

**CONSTITUTIONAL
ASSEMBLY**

**CONSTITUTIONAL
COMMITTEE
SUB-COMMITTEE**

**MONDAY
29 JANUARY 1996
(14H30)
E249**

DOCUMENTATION

**Entire Document Embargoed Until
14h30 29 January 1996**

CONTENTS

1.	Notice	Page 1
2.	Report on Meeting of CC Subcommittee on 24 January 1996	Pages 2 - 4
3.	Memorandum from the Independent Panel of Experts on Abstract Review	Pages 5 - 8

CONSTITUTIONAL ASSEMBLY

MEETING OF THE CONSTITUTIONAL COMMITTEE SUB-COMMITTEE

Please note that a meeting of the above committee will be held as indicated below:

DATE: Monday 29 January 1996

TIME: 14h30

VENUE: E249

DRAFT AGENDA

1. Opening
 2. Discussion: National Assembly
 3. AOB
 4. Closure
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N.B. Please bring your copies of the following documents to the meeting:

- i. *"Refined Working Draft (Third Edition,)"* and
 - ii. *"Additional Documentation,"* pack circulated for the Constitutional Committee Subcommittee meeting on Monday 22 January 1996.
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H EBRAHIM
EXECUTIVE DIRECTOR
CONSTITUTIONAL ASSEMBLY

Enquiries: Ms M M Sparg, Tel 245-031, Page 418 4616 code 6970

CONSTITUTIONAL ASSEMBLY

DRAFT REPORT

CONSTITUTIONAL COMMITTEE SUB-COMMITTEE MEETING WEDNESDAY 24 JANUARY 1996

1. OPENING

- 1.1 Mr Ramaphosa opened the meeting at 14h10.
- 1.2 It was agreed that the agenda item **National Executive** would not be discussed at the meeting because ongoing discussions on the issue were taking place between parties. It was further agreed that 12 February would be the deadline for conclusion of discussion on this item at bi-lateral level. A report on bi-lateral discussions would be tabled at the sub-committee on this date.
- 1.3 The following documentation was tabled:

*Revised documentation of 24 January 1996
Submissions received as at 15 January 1996:
Volume I, part 1
Volume I, part 2
Volume II, part 1
Volume II, part 2*

- 1.4 Discussion was based on the *Third Edition of the Working Draft*.

2. DISCUSSION

2.1 Courts and Administration of Justice

- 2.1.1 A report was given on a meeting between the ANC and NP that had taken place that morning. It was noted that there was still no agreement on two substantive issues:
- a. the appointment of Constitutional Court Judges, and
 - b. the Attorney General, and if agreement were reached on a national Attorney General, the roles and functions.

The report included a suggestion that a hearing be held with stakeholders in an attempt to reach agreement on the issues, and that a delegation be sent to investigate how the Attorneys General operate in Canada and Australia.

- 2.1.2 It was agreed that discussions between parties on the appointment of Constitutional Court judges and the Attorney General should continue with a deadline for report-back to the sub-committee on 12 February 1995.
- 2.1.3 It was further agreed that the Administration would organise a hearing with relevant stakeholders on these issues before 12 February 1995.
- 2.1.4 It was agreed that a trip to Canada and Australia was too costly and time-consuming. However, the Executive Director would liaise with the Commonwealth to attempt to fly in an expert(s) from Canada to address parties on the same issues.
- 2.1.5 Regarding an earlier request by the NP for a report by the Panel of Experts on the Attorney General, it was noted that the report would be available shortly.
- 2.1.6 It was noted that the meetings between parties on the **National Executive**, particularly regarding its structure, may impact on the Attorney General.
- 2.1.7 It was noted that besides the substantive unresolved issues, there were a number of technical issues, as noted in sidebar notes to the Chapter 6, which needed to be addressed. The Administration would facilitate a discussion between parties on these issues.
- 2.1.8 The DP objected that matters which related to the Attorney General and the petition by members of the National Assembly or members of the Provincial Parliament for referral of matters to the Constitutional Court, had been deleted from the draft.
- 2.1.9 After some discussion, it was noted that there was reference to these points in Sections 52 and 130. However, the Chairperson said he would discuss with Mr Gibson and the DP, statements made by Mr Gibson which questioned the integrity of the Administration. If the matter remained unresolved, he would report back to the sub-committee.

2.2 National Assembly

2.2.1 It was agreed that this be referred to parties for further discussion.

2.2.2 It was also noted that the Panel was preparing a report on the question of "abstract review" referred to in sidebar note 54, and that this would be available shortly.

2.3 Schedule

2.3.1 It was agreed that meetings of the Sub-committee be rescheduled as follows:

Monday 29 January at 14h30	National Assembly
Tuesday 30 January at 15h00	Languages, Anthem and Bill of rights
Wednesday 31 January at 11h30	Continuation of Bill of rights

2.3.2 It was agreed the programme be adjusted thereafter as necessary.

3. CLOSURE

3.1 The meeting closed at 15h00.



CONSTITUTIONAL ASSEMBLY

CONSTITUTIONAL ASSEMBLY

MEMORANDUM

TO: MEMBERS OF THE CC SUBCOMMITTEE
FROM: EXECUTIVE DIRECTOR
DATE: 26 JANUARY 1996
RE: MEMORANDUM ON ABSTRACT REVIEW

We enclose for your consideration a memorandum produced by the Independent Panel of Experts entitled "*Abstract Review.*"

HASSEN EBRAHIM
EXECUTIVE DIRECTOR

P. O. Box 15, Cape Town, 8000
Republic Of South Africa

Tel: (021) 245 031, 403 2252 Fax: (021) 24 5 2/3, 461 4487, E-mail: conassem@iaccess.za



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THE NEW CONSTITUTION

MEMO

TO: THE CHAIRPERSONS
CONSTITUTIONAL ASSEMBLY

FROM: THE PANEL OF CONSTITUTIONAL EXPERTS

DATE: 25 JANUARY 1996

RE: ABSTRACT REVIEW

1. BACKGROUND

Section 98(2)(d) (read with section 98(9)) of the interim Constitution provides for the adjudication of a dispute over the constitutionality of Bills. Section 64(1) provides that a Bill duly passed by Parliament shall be assented to by the President who is competent to sign and promulgate Bills (S. 82(1)(a), but who may refer a Bill passed by Parliament back for further consideration in the event of a procedural shortcoming (S. 82(1)(b)).

Section 54 of the Working Draft provides for referral of a Bill by the President to the Constitutional Court. Whether a Bill will also be referable in a way similar to that which is provided for by S. 98(2)(d) and 98(9) of the interim Constitution, is still undecided.

2. WHAT IS ABSTRACT REVIEW?

Either of the two possible ways of referral constitutes the possibility for abstract review of Bills. Abstract review may briefly be described as the review by the Constitutional Court of Bills or Acts for their constitutionality, but then in the absence of "case or controversy" i.e. the ordinary adversarial dispute between parties in a particular legal suit. Exactly because of the lack of a "case setting" i.e. the absence of either adversarial parties or factual/legal disputes between litigants, the review of the Bill/Act for its constitutionality is said to take place in the "abstract".

There are two modes of abstract review. **Preventative abstract review** pertains to Bills and is practised in France, Hungary, Rumania and Portugal. In France, for example, certain Bills must be submitted to the Constitutional Council for a ruling on their constitutionality before being promulgated (articles 46,61,62 of the Constitution).

The interim Constitution provides for preventative review.

Suppressive abstract review, on the other hand, pertains to Acts and applies

in Germany, Austria and Spain. For example, in Germany abstract review of laws pertains not only to post - constitution legislation, but also to preconstitutional legislation and subordinate legislation e.g. regulations issued by the executive. The procedure may be applied in the event of the suspected incompatibility between:-

federal law and the Constitution
provincial law and the Constitution
provincial law and federal law.

3. ADVANTAGES AND DISADVANTAGES

In favour of abstract review it may be argued that Bills or Acts which are constitutionally flawed or vulnerable, may be tested for their constitutionality in an expeditious and cheap way thus saving time, money and preventing possible negative consequences which might flow from the implementation thereof. It may arguably also serve as a corrective measure to the avail of a given parliamentary minority if utilized responsibly and cautiously. On the other hand, and if misused, the procedure will obviously have the effect of frustrating democratic government, unnecessarily delaying the implementation of policies and of politicising the role of the judiciary. Also, it may be argued that the constitutionality of a Bill/Act can more effectively be judged within the context of "case and controversy" than in the abstract.

4. WHEN SHOULD ABSTRACT REVIEW TAKE PLACE?

If the possibility for abstract review is provided for, at what stage of the legislative process should it be allowed? As a general rule it should only be allowed after (one or both House of) Parliament has voted on the Bill i.e. after the Bill has been passed. To allow otherwise would amount to an obvious intrusion on the legislative process and a stifling of parliamentary debate. Two more difficult questions are (i) whether a Bill which has been passed should be assented to and signed by the President if abstract review is invoked and, if so, (ii) whether the Act may be implemented pending the abstract review proceedings? If the question posed under (i) is answered in the affirmative the process obviously entails the abstract review of Acts (viz. suppressive review) and not of Bills. As regards (ii) it may be argued that the procedure loses much of its effectiveness if the Act is allowed to be implemented; for if the Act (or part of it) is found to be unconstitutional, how will the implementation which followed be undone and how and by whom can such reversal of implementation effectively be monitored or enforced? On the other hand, the misuse of the process may result in necessary and urgent implementation to be unduly delayed and frustrated.

A proper balance between these extremes could probably be struck by leaving it to the Constitutional Court to decide in each instance whether

implementation should go ahead or not. The general rule should be that implementation will not be delayed unless the Constitutional Court indicates otherwise. In order for the Constitutional Court to be empowered to prevent an Act from being implemented pending a decision on its constitutionality, it may be necessary to make provision for such powers e.g. in S. 96(3)(c) (The Constitutional Court has no jurisdiction other than that granted in the Constitution - S. 96(5)).

5. WHO SHOULD HAVE STANDING TO ENFORCE ABSTRACT REVIEW?

The discretion to enforce abstract review in terms of S. 54(2)(c) clearly rests with the President.

In terms of section 98(9) of the interim Constitution, abstract review may be enforced by a prescribed percentage of members of the National Assembly, the Senate or a provincial legislature respectively. It is suggested that standing should be restricted to these three institutions regarding Bills dealt with by each. However, it may further be considered to extend standing regarding Bills before the National Assembly (or the Senate), to provincial legislatures, when and if the Bill affects aspects such as the powers, functions and institutions of Provinces (cf. Constitutional Principles XVIII(4) and (5) with regard to amendments to the Constitution.)

In Germany (cf. par. 2 supra), standing is bestowed on the Federal Government, provincial governments or one third of Bundestag members (S. 93(1)2 of the Basic Law). In the event of abstract review the German Constitutional Court allows constitutional bodies the opportunity to comment on the subject or may even grant them the status of participants to the proceedings.

In France, abstract review can be instituted by the President, the Prime Minister, the presidents of either Chamber of Parliament or a specified parliamentary minority.

