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CONSTITUTIONAL ASSEMBLY

CONSTITUTIONAL COMMITTEE SUB-COMMITTEE

WEDNESDAY 31 JANUARY 1996 (11H30) E249

DOCUMENTATION

Entire Document Embargoed until
11H30 31 January 1996

CONTENTS

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: Wednesday, 31 January 1996

TIME: 11h30

VENUE: E249

DRAFT AGENDA

1. Opening
2. Chapter 3: Parliament - National Assembly
   - 2.1 Section 41: Composition and Election: See page 16 of the *Refined Working Draft (Third Edition)*
   - 2.2 Section 45(3): Seat of National Assembly: See Page 17 of the *Refined Working Draft (Third Edition)*
   - 2.3 Section 50(2): Internal Autonomy: See Page 18 of the *Refined Working Draft)*
     - i. Minority Party Participation in the Committee System
     - ii. Initiation of Legislation by Select Committees
   - 2.4 Section 54: Referral of Bills to Constitutional Court: See Pages 18 - 19 of the *Refined Working Draft (Third Edition)*
3. Chapter 2: Bill of Rights: See Pages 4 - 15 of the *Refined Working Draft (Third Edition)*
4. AOB
5. Closure

N.B. Please bring your copy of the following documents to the meeting:

i. *The Refined Working Draft (Third Edition),* and
ii. *"Additional Documentation,"* pack circulated for the Constitutional Committee Subcommittee meeting on Monday 22 January 1996.

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
MONDAY 29 JANUARY 1996

1. OPENING

1.1 Mr Ramaphosa opened the meeting at 14h40 .

1.2 It was noted that a number of bi-lateral meetings on the National Assembly had taken place in the morning.

1.3 The following documentation was tabled:

Documentation of 29 January 1996
Submissions received as at 29 January 1996:
Volume III, parts 1 and 2
Volume IV, parts 1 and 2

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

2. DISCUSSION: NATIONAL ASSEMBLY

2.1 Section 40: Legislative authority of Republic

2.1.1 It was agreed that this be revisited after competencies were finalised and a decision on the Senate/Council of Provinces is taken.

2.2 Section 41: Composition and election of National Assembly

2.2.1 It was agreed the National Assembly should consist of not less than 300 and not more than 400 members, with the exact number to be determined by national legislation. The Technical Refinement Team, would consider a new formulation for the clause.

2.2.2 It was noted that the DP said they would continue to pursue their position of 300 members, when this was dealt with in legislation.

2.2.3 It was agreed the phrase stating the electoral system *"...is based on a common voters roll and [results], in general, [in] proportional representation"* be redrafted by the Panel to accomodate discussion in the meeting. It was further agreed the formulation be prepared for further multi-lateral discussions on 30 January 1996. It was agreed

that this issue be deferred for decision of the Sub-committee on Wednesday 31 January 1996.

2.2.4 The Independent Panel of Experts, said that there was a difference between *"results in"* proportional representation and *"based on"* proportional representation. They said the last mentioned may not necessarily *result* in proportional representation. They suggested that the words of the formulation in the *Third Edition of the Working Draft* placed too much emphasis on the result of the elections, instead of on the electoral system itself. The Panel suggested alternate wording along the lines of *".. and designed to achieve, in general, proportional representation."*

2.2.5 The DP noted that they had initially suggested the wording *"results in"* in the Theme Committee, but that they now also agreed on *"designed to achieve"*. It was noted that the DP cautioned that too much flexibility could allow the system to be manipulated, and they suggested that it may be easier to have agreement on the electoral system before trying to finalise this provision.

2.2.6 It was noted the ANC had reservations that the redraft should not merely be an attempt to replace the term *"results in"* with a synonym, and that the Constitutional Principle states that the system of proportional representation be incorporated. They said that syntactically the words *"in general proportional representation"* must qualify the electoral *"system"*.

2.3 Section 42: Membership

2.3.1 This was agreed to, and it was noted that Section 43 fell away as it was now incorporated in Section 42. The sidebar notes would also be deleted.

2.4 Section 45: Sittings and recess periods

2.4.1 Regarding the seat of the National Assembly, it was agreed to defer this for further multi-lateral discussions and for political decision of the Sub-committee on Wednesday 31 January 1996.

2.4.2 The FF said that due to the forthcominng Local Government elections scheduled in the Cape Town area, this may not be a good time to decide on the seat of parliament.

2.4.3 The NP said that they had not decided where the seat should be, nor had they decided whether the issue be constitutionalised or not.

2.4.4 The ANC said that the seat need not be constitutionalised and

become a matter which may hamper the finalisation of the Constitution. They suggested this may be dealt with in legislation, although they had not yet decided finally that the seat not be in the Constitution. They said this was not an issue which concerned what Parliament did nor did it enhance the ethos of Parliament. They said the distance or nearness of Parliament to a place did not appear to have any relation to whether a country was more democratic or more undemocratic. They also said that it was not a normative constitutional issue and cited the example of Germany where the seat of the national legislature was dealt with only in legislation.

2.4.5 It was noted that the DP had proposed Cape Town as the seat of the National Assembly. The DP said they preferred the seat be constitutionalised as it would provide stability in this regard over the next few years.

2.4.6 The ACDP said that they supported the ANC, that the seat should not be constitutionalised, and that section 45(3) should be deleted.

2.4.7 It was noted that the question of the seat of the National Assembly may be related to the issue of the seats of the Constitutional Court and of the Appellate Division. It was noted, for example, that the seats of the Constitutional Court and the Appellate Division were determined in the Interim Constitution but not in the *Working Draft of the New Constitution*.

2.4.8 The Independent Panel of Experts suggested that a possible resolution could be found if parties also looked at a mechanism which would serve against manipulation of the seat of Parliament. A suggestion was made that any amendment on the seat of the National Assembly could be made subject to a special two thirds majority decision.

2.5 Section 46: Elections and Duration of National Assembly

2.5.1 It was agreed that Subsection 46(1) would be amended to read:

> "The National Assembly is elected for a term of five years **unless it is dissolved prior to this date in terms of the constitution.**"

2.5.2 It was agreed that Subsection (2) would consequently fall away.

2.5.3 It was agreed the broad suggestions made in the bar-note to Section 45(4) be executed, namely that "A clause dealing the National Assembly in the case where election results cannot be declared, or a court invalidates an election, needs to be inserted." It was noted that the Technical Refinement team would present a formulation on this

matter early in February.

2.6 Section 50: Internal Autonomy

2.6.1 It was agreed that the Technical Refinement Team draft new draft formulations on the following issues:

a. Minority participation in the committee system, based on Constitutional Principle XIV which reads that "Provision shall be made for participation of minority political parties in the legislative process in a manner consistent with democracy."

b. Select Committees to initiate legislation "in/after consultation with the relevant ministry.

It was agreed the formulation be drafted for discussions in multi-laterals on 30 January 1996 and for decision at the Sub-committee on 31 January 1996.

2.6.2 The NP suggested further that the Committees may legislate without consulting the Minister.

2.6.3 In respect of minority participation in the committee system, the ANC expressed reservation as to whether matters relating to minority chairpersonship of select committees were consistent with the ordinary legal interpretation of Constitutional Principle XIV. They noted that they would await the draft formulations before making further comment.

2.6.4 In response to the NP's further suggestion and in respect of Select Committees initiating legislation "in/after consultation with the relevant ministry", the ANC indicated that the idea with introduction of consultation was to create a spirit of co-operation between the legislative and executive. They requested this be kept in mind when the formulations were drafted. They also said that in terms of the rules of Parliament the possibility of a Private Member's Bill still remained.

2.6.4 The DP said that the phraseology regarding the manner of consultation may have been left too imprecise. They noted their concern that "in consultation" means "in agreement" which would create an undue restriction. They said they were concerned if this phraseology was used it may cause problems with the separation of powers and was reminiscent of South Africa's past experiences.

They further said that there was clearly a difference between the

Standing Committees and the National Executive, but that at the moment private members could initiate Bills, whereas Standing Committees could not do so. They said that in the last mentioned case the possibility remained for that interaction to take place with the National Executive, but said that this interaction should largely rely on political processes.

2.7 Section 52: Bills

2.7.1 It was agreed this be finalised only when the matter of the Houses of Parliament was settled.

2.8 Section 53: Constitutional Amendments

2.8.1 It was agreed that this also be finalised only when the matter of Houses of Parliament was settled. It was noted that Constitutional Principle XV applied.

2.9 Section 54: Assent to Bills

2.9.1 It was agreed that parties would consider the memorandum *Abstract Review* presented by the Independent Panel of Experts as well as a memorandum from the Constitutional Court which had previously been tabled at the Constitutional Committee. It was agreed that further discussion on this be deferred for multi-lateral meetings on 30 January, and that decision be deferred for the Sub-committee on Wednesday 31 January 1996.

2.9.2 The DP reminded the meeting that a number of alternative formulations had been presented in Theme Committee 5. They said they were in favour of abstract review, to take place after a Bill was passed, but before it was promulgated.

2.9.3 The NP agreed with the DP. They added that they believed one third of Parliament should be able to refer a Bill to the Constitutional Court, and that the Court could then decide whether it was a frivolous referral or not.

2.9.4 The ANC cautioned that this was not merely a question whether Parliament should be given abstract review. They stated that the NP was proposing that a minority of one third could override a majority, and said that this raised the question of the interests of other sectors if some sectors are given privileges in parliament. They said that they required more information from the Independent Panel of Experts; particularly, item 4 of the memorandum which suggests leaving the

decision to the Constitutional Court whether implementation be delayed. They said this raised certain assumptions about the work of the Constitutional Court and the empowerment of the Constitutional Court which required further scrutiny. They noted that the Constitutional Court was intended to decide on constitututionality and not substance.

2.9.5 The Panel responded to the request from the ANC by saying that one of the disadvantages of such a process was the politicisation of the Constitutional Court. They said that in order to prevent the process being abused by a minority to delay matters, it could be ensured that this referral may not occur when debates were still going on, and that delays in implementation be avoided.

3. CLOSURE

3.1 The meeting closed at 17h08.

CONSTITUTIONAL ASSEMBLY

MEMORANDUM

TO: **Members of the Constitutional Committee Subcommittee**
FROM: **Executive Director**
DATE: **30 JANUARY 1996**
RE: **Memorandum from the Constitutional Court**

We enclose for your consideration a memorandum from the Constitutional Court.

Paragraph 7 of the memorandum on page 11 relates to the issue of referring Bills to the Constitutional Court, raised in section 54 of the ***"Refined Working Draft (Third Edition)"***.

H EBRAHIM
EXECUTIVE DIRECTOR
CONSTITUTIONAL ASSEMBLY

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Constitutional Court of South Africa
Braamfontein, 2017

CHAMBERS OF
JUSTICE A CHASKALSON

29 August 1995

FAX: 021 24 1160

H Ebrahim
Executive Director
Constitutional Assembly
P O Box 15
CAPE TOWN
8000

Dear Sir

THEME COMMITTEE 5

I attach a memorandum which reflects the views of the members of the Constitutional Court on the most recent draft text of the chapter of the Constitution dealing with the Judiciary and the legal system.

The members of the Court are reluctant to express any views on issues which could affect them personally and have where possible avoided referring to any such issues. The question of tenure, however, has important implications which go beyond the position of particular individuals, and for that reason, is dealt with in the memorandum without suggesting any particular period as being the one which might be most suitable.

Yours sincerely

A Chaskalson

A Chaskalson
President
Constitutional Court

MEMORANDUM

Tuesday, 29-8-95

TO: The Constitutional Committee of the Constitutional Assembly.

FROM: Justices of the Constitutional Court.

RE: Memorandum dated 10 August 1995 by Theme Committee Five Technical Advisors.

Matters regarding the judiciary and legal systems.

1. This memorandum represents the views of all members of the Constitutional Court. On certain matters it was considered inappropriate for any comment to be made. It must therefore not be assumed that, in regard to provisions in the Memorandum on which no comment has been made, the members of the Court are necessarily in agreement with such provisions.

2. Ad section 1(1)

It is understood that the object of this sub-section is to ensure a co-ordinated, centralised National judiciary and to eliminate the possibility of a Provincial judiciary operating in tandem with a National judiciary. If that is the case it is suggested that the word "of" in the first line be replaced with the word "in". This makes the meaning more unambiguous. It also accords with the formulation in the first line of section 2.

3. Ad section 1(2)

It is suggested that the word "impartial" be inserted after the word "independent". We can see no reason why the impartiality of the Courts, in their structure and appointment, as well as in their functioning, should not be constitutionalised.

4. Ad section 1(5)

It is suggested that the word "decisions" be substituted for the word "orders". Normally the order of a Court is binding only on the parties to the case in which the order is made. Alternatively we suggest that the word "bind" be substituted by a phrase such as "be observed by" or "be respected by".

5. Ad section 2(i)

It is suggested that the words "at least" be inserted before the word "four" in the third line to make it clear that appointment of Judges from the Courts mentioned is not limited to four persons.

6. Ad section 2(ii)

The identity of the person or body who is to determine the number of Judges of the Supreme Court of Appeal is left in the air. It is suggested that the sub-section make clear by whom or by what body or institution the number of such Judges is to be determined.

7. Ad section 3(1)(b)

If section 3(1)(b) is to be retained it is strongly suggested that this jurisdiction be limited to "the constitutionality of any Bill passed by Parliament or a provincial legislature". An advisory opinion from the Constitutional Court should only be sought at the very last stage in the life of the Bill i.e. before its signature by the President. This will ensure that the Constitutional Court is not prematurely or unnecessarily involved in a dispute which may be purely political at that stage and thus, however unintentionally, be drawn into playing (actually or by perception) a political role for which it is not suited.

8. Ad section 3(6)

The sub-section is in the wrong place in as much as section 3 deals with the jurisdiction of the Constitutional Court. It should be a sub-section of section 4, preferably sub-section 3.

9. Ad section 3(6)(a)

The reference should be to the relevant paragraphs in sub-section 5, not 4. In any event the unqualified reference to "may make the orders set out in" is too wide. A phrase such as "may make orders similar to those set forth in clauses 5(a), (b) and (c) in relation to the matters over which the respective courts have constitutional jurisdiction" is suggested.

10. Ad section 3(6)(b)

It must be made plain, either in this paragraph or in another section in this Chapter, that these provisions do not preclude the granting of a temporary interdict or other temporary relief by the "other Court" premised on the finding of inconsistency..

11. Ad section 4(1)

We understand one of the objects of this sub-section to be the preservation of such inherent jurisdiction as the various divisions of the present Supreme Court currently possess and to transfer such inherent jurisdiction, as it were, to the Supreme Court of Appeal, the Court of Appeal and the High Court and other Courts of similar status. The current formulation assumes that the Supreme Court of Appeal, the Court of Appeal and the High Court and other Courts of similar status will have inherent jurisdiction existing at the date the new Constitution takes effect. This may well be a faulty assumption in as much as all these Courts, being new Courts and all creatures of a statute, may not have any inherent jurisdiction at all. It is suggested that the sub-section be reformulated

to express more clearly the intended object and to eliminate any uncertainty in this regard.

12. Ad section 5(4)

Subject to the qualification that the composition of the Judicial Service Commission is not altered we would support the retention of section 99(4) and (5) of the Transitional Constitution.

13. Ad Section 5(7) and 5(8)

1. Inasmuch as the question of tenure affects, or could affect, all members of the present Constitutional Court, it is invidious for current members of the Court to make specific proposals regarding tenure which, bearing in mind the need for transition, might affect their own tenure.

2. It is appropriate however to analyse various possibilities in the abstract and to point at features which would or might adversely affect the independence of the Constitutional Court or the proper discharge of its functions under the Constitution.

3. There are three main approaches to the question of length of tenure

(a) appointment for a tenure similar to that currently served by Supreme Court Judges;

(b) appointment for a specified term;

(c) appointment for a specified term coupled with a maximum age-limit.

4. In terms of the Memorandum under consideration, the Appellate Division (Supreme Court of Appeal) is (at an appellate level) to be given the same constitutional jurisdiction as the High

Court (current Provincial and Local Divisions of the Supreme Court). A fully integrated and vertical system is envisaged (with the exception of matters within the exclusive jurisdiction of the Constitutional Court) and on constitutional matters the Constitutional Court will in appropriate cases hear appeals from the Supreme Court of Appeal. That being the case, there is an argument, from consistency and integration, for giving the judges of the Constitutional Court tenure on exactly the same basis as the other superior courts (it is assumed that the current system of tenure for the Supreme Court Judges will be retained).

5. Appointment for a specific term only is not evaluated any further because this would not ensure staggered retirement in the absence of quite arbitrary shorter terms for specific judges.

6. Appointment for a specified term, coupled with a maximum age-limit could, subject to important conditions, not detract from the quality and competence of the Court and at the same time ensure the continuity of the Court through retirement at different times.

1. It is unnecessary to emphasise the importance of both the actual (and perceived) independence of the Constitutional Court, not only for the success of the Constitutional Court as an institution, but indeed for the Constitution itself. In the light hereof, it must be appreciated that the shorter the period of tenure, the greater the danger to the actual (and perceived) independence of the Constitutional Court.

2. With a short period of tenure, many Judges of the Constitutional Court will not have reached conventional retiring age when such a short term of office has expired. It is possible that they may, on leaving the Court, be offered appointments of some other nature from National or Provincial Governments, or from business concerns. A short term on the Constitutional Court could then be seen as a mere stepping stone to some other appointment, with negative consequences for the perceived independence of the Constitutional Court as an institution. Such subsequent appointment could be seen as a "reward" for satisfactory work done on the Constitutional Court.

6.3 A short period of tenure could also result in Judges of the Constitutional Court who were appointed to the Constitutional Court from one of the Superior Courts being obliged (by virtue of the provisions of the Judges' Remuneration and Conditions of Employment Act 88 of 1989 (as amended)) to return to the Superior Courts from which they were appointed, upon expiry of their term of office with the Constitutional Court. It seems undesirable for Constitutional Court Judges to return to Courts bound by judgments of the Constitutional Court.

6.4 A short period of appointment could have another significantly adverse effect on the status and competence of the Constitutional Court. An able young practising lawyer might be very reluctant to accept appointment for a short time, bearing in mind that the general rule in South Africa is that former judges do not return to active practice after leaving the Superior Courts. Even if they were permitted to do so, it would be quite invidious for the young lawyer in question, after having

served his/her term, to appear before the Constitutional Court. Similar invidious difficulties could arise in the case of younger academics. A short term of office might dissuade the ablest academic from accepting appointment because of the uncertainties attendant on resuming the same, or an equally advantageous, academic career. It would seem that a situation ought to be avoided where academic nominees decline to accept appointment for such reasons.

7. A tenure (sufficiently long) coupled with mandatory retirement at a particular age, even where tenure has not been completed, would ensure a satisfactory rotation of staggered retirement both for the existing and future Constitutional Courts, provided the unsatisfactory consequences alluded to in 8.3 above are avoided.

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

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MEMO

TO: THE CHAIRPERSONS
CONSTITUTIONAL ASSEMBLY

FROM: THE PANEL OF CONSTITUTIONAL EXPERTS

DATE: 25 JANUARY 1996

RE: ABSTRACT REVIEW

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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 referrable 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 legislative 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.

CONSTITUTIONAL ASSEMBLY

MEMORANDUM

TO: **Members of the Constitutional Committee Subcommittee**
FROM: **Executive Director**
DATE: **30 January 1996**
RE: **Proposed Amendments to Sections 41 and 50**

We forward to you for your consideration two proposed amendments to the *"Refined Working Draft (Third Edition)"*.

The first is a proposed amendment to section 41 from the Independent Panel of Constitutional Experts.

The second is a proposed amendment to section 50 from the Technical Refinement Team.

H EBRAHIM
EXECUTIVE DIRECTOR
CONSTITUTIONAL ASSEMBLY

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To be revisited later when electoral system is considered.

MEMORANDUM

TO: **LOUISA ZONDO**

FROM: **THE PANEL OF CONSTITUTIONAL EXPERTS**

RE: **DISCUSSION DOCUMENT : SECTION 41 - PROPORTIONAL REPRESENTATION**

Parties seem to agree:

1. Proportional representation should at least be "embraced" in general - CP VIII.

2. Some flexibility is needed.

3. Therefore "in general" is fine (depending on the rest).

4. Differences seem to be "political". The Panel suggests, as possible solutions,

Option A:

not ≤ than 300 and not > than 400 members.

"The NA consists of ... elected in terms of an electoral system of general proportional representation that is prescribed by national legislation and based on a common voters role".

If unacceptable, the earlier options are:

Option B:

"The NA consists of ... elected in terms of an electoral system that is prescribed by national legislation, is based on a common voters roll and **designed to achieve**, **in general,** proportional representation".

embraces

Option C

".. **amounting to** ..." or "**designed to amount** to proportional representation" in stead of "designed to achieve".

Option D

"... elected in terms of an electoral system that is prescribed by national legislation, is based on a common voters roll and, in general, ~~**embraces**~~

braces

in general,
proportional representation"

Option E is a version of D with the word "**embodying**" in stead of "embracing".

CONCLUDING REMARKS

All the above formulations effectively mean that any electoral system has to be designed in such a way as to achieve PR in general.

A final determination of the nature of an electoral system will depend on the detail which will have to be addressed in an electoral act.

Panel members are willing to attend the multi-lateral in an attempt to assist in discussions

Panel
30/01/1996

PROPOSED AMENDMENT TO SECTION 50 OF THE WORKING DRAFT AS PER INSTRUCTION OF CC SUBCOMMITTEE ON 29 JANUARY 1996

Insert the following subsection after subsection (1) and renumber the existing subsection (2) to "(3)".

"(2) The rules and orders must provide for the participation of -

(a) committees of the National Assembly in the legislative process, including the initiation and preparing by committees of draft legislation [n co-operation with[1]] the responsible Cabinet members; and

(b) minority parties in the committees."

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[1] The term "in consultation with", which was suggested in the Subcommittee, means with the concurrence of and is perhaps too strong in this instance. It is suggested that "in co-operation with" or "after consultation with" be used.

CONSTITUTIONAL ASSEMBLY

MEMORANDUM

TO: Members of the CC Sub-Committee

From: Hassen Ebrahim

Date: 29 January 1996

RE: SUBMISSIONS

From 15 November to 24 January 1996 The CA has received 619 submissions in response to the Working Draft. 424 of these have been processed and recorded on our database. Table 1 has been extracted from these records to give us an indication of the distribution of issues. As indicated on the Table, the 424 submissions cover 495 issues, which means that some submissions deal with more than 1 issue. 195 of these are currently in the system (80 of which are with translators, and 115 with the data capturers).

Responses to the Bill of Rights (56.6%) by far exceeds that of other chapters in the Draft.

43 out of the 424 (10%) submissions were received from Organisations.

The Petitions received (2 679) during this period are indicated in Table 2.

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TABLE 1

424 SUBMISSIONS RECEIVED (15 Nov.'95 - 24 Jan.'96)

DISTRIBUTION OF ISSUES COVERED

RESPONSES TO CHAPTERS IN THE DRAFT CONSTITUTION	No.	% OF TOTAL
Ch. 1 - Founding Provisions (A)	68	13.7
Ch. 2 - Bill of Rights (B)	280	56.6
Ch. 3 - Parliament (C)	10	2
Ch. 4 - Council of Provinces (D)	1	0.2
Ch. 5 - National Executive (E)	2	0.4
Ch. 6 - Courts & Admin of Justice (F)	4	0.8
Ch. 7 - State institutions supporting Constitutional Democracy (G)	3	0.6
Ch. 8 - Provinces (H)	4	0.8
Ch. 9 - Provincial & Nat. legislative & executive Competencies (I)	-	-
Ch. 10 - Local Government (J)	5	1
Ch. 11 - Traditional Authorities (K)	10	2
Ch. 12 - Public Administration (L)	2	0.4
Ch. 13 - Security Services (M)	6	1.3
Ch. 14 - Finance (N)	2	0.4
Ch. 15 - General Provisions (P)	-	-
Schedules (Q)	3	0.6
General Legislative Demands (R)	75	15.2
Other	20	4
TOTAL	**495**	**100**

TABLE 2

PETITIONS

No.	SUBJECT	Amount
12756	Pro Death Penalty	147
12757	Pro Right to Firearms	2 246
12758	Anti Sexual Orientation Clause	111
12759	Christianity and the State	175
	TOTAL:	2 679

SUBMISSIONS

PETITIONS
29 January 1996

PRO DEATH PENALTY

Dear Fellow South African.

I am concerned, disillusioned and disgusted. We fought apartheid and won. What have we won? A government that is basking in victory and that has forgotten its task. Governing the Country.

I believe that the first step toward good government is reducing the level of crime in order that ordinary citizens , you and I and our children can live in a climate conducive to nation building.

I BELIEVE (and hope you concur) that the first step toward reducing crime is to reintroduce the Death Penalty. Our Bill of Rights which forms part of our constitution says that everyone has the RIGHT TO LIFE, but makes no exceptions to those who TAKE LIFE and show a complete disrespect for LIFE. If you agree (independent surveys show that 70% of ordinary citizens in SA agree that the death penalty should be re-introduced) that this exception should be made and written into our constitution, then please do the following.

Be proactive, ***DO IT! Its your and your children's future on the line!***

1. MAKE A FEW COPIES OF THIS LETTER AND SEND IT TO YOUR FRIENDS. I SUGGEST AT LEAST 5. THE MORE THE MERRIER.

2. COMPLETE THE FOLLOWING AND THEN POST TO:

The Executive Director - Mr Hassim Ebrahim
The Constitutional Assembly
P O Box 15
Cape Town
8000

I, LAURENS LOUIS LANGLOIS a South African citizen concerned about the governments inability to hear the needs of ordinary citizens, request that the following amendment be made to the constitution. That the clause relating to the right to life be amended to include the provision for and application of the death penalty for serious crimes involving murder, attempted murder, armed robbery, hijacking, possession of illegal automatic weapons and rape.

Signed ..... Date 21-10-95.

This is your chance to do something positive about the serious crime problem in South Africa: - DO IT!

Sincerely

Amy Lewis

P.O. Box 135,
BOTHA'S HILL, 3660,
Kwazula Natal.

9th January, 1996.

The Executive Director,
Constitutional Assembley,
P.O. Box 1192,
Cape Town, 8000.

Dear Sir,

I wish to comment on chapter 2 section 10 of the Draft Constitution. I believe that option 2 for this section of the working draft should be adopted. (Optionally followed by any strong convictions you may have to support this point).

Yours faithfully,

Gladys Drummond.

G. Drummond (Mrs.)

PRO RIGHT TO FIREARMS

Somerset West
Date:

The Executive Director
Constitutional Assembly
P O Box 15
CAPE TOWN
8000

Sir

THE RIGHT TO OWN AND BEAR ARMS

The question "Does the right to self-defence give you the right to carry a weapon?" can only be answered with a simple "Yes". Once the right to self-defence has been acknowledged, it is logical that the means of self-defence must be available when ever and where ever it is considered necessary. Any restriction on the carrying of weapons will make it difficult, if not impossible for many to exercise that right. It will mean to permit ourselves to fall easy prey to criminal violence and to permit criminals to continue unobstructed in their evil ways.

Life is God's gift, and we are morally bound to preserve it, starting with our own and those of our families, from criminal violence.

To surrender that duty to the police is misguided because the police cannot protect us everywhere and at all times, since most criminals take care not to operate under the noses of policemen, and all too often they, the police, cannot even protect themselves.

It also raises an ethical question: "How can you rightfully ask another person to risk his life to protect yours, when you will assume no responsibility yourself?" If you believe it reprehensible to posses the means and will to use lethal force to repel a criminal assault, how can you call upon another to do this for you?

Having the means of self-defence is thus an affirmative duty.

I believe, our existing legislation with regards the possession and carrying of fire arms has served us well, and those people who go about legally armed have demonstrated, that the vast majority of legal gun-owners are responsible and law-abiding.

I also believe, that the Right to own and bear arms is an expression of true freedom and bond of trust between a government and its people. In a society that claims to be free and democratic, no truly free people must ever be debarred the use of arms.

Yours sincerely

.....
Signature

Name: ALEX HAROLD WENTZEL

Address: 31 STRANDLOPER CRES

SOMERSET WEST

7130

A. Marais
Margaretaweg 13
Wespark, Pretoria
0183

Die Uitvoerende Direkteur
Grondwetgewende Vergadering
Posbus 1190
Kaapstad
8000

Meneer,

GRONDWET

Ons merk met kommer dat ons voorleggings oor vuurwapenregte nie in die ontwerpgrondwet weerspieël word nie. Deur na te laat om die basiese reg op wapenbesit te erken en deur verder ook na te laat om die regering se mag te beperk om inbreuk op hierdie reg te maak, maak die Grondwet dit inderdaad moontlik vir enige toekomstige regering om sy burgers te ontwapen en dit terselfdertyd onmoontlik vir die burgers om hulle teen tirannie of militere diktatorskap te verset.

Ons merk met ewe groot kommer dat hoewel misdadigers uitgebreide regte toegeeu word, daar niks in die ontwerpgrondwet is wat wetgehoorsame burgers die reg of die middele gee om hulself teen sulke misdadigers te beskerm nie. Die reg op lewe, die reg op veiligheid van die persoon en die reg om vry te wees van alle vorme van geweld (Artikels 10 & 11) en die reg daarop om nie van jou eiendom ontneem te word nie (Artikel 24) is betekenisloos as 'n mens nie geregtig is op die middele om hierdie regte teen kriminele skending te beskerm nie.

Daar kan trouens aangevoer word dat die ontwerpgrondwet meer werklike en praktiese regte aan 'n misdadiger toeken om hom te help om die gevolge van sy dade te vermy as wat dit regte aan wetgehoorsame burgers gee om hul persone en eiendom teen misdadigers te beskerm.

Dit is 'n onweerlegbare feit dat 'n vuurwapen vir die oorgrote meerderheid wetgehoorsame burgers in die land die enigste doeltreffende middel is waarmee hulle hul regte kan beskerm. Die polisie kan nie almal beskerm nie en is trouens nie wetlik verplig om dit te doen nie.

Artikel 12 van die ontwerpgrondwet bied ook rede tot kommer. In sy voorgestelde vorm skiet dit byvoorbeeld te kort in vergelyking met die bepalings van die Europese Konvensie oor Menseregte. Die Konvensie kwalifiseer die reg op lewe deur voorsiening te maak vir die ontneming van lewe, inter alia, in die verdediging van enige persoon teen onwettige geweld, in 'n poging om 'n wettige arrestasie uit te voer of om 'n poging om die ontsnapping van 'n persoon uit wettige arrestasie te verhinder (Artikel 2(a)&(b) van die Konvensie). Dit weerspieël ook die huidige posisie in Suid-Afrika met betrekking tot straflose manslag. Die ontwerpgrondwet plaas egter 'n vraagteken daaroor.

Dit sal onhoudbaar wees as 'n slagoffer wat sy aanvaller in selfverdediging doodmaak of onder omstandighede wat deur Artikel 39 van die Strafprosesewet gedek word, siviel of strafregtelik aanspreeklik gehou word vir die skending van die misdadiger se grondwetlike reg op lewe.

Ons dring dus ten strekste daarop aan dat die ontwerpgrondwet aangepas word om voorsiening te maak vir die sake wat hierbo verwoord is.

Die uwe.

04-01-1996

ANTI SEXUAL ORIENTATION CLAUSE

P O Box 72196
Lynnwood ridge
0040

The secretarial
Constitutional Assembly
Cape Town

Re: Homosexualism. Constitution Chapter 3, Paragraph 8.2

Sir / Madam

We the undersigned, strongly object to the legalisation of immoral and unnatural sexual lifestyles as under chapter 3 paragraph 8.2 of our interim constitution.

The phrase "sexual orientation" must be deleted from our present constitution and not be included in the final constitution that is being drafted.

Homosexualism, lesbianism, sodomy and bestiality are unnatural, abnormal and immoral and do not deserve any constitutional protection under clauses like "sexual orientation".

Thank you for listening to the voice of the people.

Yours truly.

CHRISTIAN COMMITTEE FOR MORAL STANDARDS.

CHRISTIANITY AND THE STATE

J.H. van Dyk en B.M van Dyk
Azalea str 50
P.O Box 977
Lewis Trichardt 0920.

Mr Cyril Ramaphosa
The Chairperson of the Constitutional Assembly
P O Box 15
CAPE TOWN
8000

Dear Sir

SOUTH AFRICA A SECULAR STATE VS RELIGION

It is with great concern that I have heard rumours that State and Religion should be separated as proposed by the ANC.

I want to state clearly that this will not be accepted by our multi-cultural community and for that matter 90% of the population of our beloved country.

God our Creator has always been with us and with our country through his Spirit. He, who has been such an important part of our lives, cannot and will not allow Himself to be barred from any State Institution. If the ANC tries to do this, the wrath of God will do the same to this country as He did to the Egyptians, the Israelites, the Persian Empire and more recently Hitler's Germany, Communism in Europe and a large part of African States to the north of us, when they tried to sideline Him in their countries.

The Christian faith preaches love for one's fellowman, compassion, hard work, obedience to the government of the day and love for God, Jesus Christ and his Spirit. Aren't these the norms and values any government would like to see in the people they govern. Why sideline these people. Any government who dares to sideline Christianity, sidelines these Christian values and norms and this will lead to anarchy, rebellion and hatred. Aren't we seeing too much of this in our Godless world today? Why join hands with the powers of darkness and ruin our country? With God we will have a beautiful country. Without Him, we will have anarchy and devastation.

I want to seriously ask you to reconsider the ANC proposal and I implore you not to forget the millions of Christians who voted your government into power. For peace and stability in our country, let God Almighty reign in every State Institution, school and home in our country.

Yours faithfully

J.H. van Dyk
B.M van Dyk