2/2/1/3/1/6

CONSTITUTIONAL ASSEMBLY

SUB-COMMITTEE ONE

THURSDAY
3RD OCTOBER 1996

Room V16

10H00

DOCUMENTATION

TABLE OF CONTENTS

CONSTITUTIONAL ASSEMBLY

SUB-COMMITTEE ONE

NOTICE OF MEETING

Please note that a meeting of Sub-Committee One will take place as indicated below:

Date: **Thursday, 3rd October 1996**

Time: **10h00**

Venue: **Room V16**

Agenda

1 Opening and welcome

2 Issues to revisit:

- **(i) Public Service Commission**
- **(ii) Labour Relations**
- **(iii) Truth & Reconciliation**
- **(iv) Auditor General & Public Protector**

3 Any other business

4 Closure

CONSTITUTIONAL ASSEMBLY
SUB-COMMITTEE ONE

MINUTES OF MEETING HELD ON WEDNESDAY, 2ND OCTOBER, 1996 AT 09H00 IN ROOM V16

Chairperson: Myakayaka-Manzini, M

PRESENT:

Camerer, S
De Beer, S
Dexter, P
Eglin, C
Ebrahim, AG
Graaff, D
Green, L
Hofmeyer, WA
Love, J
Mulder, CP
Pandor, N
Radue, R
Selfe, J
Skosana, B

Panel

Van der Westhuizen, Prof J

1. OPENING

1.1 The meeting was opened by the Chairperson, Ms Myakayaka-Manzini at 09h15. Issues were dealt with in the following order:

2. STATES OF EMERGENCY

2.1 The Chair took the meeting through the proposed new table of non-derogable rights which had been drafted by Ms Sandy Liebenberg.

2.2 **Section 9, 10, 11, 12 & 28:** All parties agreed.

2.3 **Section 13:** All parties agreed but wanted the word [only] removed.

2.4 **Section 35:** Technical Committee asked to consider the term "non-admission" or "exclusion" of evidence rather than the "admission" of evidence.

3. LABOUR RELATIONS

3.1 It was agreed to postpone this matter as discussions were continuing at bi-lateral meetings. The issue would be revisited later in the day.

4. TRUTH & RECONCILIATION

4.1 Prof Van der Westhuizen took the meeting through the Memorandum prepared by the Panel on National Unity and Reconciliation Provisions. Of the 3 possible formulations provided, he motivated very strongly for the adoption of Option 3.

In the Panel's opinion Option 3 would make it clear that the contents of the Interim Constitution epilogue would become part of the new text only for the purposes of the Truth and Reconciliation process, regulated by the relevant Act, which would thus prevent any unforseen and unintended consequences.

4.2 The NP called for the removal of the words "of the validity" in Option 3 as they felt that the Act would be immunised from constitutional review.

4.3 The ANC disagreed with the sentiments expressed by the NP and it was therefore agreed to refer this matter to the Panel for their further consideration and opinion.

5. AUDITOR GENERAL & PUBLIC PROTECTOR

5.1 The ANC reported that discussions on these issues were taking place at a higher level and that they would be reporting back later in the day.

5.2 The IFP needed more time for bi-lateral meetings on this issue and would report back later.

6. PUBLIC SERVICE COMMISSION

6.1 It was agreed to continue discussions in the afternoon.

6.2 A written submission was received from the IFP.

7. ADJOURNMENT

The meeting adjourned at 10h25 and agreed to reconvene at 15h00.

8. **RECONVENE**

The meeting reconvened at 15h10 and dealt with issues as follows:

9. **STATES OF EMERGENCY**

9.1 All parties agreed to the final draft formulation of section 35(5) which reads as follows:

"(5) with respect to the exclusion of evidence if the admission of that evidence would render the trial unfair."

9.2 The IFP handed in a written submission which would be forwarded to the Management Committee for their consideration.

10. **ADJOURNMENT**

The meeting adjourned at 15h20 and agreed to reconvene at 16h00.

11. **RECONVENE**

The sub-committee reconvened a third time and continued with the following issues:

12. **PUBLIC SERVICE COMMISSION**

12.1 Prof Van der Westhuizen took the meeting through a memorandum prepared by the Panel on clause 196 and a part of 197 in accordance with instructions and proposals which emanated from bi-lateral discussions. A Third Draft 2 October 1996 was attached as Annexure A.

Many questions and points for clarification were raised which prompted much debate around many of the issues.

12.2 It was agreed that the meeting would adjourn to afford parties the time to study the Panels comments.

13. **ADJOURN**

The sub-committee adjourned at 17h25 and agreed to meet again at 19h00.

14 **RECONVENE**

The sub-committee resumed discussions at 19h35. The Chairperson offered apologies from the IFP and ACDP.

15. PUBLIC SERVICE COMMISSION: ANNEXURE A - THIRD DRAFT 2/10/96

The IFP handed in a written submission which would be forwarded to the Management Committee.

Discussion on Annexure A proceeded as follows:

i) **S 196 (1):** All parties agreed.

ii) **S 196 (2):** Brackets were removed and all parties agreed.

iii) **S 196 (3):** It was agreed to insert the words "through legislative and other measures" after the words "organs of state". All parties agreed.

iv) **S 196 (4) (a):** The ANC questioned the necessity of the words "as head of the National Executive" and suggested a fullstop after the words National Assembly., and to follow: "One of the commissioners must be designated ...etc.

The National Party preferred the wording of the earlier draft and were asked to prepare a formulation and submit in writing.

v) **S 196 (4) (b):** NP asked to submit their preferred formulation in writing.

vi) **S 196 (4) (c):** There was eventual agreement on the word "may" instead of "must".

The ANC felt that this clause was wrongly located and the Panel were asked to insert it at a more appropriate place.

vii) **S 196 (4) (d) (e) (f):** All parties agreed.

viii) **S 196 (5):** NP were asked to draft their formulation and submit in writing.

ix) **S 196 (60 & (7):** The ANC asked for the inclusion of the words "and functions, findings and advice" after the word "activities". The Panel would refine this clause accordingly in line with other sections of the constitution.

x) **S 196 (8):** Agreed, with the inclusion of the words "and efficient" after "effective".

xi) **S 196 (9):** It was agreed that a representative from each party would meet with the Panel to discuss their concerns around the issue of norms and standards. Based on their discussions, the Panel would prepare a new formulation.

xii) **S 197 (4):** All parties agreed.

16. ADJOURN

The meeting adjourned at 20h45 and agreed to meet again after the Channel meeting.

PANEL OF CONSTITUTIONAL EXPERTS

MEMORANDUM

To: **Chairpersons & Executive Director**

Date: **1 October 1996**

Re: **National Unity and Reconciliation Provisions**

---

1. THE TEXT AND THE JUDGMENT

1.1 At the meetings of the sub-committee on 25, 26 and 27 September 1996 experts were requested to again look at the proposed wording of Item 22, Schedule 6. Schedule 6 of the New Constitutional Text (NT) deals with transitional arrangements. Under the heading "National unity and reconciliation", Item 22 states:

"22. (1) Notwithstanding any other provisions of the new Constitution and despite the repeal of the previous Constitution-

(a) all the provisions relating to amnesty contained in the previous Constitution under the heading "National Unity and Reconciliation" are deemed to be part of the new Constitution; and

(b) the provisions of the Promotion of the National Unity and Reconciliation Act, 1995 (Act 34 of 1995), as amended by the Promotion of National Unity and Reconciliation Amendment Act, 1995 (Act 87 of 1995), are valid.

(2) Subitem (1)(b) does not prevent any further amendments to the Promotion of the National Unity and Reconciliation Act, 1995."

1.2 The relevant part of the Interim Constitution (IC) occurs at the end of Chapter 15, before Schedule 7, and reads:

"This Constitution provides a historic bridge between the past of a deeply divided society characterised by strife, conflict, untold suffering and injustice, and a future founded on the recognition of human rights,

democracy and peaceful co-existence and development opportunities for all South Africans, irrespective of colour, race, class, belief or sex.

The pursuit of national unity, the well-being of all South African citizens and peace require reconciliation between the people of South African and the reconstruction of society.

The adoption of this Constitution lays the secure foundation for the people of South Africa to transcend the divisions and strife of the past, which generated gross violations of human rights, the transgression of humanitarian principles in violent conflicts and a legacy of hatred, fear, guilt and revenge. These can now be addressed on the basis that there is a need for understanding but not for vengeance, a need for reparation but not for retaliation, a need for ubuntu but not for victimisation.

In order to advance such reconciliation and reconstruction, amnesty shall be granted in respect of acts, omissions and offenses associated with political objectives and committed in the course of the conflicts of the past. To this end, Parliament under this Constitution shall adopt a law determining a firm cut-off date, which shall be a date after 8 October 1990 and before 6 December 1993, and providing for the mechanisms, criteria and procedures, including tribunals, if any, through which such amnesty shall be dealt with at any time after the law has been passed.

With this Constitution and these commitments we, the people of South Africa, open a new chapter in the history of our country.

Nkosi sikelel' iAfrika. God seën Suid-Afrika

Morena boloka sechaba sa heso. May God bless our country

Mudzimu fhatutshedza Afrika. Hosi Katekisa Afrika

[See also sec 232(4)]" (The reference to sec 232(4) seems to make little sense.)

1.3 In its certification judgment the Constitutional Court ruled that 22(1)(b) does not comply with CP's II, IV and VII, read together, because it seeks to exempt a statute (the promotion of National Unity and Reconciliation Act 34 of 1995) from constitutional review. The reasoning applicable to Item 241 of Schedule 6 also applies here, according to the judgment. The Court ruled

that 22(1)(a) is not in breach of the CP's. It adds the text of the "epilogue" of the IC to the final Constitution. As such, this provision is part of the NT and subject to constitutional amendments in the ordinary course. The epilogue could not have been argued to be in breach of the CP's.

1.4 The proposed solutions in the draft formulations put forward by the technical experts convened by the Executive Director of the CA envisage the retention of 22(1)(a), but the deletion of 22(1)(b) and, consequently, 22(2).

2. POSSIBLE PROBLEMS

Possible problematic questions which could arise include the following:

2.1 The entire "epilogue" or "post-amble" is carried over into the NT. Where exactly does the epilogue of the IC fit into the NT if it is deemed to be part of the NT? Can it be assumed that it fits in only under Item 22 of Schedule 6, or could it be argued that it is an epilogue to the NT? Furthermore, are the contents of the epilogue only relevant to the specific Act and Truth Commission, or also in a wider context, eg with regard to the interpretation of other provisions of the NT? The epilogue eg also includes phrases such as "a historic bridge between the past ... and a future" and states that the pursuit of national unity and the well being of South African citizens "require reconciliation between the people of South Africa..." It also mentions the need for "reconstruction." If the meaning of the epilogue is not restricted to the Truth and Reconciliation Act and its process, it could arguably have unforseen consequences eg for the later interpretation of various clauses of the Constitution, which were not agreed on or drafted with such an epilogue in mind.

2.2 For how long must it be deemed to be part of the NT - only for as long as the relevant Act and Commission is in operation, or also thereafter? Could its possible wider implications and influence on other clauses of the Constitution depend on the duration of the Truth and Reconciliation Commission process?

3. CUT-OFF DATE

Some concern was expressed as to the cut-off date for amnesty. The entire epilogue of the IC is deemed to be part of the NT. This includes details such as the dates. The date is thus part of the NT.

4. PROPOSALS

4.1 Schedule 6 deals with the arrangements necessary for the transition from the IC to the NT. The Promotion of National Unity and Reconciliation Act was passed as a direct consequence and in terms of the IC. Its constitutionality should be tested in terms of the IC, as has already happened with regard to one or more aspects, in the AZAPO-case. The idea behind Item 22 was simply to ensure that if the Act, or parts of it, cannot be challenged under the NT and perhaps found to be unconstitutional in view of the absence of constitutional provisions for unity, reconciliation amnesty etc, whereas it was drafted and passed to comply with the IC. (The insertion of 22(1)(b) went unnecessarily far and would mean that the Act was valid, even if found to be invalid in terms of the IC by the Constitutional Court. Therefore the Court declined to certify.)

4.2 One possible way to achieve the above aim, was to make the relevant IC provisions part of the NT. Another is the earlier formulation put forward by the technical drafter(s) of Schedule 6, which was more or less the following: "The... Act...is valid to the extent that it is consistent with the Interim Constitution."

5. POSSIBLE FORMULATIONS

Option 1

The present proposal, namely Item 22(1)(a) of Schedule 6, renumbered as 22.

Option 2

"The ...Act... is valid to the extent that it is consistent with the Interim Constitution."

Option 3

"For the purpose of the validity of the Promotion of the National Unity and Reconciliation Act... all the provisions of the previous Constitution under the heading "National Unity and Reconciliation" are deemed to be part of the new Constitution, notwithstanding any other provision of the new Constitution and despite the repeal of the previous Constitution..."
(perhaps subject to further technical refinement).

6. CLOSING REMARK

Option 3 is recommended. It would make it clear that the contents of the IC epilogue become part of the NT only for purposes of the Truth and Reconciliation process, regulated by the relevant Act, and would thus prevent any unforseen and unintended consequences. It provides more clarity than Option 1. It is closer to the formulation already scrutinized and approved by the Court, than Option 2.

Limitation of rights

36. (1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors including-

(a) the nature of the right;

(b) the importance of the purpose of the limitation;

(c) the nature and extent of the limitation;

(d) the relation between the limitation and its purpose; and

(e) less restrictive means to achieve the purpose.

(2) Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights.

States of emergency

37. (1) A state of emergency may be declared only in terms of an Act of Parliament and only when -

(a) the life of the nation is threatened by war, invasion, general insurrection, disorder, natural disaster, or other public emergency; and

(b) the declaration is necessary to restore peace and order.

(2) A declaration of a state of emergency, and any legislation enacted or other action taken in consequence of that declaration, may be effective only -

(a) prospectively from the date of the declaration; and

Table of Non-Derogable Rights

Section Number	Section Title	Extent to which the right is non-derogable
9	Equality	With respect to unfair discrimination solely on the grounds of race, colour, ethnic or social origin, sex, religion or language.
10	Human dignity	Entirely
11	Life	Entirely
12	Freedom and security of the person	With respect to subsections (1)(d) and (e) and (2)(c) [only].
13	Slavery, servitude and forced labour	With respect to slavery and servitude [only].
28	Children	With respect to subsection (1)(d) and (1)(e). The rights in subparagraphs [(1)(g)](i) and (ii) of subsection (1)(g); and subsection (1)(i) in respect of children of 15 years and younger.
35	Arrested, detained and accused persons	With respect to: [the following] Subsections [only] (1)(a), (b) and (c); (2)(d); The rights in sub-paragraphs (a) to (o) of subsection (3), excluding (d); Subsection (4); and subsection (5) with respect to the exclusion of evidence if the admission of that evidence would render the trial unfair.

PANEL OF CONSTITUTIONAL EXPERTS

PRELIMINARY MEMORANDUM

To: **Chairpersons and Executive Director**

Date: **2 October 1996**

Re: **Public Service Commission**

---

1. INTRODUCTION

1.1 At the sub-committee meeting on 1 October 1996 the Panel was requested to redraft clause 196 and a part of 197, in accordance with instructions and proposals emanating from the earlier bi-lateral and the discussion at the meeting. The draft (Third Draft 2 October 1996) is attached to this memorandum (as Annexure A). (Some preliminary refinement has taken place, but the draft has to be refined further, probably on Thursday, 3 October 1996).

1.2 The Panel was also requested to provide an opinion on-

1.2.1 The effect of the requirement of the approval of the National Assembly of appointments (clause (4)(a));

1.2.2 The words may/must in the proposed clause (4)(c);

1.2.3 The question regarding the specification of the involvement of a Committee of the National Assembly in the removal process (clause (5)); and

1.3 Furthermore the Panel was requested to provide an opinion as to whether the redrafted clauses concerning the Public Service Commission (PSC) are likely to be certified by the Constitutional Court as complying with the relevant Constitutional Principles (CPs), in view of the statements concerning the PSC and the Court's judgment. This enquiry involves three questions:

1.3.1 Are the powers and functions of the PSC set out in sufficient detail? (CPs XX1X and XXX.1);

1.3.2 Has the Court's concern about the impact of the PSC's powers and

functions on the question whether the powers and functions of provinces are substantially less or inferior to those provided for in the Interim Constitution (IC) been addressed sufficiently? (CP XV111.2);

1.3.3 Are the independence and impartiality of the PSC sufficiently provided for and safeguarded? (CP XX1X).

2. GENERAL OBSERVATION

The relevant CPs provide relatively little detail regarding eg the role, powers and functions and the independence and impartiality of the PSC. Therefore the Court's judgment and other provisions of the New Text have to be analyzed. In the judgment the PSC is dealt with in a number of places. The court pointed out certain issues, but did not provide concrete solutions, proposals or guidelines. The Court's reasoning has to be deduced from various statements and its references to eg the IC and other Constitutions. These are to some extent open to different interpretations. Therefore it is not possible to predict with absolute certainty whether or not newly formulated provisions will satisfy the Court's thinking, which will also be influenced by the arguments presented before the Court during the proceedings.

2. "APPROVAL OF THE NA"

2.1 Does clause 196(4)(a) of the draft concerning the appointment of five Commissioners <u>with the approval</u> of the NA suffice, especially as far as clarity and consistency are concerned? (The issue of appointment as such is discussed below, within the context of independence and impartiality.)

2.2 The role of the President and the NA in the appointment process must be sufficiently clear to avoid potential future uncertainty, confusion and conflict, but unnecessary detail should not be provided in a Constitution and some degree of flexibility is desirable. Details could also be provided in legislation.

2.3 The appointment of judicial officers is stipulated in considerable detail in clauses 174, 175 and 178. Some measure of detail regarding appointments in terms of Chapter 9 is provided in Clause 193(4)-(6). With regard to the military and the police the NA is not involved (Clauses 202(1), 207(1) & (3). There are obvious differences though between the PSC and these institutions.

2.4 The wording of (4)(a) need not be problematic. Legislation could spell out further details as to this process. If there is a desire to add detail, this could of course be considered. However, the word after in 4(b) catches the eye, *inter alia* because it differs from (4) (a) and because it could be confusing. It is not entirely clear whether the Premier nominates before or after approval. There is nothing necessarily wrong with a difference in the procedures regarding the national and provincial spheres. However, the replacement of after with with in 2(b) will lead to more clarity.

3. MAY/MUST

The difference between may and must does not seem to be very important from the perspective of the judgment. We understand this clause to mean that the PSC as a whole, or a specific member of the PSC, may perform the powers and functions of the PSC in a specific province, eg that a specific member of the PSC may be designed to act on behalf of the PSC in a province. If this is the intention, may is preferable.

4. NA / COMMITTEE OF NA

4.1 There is some disagreement as to whether removal of Commissioners may take place "after a finding to that effect by the NA" or whether it is necessary to specify a committee of the NA. The question asked included:

- Would references to committees elsewhere in the text imply that only

the full NA has to be involved here or could the NA, in terms of its rules and orders, function through a committee?

- What is the relevant majority?

- Do parties have to be proportionately represented in such a committee?

4.2 Relevant clauses of the text include 52(4), 53, 57(2)(a)&(b), 177, 193(4)&(5) and especially 194(1).

4.3 The involvement of committees in appointments and removals is specified eg. in 193(4) and (5) and 194(1) where the procedure is described in some detail. In the case of judges the JSC makes a finding, whereafter the NA calls for the removal by a resolution adopted by at least two thirds of its members, whereafter the President must remove the judge. In terms of clause 194 a committee makes the finding, whereafter the NA adopts a resolution. The President must then remove the person.

4.4 As stated in a previous Panel memo, the judgement does not require that the process for removal of Commissioners be identical with other institutions. However, the issue of consistency and the effects of a lack thereof on interpretation of the text, is a separate one. If the committees are mentioned elsewhere, but only the NA here, it may be interpreted to mean that a committee does not have to be involved here. In terms of clause 57 the NA could utilise a committee in the process, of course. (Also see Clause 116 with regard to provinces). In practice the NA and provincial legislature will necessarily have to set up some mechanism to effectively investigate the issue and make a "finding", because the finding is justiciable.

4.5 If a committee is involved, 57(2)(b) would be relevant. The rules and orders

of the NA must provide for the participation of all minority parties represented in the NA "in a manner consistent with democracy". This phrase implies a measure of proportionality but does not mean that even the smallest party, or all parties, have to be represented in every committee.

4.6 Furthermore, in comparison with the provisions regarding removal, the present formulation does not state explicitly who does the removal. In the other cases the President takes the final step. It is recommended that this aspect be added. (The active voice is also better drafting than the passive.)

4.7 The current formulation means that in the NA a simple majority of the members present is required. The quorum requirement (53) would apply.

4.8 Whether or not to stipulate more clearly that a committee must make the finding, whereafter the NA adopts a resolution, by a majority of the members present, or of all members, is a political decision. However, the degree of clarity and precision, *inter alia*, may have some effect on the Court's final finding regarding the independence and impartiality of the PSC. The involvement of a committee may be seen to imply more thorough deliberation and could therefore enhance the prospects of certification (See however, 5 below).

5. CERTIFIABILITY

5.1 Are the powers and functions of the PSC set out in sufficient detail?

5.1.1 Neither the CP nor the Court explicitly stated what powers and functions the PSC should have. It was also not the task of the Court to provide such a description. The Court raised the issue of the powers and functions within the context of the independence of the PSC. The stronger and more sensitive the role of the PSC is, the more stringent the protection of independence has to be. On the

other hand, if the powers and functions are too weak, the Court could find that the PSC is not a true PSC, in view of its analysis of what a PSC actually is. From some paragraphs in the judgment deductions can be made, of course.

5.1.2 The Court ruled that in order to determine whether the requirements with respect to independence and impartiality have been met, the "functions and powers of each institution [including the PSC] need to be understood." (Para 160).

5.1.3 In paragraph 173 the Court states:

> "NT 196 makes provision for a PSC. It states what its purpose will be, but it does not indicate what functions it will perform or what its powers will be. This can be contrasted with IC 210, which provides a framework for the powers and functions of the PSC, and IC 213, which does the same for provincial service commissions."

5.1.4 The sufficiency of the PSC powers determines whether the central requirement of CP XXIX has been met:

> "Implicit in the insistence upon independence and impartiality is that the PSC will constitute a check upon political executive power in the administration of the public service. Without knowing what the functions and powers of the PSC will be and what protection it will have in order to ensure that it is able to discharge its constitutional duties independently and impartially, we are unable to certify that this requirement has been complied with." (Para 176).

5.1.5 The Court does not expressly employ the provisions of the IC as a yardstick in order to answer the question relating to the sufficiency of the powers of the PSC. It does however analyse IC 210 in some detail. (See Para 174). This factor may be taken into account when listing the PSC's powers now. The Court also analysed PSCs in a number of other countries.

5.1.6 A key paragraph in the Judgment is Para 278, which mentions advisory, investigatory and reporting powers.

5.1.7 Subclauses (6), (7), (8), and (9) of the draft mentions reporting, the promotion of the values and principles of public administrations, maintaining and evaluating, proposing measures, investigation, investigation and evaluation, dealing with complaints and grievances, and the rendering of advice.

5.1.8 It is recommended that the reporting function be strengthened to oblige the PSC to report on more than activities (which could mean meaningless reports on their meetings etc.) The PSC should at least also report on its functions. The reports must be made public, although this may be implied by the fact that reports have to be made to the NA and legislatures.

5.1.9 Par 276 of the Court's Judgment seems to emphasise the setting of norms and standards. This is also important in view of the concern regarding provincial powers and CP XVIII.2. The Court ruled that the setting of norms and standards by an independent body does not detract from the legitimate autonomy of

provinces, provided that the provinces are able to employ their own public servants. The question which arises is if the PSC as an independent body does not have the power to set norms and standards, whether the national government has the power to do so through national legislation. This may be seen to reduce the autonomy of provinces. The Court implies that the setting of norms and standars by a body or institution other than an independent body would affect the autonomy of provinces. It is recommended that the setting of norms and standards regarding recruitment, appointment, promotion and dismissal and the organisation and administration of the public service be added.

5.1.10 Perhaps the powers and functions subclause could be reorganised for purposes of logic. (A new proposed draft by Panel member Yacoob is attached as Annexure B).

5.2 Independence and Impartiality

5.2.1 The Court ruled, *inter alia*, that it was implicit in the CPs insistence upon independence and impartiality that the PSC will constitute a check upon political executive power in the administration of the public service, (Par 176). (This requirement is dealt with above under powers and functions).

5.2.2 The question what the powers and functions of the PSC will be has an influence on the issue of independence and impartiality.

5.2.3 Factors that may be relevant to independence and impartiality depending on the nature of the institution concerned, include appointment, tenure and removal, as well as constitutional independence. These factors, considered together, must endure independence and impartiality (par 160).

5.2.4 In Paragraph 176 of the Judgement, the Court points out that certification also depends on the "protection' the PSC will have in order to ensure that it is able to discharge its constitutional duties independently and impartially. This requirement refers to the PSC as an institution composed of members appointed in a certain manner and being sufficiently secure in that position. It should not be possible to remove them as long as they perform their functions in the manner the Constitution requires.

5.2.4 <u>Appointments</u>

The President appoints five Commissioners with the approval of the NA. The President appoints a Commissioner for each province, nominated by the Premier, with or after the approval of the provincial legislature.

In view of the Courts statement (par 176) that the PSC will constitute a check upon political executive power in the administration of the public service, the role of the President and the Premier may give rise to some concern. However, the legislatures also play a prominent and determining role. Appointments also

have to be viewed in balance with removal procedures. Furthermore, only persons who qualify in terms of (4)(f) may be appointed. Appointments are justiciable and the appointment of unqualified persons will be invalidated. In terms of 175(3) the President, as head of the national executive, appoints the President of the Constitutional Court and the Chief Justice, after consultation with the JSC.

5.2.5 Tenure

Clause 196(4)(e) of the draft seems to sufficiently deal with tenure. Commissioners are appointed for no more than two terms of five year. This aspect contributes significantly to independence.

5.2.6 Removal

Commissioners may be removed only on certain grounds and only after a finding by the NA or a provincial legislature. The remarks under 4 above are also relevant here.

The executive cannot remove commissioners without a finding by the legislature and the decision is justiciable. Any removal on grounds other than those specified will be invalid.

There is some concern about the fact that different bodies make the finding with regard to the commissioners appointed in terms of (4)(a) and (b), because different interpretations of the grounds may render some commissioners to be in a weaker position than others. A uniform procedure may contribute to the above-mentioned protection aspect.

5.2.7 Institutional Independence

Sub-clauses 196(2) and (3) deal with independence and impartiality and closely resembles eg. 165(2)-(4) (on courts) 179(4) (on the prosecuting authority) and 181(2)-(4) (on institutions). The question was asked where the reference to fear, favour or prejudice is necessary. This phrase occurs in all three of the above instances. Its inclusion may not be strictly speaking necessary, but could strengthen the overall impression of independence and impartiality of the PSC and thus contribute to certifiability, because it would avoid the argument that leaving it out is intented to indicate something particularly significant.

5.2.8 Other Factors

Other factors to be taken into account regarding independence and impartiality are the size and composition of the PSC (which renders it less likely to be intimidated than a single person) and the public attention the reporting is bound to arract.

5.3 Provincial autonomy and CP XVIII.2

5.3.1 The clear stipulation that provincial governments are responsible for the appointment, promotion, transfer and dismissal of members of the public service in their administration in 197(4) should more than adequately meet the Court's concern in paras 276 and 278.

5.3.2 As explained above, the setting of norms and standards by the PSC as one independent body avoids the possible interference that such norms and

standards could be set by another body which may be seen to detract from the autonomy of provinces. (See para 276).

5.3.3 The allocation of more powers and functions to the PSC could run the risk of detracting from the authority of provinces, in view of the Court's statement in par 278: "If the PSC has advisory, investigatory and reporting powers ... the changes will neither infringe upon their autonomy, nor reduce their powers.

5.3.4 If these considerations are taken into account, the CP XVIII.2 aspect should not be problematic.

(4) The powers and functions of the Commission are to -

(a) promote the values and principles set out in s195 throughout the public service;

(b) investigate, monitor and evaluate the organisation, administration and personnel procedures of the public service;

(c) propose measures to ensure effective and efficient performance within the public service;

(d) give directions aimed at ensuring that personnel procedures including recruitment, transfers, promotions and dismissals comply with the values and principles contained in s195;

(e) report in respect of its activities, functions -including its findings, directions and advice, and an evaluation of the extent to which the values and principles in s195 have been complied with;

(f) either of its own accord or on receipt of any complaint -

(i) investigate and evaluate the application of personnel and public administration practices and procedures and report to the relevant executive authority and appropriate legislature;

(ii) investigate grievances of public service employees concerning official acts or omissions and recommend the appropriate remedy;

(iii) monitor and investigate adherence to applicable procedures in the public service;

(iv) advise national and provincial organs of state regarding personnel practices in the public service, including recruitment, appointment, transfers, discharge and other career incidents of employees in the public service;

(5) The Commission has other powers and functions prescribed by national legislation.

(6) The Commission must report at least once a year in terms of 4(e) -
(i) to the National Assembly; and
(ii) to each of the provinces in respect of its activites in that province

197(4) Subject to the procedures agreed to in the collective agreement of the public service, provincial governments are responsible for the appointment, promotion, transfer and dismissal of members of the public service in their administrations.

NEW SEQUENCE

196 (1) single (same text)
(2) indep & impartial (same)
(3) organs of state assist (same)
(4) powers and functions (new)
(5) other powers through law (new)
(6) reporting (new)
(7) appointment (new)
(8) removal (new)
(9) commissioners in the provinces (same)

(b) The President must appoint a commissioner for each province nominated by the Premier of that province. The Premier must nominate a person approved by the majority of members of the respective provincial legislature on the recommendation of a committee of that legislature proportionately composed of all parties represented in that legislature.

(c) an Act of Parliament must regulate the procedure of all 14 appointments;

(d) commissioners must be appointed for a term of five years, which is renewable for one additional term;

(e) a person is qualified to be appointed to the Commission if he or she,

(i) is a South African Citizen

(ii) is a fit and proper person who has knowledge or experience of rendering public services, administration or management.

(9) A member of the Commission may be removed from office only -

(a) on the grounds of misconduct, incapacity or incompetence; and

(b) after a finding to that effect -

(i) in the case of a commissioner appointed in terms of subsection (8)(a), by the majority of members of the National Assembly on the recommendation of a committee of the Assembly proportionately composed of all parties represented in the Assembly;

(ii) in the case of a commissioner appointed in terms of subsection (8)(b), by a majority of members of the respective provincial legislature on the recommendation of a committee of that legislature proportionately composed of all parties represented in that legislature.

(10) Members of the Commission appointed in terms of subsection 8(b) may exercise the powers and perform the functions of the Commission in the provinces as prescribed by national legislation.

197(4) Provincial government are responsible for the appointment, promotion, transfer and dismissal of members of the public service in their administrations.

ANNEXURE A

PUBLIC SERVICE COMMISSION
Third draft - 2 October 1996
(subject to further refinement)

196 (1) There is a single Public Service Commission for the Republic.

(2) The Commission is independent and must be impartial and must exercise its powers and perform its functions without fear, favour or prejudice and regulated by national legislation in the interests of the maintenance of effective and efficient public administration and a high standard of professional ethics in the public service.

(3) Other organs of state must assist and protect the Commission to ensure the independence, impartiality, dignity and effectiveness of the Commission. No person or organ of state may interfere with the functioning of the Commission.

(4) (a) The President as head of the national executive must appoint five commissioners with the approval of the National Assembly, one of whom must be designated by the President as Chairperson of the Commission.[1]

(b) The President as head of the national executive must appoint a commissioner for each province nominated by the Premier of that province after approval by the respective provincial legislatures.

(c) Members of the Commission referred to in (b) ~~(may/must)~~ exercise the powers and perform the functions of the Commission in the provinces as prescribed by national legislation.

(d) An Act of Parliament must regulate the procedure of all 14 appointments.

(e) Commissioners must be appointed for a term of five years, which is renewable for one additional term.

(f) A person is qualified to be appointed to the Commission if he or she,

(i) is a South African citizen;

(ii) is a fit and proper person who has knowledge or experience of rendering public services, administration or management.

(5) A member of the Commission may be removed from office only -
(a) on the grounds of misconduct, incapacity or incompetence;

(b) after a finding to that effect by the National Assembly in the case of section 3 (a), or the provincial legislature in respect of members recommended by it in terms of 4 (b) in accordance with national legislation.

(6) The Commission is accountable and must report on its activities to the National Assembly at least once a year.

(7) The Commission must report to each of the provincial legislatures on the activities of the Commission in that province at least once a year.

(8) The Commission must -

(a) promote the values and principles of public administration in the public service, as set out in section 195.

(b) monitor and evaluate the organisation, administration and personnel procedures of the public service; and

(c) propose measures to ensure effective performance within the public service.

(9) The Commission may of its own accord or at the request of the executing authority, including a provincial executing authority -

(a) investigate the application of personnel and public administration practices and procedures;

(b) investigate and evaluate any matter relating to the application of the basic values and principles of public administration in the public service;

(c) deal with complaints and grievances of public service employees concerning official acts or omissions;

(d) render advice to the executing authorities regarding personnel practices in the public service, including recruitment, appointments, promotions, transfers, discharge and other career incidents of employees in the public service;

(e) render advice to executing authorities in the determination of norms and standards applicable to the public service.

197 (4) Subject to national norms and standards governing employment in the public service, provincial governments are responsible for the appointment, promotion, transfer and dismissal of members of the public service in their administrations.

[1] The NP reserves its position on a number of aspects in clause 196.

"Democracy means freedom to choose"

INKATHA

Inkatha Freedom Party
IQembu leNkatha Yenkululeko

AMENDMENTS TO THE PUBLIC SERVICE COMMISSION PRESENTED TO THE CONSTITUTIONAL ASSEMBLY SUB-COMMITTEE (1) ON WEDNESDAY, OCTOBER 2, 1996

Clause 196 [CC]
Substitute the word "single" with "national", delete the words "of the Republic" and add the word "national" before the words "public service" in subclause (1).

Substitute subclause (3) with the following:

> "A law of a province may establish a provincial Public Service Commission dealing with the public servants employed by that province."

Delete subclause (4).

Clause 197 [CC?]
Add the words "or provincial" after the word "national" where such latter word occur in subclause (1) and (2), and delete the words "for the Republic" in subclause (1).

Clause 37 - STATE OF EMERGENCY

Add the words "adopted by two-thirds majority of the members present" after the word "Parliament" in subclause (1).

Add the following item to subclause (5) as item (c) with consequent renumbering:
"(c) the denial of the essential core of the right concerned,"

In the table of non-derogable rights, add a reference to

- section 9 to include the grounds of birth, colour, ethnic or social origins, religion, belief or language
- section 28 (1)(i)
- section 35(3) and (5)

Note : These amendments increase the majority necessary to declare the Emergency, with the mitigative measure of referring only to the members present. They also limit degogability, employing the well known notion of "essential core", and correct the flaws of the table thus far identified, especially with respect to applicable international law.

Schedule 6 - TRC

Delete item 22.(1)(b) and (2)

Note : The concern of the CC was about the entrenchment of a law, which limits the supremacy of the Constitution. The deletion of the item concerned eliminates this problem, without affecting the entrenchment of the notion of amnesty for political crimes which is covered by section (1)(a). In this respect, the end result is identical to the position expressed in the interim Constitution.