

DRAFT PROPOSAL ON THE PUBLICATION OF THE BILL OF RIGHTS**1. Introduction:**

It is unlikely that the Constitutional Assembly will adopt and publish for comment a substantially complete draft constitutional text by September this year. The Constitutional Assembly may decide however to publish draft text that has been processed by the Constitutional Committee but not adopted by the Constitutional Assembly. There are thus two options. One is to not publish text of any sort this year. The other is to publish available draft text.

This discussion document presents these two options in the form of four different scenarios confronting the Constitutional Assembly should we fail to publish a substantially complete constitutional text this year.

The scenarios are based on four assumptions:

- A The Theme Committees will complete their work and produce reports as scheduled
- B A substantially complete draft constitution will not be processed by the Constitutional Committee and published for public comment by September 1995
- C There is value for the constitution-making process in publishing portions or chapters of draft text
- D The publication of a Bill of Rights is feasible both in respect of the time available to the CA and the quality of text that can be produced.

2. Four scenarios:

The four scenarios are, publishing -

- 2.1. a draft Bill of Rights only (Scenario 1)
- 2.2. a draft Bill of Rights plus draft text on the judiciary, Public Protector, Human Rights Commission, and any other available text (Scenario 2)
- 2.3. a draft Bill of Rights plus an assortment of other text (Scenario 3)
- 2.4. chapters of the final text, including an incomplete Bill of Rights (Scenario 4)

3. Which is the best scenario?

In my opinion, the CA should plan for scenario 2 while ensuring that at the minimum it achieves scenario 1. Scenario 3 is a, slightly less attractive,

variation of scenario 2. The CA must avoid scenario 4

4. Ensuring that we publish a complete Bill of Rights - why?

If we are going to publish an incomplete constitutional text, it is not good enough to publish any text that is available. Text selection matters. Our strategy should be to publish draft text which offers us the most gains overall and exposes us to the least criticism.

Scenario 2 is the most attractive scenario because these pieces of draft text can be clustered. The judiciary and the other structures are all concerned with the enforcement of fundamental rights.

At the very least we must ensure that we publish a complete Bill of Rights if we publish anything, for the following reasons:

- 4.1. An incomplete Bill of Rights is not a Bill of Rights. A Bill of Rights is an integrated system of values governing the relationship between citizens and state and between citizens. A Bill of Rights is a product of a country's peculiar history and political context. The meaning of any one right depends on the relationship between it and the other rights. In many countries there is even a hierarchy of rights. In Germany for instance the right of human dignity informs the meaning of all other rights. The importance of dealing with the Bill of Rights as a whole is the reason the Constitutional Committee has not debated individual rights.
- 4.2. Although a Constitution is an integrated system for the governance of a country, it can more or less be divided into two segments. One segment deals with the establishment of the state, organs of state and structures of government and the distribution of political power within the state. The other segment is the Bill of Rights. In other words, the Bill of Rights is fairly self contained and can be debated in isolation from the rest of the Constitution.
- 4.3. The publication of a complete draft Bill of Rights this year is an achievable goal.
- 4.4. A Bill of Rights has positive media value. Because of its symbolic force it will be seen as an achievement of the Constitutional Assembly.
- 4.5. A Constitutional Education Programme should be oriented towards education about the substance of the Constitution. The Bill of Rights affects everyones life and will continue to do so long after the structures of political power have been put in place. It is the natural engine house for any CEP.
- 4.6. These coming months provide an excellent opportunity for developing

a human rights culture in this country.

- 4.7. The majority of submissions would seem to be in this area. We could therefore publish a report to the public on the submissions received together with a draft Bill of Rights.

5. Practical consequences for the CA process

- 5.1. A smaller committee of the Constitutional Committee might need to be established in order to thrash out contentious issues.
- 5.2. Priority in the Constitutional Committee will have to be given to the Bill of Rights.
- 5.3. Initial drafts from the technical advisers will have to be produced at a faster pace.