

2/4/21/6/11

CONSTITUTIONAL ASSEMBLY
THEME COMMITTEE 2
STRUCTURE OF GOVERNMENT

CONSTITUTIONAL AMENDMENTS
(BLOCK 7)

POLITICAL PARTY SUBMISSIONS
(As at 07 August 1995)

Political Party Submissions on Constitutional Amendments

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OFFICE OF THE SECRETARY GENERAL

Mr H Ebrahim
Director of the Constitutional Assembly
Constitutional Assembly
P.O. Box 15
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27 June 1995

RE: ANC SUBMISSIONS

Please find attached ANC submissions to Theme Committees.

Please note that these are preliminary submissions and that more substantive submissions will follow.

We hope you find the same in order

pp. *Suits*

M C Ramaphosa
Secretary General

PRELIMINARY ANC SUBMISSION

THEME COMMITTEE 2 - CONSTITUTIONAL AMENDMENT

26 June 1995

The ANC is committed to the creation and protection of a democratic constitutional state. As such we believe that careful consideration must be given to the critical issue of amendment to the constitution.

THE CONSTITUTIONAL PRINCIPLES

Constitutional Principle 15 states that:

"Amendments to the Constitution shall require special procedures involving special majorities."

THE INTERIM CONSTITUTION

Section 62 of the Interim Constitution states that:

"62(1) Subject to subsection (2) and section 74, a Bill amending this Constitution shall, for its passing by Parliament, be required to be adopted by a joint sitting of the National Assembly and the Senate by a majority of at least two thirds of the total number of members of both Houses.

(2) No amendment of sections 126 and 144 shall be of any force and effect unless passed separately by a majority of at least two-thirds of all members in each House: Provided that the boundaries and legislative competences of a province shall not be amended without the consent of the relevant provincial legislature."

Section 74 declares that the Constitutional Principles set out in Schedule 4 shall not be capable of amendment or repeal.

ANC PROPOSALS

1. The ANC is of the view that all provisions of the final constitution should be capable of amendment subject to the relevant constitutionally prescribed majorities and procedures.
2. The ANC is of the view that constitutional amendments should only be affected with the consent of a majority of at least two thirds of the total number of members in both Houses.



**National Party
Nasionale Party**

**Federal Council
Federale Raad**

28 June 1995

Mr Hassen Ebrahim
The Executive Director
Constitutional Assembly
Regis House
Adderley Street
CAPE TOWN

Dear Mr Ebrahim

Enclosed please find the National Party proposals for Theme Committee 2 regarding
Amendment of the Constitution: Entrenchment.

Kind Regards

J A J A RABIE MP

NATIONAL PARTY SUBMISSION

THEME COMMITTEE 2

AMENDMENT OF THE CONSTITUTION: ENTRENCHMENT

1. Entrenchment

Entrenchment means that limitations are placed on the repeal or amendment of a constitution - in other words, that more difficult procedures are prescribed for its amendment or repeal for ordinary laws. The purpose behind entrenchment is to confer higher status on the constitution so that, *firstly*, it becomes the norm against which all government action can be measured (see below), but, *secondly*, it shall enjoy the support of as many people in the state as possible. To a large extent, the legitimacy of the constitution therefore depends on its entrenchment.

2. Entrenchment and supremacy

The principle of the supremacy of the constitution, which has been identified as a non-contentious issue, and the entrenchment of the constitution goes hand in hand. A constitution cannot be supreme without being entrenched - in other words, if it can simply be amended or repealed by the normal procedures prescribed for ordinary laws. In order to be supreme, a constitution must enjoy higher status than other laws, and such higher status is conferred on a constitution *firstly*, by the special method chosen for its adoption (for example, by a constitutional assembly or a referendum), *secondly*, by entrenchment and *thirdly*, by investing the courts with the authority to declare invalid all government actions, including laws, that are in conflict with the constitution.

We wish to reiterate: without entrenchment constitutional supremacy becomes a fiction without any substance.

3. Methods of entrenchment

There are various ways in which a constitution can be entrenched. Of course, in order to achieve the purpose behind entrenchment, the type of entrenchment that can be circumvented or easily be complied with should not be contemplated.

Firstly, a complete prohibition may be placed on the amendment or repeal of certain provisions of the constitution. Examples are -

- (a) section 79(3) of the German constitution which prohibits the amendment or repeal of the democratic and federal nature of the state;

- (b) the French and Italian constitutions which prohibit any amendment affecting the republican form of government; and

- (c) section 74 of the transitional constitution which prohibits any amendment to the Constitutional Principles and the requirement that the Constitutional Court must certify the final constitution before it comes into operation.

Secondly, it may be prescribed that the constitution may be amended only with the consent of bodies or persons not forming part of the ordinary legislative process. Examples are the ratification of any amendment to the American constitution adopted by Congress by three-quarters of the constituent states or, in the case of Switzerland, by a majority of the voters in a referendum.

Thirdly, and most frequently, a more difficult procedure may be prescribed for Parliament when it adopts constitutional amendments. These procedures may vary from special majorities to repeated approval in order to ensure a well-considered decision. In a number of states, for example the Scandinavian states, parliament even

must dissolve after the adoption of an amendment and the newly elected parliament must confirm the amendment.

Combinations of methods may be used and in most countries various special majorities are included in the process. In most countries a two-thirds majority (in both houses sitting separately or in a joint sitting) is required, but very often a three-quarters majority, and only in a few cases a three-fifths majority, is required. (See Inter-Parliamentary Union 1 *Parliaments of the World* (1986) 518 *et seq*).

4. The transitional constitution

In terms of the transitional constitution, a combination of entrenchments are used:

- (a) As pointed out, one particular provision is absolutely entrenched (section 74(1)).
- (b) Most other provisions can be amended in a joint sitting by a two-thirds majority of all members (see section 62(1)).
- (c) Amendments to the provisions dealing with the legislative and executive powers of the provinces can be amended only by a two-thirds majority in each house sitting separately and, if a particular province is affected, the consent of that provincial legislature is required (section 62(2)).
- (d) Chapter 5 on the adoption of the final constitution may be amended only by a two-thirds majority of all the members of the Constitutional Assembly (section 74(2)).

5. Proposal

We believe that the formulae adopted in the transitional constitution should be retained in principle. We expect the constitution to contain critically important principles and guarantees which should not be susceptible to easy amendment. We believe that our diverse society requires a constitution that is strongly entrenched.

Firstly, it should be possible either to identify those fundamental principles which should not be subject to amendment at all, or, at least, to formulate a commitment to a democratic form of state and democratic mechanisms which should be entrenched absolutely. Analogous to the French and Italian constitutions, an example of the latter could be an amended section 1(1) which reads: "No amendment of this Constitution which affects the democratic form of state shall be admissible".

Secondly, the rest of the constitution should, in principle, be amended only in a joint sitting by a two-thirds majority of all members. From an international perspective, a two-thirds majority is clearly the norm and from a domestic point of view, it is the very least which will give the various communities in our diverse society the sense of security that they need in regard to the entrenchment of the constitution.

Thirdly, the present provision with regard to amendments affecting the provinces in general or a particular province, should be retained unamended. This provision is one of the most important that gives recognition to the constitutional status of the provinces and to the Senate as the representative of the provinces in the national legislative process.

Fourthly, a list of the most basic fundamentals of a democratic state should be included in a Schedule to the constitution, with the directive that the Constitutional

Court must certify as being in accordance with the Schedule any amendment to the constitution that affects these fundamentals. The Schedule should contain matters such as regular multiparty elections, the supremacy of an entrenched constitution, representative and accountable government, the separation of powers, the protection of fundamental rights, an independent judiciary, the existence of three levels of government etc.