The bona fides of this Government have shown that those fears are actually unfounded.

In fact, the formulation that we now have places it within the context of the Constitution. It does provide for accountability and transparency, so there is really nothing sinister about it. I would really plead that we should not allow those two parties to undermine what I feel is great progress that has been made as far as that particular point is concerned.

I would say, however, that the formulation and the other issues, as far as their detail is concerned, should go back to the Constitutional Committee, as suggested by Comrade Vadi, where they would find an appropriate formulation without losing the substance.

Ms J Y LOVE: Mr Chairperson, I would like to raise a couple of matters and comment on some of the points that have been mentioned by colleagues here today.

Firstly, I think the Subtheme Committee needs to indicate, on the basis of some of the evidence it heard, the problems that have been experienced up to this point—in the experience of the new Government—with the existing Public Service Commission and provincial service commission structures. At the same time we would also like to stress the deep concerns that are held by people in provinces who are supportive of some sort of provincial structures; as well as of those people who are in support of an integrated national structure but want an improved involvement from provinces.

Up to now an incredible ambiguity has been felt by the provinces, as to the extent to which they really have the capacity to manage their own affairs in terms of the Public Service. In addition to that, one of the people who came to address us indicated that they felt a bit like "fax machines", as a result of receiving various inputs from national level which they are expected to transmit and regarding which they have no responsibility for designing or have had very little input. As a result, a lot of what they receive from the national level has proved to be unworkable and has created many strains and stresses. This was the set of issues that we felt it necessary to address in the drafting of the new constitution.

Secondly, many from the provinces, including those who expressed the sort of criticisms I have mentioned about the way in which the system functions at present, were deeply concerned that we should not evolve a structure of totally separate public service commissions at national and provincial level, because they felt, as was the consensus view of our Theme Committee, that there needs to be a unity and a cohesion of the Public Service throughout the country—despite the fact that, for management purposes and for the purposes of running the country at national and provincial level, very different needs and concerns would arise.

That was a second issue that we had to deal with. I think that as a result, it emerged after many hours of deliberation that the existing system of the provincial public service commissions and a national Public Service Commission was not going to suffice, on the basis that the Committee felt that the structures of a national Public Service Commission should ensure provincial representation in national processes, while simultaneously ensuring that there is full and direct accountability at provincial level for the implementation that takes place at that level, and that, secondly, there should be no provincial public service commissions.

I say this so that when the deliberations of the Constitutional Committee attend to issues of detail, they take into account the concerns and the kind of thinking that went into the decision to propose a structure that gave expression to this. At the same time there are obviously limitations that have been expressed and reiterated by members here about the inclusion of numbers in the constitution.

I do not want to dwell much further on this issue, other than to refer to what Mr Van Breda, I think, mentioned in response to Mr Mohammed Valli Moosa. It is not my understanding that at any point in the constitution will there be mention of remuneration packages. It seems to me that the question of remuneration raised as an argument in the way it was is really a little pathetic.

The second point that I wanted to mention is around the question of political appointments. It is true that there have been political appointments in the Public Service as part of our history. The difference with what is being said now and what has taken place before is that those political appointments in the past were manoeuvred and engineered in a most dishonest and most underhand way, in the sense that the democracy of the country was really placed in question.

What we are saying is that there needs to be a transparent process whereby appointments at critical management levels of the Public Service are openly identified as appointments for people with a particular understanding and of a certain calibre who can bring new blood and new ideas into the Public Service. To that extent they would be political appointments. What we have not said, what we do not intend and what we would be vehemently opposed to, is for these to be party-political appointments. That we would reject.

Thirdly, on the question of political appointments, I would just like to mention to Mr Jordaan that both the FF and the DP did not support the original phrasing of that clause. It was reported as such and he will find it minuted as such in the

Constitutional Committee minutes. That clause had been phrased in such a way that the political appointments which were mentioned, could have been interpreted to mean appointments made in contradiction with the above principles of public administration. That is why the wording was changed, also because of the good advice of Mr Eglin, in order to ensure that it would be understood that such appointments would be within the context of the principles of public administration outlined in section one.

I want to raise one concern, since the Constitutional Committee will be charged with tightening up the wording. It concerns the phrase "public administration". I think it has been explained here that we used the phrase "public administration" because we wanted to include a far broader category of persons than only public servants in the sense of people who work in offices and departments of government in the narrower sense. We wanted to indicate that public funds are used to pay salaries and to sponsor and support the adminstrations of institutions other than and in addition to these government departments.

It may be that the term "public sector" rather than "public administration" captures more adequately what we want to say. However, by using the term "administration" we were not, as has been suggested in an oblique way today, reducing the obligations and duties of the Public Service to merely administrative tasks. We were trying to draw a distinction between a broader category, namely the public sector or "public administration" as we have called it up to now, and the Public Service.

The hon member Mr Collins Chabane indicated that we should not understand the role of the Theme Committees as being that of bargaining forums and as places where trade-offs are made. I think we did not have this misunderstanding and we have tried to distil the issues. We hope that this will help the Constitutional Committee and, more importantly, help with the final drafting which the Constitutional Assembly will have to consider.

The CHAIRPERSON OF THE CONSTITUTIONAL ASSEMBLY: Order! Ms Love, you kept on looking for Mr Jordaan. I do not know whether you finally found where he is seated.

Ms J Y LOVE: He has clearly decided to join a better party.

The CHAIRPERSON OF THE CONSTITUTIONAL ASSEMBLY: Order! Well, he will have to confirm that himself.

*Mr P C CRONJÉ: Mr Chairperson, I should like to ask Kobus Jordaan whether he could perhaps talk somewhat less about mineral and energy affairs, since I want to address him on the question of political appointments.

†Kobus Jordaan said that the DP was absolutely against political appointments. However, if I were to talk to Kobus about his own career, it was because of his political standing rather than his other abilities that he got a position. I am sure that when he became the youngest ever senator, people did not go around saying: "We must have this Jordaan because he is so brilliant, etc." They wanted him because he belonged to the NP. Again, when he became commissioner-general, I am sure that it was not because of the fact that he was necessarily the best commissioner-general, but because he was an NP member.

Kobus should also understand that when he finally became the chief negotiator with the Department of Constitutional Development when Chris Heunis was Minister, his fall from grace came about because of his political situation. He began talking to the ANC and they then stripped him of his security clearance, and that was the end of Kobus Jordaan in the NP.

I think we must understand that when we talk about the top end of the Public Service, we are talking about the people who must guide all the troops under them. They must do so from a certain understanding as to who it is that they are serving.

I remember when our Comrade Joe Slovo first put his paper on the table about the Government of National Unity, he said that we needed a Government of National Unity because it was only the NP which could assist in bringing the Public Service along in the process. I took issue with him on that, because I said that the top end of the Public Service, in other words the directors-general, etc, were the political appointees, but below them were legions of people who simply wanted to serve. The engineers, doctors and nurses want to serve the public at large. It is the top appointees who give direction.

If we suddenly have a major change, especially in our context, regarding who we want to serve, we will need the people in senior positions to understand this. We want to serve all the people—

not the selfish interests of some but the needs of all. It is not that the people in senior positions will wilfully withhold anything, but they may simply not have the necessary understanding.

I have a very good personal example of this. More than a year ago I wrote a letter to then Minister Vlok about a person who was persecuted in the old days. He eventually got an interdict against the police preventing them from harassing him. He lost the interdict on appeal, and this poor person then owed the State R80 000. I wrote to Minister Vlok and explained that this person had been persecuted and that trumped-up charges had been brought against him. He had been sitting in courtrooms for days on end and they could not make one case stick. Ultimately, Minister Vlok wrote back to me and said that the matter would be investigated.

The strange thing is that about three weeks ago I got a letter from my Minister, but the tone of this letter tells me that the present Minister never read my letter. He said that they were sorry, but that they had investigated the matter and that this person in fact owed the State R80 000. I was asked if I could please ask this person to fill out a form stating what he owed in order to see whether the State could get its money back.

I had to write back to the Minister and say that I was sorry, as that person had been killed on 23 February 1994. All I am trying to say is that if the top end of the Public Service, those who have to screen what finally gets through to the Executive, do not have an understanding of the direction the Government wants to take, things simply do not get done. Therefore, Kobus, thou protesteth too much.

The CHAIRPERSON OF THE CONSTITUTIONAL ASSEMBLY: Order! Mr Jordaan has indicated that he would like to respond.

HON MEMBERS: No!

The CHAIRPERSON OF THE CONSTITUTIONAL ASSEMBLY: Order! Yes, I will allow Mr Jordaan to respond, and thereafter I will call on other members.

Mr J A JORDAAN: Mr Chairperson, firstly, in response to Janet Love, I wholeheartedly agree with her that the clause in the draft formulation has been tightened. I do not have any problems with what is contained in this Report.

What I objected to relates to the procedures that were followed in the end. When I referred to a bitterness in the mouth, this related to the way in which it is formulated on page 14 of the Constitutional Assembly Announcements, Tablings and Committee Reports. That is what I am referring to, because it is not a reflection of the discussion which we had. If hon members look at it very carefully, I think they will agree with me.

When it comes to Ramblin' Rose Cronjé, I just want to state very clearly . . .

*Perhaps I should say it to him in Afrikaans. I have understanding for political appointments and the mistakes which can creep into such appointments. We do not have a problem with the fact that expertise must be introduced at certain levels. We do not have a problem with the fact that the Minister can make appointments in the process. All I said was that when posts are advertised, it must be done in such a way that it is a transparent process, even if one already has a certain person in mind for the post. Janet also referred to this.

As usual the hon member did not listen to the argument carefully. He did not participate in that Committee's discussions. I must say, I have known Pierre for many years now, but I take strong exception to the misrepresentations he makes across the floor of the House. In fact, he knows better with regard to many of these matters but he is selectively silent and prefers to treat us to these "ramblings" of his which have absolutely nothing to do with what is contained in the Report.

However, I will take this matter up with him when the atmosphere is more informal, such as when I have to treat him in the evening when he is embarrassed and alone, or when he is out of drink and I have to help him out. [Laughter.]

The CHAIRPERSON OF THE CONSTITUTIONAL ASSEMBLY: Order! That seems to be a very good conclusion. The two hon members can have their own bilateral "bosberaad" and finalise these matters. We are quite happy with that. Another hon member on the ANC side had raised his hand.

Mr M C MOKITLANE: Mr Chairperson, I just want to make a brief remark around the issue which has been raised with regard to the Rules of the Constitutional Assembly at the moment.

I want to say that the Theme Committees are not areas where negotiations are supposed to take place. I was going to say that we should perhaps look very carefully at this issue. I am saying this in view of the fact that it has come out in the debate. I have a problem with saying that Theme Committees must process reports and ultimately come up with contentious and noncontentious issues. If we start talking about noncontentious and contentious issues, one should realise that issues are only contentious in the viewpoint of certain political parties.

Obviously, political parties represented on those Theme Committees will try to structure their debate in such a way that they do not have a lot of contentious issues. Maybe we will have to interpret this correctly, so that eventually negotiations will not be a process which can be pinned down to a particular point in the structures of the Constitutional Assembly. Let me leave this point right there.

Regarding the issue of the number of Commissioners, I think that the Theme Committee has succeeded in reducing the number drastically. In the present dispensation we are supposed to have almost 50, because each province is allowed to have between three and five. This Theme Committee has succeeded in reducing that number.

Again, there is a role which I think should not be deleted from section 2, which Comrade Valli Moosa has referred to, and which tells us what the functions of this Provincial Administration Commission should be. It will monitor and exercise oversight over the structures of Government to see whether they are performing their duties efficiently and effectively.

I would have a problem with removing this function, because it ensures that the work gets done. It also ensures that considerable savings will be effected, because if one has continuous monitoring of the public administration, one can effect some savings which might be used for the purpose of compensating the other Commissioners who, if I calculate correctly, would be 30, including the deputies.

Mr M V MOOSA: Mr Chairperson, let me say that I am quite happy with the numerous responses that we have received, especially from Theme Committee members. Let me also clarify some of the thinking that was in their minds and that was behind these particular drafts.

I am also quite impressed with the manner in which Theme Committees have come out in defence of the Theme Committee Report across party lines. I think the kind of passion with which Janet Love defends the Theme Committee Report is good. It is a display of loyalty towards the Theme Committee and is really the only dignified thing to do.

There are two fundamental questions that I would like to raise that I think nobody has addressed. Firstly, a lot of people have given operational details—people like Mr Jordaan, Janet and other people—as to why this new system is so wonderful and will work so well, and why it would be an improvement on the present system. My comment was not whether or not it would be an improvement on the present system. It may well be an improvement, and I think what is in there is very creative. The question is why it should be in the constitution.

Why do we need all of these operational details in the constitution? Is it a matter for the constitution? Do we not merely need the principles in the constitution? Then we can put down all these other things somewhere else. I am talking about the kinds of things that are subject to change from time to time. Those are my questions. Nobody has answered why, without a shadow of doubt, this must be in the constitution, just as we would have an equality clause in the constitution. We cannot have a constitution without an equality clause, but I say that the constitution can stand without these clauses in there. I am not arguing whether the operational details are good and well, or whether they can work or not.

I want to say that Phumzile Mlambo-Ngcuka very ably made the point about right-sizing the Public Service. I acknowledge that that is a point we need to take on board.

Both Mr Alex van Breda and the hon member Ms Janet Love are not very realistic when they suggest that as this is merely the constitution we do not have to put in remuneration, because perhaps we will not pay the people so much. That is what they are saying. They are not taking into account the proliferation of institutions which are entrenched in the present interim constitution, which we are trying to move away from. These are institutions with which we can do nothing but set them up as they are in the constitution and let the taxpayer pay for all of this.

It is unrealistic to suggest that a person who is in a position of authority over another should get less remuneration than the person over whom authority is exercised. For example, it is unrealistic to imagine a situation in which a Minister would be paid less than a Deputy Minister. It can happen, of course, but it is unrealistic. They could perhaps get the same.

It is unrealistic to imagine a situation in which a director-general will earn less than a deputy director-general. A person at a higher level of authority generally tends to earn more. That is how things work, and let us be realistic about this. If one brought that principle down, one could perhaps equalise matters.

I think it is a false argument to say that because constitutions do not talk about remuneration we should not worry about it. It is a concern that we must take into account in every section of the Constitution. I am not picking out this particular Theme Committee. In every report, in every section we must ask these questions: What is it going to cost? How durable is it? Is it necessary for the constitution, or can it be dealt with elsewhere? If we ask those questions, we will have a lean and mean constitution.

Nobody has told me why paragraphs 2 and 3 are necessary. Some people have said that some elements of paragraph 2, which strengthens the principles, may be necessary. That is an argument that we can take on board. In general, all of these operational details can be catered for elsewhere, because they change from year to year and from time to time.

Ms B KGOSITSILE: Mr Chairperson, the first thing I should like to propose is that the document which was prepared by the Panel of Experts and which was delivered to the last Constitutional Committee meeting should be circulated as a matter of urgency. It will be very helpful.

I should like to point out that some of what was said here today is a manifestation of certain weaknesses pointed out in the document I am referring to, which Mr Moosa also referred to. I want to read a paragraph from that document so that we can clarify what we are talking about in terms of what would be best for the constitution-making process as a whole and for the different sections we are dealing with:

> At present constitution-making is conducted in a fragmented fashion.
>
> A consequence of the present approach is that every separate theme discussed in a particular theme committee now becomes an end in itself and often an area of contest. It is often treated as a topic standing on its own, requiring extensive detail and numerous guarantees. This happens because the overall constitutional picture, the interrelationship of all constitutional provisions and the effect of enforcement mechanisms and protections are not given full weight.

Having quoted this, I want to support in large measure the points that have been raised by Mr Valli Moosa to give an example of the lack of synchronising by the different Theme Committees, and even by the Subcommittee groups in Theme Committee 6.

What we need to realise, when we talk about this particular Theme Committee, is that we are talking about some 10 specialised structures of Government which we are finally looking at in order to determine whether we should have them in the new constitution and what the implications of this will be for the future government.

With regard to one small point under point 2.5 of the draft formulations about the appointment of the commission members, I pick up a difference between how we see the appointment of other specialised structures and this proposal here, which reads:

> The chairperson and members of the Public Administration Commission shall be appointed by the President subject to approval by Parliament in accordance with a procedure prescribed by a national law.

The point here is that we usually have a procedure—in fact, that is what is being considered, in the case of other specialised structures—whereby a parliamentary committee goes through a process and makes recommendations to the President rather than the other way around whereby the President makes appointments and then Parliament must approve them.

We need to look at this kind of thing and try to co-ordinate so that we do not have a situation in which it looks like we are many different factions dealing with many separate matters and, eventually, not contributing towards one constitution and one goal.

I also want to endorse the point made by the hon member Mr Collins Chabane about the Provincial Commissioners. It will definitely be problematic

to create an expectation by even referring to Provincial Commissioners instead of referring to a Public Administration Commission at national level which, by all means, must operate in the provinces and must cater for all the points that were raised by the hon member Ms Janet Love. We must definitely improve what is happening right now.

I support the points which were made. We need to be very sensitive to the fact that the lack of co-ordination does not make for the best provisions for a global picture of one constitution for us.

Mr A ERWIN: Mr Chairperson, I do not know whether it should be a regret or an apology, but I would have dearly loved to have had a chance to make an input in the Theme Committee, but that was not possible.

The reason I say that, is that the experience I have had in finance, particularly in respect of our relationships in negotiations on the Public Service structures have highlighted for me some fairly fundamental issues that I think have to be addressed as we bring about the necessary reform in the Public Service.

I want to make some comments which in essence are also in support of a simplified statement in the constitution. One thing that is clear is that we need to have an independent Public Service Commission, reporting to Parliament, and carrying out some type of auditing inspection function.

It seems to me that to go further than that and to specify numbers and certain operational requirements, certainly at provincial level as contained in this document, is to pre-empt a more thorough reform than is even envisaged in the Theme Committee's submissions.

I should like to highlight this in two particular ways that have emerged. I think this is a case in which looking at financial aspects of the constitution and the Public Service Commission has not been adequately co-ordinated.

It is proposed here in clause 2(3) that the Public Service Commission should have responsibility for advisory, monitoring and inspection functions with regard to public administration. Public administration is a wide term. We, as the Government, have agreed that there should be increased monitoring within the Government on all aspects, particularly finance. We are at present examining the mechanisms to set up a more effective internal auditing process within the Government. At present we rely on the post facto audit of the Auditor-General, which is essential. We have to keep that.

However, we do have to introduce procedures and mechanisms within the Government which identify things as they happen. I think it would be premature to propose that we have one such internal auditing function, which is essentially what clause 2(3) suggests, in the Public Service administration and another auditing function in another department of Government. These are issues which, I think, require considerable consideration and detail.

I would also argue that it is premature to pre-empt the size of this Commission until we are absolutely clear what its final function will be. I think this is going to be something of considerable further debate. My present assessment is—and forgive me, but it is my assessment, both with my experience, as a unionist and with my current experience in finance—that unless some very substantial reforms are made within the Public Service at present, not only will the public servants continue to suffer as they are now suffering, but we will not be able to adjust to the requirements of a rapidly changing economy and we will not be able to apply the required changes to Government at present, because the current structure is not built for change. It is built for rigidity.

I think this requires a deep analysis of what function the Public Service Commission should play—whether it should be independent, whether it should report to Parliament, and whether it has certain functions of inspecting and auditing. I would strongly argue that, until we are absolutely clear what those functions are, only the main principles should be embodied in the constitution, and that the legislation that will be necessary to implement this would be the place where we would put through these more detailed propositions.

The CHAIRPERSON OF THE CONSTITUTIONAL ASSEMBLY: Order! I have two more speakers and they are both from the ANC. The ANC has virtually utilised all the time that we had allocated to them. I will, in the absence of a speaker from any other party . . . [Interjections.] I would like to apologise to the hon member. I did not notice when he raised his hand. I, therefore,

have three speakers. I am going to allow an ANC input for one minute, and then I will allow Mr De Beer who may speak for as long as he wishes. [Interjections.] Thereafter, Mrs Mlambo-Ngcuka will speak for one minute.

Mr O C CHABANE: Mr Chairperson, I have not heard arguments against the proposal which was made by Mr Moosa with regard to the resolution of not including paragraphs 2 and 3, so I take it that there is general consensus in that regard. I propose that whatever is referred to the Constitutional Committee should then exclude that part.

Mr S J DE BEER: Mr Chairperson, I first want to respond to the remark by Mr Chabane about what is happening in the Theme Committees regarding negotiations taking place and members having the opportunity to influence each other. I really want to say that a lot of hard work goes into these efforts and that there will be no point if this process takes place and then afterwards members come in from the cold and they just ignore what has been achieved within these Theme Committees.

*I think this is of the utmost importance, because we are engaged in a process of negotiation in which members are being exposed to one another, in which certain information is being given which other members do not have. We have, literally for months, been exposed to influences from other institutions, and it is wrong to say that we do not have the right to reach certain conclusions. I am afraid if that is the point of departure, then we are really doing great damage to the process.

Mr Moosa and other speakers, too, have once again referred to the necessity for more particulars regarding the commission being embodied in the constitution. I would once again like to emphasise the sensitivity of this matter and I think we could have discussed its importance with one another in our Theme Committee. We are not just talking about an isolated matter. Whenever we speak of the Commission and the functioning of the Commission at provincial level, we are speaking of a far-reaching matter.

This is a matter which carries enormous weight. The evidence we received from people who testified before us, was an indication of this. That is why I would like to emphasise the sensitivity and necessity of the matter. I want to request that this matter should, in fact, be embodied in the constitution. Then every province will have representation on the Commission and every province will have the right to nominate a member who will serve on the Commission. It is of the greatest importance for the officials at grass-roots level to know that this will indeed be the case, also on the road ahead.

Mr Moosa read from the report here, and he said we had to determine whether this would be important for the functioning of democracy. I want to tell the Chairperson this morning—I hope the members will take note of this—that this assurance of knowing that the Commission will function at the national level, but also at the provincial level, is a matter which can influence democracy in the future. We therefore say that it should be embodied in the constitution.

Mr Moosa and other speakers have also referred to the remuneration of these Commissioners. I wish to say with great respect that I think the Theme Committee has already succeeded excellently in reducing the number of Commissioners. We state in the Report that there will be nine Commissioners—one from each province—and that each will then have the right to appoint his own deputy. This does not mean that those deputies are going to function on the level of Commissioners. In reality, in so far as their remuneration is concerned, they will not qualify for the salary of a director-general. What hon members have said, is therefore not true.

I think we should also take cognisance of those arguments in this respect. Mr Moosa is now reacting from this side, but we shall have to hold further discussions with regard to this matter. I just want to say that members should have an understanding of the fact that a very good process has taken place here, and that members of this Theme Committee have listened very carefully to various people who have made meaningful inputs in this regard.

The CHAIRPERSON OF THE CONSTITUTIONAL ASSEMBLY: Thank you, Mr De Beer for that emotional submission. You sounded like a priest—a real "dominee".

Ms P G MLAMBO-NGCUKA: Mr Chairperson, I think it is important that this House does not leave with an impression that those of us who are arguing for the ministerial appointments have not considered some of the points raised by the DP. The clause, in fact, says that political appointments within the framework of constitutional

venues and principles, for example, accountability, have to be considered.

Ms J Y LOVE: Mr Chairperson, this is a response to Mr Moosa whose concern about the issue of public service is really gratifying.

He asked why clauses 2 and 3 should be there, and I am not sure whether he has read Constitutional Principle XXIX which, in the view of the law advisers, implies the need for a Public Service Commission. This is not my view, but it is the view of the law advisers.

My view is that this Constitutional Principle stipulates that should there be a Public Service Commission, it must be independent and impartial. The law advisors were of the opinion that the mere mention of the Public Service Commission in this clause requires or implies that it should be provided for in the constitution. It is on this basis that these particular clauses were put in—and its relationship with the provinces was then catered for.

That aside, there is one other point raised by Mr Alec Erwin, that is quite important. I would like him just to consider that in the past the Public Service Commission or its counterparts with different names have played a very wide role in relation to the management of the Public Service, as well as in terms of bargaining.

By describing, in broad terms, what the Public Administration Commission would do, in other words not to be part of management and not to bargain, we had hoped to pre-empt some of the duplication mentioned. If it could be rephrased in a better way, or possibly left out altogether, I think it could be entertained.

The CHAIRPERSON OF THE CONSTITUTIONAL ASSEMBLY: Order! That brings us to the end of this debate. We had allotted 105 minutes for the debate on the public administration and I am sure we all agree that this debate has actually advanced the various positions that many parties and people might have had, because it has been illuminating. In many ways it has also raised issues and questions which many people may not have been aware of.

Consensus between parties has evolved on a number of issues. The Report, as it stands, has a number of parts and there is consensus on the principles and the values that should govern the public administration. That has generally been agreed upon. From what I can see, agreement has also been reached that, in the end, we should not have a constitution that contains unnecessary detail. However, that debate needs to be entertained when we discuss the Memorandum from the Panel of Experts which will be tabled before the Constitutional Assembly when we next meet. That Memorandum provides a number of criteria that we need to bear in mind as we draft the constitution.

With regard to this debate, a number of differences have been expressed. In particular, I do not agree with Mr Chabane that there was no opposition to what Mr Moosa had suggested, in terms of doing away with paragraphs 2 and 3 and that we should agree to do so.

There are different points of view. However, they are not views that cannot be reconciled. I am confident that consensus is possible with regard to the question of political appointments. I think parties will be able to reach a point of consensus regarding the need for making provision in the constitution for Provincial Commissioners. Here too, a number of persuasive arguments were put forward, while at the same time Mr Moosa and those who supported his viewpoint also had a valid argument.

We need also to reflect on the importance of submissions that have been made to Theme Committees on matters with which we are dealing. The Theme Committee members have informed us that there were inputs from provinces and from a number of organisations. In dealing with those submissions, I think we need to give them the weight and importance they deserve. We should not, as a Constitutional Assembly, simply base everything that we finally conclude on our views as parties. We need to hear what those whom we invited to make submissions to us are saying and if their submissions carry weight and are persuasive, we need to concede that. I am saying this, because I am about to ask Mr Vadi once again to put forward the amended resolution.

It is also important that, when the Constitutional Committee takes into account the remarks and the suggestions that were made here, it should also take into account what the public, other organisations and the provinces have said in terms of the submissions they made to us.

I believe we shall not be able to adopt the resolution as proposed on the Agenda of Proceed-

ings. Mr Vadi has already proposed an amended version of that draft resolution, which amounts to referring all of this back to the Constitutional Committee, the latter finalising this Report and these draft formulations and also publishing them. However, I think Mr Vadi is best placed to read that draft resolution once again and then to proceed to have it adopted.

Mr I VADI: Mr Chairperson, the amended resolution reads as follows:

That this Assembly, noting that the draft formulations on Public Administration dated Friday, 19 May 1995, submitted by Theme Committee No 6.1—

(1) are the product of the integration of ideas of all role-players at several hearings involving stake-holders and international experts; and

(2) are the subject of continuing debate and discussion within the structures of the Constitutional Assembly;

resolves that the Constitutional Assembly authorises the Constitutional Committee to amend the said draft formulations in accordance with proposals made in today's debate, and thereafter, to publish the draft formulations for public comment and for further consideration.

Debate concluded.

Question agreed to.

DISCIPLINE IN CONSTITUTIONAL ASSEMBLY

The CHAIRPERSON OF THE CONSTITUTIONAL ASSEMBLY: As we move to the next item on the Agenda, I would like to comment on the issue of discipline, as raised by Mr Jordaan during the Constitutional Assembly business. He asked the Chairperson and his Deputy to enforce discipline. We note that and are willing to accept the suggestion. However, in the end discipline is really incumbent on all members of the Constitutional Assembly and we will need to find ways and means of ensuring that there is a certain degree of discipline, that people do attend meetings and that meetings have a quorum.

I have been informed that with regard to Theme Committee 6.1, the Core Group meeting did not take place. However, the Theme Committee did accept and adopt the Report that we have just dealt with. I am not asking for a response, but we accept the matter of discipline and we shall be doing everything in our power to enforce it.

DRAFT FORMULATIONS ON SOUTH AFRICAN RESERVE BANK

Dr R H DAVIES: Mr Chairperson, at the Constitutional Committee meeting which was held on 12 May, two decisions were taken in respect of the draft text on the South African Reserve Bank and matters arising therefrom. The first was that the Subtheme Committee should be requested to debate, at further length, some of the matters referred to in the annexure by the law adviser, and which is included here in the documentation, in order to explore the possibility of reaching a broader consensus on a number of issues that are included therein. Thereafter it was decided that the matter should be referred to the Constitutional Assembly for debate.

The Subcommittee met during the course of the week and had an initial discussion. However, members were unanimously of the view that they needed more time to consult and to consider some of the complex matters referred to in that legal opinion. The Management Committee has acceded to this request by the Subtheme Committee and, accordingly, I request the Assembly for leave to withdraw the resolution which is printed in my name on the Agenda.

The CHAIRPERSON OF THE CONSTITUTIONAL ASSEMBLY: Order! I am sure we all agree that we cannot proceed with a matter which the Theme Committee members themselves and the Management Committee have agreed should be withdrawn.

That report will then go back to the Theme Committee and the Constitutional Committee and will be brought back here for further discussion and debate.

The meeting adjourned at 11:10.

ANNOUNCEMENTS, TABLINGS AND COMMITTEE REPORTS

1. INTRODUCTION

This sitting of the Constitutional Assembly takes place almost on the eve of the first anniversary of the Constitutional Assembly, 24 May 1995. This is also the first occasion on which the CA has the

opportunity to discuss matters of substance. The Theme Committee reports which are included in this report are the first Theme Committee reports which the Constitutional Committee has forwarded to the CA for its consideration.

2. REPORT OF CONSTITUTIONAL COMMITTEE

2.1 Since the last sitting of the Constitutional Assembly, the Constitutional Committee has met on seven occasions: 27 February, 6 and 13 March, 3 and 7 April, and 5 and 12 May 1995.

2.2 The Constitutional Committee considered the following reports from Theme Committees (which the Theme Committees completed on the dates indicated):

Theme Committee 1, Final Report on Block 1, Democracy and Character of State, 28 February 1995

Theme Committee 1, Report on Block 2, Equality and Single Sovereign State, 20 April 1995

Theme Committee 2, Report on Block 1, Separation of Powers, 2 February 1995

Theme Committee 3, Report on Block 1, The Nature and Status of the Provincial and Local Systems of Government, 16 February 1995

Theme Committee 4, Report on Block 1, Constitutional Principle 11, 14 February 1995

Theme Committee 5, Report on Blocks 1-4, Judiciary and Legal Systems, 29 March 1995

Theme Committee 6.1, Report on Blocks 1-6, Public Administration, 9 May 1995

Theme Committee 6.2, Report on Blocks 1-5, Reserve Bank, 9 May 1995

Theme Committee 6.4, Report on Blocks 1-2, Supremacy of the Constitution and Accountability and Control of the Security Forces, 27 February 1995

2.3 It was reported at the last sitting of the Constitutional Assembly that the Management Committee had adopted certain drafting procedures.[1] In terms of these procedures, the Constitutional Committee was allowed to request draft formulations once it had considered a Theme Committee report. However, when it considered the *"Chairpersons' Report and Evaluation"* of 23 March 1995,[2] the Management Committee effected certain amendments to these procedures to speed up the process. In terms of the amended procedures:

i. Technical Committees would, with the production of the Theme Committee report, immediately prepare draft formulations for consideration by the Constitutional Committee;

ii. These provisions would follow the format of the Theme Committee report in clearly reflecting and distinguishing between those areas that were not contentious and those that were; and

iii. In respect of areas of contention, alternative drafts would be produced.

In addition, in keeping with the earlier drafting procedures, it was recommended that Technical Committees act in close consultation with the Constitutional Assembly Law Advisors in the production of those formulations and memoranda.

3. MANAGEMENT COMMITTEE

3.1 Subsequent to the last meeting of the

1. *Constitutional Assembly Announcements, Tablings and Committee Reports*, No 1—1995, 20 February 1995, pp. 3-4.

2. The Annual Review of the Constitutional Assembly will discuss the *"Chairpersons' Report"* in greater detail.

Constitutional Assembly, the Management Committee met on 2, 9, 16, 23, 27 and 30 March, 6 and 20 April, and 4 and 11 May 1995.

3.2 "*The Chairpersons' Report and Evaluation of the Process*" was discussed at the 27 March 1995 meeting of the Management Committee. Amongst the issues raised in the "*Evaluation*" were: the Constitutional Assembly Schedule and its broad time frames, the role of technical advisers, drafting procedures, and the Public Participation Programme.

4. THEME COMMITTEES

4.1 Meetings held

Since the last report to the Constitutional Assembly dated 20 February 1995, all Theme Committees met on at least 6 occasions as per the Constitutional Assembly schedule. Core Groups were also regularly convened, often immediately after Theme Committee meetings.

4.2 Progress Reports

Theme Committee work is progressing fairly well, as at 16 May 1995, as outlined herein:

Theme Committee 1, Completed Reports on Blocks 1 and 2, Discussing Draft Report on Block 3 (Supremacy of the Constitution)

Theme Committee 2, Completed report on Block 1, Currently considering Blocks 2-3 (Structure and Functioning of government at national and provincial levels)

Theme Committee 3, Completed report on Block 1, Currently considering Blocks 2-3 (National and Provincial Legislative and Executive Competencies)

Theme Committee 4, Completed report on Block 1, Finalising report on Blocks 2-6 (Rights to privacy; human dignity; servitude and forced labour; freedom and security of the person; freedom of expression; access to information; freedom of religion, belief and opinion; children's rights and right to life

Theme Committee 5, Completed report on Blocks 1-4, Currently Considering Block 5 (Traditional Authorities and Customary Law), work also resuming on Correctional Services

Theme Committee 6.1, Completed report on Blocks 1-6, Currently Considering Blocks 7 -10 (Elections Commission)

Theme Committee 6.2, Completed report on Blocks 1-5, Currently Considering Blocks 6-10 (Auditor General and National Revenue Fund)

Theme Committee 6.3, Finalising Report and Draft Formulations on Blocks 1-4 (Public Protector), Considering Blocks 5-6 (Human Rights Commission)

Theme Committee 6.4, Completed Reports on Blocks 1 and 2, Finalising Report on Blocks 3-6 (Defense and Policing).

5. CONCLUSION

This Report deals in the main with the substantive issues discussed by Theme Committees and the Constitutional Committee since the last sitting of the Constitutional Assembly. A detailed report on CA activities in its first year of existence is currently being prepared by the Chairpersons with the assistance of the the Administration. This report will be titled *Chairperson's Annual Report*.

APPENDIX

A. THEME COMMITTEE 6.1, FINAL REPORT ON PUBLIC SERVICE, AS AT 9 MAY 1995

1. INTRODUCTION

1.1 This report has been drawn up on the basis of the following:

1.1.1 Submissions received from Political Parties, Organi-

sations of Civil Society and Individuals; and

1.1.2 Evidence taken by the Committee from various stakeholders.

Details of all submissions received are attached to this report under cover of a document entitled overview of submissions on Public Administration.

1.2 In the course of deliberations in the Committee, the Technical Committee prepared 13 reports for the Committee.

2. MATERIAL PROCESSED BY THE COMMITTEE

The salient issues in regard to the Public Service which emerged from the material processed by the Committee are the following:

2.1 The need for a constitutional provision on the Public Service;

2.2 The nature of the constitutional provision on the Public Service;

2.3 The definition of the Public Service;

2.4 Limited political appointments in the Public Service; and

2.5 Public Administration Commission.

3. AREAS OF AGREEMENT

3.1 CONSTITUTIONAL PROVISION ON THE PUBLIC SERVICE

Constitutional Principle XXX require the inclusion of a Public Service provision in the final text of the constitution.

All parties and submissions processed favour the inclusion of a clause in the final text on the constitution on the public service as the Public Service is seen as having an important role to play in the attainment of constitutional and other policy goals.

3.2 NATURE OF CONSTITUTIONAL PROVISION ON THE PUBLIC SERVICE

All parties agree that the Constitution should provide a minimalist, flexible framework of broad principles for a developmental public service and that the Public Service be regulated by way of legislation, rather than the Constitution.

The Constitution should provide a governing framework outlining the democratic assumptions on which the Public Service is based and establish a common set of basic values and principles applicable to all public sector institutions.

The following is a list of the key values and principles proposed:

3.2.1 impartiality and equity in relation to the provision of services;

3.2.2 efficiency and effectiveness in relation to developmental and constitutional objectives;

3.2.3 professional and ethical conduct on the part of public sector employees;

3.2.4 a broadly representative public sector linked to deracialisation, flatter hierarchies and best management practice;

3.2.5 accessibility of services and information to the public;

3.2.6 responsiveness to the needs of citizens and communities;

3.2.7 transparency and openness in government and administration;

3.2.8 objectivity and equity in relation to employment practices;

3.2.9 a developmental orientation;

3.2.10 democratic, structured public participation in public policy-making and management;

3.2.11 non-hierarchical, democratic and transparent in relation to the role of public employees in public management;

3.2.12 accountability to the structures of government and to the public;

3.2.13 career development orientation; and

3.2.14 loyalty in the execution of the lawful policies of the government of the day.

The following noteworthy views were expressed in regard to some of the above principles:

Accountability

It was suggested that existing constitutional mechanisms for accountability are acceptable as far as they go, but that they are largely complaints-based mechanisms which deal with accountability for past actions. There is a strong need for proactive measures (before the fact/act) such as inspections, etc.

Representivity

The view appears to be that the concept of a broadly representative Public Service is acceptable and that mechanisms for attaining such representivity should not be referred to in the Constitution, but left to policy and legislation.

Representivity should be linked to the deracialisation and transformation of state institutions to ensure employment equity and effective service provision.

Policy-Making and Management

It is the general view that structured public participation in public policy-making is highly desirable and that appropriate, workable consultative mechanisms should be designed and established.

The monitoring and evaluation of public policy implementation should be an essential feature of public administration and mechanisms should include internal arrangements in the Public Service, as well as appropriate oversight bodies/arrangements.

3.3 DEFINITION OF THE PUBLIC SERVICE

The notion of one Public Service for the whole of the Republic of South Africa was supported.

There is agreement that the public service definition should be wide enough to cover national, provincial and local tiers of government, parastatals and the security services as all these institutions are bound to together by a set of fundamental values and principles applicable to the public service. These values and principles should be binding on all organs of state at all levels.

The above definition was agreed to subject to the following conditions:

3.3.1 that local authorities and parastatals (i.e. organisations funded partially or wholly by the State) will not be regulated by the same legislation governing personnel and management practices at national and provincial levels of government;

3.3.2 that the security services (police, prisons, defence, and departments such as education) and others where necessary, be regulated and administered in terms of separate (i.e. "own") legislation.

3.4 LIMITED POLITICAL APPOINTMENTS IN THE PUBLIC SERVICE

All parties agree in principle on the need for a provision in the constitution allowing for limited political appointments in the public service. These appointment should take the following form:

3.4.1 appointment of ministerial advisers on contract and not in terms of legislation; and

3.4.2 appointment on contract by a Cabinet Minister of certain officials in the management echelons of the Public Service (i.e Directors-General and other heads of departments/sections).

This approach was supported on the basis that it allows for lateral entry into the civil service and accordingly strengthen and improve management expertise and capacity in the Public Service, thereby creating space for the injection of fresh and novel ideas from outside the Public Service.

There was unanimity that limited political appointments within the sphere of the professional/career Public Service should not be along party political lines or ideological affiliations.

Whilst accepting the principle of limited political appointments, the DP and FF have expressed the view the issue of these appointments should be covered in legislation rather than the Constitution.

3.5 PUBLICADMINISTRATION COMMISSION

3.5.1 Constitutional Provision on the Public Administration Commission

All parties agree that the final text of the constitution should contain a clause which provide for the establishment of an independent Public Administration Commission ("the Commission").

The Commission must be established along the lines of the office of the Auditor General and should be accountable, and report, to both parliament—through a parliamentary select committee—and provincial legislatures.

3.5.2 Structure of the Public Administration Commission

All the parties have agreed on the following structure for the Commission:

(a) the Commission should consist of a Chairperson and eleven Commissioners. Of these eleven commissioners, there shall be one drawn from the nominations of each province;

(b) the Chairperson and members of the Commission should be appointed by the President subject to approval by Parliament in accordance with a procedure prescribed by a national law. Such law shall make provision for each province to nominate one commissioner for the Commission;

(c) each Commissioner shall have the power to establish an office—details of which will be set out in legislation—in his or her Province;

(d) the Premier of a Province may, subject to approval by the Provincial Legislature, appoint no more than two persons as deputies to Provincial Commissioner.

3.5.3 Appointment of Members of the Commission

The parties agree that members of the commission should be appointed by the President subject to confirmation by Parliament.

3.5.4 Role and function of the Commission

All the parties agree that the Commission should be an independent advisory body on policy matters. In addition to its advisory function, the Commission should be responsible for the inspection of personnel and management practices in departments as well as the implementation of policy and should report regularly to a relevant Parliamentary select committee and relevant Provincial Legislatures' select committees.

4. AREAS OF DISAGREEMENT

No areas of material disagreement were recorded.

5. CONCLUSION

This report has been endorsed unanimously by all the Parties. However, the FF accepted the report subject to the condition that:

"the FF be allowed to make further inputs on the issue, upon submission to the CA of its proposal on the Volkstaat Council".

6. OVERVIEW OF SUBMISSIONS RECEIVED AS AT 9 MAY 1995

PUBLIC ADMINISTRATION	
1. POLITICAL PARTIES	
African Christian Democratic Party	Public Service
African National Congress	Preliminary Submission on the Public Service
African National Congress	Public Administration
Democratic Party	Public Service and the Constitution
Freedom Front	Public Service and the Constitution
Inkatha Freedom Party	First Report on the Provincial and National Civil Service
National Party	Public Administration
National Party	Memorandum to Subtheme Committee 6.1
2. GOVERNMENT INSTITUTIONS	
Department of Education and Training	Political Appointments
Department of Education and Training	Policy on Affirmative Action
Department of Land Affairs	Public Administration and the Constitution
North West Premier: office of the Director General	Public Administration
North West Premier	Public Service
South African National Defence Force	Relationship between the Public Service Commission and the South African National Defence Force
3. ORGANISATIONS	
Africa Christian Action	Public Administration
Afrikaanse Handelsinstituut	Financial Institutions and Public Enterprises
Associated Magazines (Pty) Ltd	Public Service
Baptist Union of Southern Africa	Public Service
Civic Information Consultants	Public Administration
Confederation of Employers of Southern Africa	Matters of relevance regarding the new Constitution
Conservative Party of South Africa	Presentation of Constitutional Proposals
The Evangelical Fellowship of South Africa	The Constitution Making Process—Public Service

Graduate School of Public and Development Management	Transforming Public Sector Institutions in SA
Institute for advancement of human rights, democracy and individual right to mother tongue	Proposal on new Constitution
Institute for Defence Policy	Public Service
NAPTOSA	Public Service
Natal Public Sector Workers Union	Public Service
National Education Health and Allied Workers Union	Public Administration and the Constitution
Police and Prisons Civil Rights Union	Public Service
Public Servants Association of South Africa	Public Service
Public Servants Association of South Africa	Public Administration
Residents and Ratepayers Association	Local Government
South African Broadcasting Corporation	National Household Register of Names and Addresses
The South African Pharmacy Council	Pharmacy Amendment Bill '95
South African Democratic Teachers Union	Public Administration
Standard Bank	Public Administration
Town Council of Tzaneen	Public Administration and the Constitution
Tshidisanang M B Society	Language Broadcasting
University of Fort Hare—Dept of Political Science and Public Administration	Public Administration
University of Stellenbosch	The Purpose of a Constitution iro control over the security forces
University of the Western Cape—Dept. of Public Administration School of Government	Public Administration
University of Witwatersrand—Centre for Applied Legal Studies	Public Service Human Resource and Labour Relations Management
Volkstaat Council	Public Service
4. INDIVIDUALS	
"Signature"	Civil Service
Abrahams S	Public Administration
Alfred	Suggestions re : New Constitution
Bresler R	Request for clarity on the existing constitution
Chevalier C	Public Administration
Cloete JN	Recommendations about Provisions of the Constitution in relation to the Public Service
D N W M	Drafting of a New Constitution

Daddy R	Views for consideration—Public Administration
De Bruyn TA	Public Administration
Dimba MS	Public Administration
Dreyfus F	Public Administration and the Constitution
Driver-Jowitt JP	Public Administration
Drummond D	Public Administration
Easton HO	Public Administration
Evans S	Views on Ethical Principles
Ferreira H	Views on the Constitution for consideration
Ferreira IW	Public Administration
Galpin S	Constitutional Provision on Authorised Civic Officials
Gibson G	Public Administration
Greenberg R	Views on new Constitution
Hassim MH	Public Service
Hawardien AG	Public Service
Hellryd BAL	Civil Service
Hlekane K	Public Enterprise
Hoffenberg A	Role of Government and Public Officials
Hunter K	Public Service
Hurribance A	Public Service
JM	Matters affecting Civil Servants
Jacovides JC	Views on the Constitution
Jagger M	Views on the New Constitution
Jetupu J	Views on Transport
Jivananda S	Public Administration
Jivananda S	Public Service
Joubert Mr & Mrs	Public Administration
Jumna DD	Views on Local Government and the Group Areas Act
Kahanotivz C	Appointments to the Public Service in the Post-Apartheid South Africa
Katz J (Snr)	Democracy, Public Service, Accountability
Kekana MJ	Public Service
Kluever LR	Public Administration
Krishna B	Teachers—Retirement Age
Laleni T et al	Pensions
Jetupu J	Views on Transport

Longden-Thurgood RM	Views on the Constitution
Lowe WJ	Views on dismissal procedures
Maduma L	Views on the Constitution
Marago J	Comments and suggestions towards the new constitution
Mathias RGL	"Your-The People's Charter"
Mbotoli V	Views on the Constitution
McLean S	Views on the Constitution
Mkaba ME	Ideas on Imprisonment
Mkuzangwe LN	Public Administration
Mnisi BJ	Public Administration
Modisi EM	Public Administration
Mokgadi Mosidi E	Nursing and the Nursing Act
Mtiki ZE	Views on the Public Service
Mtshali AM	Public Service
Ngirane G	Public Administration
Nxumalo NM	Public Administration
Peer M	Public Service
Pottinger D	Subtheme Committee 6.1
Rabie D	Views on the Constitution
Ranchold M	Corruption and Democracy
Ravenscroft S	Role of Police
Richfield JM	Public Service
Sandi ND	Public Administration
Sargeant D	Lump sum benefits to civil servants
Sere M	Public Sector Units
Shepherd DF	Public Service
Sibanyoni A	Public Power, Strikes by Civil Servants and Judges and Magistrates
Simelane AM	Employment Criteria
Smith OJ	Accountability of Government Officials
Snowden SG	Public Service
Solomon R	Comments on the Public Sector
Steenkamp JAJ	Public Administration and the Public Sector
Stegen MH	Public Service
Stocks RK	Views on the New Constitution
Stones E	Public Administration
Stratten DB	Public Administration

Stuport DB	Public Administration
Swaine DH	Public Service
Swanepoel A	Public Service
Swart JS	Constitutional Principles
Taylor C	Views on Corruption, incompetence of elected officials and Autonomous Ombuds
Tongane ZJ	Public Administration
Van Eck E	Public Service
Veersamy VP	Labour Relations
Vosloo JM	Public Service and Elections
Yeadon ND	Views on how to avoid corruption of elected officials and civil servants
Young AC	Constitutional safeguards against abuse of public office

B. THEME COMMITTEE 6.2, REPORT ON THE RESERVE BANK, AS AT 9 MAY 1995

1. SCHEMATIC SUMMARY OF SUBMISSIONS AS AT 9 MAY 1995

No	CP	Issue	Consensus	Contention	Remarks
1	XXIX	Establishment of the South African Reserve Bank (SARB)/Central Bank.	Establishment of SARB/Central Bank to be regulated by an act of Parliament (ANC, NP, IFP, DP, FF and PAC).	**1. Name of the Bank:** Two views: **1.1** Retention of SARB (ANC, NP, DP, FF and PAC). **1.2** Rename the bank as Central Bank (IFP).	Should the bank be called SARB or Central Bank?

No	CP	Issue	Consensus	Contention	Remarks
2		Primary objectives of Bank.	The primary objectives of the bank shall be to protect the internal and external value of currency in the interest of balanced and sustainable economic growth (ANC, NP, DP, IFP, FF and PAC)	A different view on the objectives for establishment of SARB: "The primary objectives of the bank shall be to protect the internal and external value of currency in the interest of reconstruction, development and a balanced, sustainable economic growth" (SACP).	Constitutionalise

No	CP	Issue	Consensus	Contention	Remarks
3		Primary objectives of the SARB	The SARB shall, in pursuit of its primary objectives, exercise its powers and perform its functions independently, subject to an act of parliament: *provided that there be regular consultation between the SARB and the minister responsible for national financial matters* (ANC, NP, IFP, DP, FF and PAC). **Suggested Qualifications:** **1.** Notion of independence should be construed widely to include not only independence from government but also other powerful interest groups (SACP).		Constitutionalise

No	CP	Issue	Consensus	Contention	Remarks
			2. The SARB shall, in pursuit of its primary objectives, exercise its powers and perform its functions independently, subject to an act of parliament: Provided that the "decisions from either the SARB or Minister, affecting either authority should be reached only after due consultation between the two authorities" (FF). **3.** Regular consultation should be construed to mean in consultation with and not the weaker "after consultation with" (SACP).		

No	CP	Issue	Consensus	Contention	Remarks
4		Powers and Functions	The powers and functions of the SARB shall be those customarily exercised by central banks (ANC, NP, IFP, DP, FF, ACDP and PAC). **Suggested Qualifications:** **1.** "The powers and functions of SARB shall be those customarily exercised and performed by *SARB and other central banks*" (DP and NP). **2.** "The bank shall have the powers regulating banking and credit and shall be independent within the parameters of law and within the scope of predetermined monetary and general economic policy frameworks, to use tools of monetary intervention in the public interest" (IFP).		Constitutionalise

No	CP	Issue	Consensus	Contention	Remarks
			3. "The powers and functions of SARB shall be those customarily exercised and performed by central banks as well as intervening in money markets (*inter alia* to fix interest rates) to achieve its primary objectives" (PAC).		

No	CP	Issue	Consensus	Contention	Remarks
5		Powers and Functions	The powers and functions of the SARB shall be determined by an act of Parliament and shall be exercised and performed subject to such conditions as may be prescribed by or under such act (ANC, NP, DP, FF, ACDP and PAC). **Suggested qualification:** *"Provided that such act shall not derogate from the primary objectives and independence of the SARB" (DP).*	**Two views on the level of detail on the powers and function:** **1.** The fundamental principles contained in s197 of interim constitution are generally acceptable and further details on powers and functions should be a matter for legislation (ANC, NP, DP, FF, ACDP and PAC). **2.** To give content to the notion of independence of the bank, it is important that the bank's fundamental powers and functions should be specified in the constitution rather than left to the discretion of the majority in Parliament (IFP).	Should the SARB's powers and functions be specified in the constitution or should this be done by means of legislation?

No	CP	Issue	Consensus	Contention	Remarks
6		Powers and Functions	**1.** SARB shall submit an annual report to Parliament and authorise senior officers to give evidence before a joint committee of both houses of Parliament on the policies and activities of the SARB (ANC, NP, DP, FF, ACDP and PAC). **2.** IFP agrees with principle of reporting and accountability, but has a different formulation: **(a)** The Governor shall submit a half yearly report to parliament on the monetary status of the Republic and on the status of the banking system of the country; and **(b)** Parliament shall have the power to review any activity of the bank and to hold hearings to investigate its policies. The bank shall hold regular consultations with ministers responsible for national and provincial matters.		Should the Governor submit annual or half yearly reports to parliament?

No	CP	Issue	Consensus	Contention	Remarks
7		Powers and Functions		**Limitations on SARB's financing of Government.** **Two views:** **1.** Constitution should provide specified limits on the bank's direct financing of government (IFP); **2.** Limitations on SARB financing is unnecessary and not a matter for the Constitution (ANC and NP).	Should the constitution have a limitation clause on SARB's financing of government?
8		Powers and Functions		**Purchase of government securities.** **Two views:** **1.** The constitution should contain a clause preventing the imposition of an obligation on the SARB to purchase govt securities (IFP); **2.** The purchase of govt securities is not a matter for the constitution and SARB is not obliged to purchase govt securities (ANC, NP and FF).	Should the constitution contain a clause prohibiting the imposition of an obligation on the SARB to purchase govt securities or is this an unnecessary embellishment?

No	CP	Issue	Consensus	Contention	Remarks
9		Powers and Functions		**Structure of the SARB** **Two views:** **1.** Structure of the SARB, as a means of guaranteeing the SARB's independence, should be determined by the constitution and not legislation (IFP); and **2.** Structure of SARB should be dealt with in legislation (ANC, IFP and FF).	Should the structure of the SARB be determined by the Constitution or legislation?

No	CP	Issue	Consensus	Contention	Remarks
10		Powers and Functions		**SARB: Appointment and Representation** **Two views:** **1.** The Governor, the two deputy governors and three directors of the SARB shall be appointed by the President in consultation with Parliament or a select committee thereof. A further 10 directors of the SARB should be appointed by organised commerce, industry and labour (IFP). **2.** The Constitution should not contain the content of **(1)** above as suggested by the IFP. These are matters for legislation and regulation (ANC, NP, DP, FF).	**a)** Should the Constitution contain a clause empowering the President to appoint the Governor and his deputies and three directors? **b)** Should organised Commerce, Industry and Labour have a constitutional right to appoint directors onto the SARB's board? **c)** Should appointment of persons to the SARB board be constitutionalised or not?

No	CP	Issue	Consensus	Contention	Remarks
11		Powers and Functions		**Term of office of members of the SARB's board** **Two views:** **1.** The constitution should contain a clause providing that all members of the SARB's board serve a five year term renewable on one or more occasions. **2.** The issue of term of office of members of the SARB board should be dealt with in legislation.	Should the tenure of office of members of the SARB board be constitutionalised or not?

No	CP	Issue	Consensus	Contention	Remarks
12		Powers and Functions		**The Executive of the SARB** **Two views:** **1.** Constitutionally the Executive of the SARB should be made up of the governor, deputy governors and three directors appointed by organised commerce, industry and labour (IFP). **2.** The constitution should not describe the Executive of the SARB as this a matter for legislation and ancillary regulations.	Should the constitution contain a clause setting out the Executive of the SARB?

2. THEME COMMITTEE 6.2, REPORT ON THE SOUTH AFRICAN RESERVE BANK, 9 MAY 1995

KEY TO THE CODES IN THE REPORT

A Denotes that the party or institution has explicitly accepted in its written submission, the position as stated in the table, on the particular issue under discussion.

AQ Denotes that in its written submission, the party or institution appears to have accepted the position as stated, with some qualification or minor addition or deletion.

NCA Denotes that from the general tone of proceedings in Sub-Theme Committee discussions, the view of this technical expert is that the party or institution concerned appears to indicate that whilst having made no specific comment on a particular issue, there is a reasonable likelihood that the party or institution concerned accepts the position as stated.

D There appears to be disagreement on the issue as stated.

3. ANNEXURE B: SOUTH AFRICAN RESERVE BANK

SARB	ANC	NP	IFP	DP	FF
Section 195: The SARB, established and regulated by an Act of Parliament shall be the Central Bank	A	NCA	AQ:— "The SARB shall be reestablished as "The Central Bank of South Africa"	NCA	NCA
Section 196(1):— The primary objectives of the SARB shall be to protect the internal and external value of the currency in the interest of balanced and sustainable economic growth in the Republic	A	NCA	A	NCA	A

SARB	ANC	NP	IFP	DP	FF
Section 196(2) The SARB shall, in pursuit of its primary objectives referred to in subsection (1), exercise its powers and perform its functions independently, subject only to an Act of Parliament, referred to in Section 197	A	NCA	NCA	NCA	NCA
Section 196(2) (Continued) provided that there shall be regular consultation between the SARB and the Minister responsible for national financial matters	A	NCA	AQ (refer below)	NCA	A "Decisions affecting each other should be reached only after due consultation between the two authorities. Proper provision for this liaison should be made".

SARB	PAC	ACDP	COMMENTS FROM OTHER SUBMISSIONS
Section 195: The SARB, established and regulated by an Act of Parliament shall be the Central Bank	A	NCA	(1) *SACOB*:— "The enabling Act of Parliament establishing and regulating the Bank shall not detract from the . . . principles . . ." (mentioned in Section 196(1)). (2) CP: NCA (3) SACP: NCA
Section 196(1):— The primary objectives of the SARB shall be to protect the internal and external value of the currency in the interest of balanced and sustainable economic growth in the Republic	A	A	(1) *SACOB*: "SACOB strongly supports the principles contained in Section 196 of the Interim Constitution"; (2) *COSAB*:— "We support the retention of provisions based on Sections 196 and 197 of the Interim Constitution, setting out the primary objectives and the general nature of the powers and functions of the Bank, which powers and functions of the Bank, which powers and functions should continue to be determined by a separate Act of Parliament." (3) *SACP* D:— Too narrow:— "instead the primary objectives should be to manage the currency in the interests of reconstruction, development and a balanced, sustainable economic growth in the RSA".
Section 196(2) The SARB shall, in pursuit of its primary objectives referred to in subsection (1), exercise its powers and perform its functions independently, subject only to an Act of Parliament, referred to in Section 197	A	NCA	(1) *SACP* AQ:— Independence should include not only independence from government but also from other powerful interest groups.

SARB	PAC	ACDP	COMMENTS FROM OTHER SUBMISSIONS
Section 196(2) (Continued) provided that there shall be regular consultation between the SARB and the Minister responsible for national financial matters	A	NCA	(1) *SACOB*:— "SACOB endorses the proviso to Section 196(2) of the Interim Constitution that there should be regular consultation between the South African Reserve Bank and the Minister responsible for national financial matters"; "Any conflict between the Minister of Finance and the Governor of the Reserve Bank should be resolved by Parliament". (2) *SACP* AQ:— "We assume that 'regular consultation' means 'in consultation with' and NOT the weaker 'after consultation with'. This needs to be made clearer. The Ministry of Finance and the Reserve Bank need to work as a team"

SARB	ANC	NP	IFP	DP	FF
Section 197:— The powers and functions of the SARB shall be those customarily exercised and performed by Central Banks.	A	NCA	AQ:— "The Bank shall have the powers of regulating banking and credit and shall be independent within the parameters of the law and within the scope of predetermined monetary and general economic policy frameworks (as determined in conjunction with government), to use tools of monetary intervention in the public interest". . . ". . . the Bank . . . power to regulate banking . . . and to undertake all other powers and functions customarily exercised by central banks"	Amend to read: "The powers and functions of the SARB shall be those customarily exercised and performed by *the SARB and other* Central Banks" [supported by NP]	NCA

SARB	ANC	NP	IFP	DP	FF
Section 197:—(continued) which powers and functions shall be determined by an Act of Parliament and shall be exercised or performed subject to such conditions as may be prescribed by or under such Act.	A "We believe that the details of the operation of the Bank should, as at present, be governed by legislation, with the Constitution specifying general principles only".	NCA	D:— "In order to increase the independence of the Bank, its fundamental powers and functions should be specified in the Constitution rather than left to the discretion of the majority of Parliament" ". . . the Bank should enjoy 'autonomy' which is the power to adopt the fundamental rules of its organisation and operation. It is debatable whether this scheme leaves any space for the legislative competence of Parliament, which in any case should be limited to giving the Central Bank additional or 'secondary' goals with related powers, functions and resources, and should not prescribe how such powers and funcitons are to be organised".	AQ:— Add:— "provided that such Act shall not derogate from the primary objectives and independence of the SARB as provided for in Section 196".	NCA

SARB	ACDP	PAC	COMMENTS FROM OTHER SUBMISSIONS
Section 197:— The powers and functions of the SARB shall be those customarily exercised and performed by Central Banks	A	AQ:— ". . . it may intervene in the money markets (to inter alia fix interest rates) to achieve its primary objectives"	(1) SACP D:— "This assumes some universal agreement and practice in regard to the powers of Central Banks. This is simply not the case . . . For instance in many successful East Asian economies, the central bank has been a subordinate institution within government". We are trying to debunk the common belief that "all economically successful countries have absolutely independent central banks". "The new Constitution needs to ensure that . . . the degree of Reserve Bank independence is not so extreme that the possibilities of achieving a coherent, democratically-mandated reconstruction and development programme are undermined."
Section 197:— (continued) which powers and functions shall be determined by an Act of Parliament and shall be exercised or performed subject to such conditions as may be prescribed by or under such Act.	NCA	A	NCA

SARB	ANC	NP	IFP	DP	FF
Proposed new Section 197(2) (Proposed by the DP). (Reporting & Account-ability) Also includes comments & references from other submissions, with regard to reporting & consultation requirements to Parliament	NCA	NCA	"The Governor shall submit a half-yearly report to Parliament on the monetary status of the Republic and on the status of the banking system of the country." "Parliament shall have the power to review any activity of the Bank and to hold hearings to investigate its policies. The Bank shall hold regular consultations with the Ministers responsible for national and provincial matters."	"The South African Reserve Bank shall submit an annual report to Parliament and authorise senior officers to give evidence before a joint commission of both houses of Parliament on the policies and activities of the South African Reserve Bank"	NCA

SARB	PAC	ACDP	COMMENTS FROM OTHER SUBMISSIONS
Proposed new Section 197(2) (Proposed by the DP). (Reporting & Accountability) Also includes comments & references from other submissions, with regard to reporting & consultation requirements to Parliament	NCA	NCA	(1) *SACOB*:— "SACOB recommends that in order to enhance the accountability of the Bank, provision could explicitly be made for appearance before the Joint Standing Committee on Finance." (2) *COSAB*:— "Transparency . . . would enhance credibility. A suitable vehicle for this could be regular televised testimonies to a specific Parliamentary Committee (eg:— the Joint Standing Committee on Finance) in the form of a report-back, but not to account for or seek approval of actions."

SARB	SARB GOVERNOR	SARB: HEAD LEGAL SERVICES—MEMORANDUM TO GOVERNOR
General Comments (From SARB Governors' submission to the Sub-Theme Committee; from SARB Head—Legal Services' Memorandum to SARB Governor)	(1) "A general statement about the independence of the Reserve Bank would be sufficient"; (2) "The independence of the bank is provided for in Sections 195-197 . . ."; (3) (the independence of the bank) ". . . is the most encouraging factor to investment and the building of confidence in the future of the South African economy".	With regard to Sections 195-197:— "I would, with respect, advise against any drastic departure from the current wording of the said sections . . . because in their present form they constitute, in my submission, a well-balanced arrangement of the relationship between the Government and its monetary policy agent. It is generally acknowledged that the relationship between the Government and the Central Bank is essentially one of mutual trust and consultation and close co-ordination of economic policy targets and measures. Such relationship, creating as it does the opportunity for the blending of socio-economic forethought and professional economics expertise runs the risk of being impaired if made subject to a plethora of prescriptive legislative provisions"

SARB	SARB GOVERNOR	SARB: HEAD LEGAL SERVICES— MEMORANDUM TO GOVERNOR
Section 195: The SARB, established and regulated by an Act of Parliament shall be the Central Bank	"To date the Bank is accountable to Parliament through a special Act that spells out its role and functions"; "The section, together with Section 196, recognises the need for autonomy of the central bank"	
Section 196(1):— The primary objectives of the SARB shall be to protect the internal and external value of the currency in the interest of balanced and sustainable economic growth in the Republic		

SARB	SARB GOVERNOR	SARB: HEAD LEGAL SERVICES—MEMORANDUM TO GOVERNOR
Section 196(2) The SARB shall, in pursuit of its primary objectives referred to in subsection (1), exercise its powers and perform its functions independently, subject only to an Act of Parliament, referred to in Section 197		"The crucial problem of the exact nature and purview of the 'independence' granted to the Bank in Section 196(2) of the Constitution . . . still remains to be solved . . . Section 196(2) . . . has not yet formed a subject for interpretation by a court of law." Assuming the definition of "independent" in the Concise Oxford Dictionary (8th Edition) is the true meaning intended by the legislator, the Bank "shall be entitled and is indeed obliged to act on its own authority and shall be free from control, whether by way of any directives, instructions or any other form of direct or indirect control, by any entity outside the Bank".
Section 196(2) (Continued) provided that there shall be regular consultation between the SARB and the Minister responsible for national financial matters	"It is important to keep monetary policy out of the political system by allowing the Governor to effect such decisions without prior approval by the Minister of Finance."	"The circumscribed autonomy postulated above is, in accordance with the best-informed opinion currently prevailing in the relevant field, interms whereof a significant number of central banks, while closely collaborating with government in the form of macro-economic policy, are nevertheless required to autonomously pursue price stability through the application of the monetary expertise at their disposal."

SARB	ANC	NP	IFP	DP	FF
Other Issues Arising: 1. The Bank to be independent from party political interference	A	NCA	NCA	NCA	A
2. *New Section*:— Proposed by the IFP	**DC1** Opposes IFP proposal	**DC1** Opposes IFP proposal	**DC1** There should be specified limits on the Bank's direct financing of government.		
3. *New Section*:— Proposed by the IFP	**DC2** Opposes IFP proposal	**DC2** Opposes IFP proposal	**DC2** The Bank should not be obliged to purchase government securities.		**DC2** Opposes IFP proposal
4. *Bank's Structures*	**DC3** opposes IFP proposal	**DC3** opposes IFP proposal	**DC3** "Since the final guarantees of independence of the Bank lie in the Bank's structures, this should be determined by the Constitution and not by an Act of Parliament."		**DC3** opposes IFP proposal

SARB	PAC	ACDP	COMMENTS FROM OTHER SUBMISSIONS
Other Issues Arising: 1. The Bank to be independent from party political interference	NCA	A	(1) SACP AQ:— "But this should be supported with mechanisms to ensure that the bank is accountable to the broad, democratically-mandated goals of Government (in this case the goals of reconstruction and development . . . through . . . legislation." A more representative Board of Governors, who are more in tune with the present social challenges; increasing transparency by ensuring greater answerability to Parliament.
2. *New Section*:— Proposed by the IFP (& any related comments from other submissions)			(1) CP "The SARB in a confederal system may under no circumstances finance any deficits of any of the participating states."
3. *New Section*:— Proposed by the IFP			
4. *Bank Structures*			

SARB	ANC	NP	IFP	DP	FF
Other Issues Arising:— 5. *Appointment & Representation:*—	**DC4** opposes IFP proposal	**DC4** opposes IFP proposal	**DC4**:The Governor, the two deputy governors and three other Directors of the Central Bank shall be appointed by the President in consultation with Parliament or a select committee thereof. A further ten directors of the Bank's board should be appointed by organised commerce, industry and labour.	**DC4** opposes IFP proposal	**DC4** opposes IFP proposal
6. *Term*:—	**DC5** opposes IFP proposal	**DC5** opposes IFP proposal	**DC5:** "All members of the Bank's board should serve for a five-year term which may be renewed on one or more occasions"	**DC5** opposes IFP proposal	**DC5** opposes IFP proposal

SARB	ANC	NP	IFP	DP	FF
7. *Executive:*—	**DC6** opposes IFP proposal	**DC6** opposes IFP proposal	**DC6:** "The Executive should be made up of the Governor, the two Deputy-Governors and three other Directors from those appointed by organised commerce, industry and labour."	**DC6** opposes IFP proposal	**DC6** opposes IFP proposal
8. *Comments on drafting:*—	"Given the broad support these sections enjoy, the ANC proposes incorporating them into the Final Constitution unchanged."			"While many of these proposals are couched in 'quasi-legal' terminology, they are not intended to convey the final, precise wording required in the Constitution."	

SARB	PAC	SACP	ACDP	COMMENTS FROM OTHER SUBMISSIONS
Other Issues Arising:— 5. *Appointment & Representation*:—				(1) *SACOB*:— "The Board should be more representative than at present; future appointments should enforce the independence, credibility and the professionalism expected of a Central Bank"; "Persons who are politically active should not be eligible for appointment and the Directors and Governors should not be political appointees in a more representative Board of Directors for the Reserve Bank". (2) *COSAB:*— Central Banks should not be made politically accountable by placing political appointees on their Boards or in Executive positions. Persons who are politically active should not be eligible for appointment. Competence, not population or interest group representivity to be the main criteria for appointments. (3) *SACP:*— The Board of Governors should be more representative and should be more in tune with the present social challenges.
6. *Term*:—				(1) *SACOB*:— "The terms of Directors are not necessarily tied to Parliamentary election terms" (2) *COSAB*:— Effective functioning would be served by increasing the terms of the four Governors to eight years and the four Directors to four years.
7. *Executive*:—				
8. *Comments on drafting*:—				

SARB	SACOB	TRANSNET	COSAB
General Comments (From COSAB, SACOB and TRANSNET submissions, on the SARB).	(1) "The Reserve Bank should be independent within the system, not of the system"; (2) "While the provisions in the Interim Constitution are being supported, it is suggested that accountability and transparency be strengthened"; (3) "SACOB . . . believes it to be vitally important that the independence of the Bank should be clearly enshrined in the final Constitution"; (4) "SACOB . . . strongly supports the principles contained in Section 196 of the Interim Constitution"; (5) "SACOB endorses the proviso to Section 196(2) of the Interim Constitution".	"We agree with the existing status of the paragraphs in the Interim Constitution regarding the Reserve Bank and FFC. It is our recommendation that these paragraphs be included unchanged into the Final Constitution. It is of the utmost importance that the independent status of the Reserve Bank be acknowledged in the Final Constitution."	"We support the retention of provisions based on Sections 196 and 197 of the Interim Constitution, setting out the primary objectives and the general nature of the powers and functions of the Bank, which powers and functions should continue to be determined by a separate Act of Parliament."

4. ANNEXURE C: OVERVIEW OF SUBMISSIONS AS AT 9 MAY 1995

FINANCIAL INSTITUTIONS AND PUBLIC ENTERPRISES	
POLITICAL PARTIES	**ISSUE**
Inkatha Freedom Party	Auditor General (AG) & Reserve Bank (RB) B
Freedom Front	AG & RB
Pan African Congress	AG, RB, Annual Budget, Procurement Administration, National Revenue Fund
ACDP	Financial Institutions & Public Enterprises
African National Congress	AG, RB, Public Enterprises, National Revenue Fund, Annual Budget, Procurement Administration and other matters related to Financial Institutions
Democratic Party	AG, RB, National Revenue Fund
ORGANISATIONS	
ORGANISATION	**ISSUE**
South African Reserve Bank	Reserve Bank
Transnet	SA Reserve Bank
South African Chamber of Business	Financial Institutions & Public Enterprises
Council of South African Business	Auditor General, Reserve Bank, Financial & Fiscal Commission, National Revenue Fund, Public Enterprises
South African Communist Party	Economic & General Financial Affairs
Johannesburg Stock Exchange	Financial Services Board within the South African Financial Industry
Financial & Fiscal Commission	Financial & Fiscal Commission
Afrikanerbond	Financial Issues
Conservative Party	Financial Issues
Sonke Development Project	Financial Issues
Small Business Development Corporation	Financial Issues
INDIVIDUALS (The following individuals' submissions were all finance related)	
Anonymous	Komen E
Bruce IR	Lusenga DM
Clark PS (Mr)	Mabin HS
Daddy R	Mahe D
De Boer H	Mamkeli TM

De Jongh LB	Matzdorff R
De Kock AE	McGregor et al
Dickerson P	Mindel NW
Dimba MS	Mnguni V
Dr TB Kourie	Moloko KE
Dreyer M	Moodley I
Drummond D	Mtshali AM
Edgeworth H	Mtshali GM
Farr LS	Murphy A
Fischer W	Ntshweyese A
Fumba M	Pekeur JA
Goodall A (Mrs)	Pottinger Mr & Mrs
Hartman EE	Riggall L (Mr)
Hassim MH (Sgd)	Ryan HL (Mr)
Hlekane K (Sgd)	Schaimberg S
Hoffenberg A	Schmidt W
Hunter K	Sinovich A
Jagger M	Snowden SG
Kellerman JO	Sojica K
Kingon PJ	
ORGANISATION	**ISSUE**
Ministry of Public Enterprises	Financial Issues & Public Enterprises
Beauty without Cruelty	Financial Issues
People's Endeavour to reform Taxes NB.: no p46. Video of project with G Marcus	Financial Issues
Development Bank of South Africa	Financial Institutions & Public Enterprises
Homebased Business Association	SA Finance
Shareholder's Association	SA Finance
Office of the Auditor General	Auditor General
SBDC (Small Business Development Corporation)	Financial Institutions & Public Enterprises
African Christian Action	SA Finance
Volkstaat Council	SA Finance

ANNOUNCEMENTS, TABLINGS AND COMMITTEE REPORTS: PART ONE

TABLE OF CONTENTS

1. INTRODUCTION

This report will concentrate on substantive matters discussed by the Constitutional Committee and its sub-structures since the first substantive report from Theme Committees was tabled on 13 February 1995.

2. REPORT OF MANAGEMENT COMMITTEE

The Management Committee of the Constitutional Committee has continued to meet regularly to deal with matters of process, since the last sitting of the Constitutional Assembly on Friday 19 May 1995.

3. REPORT OF CONSTITUTIONAL COMMITTEE

3.1 The Constitutional Committee has met regularly since the last sitting of the Constitutional Assembly on Friday 19 May 1995.

3.2 The Constitutional Committee agreed on 23 June 1995 to the establishment of a permanent sub-committee of the Constitutional Committee to facilitate negotiation between political parties. The composition and terms of reference of this sub-committee are attached hereto as an Appendix.

3.3 The Constitutional Committee wishes to report on all Theme Committee Reports and draft text it has considered since 13 February 1995.

3.4 The Constitutional Committee has received 27 Reports from Theme Committee to date. Most of these have been accompanied by Draft Formulations in keeping with the revised drafting procedures.

3.5 Extensive debate has taken place in both the Constitutional Committee and Sub-Committee. This has resulted in many amendments and changes to the drafts. This Report consists of all Draft Formulations as at 18 August 1995. The Footnotes indicate areas of contention and non-contention, and the various options.

4. CHARACTER OF DEMOCRATIC STATE

4.1. DEMOCRACY AND CHARACTER OF THE STATE

The Theme Committee tabled a report outlining broad areas of agreement and contention. The Constitutional Committee accepted the Report. No draft formulation accompanied the Report. This is the case with most Reports from Theme Commmittee 1.

This Theme Committee deals with issues of broad principle, in respect of which there are not neccesarily specific clauses for the new Constitution. The principles discussed by the Theme Committee will however lay the basis for the character of the new Constitution.

4.2 EQUALITY AND SINGLE SOVEREIGN STATE

The Theme Committee tabled a report outlining broad areas of agreement and contention. The Constitutional Committee accepted the Report.

4.3 SUPREMACY OF THE CONSTITUTION

The Theme Committee tabled a report and the following draft formulation. The Constitutional Committee noted the formulation and postponed further discussion.

SUPREMACY OF THE CONSTITUTION

FIRST DRAFT,

23 May 1995

Status: Prepared by Technical Committee and CA Law Advisors for discussion in the CC.

Supremacy of the Constitution

(1) This Constitution shall be the supreme law of the Republic.

(2) Any law, act or conduct inconsistent with this Constitution shall be invalid to the extent of the inconsistency.

(3) This Constitution shall bind all legislative, executive and judicial organs of state at all levels of government.

4.4 ACCOUNTABLE GOVERNMENT

The Theme Committee tabled a report outlining broad areas of agreement. There were no contentious issues. The report was accepted by the Constitutional Committee.

4.5 THE ECONOMY

The Constitutional Committee accepted this report which outlined broad areas of agreement and contention. It was agreed the contentious matters would be revisited as work progressed.

4.6 REPRESENTATIVE GOVERNMENT, CITIZENSHIP AND SUFFRAGE

The Constitutional Committee discussed the matter and amended the draft formulation as outlined herein. Further discussion was postponed until reports were received from Theme Committees 2 and 4.

4.6.1 CITIZENSHIP AND THE FRANCHISE
FIRST DRAFT
31 July, 1995

Status: Prepared by Technical Committee on instruction of Theme Committee

CITIZENSHIP

1) There shall be a common South African citizenship.

2) The acquisition, loss and restoration of South African citizenship shall be regulated by an Act of Parliament, subject to any provision of the Chapter on Fundamental Rights which deals with these matters.

3) Every South African citizen shall be entitled to enjoy all rights, priveleges and benefits of such citizenship as are accorded to him or her in terms of this Constitution or an Act of Parliament.

4) Every South African citizen shall be subject to all duties, obligations and responsibilities of such citizenship as are imposed upon him or her in terms of this Constitution or an Act of Parliament.

THE FRANCHISE

Every South African citizen shall be entitled to vote in elections for the legislatures at all levels of government and in referenda contemplated in this Constitution, in accordance with the laws regulating such elections and referenda.

5. STRUCTURE OF GOVERNMENT

5.1 SEPARATION OF POWERS

The Theme Committee reported on broad areas of agreement. The Constitutional Committee accepted the Report and instructed the Theme Committee to proceed to its next block. It was noted that future reports would build upon and substantiate these areas of agreement.

5.2 NATIONAL ASSEMBLY AND NATIONAL EXECUTIVE

The Constitutional Committee discussed this matter and referred to the sub-committee. The draft text has been discussed at the sub-committee as outlined herein:

5.2.1 NATIONAL ASSEMBLY
THIRD DRAFT,
14 August 1995

Status: As processed after CC Debate of 11 August 1995 for discussion by CC Sub-Committee

Chapter ...

PARLIAMENT

Legislative power

1. The legislative power of the Republic shall vest in Parliament.[1]

Constitution of Parliament

2. Parliament consists of the National Assembly and .....[2]

THE NATIONAL ASSEMBLY

Composition of National Assembly

3. The National Assembly consists of ... members.[3]

National Elections

4. The election of members of the National Assembly shall be conducted in accordance with an electoral system which shall be based on a common voters' roll and [generally][4] proportional representation as provided for by national law.[5]

Duration of National Assembly

5. (1) The National Assembly as constituted in terms of a general election shall [continue][6] for a term of five years[7] as from the date of such election, unless dissolved before the expiry of its term *in terms of this Constitution*.[7]

[(2) The National Assembly may be dissolved before the end of the term for which it was elected if a vote of no-confidence in the Cabinet is passed by the National Assembly.][8]

(3) When the term for which the National Assembly was elected expires or if the National Assembly is dissolved before its term expires, the National Assembly as then constituted shall remain competent to function, and its members shall continue as members, until the day before polling for the next National Assembly.[9]

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1. This is merely a provisional clause and its only purpose at this stage is to serve as an "opening statement" for what follows. Legislative competencies are dealt with by TC 3.

2. The question of a Senate is contentious. Consequently no provisions on the Senate were included in this draft. Although there appears to be broad agreement that there should be a Senate further clarity is required whether the Senate should be part of "Parliament" or whether it should be a separate institution. Depending on what is agreed about the Senate, some of the provisions on the National Assembly may have to be rephrased and relocated to a joint section on the NA and the Senate (as, e.g. in the case of sections 55—67 of the Interim Constitution).

3. The size of the National Assembly is contentious. See Block 5 of the Report on Parliament. Contralesa proposed that the legislative chamber should include traditional leaders.

4. The DP proposed that the words in brackets be replaced by "resulting in". CC Subcommittee to consider possible reformulations.

5. **As approved by TC 2 Report of 7 August 1995 on electoral system. The majority of parties and public submissions favour a system which includes party lists and constituency elections resulting in proportional representation.**

6. **It was suggested in the CC that the word in bold brackets be replaced by "serve".**

7. **See Block 9 of the Report on Parliament. The DP proposes a term of four years.**

8. **In terms of section 20 of the Draft on the National Executive the State President may either resign or dissolve the NA if a motion of no confidence is passed in the Cabinet (including the President). See also section 6(3)(b) of the Draft on the National Executive.**

   The DP proposed that the words underlined be inserted in subsection (1) and that subsection (2) be deleted. The Technical Advisers were instructed to look at the question of duplication.

   The ANC posed the question of snap elections and whether provision should be made for the dissolution of Parliament otherwise than as a result of a motion of no confidence.

9. **As per Block 10 of the Report on Parliament. As presently worded the National Assembly and its members remain competent to function after a dissolution up to the day before polling for the next NA. However, there was some discussion (and support) in the Theme Committee on whether this should be changed so that members of the NA only vacate their seats the day before the newly elected members take up their seats.**

Speaker and Deputy Speaker[10]

6. (1) The National Assembly shall at its first sitting after a general election, and thereafter as and when it becomes necessary to fill a vacancy, elect a Speaker and a Deputy Speaker from amongst its members.[11]

(2) The Chief Justice[12] or a judge designated by him or her shall preside over the election of a Speaker, and the Speaker shall preside over the election of a Deputy Speaker.

(3) The procedure set out in Schedule ... shall apply to the election of the Speaker and the Deputy Speaker.[13]

(4) The Speaker and the Deputy Speaker have the powers and functions assigned to them by this Constitution and the law, including the rules and orders of the National Assembly.[14]

(5) The Speaker or Deputy Speaker ceases to hold office if he or she resigns from office or ceases to be a member of the National Assembly. The Speaker or Deputy Speaker may be removed from office by resolution of the National Assembly.[15]

Qualifications of members of National Assembly[16]

7. (1) Only South African citizens qualified to vote[17] in elections of the National Assembly and who are not otherwise disqualified in terms of this section are eligible to be members of the National Assembly.

(2) The following persons are disqualified from being members of the National Assembly:

(a) Unrehabilitated insolvents.[18]

(b) Persons declared to be of unsound mind by the courts of the Republic.[18]

(c) Persons convicted [after 27 April 1994][19] of an offence in the Republic, or outside the Republic if the conduct constituting the offence would have been an offence in the Republic, and sentenced to more

However, in the CC debate concern was expressed that an extension of the National Assembly beyond an election may open the door for a government, after having lost an election, to legislate for instance on the validity of the election.

The Technical Advisers were instructed to look at other jurisdictions for a solution.

10. **Section 6 is based on section 41 of the Interim Constitution as per agreement in Block 16 of Report on Parliament.**

11. **Agreed to in the CC.**

12. **In terms of the Interim Constitution the Chief Justice presides over the election of a Speaker. As the Constitutional Court is the highest court as far as constitutional matters are concerned the question arises whether the President of the Constitutional Court rather than the Chief Justice should not fulfil constitutional functions such as presiding at the election of a Speaker. The TC is of the view that this function should remain vested in the Chief Justice.**

The CC agreed that it was not vital to decide this issue at this stage. It should be settled in private discussions between the parties.

13. **The procedure referred to here is similar to that contained in Schedule 5 of the Interim Constitution. The CC agreed to this clause.**

14. **Agreed to in the CC.**

15. **Agreed to in the CC.**

16. **Drafted as per Block 8 of the Report on Parliament.**

17. **The franchise is dealt with by TC 1. Discussion of clause stands over pending TC 1's report.**

18. **Agreed to in the CC.**

19. **The formulation of this paragraph is based on section 42(1)(b) of the Interim Constitution which applied only to convictions after promulgation of the Interim Constitution, i.e. 27 April 1994.**

than 12 months' imprisonment without the option of a fine. A person shall not be regarded as convicted until an appeal against the conviction or sentence has been determined, or until the time for an appeal has expired, or if such person has received a pardon ***or amnesty.***

(d) Persons who are members of [the Senate], a provincial legislature or a local government.[20]

(e) Persons holding office of profit under the Republic[21], excluding—

(i) the Deputy State President;[22]

(ii) Ministers and Deputy Ministers;22

(iii) persons receiving a pension from public funds or from a pension fund aided by public funds;22

(iv) justices of the peace and appraisers;22 **and**

(v) members of statutory bodies performing a public function who receive remuneration as such a member

not more than their salaries as members of the National Assembly.[23]

(3) The disqualification imposed by this section on a person who served a prison sentence of more than 12 months ***shall*** lapse ... years after [his or her release

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This formulation does not cover persons convicted of serious crimes before 27 April 1994 and who at the commencement of the new Constitution are still serving imprisonment. Inclusion in the above section of the following additional paragraph (based on section 42(1)(a) of the Interim Constitution) should perhaps be considered:

"Persons who at the commencement of the Constitution are serving a sentence of more than 12 months' imprisonment without the option of a fine."

In the CC debate there was a suggestion that the date could be deleted if "amnesty" is added at the end of the paragraph. However, it would appear that the inclusion of a reference to amnesty in the paragraph is inappropriate as the paragraph only deals with ***convicted*** **persons. This provision should be understood against the background of the amnesty process which may indemnify persons who would otherwise have been convicted.**

Secondly, the deletion of the date would not cover persons who completed sentences, also for political offences, before 27 April 1994.

It is suggested that par. (c) be replaced by the following paragraphs:

(c) Persons who at the commencement of the Constitution are serving a sentence of more than 12 months' imprisonment without the option of a fine.

(d) Persons convicted after the commencement of the Constitution of an offence in the Republic, or outside the Republic if the conduct constituting the offence would have been an offence in the Republic, and sentenced to more than 12 months' imprisonment without the option of a fine. A person shall not be regarded as convicted until an appeal against the conviction or sentence has been determined, or until the time for an appeal has expired, or if such person has received a pardon.

20. **Stands over pending decisions on the Senate.**

21. **Traditional leaders receiving payments from the State run the risk of being regarded as persons holding office of profit under the Republic in terms of this section, in which event they will be disqualified from being members of the National Assembly. Their inclusion in the above list should be considered.**

The *ad hoc* committee on traditional authorities was instructed by the CC to go into this matter.

22. **Agreed to in the CC.**

23. **CC Subcommittee was requested to consider as a matter of principle whether a member of Parliament should be permitted to receive additional remuneration as a member of a statutory body.**

from prison] ***completion of the sentence.***[24]

(4) A person not qualified to be a member of the National Assembly and who sits or votes in the National Assembly knowing that he or she is not qualified, shall be liable to a fine prescribed by the rules and orders of the National Assembly.[25]

Vacation of seats[26]

8. A member of the National Assembly shall vacate his or her seat upon—

(a) ceasing to be eligible to be a member;

(b) resigning as a member;

(c) becoming a member of [the Senate] a provincial legislature or a local government; or

(d) unauthorised absence for 15 consecutive parliamentary sitting days.

Filling of vacancies[27]

9. Vacancies in the National Assembly shall be filled in accordance with a national law.

Oaths or affirmation by members

10. (1) Every member of the National Assembly, before taking his or her seat in the Assembly, shall make and sign an oath or solemn affirmation *in the terms set out in Schedule ...* before the Chief Justice or a judge designated by him or her, [in the following form:]

[I, A.B., do hereby swear/solemnly affirm to be faithful to the Republic of South Africa and solemnly promise to perform my functions as a member of the National Assembly to the best of my ability.

(In the case of an oath: So help me God.)][28]

(2) A member [nominated to fill] *filling a* casual vacancy in the National Assembly shall make and sign the oath or solemn affirmation before the Speaker.[29]

Sittings and recess periods

11. (1) The National Assembly may determine the time and duration of its sittings and its recess periods. The first sitting of the National Assembly after a [general] election shall take place *not more than* 10 days after the declaration of the result of the election at a time and on a date determined by the Chief Justice.[30]

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24. **The CC supported the principle that persons who served prison sentences of more than 12 months should not be disqualified for life. A five year ban was also supported, subject to a comparative study to be done by the Technical Advisers.**

The words in bold brackets were replaced by the words underlined.

25. **Agreed to in the CC.**

26. **The CC approved paragraphs (a), (b) and (c) and inserted paragraph (d).**

The issue of including in the new Constitution the current requirement in section 43(b) of the Interim Constitution that a member vacates his or her seat upon ceasing to be a member of the party which nominated him or her, was referred to the CC Subcommittee.

27. Agreed to in the CC.

28. Subsection (1) amended by the CC as indicated. Words in bold brackets deleted and words underlined inserted.

See foot note 11 for which judge to take the oath/affirmation.

29. Agreed to in the CC as amended.

30. Agreed to in the CC subject to the insertion of the underlined words. See foot note 11 as far as this subsection vests a function in the Chief Justice.

(2) The State President[31] may at any time summon the National Assembly to an extraordinary sitting for the conduct of urgent business.[32]

(3) The seat of the National Assembly is ....[33] where all sittings of the National Assembly shall ordinarily take place. Sittings at other venues are only permitted on the grounds of public interest, security or convenience and if provided for in the rules and orders of the National Assembly.

Quorum

12. ...[34]

Decisions

13. (1) Except where the Constitution provides otherwise, all questions before the National Assembly shall be determined by a majority of the votes cast by the members present.[35]

(2) The member of the National Assembly presiding in the Assembly has no deliberative vote, but does have and shall exercise a casting vote in the event of an equality of votes.[36]

Note: *The provisions following below (i.e. sections 14—22) will apply to both the National Assembly and the Senate should agreement be reached on a second House of Parliament.*

State President's rights in National Assembly

14. The State President is entitled to sit and to speak in the National Assembly, but may not vote.[36]

Internal autonomy

15. (1) The National Assembly shall determine its internal arrangements and make rules and orders in connection therewith.[37]

(2) The salaries, allowances and benefits of members of the National Assembly shall be as provided for by a national law.[37]

Parliamentary privilege

16. (1) [There is] *Members of the National Assembly shall have* freedom of speech and debate in [and before] the National Assembly and its committees subject to the rules and orders [of the National Assembly]. This freedom may not be limited by or questioned in the courts.[38]

(2) Members of the National Assembly are not liable to civil or criminal proceedings, arrest, imprisonment or damages as a result of anything they have said,

31. The TC prefers the term "*State* President" to distinguish the Head of State from the President of the Constitutional Court, President of the Senate etc. See Block 1 of the Report on the Presidency. Term generally supported in the CC.

32. As per Block 2 of the Report on Parliament. The National Party is in favour of a clause along the following lines:

"At the written request of ...% of its members, the Speaker shall convene a sitting of the National Assembly during a recess."

See also section 6(3)(a) of the Draft on the National Executive.

Joint sittings of the Houses of Parliament to be revisited once the role and status of the Senate have been clarified.

The CC decided that this provision should be shelved until states of emergencies are discussed.

33. Legislative seat to be dealt with by TC 1. Subsection otherwise approved by the CC.

34. Agreed in the CC that quorums must be prescribed in the rules of the NA. No provision required. See section 15.

35. Section 13 approved by the CC. Constitutional amendments, and the majorities required, are yet to be dealt with.

36. Agreed to in the CC. Depending on the nature of the Senate, this provision may be extended to entitle also Ministers and Deputy Ministers to sit and to speak in the House of which they are not members.

37. Agreed to in the CC.

38. Amended in the CC. Words in bold brackets denote deletion and words underlined insertion.

produced or submitted in or before or to the National Assembly or its committees. The same immunity applies in respect of anything revealed as a result of what they have said, produced or submitted.[39]

(3) Other privileges, immunities and powers of Parliament shall be as prescribed by a national law.[39]

Ordinary Bills

17. ....[40]

Money Bills

18. ....[40]

Bills affecting provincial matters

19. ....[40]

Bills amending Constitution

20. ....[41]

Assent to Bills

21. (1) A Bill duly passed by Parliament in accordance with the Constitution shall *without delay* be [forthwith] assented to and signed by the State President.[42]

(2) If the State President is of the opinion that a Bill is inconsistent with the Constitution or that it has not been passed in accordance with the Constitution the State President may withhold assent to the Bill and refer it back to Parliament for reconsideration. If Parliament passes the Bill without correcting the defect the State President may again withhold assent and refer the Bill to the Constitutional Court for a ruling on its constitutionality.[43]

(3) A Bill assented to and signed by the State President becomes an Act of Parliament upon its promulgation.

Safe keeping of and public access to Acts of Parliament

22. (1) All Bills duly signed by the State President shall immediately after their promulgation as Acts of Parliament be entrusted to the [Constitutional Court] for safe keeping.[44]

(2) The signed copies of the Acts of Parliament entrusted to the Constitutional Court shall be conclusive evidence of the provisions of the Acts.[45]

[(3) Members of the public shall have access to all Acts of Parliament entrusted to the Constitutional Court, subject to reasonable control imposed by a national law or the President of the Constitutional Court.][46]

5.2.2 NATIONAL EXECUTIVE THIRD DRAFT, 16 August 1995

Status: Processed after Constitutional Committee debate of 11 August 1995 for Sub-committee.

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39. Agreed to in the CC.

40. These provisions are dependent on the role of the Senate in the legislative process. Consideration should also be given to the inclusion here of a provision similar to section 98(9) of the Interim Constitution which provides for the referral to the Constitutional Court of Bills where at least one-third of the members of the NA petitions the Speaker to do so. This provision has already been agreed to in TC 5, and has for present purposes been included in the Draft on the Administration of Justice.

41. The TC has not yet reported on constitutional amendments.

42. Agreed to in the CC as amended.

43. Stands over for further discussion in the CC Subcommittee. Advisers were instructed to make a comparative analysis as to how this matter is dealt with in other jurisdictions.

44. Administration requested to obtain the views of the Constitutional Court and the AD on this matter.

45. The question of official languages and the language(s) in which laws are to be drawn up will be dealt with by TC 1, possibly in consultation with TC 2 and TC 5. Principle of the signed copy to be conclusive agreed to in the CC.

46. Agreed in the CC that subsection (3) be deleted.

Chapter ...

THE NATIONAL EXECUTIVE

Executive power

1. The executive power of the Republic as provided in the Constitution is vested in the national government consisting of the State President[47] and the Cabinet.[48]

The State President

Head of State and Government

2. (1) The State President is the Head of State, the Head of the National Executive and the Commander-in-Chief of the National Defence

Force.[49]

(2) The State President shall at all times uphold, defend and respect the Constitution as the supreme law of the land and shall be responsible for the observance of the Constitution by the national government.[50]

Election of State President

3. (1) The National Assembly[51] shall at its first sitting[52] after a national election, and thereafter as and when it becomes necessary to fill a vacancy during the term for which it was elected, elect a member of the National Assembly as the State President.[53]

(2) The Chief Justice[54] or a judge designated by him or her, shall preside over the election of the State President. The procedure set out in Schedule ... shall apply to the election of the State President.[55]

(3) A member of the National Assembly shall upon being elected as the State President vacate his or her seat in the National Assembly.[56]

(4) A sitting of Parliament to fill a vacancy in the office of State President shall take place within 30 days after the vacancy occurred, at a time and on a date determined by the President of the Constitutional Court.

Assumption of office[57]

4. The State President-elect shall assume office within .... days of his or her election and shall, before assuming office, make and sign an oath or *a* solemn affirmation *in the terms set out in Schedule* ... before the Chief Justice or a judge designated by him or her, [in the following form:]

[In the presence of those assembled here and in full realisation of the high calling I assume as State President in the service of

47. The term ''State President'' to be further considered in the CA.

48. As per Block 7 of the Report on the Presidency. This clause should be revisited when the powers and functions of provinces have been resolved.

49. Agreed to in the CC.

50. Agreed to in the CC.

51. The role of the Senate in the election of the President will be revisited when finality is reached on the question of a second House.

52. The first sitting of Parliament will in terms of section 11(1) of the Draft on Parliament be convened by the Chief Justice within 10 days after the declaration of the result of a general election.

53. As per agreement in Block 3 of the Report on the Presidency. The DP prefers a directly elected President. Matter was not resolved in the CC.

54. The CC decided that the question which judge should preside must be resolved in private discussions between the parties.

55. The procedure referred to here has in the Interim Constitution been contained in a schedule (Schedule 5). Alternatively the procedure should be prescribed by a national law.

56. Agreed to in the CC.

57. Amended by the CC. Underlined words inserted and words in bold brackets deleted. Outstanding aspects to be considered in CC Subcommittee.

the Republic of South Africa I, A.B., do hereby swear/solemnly affirm to be faithful to the Republic of South Africa, and do solemnly and sincerely promise at all times to promote that which will advance and to oppose all that may harm the Republic; to obey, observe, uphold and maintain the Constitution and all other Law of the Republic; to discharge my duties with all my strength and talents to the best of my knowledge and ability and true to the dictates of my conscience; to do justice to all; and to devote myself to the well-being of the Republic and all its people.

(In the case of an oath: So help me God.)]

Term and vacation of office and filling of casual vacancies[58]

5. (1) The State President shall be elected for a term of office commencing when he or she assumes office and ending when the person elected as the State President after the next election of the National Assembly assumes office.[59]

(2) No person may hold office as State President for terms of office exceeding a combined period of ... years.[60]

(3) The State President shall vacate office during his or her term upon—

(a) resigning from office by notice in writing to the Speaker; or

(b) adoption by the National Assembly of a resolution in terms of this Constitution removing him or her from office.

(4) A vacancy in the office of State President shall be filled as soon as a meeting of the National Assembly can be convened for the election of a new State President.[61]

Powers and functions[62]

6. (1) The State President has the powers and functions entrusted to him or her by the Constitution and the laws of the Republic.

(2) All powers and functions shall be discharged by the State President in consultation with the other members of the Cabinet, except where the Constitution provides or implies otherwise.[63]

(3) The following powers and functions are vested in the State President alone with due regard to any specific provisions of the Constitution relating to them, and in the discharge of such powers and functions the State President is not obliged to act in consulta-

58. Section 5 to be further considered in CC Subcommittee.

59. See Block 5 of the Report on the Presidency. The life of Parliament generally determines the length of tenure. As the life of Parliament has a fixed term of 5 years, the term of office of the State President is limited to 5 years. The term of office may be shorter than 5 years where Parliament is dissolved before its full term or where the State President resigns or is removed from office. In order to ensure continuity the State President's term normally expires only when his or her successor assumes office.

The IFP prefers a seven year term for the State President.

60. The maximum period a State President may serve needs further debate. See Block 5 of the Report on the Presidency.

61. Removal from office is dealt with in section 11 below. Section 3(1) provides for the election of a State President not only after a general election but also whenever a casual vacancy may occur.

62. To be further discussed at CC Subcommittee level.

63. As per agreement in point 9 of Block 7 of Report on the Presidency. In section 233(3) of the Interim Constitution the term "in consultation with" is defined to mean that the concurrence of the other functionary is required.

tion with the other members of the Cabinet:[64]

(a) to summon the National Assembly to an extraordinary sitting for the conduct of urgent business;[65]

(b) to dissolve the National Assembly after a motion of no confidence in the Cabinet has been passed by the National Assembly;[66]

(c) to assent to and sign Bills passed by Parliament;[67]

(d) to refer a Bill passed by Parliament back to Parliament for reconsideration or to the Constitutional Court for a ruling on its constitutionality;[68]

(e) to confer honours;[69]

(f) to appoint, [accredit][70], receive and recognise diplomatic representatives;[71]

(g) to negotiate and sign international agreements, and to delegate such power;[72]

(h) to [reprieve and] pardon offenders and to remit fines, penalties and forfeitures[73];

(i) to appoint and dismiss Ministers and Deputy Ministers;[74]

(j) to convene Cabinet meetings;[75] and

(k) to appoint commissions of enquiry.[76]

7. (1) Decisions of the State President taken in the discharge of his or her powers and

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64. The NP is not in favour of the State President acting alone, but prefers an arrangement whereby these powers are exercised in accordance with provisions similar to section 82(2) of the Interim Constitution, i.e. that there should be an obligation on the State President to consult the Executive Deputy President(s).

65. See point 6 Block 7 of the Report on the Presidency and also section 11(2) of the Draft on Parliament. The issue of summoning the two Houses to a joint sitting to be dealt with upon clarification of the role of the Senate. Otherwise approved in principle by the CC.

66. Agreed to in the CC.

67. Agreed to in the CC.

68. See also section 21 of the Draft on Parliament. Matter to be taken forward at CC Subcommittee level.

69. Agreed to in the CC.

70. In the diplomatic sense "accredit" means to authorise as an envoy. It would appear that the word is superfluous and that it could be deleted.

71. The NP and the DP prefer a system of prior Parliamentary approval of diplomatic representatives. To be further discussed in CC Subcommittee.

72. See point 4 Block 7 of the Report on the Presidency. It is advisable for practical reasons that provision also be made for the delegation of the power to negotiate and sign international agreements. The Theme Committee was of the view that this provision should be considered together with the question of Parliamentary approval of international agreements. See for instance sec. 231 of the Interim Constitution.

Matter to be discussed further when TC 5 reports on international law.

73. TC 4 must still report on the right to life and the question of capital punishment under the new Constitution. The words in bold brackets should be deleted if the parties agree to maintain the present position on capital punishment.

74. See point 8 Block 7 of the Report on the Presidency. See also section 13 below. NP prefers appointment and dismissal of Ministers and Deputy Ministers to be the same as in section 88 of the Interim Constitution (which would require a government of national unity with minority parties forming part of the Cabinet).

"Flagged" for further discussion.

75. Agreed to in the CC.

76. In the CC the question was raised whether the President should have the power to appoint commissions without consulting the Cabinet. Matter stands over.

functions shall be [expressed] in writing under his or her signature.[77]

(2) Decisions of the State President taken in consultation with the other members of the Cabinet shall be countersigned by a Minister.[78]

(3) The signature of the State President on any instrument shall be confirmed by [the Seal of the Republic].32

Remuneration

8. (1) The salary, allowances and benefits of the State President shall be determined by Parliament.[79]

(2) The State President may not hold any other public office or perform any other [remunerative] *paid* work.[80]

Deputy State President(s)/Prime Minister

9. ....[81]

Acting State President[82]

10. (1) If the State President is absent from the Republic or is otherwise unable to fulfil the duties of the office, or if the office of State President is vacant, an office-bearer in the order mentioned below shall act as the State President during the State President's absence or inability or until the vacancy is filled:

(a) The Deputy State President.

(b) If the Deputy State President is not available or if the office of Deputy State President is vacant, a Minister of the Cabinet designated by the State President.

(c) If the designation of a Minister by the State President is for any reason not possible, a Minister designated by the other members of the Cabinet.

(d) If the designation of a Minister by the other members of the Cabinet is not possible, the [Speaker?].

(2) An acting State President has all the responsibilities, powers and functions of the State President.

Removal of State President or Deputy State President[83]

11. The National Assembly may remove from office the State President or the Deputy State President by resolution adopted by a majority of at least two-thirds of its members, but only on the grounds of a serious violation of the Constitution or the laws of the Republic, or of serious misconduct or inability rendering him or her unfit to exercise and perform his or her powers and functions.

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77. Amended formulation agreed to in the CC.

78. The Seal of the Republic is an issue for TC 1. Otherwise agreed to in the CC.

79. Agreed to in the CC.

80. Stands over. CC Subcommittee must consider whether the clause is necessary.

81. The question whether there should be a Deputy President or a Prime Minister or more than one Deputy Presidents is in contention. Further clarity is needed before any provisions can be drafted. See Blocks 3 and 6 of the Report on the Cabinet.

82. The issue of the Acting President was not dealt with in the Reports but was considered by the Theme Committee during its discussion of the Draft. The formulation may have to be adjusted depending on how the issue of more than one Deputy President and a possible Prime Minister is resolved.

To be taken further in CC Subcommittee. The DP proposed that par. (d) be replaced by a provision conferring power on the NA to elect an Acting President.

83. No agreement on whether it is necessary to provide for the impeachment of the State President in view of the possibility of adopting a motion of no confidence in the State President. See section 20 below.

To be discussed at CC Subcommittee level.

Cabinet

12. (1) The Cabinet consists of the State President, the Deputy State President[84] and the Ministers.[85]

(2) The State President or, in his or her absence, the Deputy State President or, in the absence of the Deputy State President, another member of the Cabinet designated by the President, shall preside at meetings of the Cabinet.

Appointment and dismissal of Ministers and Deputy Ministers

13. ....[86]

Oath or solemn affirmation[87]

14. A person appointed as a Minister or Deputy Minister shall before assuming office make and sign an oath or solemn affirmation *in the terms set out in Schedule* ... before the Chief Justice or a judge designated by him or her, [in the following form:]

[I, A.B., do hereby swear/solemnly affirm to be faithful to the Republic of South Africa and undertake before those assembled here to hold my office as Minister/Deputy Minister with honour and dignity; to respect and uphold the Constitution and all other Law of the Republic of South Africa; to be a true and faithful counsellor; not to divulge directly or indirectly any matters which are entrusted to me under secrecy; and to perform the duties of my office conscientiously and to the best of my ability.

(In the case of an oath: So help me God.)]

Accountability of Ministers and Cabinet[88]

15. (1) Ministers are individually accountable both to the State President and the National Assembly for the administration of the portfolios entrusted to them, and all members of the Cabinet are collectively accountable to the National Assembly for the performance of the

84. The NP prefers two Deputy Presidents.

85. As per Block 4 of the Report on the Cabinet. See also Blocks 7, 8, 9 and 13 of the Report on the Cabinet. Some of the parties propose provision also for a Prime Minister. It is a contentious issue whether the number of Ministers should be prescribed by the Constitution and whether the Cabinet should proportionally include members of minority parties.

To be further discussed in CC Subcommittee.

86. See point 8 Block 7 of the Report on the Presidency. There are two approaches; one basically in line with sections 88(2) to (6) and 94 of the Interim Constitution, the other more or less as follows:

"(1) The State President shall appoint the Ministers of the Cabinet from amongst the members of the National Assembly* to administer the various portfolios for which the national government is responsible.

(2) The State President may appoint Deputy Ministers from amongst the members of the National Assembly* to assist in the administration of portfolios for which the national government is responsible.

(3) A Minister and a Deputy Minister hold office for as long as it pleases the State President, but shall vacate office if he or she resigns from office or ceases to be a member of the National Assembly.*"

* Appointment of Ministers and Deputy Ministers from the Senate will depend on the role and function of the Senate. Furthermore, the NP favours the appointment of a limited number of Ministers from outside Parliament. The IFP proposed that Ministers should be appointed by the Prima Minister subject to ratification by Parliament.

To be further discussed in CC Subcommittee.

87. Approved by the CC as amended, subject to a decision on which judge should take the oath/affirmative action.

88. As per agreement in Blocks 10 and 12 of the Report on the Cabinet. The DP is also of the view that the Deputy State President/Prime Minister should have a special responsibility to formally represent the Cabinet in Parliament.

Matter to be discussed at CC Subcommittee level.

functions of the national government and its policies.

(2) All Ministers shall administer their portfolios in accordance with the policies of the Cabinet.

Conduct of Ministers and Deputy Ministers[89]

16. Ministers and Deputy Ministers shall at all times act in accordance with a code of ethical conduct which shall be prescribed by a national law. It shall be particularly forbidden for Ministers and Deputy Ministers—

(a) to take up any other paid employment;

(b) to engage in activities inconsistent with that of their office or to expose themselves to any situation involving the risk of a conflict between their official responsibilities and private interests; and

(c) to use their position, or any official information entrusted to them, to enrich themselves or any other person.

Remuneration[90]

17. The salaries, allowances and benefits of Ministers and Deputy Ministers shall be as provided for by national law.

Temporary assignment of Minister's powers and functions to another Minister[91]

18. Whenever a Minister is absent or [for any reason] unable to exercise and perform any of the powers and functions entrusted to him or her, or whenever *the office of a Minister is vacant*, [a Minister has vacated his or her office and a successor has not yet been appointed], the State President may appoint any other Minister [to act in the said Minister's stead, either generally or] to exercise or perform any *or all of the first-mentioned Minister's* [specific] powers and functions.

Transfer of Minister's powers and functions to another Minister[92]

19. The State President may assign the administration of a law entrusted to a particular Minister, or the discharge of any power or function entrusted by a law to a particular Minister, to any other Minister.

Votes of no confidence[93]

20. (1) If the National Assembly passes a vote of no confidence in the Cabinet, the State President shall resign or shall dissolve the National Assembly and call an election of the National Assembly.

(2) If the National Assembly passes a vote of no confidence in the State President alone, he or she shall resign.

(3) If the National Assembly passes a vote of no confidence in the Cabinet, excluding the State President, the State President shall either resign or reconstitute the Cabinet.

5.3 THE ELECTORAL SYSTEM

The Theme Committee tabled a separate Report. The draft formulations are to be found in the Draft Formulations on National Assembly and National Executive.

6. RELATIONSHIP BETWEEN LEVELS OF GOVERNMENT

6.1 THE NATURE AND STATUS OF THE PROVINCIAL AND LOCAL SYSTEMS OF GOVERNMENT

The Theme Committee tabled a report outlining broad areas of agreement and disagreement with regard to provincial and local systems of government. The Constitutional Committee accepted the report on the understanding that the

89. It was suggested by one of the parties to insert the word "improperly" before "enrich".

90. Agreed to in the CC.

91. Reformulated to simplify the clause as per instruction of the CC.

92. Agreed to in the CC.

93. Dissolution of the NA and votes of no confidence to be taken further by CC Subcommittee.

contentious issues would be developed in further reports from the Theme Committee.

6.2 NATIONAL AND PROVINCIAL LEGISLATIVE AND EXECUTIVE COMPETENCIES

The Theme Committee tabled a Report which was discussed by the Constitutional Committee and referred to the Sub-committee. The Sub-committee is discussing broad principles and expects to issue drafting instructions to the technical advisers and CA Law Advisers soon.

7. FUNDAMENTAL RIGHTS

7.1 OVERVIEW

Theme Committee 4 tabled a number of reports and draft formulations on various matters. These were extensively debated in the Constitutional Committee. The Technical Committee is at present working on combining all of these separate formulations into a draft Chapter on Fundamental Rights, which will include questions relating to the application and limitation of these rights. This is expected to be ready in early September. A further report will follow.

The Reports tabled by the Theme Committee are:

7.2 CONSTITUTIONAL PRINCIPLE II

The Theme Committee tabled a report which clarified issues at a conceptual level. It was noted that the Theme Committee would table a more substantial report to the Constitutional Committee.

7.2 NATURE AND APPLICATION OF BILL OF RIGHTS

7.3 RIGHT TO HUMAN DIGNITY

7.4 RIGHT AGAINST SERVITUDE AND FORCED LABOUR

7.5 FREEDOM OF RELIGION, BELIEF AND OPINION

7.6 FREEDOM OF EXPRESSION

7.7. ACADEMIC FREEDOM

7.8 ACCESS TO INFORMATION

APPENDIX

STRUCTURE AND FUNCTIONING OF CONSTITUTIONAL COMMITTEE SUB-COMMITTEE

1. The Constitutional Committee on 23 June 1995 formally agreed to the establishment of a permanent sub-committee to facilitate effective negotiation in the constitution-making process.

2. The main function of this sub-committee is to process substantive matters on behalf of the Constitutional Committee.

3. The composition of the sub-committee is as follows: ANC 3, NP 2, IFP 1, FF 1, DP 1, PAC1 and ACDP 1.

4. The sub-committee deals with matters referred to it by the Constitutional Committee and reports to the the Constitutional Committee.

5. The sub-committee's functions include:
   5.1 Seeking broad consensus;
   5.2 Removing "blockages";
   5.3 Negotiating matters to be finalised by the Constitutional Committee.

6. Each political party appoints alternate members who attend sub-committee metings but would only exercise speaking rights in the absence of the full member.

7. Each political party also selects members of their parties from Theme Committees to attend sub-commitee meetings, to advise on particular issues before the sub-committee.

8. The Constitutional Committee also agreed to regularly review the composition and functioning of the sub-committee.

ANNOUNCEMENTS, TABLINGS AND COMMITTEE REPORTS: PART TWO

TABLE OF CONTENTS

8. JUDICIARY AND LEGAL SYSTEMS

8.1 COURTS AND ADMINISTRATION OF JUSTICE DRAFT, 10 AUGUST 1995

Status: Prepared by Theme Committee technical advisers as instructed by Constitutional Committee Sub-committee on Judiciary and approved for discussion in the Constitutional Committee.

THE COURTS AND THE ADMINISTRATION OF JUSTICE

Judicial Authority

1. (1) The judicial authority of the Republic shall vest in the courts established by the Constitution or an Act of Parliament.

(2) The courts shall be independent and subject only to this Constitution and the law.

(3) The courts shall apply the Constitution and the law impartially and without fear, favour or prejudice.

(4) No person and no organ of state shall interfere with the courts in the performance of their functions.

(5) The orders issued by the courts within their respective jurisdictions shall bind all persons and organs of state.

(6) Organs of state shall, through legislative and other measures, give the courts the necessary assistance to protect and ensure their independence, dignity and effectiveness.

(7) The constitutional jurisdiction[94] of all courts and the jurisdiction of the Supreme Court of Appeal shall only be determined by this Constitution; the ordinary jurisdiction of all other courts shall be determined by an Act of Parliament[95].

(8) All other matters pertaining to the functioning of any court shall be regulated only by an Act of Parliament or regulations or rules made thereunder.

The judicial system

2. There shall be the following courts of law in the Republic:

(i) The Constitutional Court, which shall be the highest court with constitutional jurisdiction, and which shall consist of a President, a Deputy President and nine other judges, four of whom shall be appointed from among the judges

94. "Constitutional jurisdiction"—used here and in sections 3(1) and 4(1)—to be defined in a definition section—as "jurisdiction in respect of all matters relating to the interpretation, protection and enforcement of this Constitution and all Provincial Constitutions."

95. This sub-clause may have to be reformulated once finality has been achieved as regards the constitutional jurisdiction of the Magistrate's Court and other Courts.

of the Supreme Court of Appeal or the High Court.

(ii) The Supreme Court of Appeal[96], which shall be the highest court of appeal in all matters other than those within constitutional jurisdiction, and which shall consist of the Chief Justice, a Deputy Chief Justice and such number of judges of appeal as may be determined.

(iii) Such Courts of Appeal as may be established by Act of Parliament[97], to hear appeals from the High Court or courts of similar status.

(iv) The provincial and local divisions of the High Court and other courts of similar status[98].

(v) Magistrates' Courts and other courts of similar status.[99]

(vi) Other courts established by law.[100]

Jurisdiction of the Constitutional Court

3. (1) The Constitutional Court only shall have jurisdiction:

(a) to determine constitutional disputes between the national and provincial governments or between provincial governments.

(b) to consider the constitutionality of any Bill before (passed by) Parliament or a provincial legislature. At the request of the Speaker of the National Assembly, the President of the Senate, or the Speaker of a provincial legislature acting on a petition by not less than 20% of each of the Assembly or Senate, or legislature, as the case may be, or all the members of all parties not constituting the majority party in such body, and with the leave of the Constitutional Court.[101]

(2) A decision of the Constitutional Court shall bind all persons and all legislative, executive and judicial organs of state.

(3) The final decision as to whether a matter falls within its jurisdiction lies with the Constitutional Court.

(4) There shall be direct access to the Constitutional Court where the interests of justice so require with leave of the Constitutional Court.

(5) *(a)* If the Constitutional Court finds any law, executive or administrative act to be inconsistent with the Constitution, it shall declare such, law or act invalid to the extent of its inconsistency.

(b) The Constitutional Court may in any matter make such further order as it may deem just and equitable, including whether or to what extent any declaration of invalidity is to have retrospective operation, and an order as to costs.

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96. The SCA is a redesignation of the Appellate Division, with the addition of constitutional jurisdiction. Transitional provisions must provide for any reference in any other law to the AD to be construed as a reference to the SCA.

97. The creation of Courts of Appeal (intermediate between the High Court -currently the inappropriately named "Supreme Court"—and the Supreme Court of Appeal—currently the AD) was canvassed in materials before TC5 and has been under discussion since February. It is supported by the Chief Justice. the President of the Constitutional Court and Justice Ackermann, Judge President Eloff, the ALS, BLA, GCB and by the Law Commission. They are accepted in principle by the parties, but their exact ambit will have to await the Hoexter Commission Report and a consequent consultative process. the Chief Justice has however stressed the need for provision of this kind for their future establishment to be included in the Constitution.

98. Such as the Water Court, Labour Appeal Court, Special Income Tax Court, and perhaps now the Land Claims Court. Consider the insertion of the words "presided over by a judge".

99. Consider the insertion of words "Presided over by a magistrate".

100. This section makes provision for the establishment of traditional land community courts, should this upon further investigation be determined to be desirable and feasible.

101. Two views on 3(1)(b)—retain (b) or delete (b). Formulation on (b) to be debated.

(c) The Constitutional Court may suspend a declaration of invalidity for a specified period to allow the competent authority to correct the defect, and impose such conditions in that regard as it may decide.

(6) *(a)* All other courts having constitutional jurisdiction may make the orders set out in clauses 4(a), (b) and (c).

(b) If any other court other than the Constitutional Court holds a national or provincial statute or any executive action of the President to be inconsistent with the Constitution, such finding shall have no force or effect unless confirmed by the Constitutional Court on appeal to it or on application to it by any person or organ of state with a sufficient interest.

Jurisdiction of other courts

4. (1) The Supreme Court of Appeal, a Court of Appeal, a provincial or local division of the High Court and any other court of similar status shall, in addition to any inherent jurisdiction existing at the date this Constitution takes effect[102], have constitutional jurisdiction and any other jurisdiction conferred by an Act of Parliament.

(2) The Magistrate's Courts and all other courts shall have such constitutional and other jurisdiction as may be conferred by an Act of Parliament.[103]

Appointment of judicial officers

5. (1) No person shall be qualified to be appointed a judicial officer or acting judicial officer unless he or she is a South African citizen and is a fit and proper person to be a judicial officer.

(2) A judicial officer shall, before commencing to perform the functions of his or her office, make and subscribe an oath or solemn affirmation in the terms set out in Schedule (...) before a judge.

(3) The Chief Justice and the President of the Constitutional Court shall be appointed by the President in consultation with the Cabinet and after consultation with the Judicial Service Commission.

National Party: The Chief Justice and the President of the Constitutional Court shall be appointed by the President (in consultation with the Cabinet and) on the advice of the JSC.

(4) Appointment of Constitutional Court Judges.

ANC: Section 99(4) and (5) of the Interim Constitution

National Party: The Deputy President of the Constitutional Court and all the judges of the Constitutional Court shall be appointed by the President after advice by the Judicial Service Commission and in consultation with the leaders of all political parties represented in Parliament. In the event of no consensus having been reached by the party leaders, the judges will be appointed by a majority of more than 75% of the members of the National Assembly

102. See note 4. Transitional provisions must ensure that inherent jurisdiction vesting in the present divisions of the Supreme Court continues in respect of the High Court, any Court of Appeal which may be established, and Supreme Court of Appeal.

103. No consensus has been reached on this aspect. The present formulation is based on the view that the matter needs further consideration and should be dealt with by Parliamentary legislation. If so, must clause 1(7) be reformulated?

and Senate sitting together.

(Please note that this is the compromise position of the NP. The original position being appointment in the same way as the Human Rights Commission is appointed in the present constitution but after advice from the JSC).

(5) The Deputy Chief Justice, Deputy President of the Constitutional Court, and all other judges shall be appointed by the President on the advice of the Judicial Services Commission.

(6) The appointment of other judicial officers shall be regulated by an Act of Parliament.[104]

(7) Members of the Constitutional Court shall hold office for non-renewable terms not exceeding nine[105] years.

(8) The five oldest members of the Constitutional Court in office at the time of the expiration of the terms of office of the present judges of the Constitutional Court shall retire at such expiration and all other members after the expiration of a further period of four years.[106]

(9) Acting judges shall be appointed by the Minister of Justice on the advice of the President of the Constitutional Court, the Chief Justice, or the Judge President of the appropriate division of the High Court or other court constituted in terms of section 2(v), as the case may be. An Acting judge to the Constitutional Court shall not serve for a total period exceeding 6 months.

Removal of judges from office

6. (1) The President may remove a judge from office on grounds of incapacity, gross misconduct or gross incompetence upon a finding to that effect by the Judicial Service Commission and the adoption by Parliament in joint session and by a majority of two-thirds of members of a resolution calling for the removal of such judge from office.

(2) A judge who is the subject of an investigation may be suspended by the President on the advice of the Chief Justice pending the finalisation of such investigation.

(3) The emoluments and pension and other benefits of judges and acting judges shall be prescribed by Act of Parliament or regulations made thereunder and shall not be subject to reduction.

Judicial Service Commission[107]

7. (1) There shall be a Judicial Service Commission, which shall, subject to subsection (3), consist of—

(a) the Chief Justice, who shall preside at meetings of the Commission;

(b) the President of the Constitutional Court;

(c) one Judge President designated by the Judges President;

(d) the Minister responsible for the administration of justice or his or her nominee;

(e) two practising advocates designated by the advocates' profession;

(f) two practising attorneys designated by the attorneys' profession;

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104. Consensus still to be attained. Is it necessary to refer to the Magistrate's Commission?

105. Advisor's suggested compromise.
ANC—10 years. NP—7 years.

106. This is a transitional mechanism and subject to further debate.

107. *Consensus issue:* Given the lack of consensus, the current section 105 is simply replicated here (with certain minor consequential changes arising from the other provisions of this draft chapter).

(g) one professor of law designated by the deans of all the law faculties at South African universities;

(h) four senators designated en bloc by the Senate by resolution adopted by a majority of at least two-thirds of its members;

(i) four persons, two of whom shall be practising attorneys or advocates, who shall be designated by the President in consultation with the Cabinet;

(j) on the occasion of the consideration of matters specifically relating to a provincial division of the High Court, the Judge President of the relevant division and the Premier of the relevant province.

(2) The functions of the Judicial Service Commission shall be—

(a) to make recommendations regarding the appointment and removal from office of judges in terms of sections 5 and 6;

(b) to advise the national and provincial governments on all matters relating to the judiciary and the administration of justice;

(3) When the Commission performs its functions in terms of subsection 2(b), it shall sit without the four senators referred to in subsection 1(h).

(4) The Commission shall determine its own procedure, provided that the support of at least an ordinary majority of all its members shall be required for its decision.

(5) The Commission may appoint committees from among its number and assign any of its powers and functions to such committee.

Seats of Courts

8. [TC 1 must report]

Language

9. [TC 1 must report]

9. SPECIALISED STRUCTURES OF GOVERNMENT

9.1 OVERVIEW

The Constitutional Committee has received and considered reports from the sub-Theme Committees of Theme Committee 6 on Public Administration and various institutions—Auditor General, Reserve Bank,Public Protector and Human Rights Commission.

In further discussion in the Sub-committee it has been suggested that a separate Chapter on Independent Institutions be considered for the new Constitution, incorporating where possible, general provisions for all of these institutions.

What is provided below are:

i The 5th Draft on Public Administration; and

ii The 2nd Draft of the proposed Chapter on Independent Institutions prepared for discussion in the Sub-committee of the Constitutional Committee. The draft Chapter incorporates previous draft formulations on the Auditor General, Reserve Bank, Public Protector, Human Rights Commission and part of the Public Administration draft dealing with the Public Administration Commission.

9.2 PUBLIC ADMINISTRATION SEVENTH DRAFT, 5 AUGUST 1995

Status: Prepared by CA Law Advisers as per instruction of Constitutional Committee Sub-committee

PUBLIC ADMINISTRATION

Basic values and principles governing public administration

1. Public administration at all levels of government, including institutions which are dependent on government funds or other sources of public money, shall be governed by the democratic values and principles enshrined in this Constitution. In particular the following principles shall be applicable:

(a) A high standard of professional ethics shall be promoted and maintained in the public administration.

(b) Good human resource management and development practices to maximise human potential shall

be cultivated in the public administration.

(c) Efficiency and the economic and effective use of resources shall be promoted in the public administration.

(d) Public administration shall be accountable. Transparency through the provision of accessible, accurate and timeous information to the public shall be fostered.

(e) Public administration shall be development oriented and the provision of services shall be conducted on the basis of impartiality and equity to all.

(f) Public administration shall function on a basis of fairness and shall serve the public in an unbiased and impartial manner.

(g) Public administration shall be oriented towards public participation in policy-making. It shall be responsive to the needs of the people.

(h)[108] Public administration shall be broadly representative of the South African people. Employment and personnel management practices in the public administration shall be based on competency/ability[109], objectivity and fairness and the need to redress the imbalances of the past to achieve the required representation.

(2) The appointment in the public administration of a number of persons on policy considerations as regulated by law shall not be precluded.[110]

(3) Laws regulating the public administration may differentiate between different sectors, administrations or institutions in the public administration.

Public Administration Commission

2. (1) There shall be a single Public Administration Commission for the Republic as prescribed by a national law. Each of the provinces shall be entitled to nominate a representative for appointment in the Commission.

(2) The Public Administration Commission shall be independent and impartial.

(3) The Public Administration Commission shall perform such functions to promote[111] the basic values and principles governing the public administration as prescribed by a national law.

(4) The Public Administration Commission shall be accountable to Parliament for its activities.

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

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108. The Subcommittee propose that paragraph (h) be reformulated as above to accommodate points made in the CC about the inclusion of the principle of affirmative action.

109. In the CC subcommittee the PAC made the point that "competency" may impede the application of affirmative action in the public administration as it emphasises formal qualifications as opposed to ability or capacity. Dictionary definitions of "competency" and "ability" would appear to support the PAC's view. "Competency" primarily suggests complete fitness for adequate performance. It denotes qualities such as efficiency, effectiveness, expertise, proficiency, experience, skills, know-how, knowledgeability, etc. "Ability" has a wider meaning and denotes the quality or state of being able to perform. Besides competency it includes capacity, capability, potential, intelligence, talent, flair, etc.

110. Section 1(2) was reworded along the lines suggested above to avoid specific references to "political appointments".

111. The Subcommittee proposes that the word "safeguard" be replaced by "promote".

Public Service

3. (1) There shall be a public service for the Republic structured and functioning in terms of a law. The public service shall loyally execute the lawful policies of the government of the day.

(2) The terms and conditions of service of employees in the public service shall be regulated by law. Employees shall be entitled to a fair pension as regulated by law.[112]

9.3 INDEPENDENT INSTITUTIONS SECOND DRAFT, 15 AUGUST 1995

Status: Processed as per instruction of Constitutional Committee Sub-committee for further discussion.

INDEPENDENT INSTITUTIONS

AUDITOR GENERAL

Establishment and* functions *[independence and impartially][113]

1. (1) There shall be an Auditor General for the Republic.[114]

[(2) The Auditor General shall be independent.

(3) The Auditor General shall discharge his or her powers and functions impartially and without fear, favour or prejudice subject only to this Constitution and the law.

(4) Organs of state shall through legislative and other measures accord the Auditor General and his or her assignees the necessary assistance and protection to ensure the independence, impartiality, dignity and effectiveness of the Auditor General, including all such immunities and privileges as are necessary for this purpose.

(5) No person and no organ of state shall interfere with the Auditor General in the discharge of his or her powers and functions.][115]

[Powers and functions][116]

[2.(1)](2) The Auditor General shall audit, and report on, the accounts and financial statements of all national and provincial state departments and administrations and of all local governments, and also all such other accounts and financial statements as may be required by law to be audited by the Auditor General.[117]

[(2)](3) The Auditor General may audit, and report on, the accounts and financial statements of any institu-

112. Section 1(2) of the previous Draft has been amended to apply only to the public service and moved to this section on the public service. The reference to a pension scheme has been scrapped.

113. This section can be combined with the powers and functions and reporting clauses if the provisions in the section relating to independence and impartiality are moved to section 21.

114. Agreed to.

115. The Sub-committee must consider whether Subsections (2) to (5) in bold brackets should be incorporated in the general provision on general principles in section 21 below. If this is agreed to the following sentence can be added to subsection (1):

"The general principles set out in section 21 shall apply to the Auditor General."

The Panel of Experts have advised that the phrases "and his or her assignees" and "including all such immunities and privileges as are necessary for this purpose" are unnecessary. See par. 2 of the Panel's opinion. However, during the discussion of the Panel's opinion one of the panellists suggested that subsections (3) and 4 should be combined and rephrased in a more positive way.

116. See foot note 1.

117. Formulation as approved by the CC.

tion funded from public money, as may be regulated by law.[118]

[(3)][119]

[Reports][120]

(4) The Auditor General shall submit the reports on audits to such authorities operating at the same level of government at which the audit was conducted, as shall be prescribed by law. If such a law so requires the Auditor General shall submit the reports also to other prescribed authorities operating at another level of government. All reports shall be made public.[121]

Appointment, qualifications, tenure and dismissal

2.[4. (1) The President shall appoint as Auditor General a person -

(a) nominated by a committee of Parliament composed of one member of each party represented in Parliament and participating in the committee; and

(b) approved by Parliament by a resolution adopted, without debate, by a majority of at least two-thirds of the members present and voting.][122]

(2) The Auditor General shall be a South African citizen who is a fit and proper person to hold such office. The Auditor General shall be appointed with due regard to his or her specialised knowl-edge of or experience in auditing, state finances and public administration, and shall not hold office in any political party or organisation.[123]

(3) The Auditor General shall be appointed for a period of not less than five years. A person appointed for a period of less than ten years may be re-appointed to serve as the Auditor General for a further period, provided that his or her total period of service as the Auditor General shall not exceed ten years.[124]

[(4)][125]

[(5) The Auditor General may be removed from office only on the grounds of misbehaviour, incapacity or incompetence upon:

(a) a finding to that effect by a committee of Parliament composed of one member of each party represented in Parliament and participating in the committee; and

(b) the adoption by Parliament of a resolution supported by at least two-thirds of the members present and voting calling for his or her removal from office.

(6) The President may suspend the Auditor General from office when his or her

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118. Agreed to in the Subcommittee, the DP reserving its position.

119. It was agreed in the Subcommittee that the previous subsection (3) dealing with the AG's access to information be deleted. The DP reserved its position.

120. See foot note 1.

121. It was agreed that a new formulation should be developed along the lines of the above formulation. Alternatively the following formulation can also be considered:

"(4) The Auditor General shall submit reports on audits to all authorities which have a direct interest in the relevant audit and also to any other authorities as may be prescribed by law. All reports shall be made public."

122. If the parties agree to a standardised appointment procedure (see section 22) the following formulation can be considered for inclusion in section 2 above.

"(1) The Auditor General shall be appointed in accordance with the requirements set out in section 22."

123. Agreed to in the Subcommittee.

124. Agreed to in the Subcommittee.

125. It was agreed in the Subcommittee that the provision on conditions of service of the AG be deleted. The DP reserved its position.

removal from office is under consideration by Parliament, and shall forthwith dismiss him or her from office upon adoption of the said resolution.][126]

[Assignment of powers and functions and provision of funds

5.][127]

FINANCIAL AND FISCAL COMMISSION

3—8[128]

CENTRAL BANK

Establishment

9. The South African Reserve Bank, established and regulated by national law, shall be the central bank of the Republic.

Primary objective

10. (1) The primary objective of the South African Reserve Bank shall be to protect the value of the currency in the interest of balanced and sustainable economic growth in the Republic.

(2) The South African Reserve Bank shall, in the pursuit of its primary objective [referred to in subsection (1)], exercise its powers and functions independently and without fear, favour or prejudice, subject only to a national law: Provided that there shall be regular consultation between the South African Reserve Bank and the Minister responsible for national financial matters.[129]

Powers and functions

11. The powers and functions of the South African Reserve Bank shall be those customarily exercised and performed by central banks. Such powers and functions shall be determined by a national law.[130]

PUBLIC ADMINISTRATION COMMISSION

Establishment and functions

12. (1) There shall be a single Public Administration Commission for the Republic as prescribed by national law. Each of the provinces shall be entitled to nominate a representative for appointment to the Commission.

[(2) The Public Administration Commission shall be independent and impartial.][131]

(3) The functions of the Public Administration Commission shall be to promote the basic values and principles governing public administration *set out in Chapter* ....[132] as prescribed by national law.

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126. This clause has now been incorporated in the standardised dismissal procedure in section 23. The following provision can be considered for inclusion in section 2 above:

"(4) The Auditor General may be removed from office in accordance with the procedure set out in section 23."

127. It was agreed in the Subcommittee that the previous section 5 be deleted, the DP reserving its position.

128. Provisions on this Commission have not yet been drafted.

129. This clause would need revisiting if the Subcommittee is of the view that the uniform provision on general principles (section 21) should also apply to the Reserve Bank. See footnote 42.

The words in bold brackets serve no purpose and can be deleted.

130. It was agreed in the Subcommittee that the previous proviso to this clause prohibiting Parliament from derogating from the principles in section 10 be deleted. The DP reserved its position.

131. If the Subcommittee agrees that the uniform provision on general principles (section 21) should also apply to the PA Commission, the words in bold brackets should be replaced by the following:

"(2) The general principles set out in section 21 shall apply to the Public Administration Commission."

132. The provisions of the Draft on the PA Commission dealing with principles governing public administration and the public service have an effect and application beyond the scope of the Commission. It would therefore be inappropriate to include these provisions in this Chapter under the heading "Independent Institutions". It is

[(4) The Public Administration shall be accountable to Parliament for its activities.]19

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

ELECTORAL COMMISSION[133]

Establishment and functions

13. (1) There shall be an Electoral Commission [which shall be independent, impartial and accountable to Parliament.][134]

(2) The Electoral Commission shall be responsible for the management of free and fair elections conducted at national, provincial and local levels of government.

Appointment of members

14. The Electoral Commission shall be composed of a minimum of three persons [who must be nominated by a representative Parliamentary Committee on Elections, approved by a seventy-five per cent majority of members of Parliament and appointed by the President.][135]

PUBLIC PROTECTOR

Establishment and functions

15. (1) There shall be a Public Protector for the Republic.[136]

[(2) The Public Protector shall be independent, impartial and subject only to the Constitution and the law. The Public Protector shall discharge his or her powers and functions without fear, favour or prejudice.

(3) ●rgans of state shall through legislative and other measures accord the Public Protector the necessary assistance and protection to ensure his or her independence, dignity and effectiveness.

(4) No person and no organ of state shall interfere with the Public Protector in the discharge of his or her powers and functions.][137]

(2) The Public Protector shall have power, as regulated by law, to investigate and report on any conduct in the affairs of the State or public administration at any level of government which is alleged or suspected to be improper or to result in any impropriety or prejudice, and to take such remedial action as is appropriate in the circumstances. In addition, the Public Protector shall

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suggested that these other provisions be included in a separate chapter under "Public Administration" to precede the chapter on the Security Services.

133. TC 6.1's report has still to be discussed in the CC.

134. The application of the uniform provision on general principles (section 21) to the Electoral Commission may require the deletion of the words in bold brackets.

135. If the parties agree to a standardised appointment procedure the words in bold brackets can be replaced by the following:

"appointed in accordance with the requirements set out in section 22."

136. Agreed to.

137. The Subcommittee should consider the inclusion of subsections (2) to (4) in bold brackets in the uniform provision on governing principles in section 21. If so, the following words can be added to subsection (1) above:

"The general principles set out in section 21 shall apply to the Public Protector."

have such other powers and functions as may be prescribed by law.[138]

[(5)](3) The Public Protector shall be accessible to all persons and communities.[139]

(4) The Public Protector shall not have the power to investigate the performance of judicial functions by the courts of the Republic.[140]

[(3)](5) Reports issued by the Public Protector in connection with the discharge of his or her powers and functions shall except in exceptional circumstances be open to the public.[141]

[(4) The Public Protector shall be accountable to Parliament for his or her activities, and shall report to Parliament on such activities at least once a year.][142]

Appointment, qualifications, tenure and dismissal

16. [(1) The President shall appoint a person recommended by Parliament as the Public Protector.

(2) Parliament shall only recommend a person for appointment as the Public protector—

(a) who has been nominated by a committee of Parliament ...; and

(b) whose nomination has been approved by Parliament by a resolution adopted by a majority of at least ... per cent of the members present and voting at a meeting.][143]

(3) The Public Protector shall be a South African citizen who is a fit and proper person to hold such office and who complies with any other requirements prescribed by law.[144]

(4) The Public Protector shall be appointed for a period of seven years.[145]

[(5) The President may remove the Public Protector from office only on the grounds of misbehaviour, incapacity or incompetence upon a finding to that effect by a committee of Parliament and the adoption by Parliament of a resolution calling for his or her removal from office.

(6) The President may suspend the Public Protector from office when his or her removal from office is under consideration.][146]

138. The CC Subcommittee agreed to this formulation. Establishment and functions can be combined in one section if section 15(2) to (4) is moved to section 21.

139. Agreed to in the subcommittee.

140. This clause was criticized on a number of points in the CC, viz

— that the negative nature of the provision is inappropriate;
— that its operation should be limited to judicial *decisions*;
— that it should be moved to the chapter on the administration of justice.

The CC decided to defer further discussion of this clause pending discussion of the Draft on the Administration of Justice.

141. Agreed to by the Subcommittee, the NP reserving its right to revisit the clause.

142. To be considered for incorporation in section 21.

143. Subsections (1) and (2) in bold brackets can be deleted if the Subcommittee agrees on a uniform appointment procedure. In such a case the following provision can be considered for inclusion above:

"(1) The Public Protector shall be appointed in accordance with the requirements set out in section 22".

144. Agreed to in the Subcommittee.

145. Agreed to in the Subcommittee.

146. Subsections (5) and (6) incorporated in the standardised dismissal procedure in section 23. The following provision can be considered for inclusion in the above section:

"The Public Protector may be removed from office in accordance with the procedure set out in section 23."

Provincial public protectors/Deputy Public Protectors[147]

17. ...

HUMAN RIGHTS COMMISSION

Establishment and functions [governing principles][148]

18. (1) There shall be a Human Rights Commission for the Republic.[149]

[(2) The Commission shall be independent and subject only to this Constitution and the law.

(3) The Commission shall discharge its powers and functions impartially and without fear, favour or prejudice.

(4) Organs of state shall through legislative and other measures accord the Commission the necessary assistance and protection to ensure its independence, impartiality and effectiveness.

(5) The Commission shall be accountable to Parliament for its activities and shall report to Parliament on such activities at least once a year.][150]

(2) The Human Rights Commission shall promote the development, protection and attainment of, and respect for, human rights and, generally, the development of a culture of human rights in the Republic. It shall for this purpose have the necessary powers accorded to it by law, including powers to monitor, investigate and report on the observance of human rights, to take steps to secure appropriate redress where human rights have been breached and to perform research and educative functions.[151]

Appointment of members

19. ..[152]

147. Stands over for discussion on provincial competencies.

148. If the bracketed subsections are moved to section 21 the clauses on establishment and functions can be combined under the heading "Establishment and functions".

149. Agreed to.

150. The bracketed subsections (2), (3), (4) and (5) could be considered for incorporation in section 21. If agreed to the following can be added to subsection (1) above:

"The general principles set out in section 21 shall apply to the Commission."

151. As agreed to in the Subcommittee.

152. There is disagreement among the parties on the method of selection and appointment of commissioners. There are two views, the one supports the approach in section 115(3) of the interim Constitution. The other view calls for the creation of an independent panel to select and recommend persons to the President for appointment as commissioners. Qualifications for members of the Commission also need further debate. These are the two options:

Option 1:

"4. (1) The members of the Human Rights Commission shall be appointed by the President on recommendation by Parliament.

(2) Parliament shall only recommend a person for appointment to the Commission—

(a) who has been nominated by a committee of Parliament composed of one representative of each party represented in Parliament and willing to participate in the committee: and

(b) whose nomination has been approved by Parliament by a resolution adopted by a majority of at least 75% of the members present and voting.

(3) A member of the Commission shall be an independent and impartial person of integrity who has a personal commitment to the promotion of fundamental rights."

GENDER COMMISSION

20. ... [153]

GENERAL PROVISIONS

General principles[154]

21. (1) The institutions [provided for in this Chapter] shall be independent, impartial and subject only to the Constitution and the law. They shall discharge their powers and functions without fear, favour or prejudice.

(2) Organs of state shall through legislative and other measures accord the said institutions the necessary assistance and protection to ensure their independence, impartiality, dignity and effectiveness.

(3) No person and no organ of state shall interfere with the said institutions in the discharge of their powers and functions.

(4) The said institutions shall be accountable to Parliament and shall report to Parliament on their activities at least once per year.

Appointments[155]

22. (1) Where the Constitution requires an appointment to be made in accordance with this section, such appointment

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Option 2:

"4. (1) The members of the Human Rights Commission shall be appointed by the President on recommendation by an independent panel of human rights experts, who do not hold office in any political party or organisation.

(2) Such panel of human rights experts shall be appointed by a multi-party parliamentary committee by resolution of a majority of at least two-thirds of its members.

(3) A member of the Commission shall be an independent and impartial person of integrity who has a personal commitment to the promotion of fundamental rights."

The Subcommittee must consider whether members of the Commission should be appointed in terms of the standard procedure clause, in which case the above can be replaced by the following:

"A member of the Human Rights Commission shall be appointed in accordance with the requirements set out in section 22."

TC 6.3 must still report.

154. The question before the Subcommittee is whether a uniform formulation such as suggested above could be applied to all the independent institutions established in terms of this Chapter, i.e.

Auditor General
Financial and Fiscal Commission (no report yet)
Reserve Bank
Public Administration Commission
Electoral Commission
Public Protector
Human Rights Commission
Gender Commission (no report yet).

If it is not feasible to apply the section to all the institutions the same approach as suggested in sections 22 and 23 can be considered, i.e. by applying it only to specific institutions. In such a case subsection (1) above can be adjusted by replacing the words in bold brackets with "to which this section applies".

155. As appointment procedures are in contention, the above formulation has been included just for the sake of form and to indicate that it will only apply where there is another provision requiring some or other appointment to be made in terms of the standard procedure. This would mean that the appointment of members of the Reserve Bank board, the Public Administration Commission, etc, will not be affected by this clause as these persons will be appointed in terms of legislation (as political agreements presently stand).

The appointment of the Auditor General, Public Protector and members of the Electoral Commission and the Human Rights Commission in terms of a uniform procedure would seem to be feasible.

shall be made by the President acting on the recommendation of Parliament.

(2) The person recommended by Parliament shall be a person—

(a) nominated by a committee of Parliament ...; and

(b) approved by Parliament by a resolution adopted by a majority of at least ... % of the members present and voting.

Removal from office

23.[156] (1) Where the Constitution provides for the removal from office of a person in accordance with this section, that person may be removed from office only on the grounds of misbehaviour, incapacity and incompetence upon—

(a) a finding to that effect by a committee of Parliament composed of one member of each party represented in Parliament and participating in the committee; an

(b) the adoption by Parliament of a resolution supported by at least [two-thirds] of the members present and voting calling for his or her removal from office.

(2) The President may suspend a person from office when his or her removal from office is under consideration by Parliament, and shall without delay dismiss him or her from office upon adoption of the said resolution.

9.3 SECURITY SERVICES

The Theme Committee tabled a report for discussion in the Constitutional Committee on 18 August 1995. The draft text is as outlined herein:

SECURITY SERVICES
THIRD DRAFT,
8 AUGUST 1995

Status: Draft by Theme Committee 6.4 Technical Advisers and the CA Law Advisers as approved by Theme Committee 6.4 for discussion in the Constitutional Committee.

STATEMENT OF PRINCIPLE

Whereas there is a need

— that national security should be based on the resolve of all South Africans, as individuals and as a nation, to live as equals and in peace and harmony, to be free from (Friday, 25 August 1995 No 4—1995) fear and want, and to seek a better life; and

— that national security should be pursued in strict compliance with the Constitution, the law and all applicable international conventions and norms;

Now therefore the following provisions and the principles enshrined therein are enacted to govern national security and the security services of the Republic, and these provisions shall be interpreted and understood in the spirit of this Statement of Principle.

156. The above formulation comes from the Auditor General Draft and would appear to be suitable also for the Public Protector. Its application to other office-bearers should perhaps also be considered.

SECURITY SERVICES[157]

Composition and structuring of security services

1. (1) The security services of the Republic consist of a single defence force, the police service and such intelligence services as may be established in terms of the Constitution.

(2) The security services shall be structured and regulated by law.[158]

(3) The security services are subordinate to the will of the people as expressed in terms of the Constitution.[159] They shall at all times act in accordance with and within the confines of the Constitution and the law, including the norms of international customary law and treaties binding on the Republic.[160]

(4) The security services shall discharge their powers and functions in the national interest. It shall therefore be unlawful for the security services to further or prejudice party political interests.[161]

DEFENCE

Defence force

2. (1) The defence force shall be structured and managed as a disciplined professional military force. Its object shall be the defence and protection of the Republic, its territorial integrity and its people.[162]

(2) In pursuing its object the defence force shall be guided by the principle of non-aggression.[163]

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157. There are four reports dealing with the security services, viz -

a "general" report d.d. 27 February 1995;

a "police" report d.d. 15 May 1995;

a "defence" report d.d. 29 May 1995; and

an "intelligence" report d.d. 26 June 1995.

This draft reflects as far as possible the agreed positions in these four reports. Some of the agreements in the reports overlap with the work of other Theme Committees, and where this is the case suitable arrangements will have to be made to bring the views of TC 6.4 to the attention of the affected Theme Committees.

The "Introductory Statement" is an attempt to encapsulate the agreement in Block 1 of the Police Report, which, in this instance, refers to all security services and not only the police.

It is the view of the TC 6.4 technical advisers that the introductory statement should rather form part of the Preamble to the Constitution.

The key points of contention in the IFP's submission is

1. The inclusion of detail;

2. provincial competencies on defence, police and intelligence matters.

158. As per agreement in Block 2 of the Defence Report and Block 5 of the Intelligence Report.

159. As per agreement in Block 2 of the Police Report.

160. As per agreement in Block 10 of the General Report.

161. As per agreement in Blocks 6 and 10 of the Defence Report and Block 1 of the Police Report.

There is, however, contention on the definition of "national interest". See foot note 15 below.

It must also be pointed out that this subsection is ohligatory in terms of CP XXXI.

162. As per Agreement in Blocks 2, 6 and 10 of the Defence Report.

A transitional provision will be required to provide for the continuation of the SANDF which is presently established and structured in terms of the Interim Constitution. Transitional measures, however, can best be dealt with separately because of the temporary legal effect of such measures.

163. As per agreement in Block 2 of the Defence Report that the defence force should be primarily defensive.

Political responsibility and accountability

3. (1) A Minister of the Cabinet shall be charged with the political responsibility for defence and shall be accountable to Parliament.[164]

(2) A (joint)[165] multi-party committee of Parliament shall be established and maintained for the purpose of continuous parliamentary oversight of all defence matters. In particular the committee shall be competent to investigate and make recommendations regarding the budget, functioning, organisation, armaments, policy, morale and state of preparedness of and draft legislation on the defence force and to perform such other functions relating to parliamentary supervision of the defence force as prescribed by law.[166]

Command of defence force[167]

4. (1) The defence force shall be under the command of a chief of the defence force who shall be appointed by the President.[168]

(2) The chief of the defence force shall exercise command of the defence force in accordance with the directions of the Minister of the Cabinet responsible for defence and, during a state of national defence, of the President.[169]

Civilian secretariat

5. A civilian secretariat for defence functioning under the direction and control of the Minister of the Cabinet responsible for defence, shall be charged with the administration of such matters in connection with defence as may be entrusted to it by law or the Minister.[170]

Employment of defence force

6. The defence force may be employed only in the national interest and as authorised by law. Such a law shall be consistent with this Constitution and shall comply with the

164. As per agreement in Block 11 of the Defence Report.

There is broad agreement in TC 2 that Ministers of the Cabinet must be appointed from the ranks of Parliament. This will rule out the appointment of a serving soldier as the Minister of Defence.

The Draft on the National Executive (TC 2) provides for ministerial accountability to the President, the Cabinet and Parliament.

165. The question of a second chamber of Parliament must still be resolved.

166. As per agreement in Block 7 of the Defence Report. The TC is of the opinion that the underlined words be added as the CA is in the process of establishing the first democratic constitutional state and that it is critical for parliamentary committees to have wide powers, particularly to review the budget. If this power is not constitutionally stipulated then Parliament would have the power in future to restrict a role which is seen as critical.

167. The agreement in Block 1 of the Defence Report that the President should be the commander-in-chief of the defence force is reflected in the Draft on the National Executive.

168. As per Block 12 of the Defence Report. The procedure for appointing the Chief of the Defence Force is an area of disagreement. The understanding is that the appointment by the President involves consultation with the Cabinet.

The TC is further of the view that the procedure for the dismissal of the Chief of the Defence Force should accord with the appointment procedure.

169. As per agreement in Block 1 of the Defence Report.

170. As per agreement in Block 11 of the Defence Report. See also Block 9 of the General Report. The question arises whether this provision is too detailed and whether it should not be replaced by a provision merely stating the principle.

norms of international customary law and treaties binding on the Republic.[171]

POLICE

Police service

7. (1) The police service shall be structured and managed as a disciplined professional police service. Its object shall be the prevention and investigation of crime, the maintenance of public order and to secure the safety and security of people and communities in the Republic.[172]

(2) The police service shall be structured to function at both national and provincial levels under the direction of the national government and the provincial governments, respectively. The police service at provincial level may include police formations operating at the local level.[173]

Political responsibility and accountability

8. (1) A Minister of the Cabinet shall be charged with the political responsibility for police and shall be accountable to Parliament.[174]

(2) A (joint) multi-party committee of Parliament shall be established and maintained for the purpose of continuous parliamentary oversight of all police matters.[175]

Control of police service

9. (1) The police service shall be under the [operational] command of a national

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171. This section is in contention as per Block 6 of the General Report and Block 10 of the Defence Report. The contention revolves around the question whether the Constitution should contain a definition of "national interest", and if so, how such definition should be formulated. If a definition is included in the Constitution, the "law" referred to in the section will have to conform to the definition. Possible approaches include the following options:

Option 1: No definition of "national interest" in the Constitution in which case it will be left to the courts to interpret and develop this concept as used in the section. In doing so a court will have regard to voluminous literature available in international jurisprudence on the meaning of "national interest".

Option 2: The Constitution should define "national interest" in specific terms to indicate the precise circumstances in which the defence force may be employed. for instance where it is necessary—

(a) to comply with international obligations towards other states and international bodies;

(b) for the preservation of life, health and property;

(c) for the maintenance of essential services;

(d) to assist the police service to uphold law and order; and

(e) in support of reconstruction and development programmes and other efforts to improve socio-economic conditions.

A precise definition has the advantage of providing immediate legal certainty but leaves little room for legal development of the concept.

Option 3: The Constitution should define "national interest" in general terms to indicate that the concept embraces both the interest of the people and the interest of the state.

172. As per agreement in Block 3.a of the Police Report. A transitional provision on the South African Police Service as presently structured will be necessary.

173. Subsection (2) is in contention as per Block 5 of the Police Report. However, in subsequent discussions in the Theme Committee broad consensus along the lines of the above formulation emerged.

174. This section is in line with the agreed position as per Blocks 8 and 9 of the General Report. The Draft on the National Executive provides for ministerial accountability to the President, Cabinet and Parliament.

175. As per agreement in Block 9 of the Police Report.

commissioner who shall be appointed by the President.[176]

(2) The national commissioner of the police service shall exercise command of the police service in accordance with the directions of the Minister of the Cabinet responsible for police.[177]

(3) A provincial commissioner for each province shall be appointed by the national commissioner in accordance with a national law who shall be responsible for all visible policing functions in the province and such other functions as prescribed by a national law.[178]

Civilian secretariat

10. (1) A civilian secretariat functioning under the direction and control of the Minister of the Cabinet responsible for police, shall exercise such powers and functions in connection with police as may be entrusted to it by law or the Minister.[179]

(2) A province may establish a civilian secretariat to function at the provincial level of the police service as prescribed by law.23

Powers and functions of police service

11. (1) The powers and functions of the police service shall be as set out in a national law. Such a law shall entrust sufficient powers and functions to the police service in order to enable the national and provincial commissioners to discharge their respective responsibilities effectively.[180]

(2) In discharging its powers and functions the police service shall endeavour to enlist the support and co-operation of the people and communities except where this is inappropriate.[181]

INTELLIGENCE[182]

Establishment of intelligence services

12. An intelligence service operating independently from the defence force or the police service may only be established by the President. The objects, powers and functions of such an intelligence service shall be set out and regulated in a national law.[183]

Political responsibility and accountability

13. The President or a Minister of the Cabinet designated by the President shall be charged with the political responsibility

176. As per Block 4 of the Police Report. The command of the national commissioner over the entire police service or only that part of it operating at national level is still in contention.

Another area where further instructions are required concerns the dismissal of the national commissioner, for instance where the occupant of the post no longer enjoys the confidence of the Cabinet.

177. Subsection (2) is in line with the agreed position as per Blocks 8 and 9 of the General Report in so far as it relates to the national commissioner.

178. A transitional provision will be required to provide for the continuation of the present division of responsibilities between the national and provincial commissioners as set out in the Interim Constitution.

179. See Block 6 of the Police Report. At its meeting of 1 August 1995 the TC agreed to the inclusion of these provisions. Foot note 14 is also applicable here.

180. See Blocks 3.a and 3.b of the Police Report. This provision has been drafted after discussion by the TC of the First Draft.

181. As per agreement in Block 12 of the Police Report.

182. This part under the heading Intelligence reflects the agreed positions as set out in the Intelligence Report. It is structured into clauses dealing with intelligence services as defined in section 12 and clauses dealing with intelligence activity, whether in the intelligence services or the intelligence divisions of the defence force and the police service.

183. As per agreement in Blocks 2 and 5 of the Intelligence Report.

for an intelligence service and shall be accountable to Parliament for such intelligence service.[184]

Control of intelligence services

14. (1) An intelligence service shall operate in accordance with the control and directions of the President or the Minister of the Cabinet responsible for such an intelligence service.[185]

(2) The head of an intelligence service shall be appointed by the President [subject to parliamentary approval].[186]

Co-ordination of intelligence activities

15. A mechanism regulated by a national law for the co-ordination of intelligence services and the intelligence divisions of the defence force and the police service shall be established by the President.[187]

Parliamentary oversight of intelligence activities

16. A (joint) multi-party committee of Parliament shall be established and maintained for the purpose of continuous parliamentary oversight of intelligence matters as set out in a national law. Budgetary oversight of intelligence services shall be performed jointly with the parliamentary committee on public finance.[188]

Civilian inspectorate

17. A civilian inspectorate shall monitor the activities of intelligence services and perform such other functions as prescribed by law. Inspectors shall be appointed by the President with the approval of Parliament by resolution adopted by a majority of at least two thirds of the members.[189] GENERAL

Code of conduct for members of security services

15. Members of the security services shall at all times act in accordance with a code of conduct prescribed by law.[190] In particular members of the security services shall

(a) be obliged to comply with all lawful orders;[191]

(b) refuse to comply with a manifestly illegal order;[192] and

(c) refrain from furthering or prejudicing any party political interest.

Training

16. Members of the security services shall be properly trained in accordance with the relevant international standards of competency and discipline. The members shall be instructed in the applicable basic concepts

184. Subsection (1) reflects the agreed position in Block 5 of the Intelligence Report.

185. As per Block 5 of the Intelligence Report.

186. As per Block 8 of the Intelligence Report. The words in bold brackets are in contention.

187. As per Block 10 of the Intelligence Report.

188. As per agreement in Block 6 of the Intelligence Report. This provision is based on an assumption that a parliamentary committee on finance will be provided for in the Constitution.

189. As per Block 7 of the Intelligence Report.

190. As per agreement in Block 13 of the General Report, Block 17 of the Police Report, Block 5 of the Defence Report and Block 1 of the Intelligence Report. See also the agreement in Block 15 of the Police Report as to the use of "minimum force" and the query whether this should be in the Constitution or the code of conduct.

191. As per agreement in Block 12 of the General Report, Block 14 of the Police Report and Block 5 of the Defence Report.

192. A constitutional prohibition on the furthering or prejudicing of party political interests by members of the security services is required by CP XXXI.

of South African law, the inviolability of human rights and international conventions and law.[193]

Personnel administration

17. The conditions of service and the rights and duties of members of the security services shall be regulated by law with appropriate mechanisms established to accommodate the specific needs of the security services. Mechanisms and procedures for the resolution of labour disputes within the security services shall be established.[194]

193. The section is based on the agreement in Block 13 of the General Report and Block 2 of the Defence Report.

194. As per agreement in Block 12 of the General Report, Block 7 of the Police Report and Block 3 of the Defence Report. The DP indicated that they may pursue the matter of a separate service commission at a later stage.

ANNOUNCEMENTS, TABLINGS AND COMMITTEE REPORTS

CHAIRPERSONS ANNOUNCEMENT

ISSUES FOR DEBATE

Please note that a meeting of the Constitutional Assembly will take place as indicated below:

Date: Friday, 25 August 1995

Time: 09h00-13h00

Venue: National Assembly

* Please note that a meeting of the Constitutional Committee will also take place on Friday, 25 August 1995 from 14h00-17h00.

The Constitutional Committee, on the recommendation of the Management Committee, has instructed that all reports that have been tabled before the Constitutional Committee be placed before the members of the Constitutional Assembly for consideration.

The Constitutional Committee further instructed that whilst members would be entitled to raise any matter, relating to these reports, for debate in the Assembly, the Chairpersons be mandated to draft a list of contentious issues for particular consideration by members. These issues are as follows:

Issues for Debate from Theme Committee 2

1. National Assembly

1.1 The membership and size of the National Assembly is a matter which requires the attention of all members of the Assembly. Accordingly, the question which requires further consideration is; *How many members should the National Assembly consist of?* (See Page 16 of CA Report, Part 1: Clause 3 of the Third Draft on the National Assembly)

1.2 There are various proposals as to the duration of the term of the National Assembly. There are two proposals put forward thus far; four years or five years. The question requiring further consideration therefore is; *What should the duration of the term of the National Assembly be?* (See Page 17 of CA Report, Part 1: Clause 5(1) of the Third Draft on the National Assembly)

1.3 It is generally agreed that the State President is obliged to uphold the constitution at all times. The question that arises is; Where the State President has reason to believe that a Bill, or a part of it, may not be constitutional; *Should the State President be entitled to withhold his or her assent to a Bill and refer it for a ruling to the Constitutional Court for a ruling?* (See Pages 30—31 of CA Report, Part 1: Clause 21(1), (2) and (3)—Assent to Bills—of the Third Draft on the National Assembly)

1.4 In terms of Clause 43(b) of the Interim Constitution, a member of the National Assembly vacates his or her seat if he or she ceases to be a member of the party that nominated him or her as a member of the National Assembly. That question that arises is; *Should a similar provision be made in the new Constitution?* (See Page 24 of CA Report, Part 1: Clause 8—Vacation of seats—of the Third Draft on the National Assembly)

2. Electoral System

2.1 The Constitutional Principle obliges the constitution to make provision for proportional representation. The question that arises is; *Whether the electoral system should also allow for constituency elections?* (See Page 16 of CA Report, Part 1: Clause 4—National Elections—of the Third Draft on the National Assembly)

Issues for Debate from Theme Committee 5

3. The Courts and the Administration of Justice

3.1 It is generally accepted that the Constitutional Court has jurisdiction over all legislation. However, there is contention as to; *Whether 20% of the members of the Assembly, Senate or Provincial Legislature should be entitled to refer a Bill to the Constitutional Court to consider its constitutionality?* (See Page 57 of CA Report, Part 2: Clause 3(b)—Jurisdiction of the Constitutional Court)

Issues for Debate from Theme Committee 6

4. Independent Institutions

4.1 The Sub-committee of the Constitutional Committee is considering the possibility of general provisions for independent institutions. The question that arises is; *What should the specific and general features of the appointment mechanisms, qualifications, tenure and mechanisms for dismissal be in respect of the following institutions:*

(a) Auditor General;

(b) Reserve Bank;

(c) Electoral Commission;

(d) Public Protector;

(e) Human Rights Commission.

(See Pages 91—91 of CA Report, Part 2: Clause 21—General Provisions—of Second Draft on Independent Institutions)

4.2 Police Service

4.3 Should the police service be structured to function at both national and provincial levels under the direction of the national and provincial governments respectively? *(See Page 102 of CA Report, Part 2: Clause 7(2)—Police Service—of Third Draft on Security Services)*

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PROCEEDINGS OF THE CONSTITUTIONAL ASSEMBLY

Members assembled in the Chamber of the National Assembly at 09:10.

The Chairperson took the Chair and requested members to observe a moment of silence for prayers or meditation.

ANNOUNCEMENTS, TABLINGS AND COMMITTEE REPORTS—see col 225.

INTRODUCTORY REMARKS

The CHAIRPERSON OF THE CONSTITUTIONAL ASSEMBLY: I would like to welcome everyone. We have not met as the Constitutional Assembly for some time now. Before we proceed, I think it is important to thank everyone, the people here and outside, for participating so enthusiastically in the constitution-making process. Without the participation of the members here and the responses we received from the people outside, we would not have made the progress we have achieved.

Many members of the Constitutional Assembly have dedicated a great deal of their time to theme committees, the Constitutional Committee and other subcommittees in order to ensure that we achieve the progress we have made. Some theme committees have already completed their work and others, in terms of our programme, will be completing their work soon.

Since the last sitting of the Assembly, we have created another structure which we call the permanent subcommittee of the Constitutional Committee. It is composed of 12 members and is assisted by members of theme committees from various parties who assist these 12 members on various issues which this subcommittee has to deal with. This subcommittee reports to the Constitutional Committee on an ongoing basis on various matters it deals with.

Today we have identified a number of issues that need to be debated openly here. Hon members would already have received documentation which sets out the reports from the Constitutional Committee. That is the pink document which also includes draft formulations on various topics or themes that have already been dealt with.

The Constitutional Committee identified four issues which we need to debate today. These revolve around some contentious issues which we believe should be addressed by the Constitutional Assembly itself. The approach we would like to take for this meeting is that there should be no party speaking lists and that we should have an open debate on these matters. Members of the Constitutional Assembly will be allowed time to speak on these issues which have been put forward. Proposals, options, suggestions and ideas are welcome, and we would like these to be taken forward by the Constitutional Committee when it next addresses all these issues.

Parties will be allowed time to speak in this debate. However, we would like to restrict members to not more than five minutes of speaking time. Smaller parties will also be allowed time to speak for more than the time they would ordinarily have had if we used party lists. From the Chair we will be able to identify people who would like to speak. Members can speak from the microphones on the floor. We would also like to say that members should feel free to raise any other matter contained in this report and on which people would like to speak.

However, we would like to concentrate a little bit of our time on discussing the issues that we have identified, as set out in the Chairperson's announcement and issues for debate. This is a four-page document. On page 113CA. we have the heading "Electoral system". We would like to report that the Constitutional Committee felt that we should not deal with electoral systems today. We will not be entertaining debate on electoral systems as this matter still needs to be processed further.

NATIONAL ASSEMBLY

(Subject for Discussion)

The CHAIRPERSON OF THE CONSTITUTIONAL ASSEMBLY: We would now like to commence and open the debate on the first issue, the National Assembly. This matter was processed by Theme Committee 2 and in reporting to the Constitutional Committee, there was some contention and differences of opinion on the three issues that were set out on page 112CA. The first is the membership and the size of the National Assembly. This is a matter that requires our attention. The question that is posed with regard to this issue is how many members the National Assembly, under the new constitution, should consist of.

Reference to this will be found on page 16 of the pink document, Part 1. We take this documentation as having been read. We will therefore not be going through the documents page by page. However, the questions that are posed are properly referenced there. We initially thought we would ask the chairpersons of the theme committees to introduce the matter properly. In the end, however, we thought that they should also participate in the debate from their party ranks.

The question that is put forward to us, therefore, is how many members the National Assembly should consist of. Should it be 1 000, 100 members or any number? This matter is now open for debate.

Mr M J MAHLANGU: Mr Chairperson, I would like to deliberate on the subject that you have introduced, namely the issue of the size of the National Assembly. The question before us today is: How many members should the National Assembly consist of?

First and foremost, I would like to indicate to the House that this is a matter of contention which has been discussed at length in the theme committee. As a result we could not reach consensus on this matter. There was neither unanimity among political submissions, nor among individual submissions on this issue.

We have listened to various criticisms from around the country. These criticisms came from the printed media and the electronic media. These stated that the National Assembly was too big. Critics state that 400 members is a big number and that it needs to be reduced.

The question which is before us today is whether we should decrease this number or increase it. If we decrease the number then how will this impact on the work of members of the National Assembly? These are the things that we need to consider as members. Some suggest that we should have 300 members and some say 350. However, if we decrease this number, what impact will this have on the work of the National Assembly?

Secondly, if we increase the number, what impact will that have on the meagre financial resources that we have in this country? These are the questions that are confronting us as members of the National Assembly. However, the view of the ANC in this regard is that we need to look at other things before we can decide exactly what the size of the National Assembly should be.

We also have to finalise the question of the type of electoral system we want in this country. We do not know whether we are going to go on with the system of pure proportional representation, or are also going to have constituencies. If we have constituencies the question is whether they are going to be multi-member constituencies, or single-member constituencies. These are some of the things that we still need to look at. If we happen to decide that we are going to go, for an example, for a constituency-based electoral system and a proportional representation system, then we need to delimitate this country into constituencies.

Another thing that immediately comes to the fore is the number of constituencies we are going to have in this country. Therefore, we shall not be in a position to work out precisely what the size of the National Assembly should be until such time as we have determined the electoral system that we want to design or opt for in this country.

It is therefore important that when we decide on the number of members in the National Assembly, we should also consider the kind of electoral system we want to have in this country. By doing so, we shall have criteria to work from. Coming up with figures at the present moment, without basing them on criteria, is going to be difficult for us.

This morning we would like to request members of the Constitutional Assembly to finalise the question of the electoral system first, and determine the type of system we are going to use and how many constituencies—if we are going to have constituencies—we should have. From that basis, we shall then be in a position to determine the size of the National Assembly.

*Maj Gen P H GROENEWALD: Mr Chairperson, I would like to refer to a few important factors which play a role in determining how large the National Assembly must be.

Firstly, we believe that if the current legislative authority is working well, we should not interfere too much as far as the size of the National Assembly is concerned. However, if it is not working well we will have to look at the situation again.

Secondly, the size of the National Assembly is also determined by the functions of the central Government, in other words if more powers and functions are devolved to the provinces and even

to the level of local authorities, the National Assembly can become smaller because the responsibilities are then decreased. It is therefore difficult to determine how large this body must be until we know what the functions of the various tiers of government are going to be.

We also find, practically speaking, that the committee system places members of Parliament under a lot of pressure. If the National Assembly becomes too small, it will undoubtedly increase the pressure on members of Parliament even further and they will be forced to spend even more time in Parliament and even less time at grassroots level among their voters. We believe that this is a very important consideration.

The FF is convinced that the National Assembly must certainly not be bigger. It could rather be somewhat smaller. It would seem that a figure of approximately 350 would give us an acceptable ratio between the number of voters and the number of representatives if we were to compare it with other parliaments in the world. I would like to issue a warning. As the number of members of Parliament decreases, the support which is offered to members of Parliament, both administratively and as far as research is concerned, will undoubtedly have to increase.

The number of members of Parliament must only be finalised once the powers and functions of the central Government and those of the provinces have been determined.

Mr C W EGLIN: Mr Chairperson, the DP would support the view of the previous two speakers to the extent that one cannot make a final decision on this issue until one has had a holistic look at all the structures that are going to be created under the Constitution. While we have a view and an attitude, we agree that, in fact, a final decision could not be reached at this stage.

It is not just a question of this Assembly per se. There is the issue of the Senate and whether there is going to be a Senate. There is the issue of the size of the provinces and the provincial legislatures, and even what should happen at the third tier of government. We also have the question of the executive body. How large should the Cabinet be at national level? How large should the executive councils be at provincial level?

One has to look holistically at what the functions of the various levels of government are, and therefore what the most prudent size is as far as the numbers are concerned. We believe that three factors have to be taken into account, and it leads us to the conclusion that—we put this forward as a first option—the Assembly should be in the order of 300 people. We are not wedded to it, but we put that forward as an indication of our attitude. Our attitude is firstly that the Assembly has, at least, to be representative. Representativeness must be taken into account when determining the final size. That may also have an impact on the electoral system, because different electoral systems might require more or less people in order to see that there is genuine representativeness in this House.

The second issue which has to be determined—Maj Gen Groenewald touched on it—is the efficiency of members. Does size or anything else add or subtract from members' efficiency? That also depends on what back-up services there are in order to make members more or less efficient.

The third issue which we believe that South Africa has to look at is that of the cost-effectiveness of the new institutions that we are creating. There is no point in us creating a whole range of legislative and executive institutions under the Constitution, and then finding that South Africa really cannot afford it. Therefore, we also argue that the cost-effectiveness is a critical factor that will have to be taken into account.

As an opening gambit, we would put it at a figure of 300. However, we believe that it should be examined in a more holistic way.

Mr A G EBRAHIM: Mr Chairperson, the PAC believes that the most important quality of the National Assembly is representativeness.

The number itself will be determined—in our view—by the electoral system we finally agree upon. It is the view of the PAC, after taking the electoral system together with representativeness, that we would certainly support the idea of the creation of constituencies based on multi-representation from those constituencies.

It is the view of the PAC that it would be wrong for a particular constituency to be represented by 48% of the population—which is possible in certain circumstances. We believe that from each constituency, one should have at least 75% representation. The number that the 75% will be made up of will differ from constituency to constituency. We believe that if we are looking at the question of reducing the number of members

of the National Assembly, before we start, we should look at other institutions which, in fact, duplicate what the National Assembly should be doing. If we can trim those with a cost-effective factor in mind, then I think we can maintain the present National Assembly, perhaps with a trim at the edges only.

We believe that it is very important that the National Assembly—which will be the legislative organ of this country—should be as representative as possible.

Mrs M J BADENHORST: Mr Chairperson, as the first speaker said, this was a contentious issue and further discussions should take place. The majority of individual submissions favoured a smaller National Assembly, but we support some of the feelings of the previous speakers. The NP is in favour of the current structure, but also suggests a possible reduction. Though the NP noted that they were happy with the present size, they agreed that the electoral system decided upon might influence the size of the National Assembly. We feel if Parliament became smaller the representation of people would be affected adversely.

The smaller the size the more it will be to the detriment of smaller parties, particularly with regard to representation in committees as Maj Gen Groenewald mentioned. Therefore, this matter has to be considered carefully, but we agree that the present size is very costly. Fewer members, however, will not make that big a difference to Parliament's expenses. Reduction would have a negative effect on their availability to the public. At present, complaints are being voiced that the proportional MPs cannot serve the public effectively and efficiently. Consequently, this matter needs to be handled with the utmost responsibility, for the reduction of MPs will limit the availability of MPs even more.

At the moment the proportion of MPs to the public is more or less one to 60 000, which is fairly standard compared to other countries, including both developed and developing countries. I beseech hon members, therefore, to consider the reduction of Parliament comprehensively and with care.

Mr L M GREEN: Mr Chairperson, although this could affect us as a small party negatively, the position of the ACDP is that we would strongly support the reduction of the National Assembly. [Laughter.]

The CHAIRPERSON OF THE CONSTITUTIONAL ASSEMBLY: Why does the hon member want to eliminate himself and his party? [Laughter.]

Mr L M GREEN: We want to do it, because we are confident that we shall grow. [Laughter.]

The CHAIRPERSON OF THE CONSTITUTIONAL ASSEMBLY: Very well.

Mr L M GREEN: Our position is that of advocating a reduction. When we talk about a reduction, it is with the perspective that we have nine provincial parliaments. Never before in the history of South Africa have we had nine provincial parliaments and, therefore, when we talk about representativeness, when we say the people must be represented in parliament, we are not simply looking at the national Parliament as such. We are also looking at the provincial parliaments.

A lot of the work being done by the national Parliament could easily be done by the provincial parliaments. What we are saying is that only the very necessary tasks that have to be done by the national Parliament should be performed by them and, therefore, the ACDP says the electoral system should be representative and should be based on proportional representativeness. We should not only look at the issue of proportional representivity, but also at the sizes of the various provinces and ensure that there is a balance in Parliament with regard to the sizes of the provinces. We recommend a slight reduction from 400 members to between 300 and 350 members. This is negotiable, of course.

The CHAIRPERSON OF THE CONSTITUTIONAL ASSEMBLY: Thank you, Mr Green. I have no further speakers on this matter, and would like to believe that a good number of proposals and suggestions have been put forward. However, more importantly, this discussion or debate has helped a great deal in that the approach in the Constitutional Assembly, as I observed it, was just to proceed, almost to set a figure without looking at many of the factors that have been raised here. This debate has assisted, and there seems to be some consensus on a number of issues which will need to be taken up by the Constitutional Committee itself when it studies the record of this debate.

With all that has been said, I think we can proceed and debate the next issue which is the duration of the term of the National Assembly. There are

some proposals here. One is that it should be four years and another is that it should be five years. There was a further proposal that we should have a seven-year term . . . [Interjections.]

Mr W A HOFMEYR: For life.

The CHAIRPERSON OF THE CONSTITUTIONAL ASSEMBLY: Well, there is another proposal that it should be for life. [Laughter.]

This issue is referred to on page 17 of part 1 of the report, clause 5(1). We would like to open this matter for debate very briefly and hear the views of the various parties.

*Mr C ACKERMANN: Mr Chairperson, the NP's standpoint is that the final constitution must determine that Parliament will have a term of five years.

The reason for this is that since the beginning of this century South Africa has always had a parliament with a term of five years. This principle is therefore traditionally established in our country.

Secondly, it is important that the term should not be too short, so that there will be continuity, which will lead to stability. If elections were to be held every four years, it could lead to a larger degree of instability, because most parties already prepare themselves to participate in such an election a year before the time. Consequently, the question also arises whether the country has the financial means to hold elections regularly and in the short term. As most members know, elections are expensive, and not only from the point of view of parties, but also from the point of view of the country as a whole.

It is interesting to note that in the history of the world one often hears of five-year plans, particularly in the economic sphere. Yesterday we heard about it once again from the Prime Minister of Malaysia. It therefore seems that the period of five years is accepted worldwide as being neither too short nor too long a time to allow countries to develop economically or to aim in that direction.

What is the international situation? In the publication *Parliaments of the World* the following interesting statistics appear. Unfortunately these figures are restricted to 30 June 1985, as a new publication is not available. Of 45 countries in Africa, 39 have a parliament with a term of five years, while six have a term which varies from three to six years. Of 29 countries in Europe, 16 have a term of five years, 12 a term of four years and one country, namely Sweden, has a term of three years. In the Middle East, eight countries have a term of four years and one country has a term of three years, while the United Arab Emirates have a term of two years. In Asia nine countries have a term of five years, five countries have a term of four years and six countries have a term of six years. In the Americas, including North and South, five countries have a term of six years, 14 countries have a term of five years and six countries have a term of four years. In Australasia three countries have a term of three years.

When all these figures are taken into account, we find that out of 129 countries, the parliaments of approximately 53% of them have a term of five years, approximately 20% have a term of four years and only 1% have a term of six years. The South African Parliament will therefore not be out of step with the rest of the world if we have a term of five years.

Mr P A C HENDRICKSE: Mr Chairperson, the ANC is in support of a five-year period. May I say, at the outset, that all the parties in the theme committee, with the exception of the DP, were in support of a five-year period. It was felt that any new government coming into power would need a period within which to implement its mandate, and that there is a settling-in period before this implementation starts. We also know, from experience, that it takes time for policies to take effect. Voters, therefore, need a reasonable chance to see if a government is performing or not.

There are also times when a government needs to take unpopular decisions, which will be a lot easier to do when one does not have elections looming on the horizon. The DP, as a party which is geared towards opposition, has the luxury of being able to say whatever it believes to be popular without having to face the consequences. However, as a party which is reasonably sure of winning the next elections, we have to be more realistic. [Interjections.] That was uncalled for.

Other speakers have also referred to majority parties in other countries being in favour of five years, but we think it is a reasonable and practical period in which to allow a party to implement its policies.

Mr C W EGLIN: Mr Chairperson, this deals with the length and term of service. I think Mr Ackermann gave us what seemed to be an impressive list of figures on how this is handled, but may I say that his figures are fundamentally flawed. [Interjections.] The figures he read out represented the maximum length of a parliament. That is not the term of office. It merely says that the term cannot extend beyond five, four or three years. In practice it very often is much less.

He said that in the old South Africa it used to be five years. Let me say that since I became involved in the old South African Parliament, elections were held in '58, '61, '66, '70, '74, '77, '82, '87, '89, and '94. That is an average of exactly four years. Whatever you wish to say, if there is a maximum of five, in practice over 36 years in South Africa the term of office of Parliament was four years. That was the practical effect.

I accept that we have to let a government bed down and so on, but there is also the question of how frequently accountability to the electorate should be tested. We also have to marry the length of time for which a government should be in power with the other criterion of how frequently we should go back to the electorate. Members have not mentioned that the American Congress goes back every two years. That is a crazy system. We argue that four years is an appropriate period.

However, we link it to another concept which is now being considered. That is whether South Africa can afford to have what I call an irregular term of office. Can we have a situation where we have snap elections or votes at any time? We would then have an election not every five years, but at intermediate periods. If one takes into account the fact that in South Africa we are going to have a national Parliament and nine provincial legislatures, is it going to be practical and possible for South Africa, with its human and financial resources, to have 10 elections all happening at different times, depending on votes of no confidence and so on?

We therefore link our proposal for four years to trying to develop the concept that there should be a fixed four-year period. In other words, we say there should be a fixed period between elections, and that elections should not take place randomly, so that the electorate, the Government and the people of South Africa can gear themselves to elections at regular intervals.

Our suggestion of four years is based on the average of periods between elections in South Africa over the past 38 years. However, we also link our proposal to the concept that instead of having elections taking place at random times, there should be a fixed period between elections so that the Government can take note of its legislative and executive programme, but equally, that we will not have 10 elections taking place at different times throughout South Africa. [Interjections.]

The CHAIRPERSON OF THE CONSTITUTIONAL ASSEMBLY: Order! Mr Eglin did more practical research in this regard.

Prof D C DU TOIT: Mr Chairperson, the hon Mr Colin Eglin comes to us again and again with this argument that in the old South Africa the period between elections was three and a half, four years, and he argues that for that reason we should now fix the period between elections.

Firstly, I think a fixed period like that which they are now proposing is an undemocratic approach to this whole matter of elections. It is a completely undemocratic approach, which I do not think can withstand any pressure.

The big mistake he is making is this. We know that in the old South Africa elections were manipulated for the purposes of getting the White electorate behind every little problem which apartheid created. Elections were a complete manipulation of the electorate. [Interjections.] One cannot use that as a precedent for a serious programme, such as the one that the present Government under the leadership of the ANC is following. [Interjections.]

We are in tune with the rest of the world if we choose five-year periods, as Mr Ackerman said. I submit that we should stick to that decision. [Applause.]

Mr A G EBRAHIM: Mr Chairperson, the PAC supports a five-year period as a term of office for the National Assembly. We have taken this position because, first and foremost, it gives the incoming government an opportunity to draw up its policy but, what is more important, it gives it time to implement that policy.

The issue which we would like the Constitutional Assembly to consider seriously is that there is no point in putting a five-year period when elections are in fact held every two, three of four years. We

must have a fixed period. We say this because there is a tendency in what one calls a democracy to manipulate the voters by calling snap elections after a particular Bill is passed, or after a reduction in taxes, in one particular case, or after giving people certain other benefits.

We therefore think we should try to eliminate this particular abuse in the form of the manipulation of voters by deciding on a fixed period. If it is five years, then the election must be held at that stage, and we should not have snap elections simply because that is convenient to the party in power at the time.

Rev K R MESHOE: Mr Chairperson, the ACDP also supports the duration of the National Assembly being five years. We also agree with the call for a fixed period of five years.

Calling snap elections before the period of five years had expired would be very costly to the country and to the government in power. Therefore we would strongly support a fixed period of five years. The fact that most countries in the world are using the period of five years is proof that there is merit in this. They have chosen this period because of a lot of research that must have been done. Therefore those who are not in agreement with the period of five years should come with convincing arguments that a period of four, three or six years is better than a period of five years.

Looking at a hand, for example, we see that a hand is a symbol of completeness when it has five fingers. [Laughter.] If you had a hand with three or four fingers people would know that something was not right. [Laughter.] A hand with six fingers would also be abnormal. Therefore we say that the figure five portrays a sense of completeness. That is why we believe that a period of five years would be the best option for this Parliament. [Interjections.]

The CHAIRPERSON OF THE CONSTITUTIONAL ASSEMBLY: Order! Rev Meshoe, I know a number of people who have fewer than five fingers, and if you were not speaking here they might have sued you for discrimination against the disabled. There is one person sitting next to me who has one short finger!

POINT OF PROCEDURE

Mr T S YENGENI: Comrade Chairperson, I am rising to raise a point of procedure, namely that of the empty benches that I see of the members of the executive. My question is, firstly, whether any apologies were received from those members.

Secondly, I want to raise the whole question of the signal that we are sending to the nation and the effect this will have on the final constitution as a product when key members of the executive are not participating in the deliberations of the Constitutional Assembly. What impact is that going to have on the final product? What signal are we sending to the nation? That is the point of procedure I wanted to raise.

The CHAIRPERSON OF THE CONSTITUTIONAL ASSEMBLY: Order! I would have thought that that is not really a procedural point. You are actually raising a question.

We in the Chair have also noted what you have noted, namely that members of the executive are not here, save for one, namely Mr Roelf Meyer, Minister for Provincial Affairs and Constitutional Development. [Interjections.] Oh, I see the Deputy Minister for Provincial Affairs and Constitutional Development, Mr Mohammed Valli Moosa, is also here. [Interjections.]

This obviously raises a serious concern. It is more of a concern in that, when we rearranged the sitting of the Constitutional Assembly, it was on a proposal from the executive, who argued that they too would like to get involved in the constitution-making process, and that we should change the day of the week allocated to this from Monday to Friday, because they are expected to be in their offices in their departments in Pretoria on Mondays and Tuesdays.

We then opted for Friday, under some protest from our side as the management of the Constitutional Assembly, because we felt that many people would want to start going home on Fridays, after they had finally prevailed on us and got us to agree that we should meet on Fridays. I would like to thank Mr Yengeni for raising this matter in the way that he has.

I would like to propose, if Mr Yengeni agrees, that we write a letter to the executive and also discuss with the President the matter of the attendance of Constitutional Assembly meetings by members of the executive. If members agree to this proposal, we should be able to report to them at the next meeting of the Constitutional Assembly.

May I just say that we are not aware of any apologies that have been forwarded. Mr

Mohammed Valli Moosa wants to rise to speak in defence of members of the executive who, we are certain, are busy with many other tasks. I know that a SADC conference is taking place. Quite a number of them are there, but not all of them.

Mr M V MOOSA: Mr Chairperson, it is not that I want to respond on behalf of people who are not here; I am certainly not aware of the details as to why members of the executive are not here. What I would like to say, however, is that the SADC summit, which is a rather important summit, has taken up the energies of a number of Ministers. Then a number of line-function Ministers, specifically, are at present discussing regional issues.

The only point I would like to respond to is the concern that has been expressed as to whether members of the executive are participating sufficiently in the constitution-making process. It may well be that members of the executive may not be at all the meetings of the Constitutional Assembly. Of course, it would be desirable that they attended more meetings, but I do not think anybody can say that various members of the executive are not participating sufficiently. One thinks, for example, of Minister Skweyiya, Minister Kader Asmal and Minister Dullah Omar. It is well known that they are participating far more actively in the process than many of us who are ordinary members of the Constitutional Assembly are. I think that point needs to be made.

As an example I can also mention here that some Ministers were working late into the night last night—certainly on the side of the ANC—in preparation for the constitutional development that is taking place. You yourself, Mr Chairperson, are aware of that. You were in discussion with a number of the Ministers.

Therefore, the impression should not be created that Ministers are not involved. I would say that every one of them, from the President down, has a deep interest in the process and is monitoring it. Many of us will be in caucus meetings again over the entire weekend of the 2nd and 3rd of September to review what is being discussed in the Constitutional Assembly right now.

I think the members may want to convey this message. However, there should be an understanding that we of the ANC would not insist that the Minister of Education, for example, should be present at a particular meeting of the Constitutional Assembly, knowing that he may be under pressure and that the issues under discussion could well be handled by others in our midst who may be more available to be here. We are really working on that basis, and I just thought I should offer this explanation. [Applause.]

The CHAIRPERSON OF THE CONSTITUTIONAL ASSEMBLY: Well, that certainly goes some way towards explaining the absence of members of the executive. However, I think we should remember, Mr Moosa, that when we agreed to meet on Fridays, it was on the specific request of members of the executive who felt that they too wanted to participate in the constitution-making process. I think we have understanding for the fact that a number of members of the executive are at the SADC summit. However, I believe that the proposal which we have put forward with regard to the point raised by Mr Tony Yengeni should be acted on. We should request them to participate more effectively in the constitution-making process by attending constitutional committee meetings as well as Constitutional Assembly meetings. I think we should now leave the matter at that.

Having heard the views of members of the Constitutional Assembly on the term of the National Assembly, it is quite clear that there is some degree of consensus about the proposal that has been put forward. The DP still feels that it should be four years. I believe that this matter can easily be resolved and that it should be resolved by the Constitutional Assembly, taking into account the views that have been expressed here.

ASSENT OF BILLS AND THEIR REFERRAL TO CONSTITUTIONAL COURT

(Subject for Discussion)

The CHAIRPERSON OF THE CONSTITUTIONAL ASSEMBLY: I should like us to move on to the next issue, which deals with the assent of Bills by the State President and their referral to the Constitutional Court. This is on page 30 and 31 of the pink document, part 1. It is generally agreed that the State President is obliged to uphold the Constitution at all times. The question that arises is this: When the State President has reason to believe that a Bill or part of it may not be constitutional, should he or she be entitled to withhold his or her assent to a Bill and refer it for a ruling to the Constitutional Court? This is the question that is being posed.

Mr W A HOFMEYR: Mr Chairperson, I want to make a suggestion. I think this point is somewhat similar to point 3 of the document entitled "Issues for Debate", which deals with the procedure by means of which Parliament should refer a Bill to the Constitutional Court. I want to suggest that we discuss these two matters together when we get to point 3.

The CHAIRPERSON OF THE CONSTITUTIONAL ASSEMBLY: I tend to agree with Mr Hofmeyr. I therefore propose that we deal with point 1.3 and point 3.1 now. Point 3.1 deals with the question of the percentage that could be required to refer a Bill to the Constitutional Court on the basis of its constitutionality. I agree with Mr Hofmeyr that we should debate these matters at the same time. Is he going to rise to speak on both?

Mr W A HOFMEYR: Mr Chairperson, I want to start with the point raised under point 3 on the document entitled "Issues for Debate", namely under what circumstances Parliament could refer a Bill to the Constitutional Court.

This is a matter that has not been resolved in Theme Committee 5, despite fairly extensive discussions. Our view at the moment is that this is an extraordinary procedure not required in our Constitution, namely that Parliament should be able to refer a Bill. However, we would be prepared to look at the possibility of allowing the State President to refer a Bill where there is an indication that the Bill may be unconstitutional.

I want to motivate our position. Firstly, looking at constitutions elsewhere in the world, we have not been able to find any provision similar to the one in our existing Constitution which says that Parliament can refer a Bill to the Constitutional Court while the Bill is actually before Parliament.

There are, I think, four or five constitutions in which we have been able to find provisions for Bills to be referred to a constitutional court. In four of the five cases, that referral is made by the President rather than by Parliament. That would be the reason we would be happier to accept the provision that the State President should make the referral.

The only case that we have been able to find in which a referral is made by Parliament, is in the case of the French constitution. However, France is not a constitutional state in the same way as our country is, but in the case of certain Bills, a number of parliamentarians there can take the matter to something called the constitutional council.

However, that is not a structure which is at all similar to our Constitutional Court. In fact, that council, as I understand it, does not have any power to look at a Bill once it has become law. It can only give an opinion on the Bill before it becomes law.

We do believe that there are legitimate concerns which have been raised about the need to ensure that Bills passed by Parliament are constitutional. Very few of those concerns cannot be dealt with in the ordinary course of events. Every citizen of this country, if he or she believes that Parliament has passed a law which is unconstitutional, can take that law to the Constitutional Court. The court has the power, through direct access, to deal with matters almost immediately.

We have seen in the case of the Western Cape, for example, where the province wanted to take a Bill of this Parliament to court, that the court treated that matter as a matter of urgency. It has gone to the court quickly. Hopefully, it will be resolved in the next couple of weeks if the President and the Premier do not come to any other agreement.

However, we do believe that this is an adequate safeguard for the citizens of this country against the abuse of power by Parliament. It is a safeguard that appears in all constitutional states, and there does not seem to be any need to go for the kinds of extraordinary procedures which are in our Constitution at the moment. In any event, so far nobody has tried to rely on that provision in the Constitution.

We do believe, however, on the question of the President, that there may be a legitimate need for something like that. The President is sworn to uphold the Constitution. If real concerns about the constitutionality of a Bill are brought to the attention of the President, the President may be put in a very difficult situation if he or she has doubts about the constitutionality of the Bill, but is expected simply to rubberstamp that Bill and sign it. We believe some form of protection has to be built in in that regard. That is all we have to say at the moment.

Mr P A SCHUTTE: Mr Chairperson, just to get clarity: Are we also addressing the question of 3.1? Is that also on the Table?

The CHAIRPERSON OF THE CONSTITUTIONAL ASSEMBLY: Precisely! We are addressing 1.3 and 3.1.

Mr D P A SCHUTTE: We believe that the question at stake here is the principle of whether a legislature at national or provincial level should be able to refer a Bill to the Constitutional Court. As to whether that should be done through the President, I do not think that is a major problem. If that is the proposal of the ANC, I think it is a matter which we can look at on merit.

Whether the percentage should be 20% or not is also a matter of detail. However, I do not think that is a major problem. We believe the 20% suggestion, coupled with the requirement that it should be entertained by the court only once the court has agreed to it, is not a major problem either. It is a matter of detail which we can discuss. However, we also believe that was the compromise situation we agreed to.

As far as the principle is concerned, we believe that this is closely linked to the very important principle of the supremacy of the constitution and, particularly, the effective supremacy of the constitution.

*It is very clear and very possible for Bills at the national and at the provincial level to be unconstitutional, or that a very good argument could be made out with regard to its being unconstitutional. I want to give the example of a provincial legislature legislating on an issue over which it has no authority. In such a case it is very important that finality should be reached in this regard as soon as possible. Waiting until it is taken to the court under normal circumstances by an ordinary citizen of the nation will only delay the matter and lead to immensely intense emotions and confrontation on the outside.

A very good example of this is land affairs, which can give rise to intense emotions. I do not believe that we should allow it in our young democracy under these circumstances.

I concede that it is important that such a measure should not frustrate our efforts to proceed with legislation. However, there are indications internationally that similar measures did not lead to this. It is also very clear that it will only be used in extreme cases.

I want to suggest that one of the most important aspects proving that this measure is fair and reasonable is the fact that it is already entrenched in the present Constitution. My colleague Dr Frik van Heerden will focus on the many international examples of similar measures.

Dr C P MULDER: Mr Chairperson, on this specific issue, I think the difference between the example to which Mr Hofmeyr referred when he said that we would find no examples in other constitutions where the legislature could apply to a constitutional court to test constitutionality because this would be reserved for the executive, is that they have a very clear distinction between the executive and the legislature.

In a sense we do not have that specific distinction in our system. In those systems the executive is directly elected. They could be members of one party and the majority in the legislature could be another party. We do not have this situation in terms of our present Constitution and in terms of the proposals so far we are not going to have that system in the next constitution either.

*I think that we should bear in mind that we are involved in a constitutional state here and that we therefore we have a Constitutional Court.

It is of the essence in the establishment of a culture of a constitutional court in the constitutional state that the court should play that role. When it concerns the consent which the President should give when legislation is signed, one should be very careful not to place the President in a situation in which he has to act as a kind of constitutional court.

If it is clear that the legislative authority has approved a law and that it has not complied with constitutional procedure it is obvious that the President should have the authority to withhold his consent and refer such a law back. If there appears to the President to be something unconstitutional about a law that has been approved by the legislative authority, we feel that he should not have the authority to refer it back to Parliament. In so doing he is placed in a situation in which he as President should give a ruling, like a constitutional court, as to whether it is constitutional or not.

If he has any doubts whatsoever, he should have the authority to refer it to the Constitutional Court for their ruling before he signs it or not. If he exercised the authority to determine whether he is of the opinion or not that it is unconstitutional and he referred it back, it may appear later that it was

not the case and this would to a certain extent reflect on the President. He ought not to be placed in such a position.

We have a system in which this clear distinction is not drawn. In terms of the present Constitution and the proposals that have been received until now, the proposals for legislation are going to come from the executive authority to the legislative authority, Parliament. We are in agreement that in such a case the legislative authority should also have the authority, in terms of a certain procedure that can be determined, to refer such a request from the executive authority to the legislative authority about passing a law regarding a certain standpoint to the constitutional court to test its constitutionality, and not simply passing it as a rubber stamp. This authority should be valid for both sides.

*Mr J A RABIE: Mr Chairperson, I am only going to talk about what is stated in section 21 and the recommendations that we made in Theme Committee 2. These deal with the authority of the President to sign a law once Parliament has approved it or to refer a law back upon finding that there was a problem concerning the procedure that was followed or if he has reservations as to whether the provisions of the constitution have been adhered to in this regard.

There are to a lesser or greater extent similar measures in other countries—Argentina, Australia, Ireland, Namibia and France. In the Theme Committee we dealt with and approved these recommendations as contained in section 21 of the pink document. It was further discussed in the Constitutional Committee and this committee felt that it should be refined somewhat so that it would give the President a precise indication of how he should deal with such legislation.

It amounts to the fact that if the President felt that the constitution was not adhered to or that the legislation did not comply with the constitutional requirements he would be able to refer it back to Parliament with the request that they should effect the necessary amendments. If Parliament heeded his concern with regard to the legislation and passed it he should sign the legislation for promulgation.

If Parliament did not comply with the President's request, he could refer it to the Constitutional Court for a ruling, make a recommendation to Parliament and refer it back to Parliament. If Parliament did not pass it, the legislation would lapse.

I do not know whether I should read the recommendation as contained in the minutes of the constitutional committee in its entirety, but I would like to propose that we include that provision under section 1 of the constitution. It features here under paragraph 2 and says:

> If the State President has reservations or concerns about the the constitutionality of a Bill or whether it has duly been passed by Parliament in accordance with the Constitution, the State President may refer the Bill back to Parliament with a clear indication of any defects. If the Bill is passed again, giving effect to the State President's reservations or concerns, the State President shall sign the Bill.
>
> If Parliament does not agree with the State President's reservations or concerns, the President shall refer the Bill to the Constitutional Court for a ruling on the constitutionality of the Bill or whether it has been duly passed in accordance with the Constitution.
>
> If the Constitutional Court finds the Bill to be consistent with the Constitution, the State President shall sign the Bill. If the Constitutional Court finds the Bill to be inconsistent with the Constitution, it shall be referred back to Parliament for further consideration, failing which, it shall lapse.

Dr F J VAN HEERDEN: Mr Chairperson, I differ with the finding by Mr Hofmeyr, namely that he could not really find support for the argument in international constitutions. According to my information, in France for instance, any Bill dealing with parliamentary procedure or framework legislation must go to the constitutional council.

*All other legislation can be referred to the constitutional council by the executive, or by 60 representatives out of a House consisting of 400, that is 15% in other words. This is specifically contained in section 61 of the French constitution.

Looking at Spain, we note that section 161 provides that after the adoption of a law, but before promulgation—I think that this is very important—the executive or 50 members out of a House consisting of 400, 12,5% in other words, can refer the law. When we look at Italy the position is that only legislation from the regions may be referred back by the central government.

When we proceed to Germany it appears that the federal government, or a federal state, or one third of the members of the Bundestag may refer the law, after the law had been passed, but once again before it comes into operation, to the constitutional court. In Germany there have been only 60 such cases since 1949. This is a measure which is not used often.

In Portugal, in terms of section 278, a Bill can be referred to the constitutional court on the request of the President; in Chile a quarter of the members can do this at any time before promulgation—that means to say before it is announced in the government gazette; in Colombia and Venezuela this can once again be done by the parliament and the President.

The idea is that not only a certain percentage or certain parties in Parliament, but also the President and/or members of Parliament should be able to refer such legislation. I think this would be the correct approach, and this entire issue reaches down to the roots of democracy. We should consider the idea of equal citizenship.

†With regard to quality of citizenship, if one were to withhold the right to refer a Bill from a certain political party, a number of political parties or a certain percentage of them, then one is really violating the roots of democracy which, in my opinion, deal with equality and liberty. Equal citizenship is a very important component in the future constitution.

Mr R K SIZANI: Mr Chairperson, I think first and foremost, that I must make the point that we are a bit concerned by the fact that there is, as of now, no clarity as to our form of state and our system of government. Secondly, we are also concerned about the fact that in some of the submissions a copycat approach seems to have been adopted, where the attitude seems to be that if something is American, it therefore must be good and we must adopt it.

The PAC stands clearly for majority rule and a parliamentary system of democracy. Our own conception, therefore, is that one should take into account that whatever system of government there will be, it will, therefore, necessarily be different from the American system of government. Our President will be a member of Parliament and the leader of the majority party in Parliament. Therefore, we would assume that any type of Bill, in the majority of cases, will be piloted through the Cabinet, probably through the party caucus and through Parliament where the President will be. It will also go through the standing committees of Parliament.

We assume that during that entire process, issues of the constitutionality or unconstitutionality of a Bill would be discussed and thrashed out. By the time that the particular Minister is pushing that Bill through Parliament, those questions would have been resolved. By the time Parliament passes that Bill, there should be clarity on whether the Bill is constitutional or unconstitutional.

Hence, in the first place, we would support Parliament or a portion of Parliament having the power to test the constitutionality of a Bill before it is passed through Parliament. Once that process has been done, and I assume that it is voted on in Parliament based on the belief that it is constitutional, with the President having participated throughout these processes and probably the Senate as well, then we do not see why we should give the President a veto power on the basis of constitutionality.

We think the question of consent must, to all intents and purposes, be a mere formality. Yes, we do accept that if the President has the power to consent he or she must also have the power to refuse. However, we think that power should really be governed by convention rather than be expressly stated in a constitution, because it is totally unnecessary.

What one will be allowing by that process is that people who have lost in the caucus, lost in Parliament and lost in the Cabinet will be given the power to form a cabal and try to influence the President and veto what has already been approved. We do not think it is the duty of the President or his advisors, at a later stage to reject a Bill that has gone through all those processes on the basis of constitutionality.

Mr D H M GIBSON: Mr Chairperson, perhaps I could draw your attention to the fact that the executive has grown by approximately 200%, because there are now two other Ministers in the House, so their interest in the new constitution is growing by leaps and bounds.

I would like to address myself to the question of references to the Constitutional Court, firstly, by the President, and secondly, by the possibility of having it referred by Parliament. I must say that the second one, the possibility of referring a Bill

from Parliament to the Constitutional Court, was not controversial at all and I am not sure when it became controversial. I really do not suffer from a bad memory and my recollection is that at the theme committee, the drafting committee and every other committee that lives and breaths and deals with this matter, it seemed not to be controversial until very recently.

The position as I understood it is that the provision in the current Constitution provides for referral if 30% of the members want it. The ANC was interested in increasing that to 50%. The DP was interested in having the threshold lowered to 5%. We discussed it and split it exactly halfway at 20%. Therefore, if one's arithmetic is as good as mine, one would know that that is precisely what happened and it seemed to be a relatively good compromise. But since then, the matter has become controversial and I do not understand why.

I would like to make the point that South Africa is a very young democracy and we are all learning what a democracy is all about. I have never lived in a democracy before and very few of the people here, expect if they were living elsewhere, have lived under democracies. It is a tender plant that we have got to nurture and care for. We also have a Constitution which we hope will belong to all the people in South Africa and it is important that the MPs will all be people who are dedicated to upholding that new constitution which we are labouring so mightily to draw up.

What we are talking about is if a Bill is before Parliament or has perhaps been passed by Parliament and a substantial body of opinion within Parliament feels the Bill is unconstitutional, we want the same position to be in the new constitution as is in the current one, ie that it is possible to refer it to the Constitutional Court for a decision. This does not mean one would hold the matter up for six months, because the Constitutional Court would regard this as a matter of urgency, a matter of importance.

There can only be one reason for not wanting to have a reference, not wanting to have a check and balance like this operating, and that is that the Government wants to be able to do what it likes. The one thing people must bear in mind is that governments come and go. Parties are in power one day and perhaps they are in power for many years. Perhaps they are not. The people who frame a constitution simply have to bear in mind that the day might come when they and the people in their party are going to need protection from the majority simply pushing things through.

This is the motivation. This is really the reason. I do not see why a government that wants to act constitutionally, and has no intention of infringing the constitution, should be opposed to it.

Let me say, with all due respect, to my friend, Mr Hofmeyr, that to suggest that we do away with that, and substitute for it perhaps a referral by the President to the Constitutional Court if he feels the Bill is unconstitutional, is really playing with smoke and mirrors. The only basis on which that could happen would be either for the President to be a member of a minority party, and therefore not in the government—otherwise he would say the thing was unconstitutional and they would not listen to him—or alternatively, for him to be a majority-party President, who has lost control of his Cabinet and of his party in Parliament.

All of us who have been legislators know with absolute certainty that a Bill cannot come before Parliament unless it has been approved by the Cabinet. The President is a member of the Cabinet, and if at any stage during the process, he wakes up in the night and suddenly discovers that there is an unconstitutionality in a Bill, I think he might just be able to whisper in the ear of the Leader of the House or the Chief Whip—if either of them is there—or any other of the Whips for that matter, that the parliamentary programme should be rearranged while they look at the Bill's constitutionality.

Dr E G PAHAD: [Inaudible.]

Mr D H M GIBSON: I beg your pardon?

The DP would be happy to consider a provision in the constitution which makes it possible for the President, before assenting, to say: "There was something wrong with the procedure followed here, and I think we should refer it to the Constitutional Court before I sign." A prime example of that would be the Bill we had with reference to the traditional leaders, in respect of which there is a substantial constitutional problem now. It would probably suit the President to be able to refer the Bill to the Constitutional Court before he had to assent to it. We would not have a problem with that.

I just want to draw the attention of the House to the fact that this aspect of the Constitution, and

the referral of Bills to the Constitutional Court, is not confined to Parliament. Hon members must just bear in mind that it is proposed to make it applicable to the provincial parliaments as well. If they think of that, then they will realise that they are not in control—they are not in power—in all of the provincial parliaments. They therefore do not have to wait for the day when they get thrown out of here by the electorate or are turfed out of the government side and sit on the opposition side.

There are certain provincial parliaments in which they are already in the minority. I think that members of the ANC—and I want to suggest to them that they should consider it very carefully—might find it a very useful protection, a very useful check and balance on provincial parliaments, to be able to say, if they really believe it, that a matter is unconstitutional, and have a Bill of a provincial parliament referred to the Constitutional Court. I think circumstances where that could happen could occur at any time.

It is really on that basis that I want to say that the controversy which has arisen should not be a controversy, and I would like to revert to the settled, happy, peaceful place that our drafting committee and theme committee were on this issue until somebody decided that they did not like it any more.

The DEPUTY CHAIRPERSON OF THE CONSTITUTIONAL ASSEMBLY: You are also very peaceful in your approach, Mr Gibson, so we enjoyed listening to you. There are three names on the list, those of Dr Pahad, Mr Sikakane and Prof Du Toit. I think I now see three additional names. I wonder whether this is what I inherited from the Chair, Mr Hofmeyr. Let us listen to the three, and then we can decide whether to cut the debate or not.

Dr E G PAHAD: Mr Chairperson, I think, first of all, it is necessary to state for Mr Gibson, if he does not know it, what the process of this constitution-making is. The theme committees are not negotiating forums. They are places at which one processes information, discusses it, and then sends it to the Constitutional Committee. I do not think he should come here and make a long speech about what they did in his theme committee, and why some people might not like what they did. That is the whole point about the Constitutional Committee and the Constitutional Assembly.

Let me say, secondly, that the impressive research done on what happens in other countries has to be tempered by the reality in this country. Unlike most other parliaments, this country's Parliament has to be a transformative one. We have to pass legislation which is going to transform this country fundamentally. Therefore the kind of issues, and the way we are going to deal with them, become very important—as opposed to what other parliaments may do.

It is not correct, as Mr Gibson wants to suggest, that if 20% of parliamentarians so desire they can then go to the Constitutional Court and if this is not possible it precludes other people from going. I presume that they will be keeping their 1,7% after 1999. At the rate they are going I am afraid they will get 0,7%, but never mind that. [Laughter.] He knows very well that any individual can go to the court and that if he and his party feel that way, having discussed this Bill, they will then still be able to go to the Constitutional Court.

The point about Parliament is that one does not then want to put the Constitutional Court in a position by saying that this matter was discussed in Parliament, that a Bill has been passed there, but that you yourself—who are part and parcel of that legislative process—now say that we must give judgement on that matter. If you are sitting in Parliament, you must raise the issues in Parliament itself. I am sure that the majority party will listen to you very closely if you are able to point out that those Bills in front of us are not consistent with the Constitution. [Interjections.] We are talking about things being consistent with the Constitution and not about the substance of the matter.

The second important point is that Parliament is the supreme lawmaker in this country. The only restriction on Parliament must be that it must be consistent with the Constitution. Therefore we should not find ways and means of giving this Parliament, or some part of it or a small minority in it, the right to say, when the Bill is in front of a House, that they are now going to run to the Constitutional Court, thereby holding up legislation.

I want to come to this Bill on the labour tenants. We cannot delay this kind of transformative legislation. We cannot go on saying that we do not like that Bill because it is going to redistribute land to the people. We cannot say because we are the NP—even the new NP, because those mem-

bers are really only interested in the interests of White Afrikaner farmers—that we are going to hold up this Bill. [Interjections.] We cannot have that. This Parliament was elected to pass laws here which are consistent with the Constitution. There must not be other things which are going to interfere with that.

That is why I say that we should not agree to 20% or 30% because, if we have 80% of people in agreement with a Bill, why must 20% now have the right to invalidate it? If you think this is inconsistent, take it to the Constitutional Court. If you think you have the money, find an individual who will go to the Constitutional Court and raise it there. However, this Parliament must be able to say that we are sure that this Bill is consistent with the Constitution.

The President, of course, should have the power to do two things. Certainly, where he considers that the procedure governing the passage of a Bill has been inconsistent with the Constitution, he should not assent to that Bill and should send it back to Parliament. If there is a conflict of interests between what Parliament thinks and what the President thinks, subsequent to sending it back to Parliament, obviously the President will then be compelled to refer the Bill to the Constitutional Court. This is what Mr Jac Rabie also referred to, but this will not be to deal with the substance of the matter, because that must be dealt with by Parliament itself. That is why we are a legislature and why we have been elected to sit here. We would stand by what Mr Willie Hofmeyr said, and I am speaking on behalf of the ANC, that we are not in agreement with Mr Gibson on this issue.

I have a last point, and Mr Gibson had better find his *Oxford Dictionary*. When he says "substantial" he should define that, because 20% out of 100% cannot be substantial. [Interjections.] No, it cannot be, but 80% out of 100% is substantial, 64% out of 100% is substantial, but 1.7% out of 100% is insubstantial. [Laughter.]

The DEPUTY CHAIRPERSON OF THE CONSTITUTIONAL ASSEMBLY: Order! I do not want to be unkind or to stifle the debate, but there are two more speakers on this topic on my list, and some of the speakers have spoken for longer than five minutes. I think that if we try to be brief, it will be appreciated.

Mr Sikakane now has the floor.

Mr M R SIKAKANE: Mr Chairperson, the comrade has taken the wind out of my sails. Now I will make a remark only, because otherwise I will be repeating what he has said.

I had thought that the Constitutional Court was meant and designed to do its work. It appears now that it is going to be a legislature. That is my concern. I ask myself what mechanism is going to be put in place to prevent the smaller parties from using the Constitutional Court as a circus. It means that each time that they are bitten in Parliament they are going to run to the Constitutional Court.

Let us therefore say that a person or party will have to raise 80% support to be able to take a matter to the Constitutional Court. I support what Mr Willie Hofmeyr said.

The DEPUTY CHAIRPERSON OF THE CONSTITUTIONAL ASSEMBLY: Order! I think we have all gained tremendously from this debate and this discussion. We thank those who participated in it.

SECTION 43(b) OF THE CONSTITUTION

(Subject for Discussion)

The DEPUTY CHAIRPERSON OF THE CONSTITUTIONAL ASSEMBLY: It was understood and agreed that we would not raise the matter of the electoral system to be discussed today. I mention this in passing, but I now put Item No 1.4, namely the issue of section 43(b) of the present Constitution. This matter is open for discussion. Members are not free to cross the floor, but to discuss the matter. [Laughter.]

*Mr A S BEYERS: Mr Chairperson, in terms of section 43(b) of the transitional Constitution, a member of Parliament must vacate his seat if he ceases to be a member of the party which nominated him as a member of Parliament. In politics this ruling is known as the "imperative mandate system".

There is certainly a case to be made out for the fact that with an electoral system of proportional representation it can be justifiable for a party to maintain its representation in a House, in due proportion to its share of the votes cast. However, it is also true that in virtually all countries with proportional electoral systems the "free mandate system", which is the opposite of the imperative system, is accepted as a democratic principle, which means that a member, when he changes

parties, does not necessarily have to vacate his seat. Portugal and South Africa, at this stage, are the only examples I could find where the imperative mandate system is still in operation. In Gabon, Cameroon, Sri Lanka and Zambia a member must, when he ceases to be a member of his party, immediately join another party to retain his seat.

In the older democracies with proportional electoral systems, such as Germany and the Netherlands, for example, the free mandate system is in operation.

The further right of a political party to dismiss or to recall its members was only applied in the former Eastern bloc countries of the world.

The NP's standpoint is briefly as follows: The imperative mandate system as embodied in sections 43(b) and 51(1)(b) as far as the Senate is concerned and 133(1)(b) as far as the provinces are concerned, is not recognised in modern democracies. It is not in line with democratic points of departure and should not be entrenched in the South African constitution. [Interjections.]

Underlying the free mandate theory is the view that a member, once he is elected, must act in the national interest in the execution of his duties, and not only in the interests of those who elected him. On the other hand, the imperative mandate theory is based on the view that a member is only responsible to that section of the electorate which elected him.

The consequence of this imperative mandate system is that it formally removes the determination of membership of Parliament from the hands of the voters and places it in the hands of parties. According to NP thinking this is an infringement of the democratic principle of representation and is therefore incompatible with Constitutional Principle VIII.

This provision gives political parties unwarranted control over their public representatives, so much so that it could lead to instituted intimidation. It entails the definite possibility that autonomous and independent thought on the part of members of Parliament can be seriously restricted, which can infringe upon the essence of the right to freedom of speech.

Because section 43(b) and its sister sections therefore fly in the face of the spirit of democratic representation, concentrate too much power in the hands of party bosses and can infringe upon the right to freedom of speech on the part of members of Parliament and can inhibit independent and original thought, the NP is opposed to them and we suggest that these provisions should not be included in the final constitution.

Dr E G PAHAD: Mr Chairperson, may we say, first of all, on behalf of the ANC, that it has always been our opinion that we cannot discuss this issue in isolation from the kind of electoral system that we are going to have. Clearly, given the electoral system we had in April 1994, it had to be made quite impossible for people to cross the floor of the House, because all of us were elected on our party lists.

Therefore, if we want to have a system in which we use the notion of free will as opposed to an imperative mandate, we would need to devise an electoral system which would be able to accommodate this. When Mr Andries Beyers says that he wants to take it out of the hands of party bosses and put it back into the hands of the voters, he has to answer this question, because there has to be a qualification.

If someone wants to cross the floor of the House—and he is quite used to doing that!—he should have the courage of his conviction to go and test himself again before the electorate. They cannot say that they were elected with the support of and on the list of one party, and then decide the next morning that they want to do something else, believing that they know better than their voters. Then . . . [Interjections.] Boy Geldenhuys, you are not going to be re-elected!

Then such a member should have to test himself again. Therefore we have to build in a qualification that there has to be a by-election when someone crosses the floor of the House.

Thirdly, I am surprised Mr Andries Beyers is taking this position, because at the moment his leader is cracking a whip which does not wound people. If he cracked a sjambok, however, which may wound them, they might want to run to this side of the House. Therefore I think they should be a bit more careful.

What we are saying is that we should not discuss this section in isolation. Let us discuss it together with the kind of electoral system that we want. If we then find an electoral system which enables us to retest the opinion of the voters in a by-election we will consider it.

The last point that I would like to make concerns the question of the right of recall. The hon member says it comes from Eastern Europe. The NP seems to have been doing a lot of research, but, regardless of where it comes from, the ANC as an organisation—ie its membership, and not the party bosses—insists that they should be elected democratically by its members. Therefore, our members who have placed us on the list must have the right to recall us if they think we are not doing our jobs well enough. Our organisation's members cannot be deprived of that right. [Applause.]

The DEPUTY CHAIRPERSON OF THE CONSTITUTIONAL ASSEMBLY: Ladies and gentlemen, I have at least another five speakers on my list. Seven minutes from now we would have doubled the time that was set aside for this debate, so I request these speakers to be brief, if possible.

Mr A G EBRAHIM: Mr Chairperson, the PAC believes that this matter is inextricably linked with the electoral system that we will finally decide upon. If we have, as we now have, the party list, it is obvious that people will have to pay allegiance to the party which placed them on the list. However, if we eventually agree that we are going to revert to a constituency basis, which is the issue that is being discussed here, then a member of Parliament would have to be accountable to that constituency.

What the PAC would not like to see, is political jaywalking from this side of the House to that side, or the other way round, based on pure opportunism. I believe that is the fundamental danger that we need to guard against. The PAC feels that any representative who is here must be accountable either to the party or to the constituency. If we have the constituency system and a member believes that he no longer subscribes to the policies of the party on whose ticket he or she won, then that member must be able to convince the constituency that they voted for the wrong party and that they need to change. He or she then has to come back either as an independent member of Parliament or as a member of another political party.

The fundamental point is that if we are going to have a Parliament based on representativeness, then the person who is sitting in Parliament must have a constituency whose mandate he or she has.

Mr L M GREEN: Mr Chairperson, with regard to section 43(b) the ACDP's position is that the essence of politics is the ability to associate freely with others. This is indeed an aspect which is to be considered when one answers the question that is posed in section 43(b).

Section 43(b) is an unfortunate section in that it stifles opposition. One of the most effective ways to ensure that a party stays connected to its constituency is to allow its members to vote against the party's policies should their opposition reflect the views of their particular constituencies. Unfortunately, in our present system, we do not have a system of constituencies. A party which relies on mechanisms that stifle opposition must realise that its policies—especially those policy aspects which were not thoroughly canvassed in the period before an election—do not necessarily reflect the thinking of a considerable number of its members, nor can it be said that it adheres closely to the principle of freedom of association.

Party discipline is one thing. To service it constitutionally is quite another. The Constitution should provide the framework for democratic principles and should not be an instrument to enforce the behaviour of party members.

When a member of a party decides to vote against party policy, it merely shows that that individual is exercising freedom of choice. This is one way for any party constantly to recheck its policies and, on the premise that every party member represents a different constituency, also its level of representativeness in the wider community.

Keeping in mind the nature of constituency-based representativeness, a particular party member might find that in order to reflect the views of his or her constituency, he or she has to vote against official party policy on occasion. If a significant number of party members so vote, the party must realise that it may have to rethink its policy on a particular point. This should not be a major issue for any party, because everyone makes mistakes. We are all fallible, and we need to recognise that fallibility and address it responsibly, not by burying our heads in the sand of a section such as section 43(b).

In a culture in which voting with one's feet is a well-known and accepted aspect of social and socio-political behaviour, this same societal aspect should be accepted in the national Houses. Our most important, our first priority, is towards

serving the people who we represented. They voted for us because they felt us to be competent to make decisions that would be acceptable to them and because they felt we could be counted upon to represent them faithfully.

Having this type of subsection removed from the Constitution will also force our parties to be stricter in their screening processes for those whom we propose on our national list. It is true that most of us are new to the environment of Parliament and organised politics at this level, but surely we have been riding long enough on training wheels. We must be bold enough now to risk a spill here and there while we continue to find our balance.

A further important aspect to be considered is that when we, especially the numerically advantaged parties in this House, insist on having the leverage that such a section undoubtedly provides, we are only proving to ourselves and our members that we do not trust them to make responsible and informed decisions after carefully weighing up all the aspects. We must be honest about this one fact, and that is that no member in this House is likely to vote against his or her party's stated policies or caucus resolutions.

When it comes to the issue of conscience then, of course, a member should be allowed to vote against his party's policies. That a member should find the need to do so should mean something more to us than that someone is out of line with the party and must lose his seat—to be punished like a child. I call upon all sensible members to realise that we stand to lose nothing by dealing with party discipline elsewhere, but to remove this obstructive subsection from the Constitution.

In conclusion, if we did not have section 43(b) in our Constitution, I am sure that the empty seats of the ACDP would have been filled to capacity long ago. [Interjections.]

The DEPUTY CHAIRPERSON OF THE CONSTITUTIONAL ASSEMBLY: Order! There are another five speakers on my list. I will try to conclude the debate after they have spoken.

Mr J H DE LANGE: Mr Chairperson, one always welcomes occasions like this when one can listen to and see the depths of the problems in the NP when they come here and try to explain away the problems in their party on the basis of democratic principles. Like Dr Pahad, I welcome the research they have done. However, suddenly trying to sell this position of theirs to us on the basis that they have gone on the road to Damascus, and that they have had this great conversion to democratic principles and traditions is rather farcical to say the least.

The fact of the matter is that one should look at who the person is that they choose to come and debate the issue for them, it is Mr Beyers. Mr Beyers has crossed the floor more often than a ping-pong ball crosses the net in a ping-pong match. [Laughter.] I am quite sure he is well equipped to do so. However, the interesting thing we have to look at is that, until a little while ago, the NP was very supportive and protective of section 43(b), as Mr Ken Andrew will tell hon members because he has been trying to convince them for a long time to shift their position. Suddenly, in the last month or so, there is this great conversion, and one wonders why.

It is very obvious why it is so. They are such a fractious bunch. They are fighting amongst themselves all the time. They cannot live together anymore. If one follows the newspapers, one will find that Mr De Klerk, their leader, has the whip in his hand so often lately that he almost looks like one of those people who were part of the Great Trek when they were trying to get the oxen in line all the time in order to move north. He is just cracking the whip all the time. [Interjections.]

It is very clear that if the NP want us to take these debates seriously, they must come and tell us clearly what their problems are. They should not come and sell their policies under some guise of democratic principles. We do not buy it.

Secondly, we of course know the second problem they have. It is simply this: They believe that there is a big pool of voters out there called the middle ground, and they want to try to capture the middle ground. This is the theory behind having to change this Constitution. It is important that we look at this and put these debates forward so that we do not get caught up in these unscientific debates we read in the newspapers emanating from some parties.

They cannot capture the middle ground with certain people within their ranks, because that middle ground is not too keen to vote for those people. What they have to do is to loosen up the control in their party so that they can start jettisoning some of those people and try to form a party to capture this middle ground.

I appeal to the NP that when they come to us and want us to take their debates seriously, they should not come on spurious grounds of democratic traditions and principles. It simply does not wash.

As for the DP, well, there is not much one can say about them. However, one can at least say that they are consistent on this issue and they have fought for this principle for a long time. Of course, in my view, the only reason for this is their lack of any coherent, good policies. They cannot draw any voters to them and it is on the basis of political expediency that they are proposing this amendment. However, be that as it may, at least they have been consistent in that political expediency. We want to say to these parties that we are not closed to these debates or discussions. The problem is that we cannot take them seriously on the grounds they are putting forward to us.

If they are serious, I suggest that they do what Dr Pahad has explained to us. If they are serious about people who cannot in good conscience stay within a particular party I do not have a problem with that. It happens. If they are serious about it, then they cannot tell us that it is that individual's right to decide what to do and what not to do in that case. One is here because of the collective will expressed by the voters on the ground. One cannot as an individual substitute what one feels is politically expedient for oneself at a given time and place oneself in any given party on the basis of such expediency.

Therefore, if they are serious and put the suggestion forward that when a person wants to cross the floor, one can allow a by-election to take place so that voters can express themselves on where that member may go, one can start debating the issue sincerely. However, until that happens, this looks to us as if this is merely an exercise in expediency. We are trying to give people a say and power over something which they should not have, because they are not here as individuals, but they represent the collective will of a certain group of people out there who voted here.

Mr D P A SCHUTTE: Mr Chairperson, when Adv De Lange has problems regarding merits, he attacks his opponents personally.

Dr Essop Pahad has offered a lecture to Mr Douglas Gibson on the meaning, with reference to the *Oxford Dictionery*, of the words "significant", "insignificant", "unacceptable" and "unjust". I would also like to give him a lecture on the meaning of those words and I would like . . .[Interjections.]

HON MEMBERS: The word is "substantial"!

Mr D P A SCHUTTE: Yes, "substantial". The support for the SACP in this country is 1%. This is insubstantial. The representation of the SACP within the ANC is 40%. This is substantial. However, I want to give hon members the assurance that this is also unacceptable and unjust. Therefore, I believe that if Dr Pahad disagrees with me, then he should support this measure. The free mandate will enable the SACP to come out of hiding so that people will know who they are dealing with. This is very important.

The main reason the ANC and specifically the SACP is against this move, is to ensure that the SACP can remain in hiding. This is unacceptable.

The DEPUTY CHAIRPERSON OF THE CONSTITUTIONAL ASSEMBLY: Order! My problem is that we are now turning the Constitutional Assembly into a Parliament. I can see that members are really enjoying this. I do not want to stifle the debate except that I can see the clock clearly from where I sit. I would appreciate it if members would focus on the debate. I do not want to stop or curtail members in any way.

Mr C W EGLIN: The Chairperson, very often this Bill, or section 43(b) is referred to as one which deals with crossing the floor. I want to make it very clear that it is a very small part of what this Bill deals with. Even if one does not cross the floor, if one falls foul of party bosses or the party machine, which results in one's party membership being withdrawn, one would then cease to be a member of this House.

We all sit here both because we were elected and as hostages of the parties to which we belong. This is the absolute reality. We are not here . . . [Interjections.] There are three features. We are all here as hostages of the bosses of the party to which we belong. If they for any reason withdraw membership, then one would cease to be a member of this House. The matter goes far beyond this.

I want to raise three cardinal issues. Our whole Constitution is based on openness, transparency, the freedoms of expression and association and the right to stand for office. Yet in this Parliament, members are bound by decisions which are not

required to be taken openly. We sit here bound by decisions which are taken not even in caucuses, but in head committees of parties, and in some cases, by leaders of parties.

We say to the rest of society that it must be open, transparent, and have freedom of expression and association. When it comes to the supreme legislature, however, everybody here is bound by decisions taken elsewhere not on the basis of the freedoms I have mentioned. This violates the concept of openness and transparency enshrined in the Constitution.

The second point is the mandate for the individual and the question of representativeness. Are we here just as agents for a party or are we here representing the people? One might say that one has to go back to constituencies every time, but then I say the parties should be compelled to go back to constituencies every time they change their policy. I am not asking for a merry-go-round of individuals. I actually believe that the constraints of party politics and an electoral system in terms of which, once every four of five years, one actually has to be re-elected, deals very effectively with people who frivolously and flippantly just cross the floor. The whole process of politics puts them in the dog box, and they will not be nominated again. It is the political process that operates in South Africa that should deal with that.

In between those elections, we are going to look after South Africa. We go back to 1939, when the United Party was split asunder on the war issue. What should have happened? Should General Smuts have resigned because Hertzog had said: "Do not go to war"? Should he then have had another 40 by-elections in order to decide what was in the interest of South Africa? One cannot always go back for specific mandates from specific constituencies. Elected to Parliament, one has to carry the responsibility of one's conscience and one's convictions in the interest of South Africa until, in fact, it is the appropriate time to get another mandate.

Lastly, and perhaps most importantly, this process which was locked into the present Constitution for whatever reason, if it goes on into the future, will actually fossilise the whole process of politics in South Africa, because it will say there are seven established parties, and those are the seven parties that are going to operate on the parliamentary scene. In the past—I am taking only White politics—the natural process of politics and political realignment, which reflected what was happening, outside politics, amongst the wider population, has always taken place as a result of splits or realignments.

I take the Hertzog case with regard to Smuts, or the Progressive Party when we walked out. It was part of a process of realignment that was taking place at that time. When the Conservative Party walked out on the issue of power-sharing, it was part of what I call an Afrikaner realignment on this issue. When the FF walked out of the Conservative Party, it was part of that process. When Mr Dalling and his four colleagues left the DP to join the ANC and were embraced by the ANC without its asking that they should have to resign and contest by-elections, this was also part of a realignment, because the ANC had been unbanned. This was part of a process in which a number of White South Africans joined the ANC. It was a natural process of realignment which took place in the politics of South Africa. It cannot happen if the Constitution says that once one breaks or bucks a particular party, one is going to be out of Parliament.

Taking the coming elections of 1999, if members want to stand for another party during the next elections, they are all going to have to resign from Parliament a year beforehand, and have by-elections or have new people appointed. We argue very strongly that the constraints of party-politics or of public opinion are the things that will regulate this process. However, one should not make the condition of staying in Parliament and fulfilling one's duties and responsibilities to the people of South Africa, according to one's conscience, dependent on decisions that are very often taken in secret by an individual or by a cabal in a party organisation.

Dr C P MULDER: Mr Chairperson, I will be brief to help you to bring this debate to a conclusion, and will not indulge in party-political debate. I have listened to what my colleagues said. The position of the FF is that in the next constitution, or any future constitution there should be no place for a section 43(b), the reason being, as many members have indicated, that we should allow this natural process of constitutional development to take place.

Things change. It is not only that a member now operates outside the mandate he received from the electorate. It also happens that parties change

their policies without going back to the electorate, and then a member should be able to say that he does not agree and he wants to do his own thing. During the next election, his position will be tested by the electorate. If he is right, he will be sent back to Parliament, and if he is wrong, they will forget about him. The present section 43(b) was inserted into the Constitution for a very specific reason, and the reason we are debating this issue is that it comes from the present Constitution. The present Constitution made provision for us to elect the Constitutional Assembly, which we did.

The electorate out there, in electing that Constitutional Assembly, decided, in giving the different parties a mandate, not to give any specific party a two-thirds majority. They decided that. They forced the people and the Constitutional Assembly to go through this process of writing the new constitution, because the Constitution provides that decisions should be taken with certain percentages. Because of that, it is imperative that that specific section 43(b) should stay in place until the completion of this Constitution.

Once that process has been finalised, there is no need in future for such a provision, and we should allow the normal dynamics of party-politics to take its course.

Mr O C CHABANE: Mr Chairperson, the DP says to us that we are actually hostages, and the alternative is what is proposed by the ACDP—anarchy.

Whilst there is freedom of association, any association is based on rules or some norms. One cannot associate at random. Once one has decided to join a political party, one must know that there is the discipline of a political party.

In terms of the present situation of proportional representation, one cannot just say that one is going to jump from one party to another, because one has been elected on the party lists. If they do want that, then we need to go into constituency elections—the electoral system. If one wants a situation where people will be jumping from one party to another, then one can go to that system, but they still say that they want proportional representation.

In that section of the National Assembly which is based on proportional representation, one cannot leave one party to go to another. With the constituency option, one can do that, but we as the ANC will contend that one needs to go back to the electorate to check whether that person still has that mandate, because that person has been elected on the basis of specific policies, not only because of the person's individual input or capabilities, but also because that person belongs to a specific party.

The DEPUTY CHAIRPERSON OF THE CONSTITUTIONAL ASSEMBLY: Order! Thank you, Mr Chabane. Thank you to everybody who participated, also for the spirit and the way the debate became lively.

I am now going to put item number 4 on the agenda, and hand the Chair to Mr Ramaphosa.

INDEPENDENT INSTITUTIONS

(Subject for Discussion)

The CHAIRPERSON OF THE CONSTITUTIONAL ASSEMBLY: Order! The fourth item—we are almost done with our work—deals with independent institutions. Theme Committee 6 has been giving consideration to the question of independent institutions. The subcommittee of the Constitutional Committee is considering at present the possibility of general provisions that will regulate independent institutions. One could call this an omnibus clause.

The question that arises is: What should the specific and general features of the appointment mechanisms, qualifications, tenure and other mechanisms for dismissal be in respect of the following institutions, the Auditor-General, the Reserve Bank, the Electoral Commission, the Public Protector and the Human Rights Commission? Reference to all these will be found in volume 2 of the pink document from page 91 onwards.

We need to address these questions, and I would like to propose that we deal with all these institutions, but not one after another. We can deal with any institution we wish to deal with.

*Dr F P JACOBSZ: Mr Chairperson, as far as the Auditor-General is concerned, this morning I would have liked to talk about some of the general principles, but the Auditor-General wrote a letter to the executive director in which he raised his reservations in respect of certain aspects. I think that until the lawyers have had the opportunity to investigate this and to show whether the existing general principles which we would have dis-

cussed could indeed accommodate these points, one cannot debate this now.

†However, coming back to the Auditor-General, there are three points I would like to raise in this regard. The first one revolves around the appointment mechanism. The procedure set out in 22(2) is quite correct as far as I see it. The Auditor-General shall be nominated by a committee consisting of one member of each party represented in Parliament and, secondly, we would like to see that this should be approved by 75% of the members present and voting.

Now, the reasons why I am stating these points are the following: We all know the Auditor-General has a very unique relationship to Parliament. He is the instrument Parliament uses to hold the executive accountable for the manner in which it spends the taxpayers' money. Therefore, the Auditor-General must be apolitical. In fact, the watchdog committee Parliament appoints, the Joint Standing Committee on Public Accounts operates on a nonparty or nonpolitical basis. It does not evaluate policy. It only evaluates how the executive spends the money in applying its policy and whether that money is spent effectively, efficiently and economically. Therefore, under those circumstances we contend that the Auditor-General should not be elected on a party-political basis, but must be a person who is acceptable to every party in this House. We say this because of the unique watchdog function he has to perform.

Now there are two other points. As far as the voting is concerned, we feel very strongly that the approval of the Auditor-General or the aspirant Auditor-General should take place without any debate. We feel it is not appropriate to subject the prospective Auditor-General to a public debate, because this may have a negative impact on his standing or on the unique relationship which he will have with Parliament.

The third point I would like to raise in this regard is the question of tenure. It is suggested in the report that the Auditor-General should be appointed for two periods of five years each or for a maximum of 10 years. Coming back to points raised by the Auditor-General, I would like to support the point that if the Auditor-General can be appointed for a second term it could influence his impartiality. In other words, as the Auditor-General says: "Currying for favour for reappointment". In order to put this beyond all doubt we favour that the appointment should be for a period of ten years.

Allow me to go on to the Reserve Bank. I do not have many comments on the clauses on the Reserve Bank.

*The exposition provided in the report as regards the clauses relating to the Reserve Bank that were included in the Constitution is acceptable to us.

†Actually, there is one further point. Consideration may have to be given to the extent to which the general provisions in clause 21 can be applied to the Reserve Bank. That is a matter for the legal people to investigate and if they should decide it would be appropriate we would have no difficulty with that at all, but as it stands at the moment, it is quite in order.

As far as the other points we were asked to raise are concerned, the questions of appointment and tenure, I would like to refer to the fact that the Act on the Reserve Bank already provides for that. It states quite specifically that the Governor of the Reserve Bank must be a person who has tested and proven experience in banking. That is all we really want there. As far as his appointment is concerned, we do not feel it is necessary that he should come through the same mechanism the other people have come through.

He has a very unique relationship with the Government. The fact that he has to control the monetary policy and the fact that the Government, on the other hand, has to control the broad economic policy, means he has a much closer relationship with the Government than possibly Parliament itself. Therefore, we feel it is quite in order that the President should appoint him. He will obviously be guided by what the Minister of Finance has to say in this regard. However, we feel very strongly that in view of the fact that the monetary policy can be manipulated for political purposes and to the detriment of the long-term economic interests of the country, this organisation must remain independent under all circumstances.

Ms B A HOGAN: Mr Chairperson, the ANC's position on this question of omnibus provisions and their application to the Reserve Bank and the Auditor-General, is that omnibus provisions are not well-suited to these kinds of institutions. I think there must be a distinction between the kinds of independent institutions that are presented to us.

That is not to say that we do not accept that there should be independence. We also accept that that independence does entail parliamentary accountability. In terms of the South African Reserve Bank, if we were to include the omnibus clauses as regards independence, it would substantially alter the provisions which were initially put forward by the Theme Committee and in the ANC agreement, and would again create the confusion which existed before. We would prefer the present provisions on the Reserve Bank, as they exist in the present interim Constitution, to continue, because we feel that they are finely worded clauses which present the picture of the activities of the South African Reserve Bank in relation to the State very accurately. If the omnibus clause concerning independence was incorporated into the provisions concerning the South African Reserve Bank, we certainly could not accept that.

The same applies to the Financial and Fiscal Commission as well. As hon members will remember, the Financial and Fiscal Commission has to have provincial representation. If the Financial and Fiscal Commission is going to be subjected to the same overarching omnibus clauses, we are once again going to have the difficulties of interpretation. What I am saying is that it is not easy to incorporate the Financial and Fiscal Commission under these omnibus clauses.

As regards the Auditor-General, we note that the provisions in section 21, as regards the independence of the Auditor-General almost exactly replicate what was initially presented in the proposals concerning the Auditor-General, and so we would be happy either way on that.

As regards the appointment procedures, the appointment procedures contained in the omnibus clauses are very similar to the appointment procedures that were initially proposed by the Auditor-General. However, I think we would be unhappy about making it a 75% majority. I think we would then just get blocked in the process, as we have seen on many occasions. I think it is open to debate what the constitution of that parliamentary committee will be, accepting that we do not believe that the Auditor-General should be a party-political tool.

What we also want to point out about the Auditor-General is that it is not a position that is linked to the executive in any way. It is a unique position that is linked peculiarly to Parliament. The Auditor-General reports to Parliament. He does not report to the executive at all. In the appointments procedure, therefore we believe that there must be some consideration of parliamentary approval of the Auditor-General, because of his or her peculiar and special relationship to Parliament.

In conclusion, we are saying that there are particular kinds of institutions that are not particularly susceptible to these omnibus provisions. We would argue, particularly in relation to the South African Reserve Bank, that those omnibus provisions should certainly not apply.

As regards the Financial and Fiscal Commission, we recognise that problems will arise. We are less insistent on the provisions with regard to the Auditor-General, but we do point out the necessity of respecting the special relationship of the Auditor-General to Parliament.

Mrs S M CAMERER: Mr Chairperson, I am very glad to hear this point of view of the ANC. It is certainly in line with our thinking on the omnibus provisions.

The NP believes that there probably is some merit in having uniform provisions, the so-called omnibus provisions, governing the characteristics of those who hold office in their capacities as representatives of independent institutions or organs of State. That is to say that the holders should indeed be independent, impartial and discharge their duties without fear or favour, etc, and that the office-bearers' dignity, independence and effectiveness should be protected.

But these are the characteristics. We believe that we should be a lot more careful when it comes to the qualifications on the one hand, and also the methods of appointment on the other. We believe that omnibus provisions will not be appropriate in those cases. There are lurking pitfalls if we treat all these various institutions and offices in the same way.

If I may illustrate, I would like to deal particularly with appointment procedures in relation to both the Auditor-General and the Public Protector. We believe, for a very good reason, that it is necessary to include some differentiation in the Constitution in relation to qualifications and appointments of these particular officials. We believe that in these appointment procedures we should apply what is similar, in a way, to the strict scrutiny type of tests that one applies to limitations of human rights. In other words, we should be much more rigorous

when it comes to the appointment of officials who have a watchdog role over Government and State activity. In the case of the Auditor-General and, particularly, the Public Protector, whose role it is to monitor and challenge Government and State activity, the appointment procedure should be seen to be much more strictly impartial in order to ensure the legitimacy of the appointment.

I would argue that this must surely be to the advantage of this or any future Government, because the appointee can then never be discredited as a party hack. In other words, where the appointment is done by recommendation of a parliamentary committee, if the committee consists of one nominee from each party in Parliament, and the 75% majority is applied to the appointment, no finger can be pointed at the majority party in power to say that their man or woman was merely put in a job. The Government in power will be able fully to rely on the legitimacy of the appointment and the decision of the official concerned can afterwards not be challenged on the basis of political bias.

However, if the committee is, for instance, made up of members proportionally to the strength of each party in Parliament, one could get the following result: If one party has over 60% support, as is now the case with the ANC in Parliament, or two-thirds of the members, and it is required that only two-thirds of a proportionally composed committee vote for a particular candidate for either the Auditor-General or the Public Protector, it can always be alleged that the appointee is in the pocket of the ruling or majority party. This can surely never be to the advantage of that party, as their appointee can constantly be undermined and challenged as not being impartial. It is the equivalent of having the accused and the judge and jury all rolled into one.

Of course, when it comes to the offices and organs of State which do not fulfil this role of monitoring the State itself, we can think again. Possibly a broadly representative committee would be adequate, but we believe that we owe it to future governments to distinguish these particular watchdog appointments in our Constitution and raise them up as special. I was glad to see, from what Ms Hogan has said, that in principle the ANC also supports this position. I think it should definitely be applied to both the Auditor-General and, particularly, the Public Protector. In the case of the latter I would also support the fact that there should not really be a parliamentary debate as to the appropriateness of the appointment.

Mr J H DE LANGE: Mr Chairperson, I am really just going to elaborate, to some extent, on what Comrade Barbara Hogan said. I agree with the points of view that she put forward.

At the outset, however, I must point out that I am a little confused concerning one aspect of the NP's position, and I am sure one of those members will clear it up for us. I thought that on the one hand Dr Jacobsz was saying that they wanted to adapt the new position for the Reserve Bank, which is the one that was used previously, plus the omnibus clauses, and that Mrs Camerer was saying something different. Maybe they can clear that up for us so that we know exactly where we stand on this issue.

Let me start off by saying that the one thing which we must make very clear is that the report which we are discussing, emanates from the experts who drafted it. It is not one which we have fully discussed in the parties and the Constitutional Committee, which means that we have not looked at all of the issues, and therefore, whatever is in that document, is obviously still open for discussion. I think that it is important to emphasise this point.

You will remember, Mr Chairperson, what the process was in this regard, namely that we had this bird's-eye view about organs of State and the appointment mechanisms, and research had to be done and the results provided to us, and we would then come to conclusions on which of these organs of State would fall into which categories.

From the draft it is clear, I think, that certain problems have already arisen, as Ms Barbara Hogan pointed out. It is clear to us that a distinction must be drawn between certain organs of State. There is the one type of organ of State which is a monitoring-type of structure, and I think Mrs Sheila Camerer and Dr Jacobsz have mentioned those, namely the Public Protector and the Auditor-General, which are clearly examples of monitoring structures and which have to be dealt with in a certain way.

Then there are organs of State like the Reserve Bank, the Public Service Commission, and perhaps the Financial and Fiscal Commission, which clearly are structures that impact directly on State policy, and therefore it would be very difficult to collapse those into one and try to deal with them

in exactly the same way. We need to discuss these structures and come to the best possible conclusion.

In that sense I would fully support what Ms Barbara Hogan said. We need to go through those structures again, say which ones we can deal with in an omnibus way, and which ones not.

The point also needs to be made concerning the terminology used with regard to these so-called independent commissions. Those structures, we made very clear, were organs of State, and in particular we said that they were additional organs of State other than these found at the three usual tiers of government. I think that the terminology previously used should still be used. These new phrases like "independent commission", and so on, I do not think take the case very much further.

I also want to emphasise the ANC's position on independence once again. We are very much bound to Constitutional Principle XXIX. That Principle is very clear, but I want to raise it here because we often hear debates on independence as if it is something that exists in a vacuum, some neutrality that does not exist in reality. We are very much bound to Constitutional Principle XXIX. It reads as follows:

> The independence and impartiality of a Public Service Commission, a Reserve Bank, an Auditor-General and a Public Protector shall be provided for and safeguarded by the Constitution in the interests . . .

This is the important part—

> . . . of the maintenance of effective public finance and administration and a high standard of professional ethics in the public service.

Therefore the independence and impartiality is placed in a very specific context, and it is not something in a vacuum. We want to emphasise that as well.

Lastly I want to say that when it comes to the appointment mechanisms, it seems to me that one will have to look at them anew. They will not necessarily all have to be the same. Although, as Ms Barbara Hogan has pointed out, we will be very much in favour of these appointment mechanisms being participatory and inclusive, but not to the extent, as Ms Hogan has pointed out, that it emasculates those structures by not making it possible for Parliament and Government to make these appointments. We therefore fully support the idea that there should be an inclusive and participatory appointment mechanism, which creates the kind of independence we want, but not to the extent of an emasculation of the process of appointments.

It is, therefore, these principles that we would be very much prepared to weigh up when we set up these structures and the appointment mechanisms.

Mrs G N M PANDOR: Mr Chairperson. I think it is important just to re-emphasise our belief that the two-thirds requirement as a special majority is significant enough. We would be concerned by the fact that once we begin to move beyond this requirement, we are asking that we give substantial rights of veto to insubstantial numbers of representatives in Parliament. Therefore we wish to reassert our view that the requirement of 66% is really quite sufficient.

I wish to speak, however, in terms of these independent institutions, on the question of appointees to these institutions. Mrs Camerer made reference to the need for us to use rigour in our search to identify appointees to the institutions. We would certainly agree with much of this sentiment, as well as the sentiment that we should search for proficiency and expertise as criteria that would accompany our search for prospective candidates to be appointed to these institutions.

We must assert, however, that we reject the notion that, for structures that emanate from the constitution, expertise is viewed by many parties as residing in those who have legal qualifications. We are very concerned that a view is emerging that those who are to be appointed to structures that are constitutionally enshrined, should be persons who are lawyers.

We would like this assembly to ditch this view, and say that in looking for appointees to such structures as the Human Rights Commission or the Public Protector we should not see ourselves as being limited to seeking appointees who have a legal background.

*Mr I J PRETORIUS: Mr Chairman, I would like to exchange a few ideas about the proposed electoral commission.

†The NP wholeheartedly supports the principle that free, fair and regular elections must take place in our country. Free, fair and regular elections form part of the ingredients of a democratic state.

Constitutional Principle VIII also confirms this belief.

In order to execute the abovementioned principle, we need a body of South Africans who will be trusted to manage future elections. The legitimacy of the election process depends largely on whether the electorate accepts the result of the election as a true reflection of the choice they have made at the polls.

To me, this is the most important principle that we must adhere to whenever we appoint the members of the proposed electoral commission. In other words, an electoral commission faces a formidable task. An electoral commission must be independent and impartial, and the staff must, above all, be efficient. Inefficiency tends to create suspicion against the impartiality of the process.

*The appointment procedure of the members of the commission must be transparent and inspire confidence. I therefore believe that the general provisions which are currently being proposed with regard to the independent electoral commission are acceptable to the NP. If the members of the commission were to be seen as pawns of the majority party, the entire process would suffer. The procedure which must be followed must therefore be considered credible by the members of the various parties.

This statement brings me to the proposed procedure. The parliamentary committee which ousts a member of a commission, in other words, which removes him, comprises one member from each party represented in Parliament. In my opinion this is a sound approach. As I have already said, credibility is therefore being built into the process and we will therefore have a representative committee.

On behalf of the NP I would therefore like to make an appeal that the parliamentary committee which recommends or nominates a member of a commission should also consist of one member from each party represented in Parliament. Such a committee would therefore not be dominated by the governing party or the majority party. It is of cardinal importance that a commission which must play the role of watchdog, must be acceptable and credible.

I want to go even further and request that all nominations, also of members of a commission, of a proposed independent electoral commission, should take place by a majority vote of 75%. This would also confirm the credibility of such an exceptional commission and facilitate the acceptance of future election results.

Mr W A HOFMEYR: Mr Chairperson, I fear having to stand up here and speak, being a lawyer myself, but I do endorse the sentiments of my learned colleague. [Laughter.]

I want to speak on the question of the appointment mechanism. Mrs Camerer mentioned this, and I think many of the other parties are also in favour of the Human Rights Commission and the Public Protector being appointed by more than a two-thirds majority in Parliament. We on this side of the House agree fully that those are institutions that need and should get special protection. However, we believe that appointment on the strength of a two-thirds majority offers more than adequate special protection. In fact, we have requested that the other parties show us where in the world more than a two-thirds majority is required for such appointments. I do not believe they will find greater protection than a two-thirds majority anywhere in the world.

In any event, our argument was that it does not make sense for the Constitution to require a majority of 75% in the case of appointments when, at the moment, the Constitution itself can most likely be amended by a two-thirds majority. Therefore, any future parliament could, in fact, just change the 75% to a majority of two thirds.

We would also like to point out the danger of going too far with this kind of special protection. We have already seen in this Parliament, with reference to the appointment of the Public Protector, that two out of the seven parties in Parliament, constituting only 30% of the representation here, could effectively stop the appointment of the Public Protector or delay it for many months, leaving the establishment of that institution in abeyance—and that in a situation where there is a desperate need for that institution.

Therefore, with regard to institutions like those, our view is definitely that consensus by a two-thirds majority offers more than adequate protection and that there is no need to build in even greater super-majorities.

The CHAIRPERSON OF THE CONSTITUTIONAL ASSEMBLY: Thank you, Mr Hofmeyr. Dr Jacobsz wants to respond to an issue that was raised by someone.

Dr F P JACOBSZ: Mr Chairperson, I would like to respond to a point raised by Mr De Lange in regard to the Reserve Bank. Our point of view is that the clauses, as put forward in this report, are acceptable. However, in order to re-emphasise or strengthen the position of impartiality and independence, one should not consider including the general provisions. We would be happy if that were done, but we nevertheless support the clauses as they stand.

Ms B KGOSITSILE: Mr Chairperson, I would like to start by reading Constitutional Principle XXIX, although I know that my colleague Mr Johnny de Lange has already done so. It reads as follows:

> The independence and impartiality of a Public Service Commission, a Reserve Bank, an Auditor-General and a Public Protector shall be provided for and safeguarded by the Constitution in the interests of the maintenance of effective public finance and administration and a high standard of professional ethics in the public service.

I would like to speak about the Public Protector. I have read this Constitutional Principle precisely to underline the facts that we want to have a Public Protector in South Africa and are bound by the constitutional principles.

I am making this point to link it to the issue of provincial public protectors, something which has been raised by other parties, but which the ANC is totally unhappy with.

We are unhappy with an approach such as the one we see, for instance, in the KwaZulu-Natal provincial constitution which has recently been produced by the IFP. Here we have a situation of a clearly autonomous and independent public protector at provincial level, totally independent from the national one. We say that that is a situation which cannot be accepted, because we are bound by the Constitutional Principle.

Secondly, I should like to talk about the issue of the parliamentary multiparty committee that will have to be considered with regard to the appointment mechanism. The position of the ANC is that we cannot accept what the other parties are saying to us, namely that we need to have a committee in which all parties have one person representing them, as is the case at present with the interim Constitution.

We feel that that committee should be so constituted that it recognises the principle of proportional representation. The vote of the majority party in Parliament cannot have the same weight as that of the ACDP, which has only two members. We do not think we should maintain that system in the new constitution.

Mrs S M CAMERER: Mr Chairperson, I simply rise to reassure Mr De Lange who suggested that there might be a contradiction in the NP's point of view. I think he said that because he was not listening to my first remarks. I just want to clarify that.

What we agree on is that when it comes to the characteristics of these various officials and independent institutions, there may be room for an omnibus description of their characteristics, such as that they should be impartial, independent and give judgement without fear or favour, etc. I think we would all like to see that apply across the board. That is like motherhood and apple pie.

On the other hand, their specific qualifications to do their job and the specific way they are appointed because of the nature of their function—in other words, the watchdogs—should be distinguished from the others. There should be the strictest scrutiny and more rigorous application of independence.

The CHAIRPERSON OF THE CONSTITUTIONAL ASSEMBLY: Order! That concludes the discussion on this matter. A number of good ideas have come forward. I think consensus is already emerging on issues about which we had differences.

POLICE SERVICE

(Subject for Discussion)

The CHAIRPERSON OF THE CONSTITUTIONAL ASSEMBLY: This is the last issue for discussion. The question is: Should the police service be structured to function at both national and provincial levels under the direction of the national and provincial governments respectively? This issue is covered in part 2 of the pink document on page 102.

Mr D P A SCHUTTE: Mr Chairperson, I believe that a number of constitutional principles are applicable here. I briefly want to refer to them.

The first one is contained in Constitutional Principle XVIII(2) which says the following:

> 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 .

Now follows the most important words—

> . . shall not be substantially less or substantially inferior to those provided for in this Constitution.

I should also like to refer briefly to Constitutional Principle XX which more or less says that the allocation of powers between the different levels shall be done on such a basis as is conducive to effective public administration.

Constitutional Principle XXI, particularly in paragraph 1, says the following:

> The following criteria shall be applied in the allocation of powers to the national government and the provincial governments:
>
> 1. The level at which decisions can be taken most effectively in respect of the quality and rendering of services . .

I believe the proposal of the ANC is that the limited policing functions which at present are with the provinces should be removed from the provinces. Such a move would be unconstitutional because it would violate the principles I have referred to. The policing function is a very important and major function. If that were to be removed from the provinces, it would certainly be in violation of at least Constitutional Principle XVIII, because it would then render the competencies of the provinces "substantially less . . . or substantially inferior . . .". I would also argue that it would be in violation of Constitutional Principles XX and XXI which call for the allocation of competencies for the sake of effective and quality administration. To suggest that there can be effective or quality policing administration at ground or community level only if all the powers in this regard are centralised, cannot possibly be upheld.

The whole move internationally, and also here, is towards community policing and taking the administration of policing to the lowest level possible. However, apart from these considerations, I believe it is highly impractical. If this proposal is adopted, then it will mean the removal of the positions of the Jessie Duartes and the Patrick McKenzies who are doing a good job. Whether one agrees with them politically or not, they are doing a necessary and a good job. To remove their positions would be not an improvement, but a regressive step. I do not think that the ANC is really serious about this.

The CHAIRPERSON OF THE CONSTITUTIONAL ASSEMBLY: Order! Let us find out if they are serious, Mr Schutte. Ms Schreiner, is the ANC serious?

Ms J A SCHREINER: Mr Chairperson, I prefer not to answer that question. Yes, we are serious.

In response to the question, there are certain basic things that we are absolutely clear about. The first is the issue of having a single police force under national command. The ideas that have been proposed in some of the submissions of having provincial police forces or a provincial paramilitary force, as was proposed by the IFP, do not have any support from within our ranks at all.

We also strongly feel that local government levels of policing should only be set up where necessary, and they should be set up under a single police service. However, we do say that the police service needs to be structured at provincial as well as national level, precisely because of the vision we have of community policing we want the police service to realise. If that is the vision which has to guide us, the police service has to be structured accordingly.

We do not believe that the constitution should go into detail regarding the allocation of powers, functions and responsibilities. Those are issues which should be dealt with in a national law.

The final point which I think should be raised in this debate is the fact that the final resolution of this particular issue is influenced by the debate on the powers of the different tiers of government and although this police structure is something we can debate today, we will not be able finally to resolve it.

Mr J SELFE: Mr Chairperson, our view is that the police should be structured at national, provincial and even local government level under the political direction of these tiers of government. Many constitutions around the world provide for this. The United States of America is probably the most obvious example. Other countries such as Britain and Germany have systems of delegation of police powers to lower tiers of government.

Many people argue for a centralised police force, suggesting that without this, discipline and effec-

tiveness will suffer. Our view is that while there should be one police service upholding one body of law, regulated by a single framework law which governs discipline, training and standards, control over the police force should be vested in provincial and, where they have the capacity, local governments.

We believe that there are three advantages to such a structure. The first is accountability. The police have a direct responsibility to the communities they serve. The communities need to be empowered to hold the police accountable for this responsibility. What better way, we argue, of holding the police accountable than through democratically elected provincial and local governments.

Secondly, it has been shown that the lower the level of political control over policing, the more responsive policing will be. The hon member Mr Schutte referred to Jessie Duarte. The fact is that when one has a provincial MEC who is in charge of policing, as she is in Gauteng, where she takes direct control, interest and responsibility for the policing in her province, policing is more responsive. The roadblocks that were erected in Gauteng recently were a good example of precisely that sort of control and interest.

Thirdly, there are distinct economies of scale in this proposal. Virtually every local authority has at least some traffic police. Some cities like Durban have well-developed city police forces. Integrating such forces within the broad ambit of policing, will release so-called national police officers to provide more effective policing elsewhere and address the distribution problems that we have in terms of policing around the country.

Lieut G ROCKMAN: Mr Chairperson, I fully support the position of the ANC. It is important for people to understand where we come from and where we want to go to in this country.

It is quite clear in the interim Constitution, as a principle, that there should be a national police service. We are not saying that there should be a federal police service or local police that will function on their own. It is, therefore, important that we should understand that in our Constitution, we are looking at a national service. A national service can therefore not be broken up by giving the executive command to provincial commissioners.

Provincial commissioners do have enough command at provincial level to deal effectively with policing matters. This will enable policing to be effective where it matters most, which is at local level.

I want to remind members of section 219 of the Constitution. It states and I quote:

> Subject to sections 214 and 218 and the directions of the relevant member of the Executive Council referred to in section 217(1), a Provincial Commissioner shall be responsible for . . .

It goes on to mention the powers that the commissioner has.

MECs like Jessie Duarte and McKenzie have the necessary powers because they can direct provincial commissioners with whatever guidance they can give to them. They have the powers to do this. People may expect to see powers being described in the Constitution. The Constitution is not the appropriate place for us to be putting this. We should go to the police Bill and discuss this within that Bill. The powers are sufficient for commissioners and MECs to deal with policing.

The Constitution goes one step further with regard to metropolitan and local policing, which falls directly under the MEC and the MEC's competency to establish such local police agencies. However, those agencies will also be governed directly by police guidelines, regulations and so on. They will also be controlled locally by a structure—the municipality or whatever—but this can only be done in conjunction with the consent of the MECs.

The Constitution lays down the guidelines in terms of which we want to establish those structures. However, the police will also be trained by the National Commissioner and by the Police Service in line with the national directives of the national Parliament. We cannot have police services functioning autonomously under provincial MECs in this country. We will find that those provinces will abuse their powers and in the end we will be sitting with police services that are manipulated by certain political parties. Therefore, we need to create national standards in this country that will apply to all police services.

Mr T C NTSIZI: Mr Chairperson, in the name of efficiency and effectiveness, the NP would like to see the Police Service restructured to function at

both national and provincial level under the direction of the national Government. The reason for this is the following: The South African Police Service should be responsible for the prevention of crime, the maintenance of law and order, the internal security of the Republic and the investigation of offenders or alleged offences.

The NP is committed to saving South Africa by ensuring the safety of everyone in the community as well as the security of properties. The NP is also committed to the maintenance of a community-orientated police service, which is capable of combating crime and violence effectively so as to guarantee a safe and peaceful society in South Africa. Close co-operation with the community is a priority if this objective is to be achieved. Members of the SAPS must be properly trained and qualified and must focus on protecting and serving the community.

*In England and America effective policing at grass-roots level by local authorities is the reason for a lower crime rate.

†In England, for instance, there are forums between the local community and the police for the following reasons: To discuss ways of maintaining a relationship of mutual trust between the police and the community in a specific area; to discuss attitudes to policing in that area; to explore and develop ways in which the police and the public can co-operate in the maintenance of a peaceful and law-abiding community; to improve the quality of life and improve the accessibility of the police to the public; to discuss opportunities for the police to consult the community and for the community to discuss all aspects of police policy which are of local concern, including operational matters; to promote a greater understanding of police issues, including the causes of crime; and to discuss issues of local concern which are directed to the attention of the police.

In Britain and the USA, where the neighbourhood watch system is supported, the crime rate is also low. Members of the public must also be allowed to join the public reserve police and do a little bit of community service.

Mr L M GREEN: Mr Chairperson, I just want to put the position of the ACDP briefly. With reference to the police service, if we look at the history of our country, we find that the functions of the police were politicised nationally to such an extent that often we found the police had been doing work that they should not have been doing.

In the past the police was nationally controlled, and if the national government made mistakes and there were immoral national policies, often we found that the police were forced, because of the laws of the country, to implement those policies. We know that the problem is whether we are going to have a national police force or a regional police force.

The ACDP's argument is that if a police force is controlled provincially and something goes wrong with the province, the province will be affected. However, if a police force is controlled nationally and something goes wrong with the national government, the entire nation will suffer.

Therefore, our position is that we believe that the police force should be structured at national, provincial and local government level, but we do not believe in the centralised control of the police force. We believe, however, that the national Government must have some control, but we would stipulate areas such as policy, standards, salaries, examinations and those standardised issues that need to be controlled.

As far as accountability is concerned, I think we also support accountability as close as possible to the community. As regards political control, we would support the position of control at provincial and even at metropolitan level. However, we do say and we do note that the violence in KwaZulu-Natal is untenable at the moment. It is a problem if a police force is in control of a provincial government if that government uses the police in order to promote its political agendas.

We feel that, somehow, the constitution must address that possibility and that likelihood. Basically, we believe that the abuse of power for political reasons, either nationally or provincially, must be limited as far as possible.

*Mr P A MATTHEE: Mr Chairperson, the Constitution lays down certain provisions to which, *inter alia*, the hon member Mr Rockman also referred, and to which he referred approvingly. However, he did not refer to the principle which has already been argued by this side, namely that those powers which have already been given, also in respect of the police, may not be diminished. No matter how one looks at this, to reduce these powers in any way, would be totally unconstitutional.

There is a definite need for community-oriented and consumer-friendly policing. This need is expressed by implication in the Constitution. It implies a total change of image in the service so that the primary legitimacy of the South African Police Service should be established in the community. Only if this succeeds will the members of the service be able themselves, through their behaviour, to establish the secondary legitimacy of the service.

Seen against the background of the present unacceptable level of crime in the country and the negative effect which this has on the economy and the quality of life of every individual South African, the standards of functioning of the police service may never be lowered, nor may their responsibility to the communities at the lowest possible level.

Those communities, whether at local or at provincial control level, must be able to hold the police who serve them responsible. There must be a real decentralisation of control over the police service from the central tier of government to the provincial tier and lower. This spirit of devolution of power is already created in the Constitution and we must give further expression to it. This is necessary in order to bring the control of the police closer to those who are affected by it.

†The community sees the police as their creation. Policing is a service to the public and it is most important that the police services are provided in a manner consistent with community values and expectations. The confidence and trust of the public at the lowest tier of government is essential for effective policing.

*If the existing Constitution is tampered with in the sphere of policing, then it seems to us on this side of the House, when we listen to the arguments of the ANC, as if this is an attempt to return, also in respect of the police, to their initial objective, namely to convert South Africa into a centrally controlled unitary state. At the time the Constitution was written this was not a problem, but now it is becoming a problem. This matter elicited great discussion in the negotiation process and virtually all the minority parties were vehemently opposed to any scaling down of significant federal powers such as those over the police in the provinces.

The eventual result, as hon members know, was that the provinces did get certain powers, but that compromises were reached and that those powers were far fewer and more restricted than many parties would have liked. Furthermore, if this is now tampered with and an attempt is made to take these powers up to the central level again, then the ANC is lighting dangerous fires. In the province I come from, KwaZulu-Natal, there is great tension . . .

The CHAIRPERSON OF THE CONSTITUTIONAL ASSEMBLY: May I ask the hon Mr Matthee to move towards conclusion. He has already taken five minutes.

*Mr P A MATTHEE: . . . about this matter and any further tampering with this will only make matters worse.

Prof D C DU TOIT: Mr Chairperson, I would just like to repeat that when we hear the NP talking about police functions, they quote from Schedule 6 and always omit to say that it is a provincial, concurrent power, subject to the provisions of Chapter 4. Really to understand the present position under the interim Constitution, they should look at Chapter 4. One cannot simply interpret it as one wants to, as a simple power under Schedule 6. It is qualified. If one looks at Chapter 4 one sees a few very important things about the present position which are not always understood.

Firstly, as Lieut Rockman has already said, in section 214(1) it is stated that there shall be "a South African Police Service". Allow me simply to give hon members the main trend of this. Section 216 states that there shall be a national Minister responsible for the SA Police Service. Do they deny that the position at the moment is that the national Commissioner shall have executive command of the Police Service?

What section 217 says in the present situation is that the MEC in the province is responsible for the performance of the service, which is not the same as regarding it as a kind of exclusive provincial power.

As regards the words "substantially less than or substantially inferior" in paragraph 2 of Constitutional Principle XVIII, that principle is completely . . .

The CHAIRPERSON OF THE CONSTITUTIONAL ASSEMBLY: Prof Du Toit, Mr Schutte would like to ask you a question.

Prof D C DU TOIT: Mr Chairperson, how much time do I have? I can take the question. I will try to answer it.

Mr D P A SCHUTTE: Mr Chairperson, from the hon member's argument it would appear that he is in support of the present situation in the Constitution. If not, let him please tell us why.

Prof D C DU TOIT: I am only explaining that that member is understanding the present interim Constitution incorrectly, and that he is basing his arguments on a wrong perception of the interim Constitution. That is why he arrives at the wrong conclusions on where he has to go. [Interjections.]

Our proposals on what we want have been made quite clear stated by Ms Jenny Schreiner. Perhaps he also did not understand that.

Let me just talk about paragraph 2 of Constitutional Principle XVIII, which contains the words "substantially less than or substantially inferior". The last speaker of the NP, and perhaps the whole NP, does not have this right. The word "substantially" . . . [Interjections.] Hon members should listen to this and then they will understand. The word "substantially" means that in the final constitution the powers and functions of a province can be less than or inferior to those provided for in the 1993 Constitution. They can be less. That is what that principle is supposed to mean, but it should not be substantially so. It can be less or more, but it should not be substantially less or more. It is not that it must be the same. Hon members have got it wrong if they understand it in that way. In other words, it is a question of degree which the Principle gives us. It is impossible to give a decisive, objective test which would authoritatively decide the question of when powers and functions are less or inferior, but not substantially so.

*Gen C L VILJOEN: Mr Chairperson. I have listened to all the speakers and there is a measure of truth in everything they have said.

I think the confusion arises because we are mixing the structure with the utilisation. On the one hand we have arguments for a decentralised police force, one which is closer to the public and the community. I think a case can be made out for this. I think a case can be made out for most police services, when it comes to implementation, falling under the control of the provincial commissioner who is close to his premier. The premier in the province is surely also responsible for law and order. I think there are very good arguments. That is what the Lieut Rockman tried to explain to us.

On the other hand there is also a measure of truth in what the ANC is saying, namely that there are certain police services, particularly the specialised services, with regard to which the utilisation of the police can, in fact, be centralised. I think that is what the Prof Du Toit was talking about when he referred to executive command.

What I want to suggest is that we should look separately at the utilisation clause and the structuring clause. Let us accept what the present Constitution prescribes regarding the creation of the police force, its existence and its decentralised utilisation, but let us see what is necessary centrally from the point of view of the national Commissioner. I think operational control over certain aspects of the police must be allocated to him.

I am convinced that the different groups are not so far apart that we must battle to get consensus on this particular subject.

The CHAIRPERSON OF THE CONSTITUTIONAL ASSEMBLY: Thank you, Gen Viljoen, for noting that the views expressed here are not so different from each other. Mr Sizani will be our last speaker.

Mr R K SIZANI: Mr Chairperson, when we deal with this question of control and the structuring of the Police Service, it is important to realise what police we are talking about. We must realise that the police we have now is not substantially different from the police that was there before. Some of the politicians who were in control of the police during that period are not substantially different from the ones that might still have that control over the police—especially at regional level. Although decentralisation, lower control over the Police Service and other services are good and sound good, we must realise that when we talk about a potent force like the Police Service and the Defence Force, we must know just what type of force it is that we are talking about and in whose hands we are going to leave it for control and accountability.

As the Police Service stands now, it must first be taught to respect all the people of this country as humans. It must be infused with a standard of human rights and respect for everybody. It must be infused with professionalism, which was not present before. The question is who, better than

the national Government, can do that? During this process of transition, and even beyond it for some time, we need the national Government to control and direct the Police Service to re-educate it in order to respect human rights and the people of this country.

During that process I hope that some politicians at the lower level will be learning about how to control and use the Police Service. We will then probably have less hit squads, as is the case in certain provinces, and less use of the Police Service as an instrument of rebellion.

The CHAIRPERSON OF THE CONSTITUTIONAL ASSEMBLY: Order! I think we will agree that this has been both a lively and a constructive debate on the substantive issues.

Following this debate, we are certainly bound to make further progress in the work of the Constitutional Assembly at Constitutional Committee level. The issues that have been raised here will be referred to the Constitutional Committee. In some respects I think a consensus has emerged on a number of issues. In others the differences are still stark. Hon members will have noticed that we have not sought to try to divide the House at this level of the Constitutional Assembly. We believe that there is still a great chance for us to reach agreement on the basis of a full consensus on the issues where the parties still differ.

We will be holding a further Constitutional Assembly meeting before Parliament goes into recess for the November elections. Members will be notified of the date of this meeting, at which we will be bringing forward proposals on how to move forward from having concluded the various negotiations and discussions.

We will also put forward a proposal on the publishing of a very first draft of the new constitution. This matter will first be discussed at Management Committee level, thereafter at Constitutional Committee level, and we will be bringing forward a proposal to members. We will also be reporting further on a number of other issues that the Constitutional Committee will have dealt with.

With these words, I would like to thank everyone for participating in this debate and I wish you all a good weekend. A Constitutional Committee meeting will be taking place at 14:00, so I want to remind those committee members that work will continue in the Constitutional Committee this afternoon.

Debate concluded.

The meeting adjourned at 12:30.