

CONSTITUTIONAL ASSEMBLY

**CONSTITUTIONAL
COMMITTEE
SUB-COMMITTEE**

**MONDAY
22 JANUARY 1996
(10H00)
E247**

***ADDITIONAL
DOCUMENTATION***

**Entire Document Embargoed Until
22 February 1996**

CONTENTS

1.	Memorandum	Page 1
2.	Index of Documents Relating to the Side Bar Notes	Pages 2 - 6
3.	Minutes of the Meeting of the Constitutional Committee on 9/10 November 1996	Pages 7 - 42
4.	Supplementary Memorandum on the Bill of Rights	Pages 43 - 78
5.	DP Comment and Input on Refined Working Draft	Pages 79 - 88
6.	NP Notes on the Refined Working Draft of the Bill of Rights	Pages 89 - 94
7.	Vryheidsfront Comment on Draft Bill of Rights	Pages 95 - 101
8.	DP Amendment to Labour s22(2)	Page 102
9.	NP Commission on Cultural Affairs	Pages 103 - 105
10.	Section 50, Option 1	Page 106
11.	Bills	Page 107
12.	NP Proposals: Commission for Gender Equality	Page 108
13.	P. 65: General Provision	Page 109
14.	Refinement Team Note on Self Determination	Page 110
15.	Provincial Finance and Fiscal Affairs	Pages 111 - 116

MEMORANDUM

TO: CONSTITUTIONAL COMMITTEE MEMBERS
FROM: EXECUTIVE DIRECTOR
DATE: 11 JANUARY 1996

RE: 3RD EDITION - REFINED WORKING DRAFT

This pack of documents has been prepared to assist with discussion of the 3rd Edition of the Refined Working Draft.

You will notice that various proposals, memorandum and other documents are referred to in the sidebar notes. We have compiled these in a resource pack to facilitate discussion of the various issues.

In some instances, the proposals referred to are contained in the minutes of the meeting of the Constitutional Committee meeting of 9 and 10 November 1995. In these instances, the index will refer you to the relevant section of the minutes, which are also contained in this pack. Other proposals are contained in separate documentation, also included in this pack.

HASSEN EBRAHIM
EXECUTIVE DIRECTOR

**INDEX OF DOCUMENTS RELATING TO THE SIDE BAR NOTES
IN THE THIRD EDITION OF THE "REFINED WORKING DRAFT"**

Location of Side Bar Note in the "Working Draft"	Reference to the Issue in the CC Minutes of 9/10 November 1995	Additional Documentation	See Page(s)
*Sec. 1 ¹	Para. 3.2.2		8
*Sec. 1(2) and 4	Para. 3.5		9
*Sec. 2(1)	Para. 3.3.3		8
*Sec. 3(3)	Para. 3.4.3		9
Sec. 5	Para.s 3.6.1 and 3.6.2		9
*Sec. 7	Para. 4.2		10
*Sec. 8(1)	Para. 4.3.1		10
Sec. 8(3)	Para. 4.3.5(iii)	"Constitutional Committee, NP Notes on the Refined Working Draft of the Bill of Rights" (See particularly the section entitled "Add Clause 4(3)")	11 and 89-94
Sec 8(4)	Para. 4.3.6	"Vryheidsfront, Comment on Draft Bill of Rights" (See particularly the section entitled "1) Clause 4 (Equality)")	11 and 95-101
Sec 13(1)(c)	Para. 4.8.3	"DP Comment and Input on Refined Working Draft, Bill of Rights" (See particularly the section entitled "9. Privacy")	13 and 79-88
Sec. 14(3)	Para. 4.9.8		13

¹An asterisk (*) indicates that the side bar note is found in the "Errata."

Location of Side Bar Note in the "Working Draft"	Reference to the Issue in the CC Minutes of 9/10 November 1995	Additional Documentation	See Page(s)
Sec. 15(2)(c)	Para. 4.10.4	"DP Comment and Input on Refined Working Draft, Bill of Rights" (See particularly the section entitled "11. Freedom of Expression")	14 and 79-88
Sec. 15(3)	Para. 4.10.5		14
Sec. 20(4)	Para. 4.14.2	"Vryheidsfront, <u>Comment on Draft Bill of Rights</u> " (See particularly the section entitled "9) <u>Clause 18: (Freedom of movement and residence)</u> ")	15 and 95-101
Sec. 22(2)(c)	Para. 4.16.2	"DP Amendment to Labour s22(2)"	15 and 102
Sec. 22(4)	Para. 4.16.4	"DP Comment and Input on Refined Working Draft, Bill of Rights" (See particularly the section entitled "Section 18 - Labour")	16 and 79-88
Sec. 25(3)	Para.s 4.19.1, 4.19.4 and 4.19.5		16-17
Sec. 27(1)(f)	Para. 4.21.3		17
Sec. 30	Para. 4.24.2	"NP: Commission on Cultural Affairs"	18 and 103-105
Sec. 31	Para. 4.25.1		18
*Sec. 34(1)(c)	Para. 4.28.2		19
Sec. 35	Para.s 4.29.2 and 4.29.3	"Supplementary Memorandum on Bill of Rights" (See particularly the text set out on pages 76-77)	19 and 43-78

Location of Side Bar Note in the "Working Draft"	Reference to the Issue in the CC Minutes of 9/10 November 1995	Additional Documentation	See Page(s)
Sec. 36	Para. 4.30.3		21
Sec.s 36(1)(2) and (3)	Para. 4.30.2(ii)		21
Sec. 36(4)	Para. 4.30.2(iii)		21
Sec. 40	Para. 5.2.1		22
*Sec. 41	Para. 5.3.2		22
Sec. 42(1)(a)	Para. 5.4.1(iii)		22
Sec. 42(2)(b)	Para. 5.5.2 and 5.5.3		23
Sec. 45(3)	Para. 5.7.2		23
Sec. 46(2)	Para. 5.8.2		23
Sec. 46(4)	Para.s 5.8.4 and 5.8.5		23-24
Sec. 50(2)	Para. 5.10.4	"Section 50, Option 1"	24 and 106
Sec. 52	Para.s 5.12.1 - 5.12.4	"Bills"	24 and 107
Sec. 53	Para. 5.13	"Bills" (See in particular the section entitled "Constitutional Amendments")	25 and 107
Sec. 54	Para. 5.14.2(i) and (ii)		25

Location of Side Bar Note in the "Working Draft"	Reference to the Issue in the CC Minutes of 9/10 November 1995	Additional Documentation	See Page(s)
Sec. 77	Para. 7.3.3		26
Sec. 78(3)	Para. 7.4.3(ii)		27
Sec. 79(3)	Para.s 7.5(ii) and (iii)		27
Sec. 83	Para. 7.7		27
*Sec. 86	Para. 7.11		28
Sec. 93	Para. 7.16.3		29
Sec. 93(4)	Para. 7.16.2		29
Sec. 96(3)	Para. 8.4.2(i)		29
Sec. 96(4)		Memorandum to follow	
Sec. 97(2)	Para. 8.5(ii)		30
Sec. 104(1)(j) and (k)	Para. 8.11.1		30
Sec. 105	8.13.1 - 8.13.4 and 8.14.		31
Sec. 108	Para. 9.4		31
Sec. 109		Memorandum to follow	
Sec. 110	Para. 9.6.2 - 9.6.4	"NP Proposals: Commission for Gender Equality, p63"	32 and 108
Sec.s 111 - 112	Para. 9.7		32
Sec. 113	Para. 9.8.1(i)(ii) and (iii)		32

Location of Side Bar Note in the "Working Draft"	Reference to the Issue in the CC Minutes of 9/10 November 1995	Additional Documentation	See Page(s)
*Sec. 115	Para. 9.9.1	"P. 65: General Provision (Chapter 7)	33 and 109
Sec. 117	Para. 10.3.1 - 10.3.3	"Refinement Team Note on Self Determination"	34 and 110
Sec. 121	Para. 10.2		33-34
Sec. 135(3)	Para. 10.2		33-34
Sec. 148 - 153	Para.s 10.6.1 and 10.6.2	"Provincial Finance and Fiscal Affairs," and the revised "Provincial Financial and Fiscal Affairs."	36 and 111-116
*Sec. 169	Para.s 12.4.1 - 12.4.3		37
Sec. 171(2)	Para. 13.2.2		37
Sec. 173(3)	Para. 13.4.2(iii)		38
Sec. 191	Para. 15.7.2		39
Sec. 193	Para. 5.4.1(iii)		22
Sec. 196	Para. 15.11		40
Sec. 199	Para. 15.14.1		40
Sec. 201	Para. 16.1.3(i)(ii) and (iii)		41

CONSTITUTIONAL ASSEMBLY

(DRAFT) MINUTES OF THE THIRTY SECOND (32ND) MEETING OF THE CONSTITUTIONAL COMMITTEE

THURSDAY AND FRIDAY, 9 AND 10 NOVEMBER 1995

Present

Ramaphosa MC (Chairperson)
Wessels L (Deputy Chairperson)

Ackermann, C
Alant, T G
Bhabha, M
Chabane, O C
De Beer, S J (Alt)
De Lange, J H
Du Toit, D C
Ebrahim, H (Advisor)
Eglin, C W
Fourie, A
Gibson, D H M (Advisor)
Gogotya, N J
Gordhan, P J
Hofmeyr, W A
Kgoali, J L
King, T J
Ligege, M G
Lockey, D
Mabandla, B S
Mahlangu, M J
Mahlangu, N J
Majola-Pikoli, N T (Alt)
Makhanya, D W
Malatsi, D M (Alt)
Malan, T J (Alt)
Marais, P G

Maree, J W (Alt)
Mbete-Kgositsile, B
Meyer, R P
Moosa, M V
Moosa, M W (Alt)
Mulder, C P
Myakayaka-Manzini, Y M
Nzimande, B E
Pahad, E G
Pandor, G N M
Pretorius, I J (Alt)
Rabie, J A
Radue, R J (Advisor)
Ranchod, B G (Advisor)
Ripinga, S
Schutte, D P A
Serote, W M (Alt)
Sifora, T V
Sizani, R K
Smuts, D (Alt)
Surty, M E (Alt)
Van Breda, A
Van Deventer, F J (Alt)
Van Heerden, F J (Alt)
Viljoen, C L

Apologies: K Andrew; K Asmal; L Green; K Meshoe and Z Skweyiya.

Absent: G Fraser-Moleketi; F Ginwala; S Holomisa; J Love; L Mtshali; S Mzimela; B Ngcuka; B Nzimande; R Rabinowitz; and P Smith.

In attendance: **Directorate:** H Ebrahim, M Sparg, L Zondo; **Minutes:** M Keegan, S Rabinowitz and T Smit; **Technical Refinement Task Team:** G Grove, M Ndziba, N Msizi and N Cetywayo (Law Advisors); D Powell (Research); C Murray, Jan Van Der Westhuisen, Z Yacoob, P Sedibe-Ncholo, J Kruger and I Semanya (Panel); N Nyoka, N Taft and J Tsalamandris (Secretariat).

1. OPENING

- 1.1 The Chairperson opened the meeting at 09h20 on Thursday 9 November 1995.
- 1.2 The meeting adopted the Agenda, but agreed that the *"Bill of Rights"* would be held over until Friday 10 November.
- 1.3 The chairpersons said that the purpose of the meeting was to finalise the *"Refined Working Draft (Second Edition)"* for the purpose of publication. There were areas where options might still be needed. The publication produced would be a working draft, and the public would need to be informed that it was work in progress. The number of options set out in the document would need to be minimised, and the document would not indicate which options were supported by specific parties.

2. MINUTES

The meeting noted the Minutes of the 30th Meeting of the Constitutional Committee on Thursday 19 October 1995 and the 31st Meeting of the Constitutional Committee on Friday 20 October 1995. It was agreed that corrections to the Minutes would be dealt with as and when the committee discussed the relevant sections of the *"Refined Working Draft"*.

3. CHAPTER 1: FOUNDING PROVISIONS

- 3.1 The Chairperson introduced *"Chapter 1, Founding Provisions,"* included in the *"Refined Working Draft (Second Revision)."* The meeting also noted the document entitled, *"Official Languages,"* tabled at the meeting.
- 3.2 Regarding section 1: *"Republic of South Africa:"*
 - 3.2.1 The meeting accepted section 1.
 - 3.2.2 The meeting noted, however, that the exact wording was preliminary and would be reviewed after the preamble was written.
- 3.3 Regarding section 2: *"Supremacy of the Constitution:"*
 - 3.3.1 The meeting adopted subsection 1(1).
 - 3.3.2 The meeting agreed to replace the existing subsection 1(2) with that from the first revision, which reads:

"The Constitution is the supreme law of the Republic. It binds the Republic, its institutions, its citizens and all persons within its boundaries; law or conduct inconsistent with it is invalid."
 - 3.3.3 It was agreed that greater clarity was needed regarding the meaning of the term *"bind."* The meeting agreed that the matter would be considered again in the third edition.

3.4 Regarding section 3: "*Citizenship:*"

3.4.1 The meeting accepted subsections 3(1) and 3(2).

3.4.2 Regarding subsection 3(3), the meeting agreed to delete "*in compliance with the Constitution and international law*" to read:

"National legislation must provide for the acquisition, loss and restoration of citizenship."

3.4.3 The Technical Refinement Task Team suggested that reference to international law might need to be retained. The meeting agreed to consider the matter in the third edition.

3.5 The meeting accepted section 4, "*Territory of the Republic.*" It was noted that a team of experts would still consider the exact definition or description of the territory.

3.6 Regarding section 5, "*National Symbols:*"

3.6.1 For subsection 5(1), the meeting agreed that the phrase "*is described in Schedule 2*" would replace "*when the Constitution takes effect continues to be the national flag,*" to read:

"The national flag of the Republic is described in Schedule 2."

3.6.2 Regarding subsection 5(2), the meeting agreed that the issue of a national anthem was very emotive, and the various views of political parties would not be included as options. Instead, the subsection would contain the following note in brackets:

"[still to be discussed further]."

3.7 Regarding section 6, "*Languages:*"

3.7.1 The meeting agreed to subsection 6(1).

3.7.2 The meeting agreed to set out 3 options for subsection 6(2):

- i. Option 1 would consist of the ANC proposal, tabled at the meeting, that reads:

"(2) The Pan South African Language Board is to promote the conditions for the development and use of the official languages.

(3) The Pan South African Language Board is in addition to be responsible for promoting respect for and the development of languages including German, Greek, Gujerati, Hindi, Portuguese, Tamil, Telegu, Urdu, sign language and other languages commonly used by communities in South Africa, as well as Arabic, Hebrew, Sanskrit and other languages used for religious purposes.

(4) National and provincial government may make use of

particular languages for the purposes of the functioning of government taking into account questions of usage, practicality and expense."

- ii. Option 2 would consist of the NP proposal, tabled at the meeting, that reads:

"The provisions of Section 3 of the present constitution will mutatis mutandis apply to the section in the new constitution dealing with languages."

- iii. Option 3 would consist of the DP view that the existing official languages would continue to be recognised and their use regulated by national and provincial legislation.

4. CHAPTER 2: BILL OF RIGHTS

- 4.1 The Chairperson introduced *"Chapter 2, Bill of Rights,"* contained in the *"Refined Working Draft (Second Edition)"* and the separately bound document entitled, *"Supplementary Memorandum on Bill of Rights and Party Submissions"* included in the documentation.

- 4.2 The meeting agreed to section 7, *"State's Duty to Respect and Protect Rights."* It was noted that this may need to be revised to deal with horizontal application. It was agreed that this would be dealt with in the third edition.

- 4.3 Regarding section 8, *"Equality:"*

- 4.3.1 The ANC expressed concern that the existing subsection 8(1) did not deal with the horizontal application of the right. The meeting agreed to consider this matter in the third edition.

- 4.3.2 The meeting agreed to subsection 8(1).

- 4.3.3 The meeting agreed to include 2 options for subsection 8(2).

- i. The first option would consist of the existing formulation, amended as follows:

- * The words *"measures including legislative measures"* would replace *"legislative and other measures that are,"* and

- * The word *"taken"* would replace *"used,"* to read:

"Equality includes the full and equal enjoyment of all rights and freedoms. The achieve equality, measures, including legislative measures designed to protect and advance groups or categories of

persons disadvantaged by [unfair] discrimination may be taken.

- ii. The second option would insert the phrase "[and likely]" to read:

"Equality includes the full and equal enjoyment of all rights and freedoms. To achieve equality, measures, including legislation, designed [and likely] to protect and advance groups or categories of persons disadvantaged by [unfair] discrimination may be taken."

4.3.4 The meeting noted the NP proposal that subsection 8(2) be redrafted along the likes of subsection 8(3) of the Interim Constitution. It was agreed that the matter would be raised in the third draft.

4.3.5 When considering subsection 8(3):

- i. The meeting agreed to the subsection with one amendment: the insertion of the phrase "[but not limited to]" to read:

"Neither the state nor any person may [unfairly] discriminate directly or indirectly against anyone on one or more grounds, including [but not limited to] race, gender, sex, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth."

- ii. The meeting agreed to consider the NP proposal set out in the side bar note to insert after "including" the words "without derogating from the generality of" or "but not limited to" in the third edition.

4.3.6 The meeting agreed to subsection 8(4), but agreed to consider the FF proposal to delete subsection 8(4) in the third edition.

4.4 The meeting agreed to section 9, "Human Dignity."

4.5 Regarding section 10, "Life:"

4.5.1 The meeting agreed, with the NP objecting, to the following amendments to subsection 10(1):

- i. The phrase "[and the death penalty is hereby abolished]" would be inserted in Option 1, to read:

"Everyone has the right to life [and the death penalty is hereby abolished]."

- ii. Option 3 would be deleted.

- 4.5.2 The meeting agreed to Option 2 of subsection 10(1).
- 4.5.3 The meeting accepted subsection 10(2).
- 4.6 Regarding section 11, *"Freedom and Integrity of the Person:"*
- 4.6.1 The meeting agreed that the word *"Security"* would replace *"Integrity"* in the section heading to read:
- "Freedom and Security of the Person."*
- 4.6.2 The meeting agreed to subsection 11(1) and 11(2)(a).
- 4.6.3 When discussing subsection 11(2)(b):
- i. The meeting agreed to place brackets around the whole subsection to read:
- "[(b) to be secure in, and control their own body.]"*
- ii. The meeting agreed to subsection 11(2)(b) with this amendment.
- 4.6.4 The meeting accepted subsections 11(3)(a) and (b).
- 4.6.5 When discussing subsection 11(3)(c):
- i. The meeting agreed to delete the words *"or the necessary legal consent"* to read:
- "(c) subjected to medical or scientific experiments without that person's consent."*
- ii. The meeting agreed to subsection 11(3)(c) with this amendment.
- 4.7 The meeting agreed to section 12, *"Slavery, Servitude and Forced Labour."*
- 4.8 Regarding section 13, *"Privacy:"*
- 4.8.1 The meeting agreed to replace the existing subsections 13(1) and (2) with the draft formulation contained on page 6 of the *"Supplementary Memorandum,"* that reads:
- "Everyone has the right to privacy, including the right not to have-*
- (a) their person or home searched;*
 - (b) their property searched;*
 - (c) their possessions seized; and*
 - (d) the privacy of their communications violated.*
- 4.8.2 The meeting agreed that the question of juristic persons would be

dealt with in a limitations clause.

4.8.3 The DP suggested that the word "*intercepted*" be inserted after the word "*communications*" in the new subsection 13(d). The meeting agreed that the matter would be dealt with when refining the third edition.

4.9 Regarding section 14, "*Freedom of Religion, Belief and Opinion:*"

4.9.1 The meeting agreed to delete everything after the word "*opinion*" in subsection 14(1) to read:

"Everyone has the right to freedom of conscience, religion, thought, belief and opinion."

4.9.2 The meeting agreed to subsection 14(1) with this amendment.

4.9.3 The meeting agreed to delete the word "*any*" in subsection 14(2)(a) and to replace "*established*" with "*made*" to read:

"that those observances follow rules made by an appropriate authority;"

4.9.4 The meeting agreed to subsection 14(2) with these amendments.

4.9.5 The Technical Refinement Task Team spoke to a document entitled, "*Proposal from the Technical Advisors Clause 14(3),*" tabled at the meeting.

4.9.6 The meeting agreed to insert the phrase "*or any other recognised traditions*" in the draft formulation contained in the "*Proposal*", to read:

"The provisions of the Constitution do not prevent legislation recognising the validity of marriage concluded under a system of religious law or other recognised traditions or a system of personal and family law adhered to by persons professing a particular religion, to the extent that the system is consistent with the Bill."

4.9.7 The meeting agreed that this amended formulation would replace the existing subsection 14(3).

4.9.8 The ANC expressed concern that although the term "*religious law*" in the new subsection 14(3) was intended to provide for the recognition of marriages, it might be interpreted to mean far more. It was agreed that the matter would be dealt with in the third edition.

4.10 Regarding section 15, "*Freedom of Expression:*"

4.10.1 The meeting agreed to subsection 15(1).

4.10.2 The meeting agreed that the draft formulation on page 7 of the "*Supplementary Memorandum*" would replace the existing subsection 15(2), and the new subsection 15(2)(c) would be placed in brackets. The new formulation would read:

"(2) *the protection in subsection (1) does not extend to -*

(a) propaganda for war;

(b) the incitement of imminent violence; or

[(c) advocacy of hatred that constitutes incitement to discrimination [that is prohibited in section 4(3)].]

4.10.3 The ANC suggested that the reference to violence in the original subsection 15(2)(b) be removed, and that the amended subsection replace subsection 15(2)(c).

4.10.4 The meeting noted the DP objection to the inclusion of "hate speech" and agreed to place subsection 15(2)(c) in brackets and deal with the matter in the third edition.

4.10.5 The meeting agreed that subsection 15(3) would present two options:

i. Option 1 would consist of the existing formulation; and

ii. Option 2, which would include two amendments to the formulation:

* The insertion of the words "*newspaper and electronic,*" and

* The substitution of "*reflects broadly the views of society*" for "*presents a diversity of opinion,*" to read:

"The state must regulate any newspapers and electronic media that it finances or controls to ensure that it is impartial and represents broadly the views of society."

4.11 The meeting agreed to section 16, "*Assembly, Demonstration and Petition*" and section 17, "*Freedom of Association.*"

4.12 Regarding section 18, "*Political Rights:*"

4.12.1 The meeting agreed to substitute "*including*" for "*which includes*" in subsection 18(1), to read:

"Every citizen is free to make political choices, including the rights - "

- 4.12.2 The meeting agreed to subsection 18(1) with this amendment.
- 4.12.3 The meeting agreed to insert the word "*adult*" in brackets in subsection 18(2) to read:
- "Every [adult] citizen has the right to free, fair and regular elections for any legislative body established in terms of the Constitution, to vote in such elections and to do so in secret."*
- 4.12.4 The meeting agreed to subsection 18(2) with this amendment.
- 4.12.5 The NP expressed concern that subsection 18(3) might clash with section 42. The meeting agreed to put brackets around this section so that it might be resolved later.
- 4.12.6 The meeting agreed to subsection 18(3) with this amendment.
- 4.13 The meeting agreed to section 19, "*Citizenship.*"
- 4.14 Regarding section 20, "*Freedom of Movement and Residence:*"
- 4.14.1 The FF expressed concern that inclusion of the word "*anywhere*" in subsection 20(1) might promote squatting. The technical advisers responded that this would be addressed in a limitations clause.
- 4.14.2 The meeting agreed that the FF proposal, set out in the side bar note, that subsection 20(4) be guaranteed subject to criminal legislation relating to fugitive offenders, would be considered in the third edition.
- 4.14.3 The meeting agreed to subsections 20(1)(2)(3) and (4).
- 4.15 The meeting agreed to section 21, "*Economic Activity.*"
- 4.16 Regarding section 22, "*Labour Relations:*"
- 4.16.1 The meeting accepted subsections 22(1)(2)(3) and (4).
- 4.16.2 The DP tabled a document entitled "*DP Amendment to Labour s22(2),*" that proposed that the existing subsection 22(2)(c) be replaced with the following formulation:
- "(c) to strike outside the currency of a collective agreement provided that*
(i) pre-strike conciliation procedures have been exhausted, and
(ii) the strike is not solely for political purpose."

- 4.16.3 The meeting agreed to consider this proposal in 1996.
- 4.16.4 The meeting noted the DP proposal regarding 22(4), set out in the side bar note. The meeting agreed to consider the proposal in 1996.
- 4.17 The meeting agreed to section 23, *"Environment."*
- 4.18 Regarding sections 24, *"Property:"*
- 4.18.1 The ANC tabled a document entitled *"ANC's Proposal on the Property Clause Provision,"* and the DP and the NP tabled a joint document entitled *"Property Clause Proposal."*
- 4.18.2 The PAC expressed the view that there should be no property clause and that the restitution clause should recognise claims back to 1652.
- 4.18.3 The meeting agreed to replace the existing section 24 with the following three options:
- i. Option 1 would consist of the PAC view that there should be no clause and that the restitution clause would accept claims back to 1652;
 - ii. Option 2 would be the *"ANC Proposal"* tabled at the meeting; and
 - iii. Option 3 would consist of the joint DP/NP *"Property Clause Proposal,"* tabled at the meeting.
- 4.19 Regarding section 25, *"Housing and Land:"*
- 4.19.1 The meeting noted that the PAC objected to the grouping of socio-economic rights.
- 4.19.2 The meeting noted that the *"Errata"* recommended that in subsection 25(1) the word *"which"* be deleted, a full stop inserted between *"housing"* and *"the"* and the words *"this right"* be inserted to read:
- "Everyone has the right to have access to adequate housing. The state must take reasonable and progressive legislative and other measures to secure this right."*
- 4.19.3 For subsection 25(2), the meeting agreed:
- i. To insert *"relevant,"* and
 - ii. To delete everything after the word *"circumstances"* to read:

"No one may be evicted from their homes arbitrarily and without an order of court [made after considering the relevant circumstances]."

- 4.19.4 The NP expressed concern that subsection 25(3), that deals with access to land, should not be included in section 25, that otherwise deals with housing.
- 4.19.5 The meeting agreed to bracket section 25(3) and to reconsider the matter in 1996.
- 4.20 The meeting agreed to section 26, *"Health, Food, Water, and Social Assistance."*
- 4.21 Regarding section 27, *"Children:"*
- 4.21.1 The meeting agreed to insert the word *"shelter"* in subsection 27(1)(c) to read:
- "basic nutrition, shelter, health and social services;"*
- 4.21.2 The meeting agreed 27(1) with this amendment.
- 4.21.3 The ANC said that 27(1)(f) needed to be reviewed, in light of the problems experienced with the detention of juveniles. The meeting agreed to consider this matter in 1996.
- 4.21.4 The meeting agreed to subsections 27(2) and (3).
- 4.22 Regarding section 28, *"Education:"*
- 4.22.1 The meeting agreed to subsections 28(1) and (2)(a)(b) and (c).
- 4.22.2 The meeting agreed to delete the phrase *"Alternative wording proposed by NP suggested for subsection 22(c)."*
- 4.22.3 The meeting agreed to create a new subsection 28(3) that would set out 2 options:
- i. Option 1 would consist of the alternative wording for 28(2)(c) proposed by the NP, that reads:
- "Everyone has the right to educational institutions based on a common culture, language, or religion, provided that there shall be no discrimination on the ground of race and, provided further that the state shall not, in granting aid to educational institutions, discriminate against any educational institution on the ground that it has been established on the basis of a common language, culture, or religion," and*

- ii. Option 2 that would say that no provision should be made, or that subsection 28(3) should not be included.

4.23 Regarding section 29, "*Academic Freedom:*"

4.23.1 The meeting agreed to include two options in this section:

- i. Option 1 would include the existing subsections 29(1) and (2); and
- ii. Option 2 would state the ANC views that:
 - * The subsection should not stand on its own, but be included in the section on freedom of religion, belief, and opinion.
 - * The right should apply to persons, but not to institutions.

4.23.2 The meeting agreed to section 29 with these amendments.

4.24 Regarding section 30, "*Language and Culture:*"

4.24.1 The meeting agreed to section 30.

4.24.2 The NP tabled a document entitled, "*NP Proposal.*" The meeting agreed to defer discussion of this document until the next meeting of the Constitutional Committee in January 1996.

4.25 Regarding section 31, "*Access to Information:*"

4.25.1 The technical advisors queried whether this right should apply to juristic persons. The meeting agreed to deal with this issue in 1996.

4.25.2 The meeting agreed to subsections 31(a) and (b).

4.25.3 It was agreed to add a new subsection (2) in brackets, that would read:

"[This right shall be regulated by an Act of Parliament.]"

4.26 Regarding section 32, "*Administrative Justice:*"

4.26.1 The meeting agreed to change the section heading to "*Just Administrative Action*" and that the section's provisions would be reworked to accord with the new heading.

4.26.2 The meeting agreed to retain the existing "*Option 1*".

- 4.26.3 The meeting agreed to delete the existing *"Option 2"* and *"Option 3."*
- 4.26.4 The meeting agreed to insert a new *"Option 2,"* based on the provisions contained on page 28 of the *"Supplementary Memorandum,"* to read:
- "Everyone has a right to just administrative action.*
- (1) No one may be adversely affected by administrative action that is unlawful or unreasonable.*
- (2) Everyone whose rights are affected adversely by administrative action has the right to fair procedure unless the administrative action is of general application.*
- (3) Everyone whose rights or interests have been adversely affected by an administrative action has the right to written reasons."*
- 4.27 Regarding section 33, *"Access to Justice:"*
- 4.27.1 The meeting agreed to change the section title to *"Access to Courts."*
- 4.27.2 The meeting agreed to insert the phrase *"where appropriate or necessary,"* to read:
- "Everyone has the right to have any dispute that can be resolved by law decided in a fair, public hearing in either a court of law or another independent and impartial forum where appropriate or necessary."*
- 4.27.3 The meeting agreed to section 33 with these amendments.
- 4.28 Regarding section 34, *"Arrested, Detained and Accused Persons:"*
- 4.28.1 The meeting agreed to subsections 34(1)(a)(b) and (c).
- 4.28.2 The Technical Refinement Task Team said that there was a question about what rights accused people should be informed of in a language they understand. This would pertain to subsections 34(1)(c) and (e). The meeting agreed to consider this question in 1996.
- 4.28.3 The meeting agreed to replace the existing subsection 34(1)(d) with the provision on pages 32 and 33 of the *"Supplementary Memorandum,"* that reads:
- "(d) to be brought before a court of law as soon as reasonably possible, but not later than 48 hours after the arrest, or where the period of 48 hours*

expires outside ordinary court hours, on the next court day; and while there, to be released from detention unless that person is charged and the court orders the further detention."

4.28.4 For subsection 34(1)(e), the DP supported the existing subsection, while the ANC and NP supported the new provision, set out on page 30 of the "*Supplementary Memorandum*". The ANC proposed that the two viewpoints be set out as two options for the subsection.

4.28.5 The meeting agreed to subsections 34(2)(a) - (f) and 34(3)(a) - (d).

4.28.6 The meeting agreed that the existing subsection 34(3)(e) would be replaced by the provision on page 30 of the "*Supplementary Memorandum*," that reads:

"to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it."

4.28.7 The meeting accepted subsections 34(3)(f) - (n).

4.28.8 The meeting agreed that the brackets would be removed from subsection 34(4) and accepted the subsection with this amendment.

4.29 Regarding section 35, "*Limitations Clause*:"

4.29.1 The meeting agreed to delete the words "*except the rights in section 37,*" in subsection 35(1), to read:

"The rights in the Bill of Rights may be limited by or pursuant to law of general application only to the extent that the limitation of a right is - "

4.29.2 The ANC said that it would prefer to use the provisions set out on page 34 of the "*Supplementary Memorandum*" as a basis for the limitations clause. The Chairperson ruled, however, that discussion of this matter would be deferred until 1996.

4.29.3 The meeting agreed to accept section 35 on the understanding that it would be returned to in January 1996.

4.30 Regarding section 36, "*States of Emergency:*"

4.30.1 The meeting agreed to subsections 36(1) - (7).

4.30.2 It flagged following matters for consideration in 1996:

- i. The ANC view that subsections 36(1)(2) and (3) might be deleted and dealt with in legislation; and
- ii. The concerns expressed by the NP and DP that subsection 36(5) might allow retrospectivity.

4.30.3 The ANC queried whether a state of emergency should be treated the same as a state of war. It was agreed that the matter would be raised in the third draft.

4.30.4 The meeting agreed to insert "*on the same grounds*" in subsection 36(8), to read:

"If a court releases a detainee, that person may not be detained again unless the state first shows a court good cause for re-detaining that person on the same grounds."

4.31 Regarding section 37, "*Enforcement of Rights:*"

4.31.1 The meeting agreed to subsection 37(1).

4.31.2 The meeting agreed to delete subsection 37(2).

4.32 Regarding section 38, "*Application:*"

4.32.1 The meeting agreed to subsections (1) and (2).

4.32.2 The meeting agreed that "*Option 1*" and "*Option 2*" would be moved to create a new subsection 38(3). Moreover:

- i. The list on page 34 of the "*Supplementary Memorandum*" would be inserted in "*Option 2;*"
- ii. The new text created would be placed in brackets; and
- iii. A note would be added stating that the option had been included only for discussion purposes, so that the public could comment.

4.32.3 The meeting agreed to section 39, "*Interpretation of Bill of Rights.*"

5. CHAPTER 3: PARLIAMENT

5.1 The Chairperson introduced "*Chapter 3, Parliament,*" in the "*Refined*"

5.2 Regarding section 40, *"Legislative Authority of the Republic:"*

5.2.1 The meeting agreed to retain subsection 40(1), but noted that it would be revised to reconcile it with similar provisions in Chapter 9.

5.2.2 The meeting agreed that in subsection 40(2) the words *"a second house"* would replace *"the Senate"* to read:

"Parliament consists of the National Assembly and a second house."

5.2.3 The meeting agreed to subsection 40(2) as amended. The Chairperson ruled that it would be reconsidered when there was agreement as to what the second house would be called.

5.3 Regarding section 41, *"Composition and Election of National Assembly:"*

5.3.1 The meeting agreed to insert the words *"300 to 400"* and to bracket the words *"results"* and *"in"* to read:

"The National Assembly consists of 300 to 400 members, who are women and men elected in terms of an electoral system that is prescribed by national legislation, is based on a common voters roll and [results,] in general [in] proportional representation."

5.3.2 The meeting agreed to add a note in brackets and in italics at the end of the subsection that would read:

"[Details of the electoral system are still to be discussed.]"

5.3.3 The meeting agreed to use brackets and italics in the published version instead of side bar notes or footnotes to provide additional information for the public.

5.4 Regarding section 42, *"Qualifications of Members of National Assembly:"*

5.4.1 Regarding subsection 42(a):

- i. The meeting agreed to section 42(a);
- ii. It agreed, however, that the Technical Refinement Task Team would investigate whether a more modern term could replace *"office of profit"* in the third edition.
- iii. The ANC reminded the meeting of the earlier decision to this subsection should include pensions as well.

5.4.2 The meeting agreed to subsection 42(b) with one amendment: that *"a second house"* would replace *"Senate"* to read:

"members of a second house, a provincial legislature or a local government;"

5.4.3 The meeting agreed to subsections 42(c)(d) and (e).

5.5 Regarding section 43, *"Vacancies:"*

5.5.1 The meeting agreed to subsections 43(1)(a)(b) and (c).

5.5.2 The NP suggested that the existing subsection 43(1)(c) should be replaced by subsection 43(d) of the Interim Constitution, that reads:

"without having obtained leave in accordance with the rules and orders, absents himself or herself voluntarily from sittings of the National Assembly or any other parliamentary forum of which he or she is a member, for 15 consecutive days on which the National Assembly or any such forum sat.

5.5.3 The Chairperson said that this matter would be dealt with in the third edition.

5.5.4 The meeting agreed to subsection 43(2).

5.6 The meeting agreed to section 44, *"Oaths or Affirmation by Members."*

5.7 Regarding section 45, *"Sittings and Recess Periods:"*

5.7.1 The meeting accepted subsections 45(1) and (2).

5.7.2 The meeting agreed to the subsection 45(3), but agreed to add a note in brackets and italics informing the public that the Constitutional Committee would need to decide upon the seat of government in 1996.

5.7.3 The ANC expressed concern that mechanisms needed to be established for facilitating discussion of the issue.

5.8 Regarding section 46, *"Elections and Duration of National Assembly:"*

5.8.1 The meeting agreed to subsection 46(1).

5.8.2 The meeting agreed to consider subsection 46(2) when dealing with votes of no confidence.

5.8.3 The meeting agreed to subsections 46(3) and 46(4).

5.8.4 The DP expressed concern that section 46(5) did not adequately handle the gap between polling and the declaration of an election as free and fair.

5.8.5 The meeting agreed that *"the first day of"* would replace *"the day*

before polling" to read:

"The National Assembly remains competent to function from the time it is dissolved or its term expires until the first day of polling for the National Assembly;"

5.9 The meeting agreed to section 47, "*Speaker and Deputy Speaker*," section 48, "*Decisions*," and section 49, "*President's Rights in National Assembly*."

5.10 Regarding section 50, "*Internal Autonomy*:"

5.10.1 The meeting agreed to subsection 50(1).

5.10.2 The Technical Refinement Task Team tabled a document entitled, "*Internal Autonomy*."

5.10.3 The meeting agreed that the existing subsection 50(2) would be replaced with the formulation in "*Internal Autonomy*," to read:

Internal autonomy

(1) *The National Assembly may determine and control its internal arrangements and may make rules and orders concerning its business and proceedings, including rules and orders regulating the establishment, composition, powers and functions, procedures and duration of its committees.*

(2) *A committee of the National Assembly may summon anyone to appear before it to give evidence on oath or affirmation or to produce documents."*

5.10.4 The meeting noted the NP proposal for subsection 50(2) and agreed to consider it in the third draft.

5.11 The meeting agreed to section 51, "*Parliamentary Privilege*."

5.12 Regarding Section 52, "*Bills*:"

5.12.1 The Technical Refinement Task Team tabled a document entitled, "*Bills*."

5.12.2 The meeting agreed to insert this document in section 52, for the purposes of publication.

5.12.3 The ANC expressed the view that the matter could only be finalised after the two houses of parliament had been decided upon.

5.12.4 The meeting agreed to consider the matter in January 1996.

- 5.13 Regarding section 53, "*Constitutional Amendments:*" the meeting agreed to insert the draft formulation contained in "*Bills,*" that reads:

Constitutional Amendments

53. *The Constitution may be amended by a Bill passed by Parliament if it is adopted by a majority of at least two thirds of the members [of both houses of Parliament].*

[Note: This clause requires further development to comply with the Constitutional Principles.]

- 5.14 Regarding section 54, "*Assent to Bills:*"

- 5.14.1 The meeting agreed to the existing section 54;
- 5.14.2 However, it agreed to add a new subsection setting out two options:
- i. Option 1 would state that Parliament or a provincial legislature could refer a Bill to the Constitutional Court to decide on its constitutionality at the request of the Speaker of the National Assembly, the Senate, or the speaker of a provincial legislature acting on the petition of not less than 20 percent of either the Assembly, the Senate or the legislature as the case may be, or all the members of all parties not constituting the majority party in such a parliament.
 - ii. Option 2 would state that this provision should not be included.

- 5.15 The meeting agreed to section 55, "*Promulgation*" and section 56, "*Safekeeping of Acts of Parliament.*"

6. CHAPTER 4: SENATE/COUNCIL OF PROVINCES

- 6.1 The Chairperson introduced "*Chapter 4, Senate/Council of Provinces,*" in the "*Refined Working Draft (Second Edition).*"
- 6.2 The ANC tabled a document entitled "*Council of Provinces,*" and the NP tabled a document entitled, "*Chapter 4, Senate/Council of Provinces.*"
- 6.3 The meeting agreed that these documents would constitute two options that would replace the existing formulations in this chapter.

7. CHAPTER 5: NATIONAL EXECUTIVE

- 7.1 The Chairperson introduced "*Chapter 5, The National Executive,*" of the "*Refined Working Draft (Second Edition).*"
- 7.2 The meeting accepted section 67, "*Executive Authority of the Republic.*"

7.3 Regarding section 68, *"The President:"*

7.3.1 For subsection 68(1), the meeting agreed to:

- i. Delete from *"Option 1"* the phrase *"and opposes that which may harm it Republic"*, to read:

"The President promotes the unity of the nation and that which will advance the Republic."
- ii. Use the amended *"Option 1"* as the draft formulation; and
- iii. Delete *"Option 2."*

7.3.2 The meeting agreed to the existing subsection 68(2) for the purpose of publication.

7.3.3 The meeting agreed to consider in the third draft Advocate Yacoob's suggestion that the subsection be restructured to read:

The President is

- (a) *the Head of State, Head of the national executive and Commander-in-Chief of the defence force;*
- (b) *must uphold, defend and respect the Constitution as the supreme law of the Republic, and*
- (c) *is responsible for the observance of the Constitution by the national executive.*

7.4 Regarding section 69, *"Powers and Functions of the President:"*

7.4.1 The meeting agreed to subsection 69(1).

7.4.2 For subsection 69(2):

- i. The ANC expressed concern that this subsection did not reflect the 20 October 1995 Constitutional Committee agreement to include powers granted exclusively to the President by legislation. The ANC recommended that a subsection (c) be inserted to cover *"all legislation that states or implies that the President may act alone."* The ANC argued that such a clause would enable legislation to grant the President exclusive powers.
- ii. The NP responded that there was no legislation that granted exclusive powers to the President and the suggested amendment would not reflect the way the Cabinet and President's Office operated.
- iii. The meeting agreed that the technical advisors would consult with the President's office to obtain clarity on the matter.

7.4.3 Regarding subsection 69(3):

- i. The meeting agreed to insert a phrase in brackets to indicate that the outcome of this subsection would depend on the outcome of section 76.
- ii. The meeting agreed to add a subsection (j) on the appointment of ambassadors and a subsection (k) on the appointment of commissions, subject to:
 - * Finalising section 76;
 - * Consultations with the President's Office, and
 - * Reference to Theme Committee 1's report on the matter.

The meeting also noted that subsection 82(1)(f) of the Interim Constitution was a useful example of how such provisions might be worded.

- iii. The meeting accepted subsection 69(3) with these amendments.

7.4.4 The meeting accepted subsection 69(4).

7.5 Regarding section 70, "*Election of President:*"

- i. The meeting agreed to section 70 for the purpose of publication.
- ii. However, it noted that the document entitled "*Errata*" suggested the deletion of section 73 and the insertion of a new subsection 70(2) that would read:
 - (2) *An election to fill a vacancy in the office of President must be held at a time and on a date determined by the President of the Constitutional court, but not more than 30 days after the vacancy occurs.*
- iii. The Chairperson ruled that this suggestion would be dealt with when refining the third edition.

7.6 The meeting agreed to section 71, "*Assumption of Office by President,*" section 72, "*Term of Office of President*" and section 73, "*Vacancies.*"

7.7 The meeting accepted section 74, "*Acting President*" for the purpose of publication, but noted that its final form would depend on the outcome of section 76.

7.8 The NP expressed concern that there was no reference to the office or appointment of the Deputy President. The Chairperson ruled that this matter would be considered in 1996.

7.9 The meeting agreed to section 75, *"Removal of President."*

7.10 Regarding section 76, *"Cabinet:"*

7.10.1 The meeting agreed to Options 1 and 2;

7.10.2 The meeting agreed, however, to delete the section numbers from Option 3 to read::

"A system of Government of National Unity based on the Interim Constitution."

7.11 The meeting agreed to section 77, *"Deputy Ministers"* for the purpose of publication. The Technical Refinement Task Team queried whether this matter should be constitutionalised. The meeting agreed to consider the matter in 1996.

7.12 The meeting agreed to section 78, *"Continuation of Cabinet after Elections."*

7.13 The meeting agreed to section 79, *"Oath of Office."*

7.14 Regarding section 80, *"Accountability of Ministers and Cabinet:"*

7.14.1 The meeting agreed to insert the words *"and a second house"* in subsection 80(1) to read:

"The Deputy President and Ministers are individually accountable both to the President and the National Assembly and a second house, and all the members of the Cabinet are collectively accountable to the Assembly and a second house for the performance of the national government and its policies."

7.14.2 The meeting agreed to subsection 80(1) with this amendment.

7.14.3 However, the meeting expressed concern that subsection 80(1) might mean that the President, as a member of the Cabinet, could be "dragged" before Parliament or a parliamentary committee. It was agreed that this matter would be considered in 1996.

7.14.4 The meeting agreed to subsection 80(2).

7.15 The meeting agreed to section 81, *"Conduct of Cabinet Members and Deputy Ministers;"* section 82, *"Temporary Assignment of Powers and Functions;"* and section 83, *"Transfer of Powers and Functions."*

7.16 Regarding section 84, *"Votes of No-Confidence:"*

7.16.1 The meeting agreed subsections 84(1), (2) and (3).

7.16.2 The meeting agreed to insert a new section 84(4), as recommended on page 8 of the *"Errata,"* to read:

(4) *A majority of the members of the National Assembly must be present when a vote of no confidence is passed.*

7.16.3 However, the meeting to consider the following matters in the third edition:

- i. That a vote of no confidence require national elections, or
- ii. That the legislature have a fixed term of office, so that a vote of no confidence would not require a snap election, but parliament could ask to be dissolved and mid-term elections be held to vote in a legislature to complete the term of office.

8. CHAPTER 6: COURTS AND THE ADMINISTRATION OF JUSTICE

8.1 The chairperson reported that a new document entitled *"Courts and Administration Draft - 9 November 1995"* would replace *"Chapter 6"* of the *"Refined Working Draft (Second Edition)."* The meeting concentrated its discussion on the tabled document.

8.2 The meeting agreed to section 85, *"Judicial Authority."*

8.3 The meeting agreed to section 86, *"Judicial System,"* with one amendment: that semi-colons would replace full stops in subsections (a) - (e).

8.4 Regarding section 87, *"Constitutional Court:"*

8.4.1 The meeting agreed to subsections 87(1) and (2).

8.4.2 Regarding subsection 87(3):

i. The meeting noted that the list under 87(3)(a) was still under discussion and not yet final;

ii. It agreed to amend subsection 87(3)(b) by substituting the word *"unconstitutional"* for *"invalid,"* to read:

"declare unconstitutional an Act of Parliament, a Provincial Act, and any conduct of the President; and"

iii. The meeting agreed to subsection 87(3)(c).

8.4.3 The meeting agreed to subsections 87(4) and (5).

8.5 Regarding section 88, *"Supreme Court of Appeal:"*

- i. The meeting accepted subsections 88(1)(2) and (3).
 - ii. However, the ANC expressed concern that another term might be needed to replace "*inherent jurisdiction*" in subsection 88(2). The meeting agreed to consider this question in 1996.
- 8.6 Regarding section 89, "*Other Courts:*"
 - i. The meeting agreed to subsections 89(1)(2) and (3).
 - ii. However, the ANC expressed concern that another term might be needed to replace "*inherent jurisdiction*" in subsection 89(2). The meeting agreed to consider this matter in 1996.
- 8.7 The meeting agreed to section 90, "*Decisions in Constitutional Matters.*"
- 8.8 Regarding section 91, "*Appointment of Judicial Officers,*" the meeting agreed to reformulate the section so that it contained two options:
 - i. The first option would consist of the existing text, and
 - ii. The second option would consist of the document entitled "*Appointment of Judicial Officers,*" tabled by the NP at the meeting.
- 8.9 The meeting agreed to section 92, "*Tenure and Remuneration.*"
- 8.10 Regarding section 93, "*Removal:*"
 - 8.10.1 The meeting agreed that subsections 93(1) and (2) would be redrafted to remove any apparent distinction between "*removal*" and "*dismissal*".
 - 8.10.2 The meeting agreed to subsection 93(3).
- 8.11 Regarding subsection 94, "*Judicial Service Commission:*"
 - 8.11.1 The meeting agreed to subsection 94(1), but agreed to consider the following suggestions from the NP in 1996:
 - i. That subsection 94(1)(h) be qualified so that when a vacancy occurred, it would be filled by the political party to which the relevant Senator belonged; and
 - ii. That a new subsection 94(1)(k) should be inserted, to allow for the inclusion of 2 additional attorney generals on the Judicial Service Commission when it considered matters relating to attorney generals.
 - 8.11.2 The meeting agreed to subsections 94(2)(3) and (4).

8.12 The meeting agreed to section 95, *"Other Matters Concerning Courts."*

8.13 Regarding the Attorney General:

8.13.1 The meeting aired a wide variety of views on the Attorney General.

8.13.2 The Chairperson ruled that, rather than including all the options, the technical advisors would add a formulation stating that the matter still needed discussion. This would include a heading like *"Appointment of Attorney General"* and a brief statement.

8.13.3 The ANC expressed its concern that this might mislead the public, when there was still a questions as to whether it would be included in the constitution at all.

8.13.4 The Chairperson ruled that the technical advisors would reflect this in the formulation.

8.14 The Chairperson ruled that the question of a transitional clause would be considered in 1996, together with other transitional provisions or mechanisms.

9. CHAPTER 7: [INSTITUTIONS SUPPORTING CONSTITUTIONAL DEMOCRACY]

9.1 The chairperson introduced *"Chapter 7, [Institutions Supporting Constitutional Democracy],"* in the *"Refined Working Draft (Second Edition)."*

9.2 The meeting agreed to insert the word *"State"* into the chapter title, to read:

"State Institutions Supporting Constitutional Democracy."

9.3 The meeting agreed to sections 96, *"Establishment and Governing Principles,"* section 97, *"Functions of the Public Protector,"* and section 98, *"Tenure."*

9.4 With regard to section 98, it was agreed that in 1996 the Constitutional Committee would consider whether the term of office of the Public Protector would be renewable.

9.5 Regarding section 99, the *"Human Rights Commission"*:

9.5.1 The meeting agreed to subsection 99(1).

9.5.2 The meeting agreed to amend subsection 99(2), by replacing *"breached"* with *"violated"* to read:

"The Human Rights Commission has the power, as regulated by national legislation, necessary to perform its functions, including

the power to monitor, to investigate and to report on the observance of human rights, to take steps to secure appropriate redress where human rights have been violated, to carry out research, and to educate."

9.5.3 The meeting accepted subsection 99(3).

9.6 Regarding section 100, *"The Commission for Gender Equality"*:

9.6.1 The Chairperson ruled that the Minutes of 20 October 1995 would be corrected to record the NP proposal that the name of the commission be changed to the *"Commission for Gender Equality and Development"*.

9.6.2 The NP tabled and spoke to the document entitled *"NP Proposals: Commission for Gender Equality, p. 63."*

9.6.3 The ANC expressed the concern that, if accepted, the NP proposal would result in "diluting" the commission's purpose. The DP queried whether the suggested amendments were necessary.

9.6.4 The meeting agreed to leave the matter in abeyance for the time being, but agreed to consider the NP proposal in 1996.

9.6.5 The meeting accepted subsections 100(1)(2) and (3), with the NP reserving the right to return to the name of the structure.

9.7 The meeting agreed to sections 101 and 102, under *"The Auditor General"*. The meeting noted, however, that the matter was subject to ongoing discussions, including consultation with the Auditor General scheduled for January 1996.

9.8 Regarding sections 103 and 104 under the *"Electoral Commission:"*

9.8.1 The meeting discussed subsection 103(1) as follows:

- i. The DP expressed concern that subsection 103(1) should not require the Electoral Commission to manage all local, provincial and national voters rolls;
- ii. The NP suggested that the provision say that the commission could delegate this power to provincial and local authorities;
- iii. The meeting agreed that more clarity was needed on the use of the word *"manage"* and would return to this matter in 1996.

9.8.2 The meeting discussed subsection 103(2) as follows:

- i. The NP and ANC queried whether the Electoral

Commission should be assigned the task of declaring elections free and fair, particularly since the courts could rule on individual election results.

- ii. The meeting agreed to delete subsection 103(2), but requested that the technical experts advise on whether mechanisms for declaring elections free and fair should be included in the constitution.

9.8.3 The meeting agreed to subsection 103(3).

9.8.4 The meeting agreed to make two amendments to section 104:

- i. The deletion of the phrase *"appointed for a period prescribed by national legislation"* and
- ii. The insertion of the sentence: *"The number of members and their terms of office must be prescribed by national legislation."*

to read:

"The Electoral Commission must be composed of at least three persons. The number of members and their terms of office must be prescribed by national legislation."

9.9 Regarding section 105, *"General Provisions:"*

9.9.1 The NP tabled a document entitled, *"P. 65: General Provisions (Chapter 7)."* The meeting agreed that discussion of the proposal would be deferred, but the matter would be considered in the third edition.

9.9.2 The meeting agreed to subsections 105(1)(2)(3) and (4).

9.10 The meeting agreed to section 106, *"Removal from Office."*

10. CHAPTER 8: PROVINCES

10.1 The Chairperson introduced *"Chapter 8: Provinces,"* included in the *"Refined Working Draft (Second Edition)."*

10.2 The meeting agreed that it would accept the provisions in this chapter, with the understanding that they would be revised to accord with changes made to the chapters on the National Assembly and the National Executive. Exceptions to this rule were

- * A note on self-determination to be inserted after section 107;
- * Section 108;
- * Section 120; and

- * A new formulation on provincial finance and fiscal affairs to be inserted after section 137.

These are discussed below.

10.3 Regarding self-determination:

- 10.3.1 The FF expressed its concern that some mention should be made of self determination, either in Chapter 4 or in Chapter 8.
- 10.3.2 In response, the Technical Refinement Task Team tabled a document entitled, *"Refinement Team Note on Self Determination."*
- 10.3.3 The meeting agreed to the proposal made in the *"Refinement Team Note"* that a comment be inserted after section 107, that would read:

"The possibility of including Constitutional provisions for the right to self determination of any community sharing a common cultural and language heritage in terms of Principle 34 is still being discussed."

10.4 Regarding section 108, *"Application of This Chapter:"* the meeting agreed to replace the existing provision with two options:

- i. Option 1 would be the draft formulation set out on page 9 of the *"Errata,"* that reads:

"The provisions of this chapter apply to all provinces except to the extent that they are modified by a provincial constitution adopted and certified in term of this Constitution."

- ii. Option 2 would consist of sections 108(1) - (10) of the document entitled *"The Status of Provinces: The Constitutional Status of Provinces, the Homogeneity Clauses, and Provincial Constitutions,"* tabled by the ANC at the meeting. These read:

"108 (1) Provinces are integral and inseparable provinces [alternatively: parts] of the Republic. They are a level of legislative and executive government of the one and sovereign state of the Republic.

(2) The inhabitants [population] of a province belong to [are part of] the South African nation. [and enjoy common South African citizenship according to this Constitution.]

(3) Provinces must promote national unity and must pursue peace in their provinces. They must commit themselves to the well-being of all the people of the

province, and cooperate in a spirit of ubuntu to reconstruct and develop their provinces.

- (4) Provinces are founded on respect for and observance of human rights. They must promote the achievement of equality between men and women an people of all races.*
- (5) Provinces must comply with the principles of constitutional democracy and the rule of law within the meaning of this Constitution to preserve [essential] homogeneity among the provinces.*
- (6) In each province the people must be represented by a body elected by general, free, equal and secret ballot.*
- (7) The provisions of this Constitution with regard to majority government, multi-party democracy, elections, regularity, universal adult suffrage, a common voters' roll, proportional or other representation, and the participation of minority parties in the legislative process in a manner consistent with democracy, apply to all provinces equally and undiminished.*
- (8) Provinces must adhere to the separation of powers between the legislature and the executive in the province, with appropriate checks and balances to ensure accountability, responsiveness and openness.*
- (9) Provinces must maintain relations of good neighbourliness to all levels of government of the Republic. They must cooperate with, assist and support the national, other provincial and the local levels of the state.*
- (10) A province can not assume more competencies or privileges than those intended by this Constitution. "*

10.5 The meeting agreed to the existing provisions in section 120, "Assent to Bills," but agreed to add a new subsection that would set out two options:

- i. Option 1 would consist of the NP proposal that the speaker of a provincial legislature be able to refer any Bill to the Constitutional Court for a decision on its constitutionality, acting on the petition of not less than 20 percent of either the assembly, the senate or the legislature as the case may be, or all the members of all parties not constituting the majority party in such a parliament.

- ii. Option 2 would consist of the ANC proposal that no option be included.

10.6 Regarding provincial finance and fiscal control:

- 10.6.1 A multi-party committee tabled a document entitled *"Provincial Finance and Fiscal Affairs."*
- 10.6.2 The meeting agreed that the Technical Refinement Task Team would use excerpts of this document to construct new sections to be inserted in the chapter on provinces (possibly to be after section 138) and in the chapter on finance.
- 10.6.3 It was noted that the DP reserved its position regarding this section.

11. CHAPTER 9: PROVINCIAL AND NATIONAL LEGISLATIVE AND EXECUTIVE COMPETENCIES

- 11.1 The Technical Refinement Task Team tabled a document entitled *"Provincial and National Legislative and Executive Competencies Amended Working Draft (Second Edition)"*.
- 11.2 The meeting agreed that this document would replace in its entirety the chapter contained in the second edition of the *"Refined Working Draft."*
- 11.3 Regarding the new provisions contained in the tabled document:
 - 11.3.1 The meeting agreed to insert a reference to the protection of the environment in section 1(c), option 3.
 - 11.3.2 The meeting agreed to insert *"[has legislative competence]"* in section 146(1)(a), to read:

"all matters in respect of which the provincial legislature has passed laws [has legislative competence]".

12. CHAPTER 10: LOCAL GOVERNMENT

- 12.1 The Chairperson introduced the document tabled by the Ministry of Constitutional Development, entitled, *"Local Government."*
- 12.2 The meeting agreed that the provisions in this document would replace those in *"Chapter 10, Local Government and Traditional Authorities,"* of the *"Refined Working Draft (Second Edition)."*
- 12.3 The meeting agreed to delete the words *"and Traditional Authorities,"* in the chapter title, to read:

"Local Government"

12.4 Regarding traditional authorities:

- 12.4.1 The meeting agreed that provisions on traditional authorities would be included in a separate chapter.
- 12.4.2 A note would be added indicating that further consideration would be given to the matter, and
- 12.4.3 The use of the term "traditional authorities" would be considered in the third edition.

13. CHAPTER 11: PUBLIC ADMINISTRATION

13.1 The Chairperson introduced *"Chapter 11, Public Administration,"* in the *"Refined Working Draft (Second Edition)."*

13.2 Regarding section 152, *"Basic Values and Principles Governing Public Administration:"*

13.2.1 The meeting accepted subsections 152(1)(a) - (i).

13.2.2 Regarding subsection 152(2):

- i. The NP said that they still preferred the use of the term "public administration" rather than "public service." The Chairperson noted that this concern had been set out in the *"Errata."* The ANC said they were still considering this proposal. It was agreed that this matter would be dealt with in the third edition.
- ii. The meeting agreed to the existing subsection 152(2).

13.3 The meeting accepted section 153, *"Public Administration Commission."*

13.4 Regarding section 154, *"Public Service:"*

13.4.1 The meeting accepted subsections 154(1) and 154(2).

13.4.2 Regarding subsection 154(3):

- i. The meeting agreed to amend Option 1 by deleting the words *"or prospective employee,"* to read:

"No employee of the public service may be favoured or prejudiced only because that person supports a particular political party or cause."
- ii. The meeting accepted Option 1 with this amendment.

- iii. The DP expressed the view that the word "*only*" should be deleted from Option 1. The meeting agreed to consider this in 1996.
- iv. The meeting agreed to delete Option 2.

14. CHAPTER 13: SECURITY SERVICES

The meeting agreed to the whole of "*Chapter 12, Security Services,*" of the "*Revised Working Draft (Second Edition).*"

15. CHAPTER 13: FINANCE

15.1 The meeting considered "*Chapter 13, Finance,*" contained in the *Refined Working Draft (Second Edition).*"

15.2 The meeting agreed to section 167, "*National Revenue Fund.*"

15.3 Regarding 168, "*Annual Budget:*"

15.3.1 The meeting agreed that the existing section 168 would be replaced by drafts produced by the Technical Refinement Task Team, based on the section entitled "*Annual Budgets*" in the document entitled "*Provincial Finance and Fiscal Affairs,*" tabled by the multi-party committee.

15.3.2 The meeting agreed, however, that the Technical Refinement Task Team would insert a word or phrase to indicate "*inter alia*" into the new formulation.

15.4 Regarding the National Exchequer:

15.4.1 The meeting agreed to insert a new section 168(a), "*The National Exchequer,*" based on section 138F of the multi-party document, to read as follows:

- "(1) *In order to ensure transparency, common generally accepted accounting practices and expenditure classifications, effective expenditure control and common treasury regulations in all levels of government, there shall be a national Exchequer Acts.*
- (2) *The national Exchequer Act shall also constitute the basic enabling legislation for provincial Exchequer Acts.*
- (3) *In the event of serious or persistent maladministration of funds, the national Exchequer Act shall define procedures whereby the national treasury can stop the transfer of funds to any national department, or allocations in terms of 138A(1)(b) to a province, or whereby a provincial treasury can stop transfers to a provincial*

department.

- (4) *In the event of the national treasury acting to stop transfer of funds to a province such action must be ratified within 30 days by Parliament.*

- 15.4.2 The meeting noted that the DP reserved its position on this section.
- 15.4.3 The meeting agreed to consider this matter in 1996.
- 15.5 Regarding section 169, *"Procurement Administration:"*
- 15.5.1 The meeting agreed to insert Option 1 as subsection 169(1), and to delete Option 2.
- 15.5.2 The meeting accepted subsections 169(2)(3) and (4).
- 15.6 The meeting accepted section 170, *"Guarantees by National Government."*
- 15.7 Regarding section 171, *"Accountability of Enterprises Receiving Public Funds:"*
- 15.7.1 The meeting agreed to section 171.
- 15.7.2 However, it agreed to consider the NP query about what implications this provision would have on the academic freedom of universities, in the third edition.
- 15.8 Regarding section 172, *"Remuneration of Persons Holding Public Office:"*
- 15.8.1 The meeting accepted section 172.
- 15.8.2 It agreed, however, that the Technical Advisors would consider how to incorporate into the section relevant provisions from the multi-party document entitled, *"Provincial Finance and Fiscal Affairs,"* particularly from the section entitled *"Miscellaneous."*
- 15.8.3 The Chairperson said that the Technical Refinement Task Team would also consider incorporating the multi-party document's prohibition on holding office for profit on holding more than one "office of profit."
- 15.9 The meeting accepted section 173, *"Establishment."*
- 15.10 Regarding section 174, *"Functions:"*
- 15.10.1 Regarding subsection 174(1):

- i. The meeting agreed to delete the words "*The form of*" from subsection 174(1)(d), to read:

"any taxes, levies, imposts, and surcharges that a provincial government intends to levy"

- ii. The meeting agreed to the whole of subsection 174(1) with this amendment.

15.10.2 The meeting accepted subsection 174(2).

15.11 The meeting agreed to add a note under section 175, "*Appointments, Qualifications, Tenure and Dismissal of Members,*" stating that this matter was still under discussion and had not yet been finalised.

15.12 The meeting agreed to retain section 176, "*Reports,*" but to consider it further in the third edition.

15.13 Regarding section 177, "*Central Bank, Establishment:*"

- i. The meeting agreed to replace the formulations in section 177 on "*Central Bank, Establishment,*" with those provisions found in the first edition of the working draft, to read:

"There is a South African Reserve Bank, which is the central bank of the Republic, and is regulated by national legislation."

- ii. The meeting agreed to discuss the matter again in the third edition.

15.14 Regarding section 178, "*Primary Object:*"

15.14.1 The meeting agreed to subsection 178(1), but agreed to discuss it further in the third edition.

15.14.2 The meeting accepted subsection 178(2).

15.15 The meeting accepted section 179, "*Powers and Functions.*"

16. CHAPTER 14: GENERAL PROVISIONS

16.1 Regarding section 180, "*International Agreements,*" and section 181, "*Customary International Law:*"

16.1.1 The meeting agreed that the provision contained on page 12 of the "*Errata*" would replace the existing subsections 180 and 181 in the "*Refined Working Draft (Second Edition).*"

- 16.1.2 The meeting adopted the new text with one revision: the meeting agreed to place brackets around the words *"and the second house."*
- 16.1.3 When considering the new section 181, however, the meeting noted the following concerns for consideration when discussing the third draft:
- i. The question of *"breach"*;
 - ii. The question of customary international law; and
 - iii. The impact of these provisions on the powers of provinces and local authorities.

17. ANY OTHER BUSINESS

- 17.1 The NP expressed concern about the presentation of the revised document. The Chairperson stressed that it would be a working draft and would be released through a variety of media.
- 17.2 The DP asked what the Constitutional Assembly would be doing in January 1996 before the closing date for submissions in February 1996. The meeting agreed that outstanding issues and well as the matters identified for further consideration would be discussed when the committee reconvened in the new year, and that this process would proceed if necessary on a parallel basis with the consideration of submissions from the public.
- 17.3 The ANC proposed that the Constitutional Assembly engage a new team of people to look at the language of the constitution and to provide it with the necessary majesty and elegance and ensure that it had a South African "flavour". These people need not be lawyers. The meeting agreed that the Administration would forward a report on this matter to the Constitutional Committee in January 1996.
- 17.4 On behalf of the Department of Constitutional Development, Mr. Meyer reported that the German Chancellor had invited a delegation of 16 to 17 members of the Constitutional Assembly to visit Germany in January 1996 to discuss constitutional matters. Parties would be approached to ensure that representatives from all parties would participate. The meeting accepted the invitation.
- 17.5 The Chairpersons thanked the Executive Director and the Deputy Directors for their efforts. Political parties also thanked the Constitutional Assembly Administration and their own back-up staff for the hard work done. In addition, they thanked the Chairpersons for displaying such able leadership, which had guided the process so effectively. The meeting also said that it was unfortunate that the IFP was still not participating in the process, as this way of working was to the benefit of all the parties.

18. CLOSURE

The Chairperson closed the meeting at 16h50 on Friday, 10 November 1995.

CONSTITUTIONAL ASSEMBLY

CONSTITUTIONAL COMMITTEE

SUPPLEMENTARY MEMORANDUM ON *BILL OF RIGHTS* *AND PARTY SUBMISSIONS*

SECTION 7: STATE DUTY TO RESPECT AND PROTECT RIGHTS

Technical Committee was asked to consider whether this clause should be separated from the rest of this chapter.

1. The sentence "Human Dignity is the foundation of a just society", can indeed form part of a preamble.
2. Since the *Preamble to the Constitution* will most probably refer to various aspects of the Bill of Rights, including human dignity, as the key elements of the constitutional order, a separate preamble to the Bill of Rights seems unnecessary.
3. In view of the consensus that all rights should be *respected and protected by the state* (see *Explanatory Memoranda of 9 October 1995*, p 264), the second sentence of the previous formulation should be retained as a substantive provision of the Bill of Rights. The Technical Committee regards it as an appropriate first provision preceding the provisions on separate rights.

SECTION 8: EQUALITY

The Constitutional Sub-Committee requested the Technical Committee to consider the following matters in relation to this clause:

- 1.1 whether the clause conformed to Constitutional Principle V;
- 1.2 the proposals of the DP regarding subsection (3);
- 1.3 the use of the qualifier, "unfair" discrimination in subsection (3);
- 1.4 the NP and DP proposal to add the words, "without derogating from the generality of" or "but not limited to..." in (3);
- 1.5 objections by the ACDP to "sexual orientation" and "gender" in (3).
- 1.6 the possible reformulation of (4).

2. Compliance with Constitutional Principle V

The Technical Committee interprets Constitutional Principle V to mean that affirmative action measures are included in the obligation of the legal system to achieve equality. Such measures do not violate the principle of equality, and may in certain circumstances be required to achieve equality (see Explanatory Memorandum of 9 October 1995 on the right to equality at paras. 4.1.5 and 6.4)

We have therefore suggested the inclusion of the phrase in ss.(2), "equality includes the full and equal enjoyment of all rights and freedoms" which complements the rights in ss.(1). This replaces the wording in section 8(3)(a) of the interim Constitution which suggests that affirmative action is an exception, and not part of the principle of equality: "This section shall not preclude measures..."

Subsection (2) of the new draft then goes on to expressly allow for legislative and other measures to achieve equality in this full sense. This would also include, where applicable, affirmative action programmes undertaken by private businesses etc.

The proposed wording does not imply that affirmative action measures are "an end in themselves" (a concern expressed by the NP). It clearly says that it is one of the means by which equality can be achieved.

The Technical Committee is of the view that this draft formulation gives full effect to Constitutional Principle V.

3. The DP's suggestion of "...measures likely to protect..." in section 4(2)

The Technical Committee is of the view that the present wording allows for the review of measures which are not rationally connected to their object, i.e. the full and enjoyment of all rights and freedoms (see Explanatory Memorandum of 9 October 1995 on the right to equality at para. 6.5).

Section 15(2) of the Canadian Charter of Rights and Freedoms allows for "any law, programme or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups..." Similarly article 23 (2) of the Namibian Constitution allows for laws, policies and programmes "aimed at redressing social, economic or educational imbalances in Namibian society arising out of past discriminatory laws or practices..."

4. The use of the term, "unfair discrimination"

The ANC proposed the deletion of "unfair", qualifying discrimination in ss.(2) and (3) because it is not found in any of the international human rights instruments. The Freedom Front has indicated that they favour its retention, but propose the deletion of ss.(4).

According to Du Plessis and Corder, this qualification was introduced to meet the concern of the DP that not all forms of differentiation/dissimilar treatment were unjustified. The DP negotiators were of the view that 'discrimination' was a generic term which could include both justified and unjustified differential or dissimilar treatment.¹ Legislation providing for special job protection for pregnant women would be an example of justified dissimilar treatment. Certain authors have also supported the use of "unfair" in section 8 (Explanatory Memorandum, para 5.3).

Certainly in the international human rights instruments and in the Canadian Charter of Rights and Freedoms and other national Constitutions, the term, "discrimination" is unqualified. In international human rights law "discrimination" has the pejorative meaning of an unsanctioned distinction.

Thus the Human Rights Committee has said that the term, 'discrimination' in the International Covenant on Civil and Political Rights (1966) should be understood to imply,

"... any distinction, exclusion, restriction or preference which is based on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, and which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms." [our underlying] ²

The relationship between the qualifier "unfair" and the general limitations clause is also problematic: What is required to prove the unfairness of a discriminatory measure in section 8 vis a vis the justifiability of the discrimination in terms of the general limitations clause ?

1. Du Plessis and Corder, Understanding South Africa's Transitional Bill of Rights, p. 141.

2. General Comment 18, 1989, para. 7.

In the light of the above, the Technical Committee recommends both that the positive formulation in ss.(2) to the effect that "equality includes the full and equal enjoyment of all rights and freedoms" is retained and that the use of the qualifier, "unfair" be reconsidered. If the qualifier is deleted, the wording of subsection (4) would have to be reconsidered.

5. The addition of the words, "without derogating from the generality of" or "but not limited to..." in ss.(3)

The Technical Committee is of the view that the proposed added words are unnecessary, and are undoubtedly part of the phrase, "including".

Other examples are:

- (1) the phrase used in Canadian Charter of Rights and Freedoms, "...and, in particular, without discrimination on the grounds of..." (section 15);
or
- (2) the phrase in article 26 of the International Covenant on Civil and Political Rights: ...on any ground such as race, colour, sex..."

(See also paras. 4.2.2 and 5.4 of the Explanatory Memorandum on equality).

6. Non-discrimination on the grounds of sexual orientation and gender

Regarding 'sexual orientation' as a ground of non-discrimination: see para. 4.2.3. of the Explanatory Memorandum on equality.

The term, 'gender' as a ground of discrimination refers to the roles and expectations that society imposes on persons as a result of their biological sex. It is thus important that neither women nor men should suffer discrimination because of the social belief that they should play certain roles e.g. the belief that all mothers should not work, but should stay at home and look after children. At the Beijing Conference this commonly accepted meaning of the word, 'gender' was accepted by all the states of the world who signed the Platform for Action.

7. Subsection (4)

As stated above if the term 'unfair discrimination' is not used, the wording of this section would have to be adjusted accordingly.

The ANC has indicated that they prefer the wording of s.8(4) of the interim Constitution. The new formulation is a plain language version of the present (4) which is preferred for its clarity and simplicity. There has been no change of meaning between the two subsections.

SECTION 11: FREEDOM AND SECURITY OF THE PERSON

1. The Technical Committee was requested to redraft this clause to incorporate the new ANC proposal for the consideration of the parties (see the draft formulation).
2. As suggested at the Constitutional Sub-Committee meeting of 9 October 1995, the various elements have been grouped together under the "umbrella" rights of 'freedom of the person' and 'security of the person' respectively.
3. The ANC proposal has been incorporated as a new subsection (2). The right to be free from all forms of violence can obviously be limited through the general limitations clause to cater for the reasonable use of force by the state to effect arrests, prevent damage to persons or property etc.
4. The Technical Committee recommends that the concept, "bodily and psychological integrity" be retained in ss.(2) as it relates to the physical and psychological violation of personal integrity.
5. The rights not to be subjected to torture and other forms of degrading treatment and medical experimentation without consent can be regarded as part of the right to security of the person and bodily integrity. However, they are so important in human rights law that we recommend that they be expressly prohibited in a separate sub-section.
6. The matter of the consent of children and others incapable of giving consent on their own behalf in ss.(3)(c) has been dealt with in the manner proposed by the Freedom Front.

SECTION 13: PRIVACY

1. The DP propose that the right not to have communications violated ought to expressly include the right not to have communications intercepted. The Technical Committee remains of the view that interception of communications constitutes a violation and that the express addition of the word is unnecessary.
2. The FF proposes that subsections (1) and (2) be qualified to make "searches by warrant in accordance with the provisions relating to criminal procedure". It is not necessary to include the qualification. That is a function of the general limitations clause. Searches under warrant properly regulated by statute constitute a universally accepted limitation to the right to privacy.

3. Proposed reformulation to deal with juristic persons as bearers of rights:

"Everyone has the right to privacy, including the right not to have -

- (a) their person or home searched;*
- (b) their property searched;*
- (c) their possessions seized; and*
- (d) the privacy of their communications violated".*

(Juristic persons the bearers of subsection (b), (c) and (d)).

SECTION 14: FREEDOM OF RELIGION, BELIEF AND OPINION

1. The ANC proposed that *"including freedom to change religion or belief, and freedom to practise religion alone or in community, in private or in public"* in section 14(1) be deleted.

Although the first part of the section will undoubtedly be interpreted to include the matters referred to in the second part, the second part is contained in most international instruments (see **Explanatory Memoranda of 9 October 1995**, p 57, no 1). The Technical Committee recommends the retention of the phrase.

2. The ANC proposed that consideration be given to the inclusion of "ideology" in section 14(1). The Technical Committee is of the opinion that "ideology" is covered by "thought, opinion and belief".
3. The Technical Committee supports the FF proposal that "any" in section 14(2)(a) be replaced with "all".
4. The Technical Committee was requested to investigate a change in the formulation of section 14(3) to the effect that (as in the case of customary law) only the recognition of the systems concerned be insulated from the provisions of the Bill of Rights, but not the rules comprising the contents of these systems.

The Technical Committee recommends that the NP proposal be followed to add the phrase "to the extent consistent with this Bill of Rights" to the opening sentence.

SECTION 15: FREEDOM OF EXPRESSION

1. Subsection 15(2)

This section is largely based on section 20 of the International Covenant on Civil and Political Rights (1966). However, unlike section 20 it does not in itself prohibit this type of speech. It simply says that this type of speech is not deserving of constitutional protection.

The suggestion of the DP and ANC to delete the words, "... and that is based on race, ethnicity, gender or religion" is supported by the Technical Committee. It avoids protracted disputes as to which of the grounds of discrimination should be included.

The ANC's point is that incitement to imminent violence (without any further qualification) should not enjoy constitutional protection.

A possible compromise formulation could be:

"(2) the protection in subsection (1) does not extend to -

(a) propaganda for war;

(b) the incitement of imminent violence; or

(c) advocacy of hatred that constitutes incitement to discrimination [that is prohibited in section 4(3)]."

2. Subsection (3)

The concern about this subsection was that it is too broad, and may cover all forms of government-produced media (e.g. AIDS education media produced by the Department of Health).

The DP proposes the following clause -

"Any public media financed directly or indirectly by the state must be impartial and present a diversity of opinion."

The Technical Committee is of the view that this suggestion addresses the concerns referred to above, and can be recommended.

The Freedom Front's suggestions of 'a survey of the diverse opinions held' is too stringent. It seems to imply that every programme must present 'a survey' of all possible opinions on the particular topic. The purpose of this section is rather to ensure that a public broadcaster or newspaper fairly reflects the general range of public opinion.

SECTION 16: FREEDOM OF ASSEMBLY, DEMONSTRATION AND PETITION

1. The FF proposed that "to present petitions" be deleted.

The fact that the right to petition is not included in international instruments and most bill of rights, does not preclude its inclusion in the new Constitution - CP II does not prescribe that only internationally recognised rights be included. A duty on recipients of petitions to consider petitions can, even in the case of frivolous petitions, not to be regarded as an unreasonably onerous duty.

SECTION 18: POLITICAL RIGHTS

1. The FF proposed that "adult" be inserted in subsection (1), (2) and (3) of the word "Every".

CP VII does not apply to section 18(1). To the extent that the word "adult" affects the voting age, this matter was considered by Theme Committee 1.

SECTION 20: FREEDOM OF MOVEMENT AND RESIDENCE

1. The FF proposed that the right to a passport in section 20(4) be guaranteed subject to criminal legislation relating to fugitive offenders.

The Technical Committee does not support the proposal because restrictions of the right to a passport of fugitive offenders can be adequately dealt with in terms of the general application clause.

SECTION 21: ECONOMIC ACTIVITY

The Technical Committee was instructed to :

- further examine international instruments, taking into account the views expressed by political parties at the Sub-Committee meeting;
- report on its understanding of the term "economic activity" and why it considered the term to be problematic, in the present context; and
- to consider the inclusion of a German type clause as an option.

1. International law and foreign law

"Freedom of economic activity" is *as such* not guaranteed in international instruments.

The right to freedom of occupation is contained in :

- article 23(1) of the Universal Declaration of Human rights: "Everyone has the right to work, to free choice of employment, to just and favourable conditions of work and to protection against unemployment"; and
- article 6(1) of the International Covenant on Economic, Social and Cultural Rights: "The State Parties to the present Covenant recognise the right to work, which includes the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts, and will take the appropriate steps to safeguard this right."

Few foreign constitutions guarantee a "right to freedom of economic activity" in so many words. Exceptions are:

- section 31(1) of the Swiss Constitution: "Freedom of trade and industry is guaranteed throughout the territory of the Confederation, subject to such limitations as are contained in the federal Constitution and the legislation enacted under its authority."
- section 4(1) of the 1994 Ethiopian constitution: "Every Ethiopian citizen has the right to engage freely in economic activity and pursue a livelihood anywhere in the national territory".

The absence of a specific right to freedom of economic activity in foreign constitutions has been ascribed to the partial overlap of such a general right with various other rights, for example, the rights to freedom of occupation, freedom of movement, freedom of association, property, free development of personality (s2(1) of the German Constitution), and in fact, every other right that can be exercised to pursue a livelihood (De Meyer "Human Rights in a Commercial Context", 1984 *Human Rights Law Journal* 139-140).

2. Problems relating to the term "economic activity" in section 26 of the interim Constitution

The same partial overlap with other rights, mentioned in the previous paragraph, exists between the right to "free economic activity" and other rights in the interim Constitution. The interim Constitution does, however, not contain a separate right on freedom of occupation. This right is presently covered by the freedom of economic activity in section 26. The omission of the present section 26 from the new Bill of Rights would therefore leave the

freedom of occupation constitutionally unprotected. The substitution of section 26 of the interim Constitution by a right to freedom of occupation in the new Bill of Rights as a third option, could solve this problem.

3. The German provision on the right to freedom of occupation

Section 12 of the German Constitution reads:

- "(1) All Germans shall have the right to freely choose their occupation, their place of work, and their place of training. Occupational practice may be regulated by or pursuant to a law.
- (2) Nobody may be forced to do a specific work, except within the framework of a traditional general public service that applies equally to all.
- (3) Forced labour is only permissible in the case of deprivation of liberty imposed by a court."

The second sentence of subsection (1) does not provide the state with an unlimited power to regulate the exercise of the right. Limitations of the right must be "by or pursuant to law", and must conform to the proportionality principle which the courts have refined by distinguishing different degrees of state intervention to which different standards of review are applied. The same effect can be achieved by applying the general limitation clause in the South African Bill of Rights.

The Technical Committee recommends the DP proposal be included as Option 3.

SECTION 22: LABOUR RELATIONS

1. **Section 22(2)(c) - "Workers have the right ... to strike".**

- 1.1 The DP proposes that the right to strike be limited to collective bargaining purposes only and accordingly propose the addition of the words "for the purposes of collective bargaining" after the word "strike".
- 1.2 The DP proposed wording is drawn from section 27(4) of the interim Constitution.
- 1.3 The Republic has recently ratified Conventions 87 and 98 of the International Labour Organisation. The Freedom of Association Committee of the ILO Governing Body monitors compliance of those Conventions by member states. It has definitively held that the right to strike extends beyond the narrow horizon of collective bargaining

and embraces the purposes of promoting and defending the socio-economic interests of workers.

1.4 The Freedom of Association Committee has held that the right to strike for the purpose of promoting and defending the socio-economic interests of workers does not (a) include purely political strikes; and (b) may be limited. The limitations contained in the new Labour Relations Act (LRA), 85 of 1995 are consonant with limitations found to be acceptable by the Committee. They are in summary: (i) no strikes until pre-strike conciliation and notification procedures have been exhausted; (ii) no strikes over disputes of the right; (iii) no strikes in essential services; (iv) no strikes during a collective agreement; (v) no strikes during a state of emergency; (vi) no strikes for purely political purposes; and (vii) special limitations on the nature and duration of sympathy and protest strikes.

1.5 Constitutions that include a right to strike in their Bill of Rights, do not limit the right in the manner proposed by the DP. Their respective courts, have, however, followed the profile of limitations described above.

1.6 The addition of the phrase "for the purpose of collective bargaining" will mean that provisions permitting protest action, such as those envisaged in section 77 of the LRA, will not be subject to constitutional scrutiny under section 22.

2. Section 22(2)(c) - "Workers have the right .. to strike"

2.1 The FF proposes the specific exclusion of essential services from the right to strike.

2.2 There is no need to specifically exclude essential services because it is a universally accepted limitation on the right to strike. The Freedom of Association Committee has held that no person may partake in a strike in a service the "interruption of which endangers the life, personal safety or health of the whole or any part of the population". Read with section 39(1)(b) which requires every court when interpreting the Bill of Rights to consider all applicable international law.

2.3 The specific exclusion may invite unnecessary constitutional litigation over what constitutes an essential service. Without the specific exclusion, the constitutional court engages in the proper constitutional enquiry namely whether any limitation to the right to strike in respect of essential services complies with section 35 (the limitations clause).

3. Section 22(4)(a) - "Every trade union and every employer's organisation has the right ... (a) to determine its own administration, programmes and activities".
 - 3.1 The DP proposes a proviso to the subsection along the following lines:

"provided that nothing in this Constitution shall preclude laws and measures designed to promote honest, efficient democratic and accountable governance".
 - 3.2 The object of a "nothing shall preclude" clause is to immunise certain laws from and the limitations clause in particular. This may be motivated by considerations such as the importance of recognising systems of religious personal and family law (section 14(2)); or the importance of social and economic regulation (section 21(2)); and the outlawing of unfair discrimination (section 35(2)) in a context where such laws are vulnerable to attack under other provisions of the Bill of Rights. Important as democratic and financially accountable trade unions and employers organisations are, there is no provision in the Constitution that would render a law designed to promote those objectives especially vulnerable to constitutional attack.
 - 3.3 The Freedom of Association Committee has held that laws that promote democratic and financially accountable trade unions and employer organisation do not infringe the right to freedom of association (). The combined effect of section 34 (the limitations clause) and section 39(1)(b) (the interpretation clause) will ensure that laws that promote such practices in trade unions and employer organisations are constitutional.
 - 3.4 It also bears stating that the new LRA requires ballots for the election of leadership, ballots for the calling of a strike, the auditing of accounts and the submission of the auditors certificate to the register of labour relations.

SOCIAL AND ECONOMIC RIGHTS

1. Grouping of social and economic rights

The Constitutional Sub-Committee requested the Technical Committee to consider:

- 1.1 the grouping of certain of the social and economic rights; and
- 1.2 to use a consistent qualifying phrase for the state's obligations e.g. "reasonable and appropriate/reasonable and progressive measures."

2. The Grouping of the Social and Economic Rights

2.1 Having considered this matter carefully the Technical Committee wishes to bring to the attention of the Sub-Committee the following issues which are pertinent to the "grouping" of the rights:

- The grouping of the social and economic rights holds the danger that the various rights which involve different obligations and policy considerations are treated in a uniform way. The measures which the state must take has different objectives in the case of each right. In the case of housing, the measures are designed eventually to secure housing for all. In the case of health, the measures are designed to improve the quality and accessibility of health care services. A distinctive body of international jurisprudence has built up on each of the rights included in the draft Bill of Rights. We are of the view that it would be a mistake to invite judges and legislators to overlook the diverse dimensions of each of these rights.
- Many of the rights involve elements which can and should be protected immediately whereas others are only realisable progressively over time. In the case of housing, the government it will take time for everyone to have access to housing. However, the obligation not to evict persons from their home arbitrarily and without a court order is an immediate obligation which is part of the right to adequate housing. Similar considerations apply in the case of education - the state must take immediate steps to secure access to basic education by all, whereas the right to further education must be progressively realised over time. The right to education in the language of choice "where reasonably practicable" is also immediately applicable. It is easier and clearer to demonstrate the different nature of the obligations on the state in respect of the various rights where, as far as possible, they are dealt with in separate clauses.
- On a symbolic level, it will also diminish the importance of each right to include them in one clause, entitled 'social and economic rights'. This may have the effect of devaluing the rights, and making them seem like some special species of rights. The additional social and economic rights which the parties have supported for inclusion in the Bill of Rights are an integral part of international human rights law. Many of the other rights in the Bill of Rights are also social and economic in character: the right to property, economic activity, labour relations, environment, language and culture etc. It would not be a correct reflection to include only a selected group of these rights under one social and economic rights clause.

- It has also not been the style of the draft Bill of Rights to group various rights together. For example, the Namibian Constitution groups so-called fundamental freedoms together, such as freedom of speech, religion, assembly, association, movement rights, the right against forced labour. This is combined with a specific limitations clause (article 21).

For the above reasons, we recommend that the grouping of certain social and economic rights be kept to a minimum.

2.2 Health, food, water and social security (Section 26)

We have suggested a draft clause which groups together the rights to health, food, water and social security.

2.3 The right to education (Section 28)

Because of the various elements of the right to education and the fact that it has existed as an independent right in the interim Constitution, we recommend that it be retained as a separate right.

2.4 The right to adequate housing, and equitable access to land (Section 25)

We recommend that the right to adequate housing and equitable access to land should also be in a separate section because of its political importance. The denial of housing rights and access to land to millions of South Africans was an important part of our history. A large number of public submissions have motivated strongly for the inclusion of the right to adequate housing in the final Constitution.

2.5 Children's rights (Section 27)

Because of their vulnerable position in society, children are guaranteed certain basic social and economic rights. Unlike the broader category of social and economic rights (to which they are also entitled) the state must take immediate steps to secure these rights, and they are not subject to progressive realisation over time. However, the level of the obligation is restricted to basic nutrition, health and social services.

The National Party in their supplementary submission have proposed the addition of the words, "and shelter" to ss.1(c) of the children's rights section. This suggests to the Technical Committee the provision

of shelters to street children and other homeless children, as well as children removed from the family home because of abuse or neglect. This is an important protection for a particularly vulnerable category of children, and we recommend the inclusion of this further right.

The National Party has also proposed that ss.(1)(d) should end with the words, "...all forms of abuse and degradation." The additional words are probably unnecessary, but the Technical Committee does not have any objections in principle to the proposed change.

The right to basic social services is an important right for children. It implies the provision of social workers and other services necessary to the welfare of children. Such services should be provided to deal with children with family problems, neglected and abused children, children with physical and learning disabilities etc. Social services should be distinguished from social security. Social services are based on social work and contribute to the welfare and development of both individual and groups in the community.³

The social rights in ss.(1)(c) are also protected in the Convention on the Rights of the Child (1989) which South Africa has ratified.

Finally, children's rights should be in a separate section, and not part of a general social and economic rights clause. The children's rights clause has various different elements, comprising an integration of both civil and political, and economic and social rights. For example, ss.1(f), deals with the special guarantees applicable to detained children; and ss.(2) lays down a general standard applicable to all proceedings concerning children. A number of submissions from the public have supported a separate children's rights clause.

3. Matter arising from the re-formulation of the social and economic rights in the draft Bill and the supplementary party submissions.

[See also the Explanatory Memorandum on the Right to Adequate Housing]

3.1 The use of the general qualifying phrase, "reasonable and progressive legislative and other measures"

After careful consideration by the Technical Committee, the above phrase has been used in the following sections: housing and land

3. The right to benefit from social welfare services is protected as a separate right in article 14 of the European Social Charter (1961). The Charter is a regional human rights treaty, protecting economic and social rights.

[section 25]; health, food, water and social security [article 26]; and the right to further education [section 28(1)(b)].

It implies that the measures adopted by the state can be reviewed both for their reasonableness and the extent to which they make progress in the implementation of the various rights. It is similar to the obligation which will in any event be incumbent on South Africa when it ratifies the International Covenant on Economic, Social and Cultural Rights (1966). The Covenant attaches particular importance to the adoption of **legislative measures** in the progressive realisation of the rights.⁴ Legislative measures are also needed to establish the framework and to regulate judicial supervision of these rights. "Other measures" include administrative, financial, educational and social measures. The word, "appropriate", is no longer used as it is included in the concept of "reasonable" measures.

The qualifying phrase also allows for **sufficient flexibility on the part of the state** to take progressive steps towards realising the various rights based on its capacity and the effective use of its available resources. Any reduction or 'going backwards' in the level of provision of a particular social and economic right motivated by a shortage of resources or the general welfare in a democratic society could be justified by the state in terms of the **general limitations clause**.

We do not recommend the National Party proposal that the words, "in accordance with resources and priorities of the state" be added. Their implications are that the state could simply allocate no money in its budget to health services one year, and say that this is "in accordance with its resources and priorities". This amounts to a 'claw-back' clause which would effectively undermine the constitutional protection of these rights. The reasonableness of the measures will be judged against capacity and resources of the state at a particular time.

3.2 Housing and Land (Section 25)

The phrase, "everyone without adequate resources..." has been replaced with, "everyone has the right to have access to adequate housing which..." The reason for this change is that it is consistent with the phrasing used in the other social and economic rights, and achieves the same effect. Those with sufficient resources will have the means of access to adequate housing (rental, ownership, etc.) and so will not need state assistance to secure housing.

4. See article 2 of the Covenant which was signed by South Africa in October 1994.

The phrase, "adequate housing" was chosen over the term shelter in for two main reasons:

- It is consistent with the right as it appears in international human rights instruments. A body of international standards have developed on the right to 'adequate housing'.⁵
- The state may take all reasonable measures towards the progressive attainment of the right. This means that it is not under an immediate obligation to supply everyone with a house on demand. On the other hand, neither should the state be allowed to provide a shack for the homeless, and then claim that it has fulfilled its obligation to ensure access to shelter.

The word, 'home' in ss.(2) refers to the dwelling where a person and his or her family is ordinarily resident.

The right in ss.(3) is not dissimilar to the one proposed by the DP in ss.(1) of their supplementary submissions on property (25 October 1995). It places a duty on the state to adopt legislation and other measures to facilitate fair access to land in South Africa.

3.3 Access to Health Care

The right to health and access to medical treatment is recognised in a number of international human rights instruments, including the -

- Universal Declaration of Human Rights (1948): article 25
- International Covenant on Economic, Social and Cultural Rights: article 12
- International Convention on the Elimination of All Forms of Racial Discrimination (1966): article 5(e)(iv)
- International Convention on the Elimination of All Forms of Discrimination against Women (1979): article 12 and article 14(2)(b)
- Convention on the Rights of the Child (1989): article 24
- European Social Charter (1961): articles 11 and 13
- the African Charter on Human and Peoples' Rights (1981): article 16
- Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (1988-not yet in force): article 10.

5. See particularly article 11 of the International Covenant on Economic, Social and Cultural Rights (1966), and the General Comment thereon by the Committee on Economic, Social and Cultural Rights [annexure to the Explanatory Memorandum on Housing].

In addition the rights related to health and medical services are protected in various forms in a number of national constitutions. These include the Constitutions of the Netherlands, Greece, Italy, Portugal, Turkey, Spain, Namibia, Angola, El Salvador.

The obligation of the state in the reformulated clause is to take progressive measures to ensure that everyone has access to health care services of the highest attainable standard. This formulation seeks to combine the elements of expanding access to health care services, and the continuous improvement of the health care system (see the ANC submission to Theme Committee 4 on further social and economic rights). The right of access to health care services should not be restricted to those without adequate resources. It also applies to persons who live in areas where health care services are underdeveloped (e.g. rural areas), and those with special needs (e.g. the elderly, persons with disabilities and HIV patients). Those who are able to secure access to appropriate health care services through their own resources would not be able to demand state assistance as of right. This right (as is the case with the right to basic education) does not imply a right to free medical treatment. The right not to be refused emergency medical treatment is an obligation which is immediately enforceable, and is dealt with in a separate subsection.

The right to reproductive health care warrants special consideration because of its central role in the health and well-being of women. Lack of information and services relating to fertility regulation and other aspects of reproductive health has severe social and economic consequences for women. This right receives special protection in the Convention on the Elimination of All Forms of Discrimination against Women (1979). It is also among the obligations undertaken by governments in the Beijing Declaration and Platform for Action.⁶ This right is neither a euphemism for abortion on demand, nor is it restricted to sterilisation as suggested by the Freedom Front. It rests on the "recognition of the basic right of all couples and individuals to decide freely and responsibly on the number and spacing of their children and to have access to the information, education and means to enable them to exercise these rights". It also implies special care and services in connection with pregnancy.⁷

-
6. Beijing Declaration and Platform for Action adopted by the Fourth World Conference on Women, Beijing, 15 September 1995, paras 96 and 96bis.
 7. Article 16(1)(e) and article 12 of the Convention on the Elimination of All Forms of Discrimination against Women.

3.4 Access to sufficient food and clean water

The right to food (or adequate nutrition) is recognised in many international human rights instruments -

- Universal Declaration of Human Rights (1948): article 25
- International Covenant on Economic, Social and Cultural Rights: article 11
- International Convention on the Elimination of All Forms of Discrimination against Women (1979): article 12(2); article 14(2)(h) -adequate water supply to rural women
- Convention on the Rights of the Child (1989): article 24(c)
- Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (1988-not yet in force): article 12.

These rights are also subject to the obligation of progressive fulfilment by reasonable legislative and other measures.

3.5. Access to social security, including social assistance

3.5.1 Public international law

The right of everyone to social security and an adequate standard of living is also recognised in most of the major international human rights instruments -

- Universal Declaration of Human Rights (1948): articles 22 and 25
- International Covenant on Economic, Social and Cultural Rights (1966): articles 9 ("the right of everyone to social security, including social assistance") and 11 ("the right of everyone to an adequate standard of living for himself and his family...")
- International Convention on the Elimination of All Forms of Racial Discrimination (1966): article 5(e)(i) and (iv)
- International Convention on the Elimination of All Forms of Discrimination against Women (1979): articles 11(1)(e), 11(2)(b), 14(2)(c)
- Convention on the Rights of the Child (1989): articles 26 and 27
- European Social Charter (1961): articles 12 (social security) and article 13 (the right to social and medical assistance)

- International Labour Organisation Convention (No. 102) Concerning Minimum Standards of Social Security (1952)
- the African Charter on Human and Peoples' Rights (1981): article 18
- Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (1988-not yet in force): article 9

3.5.2 Comparative Constitutions

Contrary to the Freedom Front's claim that these rights necessarily imply a socialist economic system the right to benefit from various forms of social security and assistance are protected in a variety of national Constitutions. These include: Germany [article 6(4) - social protection for mothers]; Denmark; Greece; Italy; Japan; Netherlands; Spain; Portugal; Switzerland and Turkey.

Some examples of these provisions are:

Spain

"The public authorities shall maintain a public system of social security for all citizens which will guarantee social assistance and services which are sufficient in cases of need, especially unemployment." [article 41]

Denmark

"Any person unable to support himself or his dependants shall, where no other person is responsible for his or their maintenance, be entitled to receive public assistance, provided he comply with the obligations imposed by statute in such respect." [article 75(2)]

Portugal

1. Everyone shall be entitled to social security.

2. It shall be the duty of the State to organise, co-ordinate and subsidise a unified and decentralised social security system, with the participation of the trade union associations, other organisations representing the workers and associations representing other beneficiaries.

...

4. The social security system shall protect citizens in sickness, old age, disability, widowhood, orphanhood, unemployment and all other situations in which the means of subsistence or capacity to work are lost or reduced.

... [article 63]

Japan

"All people shall have the right to maintain the minimum standards of wholesome and cultured living. In all spheres of life, the State shall use its endeavours for the promotion and extension of social welfare and security, and of public health. [article 25]

3.5.3 The scope of social security and social assistance

A distinction is often made between the earned benefits of workers and their families (social insurance), and need-based assistance received from public funds (social assistance). Social security is sometimes used synonymous to social insurance. In a strict sense, social insurance refers only to contributory social security benefits which are earnings-related with a direct connection between the amount paid and the benefit received.⁸ However, many schemes involve an overlap between contributory and non-contributory benefits, and there is also an overlap between these benefits and needs based social assistance. The general tendency is to give the concept of social security a wider interpretation⁹ to accord with international trends to develop comprehensive systems of social protection in response to factors such as the increased mobility of labour and changing global work patterns (the growth of the informal sector, home-based work, temporary work, self-employment etc.).

For these reasons, the right is formulated as the right of "access to a social security system, including appropriate social assistance where they are unable to support themselves and

8. These form of benefits usually also enjoy protection under the right to property: see, C. Krause, 'The Right to Property', in Eide *et al* (eds), Economic, Social and Cultural Rights - A Textbook (1995), 143, 154.

9. M. Scheinin, 'The Right to Social Security' in Eide *et al* (eds), Economic, Social and Cultural Rights - A Textbook (1995), 159.

their dependants." (see ANC and NP submission to Theme Committee four on other social and economic rights).

This covers both contributory and non-contributory social security benefits, including appropriate social assistance from the state. It accords with the general scope of the right in the international human rights instruments referred to above.

This right is subject to the usual qualification that it must be progressively realised by the state through all reasonable measures, including legislation. The right has been deliberately broadly framed to give the legislature a discretion as to what forms of social protection it wishes to adopt, the level of benefits, and the conditions and period subject to which they will be paid. Any lowering of the amount and standard of social security due to resource or other constraints would fall to be justified in terms of the general limitations clause. This is also consistent with international jurisprudence on the limitations of these rights.

SECTION 24: PROPERTY

1. The draft property clause in the second edition of the Refined Working Draft gives effect to the tentative understanding that emerged in the CC Subcommittee on 10 October 1995 (page 9 of the Minutes). It was drafted jointly by Theme Committees 4 and 6.3.
2. Subsection (1): "Property is guaranteed".
 - 2.1 The formulation is drawn from the German Basic Law. It guarantees the institution of property, which includes the right to acquire, hold and dispose of property and the duties of holders towards others.
 - 2.2 The phrase "the right of inheritance" is not included. There are at least two rights involved in this phrase: the right to dispose of property by testamentary succession and the right to interstate succession. The intention behind the inclusion of the phrase was not to constitutionalise the Roman Dutch and customary law of intestate succession but to guarantee the right to right to dispose of property in a will. We are of the view that the constitutional guarantee of property incorporates the right to dispose of it whether by way of contract, gift or testament.
3. Option to subsection (1): "The State must respect property and foster the conditions for everyone to acquire, hold and dispose of property on an equitable basis".

- 3.1 This is an edited version of the proposal made by the DP in its comments and input dated 25 October 1995.
- 3.2 This formulation is similar to the proposed subsection (1) in that it treats property as an institution and can be incorporated in the draft based on the tentative understanding.
4. Subsection (2): "The content and limits of property, including its deprivation, may be determined only by law of general application".
 - 4.1 The subsection reflects a combination of parts of the German Basic Law formulation and subsection 28(2) of the interim Constitution.
 - 4.2 This was done to ensure that the determination of the "content" and "limits" by law was not a separate class from "deprivation". It also ensures that determinations of content, limit and deprivation are not achievable by bills of attainder.
 - 4.3 The DP propose that the subsection be qualified to the effect that deprivation not be arbitrary. The Technical Committee supports the qualification.

SECTION 29: ACADEMIC FREEDOM

1. The Technical Committee was called upon to reformulate the draft clauses on academic freedom applying their minds to the wording of Article 5(3) of the German Basic Law. That article, freely translated, reads:

'Art and science, research and teaching shall be free. Freedom of teaching shall not absolve anybody from loyalty to the Constitution'.
2. There are a number of points to make in respect of the German formulation:
 - 2.1 It does not resolve the issue of whether the freedom to teach is exercisable as against the educational institution itself. This is clearly desirable in the case of a university, but is it desirable for a teacher in an Islamic school to claim a constitutional freedom to teach doctrines that are an anathema to Islam ?
 - 2.2 Does "loyalty to the constitution" mean that no-one may criticise the constitution? or does it mean that no-one may exercise the freedom to teach by promoting the overthrow of the constitutional order ? What is the relationship then between a clause of this nature and the right to freedom of expression ?

3. The Technical Committee recommends that the formulation in section 29 properly gives effect to the concept of academic freedom and the original submissions of the parties.
4. The concern expressed in the deliberations of the Sub-Committee on the August 1995 and reflected in the proposal to introduce the "loyalty" concept in the German Basic Law is the possible use of the right to academic freedom to obstruct the transformation of our universities. This can be addressed by the inclusion of a new sentence to subsection (1) to the effect that nothing in this subsection precludes the State from introducing measures to ensure that the universities comply with the Bill of Rights where relevant. This would include the rights equality, human dignity, privacy, freedom of religion, belief and opinion, freedom of expression, assembly, demonstration and petition, freedom of association, political rights, language and culture, access to information, administrative justice etc.

A proposed wording is as follows:

"(1) Every institution of higher learning and everyone within these institutions has the right to academic freedom. This right does not prevent legislative and other measures designed to ensure that institutions of higher learning comply with the Constitution."

SECTION 31: ACCESS TO INFORMATION

The Technical Committee was asked to give an opinion on possible qualifications to the right, taking into account the comparative analysis on p197 of the Explanatory Memorandum of 9 October 1995 and a suggestion that the Constitution instructs Parliament to pass a law providing access to information providing for limitation.

1. Few other Constitutions contain general guarantees on access to information. Exceptions are the Swedish Freedom of Press Act (which is a constitutional document) and section 5 of the German Constitution ("Everyone has the right ... to inform himself from generally accessible sources"). CP IX however provides that the new South African Constitution "shall provide for freedom of information so that there can be open and accountable administration at all levels of government".
2. Like, for example, the right to vote and to do so in free, fair and general elections, a constitutionally guaranteed right to access to information can only be exercised meaningfully if the detail of how and when it is to be exercised, is provided for in legislation. Johannessen, Klaaren and White ("A Motivation for Legislation on Access to Information" 1995 *South African Law Journal* 45, 51) state: "In order that the courts not be swamped with constitutional issues, statutory measures should be taken to serve as guidelines to assist courts, prosecutors and defence lawyers in the areas of

both the limitation and the implementation of such a right of access. As is done in other jurisdictions, South Africa should regulate these matters by statute". Examples of such statutes in other jurisdictions are the United States Freedom of Information Act 5 USC 552; the Canadian Access to Information Act, 1982; the Australian Freedom of Information Act, 1982; and the New Zealand Official Information Act, 1982.

3. Freedom of information statutes, apart from regulating the procedure and enforcement of requests for information, always contain provisions for denying requests, for example, on the grounds of national security, international relations, law enforcement, personal privacy, and confidential commercial information (see Klaaren et al 51-60). All these matters are covered extensively in the Open Democracy Bill which is being prepared by the special task force in the office of Deputy President Mbeki. To the extent that this Bill will limit the right of access to information in the Bill of Rights, it will have to comply with the provisions of the general limitation clause. In the view of many comparative precedents, the concern raised by the ANC and FF could be dealt with as permissible limitations in terms of the general limitation clause.

SECTION 32: ADMINISTRATIVE JUSTICE

1. The Technical Committee was instructed to try and draft a clause for publication that incorporated all three options in the draft forwarded to the Sub-Committee on 9 October 1995. The difficulty of incorporating the different options into one clause is that aspects of the different options are mutually exclusive. We have tried to resolve this by isolating the core elements of the three options.
2. This approach conforms with the proper approach to the right to administrative justice in a Bill of Rights. It should not constitute a mini-statute regulating the right to administrative justice as the interim Constitution tries to do, but be a core standard against which a statute regulating administrative justice must be judged. The statute may carve narrower rights to administrative justice (provided it complies with the limitations clause) and it may grant more extensive rights. It is not necessary to include all limitations on the right to administrative justice in the Bill of Rights nor is it necessary to go beyond the core of the right.
3. The core elements of the right to administrative justice to be included in a Bill of Rights are, we suggest, the following:
 - 3.1 The prohibition of ouster clauses.
 - 3.2 The right to lawful administrative action.
 - 3.3 The right to [justifiable/ reasonable] administrative action.

- 3.4 The right to procedural fairness where a person's rights are affected and where the administrative action is applicable to a particular person.
- 3.5 The right to written reasons where the administrative action affects a person's rights or materially affects a person's interests, unless the reasons for such action have been made public.
4. The elements of the three options are not included in the proposed core are as follows:
 - 4.1 Option 1 on page 19 of the 2nd edition provides for procedural fairness in respect of all administrative action. This is extraordinary wide. Firstly administrative action includes the promulgation of delegated legislation. Secondly it includes persons whose interests may be affected (something not even the interim Constitution contemplates). There are good arguments for the *development* of the right to administrative justice in respect of aspects of the above but this should be achieved by statute and the common law, in precisely the way the courts have developed the doctrine of "legitimate expectations".
 - 4.2 In options 1 and 3, it is not necessary to qualify the right to written reasons with the phrase "unless the reasons have been published" because the publication itself constitutes compliance with the duty to supply reasons.
 - 4.3 Option 3 on page 19 of the n edition limits procedural fairness to administrative action that affects rights and "legitimate expectations". There are two reasons for not including "legitimate expectations" in the core elements. Firstly, the inclusion of the doctrine of legitimate expectations will constitutionalise a doctrine that is by its very nature both fact specific and open to wide application. This will have the effect that a definition in the statute, if that is indeed possible, will not prevent the constitutionalising of every case involving the doctrine. If the object of the right is to provide a standard against which to test any administrative justice statute then the constitutionalising of the doctrine will have the effect of transforming the standard into a constitutional cause of action. Secondly, the doctrine has emerged without a constitutional mandate and the limited formulation proposed in the core elements of a right to administrative justice will not impede the further development of the doctrine.
5. The ANC proposed the qualification of the right to administrative justice by subjecting it to the "practicalities and interests of good governance". These concerns can be adequately addressed by the general limitation clause and do not have to be included specifically in a right that is limited to its core elements.

6. The DP proposals concerning the right to administrative justice are contained in their revised submission dated 19 September 1995. During the course of the deliberations the DP amended those submissions. The Technical Committee has considered the revised submissions and has adopted certain proposals in its draft. The main submissions made by the DP are as follows:

- 6.1 There should be no internal limitations on the scope of the rights. The Technical Committee accepts that should be the case in respect of the right to lawful and reasonable administrative action because these are the core elements of the right. The Technical Committee is of the view however that internal limitations are necessary in respect of procedural fairness because (a) a right to procedural fairness in respect of all types of administrative action is substantially wider than the US "due process" clause, which, even with its limited purview has "flooded state and federal courts with a torrent of difficult and context-specific litigation that has never abated since the due process revolution began in the 1970's" (Professor Michael Asimow "Administrative Law under South Africa's interim Constitution", unpublished draft article, 11/2/95).; (b) it is necessary to narrow the *constitutional* right to procedural fairness. It is just not possible to grant hearings in the hundreds of thousands of low level discretionary decisions that a government constantly makes. It is not an answer to say that this difficulty is capable of being addressed by the limitations clause because administrative burden and costs may not constitute a justification for a limitation of a fundamental right (Re Singh and Minister of Employment and Immigration & 6 Other Appeals 17 DLR 422:

"I have considerable doubt that the type of utilitarian consideration brought forward by Mr Bowie [counsel for the Attorney General of Canada] can constitute a justification for a limitation on the rights set out in the *Charter*. Certainly the guarantees of the Charter would be illusory if they could not be ignored because it was administratively convenient to do so. No doubt considerable time and money can be saved by adopting administrative procedures which ignore the principles of fundamental justice but such an argument in my view misses the point of the exercise under s.1. The principles of natural justice and procedural fairness which have long been espoused by our courts, and the constitutional entrenchment of the principles of fundamental justice in s.7, implicitly recognize that a balance of administrative convenience does not override the need to adhere to these principles. Whatever standard of review eventually emerges under s.1, it seems to me that the basis of the justification for the limitation of the rights under s.7 must be more compelling than any advanced in these appeals".

(At 218-219)

- 6.2 The reach of the rights should be a function of the "exercise of public power" rather than "administrative action". It is the view of the Technical Committee that this is too widely formulated for a *constitutional* right. The development of the right to administrative justice in respect of holders of public power ought to be left to common law or legislative development.
- 6.3 The express invalidation of other clauses. It is the view of the Technical Committee that the provisions of subsection (a) and the provisions of section 33, Access to Justice, will invalidate any ouster clause.
7. In order to give effect to the injunction to forge one proposal from the three options and after considering the ANC and DP proposals, the Technical Committee proposes the following as a basis for discussion:
 - "(1) No one may be adversely affected by administrative action that is unlawful or unreasonable.**
 - (2) Everyone whose rights are affected adversely by administrative action has the right to fair procedure unless the administrative action is of general application.**
 - (3) Everyone whose rights or interests have been adversely affected by an administrative action has the right to written reasons."**

SECTION 33: ACCESS TO JUSTICE

1. The FF proposed a rewording to exclude the possibility that litigants in civil cases or accused in criminal cases can insist that the State should pay for such litigation and/or provide legal representation.
 - 1.1 The right of an accused "to have a legal practitioner provided at state expense if substantial injustice would otherwise result [where the interests of justice require it]", is guaranteed in section 31(3)(e) and should be retained.
 - 1.2 Article 6(1) of the European Convention guarantees a right to a "fair trial" in both civil and criminal cases, whereas article 6(3)(c) provides for legal assistance in criminal cases "when the interests of justice so require". On the position in *civil cases* Van Dijk and Van Hoof *Theory and Practice of the European Convention of Human Rights* (1990) 316-317 state: "In the Aire case [Commission Report 1987; Court Judgement 1982] it was held that the right of access to court of Article 6(1) although it does not imply an automatic right to free legal aid in civil proceedings, does not involve the obligation for the contracting States to make access to court possible in either giving

the accused a compensation for his legal costs if he is unable to pay, or reducing the costs of the suit, simplifying the proceedings or the conditions of the suit, or providing for free legal aid, all this under the condition that these costs were necessary for instituting the proceedings and\ or for an adequate presentation of the case of the defence." On 332 they state: "[T]he Strasbourg organs make an independent examination of the complexity of the case and other relevant factors such as the applicable rules of evidence and emotional involvement of the applicant in the outcome of the proceedings." The Technical Committee recommends that the implications of the section 30 "fair trial" guarantee in civil cases be left to the courts to develop, and that limitations to the right be dealt with in ordinary legislation subject to the general limitation clause.

2. The NP proposed as an alternative option the insertion of the word "where appropriate or necessary" between the words "or" and "another".

The change in wording could be considered for inclusion as an option.

SECTION 34: DETAINED, ARRESTED AND ACCUSED PERSONS

1. The right to be released on bail [section 34(1)(e)]

Both the Freedom Front and ANC had reservations about this clause. The wording of section 25(2)(d) of the interim Constitution is confusing. Firstly, the section refers to the right to be released without bail, that is, with no limitations on the accused's freedom of movement or property). Secondly, an accused has a right to be released with bail, that is, with limitations of varying degrees (and often very severe) on the accused's rights to movement and property. When is the accused the holder of the unconditional right to be released and when not? Thirdly, when the interests of justice so requires, there is no right to be released at all.

The core elements of the right are:

- that the infringement of the accused's right to freedom pending the outcome of the criminal proceedings should be decided by a court of law;
- the court of law should consider the accused's freedom at his or her first compulsory court appearance until finality is reached in the case; and
- a court of law should decide the issue in accordance with the interests of justice.

In short, an accused has a right to have all elements of his or her release considered by a court of law in accordance with the interests of justice.

The objective of pre-sentence release is to avoid anticipatory punishment. The issue at bail proceedings is not the guilt or innocence of the accused, but whether the interest of justice will be prejudiced by his or her release subject to conditions.

The absolute content of the right is that the release decision should be taken by a court of law. The accused has the right to have a court determine what the interests of justice require. In South Africa the court's jurisdiction to consider bail has in the past been ousted with respect to serious offenses by bestowing on the Attorney-General the power to make the release decision.

From the above, it is clear that the interests of justice are not limited to the question whether the accused should be detained, but are relevant to all aspects of the bail decisions.

For these reasons, the Technical Committee recommend that section 34(1)(e) be revised to read as follows:

Everyone who is arrested for allegedly committing an offence has the right -

...

- (e) to be released from detention subject to reasonable conditions if the interests of justice so permit.

This formulation clearly indicates that the court has a discretion concerning the release of the accused. This discretion must be exercised in accordance with the interests of justice.

2. The right to a legal practitioner at state expense [sections 34(2)(c) and 34(3)(e)]

The Freedom Front have proposed more restrictive wording to these sections. It should be noted that the International Covenant on Civil and Political Rights (1966) which has been signed by South Africa requires that the state ensure to every accused person the right, amongst others -

"...to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he

does not have sufficient means to pay for it.¹⁰

The test of substantial injustice both in the interim Constitution and in the present draft formulation is a more restrictive test than the international standard referred to above.

3. The right of an arrested person to be placed under judicial authority [Section 34(1)(d)]

Although not raised by any of the parties, the Technical Committee wishes to recommend further changes to this subsection.

3.1 Objectives of the right

The aim of the right is to place an arrested person as soon as possible under the authority of a court. The rationale is twofold: firstly, to minimise the possibility of an arbitrary arrest and detention, and secondly, to protect the arrestee from the possibility of police abuse.

3.2 Structure of the right

Section 25(2)(b) of the interim Constitution relates to two situations, affording the accused two separate rights.

(a) Right in respect of the police to be brought to court

The arrestee has a right enforceable and unqualified right against the police to be brought promptly (48 hours) before a court of law.

(b) Rights in respect of the court

The second situation relates to where the arrested person is before the court. The arrestee has a qualified right to liberty: if there is no charge against him or her, then he or she has a right to immediate release. Any further detention would be arbitrary and contrary to other provisions of the Bill. The absence of a charge indicates that there is no reason why the arrestee should be further detained, and then he or she is entitled to be released.

If there is a charge then the proceedings may be postponed for the purposes of trial. The question then is whether the detention of the accused should continue. The court should thus consider pre-trial release in terms of s 25(2)(d). Unless the court denies pre-trial release in the interests of justice, the accused should be released with or without bail.

10. Article 14(3)(d). A similar provision is found in article 6(3)(c) of the European Convention on Human Rights.

3.3 The Charge

The fact that the arrestee has not been released by the police, assumes that there is a pending charge. The first task of the court is to determine whether the arrestee is indeed an accused person. Unless the prosecutor proffers at the first appearance a charge against the accused, the court is obliged to terminate the proceedings there and then and release the accused.¹¹ A charge at the first appearance need not comply with the constitutional requirements of s 25(3)(b).¹² All that is required is a clear indication of the nature of the offence and an outline of the incriminating facts. More than a nominal charge is required. There seems little point in a court conducting a thorough bail inquiry, yet the basis of the case remains untested.

The essence of the proceedings is to determine whether the further detention of the accused, or even interference with his or her freedom of movement is not arbitrary.

3.4. The phrase, "informed of the reason of further detention"

This phrase to the effect that the accused has the right "to be informed of the reason for his or her further detention, failing which he or she shall be entitled to be released," is confusing. The right to pre-trial release is determined by s.25(2)(d) and it arises at the first court appearance of the accused. Where a court denies pre-trial release, the interests of justice would require that the accused be given a reasoned decision, including the reason for the further detention. The right of appeal would be dependant thereon. It is thus submitted that the only meaning to be given to this phrase is an adjunct to the pre-trial release provision, informing the accused of the reasons for the refusal of bail. This is a right incidental to the right to a bail hearing, and does not warrant to be included in this provision.

3.5 Revised proposed formulation

Section 31(1)(d)

Everyone who is arrested for allegedly committing an offence has the right -

(d) to be brought before a court of law as soon as reasonably

11. Ex parte Prokureur-Generaal, Transvaal 1980 (3) SA 516 (T) 518 H.

12. S v Simango 1979 (3) SA 189 (T) 191 C, requiring such detail, was overruled by Ex parte Produreur-Generaal, Transvaal, supra.

possible, but not later than 48 hours after the arrest, or where the period of 48 hours expires outside ordinary court hours, on the next court day; and while there, to be released from detention unless that person is charged and the court orders the further detention.

SECTION 35: LIMITATION OF RIGHTS

1. The minutes of the Sub-Committee on 10 October 1995 and the sidenotes to the section reflect a divergence of opinion over the wording of s35(1)(a). The ANC proposed "reasonable" and the DP, FF and the NP insist on "reasonable and necessary". While the words "reasonable" and "necessary" themselves carry different meanings in ordinary use, the terms are really codewords for proportionality when use in the limitations clauses of the Bill of Rights.
2. The European Court of Human Rights and the German courts, in summary, identify the following principles of proportionality"
 - 2.1 The limitation must be capable of achieving the purpose of the limitation.
 - 2.2 The purpose of the limitation may not be realised as effectively by means of a less drastic measure.
 - 2.3 An appropriate relationship must exist between the nature and extent of the limitation and the nature and importance of the rights and public interests protected or promoted by the limitation. "Appropriate" is determined by taking into account the nature and extent of the limitations; nature and importance of the right that is limited; and the nature and importance of the public interest concerned.
3. The Canadian Supreme Court has identified similar criteria:
 - 3.1 The objective which the limitation is designed to promote must be of sufficient importance to warrant overriding a constitutionally protected right or freedom. It must bear on a pressing and substantial concern.
 - 3.2 The means chosen to attain those objectives must be proportional or appropriate to the ends. "Proportional or appropriate includes the following components: (a) the measure adopted must be carefully designed to achieve the object in question; (b) they must not be arbitrary, unfair or based on irrational considerations ie they must be rationally connected to the objective; (c) the means, even if rationally connected to the objective in this first sense, should impair 'as little as possible' the right or freedom in question; (d) there must be a proportionality between the effects of the measures and the objective

which has been identified as 'sufficiently important'.

See R v Oaken 26 DLR (4th) and R v Edward Books and Art Ltd 35 DLR (4th)

4. In S v Makwanyane, Chaskalson P draws on these criteria and fashions an approach which the Technical Committee proposes should form the basis of a limitations clause:

The limitation of constitutional rights for a purpose that is reasonable and necessary in a democratic society involves the weighing up of competing values and ultimately an assessment based on proportionality ... The fact that different rights have different implications for democracy ... means that there is no absolute standard which can be laid down for determining reasonableness and necessity. Principles can be established, but the application of those principles to particular circumstances can only be done by on a case by case basis. This is inherent in the requirement of proportionality, which calls for a balancing of different interests. In the balancing process, the relevant considerations will include the nature of the right that is limited and its importance to an open and democratic society based on freedom and equality; the purpose for which the right is limited and the importance of that purpose to such a society; the extent of the limitation has to be necessary, whether the desired ends could reasonably be achieved through other means less damaging to the right in question"

5. It is evident from the above that what is central to any evaluation of limitation of a right is the balancing of the different interests. In order to resolve the divergence of opinion, the Technical Committee proposes the words "reasonable" and necessary" be dispensed with and that the limitations clause spells out the approach adopted by Chaskalson P.
6. The Technical Committee accordingly proposes the following draft as a basis for discussion:

"(1) The rights in this Bill of Rights, except the rights in section 37, may be limited by or pursuant to a law of general application only to the extent that the limitation is justifiable in an open and democratic society based on freedom and equality which must be determined taking into account -

- (a) the nature and importance of the right that is limited;***
- (b) the nature and importance of the purpose of limitation;***
- (c) the nature and extent of the limitation;***

- (d) whether the limitation can achieve its purpose; and*
 - (e) whether the limitation can achieve the purpose of the limitation through less restrictive means.*
- (2) Any limitation in terms of subsection (1) must be consistent with the Republic's obligations under international law".*

SECTION 38: APPLICATION

1. The NP seeks clarity on the inclusion of the "judiciary" in Subsection (1), in view of the provisions of section 7(1) of the interim Constitution, as well as clauses 39(3) and 38(2) of the draft.
 - 1.1 The inclusion of the "judiciary" is motivated in the Explanatory Memoranda of 9 October 1995 on pp 272-274. Note should be taken of the following explanation on p273: "Including the judiciary in the binding clause does not imply that it is bound to apply the bill of rights in a totally unqualified way. The judiciary in deciding on matters concerning relationships between private parties (like the legislature in making laws, and the executive in administering their execution) can only be bound by the bill of rights to the extent that the bill of rights can be applied to such relationships." See also par 3.4.4 on p274.
 - 1.2 Section 39(3) contains an interpretational directive. It is an incident of the judiciary being bound by the bill of rights. It can furthermore not serve as a substitute for the fact that the judiciary must inevitably be bound by the bill of rights, as explained in the Explanatory Memorandum of 9 October 1995.
 - 1.3 Section 38(2) also applies to the legislature and the executive - it is neither in conflict with the inclusion of the judiciary in section 39(1), nor does its provision reflect on the question whether the judiciary should be included in section 39(1).
2. The FF proposes that subsection (2) starts with the words: "This Bill of Rights does not detract from.....".

The Technical Committee does not agree that the proposed phrase is more accurate and less technical than: "This Bill does not deny the existence ..."
3. The Technical Committee were requested to draw up a list indicating those rights that have as bearers human beings only and those which clearly include legal persons.

4. The Technical Committee was able to agree on a minimum of rights that clearly include legal persons. Some members of the Technical Committee included additional rights. These are reflected in brackets []:

Rights which include juristic persons as bearers:

Section 13(b), (c), (d)	Privacy
Section 14(2)	Freedom of Religion, Belief and Opinion
Section 15	Freedom of Expression
[Section 17	Freedom of Association]
Section 21	Economic Activity
Section 22	Labour Relations
Section 23 (b)	Environment
Section 24	Property
Section 28 (2)	Education
Section 29 (1)	Academic Freedom
Section 31	Access to Information
Section 32	Administrative Justice
Section 33	Access to Justice
[Section 34 (3)	Arrested, Detained and Accused Persons]

5. There was disagreement over whether the balance of the rights ought to be restricted to human beings only. One view was that they should. The other view was that legal persons can be the bearers of the following rights depending on the nature of the juristic persons concerned:

Section 8(3)	Equality -[excluding the right not to be unfairly discriminated against on the grounds listed in subsection (3)]
Section 14(1)	Freedom of Religion, Belief and Opinion
Section 16	Assembly, Demonstration and Petition
Section 17	Freedom of Association
Section 20	Freedom of Movement and Residence
Section 29 (1)	Academic Freedom
Section 34 (1), (3)	Arrested and Accused Persons

Demokratiese Party, 5de Verdieping, Marks-gebou, Parlamentsstraat, Kaapstad 8001
 Democratic Party, 5th Floor, Marks Building, Parliament Street, Cape Town 8001

PARLEMENT
 PARLIAMENT

4032911 ☎ 15, 8000 FAX 4610092 E-MAIL: dpctn@mickey.laccess.za



Demokratiese Party
 Democratic Party

DP COMMENT AND INPUT ON REFINED WORKING DRAFT, BILL OF RIGHTS 25 OCTOBER, 1995

4. *Equality*

4.2 The DP proposal "...and likely to protect" is noted in the margin, but our first choice remains "reasonable legislative and other measures. A third choice offered was "reasonably likely".

4.3 In addition to present margin notes, we indicated that we must insist on the concept "and without derogating from the generality of this provision" before listing grounds in particular. The plain language version would be acceptable.

9. *Privacy*

9.(1)(c) The DP noted that communications should be neither intercepted nor violated.

11. *Freedom of Expression*

The DP amendment is to (1)(b) not (a) and includes deletion of discrimination, hostility and the words that follow violence.

The option to delete the whole (2) should remain.

We attach public media proposal again.

17. *Economic Activity*

We attach our proposed new clause.

18. *Labour*

The DP did not agree to this. We attach our proposed changes in addition to the amendment to 4 (k).

20. *Property*

We attach a proposed clause. We do not accept the German subclause (1).

We do not believe the proposed clauses on insecure rights/tenure belong in the property clause at all.

- 2 -

Sections 21, 22, 23

In addition to our reservations as noted in the margin, we have reservations about social assistance. The key to making the socio-economic rights workable is the phrase "reasonable and appropriate measures".

We re-attach the original DP section which emphasizes need, survival, and review for rationality.

24. *Children*

DP expressed concern about (c).

25. *Education*

DP objected to (b) and assumes clause is still in flux.

26. Although it is correct that a redraft was requested, we reiterate our support for the section.

32. *Limitation*

DP revised submission dated 19 September to be included in the further submissions from political parties on the basis of which Technical Committee is reformulating. The result would be:

32 (1) (a) Reasonable and necessary in an open and democratic society based on freedom and equality of the kind envisaged by the Bill of Rights read as a whole;

(b) as is;

(c) consistent with SA's obligations under international law.

SEE ATTACHED MALAWI Constitution raised in discussion.

33. *Emergency*

(2) (b) DP noted that the section is potentially ambiguous as regards the two thirds majority required for declaration of emergency.

(5) Query.

SECTION 9 - FREEDOM OF EXPRESSION

The State shall ensure that any media or media authority which it finances, controls or supervises shall be impartial and present or promote a diversity of opinion; provided that the State may establish and finance a communication service which fairly promotes government policy.

OR:

In respect of the exercise of its control, if any, over any public media the State shall ensure diversity of expression and opinion

OR:

Any public media financed directly or indirectly by the State must be impartial and present a diversity of opinion.

ECONOMIC ACTIVITY - REVISED SECTION 15

Everyone shall have the right to pursue the livelihood of their choice and, to this end, freely choose their trade, occupation or profession, their place of work and their place of training.

SECTION 16 - LABOUR

1. Right to strike for purposes of collective bargaining.
2. Clause must reflect the appropriate constitutional principles : particularly CP XXV111 : right to fair labour practices.
3. Clause 4 must be qualified by reference to union/employer organization democracy :

Provided that it promotes honest, efficient democratic and accountable governance, every trade union and every employers' organisation has the right :

(a)

PROPERTY - DP

1. Everyone has the right to acquire, hold and dispose of property.
OR: The State shall respect property, and it shall foster conditions which enable persons to hold, acquire and dispose of property on an equitable basis.
2. No one may be arbitrarily deprived of property.
OR: The State may not deprive anyone of property except by means which are fair and justifiable.
3. Property may be expropriated only in terms of a law of general application:
 - (a) for public purposes or in the public interest which includes land reform
 - (b) subject to payment of just compensation which has been either
 - (i) agreed, or
 - (ii) determined by a court of law which must take into account all relevant factors including the current use of the property, the history of its acquisition, its market value, the value of the investment in the property and the interests of those affected.
4. 1913 restitution clause.

SOCIO - ECONOMIC

=

circumstances and economic conditions permit. Therefore, the Democratic Party proposes the following clause under the heading -

"Entitlement to the Essentials of Life."

- (1) Every citizen shall be entitled to the food and water necessary for survival; to shelter from the elements; to basic health care; to a basic education; and to a clean and healthy environment;
- (2) It is the province of parliament, and of any other authority lawfully exercising power for the purpose, to decide how these entitlements are to be realized. Consequently, any such a decision which is justifiable shall be considered to comply with this article. A decision which is reasonable and practicable and which respects the limitations on the resources available to realize the relevant entitlement, shall be considered justifiable."

A Bill of Rights enacting such a clause, would acknowledge also that the manner in which that entitlement is realized is a matter for the legislature and the executive: to make the choices necessary to realize the entitlement calls for a kind of expertise that only those branches of government, and not the judiciary, command, and for electoral accountability which only those branches enjoy. The Bill of Rights should therefore recognize all such legislative and executive choices, as long as they are justifiable; which is to say, that they are made honestly and rationally.

But where the choice is not justifiable, the court enforcing the Bill of Rights will conclude that its authors are not taking the entitlement to the essentials of life affirmed here, seriously, and it will set aside the decision. This does not require - or permit - the court to make policy choices. It requires the court to review policy choices made by legislators, cabinet ministers and officials; a function comfortably within the judicial province and one that good judges are well qualified to discharge. The necessity that such review imposes upon the legislature and the executive to justify their decisions, moreover, will also foster thoughtful decision-making and sound judgement.

- (a) lawful and procedurally fair administrative action, which is justifiable in relation to reasons given where his or her rights, freedoms, legitimate expectations or interests are affected or threatened; and
- (b) be furnished with reasons in writing for administrative action where his or her rights, freedoms, legitimate expectations or interests if those interests are known.

on rights

44. (1) There shall be no derogation, restrictions or limitation with regard to -
- ✓ (a) the right to life;
 - ✓ (b) the prohibition of torture and cruel, inhuman or degrading treatment or punishment;
 - ✓ (c) the prohibition of genocide;
 - ✓ (d) the prohibition of slavery, the slave trade and slave-like practices;
 - ✓ (e) the prohibition of imprisonment for failure to meet contractual obligations;
 - ✓ (f) the prohibition on retrospective criminalization and the retrospective imposition of greater penalties for criminal acts;
 - ✓ (g) the right to equality and recognition before the law;
 - ✓ (h) the right to freedom of conscience, belief, thought and religion and to academic freedom; or
 - ✓ (i) the right to habeas corpus.

(2) Without prejudice to subsection (1), no restrictions or limitations may be placed on the exercise of any rights and freedoms provided for in this Constitution other than those prescribed by law, which are reasonable, recognized by international human rights standards and necessary in an open and democratic society.

(3) Laws prescribing restrictions or limitations shall not negate the essential content of the right or freedom in question, shall be of general application.

(4) Expropriation of property shall be permissible only when done for public utility and only when there has been adequate notification and appropriate compensation, provided that there shall always be a right to appeal to a court of law.

(5) Whenever it is stated in this Constitution that a person has the right to the services of a legal practitioner or medical practitioner of his or her own choice, that right shall be without limitation, save where the State is obliged to provide such services of a legal practitioner or medical practitioner, in which case an Act of Parliament may prescribe that the choice of the legal practitioner or medical practitioner should be limited to those in Government service or employment.

ation and
emergency

45. (1) No derogation from rights contained in this Chapter shall be permissible save to the extent provided for by this section and no

himatan
Chair

in Malawi
Constitution
1995

PARLIAMENT OF THE REPUBLIC OF SOUTH AFRICA

TEL: (021) 404-2911



NATIONAL ASSEMBLY
PO BOX 15
CAPE TOWN
8000

Ref No.

To: John Tsalmandris

From: Dene Smuts

Date: 27 October

Dear John

ERRATUM

I have just noticed an error in my fax of 25 October.

25. Education should read:

DP objected to 2 (b) (registration with the State).

ALTERNATIVE : LABOUR

Instead of the amendment to the Labour Clause's sub. 4 I already faxed:

- (4) Every trade union and every employers' organisation has the right -
- (a) to determine its own administration, programmes and activities provided that nothing in this constitution shall preclude laws or measures designed to promote honest, efficient, democratic or accountable governance.

ALTERNATIVE : LIMITATION

Instead of 32 (c) reading:

"Consistent with SA's obligations under international law" we suggest
"consistent with international human rights standards".

Dene Smuts
DENE SMUTS

CONSTITUTIONAL COMMITTEE

NP NOTES ON THE REFINED WORKING DRAFT OF THE BILL OF RIGHTS

The NP requests that all its concerns raised during the previous meetings in respect of the Bill of Rights be noted in the sidebar notes. In addition, the NP requests that the following be added to or noted in the sidebar notes;

Add Clause 4(2)

The NP does not agree with the present formulation of the second sentence of this clause. It does not accurately reflect Constitutional Principle V. The NP does not view affirmative action measures as an end in themselves, but as a means to an end. The NP suggests the following alternative:

"This section shall not preclude measures likely to achieve the adequate protection and advancement of persons or categories of persons disadvantaged by unfair discrimination, in order to enable their full and equal enjoyment of all rights, freedoms and liberties".

Add Clause 4(3)

For the sake of certainty the NP suggests the inclusion of the words "without derogating from the generality" or "but not limited to" after the word "including", in line 3, as is done in Clause 33(3) where reference is made to "derogation".

Add Clause 7(1)

The NP proposes the insertion of "security of the person". We suggest that "plain language" would indicate that this should be preferred over "physical and psychological integrity".

Add Clause 7(3)(c)

The problems associated with the withholding of consent to medical treatment by guardians of minors has not yet been addressed.

Add Clause 7

The NP opposes the ANC proposal referred to in the sidebar.

Add Clause 9

Provided that option 1 in clause 35(3) is retained, subclause 9(2) will not be necessary.

Add Clause 10(3)

This clause must be qualified by the addition of the words "to the extent consistent with this bill" to bring it into line with the bill's treatment of customary law.

Add Clause 11(2)

The NP opposes the inclusion of this subsection and proposes its deletion in toto as an alternative option.

Add Clause 17

The NP proposes the inclusion as a further option, the relevant clause in the German constitution in respect of economic activity for consideration, as discussed in the CC. The NP is opposed to option 1.

Add Clause 20

The NP requests that the property rights clause reflected as option 1 on page 19 of the draft bill of rights published on 9 October 1995 be included as an alternative option. The NP is opposed to much of the clause as it stands.

Add Clauses 21, 22, 23 and 24

The NP proposes that access to land be separated from the right to housing/shelter. The NP opposes the provision of clause 21(2)(b). The NP wishes to propose the reconsideration of this section in relation to the regrouping and rewording of all socio-economic rights. The NP seeks clarity on the word "home".

The following proposal is made:

"In recognising and protecting human dignity, the state must provide for reasonable, appropriate and progressive measures in accordance with its resources and priorities for the promotion of the following rights:

- (1) Everyone has a right to adequate housing/shelter.
- (2) Everyone has the right not to be evicted from his or her housing/shelter or to have that housing/shelter demolished without an order from a court of law.
- (3) Everyone without adequate resources has the right of access to health care, including reproductive health care, which must at least include the necessary medical treatment.

- (4) Everyone who is unable to support himself or herself has the right to receive reasonable and appropriate social assistance for a reasonable period.
- (5) Everyone has the right of access to clean water and sufficient food.
- (6) Every child has the right ---
 - (a) [retain text]
 - (b) family and parental care etc.
 - (c) basic nutrition, health and social services and shelter
 - (d) be protected from maltreatment, neglect and all forms of abuse and degradation.
 - (e) etc"

Add Clause 25

The alternative wording is suggested for subclause (1)(c), not (2)(c) - typing error.

The NP supports the alternative wording.

Add Clause 27

The NP proposes the retention of section 31 of the interim constitution and proposes that be inserted as an alternative option.

Add Clause 30

The NP proposes as an alternative option the suggested wording of the draft with the words "where appropriate or necessary" between the words "or" and "another" in line 3 of this section.

Add Clause 31(5)

The NP supports the inclusion of the proposed subclause (5).

Add Clause 32

1. In respect of subclause (1)(a), the NP favours "reasonable and necessary"
2. The NP opposes the inclusion of subclause (2), because a provision for affirmative action is already adequately catered for in clause 4(2).
3. The NP proposes the inclusion after the words "no law" in line 2 of subclause (3) of the words 'including the common law, customary law or legislation or any other measure with legal effect or impact.
4. The NP seeks clarity on the words "or in any other provision of the constitution" in subclause (3), especially in regard to the possibility of such other provisions being amended by a majority of 50% plus 1.

Add Clause 33

The NP opposes the inclusion of subclause (5).

Add Clause 35

1. The NP seeks clarity on the inclusion of "the judiciary" in subclause (1), in view of the provisions of section 7(1) of the interim constitution as well as clauses 36(3) and 35(2) of this draft.
2. The NP supports subclause (3) of option 1.



VRYHEIDSFRONT

P.O. Box 74693
Lynnwood Ridge
0040
Tel. (012) 47-4477
47-4375
47-4450/54/14/58

1st Floor Atrium 4
Perseus Park
cor. Camelia and Priory Roads
Lynnwood Ridge
Fax (012) 47-4387

CONSTITUTIONAL COMMITTEE OF CONSTITUTIONAL ASSEMBLY COMMENT ON DRAFT BILL OF RIGHTS (DRAFT OF 19 OCTOBER 1995)

NOTE; Clauses not commented on are (provisionally) approved.

1) Clause 4 (Equality)

Proposal: That the word 'unfairly' in clause 4(3) be retained, and that clause 4(4) be deleted.

Motivation: Clause 4(4) places the burden of proof on the respondent. This is an intolerable burden. In criminal law the accused is presumed to be innocent until proved guilty (see clause 31(3)(f)). Even in civil law the burden of proof is on the plaintiff or applicant (not on the defendant or respondent). The rule for centuries has been that he who alleges, must prove. The effect of clause 4(4) is that a mere allegation of discrimination places the defendant at a disadvantage, for all conduct that differentiates can be described as 'discrimination', and it is not possible to engage in any human conduct without differentiating between different people and things.

2) Clause 6 (Life)

Proposal: That option 3 be adopted, provided that the right to reproductive health care (clause 22(1)) be phrased in such a manner that it does not detract from the protection of the potential life 'from the moment of conception' (clause 6(1)).

Motivation: The right to life is not one of the 'universally accepted fundamental rights', as it is qualified even in the International Covenant on Civil and Political Rights, 1966, which is the most comprehensive international instrument reflecting fundamental rights.

3) Clause 7 (Freedom and integrity of the person)

Proposal: That the words 'their [that person's] consent' in subsection (3)(c) be deleted and replaced by the words 'the necessary legal consent'.

Motivation: The consent required may be that of the person concerned or that of a guardian or other person in loco parentis. The present wording is too narrow.

4) Clause 9 (Privacy)

Proposal and motivation: The provisions of subsections (1) and (2) should be qualified to make possible searches by persons authorised by warrant in accordance with the provisions of legislation relating to criminal procedure.

5) Clause 10 (Freedom of religion, belief and opinion)

Proposal: That the word 'any' in subsection (2)(a) be replaced by the words 'all the'.

Motivation: The amendment will give effect to the obvious intention of the drafter.

6) Clause 11 (Freedom of expression)

Proposal: That the words 'a diversity of opinion' in subsection (3) be deleted and replaced by the words 'a survey of the diverse opinions held'.

Motivation: The existing words do not preclude a selective choice of opinions, which is not fair.

7) Clause 12 (Assembly, demonstration and petition)

Proposal: That the words 'to assemble, to demonstrate, or to present petitions' be deleted and replaced by the words 'to assemble and to demonstrate'.

Motivation: There is no universally recognised fundamental right to present petitions, linked to the right of assembly and the right to demonstrate. If such a right were to be sanctioned it would, by implication, mean that a legal burden rests on the recipient of the petition to consider its contents, however unreasonable or unfounded it may be.

8) Clause 14 (Political rights)

Proposal: The word 'adult' should be inserted in subsections (1), (2) and (3), after the word 'Every' in each of these subsections.

Motivation: Minors are also citizens, and Constitutional Principle VIII requires universal adult suffrage.

9) Clause 16: (Freedom of movement and residence)

Proposal: Subsection (4) should be rephrased to read as follows: 'Subject to the provisions of criminal legislation relating to fugitive offenders, every citizen has the right to a passport'.

Motivation: The law should not assist a person involved in criminal proceedings to leave the country.

10) Clause 17 (Economic activity)

Proposal: The Freedom Front supports option 2, subject to the insertion of the words 'authorised by law' after the word 'measures' in subsection (2).

Motivation: The scope of affirmative measures should be regulated by law and not depend merely on administrative decisions.

11) Clause 18 (Labour relations)

Proposal: The right of workers to strike, conferred by subsection (2)(c), should not extend to workers in essential services. Moreover, the right of employers to lock-out (see subsection (3)(c)) should be retained.

Motivation:

Firstly, the grievances of workers in essential services should be regulated by special legislation adapted to the circumstances of their work, so as to ensure that disruption of essential services does not occur.

Secondly, the rights of workers in labour matters should be balanced by corresponding rights pertaining to employers.

12) Clause 20 (Property)

Proposal: In the first place, that clause 20(2) be deleted. Secondly, the Freedom Front proposes the adoption of the first proposal (dated 16 October 1995) as to the text of section 20(6), viz "Every person and community whose rights or interests in land are legally insecure as a result of discriminatory laws and practices shall be entitled to

legally enforceable security of tenure'.

Motivation: Firstly, deprivation of property in subclause (2) as presently phrased can take place without compensation (as opposed to expropriation with compensation). Such a deprivation, even if it is in accordance with a law of general application, can amount to arbitrary confiscation by the state, flouting the generally accepted principle in democratic societies that compensation should be paid for deprivation (expropriation) of property.

Secondly, the alternative proposal is not acceptable, as it makes tenure reform dependent on 'any law', which would undermine the guarantees given in this clause of the bill of rights.

13) Clause 21 (Housing and land)

Proposal: That the words 'and the availability of suitable alternative accommodation' in subclause (2)(b) be deleted.

Motivation: A court order for eviction can only be made where the occupation is illegal. To make the eviction subject, inter alia, to the availability of suitable alternative accommodation, is to foster the cause of illegal squatters.

14) Clause 22 (Health)

Proposal: That clause 22(1) be rephrased, to indicate that 'reproductive health care' is limited to sterilisation.

Motivation: Abortion on demand should not be sanctioned under the euphemism 'reproductive health care'.

15) Clause 23 (Social assistance, food and water)

Proposal: That this clause be reformulated in fundamental respects, to reduce the ambit of social assistance from the state.

Motivation: This clause, as presently phrased, reflects a socialist system which contradicts democratic principles. It implies that taxpayers generally should support those 'unable to support themselves and their dependents'.

15) Clause 25 (Education)

Proposal:

In the first instance, that the limitation in subclause

(1)(c) relating to instruction in particular languages should be rephrased in order to make mother-tongue education compulsory.

Secondly, that subclause (2) be rephrased in order to place an obligation on the state to finance private educational institutions that are not wholly able to finance themselves.

Motivation:

In the first place, the relevant subclause, as presently phrased, denies possible instruction in languages of choice that are also official languages.

Secondly, the right to education is a universally accepted fundamental right. In so far as private educational institutions that partially finance themselves are not able to fulfil their functions, the state is obliged to supplement the deficiency. In this context the state's obligation is already diminished by the private funds of such institutions.

16) Clause 26 (Academic freedom)

Proposal: That a guarantee of academic freedom be retained in the bill of rights.

Motivation: The omission of such a provision would amount to a negation of a universally accepted fundamental rights, contrary to the spirit of Constitutional Principle II. However, the wording of subclause (2) should be rephrased to make it more specific.

17) Clause 28 (Access to information)

Proposal: Clause 28(a) should be qualified by fundamental rephrasing.

Motivation: It is 'completely untenable that everyone should have a right to access to 'any information held by the state'. For instance, an accused could not at all times have a right to information relating to him held by a prosecutor in a criminal case. In any event the concluding words of clause 28(b) ('that is required for the exercise or protection of any [his] rights') should be added to clause 28(a).

18) Clause 29 (Administrative justice)

Proposal: The Freedom Front favours option 3.

- Motivation: Option 1 is unacceptable in so far as it is

rather cryptic, compared with option 3. Option 2 is even less acceptable, inter alia, because the deletion of the word 'procedurally' from subsection (1) has the result that the subsection would not be in accordance with the generally accepted legal meaning of the words 'procedurally unfair'.

19) Clause 30 (Access to justice)

Proposal and motivation: This clause must be reformulated, in view of the fact that it could be read as implying that a litigant in a civil case or an accused in a criminal case can insist that that state should pay for such litigation and/or provide legal representation.

20) Clause 31 (Arrested, detained and accused persons)

Proposal: Clauses 31(1)(e), 31(2)(c) and 31(5) should be reformulated, in order to give effect to the points raised in the motivation below.

Motivation: Clause 31(1)(e) places an onerous burden of proof on the state where an accused seeks bail. The burden should rest on the accused to prove that the interests of justice require that he be released. In any event, the court should have a discretion in this regard, which should not be linked to a burden resting on the accused.

As far as clause 31(2)(c) is concerned, the words 'if substantial injustice would otherwise result' should be deleted and replaced by words having a far more restrictive effect, as the present wording will be applicable in virtually all circumstances. (the same objection also applies in the case of clause 31(3)(e).

In subsection 31(5) the words 'would bring the administration of justice into disrepute' should be deleted and should be replaced by the following words: 'would not be in the interests of justice'.

Motivation: The exclusion of evidence is warranted on far wider grounds than the single ground that the administration of justice would otherwise be brought into disrepute.

21) Clause 32 (Limitation of rights)

Proposal: In the first place, that the words 'reasonable and justifiable' in clause 32(1)(a) should be deleted. Secondly, that clause 32(2) be deleted.

Motivation: In the first instance the argument that an entrenched right should be capable of limitation by an

ordinary law of general application on the grounds of reasonableness and justifiability is untenable. It makes a mockery of the concept of entrenchment in so far as any entrenchment can easily be qualified.

Secondly, clause 32(2) is unnecessary: Clause 4(3) (if adopted in the form proposed by the Freedom Front see above) already provides for this contingency. (Clause 32(2) implies that clause 4(3) is insufficient to prohibit unfair discrimination, and that legislation in that regard is necessary.

22) Clause 33 (State of emergency and suspension)

Proposal: In the first place, that the rights mentioned in clause 33(4)(c) be carefully scrutinised and debated before being included in this provision, as the implications of no derogation from so large a number of rights are not immediately clear.

Secondly, it should be considered whether there are any other rights that should be added to this list.

23) Clause 35 (Application)

Proposal: In the first place, the Freedom Front proposes that the words 'This Bill does not deny the existence of' in subclause (2) be deleted and replaced by the following words: 'This Bill does not detract from ...'.

Secondly, the Freedom Front prefers option 1 in respect of subclause (3).

Motivation: In the first place, the proposed initial words of subclause (2) are more elegant than the existing initial words. At the same time they are not unduly technical, but are in accordance with the requirements of plain language.

Secondly, option 2 is in our view not feasible, because it would be impossible to determine in advance the various rights juristic persons should be entitled to. This is a matter to be gradually clarified by the courts in interpreting the words of option 1.

bofright
23.10.1995

DP AMENDMENT TO LABOUR S 22(2)

- (c) to strike outside the currency of a collective agreement provided that
- (i) pre-strike conciliation procedures have been exhausted
- and
- (ii) the strike is not solely for political purpose.



National Party
Nasionale Party

Federal Council
Federale Raad

10 November 1995

The Secretary
Constitutional Committee
CAPE TOWN

Sir,

Re: Commission on Cultural Affairs : chapter 7

1. As was agreed yesterday 9 November 1995, I enclose the National Party's proposal on Cultural Affairs to be included in the documentation on the constitution to be discussed in January 1996.
2. I also enclose our proposal made today by Senator Radue on Collective Selfdetermination to be treated in the same way (Bill of Rights).

Yours faithfully

Dr F J van Heerden MP

Collective self-determination

Everyone shall have collective rights of self-determination in joining, forming and maintaining organs of civil society, including linguistic, cultural and religious associations which shall be exercised on the basis of non-discrimination and free association.

NP PROPOSAL : 10/11/1995

COMMISSION ON CULTURAL AFFAIRS

FUNCTIONS OF COMMISSION ON CULTURAL AFFAIRS

- 100 (1) The Commission on Cultural Affairs must promote:
- (a) mutual respect for the diversity of cultures in South Africa
 - (b) protection for all cultures in South Africa
 - (c) conditions for the development of all cultures in South Africa.
 - (d) interaction between the different cultures in South Africa.
- (2) The Commission on Cultural Affairs has the power to :
- (a) establish Cultural Councils for those cultural societies/communities which so desire and request the Commission accordingly, provided that these societies/communities must contribute to the establishment and maintenance of such Cultural Councils as regulated by national or provincial legislation.
 - (b) monitor, promote, investigate, advise and report on any issue concerning Cultural Affairs.
- (3) The Commission on Cultural Affairs has the additional powers and functions prescribed by national legislation.
- (4) The Commission on Cultural Affairs must be composed of at least one member representing each of the official language-groups and so many other members as may be required from time to time to represent other cultures which do not form part of the main cultural groups in South Africa.

SECTION 50, OPTION 1

Committees consisting of members of all parties represented in Parliament and chaired by members of different parties shall be established in terms of the rules to -

- (a) consider, amend and substitute bills referred to it and initiate bills;
- (b) oversee the executive and administration;
- (c) investigate and report on any matter; and
- (d) call for evidence, summon persons to appear before it and produce documents, and hold public hearings.

REFERRAL TO CABINET

SECTION 52, OPTION

- (1) Any bill introduced in Parliament shall be referred back to Cabinet by the Speaker for reconsideration if requested by at least one fifth of the members of Parliament or all members of minority parties on the grounds that it detrimentally affects the interests of minorities or a particular minority.
- (2) Such a bill may be reintroduced in an amended or unamended form, in which case it must be accompanied by the reasons for its reintroduction and/or amendment.

BILLS

52. (1) A Bill may be introduced in the National Assembly or [the second house].

(2) A Bill is passed by Parliament if it adopted in both the National Assembly and [the second house].

(3) If a Bill is adopted in the one House but rejected in the other, the following procedure applies:

- (a) The Bill must be referred to a committee consisting of members of both Houses and of all parties represented in Parliament and willing to participate in the committee.
- (b) The committee must consider and report on the Bill and any proposed amendments to the Bill.
- (c) The committee's report, the Bill and any proposed amendments must then be referred to a joint sitting of the Houses.
- (d) If at the joint sitting the Bill or an amended Bill is adopted by a majority of the total number of members in both Houses, the Bill or the amended Bill must be regarded as passed by Parliament.

[Note: Dependent on whether there will be two Houses of Parliament. If Parliament is to consist of only the National Assembly the clause falls away.]

Constitutional amendments

53. The Constitution may be amended by a Bill passed by Parliament if it is adopted by a majority of at least twothirds of the members of]both Houses of] Parliament.

[Note: This clause requires further development to comply with the Constitutional Principles.]

NP PROPOSALS : COMMISSION FOR GENDER EQUALITY, p63

- NAME : "Commission for Gender Equality and Development"
- 100(1) : The Commission for Gender Equality and Development must advance and promote respect for gender equality and development opportunities and the development, protection and attainment of gender equality (or equal opportunities).
- 100(2) : "..... and promote development opportunities".

SUGGESTED AMENDMENTS:

- 105(1) : Delete: "The Public Protector and"
Commence with: "Members of any Commission....."
- 105(2) : The Auditor-General and Public Protector must be a woman or a man who is a South African citizen, is a fit and proper person to hold that office, and who does not hold office in any political party or organisation.

The Auditor-General must have specialised knowledge of, or experience in, auditing, state finances, and public administration ~~must be given due regard in appointing the Auditor-General~~ (re 191(3)).

The Public Protector must have specialised knowledge of, or experience in administration of justice, public administration or public finance (re 110(1)(4)(c)IC).

REFINEMENT TEAM NOTE ON SELF DETERMINATION

The possibility of including Constitutional provisions for the right to self determination of any community sharing a common cultural and language heritage in terms of principle 34 is still being discussed.

To be inserted after section 107 in the chapter on Provinces.

PROVINCIAL FINANCE AND FISCAL AFFAIRS

138A (1) A Province shall:

(a) be entitled to a defined and equitable share of revenue collected nationally to enable it to provide services at affordable standards and to exercise and perform its powers and functions.

(b) receive other conditional and unconditional allocations out of national revenue.

(c) be entitled to raise certain loans as defined in 138B.

(d) be entitled to raise loans in terms of 138C.

(2) The means of determining the equitable revenue share referred to in 138A(1)(a), the conditions referred to in 138A(1)(b) and the allocations made in terms of 138A(1)(b) shall be embodied in national legislation after consultation with the provinces, the taking into account the national interest, and the recommendations of the FFC. Such national legislation shall have due regard to the following matters and the FFC recommendations:

(a) the provision that has to be made for the interest and other payments in respect of the national debt.

(b) the fiscal capacities, fiscal performances, efficiency of utilisation of revenue, needs and economic disparities within and between provinces, the developmental needs, administrative responsibilities and other legitimate interests based on objective criteria.

(c) the legitimate needs and interests of the national government based on objective criteria.

(d) additional revenue collected by provinces will not be deducted from their allocations from nationally collected revenue, but there will be no obligation to compensate provinces that do not collect revenue commensurate with their fiscal capacity and tax base.

(3) The revenue share defined in terms of 138A(1)(a) and embodied in national legislation in 138A(2) shall be transferred to the provinces expeditiously and without any deduction therefrom.

(4) The allocations referred to in 138A(1)(b) shall be transferred to the provinces, but in the restricted circumstances set out in 138F may be subject to deductions.

138B (1) A provincial legislature shall be competent to:

- (a) raise taxes, levies and duties, other than income tax, VAT, other sales tax, levies on the sale of fuel, customs and excise duty and any levies imposed thereon, or other taxes collected nationally in terms of national legislation.
 - (b) impose surcharges on tax.
- (2) The competence referred to in 138B(1)(b) shall be required to be authorised by national legislation passed after recommendations of the FFC on the draft text of any such Act having been submitted to and considered by Parliament.
- (3) A provincial legislature shall not be entitled to impose taxes, levies or surcharges detrimentally affecting national economic policies, interprovincial commerce or the national mobility of goods, services, capital and labour.

138C [As per section 157 of the interim Constitution except that more thought should be given to the conditions under which guarantees are given].

138D & E [As per sections 158 & 159 in the interim Constitution.]

- 138F (1) In order to ensure transparency, common generally accepted accounting practices and expenditure classifications, effective expenditure control and common treasury regulations in all levels of government, there shall be a national Exchequer Act.
- (2) The national Exchequer Act shall also constitute the basic enabling legislation for provincial Exchequer Acts.
- (3) In the event of serious or persistent maladministration of funds, the national Exchequer Act shall define procedures whereby the national treasury can stop the transfer of funds to any national department, or allocations in terms of 138A(1)(b) to a province, or whereby a provincial treasury can stop transfers to a provincial department.
- (4) In the event of the national treasury acting to stop transfer of funds to a province such action must be ratified within 30 days by Parliament.

FINANCE

Annual Budgets

§142 There shall be national legislation that defines the procedures for the drawing up and the format of national and provincial budgets. Such budgets shall present estimates of revenue and expenditure and reflect, *inter alia*, capital

and current expenditure. These budgets shall promote transparency, accountability, and effective financial management of the public sector as a whole.

MISCELLANEOUS

Prohibition on holding more than one office of profit:

[172A]

- (1) No person shall receive remuneration out of public money for holding more than one office of profit.
- (2) Notwithstanding the provisions of subsection (1), a person serving in more than one public office shall be entitled to be reimbursed for his or her direct expenses incurred as a result of service in offices other than that in which he or she is paid from public money.

PROVINCIAL FINANCIAL AND FISCAL MATTERS

Sources of provincial funding

137A. A province -

- (a) is entitled to an equitable share of revenue collected nationally to enable it to provide services at affordable standards, and to exercise its powers and to perform its functions;
- (b) may receive other allocations from national revenue, either conditionally or unconditionally; and
- (c) may raise additional revenue from taxes and loans as provided in sections 137C and 137D.

Allocations to provinces from national revenue

137B. (1) National legislation must provide for the determination of -

- (a) the provinces' equitable share of revenue collected nationally; and
 - (b) any other allocations to provinces national revenue and the conditions on which these allocations may be made.
- (2) Legislation referred to in subsection (1) may be enacted only after consultation with the provincial governments and with due regard to -
- (a) the national interest;
 - (b) any recommendations by the Financial and Fiscal Commission;
 - (c) any provisions that have been made in respect of the national debt;
 - (d) the needs and interests of the national government based on objective criteria; and
 - (e) the fiscal capacities, fiscal performances, efficiency of utilisation of revenue, needs and economic disparities within and between provinces, the developmental needs, administrative responsibilities and other interests based on objective criteria.
- (3) Additional revenue raised by provinces may not be deducted from their share of, or other allocations, from revenue collected nationally. Equally there is no obligation on the national government to compensate provinces that do not raise revenue commensurate with their fiscal capacity and tax base.
- (4) A province's equitable share of revenue collected nationally must be transferred to the province without delay and no deduction may be made from it.
- (5) Other allocations from national revenue are subject to control by the

national treasury and deductions may be made from them.

Provincial taxes

137C. (1) National legislation may authorise a provincial legislature to raise taxes, levies and duties, and surcharges on taxes, excluding -

- (a) income tax, value-added tax or other sales tax, levies on the sale of fuel, customs and excise duties or any levies or surcharges on any taxes and duties collected nationally in terms of national legislation; or
- (b) taxes, levies or surcharges that may detrimentally affect national economic policies, interprovincial commerce or the national mobility of goods, services, capital or labour.

(2) National legislation authorising a provincial legislature to impose taxes levies, duties and surcharges may be enacted only with due regard to any recommendations by the Financial and Fiscal Commission.

Provincial loans

137D. (1) A province may raise loans for capital expenditure within the framework of reasonable norms and conditions provided for by national legislation.

(2) A province may raise loans for current expenditure only when necessary for bridging purposes during a fiscal year, and provided these loans are redeemed within 12 months and any reasonable conditions prescribed by national legislation are complied with.

(3) National legislation referred to in subsections (1) and (2) may be enacted only with due regard to any recommendations by the Financial and Fiscal Commission.

Allocations by national government

137E. The allocation of revenue by the national government -

- (a) to a provincial or local government may be made only in terms of an appropriation by an Act of Parliament; and
- (b) to a local government must be made, ordinarily, through the provincial government of the province in which the local government is located.

Provincial Revenue Funds

137F. (1) There is a Provincial Revenue Fund for each province, into which must be paid all revenue, as determined by national legislation, allocated to, or raised or received by the provincial government, or allocated through it to a local government.

- (2) No money may be withdrawn from a Provincial Revenue Fund except under appropriation made by legislation of the province concerned.

