

2/21/1/8/27

CONSTITUTIONAL ASSEMBLY

**CONSTITUTIONAL COMMITTEE
SUB-COMMITTEE**

**DRAFT REPORT OF DISCUSSIONS
12 MARCH 1996**

CONSTITUTIONAL ASSEMBLY

DRAFT REPORT

CONSTITUTIONAL COMMITTEE SUB-COMMITTEE MEETING TUESDAY 12 MARCH 1996

1. OPENING

- 1.1 Mr. Ramaphosa opened the meeting at 10h05. The meeting agreed to adjourn until 11h15 to give parties time to consider the draft formulations and documentation tabled at the meeting and to reconvene as a multi-lateral discussion.
- 1.2 The meeting reconvened at 11h25 and the agenda was adopted.
- 1.3 The following documentation was tabled:

Documentation Tuesday 12 March 1996

Draft Report of Discussions - 5 March 1996

Memorandum from the Panel of Experts and Technical Committee 4 on Clause 34(4) - Exclusion of evidence

Memorandum from the Panel of Experts on possible amendments to Section 13 ("Arbitrarily")

Submission from the South African Chamber of Business on the Property Clause

2. DISCUSSION: BILL OF RIGHTS

- 2.1 The meeting agreed that discussion would be based on the document entitled "*Draft - 9 March 1996 - Chapter 2: Bill of Rights*" contained in the *Documentation - Tuesday 12 March 1996*.
- 2.2 **Section 7: State's Duties**
 - 2.2.1 The meeting agreed to remove the brackets and to include the words "[*promote and fulfil*]" so that the section reads as follows:

*The state must respect, protect, **promote and fulfil** the rights in this Bill of Rights.*

2.3. Section 8: Equality

2.3.1 Regarding Section 8(1) and (2), the meeting agreed to these sections.

2.3.2 Regarding Section 8(3)

2.3.2.1 The meeting agreed that the Technical Refinement Team and the Technical Advisors should provide a range of possible alternative formulations to address the concerns raised by the parties taking into account the following:

- i whether the word "*unfairly*" should be included. The Panel of Experts stated that this formed part of the broader question of horizontality.
- ii the use of the active or passive voice.
- iii the possibility of incorporating Section 35(4) in this section.

2.3.2.2 The ANC stated that its understanding was that the NP had agreed that, although it favoured the inclusion of "*and affiliation*", it would consider dropping this proposal if "*or any other grounds*" was included.

2.3.3.3 The NP responded that they had not committed themselves finally on this issue but would look at a further formulation..

2.3.3.4 The NP further stated that it would prefer that a formulation in line with the wording of Section 35(4) should be taken out of the limitations clause and inserted in this section.

2.4 Section 9: Human dignity

2.4.1 The meeting agreed to this section.

2.5 Section 10: Life

2.5.1 The meeting agreed to defer discussion of this section.

2.6 Section 11: Freedom and security of the person

2.6.1 Regarding 11(2)(b)

2.6.1.1 The NP stated that it did not have a problem with the wording "*physical and psychological integrity*".

2.6.1.2 The ANC stated that the phrase "*bodily integrity*" had not been included in the reformulation where it had been proposed. The ANC had proposed that the words "*bodily integrity*" should be included in the header of 11(2) so that it reads "*Everyone has the right to bodily integrity and security of the person*".

2.6.1.3 Prof Murray clarified that the reason the Technical Refinement Team had introduced "*bodily /physical integrity*" in Section 11(2)(b) and not in the header of Section (2) was a question of elegance but they were of the opinion that this formulation achieved the same result.

2.6.2 Regarding Section 11(2)(c)

2.6.2.1 The NP stated its position as follows:

- i It had considered the wording proposed by the ANC and had taken the matter back to their principals as requested. However The NP still had concerns that the phrase "*decisions concerning their body*" might constitutionalise the right to abortion on demand and might also permit legislation that would allow euthanasia. The NP requested the opinion of the Panel on the aspect of euthanasia.
- ii It reiterated that its original position was that it did not support the inclusion of Section 11(2)(c) and that this remained its position. The NP drew the meeting's attention to the submission of Prof Lourens Du Plessis which was important in forming the NP opinion on this matter.

2.6.2.2 The ANC stated that its request for the section to be phrased as "*decisions concerning their body*" remained. The ANC stated further that it wished to place on record that it did not want to have a provision in the Constitution that would constitutionalise the right to abortion on demand but that the issue of abortion should be dealt with by legislation.

2.6.2.3 Prof Murray explained that the Panels' understanding was that none of the words would be decisive but that the whole bundle of rights would have to be considered.

2.6.2.4 The NP asked whether Section 11(2)(c) was necessary if the phrase "*physical and psychological integrity*" was included. The ANC responded that the inclusion of this section was

important as it would send strong signal to those affected by an absence of such rights, particularly women who most often suffered from violation because of their gender and that this was the only gender-specific provision and it was therefore necessary to retain it.

- 2.6.2.5 Mr Ramaphosa proposed that the NP discuss the matter with the Panel of Experts and that the matter would be revisited.

2.7 Section 12: Slavery, Servitude and forced labour

- 2.7.1 The meeting agreed to this section.

2.8 Section 13: Privacy

- 2.8.1 The meeting agreed that the Panel and Technical Advisors would prepare a memorandum on the possible inclusion of the word "*reasonably*" in 13(a),(b) and (c) to qualify the verbs "*searched*" and "*seized*" and would report back to the Subcommittee.

- 2.8.2 The ANC stated that it had considered the proposal of the Experts on "*arbitrarily*" but felt that there should be a specific reference to the notion of "reasonableness" in this section. The ANC therefore proposed the insertion of "*reasonably*" to qualify "*searched*" and "*seized*" to provide for some form of limitation in this section. The ANC believed that this might have an impact on the way the criminal justice system works and it stated that it wished to look at this issue more carefully.

- 2.8.3 The DP stated that its position on "*reasonably*" was the same as on the inclusion of the word "*arbitrarily*" and that was that this insertion was unnecessary.

- 2.8.4 The NP accepted the opinion of the Panel on this matter.

2.9 Section 14: Freedom of religion, belief and opinion

- 2.9.1 The meeting agreed to Section 14(1).

- 2.9.2 Regarding Section 14(2)(a)

- 2.9.2.1 The meeting agreed to include the word "*public*" after "*appropriate*" as proposed by the ANC so that the section reads:

"those observances follow rules made by an appropriate public

authority"

- 2.9.2.2 The meeting further agreed that the NP would take the matter back to its principals and noted that the NP position that it would be happy with the wording as it stands or alternatively had proposed the section should be amended to read:

"those observances follow rules made by the authority in immediate control of that institution"

- 2.9.2.3 The DP stated that it seemed better to leave the wording as it stands as many of these issues were in a state of flux.

2.10 Section 15: Freedom of expression

2.10.1 Regarding Section 15(1)

The meeting agreed to this section but agreed that Sections 15(1)(c) and (d) would be given further consideration by the NP who wished to ensure that these sections applied to juristic persons.

2.10.2 Regarding Section 15(2)(c)

- i The NP stated that it was against inclusion of Section 15(2) and not to have any specific limitation but rather an unfettered freedom of speech limited only by the general limitations clause.
- ii DP again expressed the view that there should be no immunisation of the right of freedom of expression. The DP clarified that immunisation was different from a ban on hate speech as what was meant was that those grounds listed in this section would not enjoy the protection of freedom of expression. The DP used the example of a statement such as "one settler, one bullet" as being one which would not enjoy protection. The DP stated that the narrower wording of "*cause harm*" in Section 15(2)(c) was a major improvement and suggested that "*incitement*" be looked at further.
- iii The ANC stated that the present wording was the bare minimum it would accept and it would want the section to remain as it stands.
- iv The PAC stated that it wished to place on record that in its submission to the World Trade Centre it had advocated that hatred based on race should be outlawed and that its position

was that statements such as "one settler, one bullet" had no place in our new dispensation.

- v The NP asked that the submissions from the public on this issue, particularly that of Gilbert Marcus on behalf of the Conference of the Editors, should not be ignored.
- vi The ANC stated that it was important to take into account the submissions of not only those who were able to write but also a range of views and broader access to submissions.
- vii The meeting agreed that a range of views had been received from a wide range of communities.
- viii The meeting agreed that the Technical Advisors would prepare a memorandum on the submissions for presentation to the Subcommittee which would highlight those submissions that should be taken into account.
- ix The meeting agreed to await the memorandum from the Technical Advisors and thereafter to discuss the matter further amongst the parties in order to finalise the wording of this section.

2.10.3 Regarding Section 15(3)

The meeting agreed that the Technical Refinement Team would reformulate this section taking into account the concerns raised and would report back to the Subcommittee. In the reformulation of this section they would consider:

- i A provision in the Bill of Rights as a limitation
- ii A general principle to be included in Chapter 7.

2.11 Section 16: Assembly, demonstration and petition

- 2.11.1 The meeting agreed that the ANC proposal of the inclusion of the words "*to picket*" should be retained in brackets and be deferred for further consideration by the parties.
- 2.11.2 The ANC stated that its proposal for the inclusion of "*picket*" was based on strong representation from the unions that this be explicitly stated in the section.

2.11.3 The DP stated that this aspect would be covered under Freedom of Expression.

2.11.4 The NP stated that it wished to consider the matter further. It was not persuaded that this proposal should be included as the term "*demonstrate*" would cover this aspect.

2.12 Section 17: Freedom of Association

2.12.1 The meeting agreed to this section.

2.13 Section 18: Political rights

2.13.1 The meeting agreed to this section.

2.14 Section 19: Citizenship

2.14.1 The meeting agreed to this section.

2.15 Section 20: Freedom of movement and residence

2.15.1 Regarding Section 20(1)

- i The meeting agreed that this matter was deferred for further consideration by parties and would be revisited.
- ii The ANC stated that it had considered the memorandum from the Experts on this issue but was not entirely persuaded by it and would like to consider the issue further, as there were a number of constitutions which limited these rights to citizens or to those lawfully in the country. It expressed concern that Sections 20(3) and 20(4) referred to "*citizen*", while 20(1) and 20(2) referred to "*everyone*".
- iii The PAC stated that it wished to give the matter further consideration.
- iv The NP stated that it was persuaded by the memorandum and preferred to wording to be retained as it is.

2.16 Section 21: Freedom of occupation

2.16.1 The meeting agreed to come back to this section but noted that:

- i The ANC would consider the inclusion of the word "*trade*"

which had been proposed by the NP but stated that other words may need to be inserted regarding regulation by legislation.

- ii The DP expressed concern about whether freedom of occupation ought not to be extended to "permanent residents" and wished to research this aspect.

2.17 Section 23: Environment

2.17.1 The meeting agreed to defer this matter to allow parties to consider the proposal by the NP included in the footnotes to the Draft.

2.17.2 The ANC stated that it was considering the NP proposal and did not envisage great difficulty in incorporating certain aspects of this proposal in the current Section 23.

2.17.3 The DP expressed the concerns regarding:

- i The horizontal application of Section 23(a)
- ii The view in the submission regarding the use of the phrase "*sustainable*" in Section 23(b)(iii) which raised concerns about the consumptive use of wildlife. The DP stated that it would distribute the submission to the parties.

2.18 Section 24: Property

2.18.1 The meeting agreed to defer this section for further discussion.

2.19 Section 25: Housing and land

2.19.1 The meeting agreed to remove "*and land*" from the heading.

2.19.2 Regarding Section 25(2)

The meeting agreed that "*within its available resources*" should be amended to read "*within the state's available resources*" and the brackets should be removed.

2.19.3 Regarding Section 25(3)

- i The meeting agreed to reinsert "*arbitrarily*" in brackets after "*demolished*". The ANC stated that it had not advocated removal of the word "*arbitrarily*" but that it should be included in brackets.

- ii The NP requested that the words "*lawfully occupied*" should be inserted in brackets to qualify "*home*".
- iii The meeting agreed that the Panel and Technical Advisors should reformulate this section taking into account the concerns raised and should provide a memorandum on the inclusion of the word "*arbitrarily*."

2.19.4 The meeting agreed that Section 25(4) would be dealt with under a section dealing with land.

2.20 Section 26: Health, food, water and social security

2.20.1 The meeting agreed to this section but noted the DP concern about the way the rights have been couched and that the DP would circulate a memorandum to parties on this issue.

2.20.2 The meeting agreed to remove brackets in Section 26(2) around "*within its available resources*" and that this should be amended to read "*within the state's available resources*".

2.20.3 The PAC expressed concern about the grouping of socio-economic rights generally and the implications thereof. The Technical Advisors responded that they had recommended against this in their memorandum but that it was for reasons of elegance that they were grouped together. They pointed out that in Section 26(2) it was made clear that this referred to separate rights by stating "*each of these rights*".

2.21 Section 27: Children

2.21.1 The meeting agreed to this section.

2.22 Section 28: Education

2.22.1 The meeting agreed that this section was deferred for further discussion and that the NP was giving further consideration to its position.

2.23 Section 30: Language and culture

2.23.1 The meeting agreed that this section would be revisited and agreed that the NP would take the matter back to its principals but that it accepted the explanation from the Technical Advisors that this section could not be brought in line with Section 14(3).

2.24 Section 31: Access to information

- 2.24.1 The meeting agreed that the Technical Refinement Team and the Technical Advisors should provide a new formulation taking into consideration the views expressed that the right should be stated first but that this right be exercised in the context of specific legislation.
- 2.24.2 The meeting agreed that the redrafted formulations would be considered in further discussions between the parties.
- 2.24.3 The NP stated that Option 2 was unsatisfactory and preferred that the basic right of access to information held by the state be stated clearly in the Constitution and that any limitation should be dealt with in legislation.
- 2.24.4 The DP expressed concerns regarding:
- i "reasonable access"
 - ii "protection of any rights"
 - iii whether it was possible to constitutionalise the horizontal application under Section 31(1)(b).
- 2.24.5 The DP referred to Constitutional Principle IX which states that *"Provision shall be made for freedom of information so that there can be open and accountable administration at all levels of government"*.
- 2.24.6 The ANC stated that Constitutional Principle IX would be covered in the right of freedom of expression and in the Chapter on Public Administration dealing with accountable government. The ANC stated further that the right should apply horizontally so that workers would be able to receive information from the companies for which they work. The right should therefore be stated first and then the difficulties associated with the right, both horizontally and vertically, should be regulated through legislation.

2.25 Section 32: Just administrative action

- 2.25.1 The meeting agreed that the Panel and Technical Advisors should reformulate this section taking into account the following concerns raised by the parties:
- i The NP stated that the ANC proposal was a *"watering down"* of the right and it would like the right entrenched and not just

the right to legislation. The right should be stated first and then the state's obligation to pass legislation could expand on this.

- ii The ANC stated that it did not agree that the right was being watered down and requested parties to consider its proposal seriously. The ANC expressed concern about conferring a right in the constitution without spelling out any connection to national legislation.
- iii The DP stated that it would consider couching the right in legislation and would consider the reformulation.

2.26 Section 33: Access to courts

2.26.1 The meeting agreed to this section.

2.27 Section 34: Arrested, detained and accused persons

2.27.1 The meeting agreed to the following with regard to this section:

- i Section 34(1)(e) - The meeting agreed that Option 1 should be deleted and noted that both the ANC and NP supported Option 2 but that the DP and PAC did not support this wording but preferred Option 1.
- ii Section 34(2)(c) - The meeting agreed that the word "*provided*" should be deleted and the brackets removed and the word "*assigned*" should be retained.
- iii Section 34(3)(f) - The meeting agreed that the words in brackets [*if the interests of justice require it*] should be deleted and a footnote should be inserted to the effect that the DP reserved its position on the wording to consider it further.
- iv Section 34(3)(m). The meeting agreed that this section should be deleted.
- v Section 34(4) - The meeting noted the wording proposed in the "*Memorandum on Section 34(4) - Exclusion of Evidence*" tabled at the meeting. However it was agreed this matter would be given further consideration by the parties. The meeting noted that the ANC wished to take further advice on this matter and that the PAC did not prefer the proposed wording. The NP asked whether it was not stronger to use words along the lines of "*any evidence obtained in this way*"

must be excluded unless the exclusion is detrimental".

2.28 Section 35: Limitations

- 2.28.1 The meeting agreed that the Panel and Technical Advisors should provide a memorandum on the use of:
- i *"demonstrably"* - The DP and NP preferred to retain it while the ANC did not support its retention.
 - ii *"pursuant to"*
 - iii *"as is reasonably possible"* - The ANC queried whether this should be located under Section 35(2) as one of the factors.
- 2.28.2 The meeting further agreed that Section 35(3) should be moved to Section 8(3) and that the Technical Refinement Team and the Technical Advisors should reformulate the section.

2.29 Section 36: States of emergency

- 2.29.1 The meeting agreed to defer discussion of this section.

2.30 Section 37: Enforcement of rights

- 2.30.1 The meeting agreed to defer discussion of this section.

2.31 Section 38: Application

- 2.31.1 The meeting agreed to defer discussion of this section.

2.32 Section 39: Interpretation

- 2.32.1 The meeting agreed to defer discussion of this section.

3. NATIONAL COUNCIL OF PROVINCES

- 3.1 Discussions were based on the *Draft Proposal on National Council of Provinces dated 5 March 1996*.
- 3.2 It was agreed that there was common ground amongst the parties that this be used as a basis for discussion and that the parties would indicate in the meeting those matters which were outstanding.
- 3.3 It was agreed that in further discussions amongst themselves, parties would try to narrow down the outstanding matters, so that an agreed upon

document could again be discussed at the next meeting of the Subcommittee.

3.4 CONCEPT

3.4.1 This was agreed to in principle.

3.4.2 It was agreed that the question whether the NCOP would be included in the definition of Parliament, would be deferred for further discussion amongst parties.

3.4.3 It was noted that the NP indicated that they would prefer the name of the NCOP to be "Chamber of Provinces."

3.5 PARAGRAPH 1: COMPOSITION

3.5.1 This was agreed to in principle.

3.5.2 It was agreed that the following matters would require further discussion amongst parties:

- i. Regarding 2(2), details around the appointment of members of the National Council of Provinces.
- ii. Regarding (2)(2)(d), details regarding referral if the Mediation Committee were to agree on a different version of the Bill.
- iii. Regarding (2)(2)(e), details regarding the results if the Mediation Committee failed to agree on the Bill or amendments thereto.

3.5.3 Regarding 3.5.2.ii, the following discussion was noted:

- a. The DP stated that in the case where the Mediation Committee were to agree on a different version of the Bill, that it should be referred to both the National Assembly and the National Council of Provinces, and that they therefore supported the second option under 2(2)(d).
- b. The ANC stated that they were still considering this matter.

3.5.4 Regarding 3.5.2.iii, the following discussion was noted:

- a. Regarding the consequences should agreement not be reached by the Mediation Committee, the DP stated that they thought it more appropriate that the Bill should lapse in this case, because the NCOP should protect provinces in this way with regard to national overrides.

They said it was too early to decide to consider on the merits whether the proposed two thirds majority was appropriate, although they did acknowledge that it is an increased majority from the ordinary majority. They stated that this proposed amendment may be in conflict with Constitutional Principle XVIII(4).

- b. The ANC said that they disagreed with the DP's interpretation of the constitutional principle related to the Senate. They stated that furthermore the question was really whether it complied with Constitutional Principle XVIII(2). They stated that in a stable democracy like Germany it may be appropriate that where the provinces did not agree a Bill may lapse, and that the Bill thereafter could be reintroduced the following year. The ANC stated that South Africa in contrast was in a transformation process, and that was why they had created the deadlock-breaking mechanism. They stated that once there was a deadlock in the mediation structure, this could bring about a constitutional crisis. They stated that this was why the provision was brought in that ordinary legislation would need to be passed by a two thirds majority which was unknown in the rest of the world. They stated that this would keep in place checks and balances.
- c. The DP responded by saying that they were not referring to ordinary legislation, but to the very special override legislation related to Schedule 5.
- d. The ANC stated that they were indeed referring to Schedule 5.
- e. The technical advisers asked the DP whether the DP meant overrides referred to constitutional principle XVIII(4). They stated that they understood that constitutional principle to be referring to something else, namely matters such as amendments to the Constitution.
- f. The DP reiterated that one could in any case change the Constitution by a two thirds majority, and there was no reason one should be restricted to this.
- g. The ANC requested the DP to reconsider their position, as they thought that the two thirds majority would provide an effective veto, while at the same time not leading to a paralysis of government and allowing for effective government.

3.6

PARAGRAPH 2: PARTICIPATION IN NATIONAL LEGISLATIVE PROCESS

- 3.6.1 This was agreed to in principle.
- 3.6.2 It was agreed that further discussions amongst parties may be required regarding the 30 day period.
- 3.6.3 It was noted that the ANC had made a proposal regarding the introduction of a 30 day period in 2(c).

3.7 PARAGRAPH 3: FINANCIAL BILLS

- 3.7.1 This was agreed to in principle, but that the NCOP's role in FFC revenue allocations required further discussion jointly with the ad hoc committee on financial matters.
- 3.7.2 The DP stated that where there was a proposal in an appropriation bill to deviate from the recommendations of the FFC to the detriment of a particular province or provinces, that it must also be approved by a majority of the Senators or the Senate/Council of Provinces in that particular province. They stated furthermore that legislation, where there were recommendations from the FFC in respect of the horizontal distribution of funds between the provinces, in other words regarding their equitable shares and allocations, that it must be approved by both houses. They summarised their position that where that national government in respect of the horizontal distribution of equitable shares as between provinces did not deviate from the recommendations of the FFC, then the National Assembly should be able to pass the Appropriation Bill in the normal way. They stated that, however, where there was a deviation in respect of this element of the budget, the approval of the Council of Provinces would be required.
- 3.7.2 It was noted that the joint multi-lateral discussions should take place between 18 and 29 March, and that discussions regarding related local government matters which had been awaited by the ad hoc committee on financial matters would also be taking place.

3.8 PARAGRAPH 4: CONSTITUTIONAL AMENDMENTS

- 3.8.1 This was generally agreed to.
- 3.8.2 It was noted that regarding 4.2, the DP withdrew their proposal included as an option that approval of two thirds of the legislature of a particular province would be required. The DP stated that they withdrew their option in compliance with the Constitutional Principles XIII(4).

3.9 PARAGRAPH 5: MEDIATION COMMITTEE

3.9.1 This was generally agreed to.

2.10 PARAGRAPH 6: VOTING IN THE COUNCIL

3.10.1 This was generally agreed to, but that the meaning of "mandate" with regard to this matter would have to be discussed further amongst the parties.

3.10.2 It was noted that the NP stated that parties would have to be clear about what was meant with the word "mandate" in this context before this clause was drafted.

3.10.3 It was noted that the technical advisers had been asked to draft for further discussion the general agreement regarding voting, which would take on board the proposal by the DP.

3.11 PARAGRAPH 7: POWERS TO SUMMON MINISTERS

3.11.1 This was generally agreed to.

3.11.2 It was agreed that parties would have to further discuss whether Ministers would have "rights" to address the National Council or its committees.

3.12 PARAGRAPH 8: APPOINTMENTS

3.12.1 It was agreed that this required further discussions amongst parties.

3.13 PARAGRAPH 9: CHAIRPERSONS

3.13.1 This matter was not further discussed at the meeting.

3.13.2 PARAGRAPH 10: GENERAL

3.13.4 Regarding 11.2, The NP indicated that they awaited proposals from the ANC regarding local government attendance and participation.

4. COMPETENCES

4.1 Discussion was based on the *National and Provincial Legislative Authority draft of 12 March*, which it was agreed could also be subtitled as the second draft.

4.2 It was noted that as it had been agreed at the last Sub-committee meeting

on this matter that there was a single document on the basis of which the meeting would conduct its business on the matter of national and provincial legislative authority. It was noted that this document had its origins in the German trip and was not merely a document agreed to by the ANC and NP, and had also been under discussion at the Sub-committee on 6 March, which included the DP. It was agreed that further changes to the document would be indicated in bold and that as far as was possible parties would be given documents in advance of meetings.

- 4.2.1 It was noted that the DP expressed concern that although they had discussed the document at the Sub-committee and that the document now before the meeting was a slightly amended version of that document, they had had little time to respond to that document before the previous meeting. They stated that this was why they were submitting now their proposal regarding Clause 3 of the draft.
- 4.3 At the NP's request, it was agreed that the further discussions were required amongst parties regarding footnote 19.
- 4.4 It was agreed to the technical advisers' opinion that a verbal report on whether the draft complied with the constitutional principles would not be worthwhile for the whole constitutional text had to be viewed in context for such an assessment. It was also noted that the draft was prepared after the technical advisers, legal advisers and the Panel of Experts had recently met and applied their minds to these matters and made suggestions which were also incorporated by the drafters in the document under discussion.
- 4.4.1 The NP requested comment from the advisers regarding whether Cause 3 of the draft met certain criteria, notably the constitutional principles. They stated that they were unaware of an opinion which had previously been prepared by the TC3 advisers on this matter.
- 4.4.2 The ANC stated that it would not be possible to request a foolproof stamp of approval from the Panel of experts and the TC3 advisers on whether a piece of the text now under discussion complied with the constitutional principles, when the related matters were not being dealt with together yet. They stated that a written analysis of matters relevant to the application of the constitutional principles on these matters in general had been done by the technical advisers in the past.
- 4.4.3 A broad comment was noted regarding a request whether the experts wished to address the meeting on matters they may wish to bring to the meeting's attention. It was noted that there were two general standards which may apply in order to see whether these general matters complied with the constitutional principles. It was noted that

the first standard was that one had to look at Constitutional Principle XXI to see whether the text broadly complied with the powers there, which should not be difficult to meet. It was noted that the second standard was that contained in Constitutional Principle XIII(2). It was noted that in this regard one would have to look at the matter relatively holistically. It was noted that with regard to the last mentioned standard one could look amongst other issues at the impact of Subclause (3), the powers, the financial provisions, and the National Council of Provinces. It was noted that Constitutional Principle XVIII(2) referred to a "package", not to each and every power, otherwise what it would do would be to dispense with the constitutional principles and establish the Interim Constitution as the sole reference point. It was noted that these were broad comments that were not directed to this particular draft, as one would have to take into account the broad scheme of things.

- 4.4.4 It was noted that none of the TC3 advisers nor members of the Panel of experts had commented on this, and it was agreed that the meeting wished to avoid the situation that the team working on the draft collectively comment verbally in a way that may appear to be at odds. It was noted that the politicians had some consensus, and that experts may come back to the meeting and raise in writing for the consideration of the meeting issues which they may think the politicians had overlooked, with the view of pulling everyone into the type of agreement or consensus that was beginning to merge.
- 4.5 It was agreed that the DP proposal on Clause 3 of this draft tabled at this meeting would be contained as a footnote to the draft for further discussion amongst parties, and that parties would endeavour to have further discussions on this and other related matters. It was noted that this was a new proposal by the DP, but it was noted that there was a sense of a narrowing of issues and that the DP proposal would assist in moving closer to agreement. Parties expressed their willingness to be available for further bi-lateral discussions on request of other parties. The following discussion concerning the DP proposal was noted:
- 4.5.1 The DP stated that they had taken note of the earlier discussions with parties and as a result had drafted a different construction for Clause (3). They stated they had taken Clause (3) and cast it in a way that would reflect in exact words the constitutional principles read together with the fact that provinces should not lose effective powers that they may have had under Section 126 of the Interim Constitution. They stated that they thought theirs was a sufficiently objective approach towards the common problem of how you deal with overrides, and that they hoped that their proposal could be compared with clause 3 to see if a synthesis could be found.

- 4.5.2 The DP stated that they wanted to convey clearly their approach that the amendment they were now proposing to Clause (3) was not the same as their original proposal. They stated that they accepted that Constitutional Principle XVIII also had bearing on Constitutional Principle XXI. They stated that CP XVIII(2) was very specific and that if you applied this it may already intrude on keeping the powers of provinces on even keel. They stated that in giving more powers to the centre, related to what was required in the constitutional principles, it weighed more heavily on being in conflict with Constitutional Principle XVIII(2). They stated that this was already a conflict situation, because if one went beyond the constitutional principles and included other concepts which were not in the constitutional principles, there was a greater chance that it would be brought into conflict with the constitutional principles, although this would not necessarily be the case. They stated that one could look holistically at the powers and functions of the provinces. They stated that they believed one should incorporate the constitutional principles as far as one could, and not go beyond that in detracting from the powers of the provinces. They stated that this may lead to legal disputes.
- 4.5.3 The DP stated that there were two main areas where they thought that Clause 3 was not in line with the constitutional principles. First, they stated this applied to where it read that "*a national objective*", "unspecified", approved by the National Council of Provinces was an override. They stated that they saw nowhere where it stated that a national objective "unspecified" could be included as an override.
- 4.5.4 Second, they stated that if one looked at the constitutional principles, especially CP XXI(2), there were actually some areas which were not overrides, but which were allocations of provinces dealt with in the schedule. The DP stated that there was a very specific override. They stated they were not concerned with where one had a duplication of powers that it could be an override, but with the very specific one in CP XXI(2), because that CP concluded that "*...the Constitution shall empower the national government to intervene through legislation or such other steps as may be defined...*" They stated that this was a very specific override. They stated further that the CP started off with the wording "*Where it is necessary for...*" They concluded that the question of whether it was necessary was an absolutely critical part of the lead into the specific criteria. They stated that what was of concern to them was that the draft text in Subclause 3(2) read that national legislation "must be regarded as necessary, if..." They stated that this meant that on the one hand it said it had to be necessary to be inserted in the Constitution, and on the other hand the Constitution would read that if it was in the

Constitution and it was approved of by the National Assembly, then it was automatically necessary. They stated that there were two fundamentally different concepts, clear overrides in terms of the Constitution as against allocation of competences in terms of the schedule.

- 4.5.5 The DP stated that they believed their proposal was in closer conformity with and taken from the constitutional principles. They commented further that where there was specific mention in the Constitution of an override, then it should be stated in those words, and the draft should not delete any phrases like "it is essential for".
- 4.6 It was agreed that although this matter had been scheduled for further discussion on 27 March 1996, that it would be discussed again on 18 March when the meeting may extend later than 18h00 if necessary.

5. PROVINCES

- 5.1 It was agreed that discussion on this would be deferred until a later stage.

6. ANY OTHER BUSINESS

- 6.1 It was agreed that the Management Committee would meet at 7h30 on 14 March, and that the Constitutional Committee which was scheduled for 15 March would be replaced by a Constitutional Committee Sub-committee meeting. It was agreed that the agenda of this Sub-committee would be finalised and parties informed as soon as possible.

7. CLOSURE

- 7.1 The meeting close at 18h00.

