

2/12/84

Susha Kays

**CONSTITUTIONAL
ASSEMBLY**

**CONSTITUTIONAL
COMMITTEE**

**THURSDAY
25 APRIL 1996
14H00
OLD ASSEMBLY
CHAMBER**

DOCUMENTATION

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CONSTITUTIONAL ASSEMBLY

CONSTITUTIONAL COMMITTEE

NOTICE OF MEETING

Please note that a meeting of the Constitutional Committee will take place as indicated below:

Date: *Thursday, 25 April 1996*

Time: *14h00 - 18h00*

Venue: *Old Assembly Chamber*

AGENDA

1. Opening
2. Minutes
3. Consideration of Amendments.
[Schedule of Amendments will follow.]
4. AOB
5. Closure

**HASSEN EBRAHIM
EXECUTIVE DIRECTOR**

For further details contact Ms M Sparg, Tel 245 031

CONSTITUTIONAL ASSEMBLY

MINUTES OF THE THIRTY SIXTH (36TH) MEETING OF THE CONSTITUTIONAL COMMITTEE

TUESDAY 16 APRIL 1996

Present

Ramaphosa, M C (Chairperson)
Wessels, L (Deputy Chairperson)

Ackermann C	Mdladlana, S (Alt)
Andrew, K (Alt)	Meshoe K R
Camerer S	Meyer R P
De Beer, S J (Alt)	Moosa M V
De Lange, J H	Moosa M W (Alt)
Du Toit, D C	Mulder, C P
Eglin, C W	Myakayaka-Manzini, Y L M
Ginwala F	Ngcuka, B T
Gordhan, P J	Nzimande, B E
Green, L M (Alt)	Pahad E G
Hofmeyr, W	Radue, R (Alt)
King, T J	Ripinga, S S
Ligege M G	Schutte, D P A
Lockey D	Sifora, T V
Love, J	Sizani, R K
Mahlangu N J	Smuts, D (Alt)
Marais, P G	Surty, M E (Alt)
Mbete-Kgositsile, B	Van Breda A

Apologies: O C Chabane, GNM Pandor, J Schreiner,

Absent: K Asmal, M Bhaba, G Fraser-Moleketi, NJ Gogotya, S P Holomisa, J L Kgoali, BS Mabandla, M J Mahlangu, D W Makhanya, LPHM Mtshali, S Mzimela, J A Rabie, R Rabinowitz, P Smith, RS Suttner, F J Van Deventer, C L Viljoen.

In attendance: Directorate: H Ebrahim, M Sparg, Minutes: M Keegan, S Rabinowitz
Law Adviser: G Grové; **Panel of Experts:** G Erasmus, J Kruger, C Murray, J Van Der Westhuizen, and Z Yacoob. **Technical Advisers:** H Cheadle, S Liebenberg, I Rautenbach

1. OPENING

- 1.1 Mr. Ramaphosa opened the meeting at 10h30.
- 1.2 The meeting agreed to the proposal that the Constitutional Committee would discuss the chapters on the Bill of Rights and State Institutions supporting Constitutional Democracy and that there would be a parallel process of sub-committees in which the following issues would be discussed: Founding Provisions, Co-operative Government, Parliament, President and the National Executive, Provinces, Local Government, Transitional Arrangements and Competences and Security.
- 1.3 The meeting noted that Finance would be discussed in a sub-committee meeting at 16h00.
- 1.4 With regard to the Judiciary, it was agreed that Mr Ngcuka and Mr Schutte would discuss when this meeting would take place.
- 1.5 The meeting agreed that the CC would meet again on Wednesday 17 April to receive reports on the matters discussed in the CC and those referred to the various sub-committees.

2. CHAPTER 2: BILL OF RIGHTS

2.1 Regarding Section 9, "Rights"

- i The meeting agreed that the Technical Refinement Team should reformulate the first sentence of Section 9(1). The ANC proposed wording along the lines of: *"This Bill of Rights sets out the fundamental rights enjoyed by the people of South Africa and affirms the democratic values of human dignity, equality and freedom."*
- ii The meeting agreed that the Technical Refinement Team should reformulate the second sentence of Section 9(1) to refer to the fact that these rights are subject to the limitations referred to in the limitations clause.
- iii The meeting agreed to Section 9(2).

2.2 Regarding Section 10, "Application"

- i The meeting agreed to Section 10(1) but agreed that Section 10(2) would be discussed together with section 11(3) of the equality clause and could only be finalised when the equality clause was completed.
- ii The meeting agreed to Section 10(3) but noted the DP concern regarding the use of the word *"required"* and that it preferred a more

generous term such as "*allowed*".

2.3 Regarding Section 11, "*Equality*"

- i The meeting agreed to Section 11(1).
- ii With regard to Section 11(2), the meeting agreed that this section was still under consideration by the parties. The DP stated that it objected to the inclusion of this provision, but it did not oppose the new grammatical formulation proposed by the Technical Refinement Team. The ANC stated that it did not prefer to wording proposed in the side-bar but preferred to retain the wording in the draft.
- iii Regarding Section 11(3), the meeting agreed to inclusion of "*pregnancy*" as a ground and the brackets could therefore be removed but parties would give further consideration to the options proposed by the Panel and Technical Committee 4 and agreed that this section would be revisited.

2.4 The meeting agreed to Section 12, "*Human dignity*".

2.5 The meeting agreed that to defer discussion of Section 13, "*Life*".

2.6 Regarding Section 14, "*Freedom and security of the person*", the meeting agreed to this section but noted the NP reservation regarding Section 14(2)(b).

2.7 The meeting agreed to Section 15, "*Slavery, servitude and forced labour*" and Section 16, "*Privacy*".

2.8 Regarding Section 17, "*Freedom of religion, belief and opinion*", the meeting agreed to this section and noted the following:

- i The ACDP concern regarding the wording in Section 17(3)(b) "*must be consistent with the provisions of this Constitution*". The ACDP expressed the view that the Bible is the supreme law and if an institution was in conflict with this, they would prefer to follow the Bible.
- ii The words "*state or state-aided*" institutions in Section 17(2) awaited resolution of the education clause. The ANC proposed the use of the word "*public*" institutions.

2.9 Regarding Section 18, "*Freedom of Expression*", the meeting agreed to this section but agreed to note in a side-bar the NP reservation concerning their proposal for the inclusion of subsection (3) dealing with impartiality of state or state-aided media.

- 2.10 The meeting confirmed that Section 19, "*Assembly, Demonstration and Petition*" and Section 20 "*Freedom of Association*" had been agreed to.
- 2.11 The meeting agreed to Section 21, "*Political rights*" and agreed that, with regard to the question of voting age, the onus was on members to check where this issue was dealt with.
- 2.12 The meeting confirmed that Section 22, "*Citizenship*" and Section 23, "*Freedom of movement and residence*" had been agreed to.
- 2.13 The meeting agreed to Section 24, "*Freedom of occupation*" with the following amendments:
- i To replace "*a*" with "*their*" in the first sentence.
 - ii To insert "*a trade or profession*" in the second sentence.
- 2.14 The meeting agreed to defer discussion of Section 25, "*Labour relations*".
- 2.15 Regarding Section 26, "*Environment*":
- i The NP stated that it still supported inclusion of the phrase "*and quality of life*" and requested that the brackets be removed.
 - ii The meeting agreed to allow this matter to stand over for further discussion by parties and to revisit this section.
 - iii The meeting further agreed to the replacement in Section 26(b) of "*their environment*" with "*the environment*".
- 2.16 Regarding Section 27, "*Property*",
- i The meeting agreed to defer discussion of this section to allow parties to continue their discussions.
 - ii The meeting agreed that the second sentence of Section 27(1) reading "*This provision does not preclude reasonable measures to regulate property*" did not form part of the draft tabled at Waenhuiskrans and should be deleted.
 - iii The meeting noted the PAC concern that its option should be included in a side-bar. The ANC stated that it had thought that all parties were giving consideration to the formulation which had been drafted at Waenhuiskrans and were taking this back to their parties.
- 2.17 Regarding Section 28, "*Housing*", the meeting agreed to this section as it stands.

2.18 The meeting agreed to Section 29, "*Health care, food, water and social security*" and noted the ACDP concern that diseases caused by poor socio-economic conditions should be highlighted and not only reproductive health care.

2.19 Regarding Section 30, "*Children*":

- i The meeting agreed to the two additional provisions, Section 31(1)(h) and (i), which parties had requested the Technical Refinement Team to insert in the Section. However, the meeting agreed that the Technical Refinement Team should refine the wording of Section 30(1)(h) to ensure consistency with the wording of Sections 36(2)(c) and 36(3)(g) along the lines of "*assigned by the state at state expense*".
- ii The ACDP expressed concern with regard to Section 31(1)(h) that Supreme Court has always been the highest custodian of minor children and if this provision could be used to enable children to take their parents to court, this would not be biblically correct.
- iii The ANC stated that the emphasis in this provision was on the state's obligation to provide legal assistance whereas the concern raised by the ACDP was a separate issue which was noted. The ANC stressed that the clause should be read as a whole.

2.20 The meeting agreed that Section 31, "*Education*" was deferred for further discussion amongst the parties in multi-laterals.

2.21 Regarding Section 32, "*Language and culture*":

- i The NP tabled a formulation reading as follows:

"Everyone has the right to use the language and to participate in the cultural life of their choice, but no one exercising these rights may do so in a manner inconsistent with the Bill of Rights."

- ii The meeting noted the NP proposal and agreed that this would be distributed for consideration by the parties in further discussions.

2.22 Regarding Section 33, "*Access to information*", the meeting agreed that this section should be deferred to await the memorandum from the Technical Committee 4 advisors.

2.23 Regarding Section 34, "*Just administrative action*":

- i The meeting agreed:

- (a) to delete the words in brackets in section 34(1)
 - (b) to remove the brackets and include the words "*whose rights have been adversely affected by administrative action*" in section 34(2).
 - (c) that the Technical Refinement Team should reformulate the transitional provisions.
- ii The ANC proposed that the Technical Refinement Team consider combining sections 34(3) and 34(4).
- iii The PAC queried the legal implications of Section 34(3). The Technical Committee 4 advisors explained that this would be dealt with in the transitional provisions to be contained in the transitional act.
- 2.24 The meeting agreed to Section 25, "*Access to courts*" with the amendment proposed by the Technical Refinement Team in Footnote 17.
- 2.25 Regarding Section 36, "*Arrested, detained and accused persons*":
- i The meeting agreed to section 36(1).
 - ii The meeting agreed that the Technical Refinement Team should harmonise the wording of Sections 36(2)(c), 36(3)(g) and 30(1)(h) along the lines of "*assigned by the state at state expense*".
- 2.26 Regarding Section 37, "*Limitation of rights*":
- i The Technical Committee 4 advisors tabled a memorandum "*Resolution of differences of opinion on Limitations Clause (Bill of Rights)*" contained in the documentation which attempted to reconcile the different positions of the parties.
 - ii The DP stated that this proposal was unacceptable and still supported the provision in the "*Blue Book*".
 - iii The NP favoured the first formulation in the current draft but would look at the Technical Committee 4 proposal and might suggest additions to it.
 - iv The ANC stated that the second option in the draft was not the ANC position but essentially an earlier draft put forward by the experts. The ANC said that it was prepared to look at the proposal of the Technical Committee 4 advisors.

- v The meeting agreed to defer discussion of this section to allow parties to consider this matter in bilateral and multi-lateral discussions.

2.27 Regarding Section 38, "*States of emergency*":

- i Regarding to Section 38(2)(b), the meeting agreed :

- (a) that the question of the majority required was still under consideration by parties. The ANC stated that it had raised the matter with its principals but had not managed to persuade them to support the compromise proposed in Footnote 20. The ANC position was that there should be a simple majority and that it had not found a precedent for the idea of special majorities.

- (b) the question of the days was still under discussion.

- ii Regarding Section 38(3),

The meeting agreed that the Technical Refinement Team should consider whether the reference to the "*High*" court was correct and ensure that this is consistent with the chapter on the courts.

- iii Regarding Section 38(5),

- (a) the meeting agreed to include sections 30(g)(i) and (ii) in the list of non-derogable rights.

- (b) the ANC queried how the list of non-derogable rights and the right to life would apply in a state of war. The ANC said it was unsure how the interaction would worked between non-derogation and the limitations clause. The Technical Committee 4 advisors explained that the normal limitations accepted on the rights would still be applicable during states of emergency and that the Defence Act would regulate the taking of life under a state of war. They stated further that the right to life was one of the core rights in international law that is regarded as non-derogable.

- iv The meeting agreed that to defer discussion of this section to allow parties to consult their principals and to give further consideration to the section.

2.28 The meeting confirmed that Section 39, "*Enforcement of Rights*" was agreed to.

2.29 Regarding Section 40, "*Interpretation of the Bill of Rights*"

The meeting agreed to this section and agreed to remove the footnote and that if any parties had objections these could be raised in a formal amendment.

3. **CHAPTER 9: STATE INSTITUTIONS SUPPORTING CONSTITUTIONAL DEMOCRACY**

- 3.1 The meeting agreed to note the valid concerns of the NP that their proposals for a *Cultural Commission* and an *Environmental Commissioner* were not included in the draft and to include reference to these proposals in a side-bar note. The meeting noted the minutes of Waenhuiskrans which stated that "*the matter of the constitutionalisation of an Environmental Commissioner still needs to be dealt with.*"
- 3.2 The NP stated that the matter of the *Cultural Commission* was being dealt with in bi-lateral discussions.
- 3.3 The meeting agreed that these issues should be placed on the CC agenda for discussion this week.
- 3.4 With regard to the NP proposal for an *Environmental Commissioner*, the ANC stated that this was adequately covered under Section 26(b) which protects the environment through reasonable legislative and other measures which would include, if necessary, such a body.
- 3.5 The DP did not support the NP proposal for an *Environmental Commissioner*.
- 3.6 The NP proposed that a reference to Section 180 did not fall easily into the list of institutions in Section 171(1) and suggested that this section should be adjusted accordingly. The meeting agreed that this was a refinement issue and that the Technical Refinement Team would give consideration to the matter but agreed that the intention was not to constitutionalise the name of the IBA but rather the obligation on the state to establish an independent authority to regulate broadcasting.
- 3.7 The ANC stated that the agreement was that this clause would be accommodated in this chapter without disturbing the rest of the chapter.
- 3.8 Regarding section 172 dealing with the *Public Protector*, the NP stated that their proposal for provincial public protectors had not been included in the side-bar notes. The NP had proposed "*Provincial constitutions may provide for provincial public protectors.*" The NP suggested the possible addition of the words "*in terms of national legislation.*"
- 3.9 The ANC stated that it did not support the NP proposal. Its position was

that there should not be provincial public protectors but that there should be a single national office and that this did not prevent the Public Protector from having offices and staff in all the provinces in order to make the office more accessible.

- 3.10 The DP stated that it supported the NP proposal.
- 3.11 The meeting agreed to this section and noted the objections of the DP and NP on this matter.
- 3.12 Regarding Section 173, the meeting agreed that the period of tenure should not be renewable.
- 3.13 The meeting agreed to Section 174, "*Human Rights Commission*". The ANC stated that it had withdrawn its proposal for the deletion of subsection (3) and supported the section as it stands in the draft.
- 3.14 The meeting agreed that the numbering of section 174(5) should be amended to read 174(4).
- 3.15 Regarding Section 175, *Commission for Gender Equality*, the meeting noted the NP proposal that a provision similar to section 174(3) should be included in this section.
- 3.16 The meeting agreed not to include this proposal as this concern was covered by section 175 and by section 171(3).
- 3.17 The meeting agreed to Section 176 on the *Auditor-General*.
- 3.18 With regard to Section 177 "*Tenure*", the meeting noted that the ANC proposed that the term should be 7 years so as to be in line with the provision on the Public Protector.
- 3.19 The meeting agreed that Section 178(1)(c) dealing with the *Electoral Commission* should be amended to replace "*and as*" with "*and which is as*".
- The section would read: "*declare the results of those elections within a period that must be prescribed by national legislation and which is as short as reasonably possible.*"
- 3.20 The meeting agreed to Section 179.
- 3.21 The meeting agreed to Section 180.
- 3.22 Regarding section 181, Mr De Beer reported that there was still no finality on Section 181(4) dealing with the composition of the committee but that the NP had a proposal on this issue which it would make available to the

Technical Refinement Team.

- 3.23 The meeting agreed that the Technical Refinement Team should redraft this section to incorporate the NP proposal so that it falls in line with the ANC view.
- 3.24 The DP queried the provision regarding members of commissions not holding political office which had been included in a previous draft.
- 3.25 The meeting agreed to defer discussion and that parties should report back on Friday on this matter.

4. CLOSURE

- 4.1 The meeting closed at 15H10.

CONSTITUTIONAL ASSEMBLY

MINUTES OF THE THIRTY SEVENTH (37TH) MEETING OF THE CONSTITUTIONAL COMMITTEE

WEDNESDAY 17 APRIL 1996

Present

Ramaphosa, M C (Chairperson)
Wessels, L (Deputy Chairperson)

Ackermann, C	Mdladlana S
Andrew, K (Alt)	Meshoe, K R
Bhabha M	Meyer, R P
Beyers, A S (Alt)	Moosa, M V
Camerer, S M	Moosa M W
Chabane, O C	Mulder, C P
De Beer, S J (Alt)	Myakayaka-Manzini, Y L
De Lange, J H	Ngcuka B T
Du Toit, D C	Nzimande, B E
Eglin, C W	Pahad, E G
Gordhan, P J	Rabie, J A
Green, L M (Alt)	Radue, R (Alt)
Hofmeyr, W	Ripinga, S S
Holomisa, S P	Sizani, R K
King, T-J	Smuts, D (Alt)
Ligege, M G	Surty, M E (Alt)
Lockey, D	Van Breda, A
Mahlangu M J	Van Heerden, FJ (Alt)
Mahlangu, N J	
Malatsi, D M (Alt)	
Marais, P G	
Mbete-Kgositsile, B	

Apologies: G N M Pandor

Absent: K Asmal, A Fourie, G Fraser-Moleketi, F Ginwala, N J Gogotya, J L Kgoali, J Love, BS Mabandla, D W Makhanya, LPHM Mtshali, S Mzimela, R Rabinowitz, DPA Schutte, TV Sifora, P Smith, RS Suttner, F J Van Deventer, C L Viljoen

In attendance: **Directorate:** H Ebrahim, M Sparg; **Minutes:** M Keegan and S Rabinowitz; **Law Adviser:** G Grové; **Panel of Experts** J Erasmus, J Kruger, C Murray, P Sedibe-Ncholo, J Van Der Westhuisen, and Z Yacoob

1. OPENING

Mr. Weseels opened the meeting at 14h30.

2. REPORT BACK ON POLITICAL PARTY DISCUSSIONS ON THE BILL OF RIGHTS

The meeting noted the following progress in political party discussions on the Bill of Rights:

- 2.1 Regarding section 9, "*Rights*," political parties were currently considering a document entitled "*Possible Reformulations of Section 9*" produced by the Technical Refinement Team.
- 2.2 Political parties were considering section 10, "*Application*" in conjunction with section 11, "*Equality*," and were approaching agreement. The matter was deferred to allow political parties to finalise the matter.
- 2.3 The meeting confirmed that section 12, "*Human Dignity*," had been agreed to.
- 2.4 The meeting confirmed that section 13, "*Life*," had been deferred to give parties more time to discuss it amongst themselves.
- 2.5 Regarding section 14, "*Freedom and Security of the Person*,"
 - i. The meeting confirmed that section 14 had been agreed to;
 - ii. The NP reported, however, that it would retain its reservation on section 14(2).
 - iii. The ACDP expressed concern with section 14(2) read together with section 29(1). The Chairperson ruled that the ACDP would forward its concern in writing to the Constitutional Assembly Administration so that it would be properly noted.
- 2.6 The meeting confirmed that section 15, "*Slavery, Servitude and Forced Labour*," and section 16, "*Privacy*," had been agreed to.
- 2.7 The meeting confirmed that agreement had been reached on section 17, "*Freedom of Religion, Belief and Opinion*," although the ACDP reservation would continue to be noted.
- 2.8 The NP instructed the Technical Refinement Team to remove its reservation regarding the removal of section 18(3). The meeting confirmed that with this amendment, section 18, "*Freedom of*

Expression," was fully agreed to.

- 2.9 The meeting confirmed that section 19, "*Assembly, demonstration and petition,*" and section 20, "*Freedom of association,*" had been agreed to.
- 2.10 The meeting confirmed that section 21, "*Political rights,*" had been agreed to, and the NP withdrew its reservations regarding voting age.
- 2.11 The meeting confirmed that section 22, "*Citizenship,*" and section section 23, "*Freedom of movement and residence,*" had been agreed to.
- 2.12 The meeting confirmed that section 24, "*Freedom of occupation,*" had been agreed to with the following amendments:
- i. "*Their*" would replace "*a*" and
 - ii. An additional "*an*" would be inserted, to read:

"their trade, an occupation or profession"
- 2.13 Regarding section 25, "*Labour relations:*"
- i. Mr. Hofmeyr reported that the NP had accepted the reformulation set out in footnote 10, and the Technical Refinement Team was investigating where best to insert it;
 - ii. However, the section was still deferred to allow political parties to consider it further.
- 2.14 The meeting confirmed that in section 26, "*Environment,*"
- i. The following words in brackets, "*[quality of life]*" would be deleted in section 26(a); and
 - ii. "*The*" would replace "*their*" in section 26(b), to read: "*to have the environment protected*".
 - iii. In addition, it was agreed that the word "*or*" would be inserted in section 26(a), to read: "*not harmful to their health or well-being*".
- 2.15 The meeting agreed to defer discussion of section 27, "*Property,*" until Thursday, 18 April 1996, to allow parties to consider it further. The meeting noted, however, that multilateral discussions had agreed to the following amendments:

- i. The NP and ANC agreed that the second sentence in section 27(1) would be deleted;
 - ii. The ANC had agreed that section 27(3)(f) would be dropped as a factor, and inserted instead in section 27(4), as proposed in footnote 13.
 - iii. The ANC expressed preference for using the term "*prevent*" instead of "*impede*" in section 27(8), but would accept the retention of the term "*impede*."
- 2.16 The meeting confirmed that section 29, "*Health care, food, water, and social security*," and section 30, "*Children*," had been agreed to, although the Technical Refinement Team would refine section 30(1) to ensure that it was consistent with 36(2)(c) and 36(3)(g) in inserting the words, "*assigned by the state at state expense*."
- 2.17 The meeting agreed to continue deferring discussion of section 31, "*Education*," to allow parties to consider it further. The DP requested that it be allowed to make an input into party discussions. The Chairperson ruled that the political parties would organise this.
- 2.18 The meeting confirmed that section 32, "*Language and culture*," was still under discussion, although the ANC reported that it was looking very favourably at the NP proposal on the matter.
- 2.19 The meeting confirmed that in regard to section 33, "*Access to information*,"
- i. The words in brackets would be deleted from section 33 (1);
 - ii. A provision would be inserted in section 33(1) along the lines of section 34(4)(d).
 - iii. Technical Committee 4 reported that it was still drafting the formulation to be inserted in section 33.
- 2.20 The meeting confirmed that section 34, "*Just administrative action*," had been agreed to with the following amendments:
- i. The words in brackets in section 34(1) would be deleted; and
 - ii. The brackets would be removed in section 34(2) and the following words inserted: "*whose rights have been adversely affected by administrative action*;" and
 - iii. The Technical Refinement Team would reformulate the

transitional provisions.

- 2.21 The meeting confirmed that it had agreed to section 35, "*Access to justice*," including the Technical Refinement Team's amendment described in footnote 17.
- 2.22 Regarding section 36, "*Arrested, detained and accused persons*," the meeting confirmed that it had agreed to:
- i. Sections 36(1), (4) and (5); and
 - ii. Agreed that sections 36(2) and (3) would be amended by inserting "*assigned by the state at state expense*," so that they not only harmonised with each other but also with section 30 (1)(h).
- 2.23 Regarding section 37, "*Limitation of rights*:"
- i. Mr. Hofmeyr reported that political parties had tentatively agreed to a proposal submitted by the technical experts, included in the document entitled "*Documentation, Bill of Rights*." He added, however, that parties needed to consult their principals before the agreement could be firmed up.
 - ii. The NP said it preferred to replace "*less*" with "*least*" in subsection (e) of the proposal, to read:

"least restrictive means to achieve the purpose."
- 2.24 Regarding section 38, "*States of emergency*:"
- i. Mr. Hofmeyr reported that the NP had proposed that political parties look at the FF compromise.
 - ii. The ANC would take back to its principles the suggestion that in section 38(2)(b) the two thirds majority be amended to 60% and that this be coupled with a clause that the decision could be taken only after a Parliamentary debate to ensure that there was transparency.
 - iii. The NP said that if there was consensus on this matter, then the brackets could probably be removed.
 - iv. The meeting confirmed that the Technical Refinement Team could add sections 30(1)(g)(i) and (ii) to the table on non-derogable rights.

- 2.25 The meeting confirmed that there was agreement on section 39, "Enforcement of rights" and section 40, "Interpretation of the Bill of Rights," and that footnote 34 could be removed.

3. DP STATEMENT TO THE PRESS

3.1 The ANC reported that the leader of the DP, Tony Leon, had stated to the Press that the ANC had "railroaded" the CA process, even though this threatened the constitution with what it claimed would be serious flaws; the ANC was planning to spend over R1 million to celebrate 8 May, and Mr. Ramaphosa had threatened a national referendum should the ANC not get its way on the property clause.

3.2 The ANC took the "strongest possible exception" to this reckless "opportunism".

3.3 Mr. Ramaphosa as Chairperson of the CA and also as an individual also took extreme exception to this "terrible misconduct" attack. Mr. Leon, he said, had stated what he knew to be lies:

- * The CA Administration, and not the ANC, was planning events for 8 May;
- * It sought not to use tax payers money for the event, but to raise funds from business and other sources;
- * Mr. Ramaphosa had not threatened a national referendum, but pointed out to business leaders that the property clause was contained finely balanced compromises and could not be easily amended. In fact, he had worked the whole period of his Chairmanship for inclusiveness and consensus.
- * On these grounds, Mr. Ramaphosa demanded an apology from Mr. Leon.

3.4 The Vice Chairperson ruled that the Management Committee would discuss the matter at its meeting on 18 April 1996 and would report back to the Constitutional Committee.

3.5 The ANC gave notice that when the Constitutional Committee next sits, it would propose that time be set aside to debate this matter in the committee, that if the DP could say this to the Press, it should be bold enough to say it here, and that there would be free discussion.

4. REPORT BACK ON MULTILATERALS ON CHAPTERS 3, - 7

4.1 Mr. Gordhan reported that progress had been made in discussions on

"Chapter 3, Principles of Co-operative Government." A second draft was currently being produced and might need to be refined. However, the parties hoped to finalise the draft formulation by 18 April 1996.

4.2 Mr. Gordhan also reported that significant progress had been made on "Chapter 4, Parliament" and "Chapter 5, The President and the National Executive." New drafts on various provisions had been agreed to, although there were still some matters outstanding. He reported that:

- i. Discussions on section 44 were continuing;
- ii. The second draft of the provisions on the National Council of Provinces would be available tomorrow; and
- iii. A new draft on the national legislative process would be completed by the morning of 18 April 1996; and
- iv. Bilateral discussions on Chapter 5 had also led to some political and technical progress. Parties would be able to report on this the following day, on 18 April 1996.

4.3 Mr. Gordhan concluded by reported that the matter of local government had still to be discussed.

5. CLOSURE

5.1 The meeting agreed to next meet at 14:00 on Thursday, 18 April 1996.

5.2 The Deputy Chairperson closed the meeting at 15h20.

CONSTITUTIONAL ASSEMBLY

MINUTES OF THE THIRTY EIGHTH (38TH) MEETING OF THE CONSTITUTIONAL COMMITTEE

THURSDAY 18/ FRIDAY 19 APRIL 1996

Present

Ramaphosa, M C (Chairperson)
Wessels, L (Deputy Chairperson)

Ackermann, C	Maree, J W (Alt)
Andrew, K (Alt)	Matthee, P A
Beyers, A S (Alt)	Mbete-Kgositsile, B
Bhabha, M	Mdladlana, S (Alt)
Camerer S	Meshoe K R
Chabane, O C	Meyer, R P
Davies R H	Moosa M V
De Beer, S J (Alt)	Moosa M W (Alt)
De Lange, J H	Mulder, C P
De Lille, P (Alt)	Myakayaka-Manzini, Y L M
Du Toit, D C	Ngcuka, B T
Eglin, C W	Nzimande, B E
Gibson, D H M	Pahad E G
Ginwala F	Radue, R (Alt)
Gordhan, P J	Schutte, D P A
Green, L M (Alt)	Sizani, R K
Hofmeyr, W	Smuts, D (Alt)
King, T J	Surty, M E (Alt)
Ligege M G	Van Breda A
Mahlangu N J ?	Van Heerden F J (Alt)
Marais, P G	Viljoen C L

Apologies: G N M Pandor, J Schreiner,

Absent: G Fraser-Moleketi, NJ Gogotya, S P Holomisa, J L Kgoali, D Lockey, J Love, BS Mabandla, D W Makhanya, LPHM Mtshali, S Mzimela, R Rabinowitz, P Smith, RS Suttner.

In attendance: Directorate: H Ebrahim, M Sparg, **Minutes:** S Rabinowitz, M Keegan
Law Adviser: G Grové; **Panel of Experts:** G Erasmus, J Kruger, C Murray, P Sedibe-
Ncholo, I Semanya, J Van Der Westhuizen, Z Yacoob. **Technical Advisers:**
S Liebenberg. **Party Adviser:** W Krull

1. OPENING

- 1.1 Mr. Ramaphosa opened the meeting at 20h35.
- 1.2 The meeting agreed that it would proceed by going through the entire Constitution and that it would receive reports throughout the evening from the various committees who were working simultaneously on specific aspects of the Constitution.
- 1.3 The meeting confirmed that Chapter 10, "*Public Administration*" had been completed and agreed to.
- 1.4 The meeting agreed that Chapter 11, "*Security Services*" was agreed to in the main and that the one outstanding issue of police powers was being discussed by the committee dealing with competences and Schedule 4.

2. PREAMBLE

- 2.1 Dr Nzimande tabled a proposed draft of the Preamble. The meeting agreed to the Preamble as tabled.

3. CHAPTER 1: FOUNDING PROVISIONS

- 3.1 Mr Moosa reported that the following had been proposed in respect of Chapter 1:

- i Section 1 would read as follows:

"The Republic of South Africa is one sovereign democratic state founded on the following values:

- (a) *a commitment to promote and protect human dignity, to achieve equality and to advance human rights and freedoms;*
- (b) *a commitment to promote non-racialism and non-sexism;*
- (c) *supremacy of the constitution; and*
- (d) *universal adult suffrage, a common voters role, regular elections and a multi-party system of democratic government to ensure accountability, responsiveness and openness."*

- ii Section 2 would remain as it stands.

- iii Section 3 would be amended to read:

- (1) *There is a common South African citizenship.*

- (2) *All citizens are equally -*
 - (a) *entitled to the rights, privileges and benefits of citizenship; and*
 - (b) *subject to the duties and responsibilities of citizenship.*
- (3) *National legislation must provide for the acquisition, loss and restoration of citizenship.*

- iv The insertion in Section 4 of the wording of the Interim Constitution which reads *"The National Anthem of Republic shall be as determined by the President by proclamation in the Gazette.*
- v Section 5 would remain as it stands in the draft.

3.2 The meeting agreed to Sections 1, 2, 3, 4 and 5 as proposed by Mr Moosa.

3.3 With regard to Section 6, "*Languages*" the meeting agreed to include Option 1 for the purposes of publication of the Bill and agreed that discussions would continue on this matter.

4. CHAPTER 2: BILL OF RIGHTS

4.1 Regarding Section 9, "*Rights*"

Mr Hofmeyr reported that parties had agreed that this section would be amended along the following lines:

- i Section 9(1) would read:

"This Bill of Rights is a cornerstone of democracy in South Africa. It enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom."

- ii Section 9(2) would remain the same.

- iii Section 9(3) would read:

"The rights in the Bill of Rights are subject only to the limitations which are set out in section 37, or contained or referred to elsewhere in it."

4.2 Regarding Section 10, "*Application*"

- i The meeting confirmed that Section 10(1) was agreed to.
- ii The meeting agreed to include the first formulation of Section 10(2) and to delete the wording in brackets.

- iii The meeting agreed to the new Section 10(3) as proposed by the Technical Advisers which reads:

"When a right in the Bill of Rights binds a natural or juristic person, and there is no law of general application that grants a remedy based on that right, a court must develop a common law to grant a remedy based on that right. In granting a remedy, the court may formulate rules that limit the right, provided that the limitation is in accordance with section 37(1)."

- iv The meeting agreed that the present 10(3) would become Section 10(4) and the wording would be remain as it stands in the draft.

4.3 Regarding Section 11, "Equality"

- i The meeting agreed to Section 11(1).
- ii With regard to Section 11(2), the meeting agreed to this section with the inclusion of "unfair" and the removal of the brackets.
- iii Regarding Section 11(3), the meeting agreed to:
 - (a) inclusion of "pregnancy" as a ground and the brackets could therefore be removed;
 - (b) inclusion of "unfairly" and the removal of the brackets;
 - (c) deletion of "[nor any person]";
- iv The meeting agreed to the insertion of a new subsection (4) which would essentially be the same as (3) but would start with the words "No natural or juristic person may unfairly discriminate..." and would include a new additional sentence which would read "The state must adopt legislation to prevent of prohibit unfair discrimination."
- v The meeting agreed to the inclusion of transitional provisions that until legislation has given effect to this right, the new Section 10(3) would apply.
- vi Section 11(5) would be deleted.
- vii The meeting agreed that once the section had been reformulated by the Technical Refinement Team parties would have sight of it before it was included in the Bill.

4.4 The meeting confirmed that Section 12, "Human dignity" was agreed to.

- 4.5 The meeting agreed to Section 13, "Life".
- 4.6 The meeting confirmed that Section 14, "Freedom and security of the person", Section 15, "Slavery, servitude and forced labour" and Section 16, "Privacy" were agreed to.
- 4.7 Regarding Section 17, "Freedom of religion, belief and opinion", the meeting agreed to this section and noted that the words "state or state-aided" institutions still needed to be harmonised with the wording of the education clause once it had been finalised.
- 4.8 The meeting confirmed that Section 18, "Freedom of Expression", Section 19, "Assembly, Demonstration and Petition", Section 20 "Freedom of Association", Section 21: "Political rights", Section 22, "Citizenship" and Section 23, "Freedom of movement and residence" had been agreed to.
- 4.9 The meeting agreed to Section 24, "Freedom of occupation" with the following amendments:
- i To replace "a" with "their" in the first sentence.
 - ii To insert "a trade or a profession" in the second sentence.
- 4.10 Regarding Section 25, "Labour relations", it was agreed that:
- i the ANC proposal in Footnote 10 would be incorporated in the text in a place to be determined by the Technical Refinement Team.
 - ii the words "to lock-out" in Section 25(3)(c) were still in contention and would be retained in brackets for the purposes of the Bill.
- 4.11 Regarding Section 26, "Environment":
- i The meeting agreed that the words in brackets "*and quality of life*" would be deleted and the phrase would read "*health or well-being*".
 - ii The meeting further agreed to the replacement in Section 26(b) of "*their environment*" with "*the environment*".
- 4.12 Regarding Section 27, "Property":
- i The meeting agreed to the following amendments:
 - (a) the second sentence of Section 27(1) reading "*This provision does not preclude reasonable measures to regulate property*" would be deleted.

- (b) Section 27(3)(f) would be deleted as proposed in the side-bar.
- ii The meeting agreed that with those amendments the draft as it stands would go into the Bill but it was noted that amendments might be moved on a consensus basis next week. There was political agreement on this clause but there were some issues which needed clarification but which would not change the balance effected in this clause.
- iii The meeting noted the concern of the PAC regarding the extent to which communal land would be protected in Section 27(1). Mr Hofmeyr stated that the ANC would pursue this concern.
- 4.13 The meeting confirmed that Section 28, "*Housing*", and Section 29, "*Health care, food, water and social security*" were agreed to.
- 4.14 The meeting confirmed that Section 30 "*Children*" was agreed to. However, the meeting agreed that the Technical Refinement Team should refine the wording of Section 30(1)(h) to ensure consistency with the wording of Sections 36(2)(c) and 36(3)(g) along the lines of "*assigned by the state at state expense*".

4.15 Regarding Section 31, "*Education*":

The meeting agreed that to retain the section as it stands for the purposes of the Bill on the understanding that parties who wished to propose amendments could do so after the Bill was tabled.

4.16 Regarding Section 32, "*Language and culture*":

The meeting agreed to amend this section to read:

"Everyone has the right to use the language and to participate in the cultural life of their choice, but no one exercising these rights may do so in a manner inconsistent with the provisions in the Bill of Rights."

4.17 Regarding Section 33, "*Access to information*", :

The meeting agreed to the following :

- i deletion of the brackets in 33(1)(b) and inclusion of the wording.
- ii insertion of a provision by the Technical Refinement Team in section 33(1) along the lines of section 34(4)(d).

4.18 Regarding Section 34, "*Just administrative action*":

- i The meeting agreed:
 - (a) to delete the words in brackets in section 34(1)
 - (b) to remove the brackets and include the words "*whose rights have been adversely affected by administrative action*" in section 34(2).
 - (c) that the Technical Refinement Team should reformulate the transitional provisions.

4.19 The meeting agreed to Section 35, "*Access to courts*" with the amendment proposed by the Technical Refinement Team in Footnote 17.

4.20 Regarding Section 36, "*Arrested, detained and accused persons*":

- i The meeting agreed to this section and noted that it had been agreed that the Technical Refinement Team should harmonise the wording of Sections 36(2)(c), 36(3)(g) and 30(1)(h) along the lines of "*assigned by the state at state expense*".

4.21 Regarding Section 37, "*Limitation of rights*":

- i Mr Hofmeyr reported that parties agreed to inclusion of the formulation proposed by the Technical Committee 4 advisors in their memorandum "*Resolution of differences of opinion on Limitations Clause (Bill of Rights)*" which reads:

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

- (a) *the nature of the right;*
- (b) *the importance of the purpose of the limitation;*
- (c) *the nature and extent of the limitation;*
- (d) *the relation between the limitation and its purpose; and*
- (e) *less restrictive means to achieve the purpose.*

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

4.22 Regarding Section 38, "*States of emergency*":

i Regarding Section 38(2)(b), the meeting agreed :

(a) with regard to the majority required, the compromise proposed by the FF as reflected in Footnote 20 had been accepted but that it had been agreed that it would not be a two thirds but a sixty percent majority and that this would be coupled with a clause that the decision could be taken only after a public parliamentary debate to ensure that there was transparency.

(b) the numbers in brackets would be deleted.

ii Regarding Section 38(3)

The meeting agreed that the Technical Refinement Team should consider whether the reference to the "*High*" court was correct and ensure that this is consistent with the chapter on the courts.

iii Regarding Section 38(5),

(a) the meeting agreed to include sections 30(g)(i) and (ii) in the list of non-derogable rights.

4.23 The meeting confirmed that Section 39, "*Enforcement of rights*" and Section 40, "*Interpretation of the Bill of Rights*" were agreed to.

4.24 The meeting noted that the FF reserved its position on the Bill of Rights as a whole until they had sight of the redraft.

5. **CHAPTER 3: CO-OPERATIVE GOVERNMENT**

5.1 Mr Gordhan tabled a draft and spoke to the document. The meeting agreed to Chapter 3 with the amendments as indicated on the draft and the additional amendment in Section 41(1)(d) with the deletion of [*geographical*].

6. **CHAPTER 4: PARLIAMENT**

6.1 Mr Gordhan tabled a draft which indicated which sections were agreed, the amendments which had been made and which issues still needed to be resolved.

6.2 The meeting agreed to the draft as tabled and noted the following:

i Section 43A needed to be made consistent with the chapter on Local Government.

- ii Outstanding issues were Section 45, 350 - 400 and the voting age.
- iii With regard to the electoral system, the ANC said the next election would be based on the system used in 1994. However it would be necessary to word this section so that it did not conflict with the Constitutional Principles. The DP disagreed with this stating that the concept of constituencies should be implemented now.
- iv The ANC flagged the issue of crossing the floor. The DP and NP opposed the inclusion of a provision like Section 43(b) of the Interim Constitution.
- v Sections 49(1) and 50(3) were still under discussion.
- vi It was agreed that in Section 55(1)(a) the words "*determine and*" would be inserted and "*proceedings and procedures*" would be deleted.
- vii Sections 56, 57, 58 and 59, 60, 61, 62, 63, 64 and 65 were agreed to as reflected in the new draft.
- viii It was noted that with regard to Section 59(2) the NP were not in favour of national legislation.
- ix It was noted that the seat of Parliament was still under discussion.
- x It was agreed that Sections 66, 67 and 68 would be adjusted in accordance with the relevant sections in the sections dealing with the National Assembly.
- xi It was noted that Section 70(3) was still under discussion.

7. CHAPTER 5: THE PRESIDENT AND THE NATIONAL EXECUTIVE

- 7.1 Mr Gordhan tabled a new draft which indicated sections which were agreed, which were amended and which were under discussion.
- 7.2 The meeting agreed to the draft and noted that with regard to Section 88(2), the ANC asked the Technical Refinement Team to ensure that power is vested in the President.

8. CHAPTER 6: PROVINCES

- 8.1 Mr Gordhan tabled a draft which indicated sections which were agreed and where amendments had been made.

8.2 The meeting agreed to the draft and noted the following:

- i Section 98(2) required transitional arrangements.
- ii The heading to Section 109 might change.
- iii The DP had objections to Section 135.
- iv The NP reservation to Section 135 was still being discussed.

9. CHAPTER 7: LOCAL GOVERNMENT

9.1 Mr Gordhan tabled a draft which indicated sections which were agreed to, where amendments had been made and issues that were still under discussion.

9.2 The meeting noted the following:

- i Section 139 and 140 had been agreed, although further refinement was necessary.
- ii The changes to Section 141 were indicated on the draft. There were a number of reservations but they would be clarified next week.
- iii Section 142 had a deletion in subsection (2), but was otherwise agreed.
- iv With regard to Section 143 there would be the addition of a new subsection 2(a), but that would be the basic framework for the legislative authority for municipalities.
- v The DP had reservations on a number of aspects of these clauses, particularly Section 143.
- vi Section 144 was agreed as indicated. However one of the outstanding issues was that in Section 144 the NP stated that it would like proportional representation.
- vii With regard to Section 145 there was a reservation that there should be mention of a 40% proportional representation provision. It was noted that this matter would require further discussion.
- viii Section 146 had been agreed to.
- ix With regard to Section 147:
 - (a) It was agreed that in Section 147(2)(b), the first words

"ordinarily resides in the municipal area" should be put in the Bill on the understanding that the matter was still open for debate and discussion.

- (b) The NP had a reservation with regard to Section 147(3) on the demarcation of wards.
- x Section 148, 149 and -150 were agreed to.
- xi The meeting noted the amendment to Section 151 as indicated on the draft, but noted that the word "*consented by the National Council of Provinces*" should be added and the rest of the provisions apply.
- xii Section 152 was agreed to.
- xiii Section 153 would be redrafted to mirror, to the extent that it is applicable, the similar provisions for executive intervention between national and provincial.

10. SCHEDULE 4:

10.1 Mr Gordhan tabled a draft of Schedule 4 Functional Areas which indicated amendments which had been agreed to.

10.2 The meeting agreed to the Schedule and noted the following:

- i It had been agreed to retain "*Education*" on the understanding that there would be consultation with the Education Department with regard to teacher training colleges.
- ii Clarity was needed on "*provincial public media*" and "*child care facilities/health*".
- iii There were a number of queries regarding the inclusion of "*Police*" but this would be left in the schedule for now.
- iv "*Local Government*" had been removed from the schedule.
- vi "*Civil protection*" would be amended to read "*Disaster management*".
- vii "*Traditional Authorities*" would be amended to read "*Traditional Leadership*".
- viii "*Management of indigenous forests*" would be amended to read "*Administration of indigenous forests*".

11. CHAPTER 8: COURTS AND ADMINISTRATION OF JUSTICE

11.1 Sen Moosa reported as follows:

- i Section 154(5) was agreed to with the following amendments:
 - (a) insertion of the words "*or decision*" after "*order*" ;
 - (b) deletion of [*and must be complied with by*].
- ii With regard to Section 155(c) it was agreed to replace "*in terms of*" with the word "*by*".
- iii With regard to Section 155(e) it was agreed to replace "*in terms of*" with "*or recognised by*".
- iv Sections 156(1), (2) and (3)(a) were agreed to.
- v With regard to Section 156(3)(b) and (c), the NP and DP wanted to include the word "*directly*" before "*connected*" and the ANC reserved its position on this matter.
- vi Sections 156(4)(a), (b), and (c) were agreed to and it had been agreed to delete subsection 156(4)(d).
- vii Sections 156(5) and (6) were agreed to.
- viii Section 157(1) and (2) were agreed to. It was agreed to amend Section 157(3) to read:

"The Supreme Court of Appeal may decide appeals in any matter. It is the highest court of appeal except in constitutional matters and it may decide only :

 - (a) *appeals;*
 - (b) *issues connected with appeals: and*
 - (c) *any other matter that may be referred to it in circumstances defined by an Act of Parliament. "*
- ix Section 158(a) was agreed to and it was agreed in Section 158 (b) to delete "*any other matter not excluded by an Act of Parliament*" and to delete the brackets and to retain the words.
- x It was agreed that Section 159 would be amended to read:

"Magistrate's Courts and all other courts may decide any matter determined by an Act of Parliament; but may not enquire into or rule

on the constitutionality of any legislation or any conduct of the President."

- xi It was agreed that Section 160(1) would be amended to read:
- "All courts function in terms of national legislation and their rules and procedures must be provided for by way of or under national legislation".* Section 160(2) would be deleted.
- xii With regard to Section 161(1)(a) it was agreed to insert the word *"any"* before *"law"*.
- xiii With regard to Section 161(2) it was agreed to delete the brackets and retain the words and to replace the word *"powers"* with *"status"*.
- xiv With regard to Section 161(2)(a) it was agreed to amend *"but the order has no force..."* to read *"but an order of validity has no force"* and to delete Section 161(2)(b).
- xv With regard to Section 161(3) it was agreed to delete the word *"(a)"* and to insert after *"party"* the phrase *"or it may adjourn the proceedings"*.
- xvi Section 161(4) was agreed to.
- xvii With regard to Section 161(5) it was agreed to replace *"a"* with *"an"* so that it reads *"or vary an order of constitutional invalidity by a court"* and to delete *"in terms of subsection (2)"*.

Parties requested the Technical Refinement Team to consider refining s161(2),(3), (4), (5) into one clause.

- xviii It was agreed to amend Section 162 to read:

"The Constitutional Court, Supreme Court of Appeal and High Courts have the inherent power to protect and regulate their own process in the interests of justice and to ensure that justice prevails in a manner not inconsistent with law".

The meeting noted that the ANC reserved its position to confirm this wording.

- xix It was agreed to delete Section 163.
- xx Section 164(1) and (2) were agreed to. Section 164(3) and (4) would be inserted in the Bill as reflected in the draft but the meeting noted that the NP and DP had reservations on these subsections.

- xxi It was agreed to include Section 164(5) and (6) as they stand in the draft but the meeting noted that the NP proposed 5 members in 164(5) and that the ANC preferred 4 but would consider this proposal.
- xxii It was agreed that Section 164(7) would go into the Bill as it stands but the wording was still under discussion and related to decisions being arrived at on other matters.
- xxiii Section 164(8) would remain as it stands.
- xxiv Section 165 was agreed to.
- xxv With regard to Section 166(1) it was agreed to replace "10/11" with "12" years and to remove the brackets.
- xxvi Sections 166(2) and (3) were agreed to.
- xxvii With regard to Section 167(1)(a) it was agreed to remove the brackets and retain the word "*grossly*" and to note NP and DP reservations.
- xxviii With regard to Section 167(1)(b) it was agreed to delete all the words in brackets.
- xxix Section 167(2) and (3) were agreed to.
- xxx With regard to Section 168(1)(d) it was agreed to replace the word "*nominee*" with "*alternate*".
- xxxi With regard to Section 168(1)(i) the meeting noted that the NP and DP reserved their positions.
- xxxii With regard to Section 168(1)(j) the meeting noted that the DP reserved its position.
- xxxiii With regard to Section 168(1)(k) it was agreed to insert after "*concerned*" the words "*or that member's alternate*".
- xxxiv It was agreed that Section 168(2) would remain as it stands.
- xxxv With regard to Section 168(3) it was agreed to delete the brackets and retain the wording.
- xxxvi It was agreed that Sections 168(4), (5) and (6) would remain the same.

11.2 Regarding Section 169, :

- i Sen Moosa reported that with regard to Section 169(1)(b), it was agreed to insert in the Bill at the end of the sentence the words "*which must ensure that they perform their functions without fear, favour or prejudice/impartially*". The meeting noted that the NP proposed "*impartially*" and the ANC was considering this.
- ii The NP said there was no agreement as far as the prosecuting authority was concerned and that the Bill should reflect the wording as it stands. Progress had been made and with more time the issues could be resolved.
- iii The ANC said that the agreements reached in Arniston were what was reflected in the draft under discussion.
- iv The meeting agreed that Section 169 as well as Section 164 were still in contention but agreed to a proposal by Mr Meyer that these sections be included as they are but would be placed in brackets for the purposes of the Bill and further discussion would take place next week and parties would table formal amendments if they wished.

11.4 The meeting noted that the DP expressed the following reservations regarding this chapter:

- i The number of judges on the Supreme Court of Appeal should be fixed in the Constitution.
- ii It was unhappy about the provisions for the appointment of judges of the Constitutional Court.
- iii It had concerns regarding the composition of the Judicial Services Commission; and
- iv Regarding the qualifications of the Attorney-General, the DP believed that the Judicial Services Commission should play a role, that the guidelines for prosecution should be published and that the national Attorney-General should be able to intervene where there has been a failure to prosecute.
- v The DP further stated that it wished to place on record that from the discussions at Arniston until this meeting there had been no discussions between the ANC and the DP on this Chapter.

11.4 The meeting agreed to Section 170.

12. CHAPTER 9: STATE INSTITUTIONS SUPPORTING CONSTITUTIONAL DEMOCRACY

12.1 With regard to the NP proposal for an Environmental Commissioner, Mrs Camerer reported that it had been agreed to insert a provision in Section 174(3) of the *Human Rights Commission* requiring the Commission to report on the right to an environment that is not harmful to one's health or well-being.

12.2 The NP said that the question of provincial public protectors was an outstanding issue.

12.3 Regarding Section 181(4), Mr De Beer reported that it had been agreed for the purposes of the Bill to replace the wording with the following:

"Parliament must recommend persons

(a) nominated by a committee of Parliament proportionately composed of members of all parties represented in Parliament;

(b) approved by Parliament by a resolution adopted by at least two thirds of the members; and

Nothing in paragraphs (a) and (b) precludes the participation of civil society in this process."

12.4 The ANC stated that with regard to Section 181(4)(b), its position was that the approval of Parliament should be by a simple majority.

13. CULTURAL COMMISSION

13.1 Dr Mulder tabled a document entitled *"Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities"* and reported that political agreement with full consensus had been reached that this Commission would be included in Chapter 9 of the Constitution.

13.2 Dr Pahad reported that it had further been agreed that the principle of collective rights of cultural, linguistic and religious communities would be reflected in the Bill of Rights and the Technical Refinement Team would formulate and consider where best to insert these provisions and to see how Constitutional Principle XXXIV which deals with self-determination could be given effect.

13.3 The meeting confirmed the agreement which had been reached.

13.4 Mr Beyers of the NP thanked the other parties and said that what the NP had

proposed with regard to a cultural councils had been achieved. This was an historic occasion and the beginning of a better future for all South Africans.

- 13.5 Gen Viljoen of the FF thanked other parties for their cooperation and for this historic occasion which ensured cultural promotion and self-determination through the recognition of group rights and a cultural commission. He stated that the final wording would still need to be looked at and then the task of implementation would begin.
- 13.6 Mr Moosa stated that the ANC over the past months had held numerous discussions on the national question in South Africa. The Freedom Charter spoke specifically of the dignity of all cultures in South Africa and the ANC had to consider what the national question meant in present day South Africa. He stated that this was a proposal of the ANC which captured in a progressive and democratic manner the aspirations of the people of this country. Apart from the Commission and the aspects of the Bill of Rights which still needed to be attended to, this also addressed two other aspects of the Constitution, that is, the language question and the related issue of education. It was therefore a package of issues.
- 13.7 Prof Asmal stated that this was an enormous breakthrough and was the recognition of the collective expression of individual rights. He said that the insertion in the Bill of Rights recognised that citizens who are part of an acknowledged South African community have rights in communion with others and this would provide many of the answers to issues such as education and language. In addition it gave real content to the freedom of association clause.
- 13.8 Mr Gibson of the DP expressed pride at the historic moment and said that the people of South Africa would be reassured by this affirmation and that the idea of cultural councils was originated many years ago by Colin Eglin.
- 13.9 Mr Meyer of the NP stated that the success of this agreement was evident because every party was claiming victory. He affirmed that this was a major breakthrough and that concepts like language, culture and religion would get a new dimension and would become liberated in a democratic South Africa.
- 13.10 Mr Ramaphosa said he felt proud and privileged to have been part of the discussions when this agreement was reached. He stated that this recognised our nationhood as South Africans and put us irrevocably on the way to resolving every outstanding issue and to adopting the Constitution on 8 May.

14. CHAPTER 12: TRADITIONAL AUTHORITIES

- 14.1 Mr Moosa reported that the Technical Refinement Team were considering the reformulation of Sections 198 (1) and (2) as noted in the side-bar. He

further reported that there had been a consultation that morning between members of the Management Committee and a delegation from Contralesa who had raised a number of problems with the draft of Chapter 12 and who had submitted a document in which a number of issues had been identified for consideration by parties.

14.2 The meeting agreed that parties should discuss this matter with members of the Panel of Experts to see whether the chapter could be improved and the concerns addressed so that the chapter could be finalised.

15. CHAPTER 13: FINANCE

15.1 Dr Davies tabled a new draft and spoke to the document. He highlighted two issues:

- i The words in brackets in Section 204 needed to be resolved.
- ii There was the more general issue that there were a number of pieces of national legislation which deal with provincial budgeting matters and which should go through the "Section 72 route". This need not be provided for in this Chapter but must be included in the Constitution.

15.2 Regarding Section 204

The meeting agreed:

- i to include the word "*equitable*" and to remove the brackets, and
- ii to amend the words "*and promotes social equality*" to read "*and promotes equality and social justice*".

15.3 Regarding Section 208,

- i The ANC proposed the following amendments to this section:
 - (a) The insertion of a new subsection 208(1)(c) which would read:
"Two persons nominated by local government in terms of section 151"
 - (b) The present Section 208(1)(c) would become (d), and "*seven*" would be amended to read "*nine*".
- ii Mr Wessels ruled that the section be amended as proposed for insertion in the Bill.

16. TRANSITIONAL ARRANGEMENTS

- 16.1 Mr Ebrahim reported that a document on "*Transitional Arrangements*" had been tabled previously. The meeting noted that there were two views on this matter, either that Transitional Arrangements should be a Bill separate from the Constitution or should that it should be a schedule which would form part of the Constitution.
- 16.2 The meeting agreed that "*Transitional Arrangements*" should be incorporated as a schedule to the Bill.

17. CLOSURE

- 17.1 The meeting rose at 05h47 on Friday 19 April 1996.



CONSTITUTIONAL ASSEMBLY

22 April 1996

B.1.1

Chief Justice
Judicial Service Commission
P O Box 258
BLOEMFONTEIN
9300

Dear Justice Corbett

Thank you for your letter dated 20 April 1996. I have taken note thereof and will endeavour to bring the contents of your letter to the attention of the role-players in the Constitutional Committee.

Yours faithfully

HASSEN EBRAHIM
EXECUTIVE DIRECTOR

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THE NEW CONSTITUTION



JUDICIAL SERVICE COMMISSION

Tel: (051) 447-2789
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P.O. Box 258
BLOEMFONTEIN
9300

20 April 1996

The Executive Director
Theme Committee No 5
Constitutional Assembly
P.O.Box 15
Cape Town
8000

Dear Mr Ebrahim,

re: The appointment of Alternate Members to the Judicial Service Commission

Neither sec. 105 of the Constitution of the Republic of South Africa Act 200 of 1993 nor the Judicial Service Commission Act 9 of 1994 makes provision for the appointment of alternates to take the place of members of the Commission who are unable to attend meetings of the Commission. This has proved a serious inconvenience, especially as the decisions of the Commission require the support of "at least an ordinary majority of all its members" (see sec. 105(4) of Act 200 of 1993).

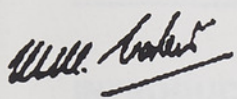
At a recent meeting the Commission resolved that the Constitutional Assembly be requested to make provision in the new Constitution, in principle, for the appointment of alternates to the members of the Commission, without specifying the method of appointment or the members in respect of whom alternates may be appointed. These particular matters would then be dealt with in subsequent legislation. When such subsequent legislation is formulated the Commission would wish to make representations as to the provisions thereof.

PANEL OF CONSTITUTIONAL EXPERTS

MEMORANDUM

I accordingly convey to you the request that provision be made in the new Constitution, in principle, for the appointment of alternates to members of the Commission.

Yours truly,



M.M. Corbett
CHIEF JUSTICE

INDIVIDUAL RIGHTS AND SELF-DETERMINATION

On Thursday - Friday 14-15 April an agreement was reached to create a Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities in Chapter 3. In addition, the Panel recommended to the Government collective rights as to culture, religion and language in the Bill of Rights, and to investigate whether CPs 11, 12 and 34 have been complied with and to make a recommendation as to the incorporation of the notion of "self-determination".

2. The Commission was integrated into sections 177, 180 and 182 of the Bill. (The appointment procedure regarding Commission members was tentatively not integrated with the general provisions regarding appointments (section 180(1) but left to be dealt with in legislation (section 182). This could be amended, of course.

COLLECTIVE RIGHTS

3. As to the collective rights, the Panel paid particular attention to the wording which appeared in the Documentation of the tri-lateral. The formulation proposed as section 31AA and section 22A in the Documents of different parties reflects the contents of Article 27 of the International Covenant on Civil and Political Rights. The Panel also took the proposed section 208 into account.

4. The Panel did not regard it as useful to enter into an analysis or a debate regarding concepts such as "collective rights", "group rights", or rights of "communities", but rather tried to reflect the agreement between parties as best as possible. The agreed status of the Bill of Rights in its current form was taken into account. The Panel also consulted with a member of Technical Committee 4.

It was not thought wise to attempt to introduce into the Bill of Rights a right

PANEL OF CONSTITUTIONAL EXPERTS

MEMORANDUM

To: CHAIRPERSONS AND EXECUTIVE DIRECTOR OF THE CA
DATE: 23 APRIL 1996
RE: COLLECTIVE RIGHTS AND SELF-DETERMINATION

INTRODUCTION

1. At the tri-lateral on Thursday - Friday 18-19 April an agreement was reached to include a Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities in Chapter 9. In addition, the Panel was requested to (i) incorporate collective rights as to culture, religion etc into the Bill of Rights, and (ii) to investigate whether CPs 11, 12 and 34 have been complied with and to make a recommendation as to the incorporation of the notion of "self-determination".
2. The Commission was integrated into sections 177, 181 and 182 of the Bill. (The appointment procedure regarding Commission members was tentatively not integrated with the general provisions regarding appointments (section 189(3)-(5)), but left to be dealt with in legislation (section 182). This could be amended, of course.

COLLECTIVE RIGHTS

3. As to the **collective rights**, the Panel paid particular attention to the wording which appeared in the documentation of the tri-lateral. The formulation proposed as section 30AA and section 32A in the documents of different parties reflects the contents of Article 27 of the International Covenant on Civil and Political Rights. The Panel also took the proposed section 30B into account.
4. The Panel did not regard it as useful to enter into an analysis or a debate regarding concepts such as "collective rights", "group rights", or rights of "communities", but rather tried to reflect the agreement between parties as best as possible. The agreed status of the Bill of Rights in its current form was taken into account. The Panel also consulted with a member of Technical Committee 4.

It was not thought wise to attempt to introduce into the Bill of Rights a rigid

distinction between "individual" rights and the rights of "communities" or "groups", or "collective rights", for a number of reasons. Several rights in the Bill can in some way or another be exercised "collectively", such as freedom of assembly, the right to strike, aspects of the right to property and the rights to housing, health care, food, water and social security, as well as the right to the environment.

The right to equality, which is regarded as an "individual" right, can sometimes only be enforced by taking social patterns of behaviour into account. To prove indirect discrimination, an individual would often have to prove that e.g the requirement of specific qualifications for a job discriminates indirectly, because of the fact that a certain category of persons have been excluded from access to those qualifications.

The recognition of the right to freedom of association obviously also serves to protect collective behaviour.

Furthermore, the locus standi provision under **Enforcement of Rights** provides that rights can be enforced not only by individuals acting in their own interests (section 37(a)), but also by anyone acting as a member of, or in the interest of, a group or class of persons (section 37(3)).

It was therefore rather attempted to emphasize the fact that rights pertaining to culture, religion and language can be **collectively exercised by people as members of communities**, in addition to the general recognition of freedom of association.

5. As stated above, the wording of 30AA and 32A in the documents of the bi-lateral closely resembles Article 27 of the International Covenant. In its General Comment 23 (Fiftieth Session, 1994) (UN doc CCPR/C/21/Rev I/Add 5) the UN Human Rights Committee observed that the article established and recognizes a right which is conferred on individuals belonging to certain groups, distinct from and additional to, all other rights which they as individuals in common with everyone else are entitled to. The right in Article 27 is not to be confused with the right to self-determination of people in Article I. The Committee furthermore observed that the enjoyment of the rights in article 27 may require positive measures by the state. However, the Committee also pointed out that none of the rights protected under Article 27 may be legitimately, exercised in a manner or to an extent inconsistent with the other provision of the Covenant.
6. Therefore, three possible approaches to the collective rights issue are proposed, namely (1) integration into the rights to language and culture, (2) integration into the rights to religion as well as language and culture and (3) a separate right along the lines of the proposed wording in the tri-lateral documents.

- 6.1 In order to integrate the concept into the language and culture clause, Section 30 could be redrafted as follows:

Language and Culture

- (1) Everyone has the right to use the language of their choice.
- (2) Everyone who belongs to a cultural, religious or linguistic community has the right to enjoy their culture, to practice their religion and to use their language, together with other members of their community, and to form, join and maintain linguistic, cultural and religious associations and other organs of civil society.
- (3) No one exercising these rights may do so in a manner inconsistent with any provision of the Bill of Rights.

- 6.2 Or integration could take place into the freedom of religion clause, as well as the language and culture clause.

The language and culture clause could then be as proposed under 6.1, without reference to religion, and section 15 could be redrafted as follows:

Freedom of religion, belief and opinion

15(1) Everyone has the right to freedom of conscience, religion, belief and opinion, including the right to practice their religion or belief individually, or with other members of their religious community.

- (2) Same as in Bill

(This wording also slightly resembles Art 18 of the Covenant.)

- 6.3 Alternatively, a new separate clause could be inserted:

6.3.1 Cultural, religious and linguistic communities

30A (1) Everyone who belongs to a cultural, religious or linguistic community has the right, with other members of their community, to

- (a) enjoy their culture, practice their religion and use their language; and
- (b) form, join and maintain linguistic, cultural and religious associations and other organs of civil society.

- (2) These rights may not be exercised in a manner inconsistent

with any provision of the Bill of Rights.

6.3.2 This clause could also more closely resemble the wording of Art 27 and in the tri-lateral documentation:

Cultural, Religious and Linguistic Communities

- 30A (1) Persons belonging to a cultural, religious or linguistic community may not be denied the right, with other members of their community, to
- (a) enjoy their culture, practice their religion and use their language; and
 - (b) form, join and maintain linguistic, cultural and religious associations and other organs of civil society.
- (2) These rights may not be exercised in a manner inconsistent with any provision of the Bill of Rights.

6.4 In view of other international documents and later trends, 6.3 could be formulated in such a way as to clearly make the **community** the bearer of the right, rather than members of communities. However, this desire was not reflected in the formulation contained in the tri-lateral documentation, which was based on Article 27.

6.5 The inclusion of words such as: "This right may be further elaborated by national legislation" was suggested in the documentation. It is not recommended. Legislation can obviously elaborate on all the rights in the Bill of Rights. For example, a criminal procedure act is necessary as far as the rights of accused persons are concerned. To include this phrase only in certain places may either suggest that other rights may not be elaborated on, or may suggest that these rights are weaker and therefore in need of further elaboration.

7. CP34 AND SELF-DETERMINATION

CP34 states that the recognition in Schedule 4 of the right of the South African people as a whole must not be construed as precluding provision for a notion of a right of self-determination of a community. It does not require the final Constitution to give such a right in the same way that e.g CP2 requires the protection etc of fundamental rights, or CP3 requires the prohibition of discrimination.

However, in order to ensure that the spirit and essence of CP34 is clearly seen to be captured in the new Constitution, it is recommended that a clause along the following lines be inserted:

Self-determination

The right of the South African people as a whole to self-determination, as manifested in this Constitution, does not preclude, within the framework of this right, recognition of the notion of the right of self-determination of any community sharing a common cultural and language heritage, within a territorial entity in the Republic or in any other way.

An attempt is thus made to avoid reference to "constitutional provision" or "may be constitutionalized", with regard to the self-determination of a community, because this would look odd in a Constitution.

8. It is recommended that this clause does not go into the Bill of Rights, because it does not recognize a right in the same way and of the same kind as the Bill of Rights. It could go into **General Provisions**, under a separate heading, in **Chapter 14**.
9. These proposals may be further refined. Panel members are available for consultation in the process of finalizing the proposed amendments.

