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**To: Members of the Constitutional Committee**  
**From: Hassen Ebrahim**  
**Date: 25 March 1996**  
**Re: Agenda and Documentation**

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Please note that the agenda for the Constitutional Committee scheduled for today 25 March 1996 at 10h00 - 18h00 in the Old Assembly Chamber is set out below.

***Members will have received their copy of the 4th Edition of the Refined Working Draft on Wednesday 20 March 1996. We apologise for any inconvenience due to the fact that the agenda and the documentation contained in this pack are only available on the day of the meeting.***

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### DRAFT AGENDA

1. Welcome and Opening
2. Minutes of meeting on 9 and 10 November 1995: see pp 2 - 37
3. Proposals on Process - Memorandum: see pp 39 - 46
  - 3.1 Schedule: see pp 39 and 62 - 64
  - 3.2 Amendment of Constitution: see pp 41 and 47
  - 3.3 Final Text: see pp 41 - 42
  - 3.4 Adoption Procedure: see pp 42 - 44
  - 3.5 Certification: see pp 45
4. Consideration of 4th Edition of Working Draft : see separate documents
5. Constitutional Assembly of 29 March 1996: see pp 41
6. A.O.B
7. Closure

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*For further details please contact Ms MM Sparg Tel: 021 245 031*

# CONSTITUTIONAL ASSEMBLY

## (DRAFT) MINUTES OF THE THIRTY SECOND (32ND) MEETING OF THE CONSTITUTIONAL COMMITTEE

THURSDAY AND FRIDAY, 9 AND 10 NOVEMBER 1995

### Present

Ramaphosa MC (Chairperson)  
Wessels L (Deputy Chairperson)

Ackermann, C  
Alant, T G  
Bhabha, M  
Chabane, O C  
De Beer, S J (Alt)  
De Lange, J H  
Du Toit, D C  
Ebrahim, H (Advisor)  
Eglin, C W  
Fourie, A  
Gibson, D H M (Advisor)  
Gogotya, N J  
Gordhan, P J  
Hofmeyr, W A  
Kgoali, J L  
King, T J  
Ligege, M G  
Lockey, D  
Mabandla, B S  
Mahlangu, M J  
Mahlangu, N J  
Majola-Pikoli, N T (Alt)  
Makhanya, D W  
Malatsi, D M (Alt)  
Malan, T J (Alt)  
Marais, P G

Maree, J W (Alt)  
Mbetse-Kgositsile, B  
Meyer, R P  
Moosa, M V  
Moosa, M W (Alt)  
Mulder, C P  
Myakayaka-Manzini, Y M  
Nzimande, B E  
Pahad, E G  
Pandor, G N M  
Pretorius, I J (Alt)  
Rabie, J A  
Radue, R J (Advisor)  
Ranchod, B G (Advisor)  
Ripinga, S  
Schutte, D P A  
Serote, W M (Alt)  
Sifora, T V  
Sizani, R K  
Smuts, D (Alt)  
Surty, M E (Alt)  
Van Breda, A  
Van Deventer, F J (Alt)  
Van Heerden, F J (Alt)  
Viljoen, C L

**Apologies:** K Andrew; K Asmal; L Green; K Meshoe and Z Skweyiya.

**Absent:** G Fraser-Moleketi; F Ginwala; S Holomisa; J Love; L Mtshali; S Mzimela; B Ngcuka; B Nzimande; R Rabinowitz; and P Smith.

**In attendance: Directorate:** H Ebrahim, M Sparg, L Zondo; **Minutes:** M Keegan, S Rabinowitz and T Smit; **Technical Refinement Task Team:** G Grove, M Ndziba, N Msizi and N Cetywayo (Law Advisors); D Powell (Research); C Murray, Jan Van Der Westhuisen, Z Yacoob, P Sedibe-Ncholo, J Kruger and I Semenya (Panel); N Nyoka, N Taft and J Tsalamandris (Secretariat).

### 1. OPENING

- 1.1 The Chairperson opened the meeting at 09h20 on Thursday 9 November 1995.
- 1.2 The meeting adopted the Agenda, but agreed that the "*Bill of Rights*" would be held over until Friday 10 November.
- 1.3 The chairpersons said that the purpose of the meeting was to finalise the "*Refined*

*Working Draft (Second Edition)*" for the purpose of publication. There were areas where options might still be needed. The publication produced would be a working draft, and the public would need to be informed that it was work in progress. The number of options set out in the document would need to be minimised, and the document would not indicate which options were supported by specific parties.

## 2. MINUTES

The meeting noted the Minutes of the 30th Meeting of the Constitutional Committee on Thursday 19 October 1995 and the 31st Meeting of the Constitutional Committee on Friday 20 October 1995. It was agreed that corrections to the Minutes would be dealt with as and when the committee discussed the relevant sections of the *"Refined Working Draft"*.

## 3. CHAPTER 1: FOUNDING PROVISIONS

3.1 The Chairperson introduced *"Chapter 1, Founding Provisions,"* included in the *"Refined Working Draft (Second Revision)."* The meeting also noted the document entitled, *"Official Languages,"* tabled at the meeting.

3.2 Regarding section 1: *"Republic of South Africa:"*

3.2.1 The meeting accepted section 1.

3.2.2 The meeting noted, however, that the exact wording was preliminary and would be reviewed after the preamble was written.

3.3 Regarding section 2: *"Supremacy of the Constitution:"*

3.3.1 The meeting adopted subsection 1(1).

3.3.2 The meeting agreed to replace the existing subsection 1(2) with that from the first revision, which reads:

*"The Constitution is the supreme law of the Republic. It binds the Republic, its institutions, its citizens and all persons within its boundaries; law or conduct inconsistent with it is invalid."*

3.3.3 It was agreed that greater clarity was needed regarding the meaning of the term *"bind."* The meeting agreed that the matter would be considered again in the third edition.

3.4 Regarding section 3: *"Citizenship:"*

3.4.1 The meeting accepted subsections 3(1) and 3(2).

3.4.2 Regarding subsection 3(3), the meeting agreed to delete *"in compliance with the Constitution and international law"* to read:

*"National legislation must provide for the acquisition, loss and restoration of citizenship."*

3.4.3 The Technical Refinement Task Team suggested that reference to international law might need to be retained. The meeting agreed to consider the matter in the third edition.

3.5 The meeting accepted section 4, *"Territory of the Republic."* It was noted that a team of experts would still consider the exact definition or description of the territory.

3.6 Regarding section 5, *"National Symbols:"*

3.6.1 For subsection 5(1), the meeting agreed that the phrase *"is described in Schedule 2"* would replace *"when the Constitution takes effect continues to be the national flag,"* to read:

*"The national flag of the Republic is described in Schedule 2."*

3.6.2 Regarding subsection 5(2), the meeting agreed that the issue of a national anthem was very emotive, and the various views of political parties would not be included as options. Instead, the subsection would contain the following note in brackets:

*"[still to be discussed further]."*

3.7 Regarding section 6, *"Languages:"*

3.7.1 The meeting agreed to subsection 6(1).

3.7.2 The meeting agreed to set out 3 options for subsection 6(2):

i. Option 1 would consist of the ANC proposal, tabled at the meeting, that reads:

*"(2) The Pan South African Language Board is to promote the conditions for the development and use of the official languages.*

*(3) The Pan South African Language Board is in addition to be responsible for promoting respect for and the development of languages including German, Greek, Gujerati, Hindi, Portuguese, Tamil, Telegu, Urdu, sign language and other languages commonly used by communities in South Africa, as well as Arabic, Hebrew, Sanskrit and other languages used for religious purposes.*

*(4) National and provincial government may make use of particular languages for the purposes of the functioning of government taking into account questions of usage, practicality and expense."*

ii. Option 2 would consist of the NP proposal, tabled at the

meeting, that reads:

*"The provisions of Section 3 of the present constitution will mutatis mutandis apply to the section in the new constitution dealing with languages."*

- iii. Option 3 would consist of the DP view that the existing official languages would continue to be recognised and their use regulated by national and provincial legislation.

#### 4. CHAPTER 2: BILL OF RIGHTS

4.1 The Chairperson introduced "Chapter 2, Bill of Rights," contained in the "Refined Working Draft (Second Edition)" and the separately bound document entitled, "Supplementary Memorandum on Bill of Rights and Party Submissions" included in the documentation.

4.2 The meeting agreed to section 7, "State's Duty to Respect and Protect Rights." It was noted that this may need to be revised to deal with horizontal application. It was agreed that this would be dealt with in the third edition.

4.3 Regarding section 8, "Equality:"

4.3.1 The ANC expressed concern that subsection 8 did not deal with the horizontal application of the right. The meeting agreed to consider this matter in the third edition.

4.3.2 The meeting agreed to subsection 8(1).

4.3.3 The meeting agreed to include 2 options for subsection 8(2).

- i. The first option would consist of the existing formulation, amended as follows:

- \* The words "measures including legislative measures" would replace "legislative and other measures that are," and

- \* The word "taken" would replace "used," to read:

*"Equality includes the full and equal enjoyment of all rights and freedoms. To achieve equality, measures, including legislative measures designed to protect and advance groups or categories of persons disadvantaged by [unfair] discrimination may be taken."*

- ii. The second option would insert the phrase "[and likely]" to read:

*"Equality includes the full and equal enjoyment of all rights and freedoms. To achieve equality, measures, including legislation, designed [and likely] to protect and advance groups or categories of persons disadvantaged by [unfair] discrimination may be taken."*

4.3.4 The meeting noted the NP proposal that subsection 8(2) be redrafted along the likes of subsection 8(3) of the Interim Constitution. It was agreed that the matter would be raised in the third draft.

4.3.5 When considering subsection 8(3):

- i. The meeting agreed to the subsection with one amendment: the insertion of the phrase "*[but not limited to]*" to read:

*"Neither the state nor any person may [unfairly] discriminate directly or indirectly against anyone on one or more grounds, including [but not limited to] race, gender, sex, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth."*

- ii. The meeting agreed to consider the NP proposal set out in the side bar note to insert after "*including*" the words "*without derogating from the generality of*" or "*but not limited to*" in the third edition.

4.3.6 The meeting agreed to subsection 8(4), but agreed to consider the FF proposal to delete subsection 8(4) in the third edition.

4.4 The meeting agreed to section 9, "*Human Dignity.*"

4.5 Regarding section 10, "*Life:*"

4.5.1 The meeting agreed, with the NP objecting, to the following amendments to subsection 10(1):

- i. The phrase "*[and the death penalty is hereby abolished]*" would be inserted in Option 1, to read:

*"Everyone has the right to life [and the death penalty is hereby abolished]."*

- ii. Option 3 would be deleted.

4.5.2 The meeting agreed to Option 2 of subsection 10(1).

4.5.3 The meeting accepted subsection 10(2).

4.6 Regarding section 11, "*Freedom and Integrity of the Person:*"

4.6.1 The meeting agreed that the word "*Security*" would replace "*Integrity*" in the section heading to read:

*"Freedom and Security of the Person."*

4.6.2 The meeting agreed to subsection 11(1) and 11(2)(a).

4.6.3 When discussing subsection 11(2)(b):

- i. The meeting agreed to place brackets around the whole subsection to read:

*"[(b) to be secure in, and control their own body.]"*

- ii. The meeting agreed to subsection 11(2)(b) with this amendment.

4.6.4 The meeting accepted subsections 11(3)(a) and (b).

4.6.5 When discussing subsection 11(3)(c):

- i. The meeting agreed to delete the words *"or the necessary legal consent"* to read:

*"(c) subjected to medical or scientific experiments without that person's consent."*

- ii. The meeting agreed to subsection 11(3)(c) with this amendment.

4.7 The meeting agreed to section 12, *"Slavery, Servitude and Forced Labour."*

4.8 Regarding section 13, *"Privacy:"*

4.8.1 The meeting agreed to replace the existing subsections 13(1) and (2) with the draft formulation contained on page 6 of the *"Supplementary Memorandum,"* that reads:

*"Everyone has the right to privacy, including the right not to have-*

- (a) their person or home searched;*
- (b) their property searched;*
- (c) their possessions seized; and*
- (d) the privacy of their communications violated.*

4.8.2 The meeting agreed that the question of juristic persons would be

dealt with in a limitations clause.

4.8.3 The DP suggested that the word *"intercepted"* be inserted after the word *"communications"* in the new subsection 13(d). The meeting agreed that the matter would be dealt with when refining the third edition.

4.9 Regarding section 14, *"Freedom of Religion, Belief and Opinion:"*

4.9.1 The meeting agreed to delete everything after the word *"opinion"* in subsection 14(1) to read:

*"Everyone has the right to freedom of conscience, religion, thought, belief and opinion."*

4.9.2 The meeting agreed to subsection 14(1) with this amendment.

4.9.3 The meeting agreed to delete the word *"any"* in subsection 14(2)(a) and to replace *"established"* with *"made"* to read:

*"that those observances follow rules made by an appropriate authority;"*

4.9.4 The meeting agreed to subsection 14(2) with these amendments.

4.9.5 The Technical Refinement Task Team spoke to a document entitled, *"Proposal from the Technical Advisors Clause 14(3),"* tabled at the meeting.

4.9.6 The meeting agreed to insert the phrase *"or any other recognised traditions"* in the draft formulation contained in the *"Proposal"*, to read:

*"The provisions of the Constitution do not prevent legislation recognising the validity of marriage concluded under a system of religious law or other recognised traditions or a system of personal and family law adhered to by persons professing a particular religion, to the extent that the system is consistent with the Bill."*

4.9.7 The meeting agreed that this amended formulation would replace the existing subsection 14(3).

4.9.8 The ANC expressed concern that although the term *"religious law"* in the new subsection 14(3) was intended to provide for the recognition of marriages, it might be interpreted to mean far more. It was agreed that the matter would be dealt with in the third edition.

4.10 Regarding section 15, *"Freedom of Expression:"*



4.10.1 The meeting agreed to subsection 15(1).

4.10.2 The meeting agreed that the draft formulation on page 7 of the "Supplementary Memorandum" would replace the existing subsection 15(2), and the new subsection 15(2)(c) would be placed in brackets. The new formulation would read:

"(2) the protection in subsection (1) does not extend to -  
(a) propaganda for war;  
(b) the incitement of imminent violence; or  
[(c) advocacy of hatred that constitutes incitement to discrimination  
[that is prohibited in section 4(3)].]

4.10.3 The ANC suggested that the reference to violence in the original subsection 15(2)(b) be removed, and that the amended subsection replace subsection 15(2)(c).

4.10.4 The meeting noted the DP objection to the inclusion of "hate speech" and agreed to place subsection 15(2)(c) in brackets and deal with the matter in the third edition.

4.10.5 The meeting agreed that subsection 15(3) would present two options:

- i. Option 1 would consist of the existing formulation; and
- ii. Option 2, which would include two amendments to the formulation:
  - \* The insertion of the words "newspaper and electronic," and
  - \* The substitution of "reflects broadly the views of society" for "presents a diversity of opinion," to read:

*"The state must regulate any newspapers and electronic media that it finances or controls to ensure that it is impartial and represents broadly the views of society."*

4.11 The meeting agreed to section 16, "Assembly, Demonstration and Petition" and section 17, "Freedom of Association."

4.12 Regarding section 18, "Political Rights:"

4.12.1 The meeting agreed to substitute "including" for "which includes" in subsection 18(1), to read:

*"Every citizen is free to make political choices, including the rights - "*

4.12.2 The meeting agreed to subsection 18(1) with this amendment.

4.12.3 The meeting agreed to insert the word "adult" in brackets in subsection 18(2) to read:

*"Every [adult] citizen has the right to free, fair and regular elections for any legislative body established in terms of the Constitution, to vote in such*

*elections and to do so in secret."*

- 4.12.4 The meeting agreed to subsection 18(2) with this amendment.
- 4.12.5 The NP expressed concern that subsection 18(3) might clash with section 42. The meeting agreed to put brackets around this section so that it might be resolved later.
- 4.12.6 The meeting agreed to subsection 18(3) with this amendment.
- 4.13 The meeting agreed to section 19, "*Citizenship.*"
- 4.14 Regarding section 20, "*Freedom of Movement and Residence:*"
- 4.14.1 The FF expressed concern that inclusion of the word "*anywhere*" in subsection 20(1) might promote squatting. The technical advisers responded that this would be addressed in a limitations clause.
- 4.14.2 The meeting agreed that the FF proposal, set out in the side bar note, that subsection 20(4) be guaranteed subject to criminal legislation relating to fugitive offenders, would be considered in the third edition.
- 4.14.3 The meeting agreed to subsections 20(1)(2)(3) and (4).
- 4.15 The meeting agreed to section 21, "*Economic Activity.*"
- 4.16 Regarding section 22, "*Labour Relations:*"
- 4.16.1 The meeting accepted subsections 22(1)(2)(3) and (4).
- 4.16.2 The DP tabled a document entitled "*DP Amendment to Labour s22(2),*" that proposed that the existing subsection 22(2)(c) be replaced with the following formulation:
- "(c) to strike outside the currency of a collective agreement provided that*  
*(i) pre-strike conciliation procedures have been exhausted, and*  
*(ii) the strike is not solely for political purpose."*
- 4.16.3 The meeting agreed to consider this proposal in 1996.
- 4.16.4 The meeting noted the DP proposal regarding 22(4), set out in the side bar note. The meeting agreed to consider the proposal in 1996.
- 4.17 The meeting agreed to section 23, "*Environment.*"
- 4.18 Regarding sections 24, "*Property:*"
- 4.18.1 The ANC tabled a document entitled "*ANC's Proposal on the Property Clause Provision,*" and the DP and the NP tabled a joint document entitled "*Property Clause Proposal.*"

4.18.2 The PAC expressed the view that there should be no property clause and that the restitution clause should recognise claims back to 1652.

4.18.3 The meeting agreed to replace the existing section 24 with the following three options:

- i. Option 1 would consist of the PAC view that there should be no clause and that the restitution clause would accept claims back to 1652;
- ii. Option 2 would be the "ANC Proposal" tabled at the meeting; and
- iii. Option 3 would consist of the joint DP/NP "Property Clause Proposal," tabled at the meeting.

4.19 Regarding section 25, "Housing and Land:"

4.19.1 The meeting noted that the PAC objected to the grouping of socio-economic rights.

4.19.2 The meeting noted that the "Errata" recommended that in subsection 25(1) the word "which" be deleted, a full stop inserted between "housing" and "the" and the words "this right" be inserted to read:

*"Everyone has the right to have access to adequate housing. The state must take reasonable and progressive legislative and other measures to secure this right."*

4.19.3 For subsection 25(2), the meeting agreed:

- i. To insert "relevant," and
- ii. To delete everything after the word "circumstances" to read:

*"No one may be evicted from their homes arbitrarily and without an order of court [made after considering the relevant circumstances]."*

4.19.4 The NP expressed concern that subsection 25(3), that deals with access to land, should not be included in section 25, that otherwise deals with housing.

4.19.5 The meeting agreed to bracket section 25(3) and to reconsider the matter in 1996.

4.20 The meeting agreed to section 26, "Health, Food, Water, and Social Assistance."

4.21 Regarding section 27, "Children:"

4.21.1 The meeting agreed to insert the word "shelter" in subsection 27(1)(c) to read:

*"basic nutrition, shelter, health and social services;"*

4.21.2 The meeting agreed 27(1) with this amendment.

4.21.3 The ANC said that 27(1)(f) needed to be reviewed, in light of the problems

experienced with the detention of juveniles. The meeting agreed to consider this matter in 1996.

4.21.4 The meeting agreed to subsections 27(2) and (3).

4.22 Regarding section 28, "*Education:*"

4.22.1 The meeting agreed to subsections 28(1) and (2)(a)(b) and (c).

4.22.2 The meeting agreed to delete the phrase "*Alternative wording proposed by NP suggested for subsection 22(c).*"

4.22.3 The meeting agreed to create a new subsection 28(3) that would set out 2 options:

i. Option 1 would consist of the alternative wording for 28(2)(c) proposed by the NP, that reads:

*"Everyone has the right to educational institutions based on a common culture, language, or religion, provided that there shall be no discrimination on the ground of race and, provided further that the state shall not, in granting aid to educational institutions, discriminate against any educational institution on the ground that it has been established on the basis of a common language, culture, or religion," and*

ii. Option 2 that would say that no provision should be made, or that subsection 28(3) should not be included.

4.23 Regarding section 29, "*Academic Freedom:*"

4.23.1 The meeting agreed to include two options in this section:

i. Option 1 would include the existing subsections 29(1) and (2); and

ii. Option 2 would state the ANC views that:

\* The subsection should not stand on its own, but be included in the section on freedom of religion, belief, and opinion.

\* The right should apply to persons, but not to institutions.

4.23.2 The meeting agreed to section 29 with these amendments.

4.24 Regarding section 30, "*Language and Culture:*"

4.24.1 The meeting agreed to section 30.

4.24.2 The NP tabled a document entitled, "*NP Proposal.*" The meeting agreed to defer discussion of this document until the next meeting of the Constitutional Committee in January 1996.

4.25 Regarding section 31, "*Access to Information:*"

4.25.1 The technical advisors queried whether this right should apply to juristic persons.  
The meeting agreed to deal with this issue in 1996.

4.25.2 The meeting agreed to subsections 31(a) and (b).

4.25.3 It was agreed to add a new subsection (2) in brackets, that would read:

*"[This right shall be regulated by an Act of Parliament.]"*

4.26 Regarding section 32, "*Administrative Justice:*"

4.26.1 The meeting agreed to change the section heading to "*Just Administrative Action*" and that the section's provisions would be reworked to accord with the new heading.

4.26.2 The meeting agreed to retain the existing "*Option 1*".

4.26.3 The meeting agreed to delete the existing "*Option 2*" and "*Option 3*."

4.26.4 The meeting agreed to insert a new "*Option 2*," based on the provisions contained on page 28 of the "*Supplementary Memorandum*," to read:

*"Everyone has a right to just administrative action.*

*(1) No one may be adversely affected by administrative action that is unlawful or unreasonable.*

*(2) Everyone whose rights are affected adversely by administrative action has the right to fair procedure unless the administrative action is of general application.*

*(3) Everyone whose rights or interests have been adversely affected by an administrative action has the right to written reasons."*

4.27 Regarding section 33, "*Access to Justice:*"

4.27.1 The meeting agreed to change the section title to "*Access to Courts*."

4.27.2 The meeting agreed to insert the phrase "*where appropriate or necessary*," to read:

*"Everyone has the right to have any dispute that can be resolved by law decided in a fair, public hearing in either a court of law or another independent and impartial forum where appropriate or necessary."*

4.27.3 The meeting agreed to section 33 with these amendments.

4.28 Regarding section 34, "*Arrested, Detained and Accused Persons:*"

4.28.1 The meeting agreed to subsections 34(1)(a)(b) and (c).

4.28.2 The Technical Refinement Task Team said that there was a question about what rights accused people should be informed of in a language they understand. This would pertain to subsections 34(1)(c) and (e). The meeting agreed to consider this question in 1996.

4.28.3 The meeting agreed to replace the existing subsection 34(1)(d) with the provision on pages 32 and 33 of the "*Supplementary Memorandum*," that reads:

*"(d) to be brought before a court of law as soon as reasonably possible, but not later than 48 hours after the arrest, or where the period of*

*48 hours expires outside ordinary court hours, on the next court day; and while there, to be released from detention unless that person is charged and the court orders the further detention."*

4.28.4 For subsection 34(1)(e), the DP supported the existing subsection, while the ANC and NP supported the new provision, set out on page 30 of the "Supplementary Memorandum". The ANC proposed that the two viewpoints be set out as two options for the subsection.

4.28.5 The meeting agreed to subsections 34(2)(a) - (f) and 34(3)(a) - (d).

4.28.6 The meeting agreed that the existing subsection 34(3)(e) would be replaced by the provision on page 30 of the "Supplementary Memorandum," that reads:

*"to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it."*

4.28.7 The meeting accepted subsections 34(3)(f) - (n).

4.28.8 The meeting agreed that the brackets would be removed from subsection 34(4) and accepted the subsection with this amendment.

4.29 Regarding section 35, "Limitations Clause:"

4.29.1 The meeting agreed to delete the words "except the rights in section 37," in subsection 35(1), to read:

*"The rights in the Bill of Rights may be limited by or pursuant to law of general application only to the extent that the limitation of a right is -"*

4.29.2 The ANC said that it would prefer to use the provisions set out on page 34 of the "Supplementary Memorandum" as a basis for the limitations clause. The Chairperson ruled, however, that discussion of this matter would be deferred until 1996.

4.29.3 The meeting agreed to accept section 35 on the understanding that it would be returned to in January 1996.

4.30 Regarding section 36, "States of Emergency:"

4.30.1 The meeting agreed to subsections 36(1) - (7).

4.30.2 It flagged following matters for consideration in 1996:

- i. The ANC view that subsections 36(1)(2) and (3) might be deleted and dealt with in legislation; and
- ii. The concerns expressed by the NP and DP that subsection 36(5) might allow retrospectivity.

4.30.3 The ANC queried whether a state of emergency should be treated the same as a state of war. It was agreed that the matter would be raised in the third draft.

4.30.4 The meeting agreed to insert "*on the same grounds*" in subsection 36(8), to read:

*"If a court releases a detainee, that person may not be detained again unless the state first shows a court good cause for re-detaining that person on the same grounds."*

4.31 Regarding section 37, "*Enforcement of Rights:*"

4.31.1 The meeting agreed to subsection 37(1).

4.31.2 The meeting agreed to delete subsection 37(2).

4.32 Regarding section 38, "*Application:*"

4.32.1 The meeting agreed to subsections (1) and (2).

4.32.2 The meeting agreed that "*Option 1*" and "*Option 2*" would be moved to create a new subsection 38(3). Moreover:

- i. The list on page 34 of the "*Supplementary Memorandum*" would be inserted in "*Option 2;*"
- ii. The new text created would be placed in brackets; and
- iii. A note would be added stating that the option had been included only for discussion purposes, so that the public could comment.

4.32.3 The meeting agreed to section 39, "*Interpretation of Bill of Rights.*"

## 5. CHAPTER 3: PARLIAMENT

5.1 The Chairperson introduced "*Chapter 3, Parliament,*" in the "*Refined Working Draft (Second Edition).*"

5.2 Regarding section 40, "*Legislative Authority of the Republic:*"

5.2.1 The meeting agreed to retain subsection 40(1), but noted that it would be revised to reconcile it with similar provisions in Chapter 9.

5.2.2 The meeting agreed that in subsection 40(2) the words "*a second house*" would replace "*the Senate*" to read:

*"Parliament consists of the National Assembly and a second house."*

5.2.3 The meeting agreed to subsection 40(2) as amended. The Chairperson ruled that it would be reconsidered when there was agreement as to what the second house would be called.



5.3 Regarding section 41, "*Composition and Election of National Assembly:*"

5.3.1 The meeting agreed to insert the words "300 to 400" and to bracket the words "results" and "in" to read:

*"The National Assembly consists of 300 to 400 members, who are women and men elected in terms of an electoral system that is prescribed by national legislation, is based on a common voters roll and [results,] in general [in] proportional representation."*

5.3.2 The meeting agreed to add a note in brackets and in italics at the end of the subsection that would read:

*"[Details of the electoral system are still to be discussed.]"*

5.3.3 The meeting agreed to use brackets and italics in the published version instead of side bar notes or footnotes to provide additional information for the public.

5.4 Regarding section 42, "*Qualifications of Members of National Assembly:*"

5.4.1 Regarding subsection 42(a):

- i. The meeting agreed to section 42(a);
- ii. It agreed, however, that the Technical Refinement Task Team would investigate whether a more modern term could replace "office of profit" in the third edition.
- iii. The ANC reminded the meeting of the earlier decision to this subsection should include pensions as well.

5.4.2 The meeting agreed to subsection 42(b) with one amendment: that "a second house" would replace "Senate" to read:

*"members of a second house, a provincial legislature or a local government;"*

5.4.3 The meeting agreed to subsections 42(c)(d) and (e).

5.5 Regarding section 43, "*Vacancies:*"

5.5.1 The meeting agreed to subsections 43(1)(a)(b) and (c).

5.5.2 The NP suggested that the existing subsection 43(1)(c) should be replaced by subsection 43(d) of the Interim Constitution, that reads:

*"without having obtained leave in accordance with the rules and orders, absents himself or herself voluntarily from sittings of the National Assembly or any other parliamentary forum of which he or she is a member, for 15 consecutive days on which the National Assembly or any such forum sat."*

5.5.3 The Chairperson said that this matter would be dealt with in the third edition.

- 5.5.4 The meeting agreed to subsection 43(2).
- 5.6 The meeting agreed to section 44, "*Oaths or Affirmation by Members.*"
- 5.7 Regarding section 45, "*Sittings and Recess Periods:*"
  - 5.7.1 The meeting accepted subsections 45(1) and (2).
  - 5.7.2 The meeting agreed to the subsection 45(3), but agreed to add a note in brackets and italics informing the public that the Constitutional Committee would need to decide upon the seat of government in 1996.
  - 5.7.3 The ANC expressed concern that mechanisms needed to be established for facilitating discussion of the issue.
- 5.8 Regarding section 46, "*Elections and Duration of National Assembly:*"
  - 5.8.1 The meeting agreed to subsection 46(1).
  - 5.8.2 The meeting agreed to consider subsection 46(2) when dealing with votes of no confidence.
  - 5.8.3 The meeting agreed to subsections 46(3) and 46(4).

5.8.4 The DP expressed concern that section 46(5) did not adequately handle the gap between polling and the declaration of an election as free and fair.

5.8.5 The meeting agreed that "*the first day of*" would replace "*the day before polling*" to read:

*"The National Assembly remains competent to function from the time it is dissolved or its term expires until the first day of polling for the National Assembly;"*

5.9 The meeting agreed to section 47, "*Speaker and Deputy Speaker*," section 48, "*Decisions*," and section 49, "*President's Rights in National Assembly*."

5.10 Regarding section 50, "*Internal Autonomy*:"

5.10.1 The meeting agreed to subsection 50(1).

5.10.2 The Technical Refinement Task Team tabled a document entitled, "*Internal Autonomy*."

5.10.3 The meeting agreed that the existing subsection 50(2) would be replaced with the formulation in "*Internal Autonomy*," to read:

*Internal autonomy*

(1) *The National Assembly may determine and control its internal arrangements and may make rules and orders concerning its business and proceedings, including rules and orders regulating the establishment, composition, powers and functions, procedures and duration of its committees.*

(2) *A committee of the National Assembly may summon anyone to appear before it to give evidence on oath or affirmation or to produce documents."*

5.10.4 The meeting noted the NP proposal for subsection 50(2) and agreed to consider it in the third draft.

5.11 The meeting agreed to section 51, "*Parliamentary Privilege*."

5.12 Regarding Section 52, "*Bills*:"

5.12.1 The Technical Refinement Task Team tabled a document entitled, "*Bills*."

5.12.2 The meeting agreed to insert this document in section 52, for the purposes of publication.

5.12.3 The ANC expressed the view that the matter could only be finalised after the two houses of parliament had been decided upon.

5.12.4 The meeting agreed to consider the matter in January 1996.

5.13 Regarding section 53, "*Constitutional Amendments:*" the meeting agreed to insert the draft formulation contained in "*Bills,*" that reads:

*Constitutional Amendments*

53. *The Constitution may be amended by a Bill passed by Parliament if it is adopted by a majority of at least two thirds of the members [of both houses of Parliament].*

*[Note: This clause requires further development to comply with the Constitutional Principles.]*

5.14 Regarding section 54, "*Assent to Bills:*"

5.14.1 The meeting agreed to the existing section 54;

5.14.2 However, it agreed to add a new subsection setting out two options:

i. Option 1 would state that Parliament or a provincial legislature could refer a Bill to the Constitutional Court to decide on its constitutionality at the request of the Speaker of the National Assembly, the Senate, or the speaker of a provincial legislature acting on the petition of not less than 20 percent of either the Assembly, the Senate or the legislature as the case may be, or all the members of all parties not constituting the majority party in such a parliament.

ii. Option 2 would state that this provision should not be included.

5.15 The meeting agreed to section 55, "*Promulgation*" and section 56, "*Safekeeping of Acts of Parliament.*"

## 6. CHAPTER 4: SENATE/COUNCIL OF PROVINCES

6.1 The Chairperson introduced "*Chapter 4, Senate/Council of Provinces,*" in the "*Refined Working Draft (Second Edition).*"

6.2 The ANC tabled a document entitled "*Council of Provinces,*" and the NP tabled a document entitled, "*Chapter 4, Senate/Council of Provinces.*"

6.3 The meeting agreed that these documents would constitute two options that would replace the existing formulations in this chapter.

## 7. CHAPTER 5: NATIONAL EXECUTIVE

7.1 The Chairperson introduced "*Chapter 5, The National Executive,*" of the "*Refined Working Draft (Second Edition).*"

7.2 The meeting accepted section 67, "*Executive Authority of the Republic.*"

7.3 Regarding section 68, "*The President:*"

7.3.1 For subsection 68(1), the meeting agreed to:

- i. Delete from "*Option 1*" the phrase "*and opposes that which may harm it Republic*", to read:

*"The President promotes the unity of the nation and that which will advance the Republic."*

- ii. Use the amended "*Option 1*" as the draft formulation; and

- iii. Delete "*Option 2.*"

7.3.2 The meeting agreed to the existing subsection 68(2) for the purpose of publication.

7.3.3 The meeting agreed to consider in the third draft Advocate Yacoob's suggestion that the subsection be restructured to read:

*The President is*

- (a) *the Head of State, Head of the national executive and Commander-in-Chief of the defence force;*
- (b) *must uphold, defend and respect the Constitution as the supreme law of the Republic, and*
- (c) *is responsible for the observance of the Constitution by the national executive.*

7.4 Regarding section 69, "*Powers and Functions of the President:*"

7.4.1 The meeting agreed to subsection 69(1).

7.4.2 For subsection 69(2):

- i. The ANC expressed concern that this subsection did not reflect the 20 October 1995 Constitutional Committee agreement to include powers granted exclusively to the President by legislation. The ANC recommended that a subsection (c) be inserted to cover "*all legislation that states or implies that the President may act alone.*" The ANC argued that such a clause would enable legislation to grant the President exclusive powers.

- ii. The NP responded that there was no legislation that granted exclusive powers to the President and the suggested amendment would not reflect the way the Cabinet and President's Office operated.
- iii. The meeting agreed that the technical advisors would consult with the President's office to obtain clarity on the matter.

7.4.3 Regarding subsection 69(3):

- i. The meeting agreed to insert a phrase in brackets to indicate that the outcome of this subsection would depend on the outcome of section 76.
- ii. The meeting agreed to add a subsection (j) on the appointment of ambassadors and a subsection (k) on the appointment of commissions, subject to:

- \* Finalising section 76;
- \* Consultations with the President's Office, and
- \* Reference to Theme Committee 1's report on the matter.

The meeting also noted that subsection 82(1)(f) of the Interim Constitution was a useful example of how such provisions might be worded.

- iii. The meeting accepted subsection 69(3) with these amendments.

7.4.4 The meeting accepted subsection 69(4).

7.5 Regarding section 70, "*Election of President:*"

- i. The meeting agreed to section 70 for the purpose of publication.
- ii. However, it noted that the document entitled "*Errata*" suggested the deletion of section 73 and the insertion of a new subsection 70(2) that would read:

(2) *An election to fill a vacancy in the office of President must be held at a time and on a date determined by the President of the Constitutional court, but not more than 30 days after the vacancy occurs.*

- iii. The Chairperson ruled that this suggestion would be dealt with when refining the third edition.

7.6 The meeting agreed to section 71, "*Assumption of Office by President,*" section 72, "*Term of Office of President*" and section 73, "*Vacancies.*"

7.7 The meeting accepted section 74, "*Acting President*" for the purpose of publication, but noted that its final form would depend on the outcome of section 76.

7.8 The NP expressed concern that there was no reference to the office or appointment of the Deputy President. The Chairperson ruled that this matter would be considered in 1996.

7.9 The meeting agreed to section 75, "Removal of President."

7.10 Regarding section 76, "Cabinet:"

7.10.1 The meeting agreed to Options 1 and 2;

7.10.2 The meeting agreed, however, to delete the section numbers from Option 3 to read:

*"A system of Government of National Unity based on the Interim Constitution."*

7.11 The meeting agreed to section 77, "Deputy Ministers" for the purpose of publication. The Technical Refinement Task Team queried whether this matter should be constitutionalised. The meeting agreed to consider the matter in 1996.

7.12 The meeting agreed to section 78, "Continuation of Cabinet after Elections."

7.13 The meeting agreed to section 79, "Oath of Office."

7.14 Regarding section 80, "Accountability of Ministers and Cabinet:"

7.14.1 The meeting agreed to insert the words "and a second house" in subsection 80(1) to read:

*"The Deputy President and Ministers are individually accountable both to the President and the National Assembly and a second house, and all the members of the Cabinet are collectively accountable to the Assembly and a second house for the performance of the national government and its policies."*

7.14.2 The meeting agreed to subsection 80(1) with this amendment.

7.14.3 However, the meeting expressed concern that subsection 80(1) might mean that the President, as a member of the Cabinet, could be "dragged" before Parliament or a parliamentary committee. It was agreed that this matter would be considered in 1996.

7.14.4 The meeting agreed to subsection 80(2).

7.15 The meeting agreed to section 81, "Conduct of Cabinet Members and Deputy Ministers;" section 82, "Temporary Assignment of Powers and Functions;" and section 83, "Transfer of Powers and Functions."

7.16 Regarding section 84, "Votes of No-Confidence:"

7.16.1 The meeting agreed subsections 84(1), (2) and (3).

7.16.2 The meeting agreed to insert a new section 84(4), as recommended on page 8 of the "Errata," to read:

(4) *A majority of the members of the National Assembly must be*

*present when a vote of no confidence is passed.*

7.16.3 However, the meeting to consider the following matters in the third edition:

- i. That a vote of no confidence require national elections, or
- ii. That the legislature have a fixed term of office, so that a vote of no confidence would not require a snap election, but parliament could ask to be dissolved and mid-term elections be held to vote in a legislature to complete the term of office.

## 8. CHAPTER 6: COURTS AND THE ADMINISTRATION OF JUSTICE

8.1 The chairperson reported that a new document entitled "*Courts and Administration Draft - 9 November 1995*" would replace "*Chapter 6*" of the "*Refined Working Draft (Second Edition)*." The meeting concentrated its discussion on the tabled document.

8.2 The meeting agreed to section 85, "*Judicial Authority*."

8.3 The meeting agreed to section 86, "*Judicial System*," with one amendment: that semi-colons would replace full stops in subsections (a) - (e).

8.4 Regarding section 87, "*Constitutional Court*:"

8.4.1 The meeting agreed to subsections 87(1) and (2).

8.4.2 Regarding subsection 87(3):

- i. The meeting noted that the list under 87(3)(a) was still under discussion and not yet final;



- ii. It agreed to amend subsection 87(3)(b) by substituting the word "*unconstitutional*" for "*invalid*," to read:

*"declare unconstitutional an Act of Parliament, a Provincial Act, and any conduct of the President; and"*

- iii. The meeting agreed to subsection 87(3)(c).

8.4.3 The meeting agreed to subsections 87(4) and (5).

8.5 Regarding section 88, "*Supreme Court of Appeal*:"

- i. The meeting accepted subsections 88(1)(2) and (3).
- ii. However, the ANC expressed concern that another term might be needed to replace "*inherent jurisdiction*" in subsection 88(2). The meeting agreed to consider this question in 1996.

8.6 Regarding section 89, "*Other Courts*:"

- i. The meeting agreed to subsections 89(1)(2) and (3).
- ii. However, the ANC expressed concern that another term might be needed to replace "*inherent jurisdiction*" in subsection 89(2). The meeting agreed to consider this matter in 1996.

8.7 The meeting agreed to section 90, "*Decisions in Constitutional Matters*."

8.8 Regarding section 91, "*Appointment of Judicial Officers*," the meeting agreed to reformulate the section so that it contained two options:

- i. The first option would consist of the existing text, and
- ii. The second option would consist of the document entitled "*Appointment of Judicial Officers*," tabled by the NP at the meeting.

8.9 The meeting agreed to section 92, "*Tenure and Remuneration*."

8.10 Regarding section 93, "*Removal*:"

8.10.1 The meeting agreed that subsections 93(1) and (2) would be redrafted to remove any apparent distinction between "*removal*" and "*dismissal*".

8.10.2 The meeting agreed to subsection 93(3).

8.11 Regarding subsection 94, "*Judicial Service Commission*:"

8.11.1 The meeting agreed to subsection 94(1), but agreed to

consider the following suggestions from the NP in 1996:

- i. That subsection 94(1)(h) be qualified so that when a vacancy occurred, it would be filled by the political party to which the relevant Senator belonged; and
- ii. That a new subsection 94(1)(k) should be inserted, to allow for the inclusion of 2 additional attorney generals on the Judicial Service Commission when it considered matters relating to attorney generals.

8.11.2 The meeting agreed to subsections 94(2)(3) and (4).

8.12 The meeting agreed to section 95, "*Other Matters Concerning Courts.*"

8.13 Regarding the Attorney General:

8.13.1 The meeting aired a wide variety of views on the Attorney General.

8.13.2 The Chairperson ruled that, rather than including all the options, the technical advisors would add a formulation stating that the matter still needed discussion. This would include a heading like "*Appointment of Attorney General*" and a brief statement.

8.13.3 The ANC expressed its concern that this might mislead the public, when there was still a questions as to whether it would be included in the constitution at all.

8.13.4 The Chairperson ruled that the technical advisors would reflect this in the formulation.

8.14 The Chairperson ruled that the question of a transitional clause would be considered in 1996, together with other transitional provisions or mechanisms.

## 9. CHAPTER 7: [INSTITUTIONS SUPPORTING CONSTITUTIONAL DEMOCRACY

9.1 The chairperson introduced "*Chapter 7, [Institutions Supporting Constitutional Democracy]*," in the "*Refined Working Draft (Second Edition).*"

9.2 The meeting agreed to insert the word "*State*" into the chapter title, to read:

*"State Institutions Supporting Constitutional Democracy."*

9.3 The meeting agreed to sections 96, "*Establishment and Governing Principles,*" section 97, "*Functions of the Public Protector,*" and section 98, "*Tenure.*"

9.4 With regard to section 98, it was agreed that in 1996 the Constitutional Committee would consider whether the term of office of the Public Protector would be renewable.

9.5 Regarding section 99, the "*Human Rights Commission*".

9.5.1 The meeting agreed to subsection 99(1).

- 9.5.2 The meeting agreed to amend subsection 99(2), by replacing "breached" with "violated" to read:

*"The Human Rights Commission has the power, as regulated by national legislation, necessary to perform its functions, including the power to monitor, to investigate and to report on the observance of human rights, to take steps to secure appropriate redress where human rights have been violated, to carry out research, and to educate."*

- 9.5.3 The meeting accepted subsection 99(3).

- 9.6 Regarding section 100, *"The Commission for Gender Equality"*:

9.6.1 The Chairperson ruled that the Minutes of 20 October 1995 would be corrected to record the NP proposal that the name of the commission be changed to the *"Commission for Gender Equality and Development"*.

9.6.2 The NP tabled and spoke to the document entitled *"NP Proposals: Commission for Gender Equality, p. 63."*

9.6.3 The ANC expressed the concern that, if accepted, the NP proposal would result in "diluting" the commission's purpose. The DP queried whether the suggested amendments were necessary.

9.6.4 The meeting agreed to leave the matter in abeyance for the time being, but agreed to consider the NP proposal in 1996.

9.6.5 The meeting accepted subsections 100(1)(2) and (3), with the NP reserving the right to return to the name of the structure.

9.7 The meeting agreed to sections 101 and 102, under *"The Auditor General"*. The meeting noted, however, that the matter was subject to ongoing discussions, including consultation with the Auditor General scheduled for January 1996.

9.8 Regarding sections 103 and 104 under the *"Electoral Commission:"*

9.8.1 The meeting discussed subsection 103(1) as follows:

- i. The DP expressed concern that subsection 103(1) should not require the Electoral Commission to manage all local, provincial and national voters rolls;
- ii. The NP suggested that the provision say that the commission could delegate this power to provincial and local authorities;
- iii. The meeting agreed that more clarity was needed on the use of the word "manage" and would return to this matter in 1996.

9.8.2 The meeting discussed subsection 103(2) as follows:

- i. The NP and ANC queried whether the Electoral Commission should be assigned the task of declaring elections free and fair, particularly since the courts could rule on individual election results.
- ii. The meeting agreed to delete subsection 103(2), but requested that the technical experts advise on whether mechanisms for declaring elections free and fair should be included in the constitution.

9.8.3 The meeting agreed to subsection 103(3).

9.8.4 The meeting agreed to make two amendments to section 104:

- i. The deletion of the phrase "appointed for a period prescribed by national legislation" and
- ii. The insertion of the sentence: "The number of members and their terms of office must be prescribed by national legislation."

to read:

"The Electoral Commission must be composed of at least three persons. The number of members and their terms of office must be prescribed by national legislation."

9.9 Regarding section 105, "General Provisions:"

9.9.1 The NP tabled a document entitled, "P. 65: General Provisions (Chapter 7)." The meeting agreed that discussion of the proposal would be deferred, but the matter would be considered in the third edition.

9.9.2 The meeting agreed to subsections 105(1)(2)(3) and (4).

9.10 The meeting agreed to section 106, "Removal from Office."

## 10. CHAPTER 8: PROVINCES

- 10.1 The Chairperson introduced "*Chapter 8: Provinces*," included in the "*Refined Working Draft (Second Edition)*."
- 10.2 The meeting agreed that it would accept the provisions in this chapter, with the understanding that they would be revised to accord with changes made to the chapters on the National Assembly and the National Executive. Exceptions to this rule were
- \* A note on self-determination to be inserted after section 107;
  - \* Section 108;
  - \* Section 120; and
  - \* A new formulation on provincial finance and fiscal affairs to be inserted after section 137.

These are discussed below.

### 10.3 Regarding self-determination:

- 10.3.1 The FF expressed its concern that some mention should be made of self determination, either in Chapter 4 or in Chapter 8.
- 10.3.2 In response, the Technical Refinement Task Team tabled a document entitled, "*Refinement Team Note on Self Determination*."
- 10.3.3 The meeting agreed to the proposal made in the "*Refinement Team Note*" that a comment be inserted after section 107, that would read:

*"The possibility of including Constitutional provisions for the right to self determination of any community sharing a common cultural and language heritage in terms of Principle 34 is still being discussed."*

### 10.4 Regarding section 108, "*Application of This Chapter*:" the meeting agreed to replace the existing provision with two options:

- i. Option 1 would be the draft formulation set out on page 9 of the "*Errata*," that reads:

*"The provisions of this chapter apply to all provinces except to the extent that they are modified by a provincial constitution adopted and certified in term of this Constitution."*

- ii. Option 2 would consist of sections 108(1) - (10) of the document entitled "*The Status of Provinces: The Constitutional Status of Provinces, the Homogeneity Clauses, and Provincial Constitutions,*" tabled by the ANC at the meeting. These read:

- "108 (1) *Provinces are integral and inseparable provinces [alternatively: parts] of the Republic. They are a level of legislative and executive government of the one and sovereign state of the Republic.*
- (2) *The inhabitants [population] of a province belong to [are part of] the South African nation. [and enjoy common South African citizenship according to this Constitution.]*
- (3) *Provinces must promote national unity and must pursue peace in their provinces. They must commit themselves to the well-being of all the people of the province, and cooperate in a spirit of ubuntu to reconstruct and develop their provinces.*
- (4) *Provinces are founded on respect for and observance of human rights. They must promote the achievement of equality between men and women and people of all races.*
- (5) *Provinces must comply with the principles of constitutional democracy and the rule of law within the meaning of this Constitution to preserve [essential] homogeneity among the provinces.*
- (6) *In each province the people must be represented by a body elected by general, free, equal and secret ballot.*
- (7) *The provisions of this Constitution with regard to majority government, multi-party democracy, elections, regularity, universal adult suffrage, a common voters' roll, proportional or other representation, and the participation of minority parties in the legislative process in a manner consistent with democracy, apply to all provinces equally and undiminished.*
- (8) *Provinces must adhere to the separation of powers between the legislature and the executive in the province, with appropriate checks and balances to ensure accountability, responsiveness and openness.*
- (9) *Provinces must maintain relations of good neighbourliness to all levels of government of the Republic. They must cooperate with, assist and support the national, other provincial and the local levels of the state.*
- (10) *A province can not assume more competencies or privileges than those intended by this Constitution."*

- 10.5 The meeting agreed to the existing provisions in section 120, "*Assent to Bills,*" but agreed to add a new subsection that would set out two options:

- i. Option 1 would consist of the NP proposal that the speaker of a provincial legislature be able to refer any Bill to the Constitutional Court for a decision on its constitutionality, acting on the petition of not less than 20 percent of either the assembly, the senate or the legislature as the case may be, or all the members of all parties not constituting the majority party in such a parliament.
- ii. Option 2 would consist of the ANC proposal that no option be included.

10.6 Regarding provincial finance and fiscal control:

10.6.1 A multi-party committee tabled a document entitled "*Provincial Finance and Fiscal Affairs.*"

10.6.2 The meeting agreed that the Technical Refinement Task Team would use excerpts of this document to construct new sections to be inserted in the chapter on provinces (possibly to be after section 138) and in the chapter on finance.

10.6.3 It was noted that the DP reserved its position regarding this section.

**11. CHAPTER 9: PROVINCIAL AND NATIONAL LEGISLATIVE AND EXECUTIVE COMPETENCIES**

11.1 The Technical Refinement Task Team tabled a document entitled "*Provincial and National Legislative and Executive Competencies Amended Working Draft (Second Edition)*".

11.2 The meeting agreed that this document would replace in its entirety the chapter contained in the second edition of the "*Refined Working Draft.*"

11.3 Regarding the new provisions contained in the tabled document:

11.3.1 The meeting agreed to insert a reference to the protection of the environment in section 1(c), option 3.

11.3.2 The meeting agreed to insert "*[has legislative competence]*" in section 146(1)(a), to read:

*"all matters in respect of which the provincial legislature has passed laws  
[has legislative competence]"*

**12. CHAPTER 10: LOCAL GOVERNMENT**

12.1 The Chairperson introduced the document tabled by the Ministry of Constitutional Development, entitled, "*Local Government.*"

12.2 The meeting agreed that the provisions in this document would replace those in "*Chapter 10, Local Government and Traditional Authorities,*" of the "*Refined Working Draft (Second Edition).*"

12.3 The meeting agreed to delete the words "*and Traditional Authorities,*" in the chapter title, to read:

*"Local Government"*

12.4 Regarding traditional authorities:

12.4.1 The meeting agreed that provisions on traditional authorities would be included in a separate chapter.

12.4.2 A note would be added indicating that further consideration would be given to the matter, and

12.4.3 The use of the term "traditional authorities" would be considered in the third edition.

**13. CHAPTER 11: PUBLIC ADMINISTRATION**

13.1 The Chairperson introduced "*Chapter 11, Public Administration,*" in the "*Refined Working Draft (Second Edition).*"

13.2 Regarding section 152, "*Basic Values and Principles Governing Public Administration:*"

13.2.1 The meeting accepted subsections 152(1)(a) - (i).

13.2.2 Regarding subsection 152(2):

- i. The NP said that they still preferred the use of the term "public administration" rather than "public service." The Chairperson noted that this concern had been set out in the "*Errata.*" The ANC said they were still considering this proposal. It was agreed that this matter would be dealt with in the third edition.
- ii. The meeting agreed to the existing subsection 152(2).



13.3 The meeting accepted section 153, "*Public Administration Commission.*"

13.4 Regarding section 154, "*Public Service:*"

13.4.1 The meeting accepted subsections 154(1) and 154(2).

13.4.2 Regarding subsection 154(3):

i. The meeting agreed to amend Option 1 by deleting the words "*or prospective employee,*" to read:

*"No employee of the public service may be favoured or prejudiced only because that person supports a particular political party or cause."*

ii. The meeting accepted Option 1 with this amendment.

iii. The DP expressed the view that the word "*only*" should be deleted from Option 1. The meeting agreed to consider this in 1996.

iv. The meeting agreed to delete Option 2.

#### 14. CHAPTER 13: SECURITY SERVICES

The meeting agreed to the whole of "*Chapter 12, Security Services,*" of the "*Revised Working Draft (Second Edition).*"

#### 15. CHAPTER 13: FINANCE

15.1 The meeting considered "*Chapter 13, Finance,*" contained in the *Refined Working Draft (Second Edition).*"

15.2 The meeting agreed to section 167, "*National Revenue Fund.*"

15.3 Regarding 168, "*Annual Budget:*"

15.3.1 The meeting agreed that the existing section 168 would be replaced by drafts produced by the Technical Refinement Task Team, based on the section entitled "*Annual Budgets*" in the document entitled "*Provincial Finance and Fiscal Affairs,*" tabled by the multi-party committee.

15.3.2 The meeting agreed, however, that the Technical Refinement Task Team would insert a word or phrase to indicate "*inter alia*" into the new formulation.

15.4 Regarding the National Exchequer:

15.4.1 The meeting agreed to insert a new section 168(a), "*The National Exchequer,*" based on section 138F of the multi-party document, to read as follows:

*"(1) In order to ensure transparency, common generally accepted accounting practices and expenditure classifications, effective*

*expenditure control and common treasury regulations in all levels of government, there shall be a national Exchequer Acts.*

- (2) *The national Exchequer Act shall also constitute the basic enabling legislation for provincial Exchequer Acts.*
- (3) *In the event of serious or persistent maladministration of funds, the national Exchequer Act shall define procedures whereby the national treasury can stop the transfer of funds to any national department, or allocations in terms of 138A(1)(b) to a province, or whereby a provincial treasury can stop transfers to a provincial department.*
- (4) *In the event of the national treasury acting to stop transfer of funds to a province such action must be ratified within 30 days by Parliament.*

15.4.2 The meeting noted that the DP reserved its position on this section.

15.4.3 The meeting agreed to consider this matter in 1996.

15.5 Regarding section 169, "*Procurement Administration:*"

15.5.1 The meeting agreed to insert Option 1 as subsection 169(1), and to delete Option 2.

15.5.2 The meeting accepted subsections 169(2)(3) and (4).

15.6 The meeting accepted section 170, "*Guarantees by National Government.*"

15.7 Regarding section 171, "*Accountability of Enterprises Receiving Public Funds:*"

15.7.1 The meeting agreed to section 171.

15.7.2 However, it agreed to consider the NP query about what implications this provision would have on the academic freedom of universities, in the third edition.

15.8 Regarding section 172, "*Remuneration of Persons Holding Public Office:*"

15.8.1 The meeting accepted section 172.

15.8.2 It agreed, however, that the Technical Advisors would consider how to incorporate into the section relevant provisions from the multi-party document entitled, "*Provincial Finance and Fiscal Affairs,*" particularly from the section entitled "*Miscellaneous.*"

15.8.3 The Chairperson said that the Technical Refinement Task Team would also consider incorporating the multi-party document's prohibition on holding office for profit on holding more than one "office of profit."

15.9 The meeting accepted section 173, "*Establishment.*"

15.10 Regarding section 174, "*Functions:*"

15.10.1 Regarding subsection 174(1):

- i. The meeting agreed to delete the words "*The form of*" from subsection 174(1)(d), to read:

*"any taxes, levies, imposts, and surcharges that a provincial government intends to levy"*

- ii. The meeting agreed to the whole of subsection 174(1) with this amendment.

15.10.2 The meeting accepted subsection 174(2).

15.11 The meeting agreed to add a note under section 175, "*Appointments, Qualifications, Tenure and Dismissal of Members,*" stating that this matter was still under discussion and had not yet been finalised.

15.12 The meeting agreed to retain section 176, "*Reports,*" but to consider it further in the third edition.

15.13 Regarding section 177, "*Central Bank, Establishment:*"

- i. The meeting agreed to replace the formulations in section 177 on "*Central Bank, Establishment,*" with those provisions found in the first edition of the working draft, to read:

*"There is a South African Reserve Bank, which is the central bank of the Republic, and is regulated by national legislation."*

- ii. The meeting agreed to discuss the matter again in the third edition.

15.14 Regarding section 178, "*Primary Object:*"

15.14.1 The meeting agreed to subsection 178(1), but agreed to discuss it further in the third edition.

15.14.2 The meeting accepted subsection 178(2).

15.15 The meeting accepted section 179, "*Powers and Functions.*"

## 16. CHAPTER 14: GENERAL PROVISIONS

16.1 Regarding section 180, "*International Agreements,*" and section 181, "*Customary International Law:*"

16.1.1 The meeting agreed that the provision contained on page 12 of the "*Errata*" would replace the existing subsections 180 and 181 in the "*Refined Working Draft (Second Edition).*"

16.1.2 The meeting adopted the new text with one revision:

the meeting agreed to place brackets around the words "*and the second house.*"

16.1.3 When considering the new section 181, however, the meeting noted the following

concerns for consideration when discussing the third draft:

- i. The question of "breach";
- ii. The question of customary international law; and
- iii. The impact of these provisions on the powers of provinces and local authorities.

## 17. ANY OTHER BUSINESS

- 17.1 The NP expressed concern about the presentation of the revised document. The Chairperson stressed that it would be a working draft and would be released through a variety of media.
- 17.2 The DP asked what the Constitutional Assembly would be doing in January 1996 before the closing date for submissions in February 1996. The meeting agreed that outstanding issues and well as the matters identified for further consideration would be discussed when the committee reconvened in the new year, and that this process would proceed if necessary on a parallel basis with the consideration of submissions from the public.
- 17.3 The ANC proposed that the Constitutional Assembly engage a new team of people to look at the language of the constitution and to provide it with the necessary majesty and elegance and ensure that it had a South

African "flavour". These people need not be lawyers. The meeting agreed that the Administration would forward a report on this matter to the Constitutional Committee in January 1996.

17.4 On behalf of the Department of Constitutional Development, Mr. Meyer reported that the German Chancellor had invited a delegation of 16 to 17 members of the Constitutional Assembly to visit Germany in January 1996 to discuss constitutional matters. Parties would be approached to ensure that representatives from all parties would participate. The meeting accepted the invitation.

17.5 The Chairpersons thanked the Executive Director and the Deputy Directors for their efforts. Political parties also thanked the Constitutional Assembly Administration and their own back-up staff for the hard work done. In addition, they thanked the Chairpersons for displaying such able leadership, which had guided the process so effectively. The meeting also said that it was unfortunate that the IFP was still not participating in the process, as this way of working was to the benefit of all the parties.

## 18. CLOSURE

The Chairperson closed the meeting at 16h50 on Friday, 10 November 1995.

## MEMORANDUM

**To: Members of the Constitutional Committee**  
**From: Hassen Ebrahim**  
**Date: 25 March 1996**  
**Re: DECISIONS REQUIRED: PROPOSALS ON PROCESS**

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Please find attached a document detailing proposals on process presented to the Management Committee on 14 March 1996. The Management Committee accepted the document in broad outline and agreed to forward its recommendations to the Constitutional Committee. The draft minutes of the Management Committee are also attached.

The decisions required by the Constitutional Committee are as ff:

1. **SCHEDULE**

1.1 **GENERAL**

Approval of schedule as outlined, subject to the need for flexibility and further re-appraisal on 4 April;

1.2 **CONSTITUTIONAL ASSEMBLY OF 29 MARCH 1996**

Approval of Management Committee recommendation that Chairpersons are to finalise the report of Constitutional Committee to Constitutional Assembly of 29 March and the programme of the CA on this day.

2. **AMENDMENT OF CONSTITUTION**

Recommendation of amendment of interim Constitution to the Constitutional Assembly on 29 March 1996;

3. **FINAL TEXT**

Approval of dates for consideration of final text by Constitutional Committee from 15 - 19 April 1996;

4. **ADOPTION PROCEDURE**

Approval of adoption procedure set out in enclosed document.

5. **CERTIFICATION**

Requirements in terms of Rules and interim Constitution are set out in broad outline. The Management Committee is to consider this matter and forward proposals at a later date.

**To: Members of the Constitutional Committee**

**From: Hassen Ebrahim  
Executive Director**

**Date: 25 March, 1996**

**RE: PROPOSALS ON THE PROCESS**

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**Note:** This document is the same document put to the Management Committee on the 14 March 1996. However, some changes have been made to the section dealing with the adoption procedure in discussion with the Chairpersons. The proposed amendment has also been revised in line with discussions at the Management Committee. The draft minutes of the Management Committee of the 14 March 1996 are also attached for your information.

## **1. SCHEDULE**

- 1.1 There is a general agreement that is both possible and desirable to adopt the Constitution by 8 May 1996. A schedule for the remaining time left to the CA must take account of the following:
- \* the number of issues requiring attention;
  - \* the time needed for technical work on the final draft; and
  - \* the time required for the adoption process itself.
- 1.2 The last opportunity to carry out technical and research work is during recess from 5 to 14 April 1996. In order to allow for sufficient opportunity by the Technical Refinement Team to prepare the final text, it is necessary to ensure that the political finalisation of the debates is substantially complete by 4 April 1996.
- 1.3 We are therefore left with eight working days to substantially finalise the political issues for debate. This excludes one in March for a session of the Constitutional Assembly has been scheduled but includes 26,27 and 28 March which are half working days where our programme is to run concurrently with Parliament.

- 1.4 A schedule as at 22 February, which takes account of all the above, is attached hereto.

## **2. 4th EDITION**

- 2.1 The 4th Edition of the Working Draft clearly identifies the issues that require attention. . A list of outstanding issues as at 14 March is attached hereto.
- 2.2 The 4th Edition also serves to bring to the attention of the Constitutional Committee, the public's submission on the Working Draft published in November last year. 20 February 1996 was the closing date for submissions on the Working Draft. To date, 249 942 submission were received. The vast majority of these, approximately 248 504, were received in the form of petitions. 1 438 substantive submissions were received. Of these, 238 were received from individuals.
- 2.3 A statistical report on submissions is included in the Submissions pack accompanying the 4th Edition. As submissions were received, they were copied, sorted and categorised, and copied with summaries directly to political parties and members of the sub-committee. The bulk of the submissions were processed and summarised in a record time of two weeks, as most submissions (each volume consisting of two parts) were produced and distributed.
- 2.4 To further facilitate consideration of these submissions, the Administration has attempted to cross-reference submissions to each provision in the 4th Edition of Working Draft in the form of End-notes. These end-notes are not intended to replace the original submissions, many of which are fairly detailed. They are intended to serve merely as an aide, to facilitate discussions. To further assist, the technical committee on the Bill of Rights analyzed the submission relevant to this Chapter in some detail and produced memoranda for the Constitutional Committee.

## **3. CONSTITUTIONAL COMMITTEE**

The Management Committee agreed that the Constitutional Committee meeting scheduled for 25 March 1996, will be largely process oriented. It will receive the report from the Management Committee based on the evaluation of 14 March and consider outstanding issues in the 4th Edition and public submissions in the End-notes. Rather than debating the substance of these issues, it is proposed that the Constitutional Committee, look at mechanisms and dates for these issues to be dealt with at sub-committee level.



#### **4. CONSTITUTIONAL ASSEMBLY**

It was also agreed that the Constitutional Assembly be convened on 29 March 1996 for the following purposes:

- 4.1 To receive a report from the Constitutional Committee, which will include a report on the evaluation by the Management Committee, a schedule for the remaining period and a list of outstanding issues;
- 4.2 To consider the 4th Edition of the Working Draft and debate outstanding issues. It is proposed that the Constitutional Committee empowered to authorise the Chairpersons to identify some outstanding issues to debate at CA level;
- 4.3 To deal with two important process issues concerning the adoption process and amendment of the Constitution; and CA Rules - see paragraphs 5.2 and 7.3 (ii) below.

#### **5. AMENDMENT OF THE CONSTITUTION**

- 5.1 Some debate has taken place already at Management Committee level about the need to plan for two possible scenarios - the need to allow the CA to refer to the independent Panel of Constitutional Experts, if the need arises, as a deadlock breaking mechanism in terms of s73(3) of the Constitution; and the need for the CA to reconvene in the event of the non-certification of the adopted text.
- 5.2 In order to ensure that we are able to deal with these two possibilities, it is proposed that the Constitutional Assembly on 29 March 1996 amends the Constitution. The Amendment would provide for the possibly of referring to the Panel as a deadlock-breaking mechanism in the event of non-adoption on 8 May; and to allow the CA to reconvene for a further period to deal with issues in the event of non-certification. The proposed amendment has been revised since the Management Committee and is attached hereto.

#### **6. FINAL TEXT**

- 6.1 Since it is the responsibility of the Constitutional Committee to finally negotiate the text, it is recommended that we are left with two options;
  - i To hold a Constitutional Committee between 1-4 April to politically finalise the text; or
  - ii To arrange for a multi-lateral between 1 - 3 April and report to the Constitutional Committee on 4 April 1996.

- 6.2 The Management Committee agreed to decide on this matter towards the end of March 1996.
- 6.3 Should the political debates be substantially completed by 4 April 1996, it is possible for a final text to be produced for political consideration by 15 April, that is, immediately after the recess period. This will place the Constitutional Committee in a position to finally consider the text with a view of initiating the process required for its adoption.
- 6.4 It is expected that formal adoption procedures will commence towards the end of April if work proceeds according to plan.
- 6.5 The final sitting of the Constitutional Assembly would take place on 8 May for purposes of adoption, tabling of the final CA report and a resolution mandating the Chairpersons to file the final text with the Constitutional Court.

## **7. PROCESS OF ADOPTION**

### **7.1 CONSTITUTIONAL REQUIREMENTS**

- 7.1.1 Section 73(1) of the Constitution requires the Constitutional Assembly to pass the final text within two years as from the date of the first sitting of the National Assembly. The first adoption took place on 9 May 1994. Therefore the final date of adoption must be no later than 8 May 1996.
- 7.1.2 Section 73(2) requires a majority of two-thirds of all members of the Constitutional Assembly to pass the final text provided that all provisions relating to boundaries, powers and functions of provinces shall also require a two thirds majority of the Senate. Procedurally therefore there should be two sets of votes cast on the final text.

### **7.2 REQUIREMENTS OF CA RULES**

- 7.2.1 The Rules of the Constitutional Assembly lay out an elaborate procedure for adoption consisting of four stages. This includes the stipulation that not more than one stage may be held on any one particular day. It also includes a particularly lengthy third stage during which each clause is separately considered. This stage of legislation, which is called the Committee of the Whole House in the Westminster system, has been replaced since 1987 in Parliament by the referral of the bill to a committee.
- 7.2.2 Since the process of constitution-making has taken place thus far in committee, and considering the time that would be required for adoption if the strict letter of the Rules were to be followed, a

streamlined procedure for adoption has been considered and recommended to the Constitutional Assembly.

### **7.3 PROPOSED PROCEDURE FOR PASSING OF THE NEW CONSTITUTIONAL TEXT**

#### **7.3.1 QUORUM**

A quorum of 164 members required during debate. A simple majority for all decisions, with the exception of decisions taken during the Third and final Stage, when a majority of at least two-thirds of all the members of the CA is required.

#### **7.3.2 LANGUAGES**

The CA will attempt to have the final text available in all 11 official languages by 15 April 1996. However, for practical purposes in terms of the adoption procedure dealt with in this section, it is recommended that the proposed amendments and Order Papers be dealt with in English only. Members speaking during the process however will have translations available in all 11 languages and will be encouraged to use all languages.

#### **7.3.3 PROVISIONAL TIMETABLE**

Mon	22 April	Introduction and First Stage
Tue	23 April	Open Day
Wed	24 April	Second Stage: Preamble and Chapters 1 and 2
Thu	25 April	Open Day
Fri	26 April	Second Stage: Chapters 3,5 and 6
Mon	29 April	Second Stage: Chapters 4,8 and 9
Tue	30 April	Open Day
Wed	1 May	Public Holiday
Thu	2 May	Second Stage: Chapters 7,10,11,13,14 and 15
Fri	3 May	Open Day
Mon	6 May	Second Stage: Chapter 7,10,11,13,14 and 15
Tue	7 May	Open Day
Wed	8 May	Third Stage - Final Adoption

#### **7.3.4 FIRST STAGE**

- (1) This first stage signifies the formal commencement of the adoption procedures during which the Chairperson will place the bill on the Order Paper.
- (2) During this stage the Chairperson will deliver his introductory speech on the bill.

- (3) After the introductory speech, one member of each political party in the Constitutional Assembly may make a statement on the bill on behalf of her or his party.
- (4) When statements have been made on behalf of all political parties in the Constitutional Assembly who wish to be heard, a period of Open Time will ensue at the end of the day.

#### **7.3.5 SECOND STAGE**

- (1) During this stage, member in charge places the final text on Order Paper for consideration of the clauses and other provisions.
- (2) The clauses and other provisions of the bill will be considered in order put by the presiding officer according to the provincial timetable set out above.
- (3) Proposed amendments to the final text by political parties must be received by 12h00 on Thursday 18 April 1996.
- (4) After debating the proposed amendments, the presiding officer shall refer the proposed amendments to the Constitutional Committee.

#### **7.3.6 THIRD AND FINAL STAGE**

During this stage, the final text as a whole, incorporating any changes if any, will be put to members for a vote, requiring a two-thirds majority. Provisions dealing with boundaries, powers and functions of provinces will be put to a separate vote to members of the Senate, requiring a two-thirds majority.

#### **7.3.7 PROPOSED RESOLUTION**

The Constitutional Assembly hereby agrees to amend the Rules in accordance with the procedure outlined.

### **8. TRANSLATION**

- 8.1 The Final text of the Constitution will be published in the Government Gazette and distributed to all Constitutional Assembly members together with the final CA Report towards the end of April 1996. The text will be in as many of the official languages as possible.
- 8.2 Work has already commenced on translating the provisions of the 3rd Edition into all official languages. It is expected that we will have complete drafts translated into all official languages by 1 April 1996.

## **9. CERTIFICATION**

### **9.1 CONSTITUTIONAL REQUIREMENTS**

Whilst the Constitution states in s71 that the new text will not be of any force of effect unless it is certified by the Constitutional Court to be in compliance with the Constitutional Principles, it is silent as to the procedure for certification.

### **9.2 CA RULES REQUIREMENTS**

In terms of Rule 97(1) two "fair" copies of the text passed by the Constitutional Assembly must be certified by the Secretary and lodged with the Constitutional Court with a view to certification. These copies must also be accompanied by a request to the effect that if the Constitutional Court certifies the text, one of the copies bearing the Court's certificates should be returned to the secretary for presentation to the President for assent.

### **9.3 CONSTITUTIONAL COURT RULES**

- i In terms of Rule 15, the Chairperson of the Constitutional Assembly required to "certify in writing the content of the constitutional text passed by the Constitutional Assembly and submit such text to the registrar with a formal request to the court to perform its functions in terms of section 71(2) of the Constitution."
- ii This certificate should include a statement specifying that the provisions of the text were passed by the requisite majority and whether any of the political parties represented in the Assembly wish to address the Constitutional Court.
- iii The Chairperson of the Court may direct that the CA Chairperson provide further information as may be necessary and that all interested parties in the Assembly may be allowed to table written submissions and may be present oral argument if necessary.

### **9.4 MANAGEMENT COMMITTEE**

The Management Committee would need to consider the details of the process and form of petition for certification of the approved text at a later stage. The Constitutional Court has provisionally indicated that it could sit for the month of June for purpose of certification.

**10. PUBLICATION OF CONSTITUTION**

The Administration is preparing proposals for the consideration of the Chairpersons on the publication of the Constitution after certification. This involve producing the Constitution in various formats - including the official A4 version, a pocket-book version on parchment with calligraphy for the signing ceremony by the President.

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22 MARCH 1996

**[Note: Words in bold brackets denote deletion and words underlined denote insertion].**

## BILL

To amend the Constitution of the Republic of South Africa, 1996, in order to further regulate certain matters in connection with the constitution-making process; and to provide for incidental matters.

BE IT ENACTED by the Constitutional Assembly, as follows:-

### Amendment of section 71 of Act 200 of 1993

1. Section 71 of the Constitution of the Republic of South Africa, 1993, is hereby amended by the insertion after subsection (2) of the following subsection:

"(2A) If the Constitutional Court finds that not all the provisions of a draft of the new constitutional text passed by the Constitutional Assembly in terms of section 73(2) or approved by it in terms of section 73(5) comply with the Constitutional Principles, the Constitutional Court must -

- (a) set out in its ruling in what respect the draft text does not comply with the Constitutional Principles; and
- (b) order the Constitutional Assembly to rectify the draft text within a specified period, which may not be less than three months of the order."

### Amendment of section 73 of Act 200 of 1993

2. Section 73 of the Constitution of the Republic of South Africa, 1993, is hereby amended -

- (a) by the substitution for subsection (3) of the following subsection:

"(3) If the Constitutional Assembly fails to pass a proposed draft of the new constitutional text in accordance with [subsection (1)] subsections (1) and (2), but such draft is supported by a majority of all its members, such proposed draft shall be referred by the Chairperson to the panel of constitutional experts referred to in section 72(2) for its advice, to be given within 30 days of such referral, on amendments to the proposed draft, within the framework of the Constitutional Principles, which might secure the support required in terms of subsection (2)"; and

(b) by the substitution for subsection (9) of the following subsection:

"(9) If the relevant text is not approved in the referendum in accordance with subsection (8), [or if a new constitutional text is not passed in terms of this Chapter within the period of two years referred to in subsection (1),] the President shall dissolve Parliament by proclamation in the Gazette within 14 days after the referendum, [or the expiry of the said period,] whereupon an election contemplated in section 39(1)(a) shall be held."

**Short title**

3. This Act shall be called the Constitution of the Republic of South Africa Second Amendment Act, 1996.



**CONSTITUTIONAL ASSEMBLY  
DRAFT MINUTES OF THE MANAGEMENT COMMITTEE MEETING  
THURSDAY 14 MARCH 1996**

**PRESENT  
RAMAPHOSA M C (CHAIRPERSON)**

**Chabane O C  
Eglin C W  
Meshoe K R  
Meyer R P  
Moosa M V**

**Myakayaka-Manzini M  
Sizani R K  
Van Breda A  
Viljoen C  
Wessels L (Deputy Chairperson)**

**Absent:** P F Smith.

**In Attendance:** H Ebrahim, P Lillienfeld, M Sparg, G Grové, and M Keegan.

**1. OPENING**

The Chairperson opened the meeting at 07h38 and the meeting approved the agenda.

**2. MINUTES**

The meeting adopted the Minutes of the Management Committee Meeting of Thursday 22 February 1996.

**3. MATTERS ARISING**

None - Included In agenda items below.

**4. EVALUATION**

- 4.1 Mr. Ebrahim introduced the document entitled, "*Survey of Issues Requiring Attention*," tabled at the meeting, and then spoke to the document entitled "*Proposals on Process*," included in the documentation.
- 4.2 Mr Ebrahim spoke to the revised "*Constitutional Assembly Programme*," included in the documentation. He said the schedule was based on the following reasoning:
- 4.2.1 On the basis of the "*Survey of Issues Requiring Attention*," and of progress made, it seemed that the Constitutional Assembly could complete its work by 8 May.
- 4.2.2 The only time that the Technical Refinement Team could meet to prepare the final text without interfering with political decisions was between 5 and 14 April.
- 4.2.3 To allow this, the Constitutional Committee would need to meet between 1 and 4 April to consider the entire text and decide on outstanding matters.
- 4.2.4 This in turn would require that political decisions be made on each matter by the end of March, and that parties be prepared to provide a final mandate to their representatives by that time.
- 4.2.5 Mr. Ebrahim asked for agreements in principle regarding the following:
- I. There were two options for how the Constitutional Assembly used the time between 1-4 April 1996 to prepare final instructions to the Technical

Refinement Team:

- \* The Constitutional Committee could be convened for all four of these days; or
  - \* Parties could meet in multi-laterals between 1-3 April 1996 and the Constitutional Committee meet on 4 April 1996.
- II. The final draft would be ready for distribution in all 11 official languages by 15 April; the Constitutional Committee would meet to assess the text between 15 and 18 April 1996; and
- III. The Constitutional Assembly be convened to undertake the formal process of adoption between 22 April and 8 May.
- 4.2.6 Mr. Ebrahim said that the final text would be translated into the 11 official languages. However, it would not be practically possible to use more than one language in preparing order papers and amendments, if any, during the adoption process itself in the Assembly.
- 4.2.7 Finally, he said that the Administration was currently developing proposals for the Chairpersons on the publication of the certified constitution. This would be produced in various formats.
- 4.3 Mr. Ebrahim spoke to the document entitled "*Proposed Amendment of the Interim Constitution*," contained in the documentation.
- 4.3.1 Mr. Ebrahim reminded the meeting that it had instructed the Administration to provide for two possible scenarios:
- I. Should a two thirds majority not be achieved on 8 May 1996, provision needed to be made to use the Panel as a deadlock breaking mechanism, as set out in s73(3) of the Interim constitution; and
  - II. Provision needed to be made for the situation where the Constitutional Court did not certify provisions in the new constitution.
- 4.3.2 The enclosed amendments of the Interim Constitution provided for these situations.
- 4.4 Mr. Wessels highlighted the fact that the schedule required the Constitutional Assembly to work concurrently with Parliament:
- 4.4.1 This would affect only the small number of participants in the Constitutional Committee sub-committee on 26, 27 and 28 March 1996.
- 4.4.2 Mr. Wessels drew particular attention to 29 March 1996, however, as a "red letter day," during which a critical meeting of the full Constitutional Assembly would occur to consider constitutional proposals as well as an amendment of rules.
- 4.4.3 In addition, he reported that the Constitutional Committee would need to work concurrently with Parliament during the week of 15-19 April. This placed a heavy burden on members of the Constitutional Committee, but the Whips understood that this would be preferable to adjourning Parliament.
- 4.5 Mr. Wessels asked parties to take serious note of the schedule, to give their representatives timely notice, and to begin working now to assure that their representatives were free to participate in Constitutional Assembly meetings.

- 4.6 Mr. Eglin of the DP asked that the deadline be moved to the end of June 1996. He said the 8 May deadline was difficult because:
- I. It created too tight a programme for the smaller parties, particularly given the concurrency of the Constitutional Assembly and Parliament;
  - II. It made no provision for "snags" in the process; and
  - III. More time might be needed to accommodate the technical work, including translations.
- 4.7 Mr. Eglin concluded that moving the deadline might be necessary to achieve the necessary "thoroughness of the final phase." As such it would be a "process shift" not a "political shift." He said it may be possible for the President to change the date by proclamation.
- 4.8 Mr. Moosa of the ANC responded that:
- I. After considering the "Survey of Issues," the number of issues on which there were serious differences were very few. The majority of outstanding issues were a question of finding the right formulation, not of fundamental differences in principle. In addition, the nature of some of the issues on which fundamental differences existed, was such, that parties would only take decisions at the 11th hour, whenever that is.
  - II. Thus, the schedule appeared to be realistic. This did not mean that the deadline could not be moved. In fact, thoroughness could not be sacrificed for an artificial date. However, the question of moving the deadline should not be taken lightly, particularly if it meant simply postponing hard decisions that, sooner or later, had to be taken.
  - III. However, Mr Eglin's points were valid and a degree of flexibility was needed.
- 4.9 Gen. Viljoen of the FF supported Mr. Eglin's proposal that the deadline shift to the end of June to accommodate two concerns. These were:
- I. What would happen if the IFP returned to the process? How would the Constitutional Assembly accommodate their return? Mr. Viljoen argued that they should be given some time to raise questions, although he recognised that there was a danger here. And,
  - II. A third stage or public participation should be allowed, particularly to allow those who made submissions to make comments on the final draft. The Panel could quickly go through these final submissions, and identify those which were particularly useful.
- 4.10 Regarding the IFP's return:
- I. Mr. Ramaphosa responded that there was no certainty about whether or not the IFP would return and it was therefore not possible to plan for their return now;
  - II. Mr. Chabane of the ANC added that dates shouldn't be changed to accommodate the hypothetical return of the IFP. The matter should be left until such a time that the IFP actually returned, if they did.
- 4.11 Regarding a third phase of submissions:
- 4.11.1 Mr. Ramaphosa queried whether a final text could not be sent out, particularly to individuals or organisations that gave submissions.

- 4.11.2 Ms. Sparg responded that distribution or publication of the final text could certainly occur. However, there were already 30 volumes of second phase submissions to consider. These, alongside the order papers and amendments, amounted to a flood of documents that members had to consider. Consideration of yet another, third round of submissions would be too much for members, particularly taking into account the time needed for sorting and copying of the submissions to members.
- 4.11.3 Mr. Ramaphosa ruled that the matter would be given further attention, to see the extent to which it could be fit into the already very tight schedule.
- 4.11.4 Mr. Meshoe of the ACDP expressed concern that this would raise the public's expectations unfairly.
- 4.11.5 Mr. Ramaphosa reflected that submissions had been taken very seriously in the past and that parties continued to debate the views of submissions received on the Working Draft.
- 4.12 Mr. Chabane of the ANC expressed concern that the Constitutional Assembly process actively engaged only a small number of people, and a large majority of Constitutional Assembly members were not well briefed on what was happening. In light of this he asked that:
- i. Upcoming meetings of the Constitutional Committee and Constitutional Assembly meetings not be shifted; if the schedule were changed, rather compress multilaterals or sub-committee meetings; and
  - ii. A briefing document be prepared for Constitutional Assembly members on the problems and the process, that they could consider as they go into recess.
- 4.13 Mr. Chabane of the ANC supported the changes to the Interim Constitution proposed in the documentation, but queried why the proposed amendment to s71 specified the period "not less than three months."
- i. Mr. Wessels responded that the Court would extend the life of the Constitutional Assembly, so that within the time span, it could rectify the problems identified.
  - ii. Mr. Ebrahim explained that at least three months were needed to allow this work to be fitted into the Parliamentary programme.
  - iii. Mr. Wessels suggested that the precise time period be considered further before the proposal went to the Constitutional Committee.
  - iv. Mr. Moosa of the ANC said that the exact time period was not important, as long as it was realistic.
- 4.14 Mr. Moosa of the ANC posed the following questions:
- i. Re. s71(3A): what would happen if the Constitutional Court referred a specific provision back to the Constitutional Assembly because it fell outside the Constitutional Principles, and the amended version could not get a two-thirds majority of support? And,
  - ii. What would happen if the Panel could not provide a consensus report in the 30 days given, or what if its report did not receive a two-thirds majority of support?
  - iii. What happens to s73(9) in the light of the proposed amendment?
- 4.15 Mr. Grové responded that the proposed amendment in s73(3) would extend the life of

the CA so that all other provisions in Chapter 5 could apply after 8 May. However, he would consider the matter further.

4.16 Mr. Meyer of the NP asked whether the Constitutional Assembly could amend the Interim Constitution.

4.16.1 Mr. Ramaphosa responded that provisions in chapter 5 permitted this, as was seen when the Constitutional Assembly amended the Constitution to allow for additional members of the Panel.

4.16.2 Mr Lillienfeld added that s74(2) allowed for this with a two thirds majority.

4.17 Mr. Eglin said that although the DP preferred that the deadline be extended to the end of June, "for thoroughness", flexibility was still needed. He proposed, then, that the schedule be fixed up until 4 April, but flexible thereafter, to allow the Management Committee to assess on 4 April whether further changes to the programme were needed.

4.18 Mr. Moosa responded that the Management Committee could review the situation on 4 April, but that it nevertheless accept the programme up until the end of May to allow the Administration to plan its work. However, it would recognise the need for flexibility.

4.18.1 This had the advantages that:

- I. The Constitutional Assembly would not simply be postponing decisions on "irksome" issues;
- II. There was great value in giving certainty on the constitutional order;
- III. Extending the deadline would create the possibility of yet another extension and introduce a degree of uncertainty. It would impact on the image and performance of a country if we are unable to meet deadlines we set for ourselves. There is a great deal of international interest to see if we are able to meet the deadline.

4.18.2 However, he added, thoroughness should not be sacrificed.

4.19 Mr. Ramaphosa ruled that:

- I. The schedule was realistic and was provisionally accepted;
- II. The Constitutional Assembly would proceed to work as planned, and adoption would proceed for 8 May 1996.
- III. There would be "breathing spaces" for parties during adoption, as set out in the schedule;
- IV. 1-3 April could be used in multi-laterals, or perhaps the Constitutional Committee could meet outside of Parliament in a lekgothla/bosberraad/indaba to finalise outstanding issues. This would be determined towards the end of March.
- V. The Chairpersons and Administration would consider whether further public submissions could be factored into the programme in a meaningful way.
- VI. The Constitutional Assembly would continue to appeal to the IFP to return to the process. However, this could only be dealt with once they returned, should they do so.

- vii. The proposed amendments would be forwarded to the Constitutional Committee on 25 March and thereafter to the Constitutional Assembly for its consideration on 29 March 1996.
- viii. Although the Chairperson was confident that the 8 May 1996 deadline would be reached, the Management Committee would re-evaluate the process on 4 April 1996.

**5. ANY OTHER BUSINESS**

**5.1 CONSTITUTIONAL ASSEMBLY MEETING ON 29 MARCH 1996**

The meeting agreed that the Chairpersons would finalise the Constitutional Committee's report to the Constitutional Assembly and the C.A's programme on 29 March 1996.

**5.2 MEETING WITH PROVINCIAL PREMIERS**

The Chairperson informed the meeting that members of the Management Committee would meet with provincial premiers and some members of provincial executives on Friday, 22 March 1996 In the afternoon, after 13h00. Members would be advised of the venue.

**6. CLOSURE**

The Chairperson closed the meeting at 09h06.

# SURVEY OF ISSUES REQUIRING ATTENTION

AS AT 14 MARCH 1996

	Section	Section Title	Deadlock	Decision Required	Technical Refinement
1		<i>Preamble</i>		Submissions	
2	5	<i>Anthem</i>		Anthem	
3	6	<i>Language</i>		NP formulations	
<b>CHAPTER 2: BILL OF RIGHTS</b>					
4	8(3)	<i>Equality</i>			Reformulate and provide options
5	10	<i>Life</i>	Death penalty		
6	11(2)(b) and (c)	<i>Freedom and Security of Person</i>		i. "Bodily/physical integrity" ii. "Decisions concerning their body"	
7	13	<i>Privacy</i>			Panel memo
8	15(2)(c) and (3)	<i>Freedom of Expression</i>		Harm test	Reformulate 15(3)
9	16	<i>Assembly, Demonstration and Petition</i>		"[Picket]"	
10	20	<i>Freedom of Movement and Residence</i>		"Everyone"	

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	Section	Section Title	Deadlock	Decision Required	Technical Refinement
11	21	<i>Freedom of Occupation</i>		i. "[Trade]" ii. Permanent residents	
12	22	<i>Labour Relations</i>	i. Right to strike ii. Right to lock-out iii. Union administration		
13	23	<i>Environment</i>		NP proposal	
14	24	<i>Property</i>		Various matters	
15	25(3)(4)	<i>Housing</i>		i. "[Arbitrarily]"	Panel memo
16	27	<i>Children</i>		"[parental] care"	
17	28	<i>Education</i>	Whole Section		
18	31	<i>Access to Information</i>			Reformulation
19	32	<i>Just Administrative Action</i>			Reformulation
20	34(4)	<i>Arrested, Detained and Accused Persons</i>		Exclusion of evidence	
21	35(1)(a)	<i>Limitations</i>			Panel memo
22	36	<i>State of Emergency</i>			i. Panel memo ii. Reformulation
23	38	<i>Application</i>		"i. Appropriate/ applicable" ii. Juristic persons	



	Section	Section Title	Deadlock	Decision Required	Technical Refinement
<b>CHAPTER 3 - NATIONAL ASSEMBLY</b>					
24	41	<i>Composition and Election</i>		Electoral system	
25	46(4)	<i>Elections and Duration of National Assembly</i>			Reformulation
26	52	<i>Bills</i>			Finalise after 2nd House
27	53	<i>Constitutional Amendment</i>		Exempt clauses	
28	54A	<i>Application by Members to Constitutional Court</i>		Whole section	
<b>CHAPTER 4 - NATIONAL COUNCIL OF PROVINCES [AGREED TO USE DRAFT 5 MARCH AS BASIS FOR DISCUSSION]</b>					
29	1.	<i>Concept</i>		i. Name ii. In definition of Parliament?	Tech Advisors' opinion
30	2.	<i>Composition</i>		i. Appointment ii. Referral after mediation iii. Majorities	
31	3.	<i>Participation in National Legislative Process</i>		30 day cooling off period	
32	4.	<i>Financial Bills</i>		FFC and provincial allocations	
33	7.	<i>Voting in the Council</i>		"Mandate"	
34	8.	<i>Powers to Summons Ministers</i>		Ministers' rights	

	Section	Section Title	Deadlock	Decision Required	Technical Refinement
35	9.	<i>Appointment</i>		Appointment of Constitutional Court judges etc.	
36	11.	<i>General</i>		Whole section	
<b>CHAPTER 5 - NATIONAL EXECUTIVE</b>					
37	78(1)(j)	<i>Powers and Functions of President</i>		Appointment of ambassadors	
38	85	<i>Multiparty participation in executive</i>		NP Proposals	
39	93	<i>Snap elections</i>		Legislative terms	
40	93(4)	<i>Votes of No Confidence</i>		Appointment of new President	Reformulation
<b>CHAPTER 6 - COURTS AND ADMINISTRATION OF JUSTICE</b>					
41	99A	<i>Inherent Power</i>		Outstanding	
42	100	<i>Appointment of Judges</i>	Options		
43	101(3)	<i>Acting Judges</i>		Appointment	
44	105	<i>Attorney General</i>	Structure		
<b>CHAPTER 7 - STATE INSTITUTIONS SUPPORTING CONSTITUTIONAL DEMOCRACY</b>					
45	109(4)	<i>Human Rights Commission</i>		Deletion of (4)	
46	111	<i>Auditor General</i>		"Holding office in a political party"	
47	113(1)(c)	<i>Electoral Commission</i>			Reformulate 113(1)(c)

	Section	Section Title	Deadlock	Decision Required	Technical Refinement
48	115	<i>General Provisions Appointments</i>		Composition of committee	
49	116	<i>Removal from Office</i>		Composition of committee	
50		<i>Independent Broadcasting Authority</i>			Formulations
51		<i>Cultural Commission(s)</i>		Volkstaat and NP proposals	
52		<i>Environmental Commission</i>		NP proposal	
<b>CHAPTER 8 - PROVINCES</b>					
53		[Co-operative governance]		NP proposal	
54	148-53	<i>Provincial Financial and Fiscal Matters</i>			Reformulate
55	154	<i>Provincial Constitutions</i>		Homogeneity	
<b>CHAPTER 9 - PROVINCIAL COMPETENCIES</b>					
56	1	<i>National and Provincial Legislative Authority: Legislative Authority of the Republic</i>			Reformulation
57	2	<i>Legislative Authority of Provinces</i>		Framework legislation	Reformulation
58	3	<i>Conflicts between National and Provincial Legislation</i>		Overrides	Reformulation
59	5	<i>Conflicts That Cannot Be Resolved</i>		Measuring provincial capacities	
60	6	<i>Subsidiarity</i>		Outstanding	

	Section	Section Title	Deadlock	Decision Required	Technical Refinement
61	7	<i>Asymmetry</i>		Outstanding	
62	8	<i>Justiciability</i>		Outstanding	
63		<i>National and Legislative Executive Competencies</i>		Outstanding	
<b>CHAPTER 10 - LOCAL GOVERNMENT</b>					
64	163-168	<i>Local Government</i>		Outstanding	
<b>CHAPTER 11 - TRADITIONAL AUTHORITIES</b>					
65	169-173	<i>Traditional Authorities</i>		Outstanding	
<b>CHAPTER 12 - PUBLIC ADMINISTRATION</b>					
66	171(1)	<i>Public Administration</i>			i. Panel memo ii. Reformulation
67	173(3)	<i>Public Service</i>			Reformulation
<b>CHAPTER 13 - SECURITY SERVICE</b>					
68	182	<i>Control of Police Service</i>		Outstanding	
<b>CHAPTER 14 - FINANCE</b>					
69	188(2)(c)	<i>Treasury Control</i>			Finalise after 2nd House
70	192(1)(d)	<i>Remuneration of Persons Holding Public Office</i>			Finalise after Traditional Authorities
71	193(2)(d), and (h), and (3)(h)	<i>Allocations from National Revenue:</i>			Finalise after Local Government

	Section	Section Title	Deadlock	Decision Required	Technical Refinement
72	196	<i>Appointment of Members</i>			Panel memo
<b>CHAPTER 15 - GENERAL PROVISIONS</b>					
73	201-203	<b>International Agreements</b>		Party submissions	
74	<b>Self Determination</b>			Concept of Volkstaat	
75	<i>Schedules</i>			Outstanding	
76	<i>Transitional Arrangements</i>			Consider on ongoing basis	TRT to consider on ongoing basis
	<b>Total</b>		<b>5</b>	<b>54</b>	<b>25</b>

# CONSTITUTIONAL ASSEMBLY PROGRAMME - 1996

## MARCH

MON	TUES	WED	THURS	FRI	SAT	SUN
				1	2	3
<b>4</b> Bilaterals between parties	<b>5</b> Sub-Committee 10 - 18:00 E249 (Bill of Rights)	<b>6</b> Sub-Committee 14 - 18:00 E249 (Provinces, Competencies & National Council of Provinces)	<b>7</b>	<b>8</b> Sub-Committee 10 - 18:00 E249 (Institutions of Constitutional Democracy, Public Administration, Security Services)	<b>9</b>	<b>10</b>
<b>11</b> Bilaterals between parties	<b>12</b> Sub-Committee 10 - 18:00 E249 (Bill of Rights & Provinces, Competencies, Nat. Council of Provinces)	<b>13</b> <i>Budget Speech</i>	<b>14</b> Man Com 8-10 V16 (Evaluation)	<b>15</b> Sub-Committee 10 - 18:00 OAC (Courts & Admin of Justice, Nat. Executive, Transition Arrangements, & National Assembly)	<b>16</b>	<b>17</b>
<b>18</b> Sub-Committee 10 - 18:00 E249 (Bill of Rights & Provinces, Competencies, Nat. Council of Provinces)	<b>19</b>	<b>20</b> Multi-laterals 10 - 18:00 V16 (Competencies)	<b>21</b> <i>Public Holiday</i>	<b>22</b>	<b>23</b>	<b>24</b>
<b>25</b> Constitutional Committee 10:00 - 18:00 OAC (4th Edition of Working Draft)	<b>26</b> Sub-Committee 15 - 18:00 OAC (Traditional Authorities & Self Determi- nation, Security Services, & Institutions of Constitu- tional Democracy)	<b>27</b> Multilateral 14 - 18:00 V16 (Competencies & National Council of Provinces)	<b>28</b> Sub-Committee 14 - 18:00 OAC (Local Gov, General Provisions, Public Admin, Finance & Schedules)	<b>29</b> Constitutional Assembly (Consider Working Draft & pass resolution)	<b>30</b>	<b>31</b>

# APRIL

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MON	TUES	WED	THURS	FRI	SAT	SUN
<b>1</b> Const. Committee 10:00 - 18:00 OAC (Debate on Outstanding Issues) or Multilateral	<b>2</b> Const. Committee 10:00 - 18:00 OAC (Debate on Outstanding Issues) or Multilateral	<b>3</b> Const. Committee 10:00 - 18:00 OAC (Debate on Outstanding Issues) or Multilateral	<b>4</b> Man. Committee V16 8:00 - 10:00 Const. Committee 10:00 - 18:00 OAC (Debate on Outstanding Issues)	<b>5</b> <i>Good Friday</i> Technical Preparation of Final Draft	<b>6</b> Technical Preparation of Final Draft	<b>7</b> Technical Preparation of Final Draft
<b>8</b> <i>Family Day</i> Technical Preparation of Final Draft	<b>9</b> <i>RECESS</i> Technical Preparation of Final Draft	<b>10</b> <i>RECESS</i> Technical Preparation of Final Draft	<b>11</b> <i>RECESS</i> Technical Preparation of Final Draft	<b>12</b> <i>RECESS</i> Technical Preparation of Final Draft	<b>13</b> Technical Preparation of Final Draft	<b>14</b> Print Final Text
<b>15</b> <u>Distribute Final Draft for CC Debate</u> Const. Committee OAC 10:00 - 18:00 (Final Debates - Final Draft)  <i>Committee on Votes</i>	<b>16</b> Const. Committee OAC 10:00 - 18:00 (Final Debates - Final Draft)  <i>Committee on Votes</i>	<b>17</b> Const. Committee OAC 10:00 - 18:00 (Final Debates - Final Draft)  <i>Committee on Votes</i>	<b>18</b> Man. Committee V16 8:00 - 10:00 Const. Committee OAC 14:00 - 18:00 (Final Debates - final Draft)  <i>Committee on Votes</i>	<b>19</b> Const. Committee OAC 10:00 - 18:00 (Final Debates - Final Draft)  <i>Committee on Votes</i>	<b>20</b> Prepare Final Draft for Print & Publication	<b>21</b> Prepare Final Draft for Print & Publication
<b>22</b> Const. Assembly 10:00 - 18:00 (First Stage)	<b>23</b> Man. Committee V16	<b>24</b> Const. Assembly 10:00 - 18:00 (Second Stage First Day)	<b>25</b> Man. Committee V16	<b>26</b> Const. Assembly 10:00 - 18:00 (Second Stage - 2nd Day)	<b>27</b>	<b>28</b>
<b>29</b> Const. Assembly 10:00 - 18:00 (Third Stage - 1st Day)	<b>30</b> Const. Assembly 10:00 - 18:00 (Third Stage - 2nd Day)					

## MAY

MON	TUES	WED	THURS	FRI	SAT	SUN
		<b>1</b> <i>Worker's Day</i>	<b>2</b> Const. Assembly 10:00 - 18:00 (Third Stage - 3rd Day)	<b>3</b> Const. Assembly 10:00 - 18:00 (Third Stage - 4th Day)	<b>4</b>	<b>5</b>
<b>6</b> Const. Assembly 10:00 - 18:00 (Third Stage - 4th Day)	<b>7</b> Man. Committee V16	<b>8</b> Const. Assembly 14:30 - 18:00 (Third Reading & Adoption)	<b>9</b>	<b>10</b>	<b>11</b>	<b>12</b>